State Aid for Virginia’s Private Colleges?

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A National Pattern

Prior to 1960, state subsidies in the private sector of higher education were essentially limited to the few states who used such arrangements as an alternative to maintaining extensive public college systems or advanced programs in high-cost areas. By 1970, however, a wide variety of subsidy programs had been established in all but 14 states.¹ Student aid (scholarships, loans, tuition grants) appear to comprise the most prevalent form of subsidy arrangements, although some states also permit direct institutional grants through such devices as service contracts, appropriations to operating budgets, or low-cost financing of capital facilities.

Unlike the limited programs of an earlier era, the emergence of state subsidies as a national pattern during the 1960's reflected widespread public concern for the continuing health and survival of private higher education as such. For much of our history, private colleges and universities had been a dominant force in higher education, and as late as 1950 enrolled approximately half of all college level students. By 1970, however, practically every state had committed itself to statewide systems of low-tuition public colleges or universities accessible to nearly every locality. This massive expansion seriously compromised private higher education’s competitive position in an expanding student market, and by 1970 the private sector’s share of college enrollments had dropped to less than one-third. It appeared that public higher education might be on its way to establishing a virtual monopoly on college enrollments. The corresponding economic impact also seemed to indicate that all but the most

affluent private institutions would run the risk of eventually having to close their doors, go public, or become private enclaves for the very rich.

The more recent subsidy trends may thus be viewed as part of a comparatively widespread national effort to "save private higher education" by strengthening its competitive position in the student market, or otherwise generating new income to stabilize an already precarious fiscal situation. Implicitly, a strong private sector was considered essential to a balanced higher educational enterprise. These trends are now frequently justified as a matter of official policy which affirms the soundness of government action to maintain a "pluralistic" system of higher education, i.e., a coordinated public/private system in which some public funds are made available to assist the private sector.

State support of a pluralistic system of higher education has thus emerged as a new issue of public policy in the history of higher education in America. Its increasing prominence has resurrected some fundamental political and legal problems inherent in the American tradition of governmental relationships with private enterprise. The appropriation of public monies for the benefit of private educational agencies—particularly church-related ones—stirs political sensibilities in most states and is frequently susceptible to constitutional challenge at both federal and state levels.

The Virginia Pattern

We intend in this article to present a case study of the more salient difficulties in developing a subsidy program that is responsive to the complexities of the private college problem, on the one hand, while conforming to political sensibilities and legal constraints, on the other. The focus of our consideration will be a 10-year effort in the Commonwealth of Virginia to establish a subsidy program for private higher education.

Essentially, our point is that political and legal obstacles tend to inhibit a response that is commensurate with the need. In Virginia for example, no subsidy program is operative as of this writing, even though the nature of the private sector problem was acknowledged ten years ago and efforts to deal with it have been accelerating since then. In point of fact, even though the Virginia Constitution was amended and authorizing legislation passed, the proposed program is currently undergoing its second judicial review after having been adjudged unconstitutional in its original form on narrow, technical grounds. And even though the amended legislation would appear to have a better chance of passing judicial muster, it is fair to ask whether the resultant program will produce an equitable state effort to maintain a so-called pluralistic system of higher education. The specifics of our judgment in these respects will unfold in the following pages as we review the historical, legislative and judicial events leading up to the current situation.
Historical Perspective

In general terms, and allowing for comparatively minor variations, the Virginia experience with the basic issue being discussed here is not unlike the experience of most states. Until the early 1960's, the Commonwealth's public and private institutions had operated in virtual isolation from each other. Little, if any, thought was given to interaction between the two sectors, much less to such total concepts as a "pluralistic system" which would include some form of public funding for private sector institutions.

The build-up of public higher education, which reached its peak between 1964 and 1970, changed all that. During the 1964–70 period, for example, the Commonwealth created a statewide system of low tuition community colleges, and increased state general fund appropriations (exclusive of capital outlay) from $27,627,983 for 22 state-supported institutions\(^2\) to $129,320,667 for 36 institutions.\(^3\) Public college enrollments increased during the same period by 124%, amounting to approximately four-fifths of all college enrollments within the Commonwealth.\(^4\)

In the meantime private sector trends were, comparatively speaking, in the opposite direction. One private institution, even though enjoying substantial financial backing at first, was eventually taken over by the state. Overall private enrollments, while increasing in absolute terms by approximately 21%, declined as a share of total state enrollments to less than one fifth. More ominously, current fund balances for 26 accredited private institutions collectively decreased from several million in 1964–65 to less than $100 thousand in 1969–70.\(^5\) Many private institutions were individually experiencing substantial and recurring current fund deficits, and even the most affluent were predicting a serious situation within ten years. Perhaps most revealing is the fact that all private institutions were diverting educational and general income in increasing amounts to cover growing student aid deficits which had nearly doubled in less than five years.\(^6\)

In short, interaction between public and private higher education had begun to manifest itself in dramatic but undesirable ways. Public higher education was booming and private higher education was faltering. And while this sort of interaction was not entirely one of cause and effect, the public college boom was a major (if not an overwhelming) complication of the private college plight. For example, the fact that the private institutions were diverting educational revenue to student aid means, in effect, they were foregoing essential improvements in their educational operations in order to remain competitive vis-a-vis enrollments.

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\(^5\) Id. at 16.

\(^6\) Id.
Virginia’s response to these problems was on the whole also fairly typical. Between 1964 and 1971 several studies were completed. By 1972, recommended legislation for private sector subsidies had been adopted. In retrospect, however, the legal problems currently confronting the State were probably generated—at least in the early stages—by an excess of caution in facing the issues squarely from the start. In historical sequence, the current uncertainties arose out of three successive phases in the effort to find a viable answer: (1) the 1964–67 phase, involving a comprehensive study of public and private higher education by a prestigious state commission; (2) the 1968–69 phase, involving constitutional revisions designed to ease constraints that were felt to have an adverse impact on private higher education; and (3) the 1970–72, phase involving two separate studies of private higher education and resulting in two separate legislative acts authorizing private sector subsidies.

The 1964–67 phase began with a state effort to study the problem, but ended with explicit rejection of any state responsibility for financial relief of private higher education. At the request of private college representatives, enabling legislation for a comprehensive study of higher education was amended in the 1964 legislative session to assert the General Assembly’s interest in preserving, strengthening and maintaining “. . . Virginia’s dual and complementary system of public and private colleges and universities . . .”7 A proposed study commission was expanded to include representatives from the private sector and was directed to study the objectives and needs of both public and private sectors.

All this, however, was to no avail. Despite legislative urgings, the Commission report8 in December 1965 did not deal substantively with the private college issue. The closest it came was a disapproving statement on the so-called “matching fund” practices of the legislature, which forced public colleges to raise current and capital funds from private benefactors.9 But there were no recommendations at all for any kind of direct state financial relief for the private sector.

In fact, by 1967 the thrust of public policy had gone still further in the opposite direction. That year the Virginia Plan for Higher Education, which drew heavily on the Commission’s report, pointedly observed that “the State was committed to the support of its public institutions” and while, in effect, expressing pride in Virginia’s “distinguished private institutions” noted carefully that their support came from private sources.10

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7 S. J. Res. 30 (1964 Session).
8 COMMONWEALTH OF VIRGINIA, REPORT OF THE HIGHER EDUCATION STUDY COMMISSION (December 1965).
9 Id. at 185–187.
10 The State of Virginia had followed a policy for a number of years of providing partial support for special projects and such current expenses as faculty salary increases and urging the public institutions either through increased student fees or solicitation from private benefactors to raise the required matching funds.
The next phase (1968–69) involved a more circumspect approach and produced more promising results. This time the private colleges, by now organized into an informal association,\textsuperscript{11} approached the State Commission on Constitutional Revision which had been established by the 1968 General Assembly to conduct a comprehensive overhaul and updating of the nearly outmoded 1902 constitution. In July 1968 the Association asked the Commission to consider revisions which would (1) permit state aid to any Virginia resident attending any accredited institution, provided such funds would not be used by students to pursue programs for careers in full-time religious vocations, (2) permit the General Assembly to create a state bonding authority for low-cost capital financing, and (3) permit state agencies to contract with accredited private institutions of higher learning for educational services.

The form in which the suggestions were reported out by the Commission in 1969 is of particular interest. Ignoring the third recommendation but adopting the first two, the Commission proposed a new article as follows:

The General Assembly may provide for loans to students attending non-profit institutions of higher education in the Commonwealth whose primary purpose is to provide collegiate or graduate education and not to provide religious training or theological education. The General Assembly may also provide for a state agency or authority to assist in borrowing money for construction of educational facilities at such institutions.\textsuperscript{12}

So far as subsequent legal problems are concerned, the crux of the matter is reflected in the type of subsidy permitted (loans), and in the "primary purpose" phraseology of the first sentence.\textsuperscript{13} Though seemingly responsive to the private college interest and presumably consistent with prevailing attitudes at the time, this constitutional amendment has not produced an advantageous loan program that would avoid other pitfalls. The following summary review of third phase events (1970–72) illustrates the mounting complexities that were generated.

**The Third Phase: Prelude to Litigation**

Probably because the first attempt had been so discouraging, there were no other significant efforts between 1964 and 1970 to bring the private college problem to public attention by means of a highly visible study. But within a six-month period in 1970–71, not one, but two, separate studies were initiated, the first by the private colleges themselves and the...

\textsuperscript{11} The Association of Independent Colleges in Virginia was formed in July 1968 by about one half of the leading private colleges in Virginia to address questions of legislation and constitutional revision of concern and interest to the private college sector.


\textsuperscript{13} As a matter of corollary interest, no bonding authority projected in the second sentence has been created by the General Assembly.
second by the state. The differing emphases and consequences of these two studies contributed directly to the eventual legal dilemma.

In April 1970, representatives of Virginia's leading private colleges launched the first of the two studies. Its announced aim was to determine "...the aggregate useful contribution [of private higher education] to the economic, civic, political, educational and cultural life and progress of the Commonwealth and region, and to present the results of such a survey in an objective, believable report to the citizens of the Commonwealth".14 The project included all twenty-six independent, accredited, two-year and four-year institutions in the state and focused upon the role, impact, and future of independent higher education in the Commonwealth. A sponsoring body, the Council of Independent Colleges in Virginia,15 was formally established and took over as contracting agency for the study in December 1970. The study was completed during the 1970–71 academic year and resulted in two publications entitled Virginia's Private Colleges and the Public Interest: The Case for a Pluralistic System16 and The Fact Book on Private Higher Education in Virginia.17

At the same time the private sector was involved in studying itself, the General Assembly also took action in this direction. Senate Joint Resolution 21 of the 1971 Session requested the State Council of Higher Education for Virginia to "study the role of the independent universities, colleges, business colleges and junior colleges in the state in the overall scheme of higher education, so that their services may be encouraged, strengthened and included in the future plans for development of higher education in the State".18 This study was conducted by a panel of outside consultants during the spring of 1971 and resulted in a report entitled "State Support for Higher Education in Virginia".19

The findings of the two studies were quite similar, and both favored state action to strengthen the private sector. Their recommendations, moreover, agreed on a fundamental point: in neither case was direct institutional aid recommended, but rather aid to the student for use at the institution of his choice.

But there were also basic differences in the recommended programs. The first study (by the private colleges) recommended a forgivable loan program aimed at meeting specific needs of students desiring to attend or actually attending one of the twenty-six member institutions of the Coun-

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14 Minutes of meeting of Virginia Foundation of Independent Colleges (April 8, 1970).
15 The Council of Independent Colleges in Virginia was formed at an organizational meeting in November, 1970, by all twenty-six private, accredited colleges and universities in the Commonwealth. The Council was granted a Charter by the State Corporation Commission in January, 1971.
18 S. J. Res. 21 (1971 Sess).
cil of Independent Colleges. The second study (by the state) recommended a statewide scholarship program which could be utilized for undergraduate students at either public or private institutions.

These differences were reflected in corresponding bills adopted by the 1972 legislative session. The statute favored by the private colleges (Senate Bill 77) created a program aimed at the private sector alone. It provided for tuition assistance loans for "bona fide residents of Virginia who attend private, accredited and nonprofit institutions of collegiate education in the Commonwealth whose primary purpose is to provide collegiate education and not to provide religious training or theological education". This program, to be administered by the State Council of Higher Education, was to provide loans which: (1) could be repaid in money or academic work; (2) would limit student eligibility to four academic years; and (3) would not exceed in amount the annual average appropriation per full time equivalent student for the previous year from the State General Fund for operating costs at two-year and four-year Virginia public institutions. The statute required that students maintain satisfactory progress according to the requirements of the institutions they attended.

A significant feature of the legislation was the provision that loan repayment could be either in the form of money or in academic work. If satisfactory progress were maintained for a year, the loan for that year was considered repaid. Lack of satisfactory progress during a year required monetary repayment to the state. The General Assembly appropriated $225,000 for fiscal year 1972–73 and $450,000 for 1973–74 for this tuition loan program.

The second statute (Senate Bill 434) was backed by the State Council of Higher Education but incorporated distinctions between nonsectarian and sectarian colleges not contained in the original State Council recommendation. It created the Virginia Grant and Loan Commission which was charged with developing and administering a statewide program of financial aid to undergraduate students attending either public or private institutions of higher education in Virginia. Limited to bona fide Virginia residents, the form of aid was to be "grants or loans to students who wish to enroll, or are enrolled, at any accredited degree-granting public or private nonprofit nonsectarian institution of higher education in Virginia, and in the form of loans for students who wish to enroll, or are enrolled, in any accredited degree-granting private nonprofit sectarian institution of higher education, excepting those institutions whose primary purpose is religious or theological education".

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21 Id.
24 Id.

This provision reflects the kind of political caution which tends to undermine an otherwise constructive answer to private college needs. Since 17 of Virginia's private institutions are church-related, such a statutory definition would raise questions as to which of those colleges are "sectarian" and which students in private institutions would therefore be eligible for loans, rather than scholarships.
Both grant and loan awards would be based upon consideration of the applicant's academic ability, financial need, and cost of attendance at the institution of his choice. As with Senate Bill 77, the loans provided by this statute could be repaid either in academic work, or in money, with basically the same requirement for satisfactory academic progress on the part of the loan recipient. This aid program was funded by a token appropriation in the amount of $25,000 for the 1972-74 biennium for operating costs of the Commission for administering the program, and $10,000 for actual loan and grant awards.

Thus, this third phase—unlike the first two—produced rapid and somewhat overabundant results. In slightly over one year, Virginia had not one, but two, subsidy programs involving private sector institutions. Yet, the problem was far from being resolved.

The situation at this time, in short, was simply that Virginia had skirted the political issues of private sector subsidies only to run head on into the constitutional issues. During the course of the legislative session it became apparent that both bills contained provisions which ought to be subjected to a court test. The legislation was adopted with the implicit understanding that there would be such a test.

In this manner Virginia arrived at the current phase of its dealings with private sector subsidies. The remainder of this article is concerned primarily with an analysis and evaluation of this phase.

Judicial Considerations

As background for consideration of the specific cases before the State Supreme Court, it is desirable to review briefly both the general constitutional issues involving private sector subsidies as well as the specific issues applying in Virginia. The fundamental issue is, of course, the constitutional constraints of the First Amendment to the Federal Constitution and corresponding restrictions in the Virginia Constitution.

In specific terms, the fundamental issue is separation of church and state. As a matter of historical fact, many (if not most) private colleges throughout the country were first established by church bodies, and many retain varying degrees of relatedness to church groups even today. In Virginia, for example, 17 of the 26 accredited private institutions could reasonably be identified as church-related institutions within the customary meaning of that term.

Now, as a matter of practical politics, subsidy programs can rarely be developed which include nonsectarian institutions or their students within their purview, while excluding sectarian ones. As a result, if a state's private sector includes one or more church-related institutions, subsidy programs aimed at the private sector are generally subject to constitutional challenge. As a matter of fact, there has been a significant increase in constitutional challenges to federal and state aid for private higher education since World War II. In recent years there have been state cases in
Maryland, South Carolina, Vermont, and Virginia, and federal cases in Connecticut, and New York.

**Miller v. Ayres, 213 Va 251, 191 S.E. 2d 261 (1972)**

In May 1972 the Comptroller of Virginia wrote the Attorney General that, although no demand had yet been made upon him for disbursement of money under the 1972 loan legislation, he entertained doubts as to the constitutionality of the acts both under the First Amendment to the United States Constitution and under the Constitution of Virginia. The Comptroller therefore advised that he would refuse to honor vouchers for student loans until the Supreme Court of Virginia, pursuant to a statute making possible test cases to resolve the constitutionality of legislation, should declare the 1972 loan acts to be constitutional. The Attorney General of Virginia forthwith filed a petition for a writ of mandamus asking the court to uphold the loan acts as to constitutionality and to issue a writ of mandamus requiring the Treasurer to issue warrants under the acts when called upon to do so.

The case, styled *Miller v. Ayres*, was heard on a expedited basis. Both the Attorney General and counsel for the Comptroller filed opening briefs in late May, as did counsel for the Council of Independent Colleges in Virginia, as amicus curiae. Reply briefs were filed a week later, and shortly thereafter the case was argued orally.

Two key issues were raised in *Miller v. Ayres*. One question turned upon two related sections of the Virginia Constitution—Article VIII, section 10, which permits grants to students in private schools but only

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31 Va. Const. art. VIII, §10:

State appropriations prohibited to schools or institutions of learning not owned or exclusively controlled by the State or some subdivision thereof; exceptions to rule.—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
if those schools are nonsectarian, and Article VIII, section 11, which permits loans, but not grants, to students attending private colleges whose primary purpose is to provide collegiate or graduate education and not to provide religious training or theological education. The other question involved the establishment clause of the First Amendment to the Federal Constitution.

Article VIII, section 10, of the Virginia Constitution, which has counterparts in many state constitutions, restricts the appropriation of public funds to schools or other institutions of learning controlled by the Commonwealth or one of its political subdivisions. That section has been construed rather strictly by the Virginia courts, and in 1956, after the Supreme Court of Virginia had invalidated a program of tuition grants to children of persons killed in the World War, the section was amended to make possible appropriations in furtherance of education in nonsectarian private schools and colleges in Virginia.

During the revision which resulted in the adoption of the Constitution of 1971, another section was added to the Constitution—Article VIII, section 11, which permits loans, but not grants, to be given to students in private colleges, including those that are church-related, so long as the primary purpose of the institution is to provide collegiate or graduate education and not to provide religious training or theological education. In short, section 10 allows both grants and loans, but not to students in sec-

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.

22 Va. Const. art. VIII, §11:
Aid to nonpublic higher education.—The General Assembly may provide for loans to students attending nonprofit institutions of higher education in the Commonwealth whose primary purpose is to provide collegiate or graduate education and not to provide religious training or theological education. The General Assembly may also provide for a State agency or authority to assist in borrowing money for construction of educational facilities at such institutions, provided that the Commonwealth shall not be liable for any debt created by such borrowing.

After the 1956 amendment to section 10, the court upheld the power to the General Assembly to create a program of tuition grants for students in nonsectarian private schools. Harrison v. Day, 200 Va. 499, 106 S.E. 2d 686 (1959).

24 In 1969, a study commission, the Commission on Constitutional Revision, laid before the General Assembly of Virginia proposed revisions in the Constitution of Virginia. See The Constitution of Virginia: Report of the Commission on Constitutional Revision (1969) (hereinafter CCR Report). These proposals were debated by the Assembly at a special session called in 1969. Those changes agreed to by the Assembly at that session and again at the regular 1970 session were submitted to the people, who approved the revisions at referendum in November 1970. Technically the revision took the form of amendments to the Constitution of 1902, but the document was in fact so complete a rewriting of the existing charter that the new Constitution is referred to as the Constitution of 1971. It was effective on July 1, 1971.

For the Commission on Constitutional Revision’s thinking in proposing Article VIII, section 11, see CCR Report at 272–74.
tarian colleges. Section 11 allows only loans, but they may go to students in sectarian colleges so long as they meet the "primary purpose" test.

The crux of the problem which the 1972 loan acts raised under the Virginia Constitution was whether the "loans" which they provided were in fact loans in the sense intended by section 11. If they were found by the Court to be grants, rather than loans, then they could not rest on section 11. Instead they would have to be tested against section 10, which does not permit aid to go to students in sectarian institutions, whatever the primary purpose of those institutions.

Counsel for the Comptroller argued that a loan repayable in academic work was a gift or grant, not a true loan. In asking a student to make satisfactory academic progress in order to be forgiven the loan, the Comptroller submitted that the Commonwealth was not asking the student to do anything he would not be trying to do anyway, loan or no loan. "Where is the consideration," the Comptroller asked, "which must flow between the promisor and the promisee in order to constitute a valid contract?"

What, he asked further, did the State gain from a student's being able to pass his courses and to stay in school? By the Comptroller's view, the student undertook in fact no real obligation, the Commonwealth got nothing in return for its money, and the loan must therefore be a gift.35

The Attorney General and counsel for the Council of Independent Colleges contended that those who framed and adopted section 11 intended that a loan under section 11 need not be limited to a loan repayable in money. In proposing section 11 the Commission on Constitutional Revision had pointed to the state teachers scholarships—which permit recipients of loans to repay them by teaching in the public schools—as an illustration of the kind of program which, under section 11, could be extended to students attending private colleges and universities.36 Moreover, nothing had been said at the 1969 session of the General Assembly, the sessions at which the revised constitution took its final form, to undercut a reading of section 11 as permitting loans repayable other than in money. To bolster this interpretation, the Attorney General and the amicus curiae gave examples of loan programs—in Virginia, under federal law, in other states, and in private universities—which permitted loans to be cancelled upon the happening of some condition subsequent, such as teaching or nursing.37 Once it was established that repayment might take some form other than money, the acts' proponents reasoned, it was up to the General Assembly to decide on what conditions a loan should be cancelled and to conclude whether the state has gotten sufficient benefit in return for forgiving the loan.38

Much of the argument about the First Amendment question in Miller v.

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35 Brief of Comptroller, pp. 16–18.
36 CCR. Report at 273.
37 Brief of Attorney General at 8–10; Brief of Council of Independent Colleges in Virginia at 10–15.
Ayres turned on interpretations of two recent decisions of the United States Supreme Court. One was *Lemon v. Kurtzman*, in which the Court struck down state programs aiding parochial elementary and secondary schools. The other, decided the same day as *Lemon*, was *Tilton v. Richardson*, in which the Court upheld the Higher Education Facilities Act, a federal statute authorizing construction loans to institutions of higher learning, including those that are church-related. The Americans United for Separation of Church and State, who filed a somewhat belated amicus brief, sought to bring the Virginia loan acts within the ambit of *Lemon*, as well as various federal district court cases decided subsequent to *Lemon* and, like that case, striking down programs of state aid at the level of elementary and secondary private education. In a line of cases, including *Lemon*, the Supreme Court has laid down three criteria by which the constitutionality of a statute may be measured under the First Amendment’s establishment clause: the statute must have a secular purpose, its primary effect must be one which neither advances nor inhibits religion, and it must not foster an excessive entanglement between government and religion. The Americans United argued that the Virginia acts must fall under one or another of these three tests—especially those involving effect and entanglement.

In a similar vein, the Comptroller cited a number of cases arising in the context of primary or secondary education (some of them school segregation cases) to urge the Court to strike down the Virginia loan acts as violating the Establishment Clause.

The Attorney General and the Council of Independent Colleges sought, in reply, to invoke *Tilton v. Richardson* and to draw a sharp line between First Amendment questions arising in the context of higher education and those involving primary and secondary schools. The attorneys defending the Virginia acts quoted from the Supreme Court’s language in *Tilton* about the “significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools”—differences including the affirmative policy of parochial schools to inculcate a particular religious faith, the lesser susceptibility of college students to religious indoctrination, and the tradition of academic freedom that exists at church-related colleges as at others. Moreover, the case of the Virginia loan acts’ proponents was bolstered by the fact that the federal statute which the Supreme Court had upheld in *Tilton* was the very act to which the Commission on Constitutional Re-

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40 U.S. 602 (1971).
1 Brief of Americans United for Separation of Church and State, *passim*.
2 Brief of Comptroller at 18–27.
5 403 U.S. at 685–86.
vision had looked in drafting section 11's language permitting aid to go only to students attending private colleges whose primary purpose was collegiate or graduate education and not to provide religious training or theological education.\(^{46}\)

In September, before the beginning of the academic year, the court handed down its opinion.\(^{47}\) Although the court ruled that the loan statutes met the standards of the First Amendment and of the Fourteenth Amendment's Equal Protection Clause (which had been argued as well), the justices concluded that the acts provided for "conditional grants or gifts and not loans" within the meaning of "loans" in Article VIII, section 11, of the Virginia Constitution. Under the acts, the court reasoned, a student "need do nothing more than would ordinarily be expected of him, namely to make normal progress toward completion of his course of study". Nor was there any obligation that the student, on completing his education, remain in Virginia to confer such benefits as might flow from a better educated citizenry.\(^{48}\)

On every other count the court ruled in favor of the Virginia acts. The court viewed the United States Supreme Court's decision in *Tilton v. Richardson* as "wholly dispositive" of the First Amendment question before the court in *Miller*. The Virginia court considered the three relevant criteria—purpose, primary effect, and degree of entanglement—and found all three satisfied. Like the federal statute in *Tilton*, the Virginia acts had a preamble which the court found sufficient to indicate a secular purpose. Finding the primary effect of the Virginia acts not to be the advancement of religion, the Virginia court, like the *Tilton* Court, rejected the argument that "religion so permeates the secular education provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable". And, in concluding that the loan statutes did not give rise to excessive entanglement between government and religion, the court in *Miller* agreed with the United States Supreme Court in finding "compelling distinctions" between parochial elementary and secondary schools and church-related colleges and universities.\(^{49}\)

In deciding *Miller v. Ayres*, the court also rejected challenges to the loan acts grounded in the Equal Protection Clause of the Fourteenth Amendment. The Comptroller had argued that the acts, by limiting loans to Virginia students attending nonprofit institutions of higher learning in the Commonwealth, discriminated against Virginia students attending proprietary institutions in Virginia and Virginia students attending institutions in other states. Further, he had submitted that the acts discriminated against students receiving loans or grants under other statutes imposing an obligation for repayment either in money or service, against

\(^{46}\) CCR Report at 274 n.38.
\(^{48}\) 213 Va. at 268, 191 S.E. 2d at 274.
\(^{49}\) 213 Va. at 261-64, 191 S.E. 2d at 269-71.
students unable to make satisfactory academic progress in their course of study, and against students who might be compelled to withdraw during the academic year for reasons they thought meritorious and not deemed meritorious by the agency administering the loans.\textsuperscript{50} Noting that the case did not involve any "suspect" legislative classifications (e.g., race) or "fundamental" rights (e.g., voting), the court ruled that the equal protection question was to be decided on the traditional "rationality" standard—that is, whether the classifications in the statutes bore any rational relation to a legitimate state purpose.\textsuperscript{51} As a rational basis for supporting the challenged distinctions could readily be conceived, the court held the requirements of equal protection to be satisfied by the acts.\textsuperscript{52}

Thus, in deciding \textit{Miller v. Ayres} the court upheld the Virginia loan statutes against every constitutional challenge, state and federal, save one—the contention that the financial aid extended under the acts did not constitute "loans" within the meaning of Article VIII, section 11, of the Virginia Constitution, was instead a gift or grant, and therefore, insofar as it could be given to students at sectarian institutions, violated Article VIII, section 10.

\textbf{The 1973 Legislation}

Even though the 1972 statutes were struck down, the court, by reading and deciding all of the constitutional questions before it, seemed to give guidance to those who wanted to introduce revised loan legislation at the 1973 session of the General Assembly. The other constitutional questions, especially that of establishment of religion, having been resolved in the original statutes' favor, the proponents of aid had to concern themselves only with tightening the repayment aspects of the acts so that students who repaid their loans other than in money would be obliged to perform actions of discernible benefit to the Commonwealth.

At the 1973 legislative session, the General Assembly gave its overwhelming approval to revised versions of the tuition loan programs.\textsuperscript{53} The two bills approved by the Assembly and signed by the Governor were in their major outline similar to the bills approved in 1972. The key changes were in the repayment features of the loan programs; here the drafters on the legislation took their cue from the court's decision in \textit{Miller v. Ayres}. The court, in striking down the earlier acts, had concluded that it could see neither direct benefit to the Commonwealth, such as teaching in the public schools, nor indirect benefit, such as might accrue by an obligation that a student remain in Virginia after completing his education. Therefore the

\textsuperscript{50} Brief of Comptroller at 28–29.


\textsuperscript{52} 215 Va. at 265–66, 191 S.E. 2d at 272–73. The court also rejected attacks based on other sections of the Virginia Constitution. 215 Va. at 266–67, 191 S.E. 2d at 273.

1973 acts were framed to specify five classes of actions deemed to be beneficial to, or of service to, the Commonwealth. If the recipient of a loan did not repay his loan in money, then in order to make repayment for one successfully completed academic year for which a tuition loan was received he must do one or more of the following:

(1) reside and be domiciled in Virginia and be employed by the Commonwealth or one of its political subdivisions for one year;\(^{54}\)

(2) reside and be domiciled in Virginia and be employed by certain kinds of charitable organizations for one year;\(^{55}\)

(3) reside and be domiciled in Virginia and be gainfully employed in Virginia or elsewhere for a year and a half;

(4) reside and be domiciled in Virginia for a period of two years;

(5) serve on active duty anywhere as a member of the armed forces of the United States for one year.

The same statutory procedure used to test the 1972 legislation was promptly invoked to put at rest any question about the constitutionality of the statutes enacted in 1973. Once again, the Comptroller raised the question of the acts' constitutionality, and the Attorney General sought a writ of mandamus in the Supreme Court of Virginia. As in 1972, the Council of Independent Colleges filed an amicus brief in support of the acts' constitutionality, and Americans United for Separation of Church and State filed a brief arguing their invalidity.

Counsel for the Comptroller argued that the General Assembly in its 1973 legislation had once again created a program of gifts and grants. One could not be sure, he submitted, that the actions which loan recipients might be called upon to perform would in fact be beneficial to the Commonwealth. As to state employment, for example, the loan recipient might hold an important position or a "menial or unessential" job. Moreover, the Comptroller argued that the loan recipient who remained in Virginia, whatever his employment, would be doing nothing more for the Commonwealth than would a college graduate who remained in Virginia without ever having had a state loan.

In effect, the Comptroller contended, the key to the loan program was the further provision—repayment by simply remaining in Virginia, without regard to employment. This was a provision which allowed the recipient to discharge his loan "by doing absolutely nothing". He might, it was argued, be "unemployed, on the welfare rolls, an inmate of the penal system, or the leader of a crime syndicate".\(^{66}\)

In defense of the loan statutes, the Attorney General and the Council for Independent Colleges began with the premise, deriving from the 1972

\(^{54}\) For teachers and those similarly situated, an academic year constitutes a full year under the statutes.

\(^{55}\) The statutory definitions derive from the definitions in Int. Rev. Code of 1954, §§501 (a), 501 (c) (2) and (3), of charitable organizations and other activities qualifying as tax-exempt for federal tax purposes.

\(^{66}\) Brief of Comptroller at 6–10.
decision in *Miller v. Ayres*, that loans in a program created under Article VIII, section 11, could be made repayable in actions of service to, or beneficial to, the Commonwealth. Then it was submitted that the actions which the 1973 legislation permitted a loan recipient to undertake as repayment of his loan were of a kind to confer such service or benefit. That public or charitable employment was beneficial to the Commonwealth required little documentation; examples of state loans repayable by acts of public service (e.g., teaching or the practice of medicine) abounded in the statutes of Virginia and other states.  

The benefits accruing from adding college graduates to the labor force were demonstrated by showing the correlation between higher education on the one hand and higher income, greater tax revenues, less unemployment, and economic growth on the other.  

The provision permitting one to repay a loan by simply residing and being domiciled in Virginia (at a rate of two years for each year of the loan) was placed in the 1973 acts largely with such people as homemakers in mind—people who, though not themselves earning wages or salary make important contributions to the Commonwealth, it economy, and its general well-being. Therefore the Attorney General and the Council documented to the court both the economic value of a homemaker’s services and, more generally, the important role, far out of proportion to their numbers, that college-educated people play in the civic, political, and cultural life of their communities.  

How the court in the 1973 test case would approach the question of benefits to the Commonwealth from the actions required by the loan statutes would seem to turn in large measure on the court’s conception

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67 See, e.g., ARK. STAT. ANN. §§80-2908 to 2920 (1971 Supp.) (repayment of loan by practicing medicine in small towns in Arkansas); Fla. STAT. ANN. §§239.38, 239.43, 239.44, 239.47, 239.52 (1972 Supp.) (repayment by teaching or nursing); Ga. CODE ANN. §§32-3005, 32-3101, 3203120 (1969) repayment by medical, paramedical, and other services); Md. CODE ANN., Art. 77A, 59, 62, 63 (1972 Supp.) (repayment by practicing medicine, nursing, dentistry, etc.); N.D. CENTURY CODE §§15-52-10 to 15-52-29 (1971) (repayment by practicing medicine, or dentistry); S.D. COMP. LAWS ANN., Ch. 13-56A (1972 Supp.) (repayment by practicing medicine or nursing) Virginia statutes permitting loans to be repaid in services or beneficial actions include Va. CODE ANN., §§23-35.3 (d) (1973) (doctors), 23-35.3 (b) (1973) (dentists), 23-35.11 (1973) (nurses), 23-37.3 (1973) (dental hygienists), 23-38.2 (1972) (mental health), and 23-38.5 (soil scientists), 23-105, 23-107 (1973) (VMI cadets), as well as the scholarship program for public school teachers.

68 Brief of Attorney General at 15–16; Brief of Council of Independent Colleges in Virginia at 19–25.

69 Economists at the Chase Manhattan Bank have computed the value of a homemaker’s services—acting as nursemaid, dietitian, cook, laundress, etc.—as being $257.53 a week, or $13,591.56 a year. Brief of Council of Independent Colleges in Virginia at 26. [However, the legislation, requires longer service in this capacity (2 years) before the loan would be forgiven than is required for a person earning the minimum wage or less (1½ years). A subtle sex discrimination? See Sandler, *Sex Discrimination, Educational Institutions and the Law*, infra. Ed.]

of the respective role of court and legislature. In painting a picture of loan recipients being forgiven their loans while on welfare or in jail, the Comptroller was inviting the court to consider whether in any individual case a loan recipient might in fact not be conferring a benefit on the Commonwealth.61 The proponents of the statutes, in contrast, were emphasizing the benefits conferred by loan recipients as a class. To uphold the statutes, they argued, the court should not itself make essentially legislative judgments about benefits and detriments; it should ask only whether there was a body of data on which the Legislature reasonably could conclude that the actions asked of the loan recipients were beneficial.62

The Comptroller, supported by the Americans United for Separation of Church and State, sought to reopen the question of establishment of religion. Americans United, in their amicus brief, cited a number of federal district court decisions decided since Tilton v. Richardson63—cases which the proponents of the loan acts distinguished as all having involved state aid at the elementary and secondary school level and therefore being of a kind with Lemon v. Kurtzman rather than Tilton.64 Counsel challenging the Virginia statutes also argued that the acts violated the Free Exercise Clause of the First Amendment, a question not decided in the 1972 decision in Miller, in which only the establishment clause had been explored.65 The Attorney General and the Council of Independent Colleges, replied that, there being neither claim nor showing of coercion, there could be no free exercise objection to the statutes.66

Even though the First Amendment was once again invoked in the 1973 litigation, one might well wonder whether the court would have any disposition to reexamine that question at any length, having less than a year before upheld the 1972 legislation as being compatible with the First Amendment. Moreover, although there had continued to be much church-

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61 See Brief of Comptroller at 6–10.
62 See Reply Brief of Council of Independent Colleges at 2–6. Cf. commerce clause cases, in which the United States Supreme Court asks only if there is rational basis for Congress’ judgment that a given regulatory scheme is necessary to the protection of commerce, and in which, further, the Court says that, in regulating commerce, Congress is free to look at a class of establishments rather than viewing individual establishments in isolation. See, e.g., Katzenbach v. McClung, 379 U.S. 294, 300–01, 303–04 (1964); United States v. Darby, 312 U.S. 100, 120–21 (1941).
63 Brief of Americans United for Separation of Church and State, passim.
64 Reply Brief of Attorney General at 9; Reply Brief of Council of Independent Colleges in Virginia at 7. Americans United also cited a decision of the Supreme Court of Washington, Weiss v. O’Brien, No. 42571 (May 10, 1973), a case whose actual holding rested on the Washington State Constitution and whose dictum as to the First Amendment was interwoven with the factual findings in that case. See Reply Brief of Council of Independent Colleges at 7 n.22.
65 Brief of Comptroller at 10; Brief of Americans United for Separation of Church and State at 12.
66 Reply Brief of Attorney General at 8–9; Reply Brief of Council of Independent Colleges in Virginia at 10–11. In Tilton v. Richardson, 403 U.S. 672, 689 (1971), the Court observed, “Appellants claim that the Free Exercise Clause is violated because they are compelled to pay taxes the proceeds of which in part finance grants under the Act. Appellants, however, are unable to identify any coercion directed at the practice or exercise of their religious beliefs.”
and-state litigation in the state courts and the lower federal courts, there had been nothing from the United States Supreme Court to disturb in any way the marked line which it had drawn in \textit{Tilton} between cases involving elementary and secondary schools and those involving higher education. Indeed in June 1973, after the arguments in the Virginia Court, the United States Supreme Court decided cases which once again underscored the Court's perception of state programs involving private colleges as being markedly different from state aid to private elementary and secondary schools. Thus the Court upheld a South Carolina statute establishing a state authority created to assist private institutions of higher education to finance capital projects, while it struck down a variety of state programs (such as tuition reimbursement and income tax benefits) aiding parochial elementary and secondary schools.\footnote{Hunt \textit{v.} McNair, 93 S. Ct. 2868 (1973); Levitt \textit{v.} Committee for Public Education, 93 S. Ct. 2814 (1973); Sloan \textit{v.} Lemon, 93 S. Ct. 2882 (1973); Committee for Public Education \textit{v.} Nyquist, 93 S. Ct. 2955 (1973), all decided June 25, 1973.}

Hence the outcome of the 1973 Virginia litigation would seem to rest on the court's deciding whether the General Assembly, in revising the loan statutes, had required a sufficient quid pro quo from a loan recipient to make the transaction a bona fide loan within the meaning of section 11. That decision would seem to depend, in turn, on the court's view of the place of legislative facts, that is, whether the court would be able to conclude that there were sufficient data on the basis of which the General Assembly might reasonably conclude that the actions asked of loan recipients would be beneficial to the Commonwealth.

\textbf{Conclusions}

Virginia has a long and venerable tradition of the separation of church and state, going back to documents like Madison's Memorial and Remonstrance and Jefferson's Bill for Religious Liberty, and it is only natural that proposals for aid to church-related colleges would be closely scrutinized. Moreover, proposals for aid to private education, whether church-related or not, necessarily require adjustments in thinking geared to decades of restrictions (many of them born of the era in which public education was in its infancy) against use of public funds for the private sector. On the other hand, our foregoing account should suggest some of the complications and problems which an excess of caution can create.

In any event, the events in Virginia, including the two test cases, have resolved many basic constitutional questions; and we can offer several conclusion:

1. In spite of initial hesitation, Virginia has now come to the prevailing view that it is sound public policy to maintain a viable pluralistic statewide system of higher education.

2. The Supreme Court of Virginia's clear-cut response to the church-state issue in the 1972 court test demonstrated that even states with a strong
tradition of separation of church and state agree with the United States Supreme Court in distinguishing between sectarianism in higher education and the secular education functions of a church-related college.

3. The revision of Virginia's Constitution, while helpful in permitting new forms of aid to students in church-related colleges, suggests the legal complications which can arise from drawing fine legal distinctions such as that between a "loan" and a "grant".68

4. A comparison of the United States Supreme Court decision in such cases as Tilton v. Richardson and Hunt v. McNair,69 and the Virginia Supreme Court's interpretations of the Virginia Constitution suggests that since state constitutional inhibitions on state aid to the private sector are a commonplace, proponents of such aid in many states may find their state constitutions more troublesome as obstacles than the First Amendment to the Federal Constitution.

5. Resolving constitutional questions, state and federal, is an important step in the right direction, but often leaves unresolved important policy questions; in particular, the equity of a particular program and its adequacy in maintaining a viable pluralistic system of higher education.70

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68 An amendment to Article VIII, Section II, of the Virginia Constitution was approved by the 1973 General Assembly. If approved a second time (in 1974) by the Assembly and by the people in referendum, the amendment would permit grants (not just loans) to students in private colleges of the kind described in Section II.


70 As this article was going to press, the Supreme Court of Virginia handed down a decision in which the 1973 loan legislation was only partially validated. The Court ruled that all of the forms of repayment set forth in the statutes could be made available to students in public institutions and to those in nonsectarian private institutions. But as to students in sectarian private institutions, loans must be repaid either in money or by "public service to the Commonwealth." In the Court's view, four of the five kinds of alternate repayment set out in the statutes did not constitute such "public service"; only employment by the Commonwealth or one of its political subdivisions met this test. As to the questions raised under the First Amendment, the Court in its 1973 opinion, as in 1972, rejected challenges to the statutes raised under that Amendment. Miller v. Ayres (August 30, 1973).

The 1973 Miller decision by no means resolves all legal questions arising out of the Virginia loan legislation. In particular, the opinion leaves for further definition which of Virginia's church-related colleges will be found to be "sectarian" and which "nonsectarian."