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HAS GOVERNMENT AN INTEREST IN RELIGION?

F. William O'Brien, S.J.†

I.

INTRODUCTION: THE STATE OF THE QUESTION.

In a letter to the New York Times,1 printed July 27, 1957, Mr. Patrick Murphy Malin, Executive Director of the American Civil Liberties Union, explained why ACLU had recently reversed its previous acceptance of a suggestion that questions concerning religion be included in the 1960 census. The reasons for its new position, wrote Mr. Malin, were the first amendment provisions against laws (1) prohibiting the free exercise of religion, and (2) respecting an establishment of religion. "As for the second provision," he commented, "assembling of information about religious beliefs would aid some or all religious bodies and thus breach the wall between church and state."

Many people may well agree that religious questions should not be included in any government census. However, students of American history and constitutional law might seriously question the assertion that the first amendment is violated by any government gesture which will "aid some or all religious bodies." Of course this gloss on the "establishment" provision did not originate with Mr. Malin. In 1947, the Supreme Court, while permitting the public payment of transportation costs for children in parochial schools, ruled that the provision demanded the following prohibitions:

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1. N.Y. Times, July 27, 1957, p. 18. As a result of protests by the ACLU and other groups, who feared a violation of the doctrine of separation of Church and State, the Census Bureau announced in December, 1957, that the query on religion had been dropped. See N.Y. Times, Dec. 13, 1957, p. 1.

(335)
"Neither [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one over another."2

Four Justices went beyond this restrictive reading of the first amendment. Voicing disapproval of the New Jersey allowance, even as a public welfare measure, Rutledge, speaking for Jackson, Frankfurter, and Burton, wrote as follows in a dissenting opinion:

"In view of . . . history no further proof is needed that the [First] Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises. . . . Legislatures are free to make, and courts to sustain, appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observances, be the amount large or small."3

Justice Jackson supplemented this dissenting opinion with one of his own in which Justice Frankfurter concurred. Re-enforcing the above strictures, he said:

"[T]he state may pay out tax-raised funds to relieve pauperism, but it may not under our Constitution do so to induce or reward piety. It may spend funds to secure old age against want, but it may not spend funds to secure religion against skepticism."4

One year later, this no-aid theory embodied in the dissenting opinions won the approval of eight members of the Court, which struck down an arrangement whereby the public schools were used to teach religion to children whose parents had requested it.5 Reiterating the Everson principle, Justice Black offered inter alia this explanation in his majority opinion:

"[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."6

Justice Stanley Reed, the sole dissenter in the McCollum case, disagreed with the Court's interpretation of the first amendment and its application to the school arrangement. "The history of American

2. Everson v. Board of Educ., 330 U.S. 1, 15 (1947). The often-quoted phrase "separation of Church and State" appears no place in the Constitution. Nor is it in the constitution of any of the states. Moreover, a study of 132 constitutions currently in effect has revealed to this writer that it is used only in those of Russia and eight of her satellites: Bulgaria, Byelorussia, Hungary, Mongolia, Poland, Rumania, Ukrainia and Yugoslavia.
3. Id. at 41, 52-53.
4. Id. at 25.
6. Id. at 212.
education," he protested, "is against such an interpretation of the First Amendment."

Although Justice Reed had no support from his colleagues on the Court, he received comforting confirmation from legions of scholars who likewise thought that an unbiased reading of history must evoke a categorical denial of the majority's contention. Edwin S. Corwin of Princeton traced Black's aberration — and that of those who joined him — to the tortuous excursion into American history made by Rutledge in his Everson dissenting opinion. Rutledge — so said this eminent scholar of constitutional law — had simply "sold his brethren a bill of goods." To refute the "no-aid" gloss put on the first amendment by Rutledge, Black et al., Corwin and other writers have called upon the countless age-old practices of aid proffered to religion by the federal government ever since the first Congress appointed chaplains to the two houses.

However, in appealing to history, most parties to the controversy have given insufficient consideration to the legal opinions of the state judges. Yet as one writer of a judicial biography remarked, "a society reveals itself in its law and nowhere better than in the reports of the decisions of the state courts." This is especially true in regard to government in America and its traditional relationship with religion. Until very recent times, federal judges have had but few occasions to discuss the matter, whereas judges in every state in every period of our history have treated the subject in hundreds of their opinions. These opinions will be surveyed in the following pages in the hope of shedding light on this highly controversial question: Must American governments, "in view of history" assume an attitude of indifference to religion and abstain from any action tending to "promote" or "encourage" it? Or does such an official posture collide with "practices embedded in our society," with "our tradition and culture" and "the accepted habits of our people"?

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7. Id. at 241. Although Justice Reed wrote that he accepted the general principle of no-aid — id. at 218 — he practically disavows it throughout the rest of his opinion.

8. As a sample of writers of such a view, see several articles in 14 Law & Contemp. Prob. 1-159 (1949).


10. The writer, enlarging on this point, adds: "Not even our constitutional law can be placed in proper perspective without considering them. The almost exclusive concern of scholars with the opinions of the Supreme Court of the United States may distort the true picture." Levy, The Law of the Commonwealth and Chief Justice Shaw 3 (1957).


II.

A.

THE NEW ENGLAND ESTABLISHMENTS.

"The social development of New England, like its history, was due largely to three principal causes; . . . and most important of all was the intensity of religious enthusiasm and the identity of religious convictions." People bred in such a milieu accepted it as axiomatic that government should "aid, promote, encourage" religion, and principles embodying traditional practices to this effect were written into the constitution of Massachusetts when it was drafted in 1780. Article III of the declaration of rights invested towns — generally co-terminous with parishes — with the right to levy taxes for the support of ministers and of religion, which this same article characterized as essential for "the good order and preservation of civil government." Considerable dissatisfaction was evinced over the practical operation of this provision, for, de facto, it resulted in a quasi-establishment of the Congregational church. Such a result was chafing to the minority religions — Episcopalian, Baptist, Methodist, Universalist — which, although guaranteed freedom of worship and even the power to tax their respective communicants, experienced great difficulty in utilizing the latter right. This and other strictures often resulted in court cases where grievances were aired if not always relieved. It is significant to note that the dissidents seldom if ever protested the concept of government aid to religion but rather the frequent interpretations of the constitution which denied them eligibility to receive a share of tax money. An additional complaint arose from isolated individuals or groups of insufficient numbers to form congregations of their own persuasions. This made them subject to assessments for support of the nearest church, whether or not they attended.

The first judicial utterance on these constitutional provisions came in 1780 from the lips of William Cushing, Chief Justice of the Supreme Judicial Court. In a charge to the grand jury in York County, he deemed it necessary, so it would seem, to rebut objections raised in certain quarters. Thus he spoke:


14. Since the legislature could not regulate doctrine nor enforce conformity, and since dissident groups also received tax money, the Congregational Church was not established as was the Church of England but was merely highly favored. See Thorning, Religious Liberty in Transition 27 (1931).
"As to the rights of conscience, which ought ever to be held sacred, they stand as well secured as may be, all sects and persuasions being left unrestricted to associate for the worship of God, in such manner and season as they think best; and under this restriction it cannot be thought an infringement to the right that the Legislature, if need be, should compel the support of public worship, and of the teachers of religion and morals; as the public social veneration of the Supreme Governor of the world is a duty essential to all religion and morality."

A test case, *Murray v. The Inhabitants of First Parish of Gloucester,* came before the Supreme Court in 1786. The Universalist minister brought suit to recover tax money which his parishioners had paid to the town treasury for support of the Congregational church. In rebuttal to his claims, it was alleged that the Rev. Mr. John Murray had denied the external rite of Baptism and eternal damnation, and hence was not a "teacher of piety, religion and morality" — a constitutional requirement for tax benefit. The court, however, did not sustain this argument and thus decided that Murray should be made a beneficiary of the relevant provisions of the declaration of rights.

The Supreme Judicial Court was not always so amenable to persuasion by the protesting unorthodox sects nor by those founding their claims on other grounds. In 1809, in *Dillingham v. Snow,* the court denied farmer Dillingham a new trial in his action against the assessors who had taken his cows in payment for taxes levied for support of a parish and minister of religion. The plaintiff did not challenge the right of public aid to religion. He rather protested that there was no such parish as the North Parish of Harwick. In answer, the court replied that even if this fact be established, still the contested assessment was legal for "when no part of a town is included in, or constitutes a parish, the duties of a parish are required of the town, who are obliged to maintain and support public religious worship." The above remarks of the court were prefaced by the following paragraph, which is interesting because it sketches in brief the rather extensive powers conferred by law on incorporated parishes:

"Parishes are incorporated . . . [and] authorized and obliged to elect and support some protestant public teacher of piety, religion and morality; they may erect houses of public worship and may

15. See hand-written copy of this charge among Cushing Papers, vol. 11 (non-paginated), in Massachusetts Historical Society, Boston.
17. 5 Mass. 547 (1809).
18. *Id.* at 554.
have parsonages. To defray the expenses arising from the execution of these powers, they may raise money, by assessing it on the polls and estates of the inhabitants, and by collecting it — for which purpose the parish collector is invested with authority to compel payment.”

In 1810, the case of *Barnes v. First Parish in Falmouth* came before the highest judicial tribunal and the decision rendered bore down heavily on small groups of religious dissenters. The Rev. Thomas Barnes, a Universalist minister, claimed that tax money paid from 1789 to 1805 by men of his own persuasion, a certain Buxton and Knight, should be turned over to himself and not to the Congregationalist parish. But the court punctured his argument by pointing out that the constitution allowed such payment only to incorporated religious societies. Thus the small informal religious conventicle of Rev. Barnes was denied the beneficence of article III. Although Barnes undoubtedly chafed under the strictures of this interpretation, he certainly must have acquiesced in most of the following excerpts from the opinion of Chief Justice Theophilus Parsons:

“The object of a free civil government is the promotion and security of the happiness of the citizens. These effects cannot be produced, but by the knowledge and practice of our moral duties, which comprehend all the social and civil obligations of man to man, and of the citizen to the state. If the civil magistrate in any state could procure by his regulations an uniform practice of these duties, the government of that state would be perfect...

“Civil government... availing itself only of its own power, is extremely defective; and unless it could derive assistance from some superior power, whose laws extend to the temper and disposition of the human heart, and before whom no offense is secret, wretched indeed would be the state of man under a civil constitution of any form...

“The second objection [of Barnes] is, that it is intolerant to compel a man to pay for religious instruction, from which, as he does not hear it, he can derive no benefit. This objection is founded wholly in mistake. The object of public religious instruction is to teach, and to enforce by suitable arguments, the practice of a system of correct morals among the people, and to form and cultivate reasonable and just habits and manners; by which every man's person and property are protected from outrage, and his personal and social enjoyments promoted and multiplied. From these effects every man derives the most important benefits, and whether he be, or not, an auditor of any public teacher, he receives more solid and permanent advantages from this public

19. *Id.* at 553-54.
20. 6 Mass. 401 (1810).
instruction than the administration of justice in courts of law can give him. The like objection may be made by any man to the support of public schools if he has no family who attend; and any man, who has no lawsuit may object to support of judges and jurors on the same ground; when if there were no courts of law, he would unfortunately find that causes for lawsuits would sufficiently abound.

"... Our constitution certainly provides for the punishment of many of the breaches of the laws of christianity; not for the purpose of propping up the christian religion, but because those breaches are offenses against the laws of the state; ... But there are many precepts of christianity of which the violation cannot be punished by human laws; and as obedience to them is beneficial to civil society, the state has wisely taken care that they should be taught and also enforced by explaining their moral and religious sanctions; as they cannot be enforced by temporal punishments."²¹

This citation, protracted though it be, is given here because it is an excellent exposition of an argument which appears time and time again in opinions issuing from hundreds of judges in every American court throughout a century and a half. In Massachusetts, such distinguished national figures as John Adams, Daniel Webster and Joseph Story urged the same point, that public aid to religion was a duty because the common good was promoted by religion and morality, which help secure property and business, and make better subjects and better civil officials.²² With benefits so commonly distributed, why, these men asked, is it not just equally to distribute the cost?

In 1820, a shrewd manufacturer excogitated an ingenious argument, which he hoped would win his company's release from the legal duty to pay the parish tax for support of religion. The tax, he argued, was improperly assessed on his corporation because, since the Amesbury Nail Factory had no soul, it could derive no benefit from an institution established only pro salute animae.²³ In parrying this clever thrust at the law, the parish tax collector made the following defense:

"So far as the community is interested in the support of public, religious and moral, instruction it regards only the prevention of crimes, not the salvation of souls. The property of corporate bodies is just as much benefited by these institutions, as that of individuals. The expense of schools rests upon the same foundation..."²⁴

²¹ Id. at 404-05, 409-11.
²⁴ Id. at 54.
The court accepted this explanation with these words of approval:

"It was justly said in the argument, that the same objection . . . [against taxes for churches] would as well apply . . . for the support of schools, as to those raised for the support of public religious instruction. But the truth is, that the interests of corporations are promoted by both, equally with those of individuals. Property is made more secure, both by the education of children, and the religious and moral instruction of adults."\(^22\)

Other New England states had arrangements similar to that of Massachusetts. In the territory of Maine, the identical provisions applied since that region was part of the Bay State until 1820. In 1824, in the case of *Inhabitants of Alna v. Plummer*, the court spoke thus of the contemporary Maine arrangement:

"It is, and long has been, within the ordinary powers and duties of towns . . . to provide for religious instruction. To this end they may vote and assess money for the erection and repair of meeting houses; and for the support and maintenance of ministers. . . .

"[T]he inhabitants . . . are as beneficially interested in these objects, as when they vote and assess money for the support of schools."\(^26\)

An examination of the constitution of New Hampshire will reveal a striking similarity between the religion articles of its bill of rights and the declaration of rights in the Massachusetts constitution. Article VI expressed the doctrine commonly accepted in practically every section of America, and frequently embodied in the constitutions and statutes of the states: "the best and greatest security to government" is derived from "morality and religion", instruction in which the government should strive "to promote."\(^27\) Thus, article VI concluded:

\(^{25}\) *Id.* at 55.

\(^{26}\) 3 Me. 88, 89 (1824). This particular practice in Maine and other New England states was eventually abandoned due to insoluble problems arising with the multiplication of sects. However, there was no retreat from the principle that churches perform a public function, not merely a private one, and therefore deserve public aid. Thus spoke the court in 1875 in *Trinity Church v. Boston*, 118 Mass. 164, 165: "The purpose of the tax-exempting statute is to relieve such organizations from the burden of taxation upon property devoted to public uses."

\(^{27}\) Vermont was a part of New Hampshire until 1791. Its first temporary constitution, art. XLI, stated that "Laws for the encouragement of virtue . . . shall be made . . . and all religious societies . . . for the advancement of religion and learning . . . shall be encouraged."

In 1903, the Kentucky Supreme Court spoke as follows: "From the earliest settlement, through every form of social compact, and by universal consent, ingrafted now either upon the constitution of the states, or upon their statutes, is the idea that the public well-being justifies the most liberal encouragement of religious teachings and practices . . . ." *Commonwealth v. YMCA*, 116 Ky. 711, 719, 76 S.W. 522, 523 (1903).
"the people . . . have a right to empower the Legislature to authorize . . . the support . . . of public Protestant teachers of piety, religion and morality." Supplementing this provision was an immunity clause which forbade compelling a person to support a sect other than his own. The interpretation of article VI fathered scores of the most litigious court cases and generated contentiousness lasting even into the twentieth century. To this date, in spite of several unsuccessful attempts to expunge the discriminating words, "Protestant teachers of . . . religion" may still be supported by tax money.

In the classic case of Muzzy v. Wilkins in 1803, John Muzzy, a Presbyterian, protested his being taxed to support the Congregational minister of Amherst. Chief Justice Jeremiah Smith, who had been in Congress just one year after the Bill of Rights of the United States Constitution was ratified, wrote a scholarly and lucid opinion in which he discussed at length the nature of a religious establishment. To use tax money for religious instruction did not, he contended, constitute an establishment nor violate freedom of conscience. The discussion of these two points, although unnecessary for deciding the instant case, as shall be seen, was indulged in by Smith because he thought the case would become a guiding precedent for the future "in the construction of a great and fundamental article of the Constitution." An examination of "all parts of that instrument which relate to the same subject" was best calculated to collect the framers' intention. Since "no human government has a right to set up a standard of belief" the New Hampshire constitution "prescribes no articles of faith," and allows every man the right to "worship God according to his own conscience," and "all denominations are equally under the protection of the law, are equally the objects of its favor and regard," and a citizen's religion "neither promotes nor hinders his political advancement." But these liberal allowances must not lead a person "to infer that religion is a thing of no consequence to society. The reverse is the case." It affords "the

28. THORNING, RELIGIOUS LIBERTY IN TRANSITION 143-225 (1931).
29. Id. at 224-25.
30. Article VI of the bill of rights of the constitution of New Hampshire states that the people may authorize the legislature and towns to support Protestant teachers at the people's expense.
32. Muzzy v. Wilkins, Smith (N.H.) 1, 12 (1803).
33. Id. at 15.
34. Id. at 3.
35. Id. at 6.
36. Id. at 8.
37. Id. at 9. This statement is not true. The constitution made it impossible for a Catholic to hold the office of Governor, state senator or state representative. This restriction was not eliminated until 1877. THORNING, op. cit. supra note 14, at 212-13.
best and greatest security to government," and therefore the constitution has provided means "to promote" instruction in the same. The principal means provided is the public support of "public teachers of religion and morality" 39 chosen and maintained because it is believed "their instructions will promote the good of society."

This arrangement, Smith continued, does no violence to the individual conscience, because "the privilege is extended to all denominations" and the state prescribes no "rules of faith or doctrine." 40 Unfortunately, some few isolated individuals will have to contribute to a religion in which they do not believe, but this is no more unjust than taxing for education or for war those people "who profess to believe that learning is no way useful to the State" or those who are "conscientiously scrupulous about the lawfulness of bearing arms." 41 "On this subject of conscience, there is no mistake more common than for men to mistake their wills and their purses for their consciences." 42 Chief Justice Smith continued:

"Public instruction in religion and morality . . . is to every purpose a civil, not a spiritual, institution. The relation that subsists between a minister and a town is civil, that which subsists between a minister and a church is spiritual. Hence, the former is regarded in our laws, the latter is not. Society has a right to judge what will promote the good of society and to provide for it at public expense. The minority must submit to the judgment of the majority." 48

An opinion written in the case of Second Ecclesiastical Soc'y of Portland v. First Soc'y 43 shows clearly the official view on the question of Church-State relations in Connecticut. Thus spoke the court:

"[P]rovision for the support and maintenance of religious instruction and worship was considered to be a duty resting on the state, as much as the promotion of general education, the support of the poor, or the maintenance of roads and bridges; and that provision was made and carried into effect through the instrumentality of local ecclesiastical societies established by the state through its legislative power, as those other objects respectively were accomplished through the agency of school societies, and districts, and of towns. . . . They were governmental instrumentalities, composed of individuals, as component parts of the great com-

39. Id. at 14.
40. Id. at 13.
41. Id. at 14.
42. Id. at 15.
43. Id. at 14. See also on this point Baptist Soc'y v. Town of Wilton, 2 N.H. 508, 512 (1882).
44. 23 Conn. 255 (1854).
munity, for the promotion of the general welfare of that community, and in which no person had an interest, or was to derive a benefit, of a character particular or individual to himself merely, but only in connection with, and as he participated in, the welfare of the community generally. . . .”

Although two judges dissented from the judgment of the court, they by no means challenged this reading of history. Proof is had from their own words:

“The great object of the first settlers of the colony of Connecticut, as well as those of the other New England colonies, was the support of religion.”

Carl Zollman, the distinguished scholar of American civil church law, has written that “in support of the general power of taxation possessed by these parishes,” there are “hundreds of cases” which “could be cited.” “The general power of tax was regarded as such an elementary proposition that no one seems to have denied it.”

B.

AFTER THE FIRST AMENDMENT.

It is perhaps unnecessary to add that the first amendment, ratified in 1791, was in no way intended to disturb the prevailing practice in several of the states. Nor were their arrangements deemed to be in any way alien to the spirit breathed forth by the religious provisions of that amendment. As a matter of fact, there are sound reasons for believing that the clause forbidding Congress from making laws “respecting an establishment of religion” had as one of its two principal objectives the protection of the various church arrangements established by law in the states. It is significant that the constitutions of both Massachusetts and New Hampshire stated in their declaration of rights that “the people . . . have a right” to provide for the public support of the Protestant religion. In the ratifying conventions, the delegates were much exercised over the want of any bill of rights in the federal constitution, an omission which many feared might permit the new central government to disturb their established laws vis-a-vis religion.

45. Id. at 272-73.
46. Id. at 277. (dissenting opinion of Waite, J., concurred in by Hinman, J.)
47. Id. at 277. For corroboration, see Jewett v. The Thames Bank, 16 Conn. 511, 515-16 (1844).
48. Zollman, American Civil Church Law 42, n. 5 (1917).
50. Mass. Const. art. 3 (1780); N.H. Const. art. 1, § 6 (1784).
To forestall such a danger seems to have been the motive of the New Hampshire convention when it proposed as an amendment that "Congress shall make no laws touching religion, or to infringe the rights of conscience." 51 A careful reading of remarks made in the Massachusetts convention would seem to indicate that the bill of rights desired by the foremost delegates there was one protecting the group-right of towns and parishes as spelled out in article II of its own declaration of rights. 52 Even in far-off North Carolina, apprehension was felt that the new Constitution might be the thin edge of the wedge used to split its relationship of preference to the Protestant religion. 53 To allay such fears, James Iredell, a leading delegate and soon to become a Justice of the United States Supreme Court, offered this comforting observation to his disquieted colleagues: "[Congress] certainly have no authority to interfere in the establishment of any religion whatsoever.... Each state must be left to the operation of its own principles." 54

To satisfy requests from several states, amendments to the new Constitution were proposed in the first Congress. The amendment on religion was subjected to several revisions. 55 Before the final draft was decided upon, fear was expressed by some Congressmen that the then pending versions might be interpreted to allow Congress to interfere with the establishments or quasi-establishments in several of the states. Mr. Sylvester of New York evidenced such fear, 56 and Mr. Huntington of Connecticut offered the following significant observation:

"The ministers of their congregations to the Eastward were maintained by the contributions of those who belonged to their society; the expense of building meeting-houses was contributed in the same manner. These things were regulated by by-laws. If an action was brought before a Federal Court on any of these cases, the person who neglected to perform his engagements could not be compelled to do it; for a support of ministers or building of places of worship might be construed into a religious establishment.... He hoped, therefore, the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all." 57

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51. 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 362 (J. Elliot ed. 1861).
52. 2 Id. at 44, 80, 87, 100, 118, 148. The danger, envisioned by many was not that the new government might prescribe a religion for the people but that it might proscribe their particular arrangement of public aid to religion.
53. Art. XXXII restricted holding of civil offices to Protestants.
54. 4 DEBATES, op. cit. supra note 51, at 244.
55. ANNALS OF CONG. 431-42, 450, 660-65, 729-31 (1789) [1789-1824].
56. Id. at 729.
57. Id. at 730-31.
Mr. Madison, father of the original amendment, had just given his interpretation to dissipate these apprehensions, noting that the intention was merely to prevent a “national religion” or national laws infringing the rights of conscience.\(^{58}\) Apparently such balm was not completely soothing to the distressed Congressmen, for almost immediately a revision was proposed and adopted by the House: “Congress shall make no laws touching religion, or infringing the rights of conscience.\(^{59}\) This was practically the same as the amendment proposed by the ratifying convention of New Hampshire.\(^{60}\)

Whatever this brief discussion may prove, it is certain that when the various quasi-establishments were abandoned, the abandonment was not due to the first amendment, but to the concurrence of several factors — social, political and religious — which had long been building up within the states themselves and whose confluence finally washed away the bases of support for the age-old church-government institutions.\(^{61}\) Although the particular Protestant sects then gradually yielded their place of preferment, there was no general retreat on the part of the people — high or low — from the oft-enunciated principle that the state should foster, aid and encourage religion. A canvass of court opinions in a number of jurisdictions reveals how universal was this particular tenet. Most of these opinions were written in cases which involved tax exemption to churches and church-related schools, but the principles evoked therein find their way into many other types of religious cases.

It is interesting to observe that in several states no need was felt for explicit laws exempting churches and/or schools, for the practice was “so entirely in accord with the public sentiment, that it universally prevailed.”\(^{62}\) The custom was soon put upon more secure foundation until today all states extend this favor to churches and church-related schools either by statute or by constitutional provision.\(^{63}\) In reading the opinions discussed in the ensuing pages, two points deserve careful reflection. First, in practically none of the cases was the basic immunity

\(^{58}\) Id. at 730.

\(^{59}\) Id. at 731. The present wording was agreed upon after several other versions were discussed and rejected. Corwin argues that the word “respecting” was inserted precisely to protect from Congressional interference the establishments in five of the states — as well as to forbid a national church. Corwin, op. cit. supra note 9, at 12. For the effect of the fourteenth amendment, see id. at 19.

\(^{60}\) 1 Debates, op. cit. supra note 51, at 362.

\(^{61}\) Stokes, Church and State in the United States 408-46 (1950); Thoening, Religious Liberty in Transition, passim (1931).


provision ever contested but only the special application in the respective instance. Second, the constitution of nearly every state proscribes either a religious establishment or preferential treatment of any one sect. Moreover, these state constitutions frequently spell out additional prohibitions respecting church-state relations. In view of these explicit strictures, it will be instructive to learn how the various courts of the states, after “disestablishment” became general, have justified the common spirit of government benevolence and concrete aid to religion. Moreover, the “no establishment” clauses in many of these state constitutions are clearly inspired by the similar provision in the federal constitution. Therefore, a study of relevant opinions from state courts should help immeasurably toward a proper interpretation of the federal provision.

C.

AID TO RELIGION IN THE NORTHEAST.

An early case arose in 1838 in Vermont when a Congregational church contested a tax assessment made on its fund, which was not explicitly exempted by either constitution or statute. In allowing the claim for immunity, the court spoke thus:

"By the Constitution of this state (chap. 2, sec. 41), it is provided that 'all religious societies and bodies of men . . . for the advancement of religion and learning . . . shall be encouraged and protected.' [Funds for such] have, in some instances, been partly contributed by the state, and all have grown up by legislative encouragement and enactment . . . [T]hey have contributed extensively to religion, benevolence and learning, and have elevated our condition, and given character to us, as a people. The question now is, did the legislature in 1825, disregard the direction in the constitution, and forget the feelings and interests of

64. The constitutions of Alabama, Iowa, Louisiana, South Carolina, and Utah forbid the establishment of a religion by law.
In other constitutions the government is forbidden from giving preference to any religious denominations or mode of worship: Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Minnesota, Missouri, Montana, New Jersey, New Mexico, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, Wisconsin.
Some of the states maintained their established religions for several years after the federal constitution was ratified. Massachusetts did not disestablish until 1833. Thorning, op. cit. supra note 61, at 90-93.
65. An explicit prohibition against compelling people to support any mode of worship or religious denomination or place of worship or religious minister is contained in the constitutions of at least twenty-eight of the states. In spite of these prohibitions, all the states exempt from taxation churches and church-related schools. In many states, the exemption rests on a constitutional provision; in others, the practice rests upon age-old custom which it was not thought necessary to embody in the constitution.
the people, and proceed, instead of fostering and encouraging, to tax and levy public contributions and exactions on the scanty funds of all those institutions?"^{67}

A New Hampshire court manifested a liberality, which must be characterized as magnanimous for that state and that year, when it ruled in 1876 that the special favoritism to the Protestant religion demanded by article 6 of the state constitution must not estop an act aiding a Catholic school. The court said:

"Notwithstanding by the policy of our fathers, as expressed in their bill of rights, art. 6, the protestant religion is regarded with peculiar favor, still every denomination of Christians . . . is declared to be equal under the protection of the law. Protection and taxation are reciprocal. Our Constitution prescribes the duty of legislators and magistrates . . . to cherish . . . all seminaries and public schools; to encourage private and public institutions for the promotion of . . . arts and sciences etc., . . . to . . . inculcate the principles of humanity and general benevolence. . . .

". . . It is none of our business . . . whether the lady superior of the sisters of mercy [of the Catholic school] upholds the dogmas of the Romish Church, or inculcates the doctrine of universal salvation after the most liberal sort of protestantism. It would be a reproach to us if it were otherwise. . . ."^{68}

In Rhode Island, in 1885,^{69} the supreme court was called upon to interpret a statute exempting from taxation buildings used for religion or educational purposes. This was broad enough to cover churches used for worship and buildings used for schools. Did it extend a like immunity to a building utilized for education other than "free public," — specifically, the classrooms in the basement of a church serving as a parochial school? The court answered in the affirmative, making the significant observation that the statute, inasmuch as it employed the word "or" between "religious" and "educational," "seems to recognize the close connection which exists between religion and education."^{70} The exemption was granted.

The Connecticut high court invoked the policy of the state to encourage religion as grounds for exempting the First Unitarian Church of Hartford from taxation, even if used for theatrical performances, although the relevant statute applied to "buildings exclusively occupied as churches." Said the court:

67. Id. at 244, 245.
68. Warde v. Manchester 56 N.H. 508, 509-10 (1876).
69. St. Mary's Church v. Tripp, 14 R.I. 307 (1883).
70. Id. at 309.
"The policy on which the exemption of church buildings from taxation is granted, is the encouragement of religion; and that policy is not hindered but rather promoted, by permitting this building to be used for profit, when not needed for those services distinctly called religious services."\[71\]

In 1899, the court justified the tax exemption as extended to the dormitories of Yale University, and in doing so, it offered the following epitome of a significant bit of Connecticut history:

"The reason of such a public policy [of tax exemption] is apparent. The principle that . . . buildings occupied for those essential supports of government, public education and public worship, ought not to be the subject of taxation, has been with us accepted as axiomatic. It has been incorporated into the constitutions of several states. It has been inseparably interwoven with the structure of government and the habits and convictions of our people, since 1638. . . . It is not merely an act of grace on the part of the State. It stands squarely on State interest. . . ."\[72\]

A like ruling was made in 1910\[73\] relative to the Concord, New Hampshire, Roger E. Foster Memorial parish house which, the court said, had not lost its character as a place of worship merely because it was sometimes used for secular purposes and entertainments by parties who pay. Elaborating on the basis for its decision, the opinion added:

"The meaning originally attached to it [the 1842 statute of exemption] was not a technical one. It was evidently intended to include such buildings as were then usually and properly termed 'churches' and used for the encouragement of religion and piety, which in the bill of rights (article 6) it is declared 'will give the best and greatest security to government.' Argument is unnecessary to show that the purpose was to promote religious worship, and not to discourage it by limiting the exemption to the very small number of church buildings in the state in which no secular entertainments were permitted. Indeed, it is probable that there were none of that exclusive character. . . . [N]o one ever supposed that such use made the meeting house liable to taxation."\[74\]

These holdings are not cited as though they are typical for all jurisdiction, or for all times. Some courts have been latitudinarians\[75\]

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72. Yale Univ. v. Town of New Haven, 71 Conn. 316, 332, 42 Atl. 87, 92 (1899).
74. Id. at 424-25, 75 Atl. at 533.
like the above, others have been strict constructionists in interpreting
tax immunity provisions, but none ever seem to have denied the propo-
sition that the state may aid and encourage religion. The opinions
quoted above are included in this survey merely to stress this latter
point. In a 1955 case in New Hampshire, the court upheld the
claim to exemption of a hospital conducted under religious auspices.
The “public welfare” argument was sufficient for extending the immu-
ity from taxation, and therefore the court, in the following quo-
tation, is revealed as viewing the religious problem from a somewhat
different position:

“What was intended to be forbidden by the amendment of 1877
was support of a sect or denomination by the state, at the expense
of taxpayers of other denominations or of no denomination. It
was not intended that members of denominations should be de-
prived of public benefits because of their beliefs.”

Before leaving the New England scene, there is a highly interest-
ing 1913 advisory opinion of the Massachusetts Supreme Judicial
Court which is calculated to provoke much thought. The General
Court [Legislature], in accordance with a provision of the state consti-
tution, had requested the judges to give their advice relative to school
appropriations. All seven members of the highest tribunal of the
commonwealth answered in an advisory opinion that, although article
2 of the declaration of rights and article XI of the amendments of the
state constitution “absolutely prohibit the enactment of any law estab-
lishing any particular religion or restraining the free exercise of any
particular religion,” there would be nothing unconstitutional in ap-
propriating money “for higher educational institutions, societies or
undertakings under sectarian or ecclesiastical control.” Three of
the justices thought that even appropriations made for churches would
be constitutional.

Courts in the Middle Atlantic states have repeatedly professed
their adherence to the principle that American governments should
extend encouragement and concrete aid to religion and religious insti-

76. Connecticut Spiritualist Camp-Meeting Ass'n v. East Lyme, 54 Conn. 152
(1884). In Franklin St. Soc'y v. Manchester, 60 N.H. 342 (1880), the court
ruled that the property claimed as exempt was not actually covered by the constitutio-
nal provision and therefore decided against the society. It did not give any
pronouncement on the broad constitutional question since this was not before the
court. Id. at 350.
78. Id. at 522, 113 A.2d at 116.
82. Id. at 602, 102 N.E. at 465.
tutions. In 1853, a case arose in New Jersey involving a church's claim to tax exemption in face of the objection that at the time the particular assessment was made, the charter did not expressly cloak churches with this immunity. Nevertheless, the court made the church the beneficiary, justifying its action thus:

"Meeting houses and school houses, although not formally exempted by the tax laws in force prior to 1851, were seldom if ever assessed in any part of the state. This omission was so obviously proper, and so entirely in accordance with the public sentiment, that it universally prevailed, and was in fact a contemporaneous construction of the laws this court would probably have sanctioned, had the question been formally raised." 84

Discussing the circumstances which attended the adoption of statutes for exemption, the court commented that in 1851 the legislature, obeying the almost universal, innate promptings of the human heart, promptly enacted the laws requested by the public. 85

In New York an 1886 decision of the supreme court interpreted the tax exemption to include the farm lands deemed necessary for a seminary's subsistence. 86 Employing language which seems to echo that emitting from other state tribunals, the court stated:

"The policy of the law has been, in this state from an early day, to encourage, foster and protect corporate institutions of religious and literary character, because the religious, moral and intellectual culture afforded by them were deemed, as they are in fact, beneficial to the public, necessary to the advancement of civilization, and the promotion of the welfare of society." 87

Six years later another New York court 88 displayed great benevolence toward a Jewish synagogue, accepting its prayer of relief from taxation for the six rooms on the third floor occupied by the janitor and his family. Arguing from the underlying purpose of laws favoring churches with exemption, the court made this comment:

"The object of the statute was to foster incorporated religious societies and it must be reasonably construed, ac-

84. Id. at 120. Courts in other states have spoken in a like vein, observing that this type of official aid to religion was so much taken for granted that no need was felt for formal legislation, e.g., in Massachusetts for well over a half century after the constitution was ratified and in New Hampshire for sixty years after its fundamental law was accepted. All Saints Parish v. Brookline, 178 Mass. 404, 412, 59 N.E. 1003, 1005 (1901) (dissenting opinion); Franklin St. Soc'y v. Manchester, supra note 76, at 349.
86. People ex rel. Seminary of Our Lady of Angels v. Barber 42 Hun. 27 (N.Y. Sup. Ct. 5th Dep't 1886), aff'd 106 N.Y. 669, 13 N.E. 936 (1887).
87. 42 Hun. at 30.
cording to its spirit, in furtherance of the legislative intent. It cannot be frustrated by a technicality . . . ."\textsuperscript{88}

Two generations later, another New York court\textsuperscript{89} discussed the basic motives which prompts governments to aid religious institutions through the medium of benign tax statutes. Upholding a claim of exemption for cloistered sisters on the teaching staff of a parochial school, the unanimous court proffered this explanation:

"It is true that the rule of strict construction [for taxation] is pertinent to exemptions, but it is to be applied in the light of the purposes to be furthered by the exemptions, so as not to thwart those purposes. Here that purpose is to encourage and assist religious and educational activities, to the end that the community may benefit from the moral, social and cultural betterments consequent upon these activities."\textsuperscript{91}

The opinion then rebutted the argument that such exemptions lay an additional burden on the city and other taxpayers:

"[Taxes forgone] are infinitesimal in amount compared with the cost to the community to educate the pupils of this parochial school should it become necessary to do so by different public facilities. The purely monetary benefit which accrues to the city through this exemption by the legislature far exceeds in amount the taxes canceled."\textsuperscript{92}

D.

AID AND ENCOURAGEMENT IN THE SOUTH.

Courts in the southern states have time and again endorsed the principle that government must "aid, promote, encourage" religion. In 1846, the Maryland Supreme Court invoked this principle in making a special plea to the legislature to estop the effect of its own ruling — a ruling compelled by the existent statutes. The opinion was largely an appeal to the law-makers to throw the mantle of state protection over the mouldering remains of the dead in a cemetery which was a part of church property.\textsuperscript{93} In this case it was anxiety not so much for the dead as for the quick that elicited the court's solicitous concern. The

\textsuperscript{88} Id. at 480, N.Y. Supp. at 793.
\textsuperscript{91} Id. at 373, N.Y. Supp. at 541.
\textsuperscript{92} Id. at 374, N.Y. Supp. at 541.
\textsuperscript{93} Dolan v. Baltimore, 4 Gill 394 (Md. 1846). The facts are the following: a priest had gotten an injunction against the sale of the parish cemetery for unpaid taxes. A lower court dissolved the injunction. Upon appeal, the ruling was upheld as the existing law demanded, but the supreme court made a special "appeal" to the legislature to prevent the sale.
state must take care, it said, lest its moral and religious sense be subjected to affronts from indecencies committed against the bones of the departed — a possibility greatly enlarged by burdening church cemeteries with tax assessments. Such official action, the court strongly implied, was a needed supplementary aid, afforded by the state, to religious education. Thus, the “appeal” rested “upon the principle of cultivating a sound state of social, moral and religious character, which cannot be successfully attained by the precepts of schools and colleges, while their instructions are counteracted by the exhibition of spectacles which must shock, and ultimately weaken, the moral sense.”

Several other cases have provoked southern judges to write long and eloquent expositions of the “aid to religion” thesis. In 1834, the Kentucky Court of Appeals was called upon to settle a dispute between the Shaker’s Society and a pair of seceding members, who upon their leaving, claimed the right to take a portion of property belonging to the parent group. In denying such a right, the court penned a few words anent the relation of religion to the state:

“So long as piety is recognized, by common assent, and by the legislature, as a valuable constituent, in the character of our citizens, the general law must foster and encourage what tends to promote it. In legal estimation, it must be viewed, as what is not only estimable in itself, but as an appurtenance to the characters of individual citizens, of great value to society, for its tendency to promote the general weal of the whole community.”

A Baptist orphan asylum contested its tax assessment before the Kentucky Supreme Court and elicited a favorable decision in 1897. Against the Baptists’ position there was urged the point that the asylum, established largely for the benefit of members of its own creed, was not a “purely public charity” within the meaning of the state constitution. In rebutting this argument, the court stated that a charity does not lose its public character merely because it aims to serve part of the public rather than the whole, that to make Baptists the object of one’s magnanimous bequests is classification no more noxious, nor less beneficial to the public at large than institutions for the blind, the aged, or disabled seamen. Accordingly the tax exemption was granted.

94. Id. at 403.
95. Gass v. Wilhite, 2 Dana 170 (Ky. 1834).
96. Id. at 180-81.
97. Trustees of Ky. Female Orphan School v. City of Louisville, 100 Ky. 470, 36 S.W. 921 (1897).
98. Id. at 473, 36 S.W. at 922.
99. Id. at 474, 36 S.W. at 923.
A somewhat similar question had arisen seven years earlier in the case of Higgins v. Prater where a private school's right to tax relief was challenged on the grounds that it did not constitute a part of the common school system. The court undertook a wide historical research and came up with this report to shore up its decision granting the benefit asked:

"Other institutions having an educational character, and which do not constitute a part of our common school system, have for years been supported by general taxation.

"If it be true that the framers of our constitution intended to forbid any public aid to any educational institution save our common schools, then they did that which so far as we have been able to examine, has been done in no other State in the Union; and to-day, in many of them as in Illinois, Virginia, and Michigan, other higher institutions of learning than their common schools are liberally supported by general taxation, reflecting credit upon them . . . "

The school involved in the Higgins case was not a religious institution, but in 1903, in Commonwealth v. YMCA there came within the purview of Kentucky Supreme Court the particular problems arising when an organization of that description asks that it be made the beneficiary of tax exemption. In granting the request, the court wrote a highly significant opinion, which contained this blunt proposition: "If the worship is religious, commending itself to the consciences of its votaries, it is within the pale of the law's favor." What might well provoke some wonderment is the fact that, although the defendant here claimed that tax exemption could rest on any of three grounds — one being the purely public welfare activity of the YMCA — the court chose to anchor its decision to the religious character of the organization. "Its religious work is its main work." This premise elicited the following eloquent paragraph:

"From the earliest settlements, through every form of social compact, . . . engrafted now either upon the constitutions of the States, or upon their statutes is the idea that the public well-being justifies the most liberal encouragement of religious teachings and practices, and to that end, always, buildings used for religious worship have been exempted from taxation."
What is striking about this opinion is its remarkable similarity to opinions which had been written a century ago by New England courts, thus witnessing to an ever abiding American tradition — *semper et ubique* — of government encouragement to religion for purposes of promoting the general welfare. In 1803, the New Hampshire Supreme Court had said that “religion is the best and greatest security to government” and therefore the state constitution provided means “to promote” instruction in the same.107 In 1810, the Massachusetts Supreme Judicial Court had justified public support of religious instruction on the grounds that by it “every man’s person and property are protected from outrage, and his personal and social enjoyment promoted and multiplied.” The court asserted that “he receives more solid and permanent advantages from this public instruction than the administration of Justice in Court can give him.”108 Nearly one hundred years later, the Kentucky Supreme Court echoed identical phrases.

“Religious societies are deemed to be public benefactors. Their teachings and moral discipline among their members are probably of as much value to society, in keeping the peace and preserving rights of property, as the most elaborate and expensive police system without such influences. Hence they are regarded with favor.”110

In 1852, the Georgia Supreme Court went so far as to write that “the state is bound, although not named by an Act of Legislature, for the maintenance of religion, the advancement of learning.”110 In 1886, the First Methodist Episcopal Church received benefit of this liberal policy in a case111 in which the Georgia court reasoned that the policy of the state, as exhibited in its constitution and in the history of its legislation, is to encourage and advance religion.112 In support of this policy, the court borrowed a paragraph from Cooley and inserted it thus in its opinion:

“[T]he same reasons of state policy, which induce the government to aid institutions of charity and seminaries of instruction

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107. Muzzy v. Wilkins, 1 Smith (N.H.) 11 (1803).
111. Trustees of the First Methodist Episcopal Church, South v. City of Atlanta, 76 Ga. 181 (1886) (estopping seizure of certain property for non-payment of taxes).
will incline it also to foster religious worship and religious institutions, as the conservators of public morals and valuable, if not indispensable, assistants in the preservation of public order."

The court returned to its own fundamental law and remarked:

"[O]ur Constitution, while it takes away the temptation and power to make . . . discrimination either in favor of or against any one religious denomination or sect, leaves it open to the legislature to encourage religious instruction by exempting from taxation for the support of the state government 'places of religious worship.'"  

In 1854, a law prohibiting certain types of business on Sunday came for review before the Missouri Supreme Court. A portion of the opinion is worth quoting as further demonstrating how careful the courts have traditionally been in invoking the customs and history of the people in reaching their decisions. Upholding the law, the court thus chided its opponents:

"Those who question the constitutionality of our Sunday laws seem to imagine that the constitution is to be regarded as an instrument framed for a state composed of strangers collected from all quarters of the globe, each with a religion of his own, bound by no previous social ties, nor sympathizing with any common reminiscences of the past; that, unlike ordinary laws, it is not to be construed in reference to the state and condition of those for whom it was intended, but that the words in which it is comprehended are alone to be regarded, without respect for the history of the people for whom it was made.

"It is apprehended that such is not the mode by which our organic law is to be interpreted. We must regard the people for whom it was ordained. It appears to have been made by Christian men. The constitution, on its face, shows that the Christian religion was the religion of its framers."

The court concluded that the law, instead of violating religious freedom, actually protected it by making it possible for the vast majority to worship according to their conscience without disturbance. "The framers of the statute deemed [it] . . . necessary to secure the full enjoyment of the rights of conscience."

The state of Tennessee has also furnished cases in which official aid and encouragement to religion was justified by reason of its contri-

113. Id. at 193.
114. Id. at 197.
116. Id. at 216, 217.
117. Ibid.
bution to the public well-being. In *Methodist Episcopal Church, South v. Hinton*,\(^{118}\) the supreme court of the state justified tax exemption for a Methodist publishing company (although it was engaged in the secular business of printing handbills, letterheads, etc.), for, argued the court, the business was "used as an arm or agency of the Methodist Church in the publication or distribution of books, periodicals, and in the support of the preachers mentioned, together with their wives, widows, and children." The premise relied on by the court is stated thus:

"The fundamental grounds upon which all such exemptions are based is the benefit conferred upon the public by such institutions, and a consequent relief to some extent of the burden upon the state to care for and advance the interests of its citizens."\(^{119}\)

In *City of Athens v. Dodson*,\(^{120}\) the Tennessee court, while holding that a Baptist Church could not claim exemption from a special assessment levied for improvements of the adjoining street, made this avowal:

"In reaching our conclusion, . . . we have borne in mind that strictness of construction is not to be followed when considering an exemption from taxation in favor of religious, scientific, literary and educational institutions."\(^{121}\)

In 1914, the Virginia Supreme Court offered some interesting observations which are highly significant in making a proper appraisal of the *McCollum* opinion.\(^ {122}\) In *Commonwealth v. Lynchburg YMCA*,\(^ {123}\) the court ruled that the provision in the state constitution exempting property of "religious associations" was broad enough to embrace the entire YMCA building, even the floors rented out to guests. Referring to the general principle, the court first said: "The exemptions . . . are in accord with the policy of the state from an early day."\(^ {124}\) Then addressing itself to the specific case, the court underscored the following activities of the organization as justification for its benevolent extension of the exempting provision:

"The [YMCA] Secretary and his assistants seek out young men and boys and endeavor to bring them under moral and religious influences, to secure their attendance at some place of worship . . . and by every possible means surround them with Christian in-

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\(^{118}\) 92 Tenn. 188, 21 S.W. 321 (1892).

\(^{119}\) Id. at 190, 21 S.W. at 322.

\(^{120}\) 154 Tenn. 469, 290 S.W. 36 (1926).

\(^{121}\) Id. at 475, 290 S.W. at 38.


\(^{123}\) 115 Va. 745, 80 S.E. 589 (1914).

\(^{124}\) Id. at 747, 80 S.E. at 590.
fluences. . . During the week Bible classes are taught in this building, large numbers of young men being gathered in these classes, who engage in a regular and systematic study of the Bible.”

E.

THE MID-WEST AND THE TRADITION.

A multitude of cases have arisen in the West and Midwest, contributing substantially to the literature on Church-State relations. In Griswold College v. Iowa, the state supreme court ruled that a school affiliated to a Protestant church was entitled to a tax exemption on all its property, including the homes for professors and clergymen, and that such a ruling did no violence to article 3, section 1 of the constitution, which forbids a “law respecting an establishment of religion” or compelling any person to “pay tithes, taxes . . . for building or repairing of places of worship, or the maintenance of any minister or ministry.” Two dissenting judges disagreed with the all-inclusiveness of the decision, but they made it clear that they too would permit the tax benefit for all the grounds of a church or of a religious school.

An early Michigan decision held that although the lots on which a cathedral was located are tax exempt, a special assessment for paving the street in front was valid. Addressing itself to the reason for exemptions to churches, the court spoke thus:

“The motive for exempting houses of religion from a general burden, is very obvious and very commendable. They are justly regarded as having a claim upon the public benevolence, and while the constitution wisely provides that ‘no money shall be appropriated or drawn from the Treasury for the benefit of any religious sect or society, theological or religious seminary, nor shall property belonging to the State be appropriated for any such purposes,’ (Constitution, Art. 4, § 40), an equally wise policy dictates that some consideration should be had for the public benefit which they bestow. But the extent and the manner of the encouragement to be conferred upon religious associations . . . is confided . . . to the wisdom and discretion of the Legislature, and not to the judicial tribunal of the State.”

In 1903, the Minnesota Supreme Court wrote a strong opinion which analyzed the policy of state encouragement to religion. It

125. Id. at 754, 755, 80 S.E. at 592.
126. 46 Iowa 275 (1877).
127. Id. at 282, quoting from Iowa Const. art. 3, § 1.
128. Id. at 284.
130. Id. at 592.
131. Rice County v. Bishop Seabury Mission, 90 Minn. 92, 95 N.W. 882 (1903).
ruled that the corporation, a Protestant seminary of learning, was entitled, under section 3, article 9 of the constitution, to tax exemption on its $270,000 endowment fund, which had been invested in farm mortgages, the income being devoted exclusively to support of the institution. In arriving at this decision, the court wrote this endorsement of the "aid" principle:

"It has been the policy of our people, from the organization of the territory to the present time, to encourage and by all proper means assist in the support and maintenance of educational institutions. . . . The work of such institutions is done primarily for the individual educated, but results ultimately in the public good. Their function is largely public, and property possessed by them is devoted, not to private gain to individuals, but to a beneficent use — the education and enlightenment of the citizen. . . . In this light, it is important to inquire how institutions may best and most successfully be encouraged. The 'encouragement' ought not to be limited to mere formal acts of recognition and praise on the part of the state or people, but to broad acts of such potentiality as will result in substantial benefit and assistance to them. Of course, the people would not tolerate the direct appropriation of money from the public treasury for such institutions, and immunity from taxation has been resorted to as the most effectual and substantial way of extending them aid and assistance."\(^{132}\)

It is significant that the court thought it pertinent to stress the point made by the defendant, namely that the Mission was "a seminary of learning" and "not a charitable institution."\(^{133}\) Apparently, both the judges and the counsel for the Mission deemed that an organization of the former description was more deserving of the state's benevolence.

Twenty years later the court once again gave a liberal interpretation to article 9 of the constitution — this time to the benefit of Carleton College, a Lutheran institution.\(^ {134} \) Article 9 provides that "Academies, colleges, universities, and all seminaries of learning . . . shall be exempt from taxation." The court ruled that whatever college property was reasonably necessary for educational purposes should be included in the exemption.\(^ {135} \) Specifically this was stated to be the dormitories, residences of president and professors, and farm lands adjoining the campus devoted to the needs and purposes of the college.\(^ {136} \) The fact that the lands yielded incidental profits was not enough to forbid the exemption, although a farm two miles distant belonging to the college was ex-

\(^{132}\) Id. at 96, 95 N.W. at 883.
\(^{133}\) Id. at 94, 95 N.W. at 882.
\(^{134}\) State v. Carleton College, 154 Minn. 280, 191 N.W. 400 (1923).
\(^{135}\) Id. at 286, 191 N.W. at 403.
\(^{136}\) Id. at 286-89, 191 N.W. at 403-04.
cluded as being not “reasonably necessary” for the accomplishment of the purposes of an institution of learning.\textsuperscript{137}

Hardly new was the observation that “the value of religious influences has been recognized and encouraged as a factor for good by this nation.”\textsuperscript{138} However, not yet encountered so far in this study is the court’s caution that the state will be more strict in exempting churches than educational institutions.\textsuperscript{139} Then adverting to the overcrowded condition of the state schools and the demands made for more buildings, the court asked this rhetorical question:

“With this situation in mind, should strict rules of construction be applied to the tax exemption of private institutions doing the very work the state deems so imperative, but wherein it realizes that with all its efforts the desired measure of success had not been fully achieved?”\textsuperscript{140}

Gentle sarcasm and light ridicule were the weapons employed by the court to turn back the cry that the exemption shifted an additional burden on to the taxpayers:

“The complaint of injustice to the city of Northfield, by the ruling that the farm described as contiguous to the college campus and this dormitory and scattered faculty houses are exempt from general taxes, is not to be taken seriously. No doubt golden eggs come to the denizens of the city of Northfield from Carleton College and St. Olaf College; in fact its consuming population is increased some 2,000 during the school year, to say nothing of the cultural benefits emanating from institutions of learning. The wail of protest may well be imagined should any other city attempt to secure the removal of these institutions from Northfield.”\textsuperscript{141}

It is interesting to note that no protest seems to have been made on the grounds of the school’s being Lutheran or religious. The extreme largess characterizing the exemption would appear as the principal cause for complaint in the case.

In the relatively recent case of \textit{State v. Board of Foreign Missions of Augustana Synod},\textsuperscript{142} the Minnesota Supreme Court took occasion to extol the contribution of religion to the public weal and to underscore the traditional benevolent reciprocation on the state’s part. In dispute here was a tax exemption claimed for the local residence of the director

\begin{itemize}
  \item \textsuperscript{137} \textit{Id.} at 289, 191 N.W. at 404.
  \item \textsuperscript{138} \textit{Id.} at 283, 191 N.W. at 402.
  \item \textsuperscript{139} \textit{Id.} at 284, 191 N.W. at 402.
  \item \textsuperscript{140} \textit{Ibid.}
  \item \textsuperscript{141} \textit{Id.} at 289, 191 N.W. at 404.
  \item \textsuperscript{142} 221 Minn. 536, 22 N.W.2d 642 (1946).
\end{itemize}
of foreign missions for the Lutheran faith. Justifying its decisions in favor of the claimed immunity, the court spoke thus:

"The constitutional exemption . . . was granted, not to the church building or parsonage, but to the church as a living institution for the advancement of religion as a way of life for all men. It is noteworthy that from a time long prior to the organization of Minnesota as a territory to the present it has been the policy to encourage 'religion, morality and knowledge' as necessary to good government and the happiness of mankind. . . . Keeping in mind the fundamental purpose of encouraging the advancement of religion for the public good, it would indeed seem arbitrary [to exclude the mission director while including parsons of local churches]."148

It is significant that in none of these Minnesota cases — and in practically none in other states — was the basic policy of "encouragement to religion" ever made the target of the litigants' thrust. The sole reason for contest was the particular application in the respective cases.

In 1900, a Nebraska opinion 144 said that all on the court agreed to the principle of exempting religious institutions, although in the instant case the immunity should start only on the second floor of the YMCA building since the first floor had been delivered over to business enterprises. By way of supplying a brief gloss on the principle, the court made this observation:

"As is said by many eminent authorities, the exemptions are granted on the hypothesis that the association or organization is of benefit to society, that it promotes the social and moral welfare, and, to some extent, is bearing burdens that would otherwise be imposed upon the public, to be met by general taxation, and that from these considerations the exemption is granted."145

An Indiana court146 spoke rather unfavorably of the exemption benefit, but the curtness of the opinion may well have been provoked by the broad claims made by the Presbyterian church involved. The statute was therefore strictly interpreted and, although the edifice was granted exemption, the church-held lands diverted to secular uses for gain were ruled subject to assessment.147

143. Id. at 542, 22 N.W.2d at 645-46. The citation in the text contains a reference to the Northwest Ordinance of 1787 — the fundamental law for the territory of which Minnesota was a part. First enacted by the Congress of the Confederation, it was re-enacted by the first Congress of the United States in 1791.
144. YMCA of Omaha v. Douglas County, 80 Neb. 642, 83 N.W. 924 (1900).
145. Id. at 646, 83 N.W. at 926.
147. Id. at 88. "It is easier to admire the motives for such exemption than to justify it by any sound argument."
A South Dakota opinion of 1921\footnote{O'Brien: Has Government an Interest in Religion} captures attention because it is a strong witness to the abiding influence of the earliest American traditions as sketched in the opening pages of the present work. Holding exempt from taxation the parsonage of the First Congregational Church of Pierre, the court encompassed a century and a quarter of American history in tracing the genealogy of the state's policy of beneficence towards religious institutions. The following lines epitomize its findings:

"Following the precedent of Massachusetts, the mother of our public school system and leader in religious life, that 'it is the right and duty of all men in society to worship the Supreme Being,' the framers of our constitution recognizing the importance of religion and education, declared in the constitution, (6:3), that our state motto shall be 'Under God the people rule;' in Article 8, Sec. 1, they declared that the stability of our form of government depends 'on the morality and intelligence of the people,' . . . thus religion and education have been recognized as foundation pillars of American civilization; and it is questionable whether strict construction should apply to constitutional provisions relating to exemptions of property used for religion or educational purposes [but rather a liberal construction]. . . ."\footnote{O'Brien: Has Government an Interest in Religion}

Illinois, which gave birth to the controversial \textit{McCullum} case,\footnote{O'Brien: Has Government an Interest in Religion} has been buffeted by several other stormy litigations involving religion in some shape or form. In 1879, a taxpayer objected to the use of a public school building for Sunday worship, grounding his demands for a cease and desist order on articles 2 and 8 of the state constitution — provisions which prohibited any compelled support of a place of worship and the making of appropriations to aid any church.\footnote{O'Brien: Has Government an Interest in Religion} Ruling that the taxpayer had not demonstrated how he had been compelled to contribute to a place of worship by reason of the practice involved, the court said:

"Religion and religious worship is not so placed under the ban of the constitution that they may not be allowed to become the recipient of any incidental benefit whatsoever from the public bodies or authorities of the state. That instrument itself contains a provision authorizing the legislature to exempt property used for religious purposes from taxation, and thereby, the same as is complained of here, there might be indirectly imposed the burden of increased taxation, and in that manner, the indirect support of places of worship.\footnote{O'Brien: Has Government an Interest in Religion}" 

\begin{thebibliography}{99}
\footnotesize
\item \textit{State ex rel. Eveland v. Erickson}, 44 S.D. 63, 182 N.W. 315 (1921).
\item Id. at 64, 67-68, 182 N.W. at 316.
\item \textit{McCullum v. Board of Educ.}, 333 U.S. 203 (1948).
\item \textit{Nicholas v. School Directors}, 93 Ill. 61, 62 (1879).
\item Id. at 64.
\end{thebibliography}
An early Illinois opinion arrests one's passage through these multitudinous cases because in it the judges appear to retreat from the "aid to religion" thesis. However, a perusal of the facts in this instance, recited at length by the court, reveals that defendant's unusual claim could easily invite an official frown from the high tribunal. Involved here was a Catholic Home of the Good Shepherds, which had no technical staff but merely took in girls to live in a residence whose whole regimen was quite properly judged sectarian. To give tax money to support girls under such auspices, when practically no educational returns could be promised, was deemed an invalid aid to a religious sect. Several years later, the language of this opinion was softened in two cases in which the facts were somewhat different. In Dunn v. Chicago Industrial School, a Catholic school received the tuition payments requested, and in Dunn v. Addison Manual Training School, a Lutheran institution was the recipient. In the first of these cases, it was argued that no girl could be put in any home, with clothes, tuition and board paid, if religion were therein taught, in response to which, the court said, "This is a clear misapprehension of the attitude of the people toward religion expressed in the constitution." Continuing, the opinion noted that "the people not only did not declare hostility to religion, but regarded its teachings and practices as a public benefit which might be equal to the payment of taxes." An additional argument was suggested to the court by its reading of the "freedom to worship" provision of the state constitution, which, said the opinion, might well be deemed abridged if religion were refused an entrance to a home where girls were sent by the state.

In 1928, in the case of Garrett Biblical Institute v. Elmhurst State Bank, the court held that a charter authorizing the establishment and maintenance of a school for the study of the bible by anyone wishing to attend, to be controlled by the Methodist Episcopal Church, and exempting its property from taxation, was not in conflict with articles 2 and 3 of the state constitution, nor with the federal constitution's provisions relating to freedom of worship. Once again a state court com-

153. Cook County v. Chicago Industrial School for Girls, 125 Ill. 540, 18 N.E. 183 (1888).
154. Id. at 545, 547, 549, 558.
155. Id. at 558. This is one case in which the court denied the soundness of the quid pro quo argument, i.e., that a private school is entitled to state aid by reason of the fact that it relieves the state of a burden it is required to shoulder. Id. at 570-71. But see cases cited in notes 156 and 157, infra.
156. 280 Ill. 613, 117 N.E. 735 (1917).
157. 281 Ill. 352, 117 N.E. 993 (1918).
158. 280 Ill. 613, 616, 117 N.E. 735, 736 (1917).
159. Id. at 616.
160. Ibid.
161. 331 Ill. 308, 163 N.E. 1 (1928).
mented on the high estate of religious education in the American tradition:

"It is practically universally recognized that in a Christian nation such as ours it is important to the public good that there should be schools not devoted entirely to training or stimulating the brain or intellect, but that such training may also be supplemented by training and bringing up the moral character and better impulses of the heart. . . . Pursuing this policy in establishing institutions of learning, the state granted the right to religious denominations without discrimination, to establish and maintain such institutions." 162

Finally it should be recalled that in the widely publicized McCollum case, 163 the Illinois high court had allowed religion to be publicly aided by permitting the continuance of the "released time" program in public schools. 164 A court opinion in a 1913 case is highly instructive for reaching a proper judgment on the validity of providing such a program. It was argued in Reichwald v. Catholic Bishop of Chicago 165 that the Illinois constitution had been violated by permitting the erection of a chapel on the grounds of a county poor farm. In rejecting this contention, the state supreme court observed that "in return for the care given the body the State does not exact the surrender of all care for the soul." 166 Developing this principle the court continued in the following vein:

"The state undertakes to provide for all the wants of the unfortunate wards whom it has collected at the poor farm. . . . So a lecture room may be established. If charitably disposed persons wish to hold religious services in the lecture room occasionally or regularly, without expense to the county, no constitutional right is interfered with. . . . No one can be obliged to attend or to contribute, but no one has a right to insist that the services shall not be held. The man of no religion has a right to act in accordance with this lack of religion but no right to insist that others shall have no religion." 167

162. Id. at 318. See the similar statement that it is not the "public policy of the state that the children of the state shall not receive any education in any other school than in one of the public schools established by itself." Gilmour v. Pelton, 5 Ohio Dec. Reprint 447, 452 (1876).
164. In Iowa, when there was contested the use of public school buildings for Sabbath schools and religious meetings, the court chided the challengers by retorting that such use "ought not to be questioned in a Christian state." Towsend v. Hagen, 35 Iowa 194, 198 (1872).
165. 258 Ill. 44, 101 N.E. 266 (1913).
166. Id. at 47, 101 N.E. at 267.
167. Id. at 48, 101 N.E. at 267.
F.

RELIGION AND THE FAR WEST.

The Supreme Court of California was forced to come to grips with the religious question in 1858 in the case of Ex Parte Newman,\(^\text{168}\) there voiding legislation which outlawed work on Sunday. Three years later the court re-examined its conscience and then reversed the earlier ruling.\(^\text{169}\) In doing so, the judges observed that another "such strong concurrence of opinion affecting the general community cannot be found in the history of American jurisprudence."\(^\text{170}\) The reasoning here as in a host of similar cases seems to have been that "in a popular government by the majority, public institutions will be tinged more or less by the religious proclivities of the majority"\(^\text{171}\) and that while courts and legislatures in America will not regard a religion qua religion, they must regard the people as they are with their beliefs such as they be. Thus blasphemy against Christ has been punished not because of the offense to religion but because of the offense to people with such a religion — the offense being of such proportions as to cause serious disturbance of the peace.\(^\text{172}\) Likewise, states have punished polygamy not because it violates Christian principles but because it offends people who hold Christian principles.\(^\text{173}\) All legislation of this category will indeed aid, foster, favor, and encourage religion, but only because governments exist to aid, foster, favor, and encourage the people as they exist in reality and not some abstract species of humanity. "Constitutions and statutes are drafted and adopted for the government of men;"\(^\text{174}\) they are not instruments "framed for a state composed of strangers . . . to be construed" without "reference to the state and condition of those for whom . . . intended."\(^\text{175}\)

More recently, Californians have bestirred themselves over indirect aid to religion in the form of tax exemptions for private and parochial schools. In 1956, in Lundberg v. County of Alameda\(^\text{176}\) tax exemption for religious schools was challenged as being against the first amendment, made applicable to the states by reason of the four-

\(^{168}\) 9 Cal. 502 (1858). Of this decision, Zollman wrote that it was "out of line with all the authorities." Zollmann, American Civil Church Law 27, n. 4 (1917).

\(^{169}\) Ex Parte Andrews, 18 Cal. 678 (1861).

\(^{170}\) Id. at 681.

\(^{171}\) Hysong v. Gallitzin School District, 164 Pa. 629, 655, 30 Atl. 482, 483 (1894).

\(^{172}\) State v. Chandler, 2 Del. (2 Harr.) 553, 576 (1837).

\(^{173}\) Toncray v. Budge, 14 Idaho 621, 95 Pac. 26 (1908).

\(^{174}\) Id. at 652, 95 Pac. at 36.

\(^{175}\) State v. Ambis, 20 Mo. 214 (1854).

\(^{176}\) 46 Cal.2d 644, 298 P.2d 1 (1956); same as Heisey v. County of Alameda, appeal dismissed, 352 U.S. 921 (1956).
teenth. Rejecting this contention, the court made this apposite summary of American history:

"[E]ven if we regard the exemption as benefiting religious organizations, it does not follow that it violates the First Amendment. The practice of granting tax exemptions benefiting religious sects began in the colonial period. Today, at least some tax exemption for religious groups is authorized by statutory or constitutional provisions in every state and the District of Columbia, as well as by federal law. No case has been found holding that the grant of such exemptions is contrary to state or federal constitutional provisions prohibiting the support or establishment of religion, and where the matter has been raised, exemptions have been upheld."177

The California courts have likewise justified public aid to religion by permitting tax exemptions to YMCA dormitories whose purpose is to bring youth "under moral and religious influence;"178 by exempting a retreat house "providing a place of religious reflection;"179 by extending the same immunity to a charity, defined in part as "a gift" for bringing "hearts under the influence of education or religion;"180 and by allowing parochial children to use public school bus seats, when vacant, to and from classes.181

G.

THE FEDERAL COURTS.

In the 1947 Everson case, the United States Supreme Court employed these words: "Neither [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one over another."182 "In view of ... history no further proof is needed that the [First] Amendment forbids any appropriation ... to aid ... any

177. Id. at 7-8. The three dissenters in this case did not question the validity of the reasoning embodied in the passage cited. They merely judged that the 1952 referendum was intended to include colleges only.
182. Everson v. Board of Educ., 330 U.S. 1, 15 (1947) (majority opinion of Justice Black). Five years later, the court greatly qualified the philosophy underlying the Everson opinion, and thus gave evidence of a return to a more traditional view. Wrote Justice Douglas for the majority: "We are a religious people whose institutions presuppose a Supreme Being .... When the state encourages religious instruction .... it follows the best of our traditions." Zorach v. Clauson, 343 U.S. 306, 313-14. (1952).
and all religious exercises . . . . 183 Legislatures are free to make, and
courts to sustain, appropriations, only when . . . they do not aid, pro-
mote, encourage or sustain teaching." 184 In view of the tedious repeti-
tions in the above pages, it is an understatement to say that this is not
ture. Of course, the objection will be urged that the opinions cited
were in state cases and, for the most part, before the inhibitions of the
first amendment were made to bear upon state legislatures. In rebuttal, it
should be first noted that many state constitutions have borrowed
freely from the federal Bill of Rights in writing their fundamental law,
incorporating all of the guaranties of the first amendment. 185 Thus, the
decisions rendered and opinions written by judges in the states should
constitute a trustworthy interpretation and commentary on the meaning
of the relevant clauses on religion.

More apposite, perhaps, although limited in number, are the
decisions of the Supreme Court itself. In 1899, the Court
allowed the government to "aid" religion by appropriations
for a District of Columbia hospital conducted by Catholic
Sisters. 186 In 1908, it upheld the payment of money held
by the government in trust for the religious education of Indian
children. 187 In the Selective Draft Law cases, the Court heard the
contention that the Constitution forbade exemptions on religious
grounds — an argument it disposed of in a single sentence, "because we
think its unsoundness is too apparent to require us to do more." 188 In
1930, in Cochran v. Louisiana 189 the Court permitted "aid" to religion
by allowing to stand a Louisiana statute by which free secular textbooks
were supplied to children for use in any school of their choice, public
or private, even though sectarian schools were also included. It is
interesting to note that in this case the textbook provision was con-
tested on the sole grounds of an alleged violation of the state constitu-
tion. Neither the plaintiff nor the Supreme Court raised the question of a possible violation of the "establishment" clause of the federal
constitution.

In 1934, Mr. Justice Owen Roberts, speaking for a unanimous
Court, upheld a tax-deduction law and in doing so he made this app-
roving observation: "Congress, in order to encourage gifts to re-

183. Everson v. Board of Educ., 330 U.S. 1, 28, 41 (1947) (dissenting opinion
of Justice Rutledge, joined by Frankfurter, Jackson, and Burton, protesting the
payment with public funds of bus fares for children to parochial schools).
184. Id. at 52-53.
185. See notes 64 and 65, supra.
189. 281 U.S. 370 (1930).
igious . . . objects, granted the privilege . . . " Such a sentiment hardly comports with the view of some that American governments are prohibited from any action aimed at encouraging religion.

That the opinion of Justice Roberts and the 1934 Court is in direct lineal descent from that of the earliest of Supreme Court Justices may be inferred from the words of Justice Story in the 1815 case of *Terrett v. Taylor*. A Virginia statute had been contested as infringing the religion clauses of the Virginia constitution and its bill of rights of 1776, inasmuch as the statute confirmed to the Episcopal Church the title to lands acquired when it was the established church in the state, and also incorporated the individual vestries. Upholding the law, Story wrote as follows:

"[I]t is difficult to perceive . . . that the [Virginia] legislature may not enact laws more effectually to enable all sects to accomplish the great objects of religion . . . [T]he free exercise of religion cannot be justly deemed to be restrained by aiding with equal attention the votaries of every sect to perform their religious duties, or by establishing funds for the support of ministers, for public charities for the endowment of churches, or for the sepulture of the dead."

III.

Summary

The opinions cited above reveal that three reasons have been advanced by the courts as justification for the age-old practice of extending government aid and encouragement to religion. The chief reason has been that religious institutions perform a secular and material function, public in character, thereby relieving the state of part of its duty. Just as long as religious schools teach secular subjects and church-affiliated hospitals mend ailing bodies, they have been judged to be public-welfare enterprises and accorded the same government benevolence extended to other schools and hospitals. Courts have frequently written that it would be completely opposed to the American tradition, and perhaps a violation of constitutional guaranties, if aid were withheld from such institutions because of considerations of religion.

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191. 9 Cranch 43 (1815).
192. Id. at 49.
193. Zollman remarks that because of such functions, "The state . . . is making a very good bargain in having part of its work performed by them" [i.e., religious institutions] in return for some minimal consideration like tax exemption. Zollman, *American Civil Church Law* 237 (1917).
Some competent scholars deem that this is the only defensible argument for public aid to religious organizations. Given the restrictions of the various American constitutions, they see no logical justification for government assistance in church [spiritual] work as such, even in the form of exemption from taxes. For them only sentiment and age-old custom support the practice.\textsuperscript{195} However, courts have been practically unanimous in holding that the very spiritual activity itself of religious societies constitutes a compelling reason for government aid. Time and again judges have emphasized that religions merit public beneficence precisely because, by raising the spiritual and moral tone of their adherents, they are public benefactors. The courts have indeed admitted that things superterrestrial are outside the purview of the state, that it has, therefore, no interest in promoting interests beyond this earthly bourne. But religion, even in its most celestial and world-transcendent activities, does have good civil effects of which the state must take cognizance. "Religious societies \ldots are public benefactors. \ldots Hence they are regarded with favor [by the state]."\textsuperscript{196}

Although governments in America maintain a strict impartiality toward the various churches, "neutrality does not spell indifference. Both the state and the United States governments cannot but recognize the high ethical value of religion to their own purposes."\textsuperscript{197} The state, therefore, gives every encouragement to propounders of the Decalogue and teachers of particular creeds, not "for the purpose of propping up the Christian religion"\textsuperscript{198} or any other faith — but solely because of the salutary civil effects of such teachings. In a sense, the state is thus made a zealous co-worker with the minister, but for motives different from those which enkindle the latter's devotion. "The relation which subsists between a minister and a town is civil, that which subsists between a minister and a church is spiritual."\textsuperscript{199} The state, indeed, cannot but recognize that although "the work of such institutions [religious schools] is done primarily for [the good of] the individual educated, \ldots [it] results ultimately to the public good."\textsuperscript{200} Thus, the state "must foster and encourage what tends to promote

\textsuperscript{195} Zollman, \textit{American Civil Church Law} 237 (1917); Paulsen, \textit{Preferment of Religious Institutions in Tax and Labor Legislation,} 14 \textit{Law & Contemp. Prob.} 144 (1949). If this reasoning be sound, then those who protest aid to religious schools on constitutional grounds are \textit{a fortiori} destroying the basis for aid to churches in the form of tax exemptions, etc.

\textsuperscript{196} Commonwealth v. YMCA, 116 Ky. 711, 719, 76 S.W. 522, 523 (1903).

\textsuperscript{197} Zollman, \textit{American Civil Church Law} 285 (1917).

\textsuperscript{198} Barnes v. First Parish in Falmouth, 6 Mass. 401, 411 (1810).

\textsuperscript{199} Muzzy v. Wilkins, Smith (N.H.) 1, 14 (1803).

\textsuperscript{200} Rice County v. Bishop Seabury Mission, 90 Minn. 92, 96, 95 N.W. 882, 883 (1903).
[piety],”

Courts have frequently particularized these salutary civil effects deriving from purely spiritual instruction as "the best and greatest security to government" and "of as much value to society, in keeping the peace and preserving rights of property, as the most elaborate and expensive police system . . . ." Religion has, therefore, been promoted by the state, not merely because it adorns the community with "amiable qualities" and helps to "import a charm to existence," but rather because it furnishes "a sure basis on which the fabric of civil society can rest, and without which it could not endure." Religions have been deemed "conservators of public morals, and valuable, if not indispensable, assistants in their [the states'] preservation of public order." The argument implied in all these court opinions is simply this: the inculcation of religious obligations on citizens is necessary for government and civil society. Therefore, the state cannot be indifferent to religion without being false to its own nature as a secular institution and grossly negligent of its basic responsibilities. But the state itself is excluded from engaging in such spiritual work, since "the duties enjoined by religious bodies . . . [are] beyond the scope of civil government. . . ." Therefore, precluded as it is from a function essential to its own being, the state must encourage those who can perform the work for it—

"Civil government, . . . availing itself of its own power, is extremely defective; and unless it could derive assistance from some superior force, whose laws extend to the temper and disposition of the heart, and before whom no offense is secret, wretched indeed would be the state of man under a civil constitution of any form."

The third reason given by courts for laws promoting religion rests on the very nature of government — especially a democratic one.

201. Gass v. Wilhite, 32 Ky. (2 Dana) 170, 171 (1834).
204. Commonwealth v. YMCA, 116 Ky. 711, 719, 76 S.W. 522, 523 (1903).
205. First Methodist Episcopal Church v. Atlanta, 76 Ga. 181, 193 (1886).
206. Id. at 192.
207. Ibid.
208. Barnes v. First Parish in Falmouth, 6 Mass. 401, 405-06 (1810). The argument advanced above as a second justification for state aid to religion is, like the first one, a public welfare argument, grounded on a quid pro quo basis. But here religion performs a purely spiritual function affecting the secular concerns of the state and the public. Therefore, the quid is some material assistance from the state; the quo is strictly spiritual activity bestowing an incidental but real secular and civil benefit.
In passing legislation, people do not first strip themselves of their traditions, predilections, customs and aspirations. Thus, "in a popular government by the majority, public institutions will be tinged more or less by the religious proclivities of the majority."\(^{209}\) It is no cause for wonderment, therefore, that in America "Christianity is . . . interwoven with the web and woof of the . . . government."\(^{210}\) Courts have looked upon laws which favor religion simply as reflecting "the attitude of the people toward religion . . . ."\(^{211}\) Moreover, "the object of a free civil government is the promotion and security of the happiness of the citizens."\(^{212}\) Thus "so long as piety is recognized by common assent . . . as a valuable constituent in the character of our citizens, the general law must foster and encourage what tends to promote it."\(^{213}\)

Relative to this point, courts have distinguished between a religion preferred by law and a religion preferred by the people.\(^{214}\) American constitutions prohibit the first, but to forbid legislatures from giving recognition to the people's preference is to deny a basic democratic principle, to render government insensitive to the will of the governed and to make justice really blind. Courts and law-making bodies have generally operated on the principle that they "must regard the people for whom [the constitution] was made."\(^{215}\) Thus, blasphemy of Christ\(^{216}\) and polygamy\(^{217}\) have been proscribed solely because Christianity "is the popular religion of the country,"\(^{218}\) and such actions being highly offensive to the people as they are de facto constituted, would entail a serious breach of the peace. This does not imply an inarticulate major premise that Christianity is the true religion, for "the judicial eye of the civil authority of this land cannot penetrate the veil of the Church"\(^{219}\) and, "constitutions and statutes care nothing about what men believe with respect to a future existence."\(^{220}\) Thus, civil authorities

\(^{209}\) Hysong v. Gallitzin School District, 164 Pa. 629, 656, 30 Atl. 482, 483 (1894).
\(^{210}\) Church v. Bullock, 104 Tex. 1, 7, 109 S.W. 115, 118 (1908). The court referred to the state in this case.
\(^{211}\) Dunn v. Chicago Industrial School, 280 Ill. 613, 616, 117 N.E. 735, 736 (1918). In 1858, Justice Stephen Field, subsequently to become a distinguished member of the United States Supreme Court, wrote thus: "Christianity is the prevailing faith of our people; it is the basis of our civilization; and that its spirit should infuse itself into and humanize our laws, is as natural as that the national sentiment of liberty should find expression in the legislation of our country." Ex parte Newman, 9 Cal. 502, 523-24 (1858) (dissenting).
\(^{212}\) Barnes v. First Parish in Falmouth, 6 Mass. 401, 404 (1810).
\(^{213}\) Gass v. Wilhite, 32 Ky. (2 Dana) 170, 180 (1834).
\(^{214}\) State v. Chandler, 2 Del. (2 Harr.) 553, 567 (1837).
\(^{215}\) State v. Ambs, 20 Mo. 214, 216 (1854).
\(^{216}\) State v. Chandler, supra note 214, at 577.
\(^{217}\) Toncray v. Bridge, 14 Idaho 621, 632, 95 Pac. 26, 36 (1908).
\(^{218}\) State v. Chandler, supra note 214, at 577.
\(^{219}\) Shannon v. Frost, 42 Ky. 253, 259 (1842).
\(^{220}\) Toncray v. Bridge, supra note 217, at 652, 95 Pac. at 36.
have not found it necessary to weigh the sinfulness of blasphemy nor to measure the extent of the divine displeasure. Should the nation be converted to Mohammedanism, one court reasoned, blasphemy against Mahomet would be highly offensive to the people and equally disruptive of public peace. Therefore, legislators, true to the basis mandate that they “must regard the people" as they are would properly enjoin public revilers of the prophet.

Laws proscribing unseemly and unnecessary business on Sundays are grounded on this same theory of government, thus justifying restrictions on public activities deemed highly offensive to the sensibilities of people as they are constituted by custom and tradition. An additional argument is that by the laws of competition, the overwhelming majority of employees and employers, who strongly desire Sunday for worship and rest, are coerced into business as usual, thus tending “to starve the moral and spiritual natures of the many out of deference to the few"

Such laws do aid religion and do assist people in fulfilling their Sunday obligation. But the state has not enacted these laws “for the purpose of propping up the Christian religion." Nor are civil authorities deemed enforcement officers of the Third Commandment. Let a sinner neglect Sunday service and engage in the most servile work privately within his own home. Public officials will not bestir themselves to enjoin or rebuke him, although his pastor might properly issue a reprimand. Thus the civil and the spiritual do cooperate but each from motives peculiar to its own mission and mandate.

In conclusion, then, although the survey made in these pages is not exhaustive, it is sufficiently complete to confirm an 1898 statement of the Supreme Court relative to the state constitutions, namely, that

221. State v. Chandler, supra note 214, at 568.
224. State v. Petit, 74 Minn. 376, 77 N.M. 225 (1898); State v. Ambs, 20 Mo. 214, 218-19 (1854). See also Shaver v. State, 10 Ark. 259, 263 (1830); Zollman, American Civil Church Law 28 (1917). The Arkansas opinion goes beyond the theory expounded by most courts and would lead the reader to conclude that the state is enforcing Sunday observance qua religious obligation.
225. Church v. Bullock, 104 Tex. 1, 7, 109 S.W. 115, 118 (1908). This case dealt with Bible reading in the schools, but the quotation in the text is relevant here. Individuals who protest Sunday laws are resting their objections on a laissez-faire philosophy, the fallacies of which were exposed by the Supreme Court in the land-mark case of United States v. Darby, 312 U.S. 100 (1941), upholding a federal minimum wage law.
226. In practically all the opinions cited in this article, the courts have either admitted the fact or assumed without comment that Sunday laws, etc., do aid religion. But in 1947, the Supreme Court “discovered" that the first amendment, interpreted by “history", forbids state or federal laws “which aid one religion" or “aid all religions..." Everson v. Board of Educ., 330 U.S. 1, 15 (1947).
all indicate "a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well-being of the community."\textsuperscript{228} It proves that a government unconcerned with or indifferent to religion is unknown to American history and that when any state extends a friendly hand to "aid, encourage, promote" religious teaching, it acts in accordance with the oldest tradition of the nation.

\textsuperscript{228} Many writers claim that the "no aid" interpretation of the first amendment is dangerous to religious freedom — as well as to our pluralistic society — in a period of rather intensive social welfare activity on the part of government and other purely secular organizations. Thus Carl B. Swisher of Johns Hopkins University wrote that "as more and more non-religious institutions are the beneficiaries of governmental aid, religion which is not similarly aided must suffer in the competition." Swisher, \textit{American Constitutional Development} 1032 (2d ed. 1954). Wilber Katz of the University of Chicago has observed that the tax immunity granted to religious institutions is merely a governmental policy designed to protect religious freedom by making it possible for them to compete with other institutions similarly privileged. Katz, \textit{Freedom of Religion and State Neutrality}, 20 \textit{U. Chi. L. Rev.} 426, 431 (1953). In the early days of our history, less need actually existed for any such benefactions from the state, but today there is more than rhetoric in the protest that the government is now collecting the tithes.