The Reassertion of Church Doctrine in American Higher Education:
The Legal and Fiscal
Implications of the Ex Corde Ecclesiae for Catholic Colleges and Universities in the United States

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**Abstract**

Since the late 1980s religious colleges and universities in the United States have faced substantial pressure from church authorities to conform to newly created sectarian doctrines and mandates. Due to the controversial and divisive nature of many of the provisions enunciated by church authorities, religious institutions find themselves facing precarious legal challenges where the constitutionality of governmental appropriations could be challenged and faculty are becoming increasing concerned about their academic freedom. This paper analyzes the legal and fiscal implications of one of the more controversial church doctrines to impact American higher education in recent years, the *Ex Corde Ecclesiae*, issued by the Catholic Church. For Catholic colleges and universities, the proposed changes advanced in the *Ex Corde Ecclesiae* raise serious constitutional and other legal issues for faculty, students, and administrators. This paper will address these concerns while also discussing the possible fiscal consequences of pursuing sectarian agendas by church authorities not only for Catholic colleges and universities, but also for other religious institutions facing comparable mandates.
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Introduction

At many Catholic universities and colleges in the United States, there are few outward signs of the institution’s Roman Catholic identity on campus. For example, Fordham University does not require its students to attend mass, and there are no crucifixes in the classrooms. Boston College and Georgetown emphasize student diversity, academic excellence and athletic success in their brochures to potential applicants. Like other private non-Catholic institutions of higher learning, these and other Catholic institutions (constituting over 600,000 students\(^1\)) receive little or no money from the Church and are chartered by local government bodies. In short, Catholic institutions for years have been allowed to express their identity in a variety of ways, making it possible for these institutions to expand their student bodies, diversify their faculties and qualify for federal and state government aid.

However, over the last few years, the heads of many Catholic universities and colleges have been at loggerheads over a recent request by a committee of American bishops to make Catholic institutions more answerable to Church authority. The request stems from a broad initiative by the Pope in Rome to reassert the Church’s primacy in Catholic higher education around the globe. In a document entitled Ex Corde Ecclesiae ("From the Heart of the Church"), published in 1990, the Pope called upon Catholic institutions of higher learning to "make known their Catholic identity" by integrating Catholic teaching and discipline in all university activities.\(^2\) The document provides that university presidents should take an oath of fidelity to the Catholic Church and that teachers should be faithful to and respect Catholic doctrine and morals in their
research and teaching. In addition, the document calls for the approval of theology professors by church officials and directs Catholic universities and colleges to fill a majority of the positions on faculty and boards of trustees with "faithful Catholics." In practice this means that all faculty and staff will have to inform their campus administrations of their religious opinions and identity at different periods during their careers. These and other proposals by the Holy See have alarmed many presidents, administrators and teachers of Catholic institutions in the United States, who fear that control over the direction of Catholic institutions will be lost and academic freedom compromised in order to carry out the Pope's wishes.

But loss of autonomy and academic freedom are not the only problems facing Catholic institutions. Catholic presidents have expressed concern that the proposed changes set forth in the Ex Corde Ecclesiae present significant legal problems as well. Lawsuits over free speech, hiring discrimination and government support of religion are sure to arise if the Church goes too far in tightening its grip on Catholic institutions. Realizing that its new policies might create legal dilemmas, the Vatican allowed its bishops in individual countries to consult with Catholic institutions before implementing the provisions enunciated in the document. However, the current proposal by the National Committee on American Bishops to insert greater Church control over certain aspects of Catholic higher education has done little to dispel concerns over the potential cost of the Vatican's new plan. According to Thomas J. Reese, editor of the weekly Jesuit journal America, "if these guidelines were adopted, the colleges would be put between a rock and a hard place."

The purpose of this paper is to examine the legal and fiscal implications of the recent Vatican proposal to increase the Church's control over Catholic universities and colleges in the United States. In particular, this paper will focus on the legality of the Vatican's proposals under
the Establishment Clause of the First Amendment. Part I of the paper examines the historical context leading up to the recent initiative by the Vatican and the National Committee of American Bishops to reassert the Church's authority with the *Ex Corde Ecclesiae* over Catholic institutions of higher learning in the United States. Part II describes the original intent behind the Establishment Clause and the creation of a "wall of separation" between church and state. It also analyzes the evolution of judicial thought in this area over the last three decades as it pertains to government funding of higher education. Part III focuses on the potential pitfalls and legal problems presented for Catholic institutions of higher learning if the Vatican's new proposals for Catholic colleges and universities are adopted. The smooth ride that private parochial institutions have enjoyed in the courts since the early 1970s, with regard to federal and state aid to religious institutions, may be challenged if the Church disregards the constitutionality of their actions with this bold new initiative.

*Part I: The Church and Catholic Higher Education in the United States: 1965 – Present*

If the historical relationship between the Catholic Church and Catholic institutions of higher learning in the United States could be summed up in one word, that word would be "paradoxical". The word "paradoxical" is appropriate because, for years, the two entities have had contradictory viewpoints on the proper role or mission of Catholic universities and colleges. The Church, on the one hand, has adhered to the concept that the primary obligation of Catholic institutions is to maintain and promote their Catholic identity. This means that Catholic colleges and universities should strive to maintain an integrated approach to higher education, combining the spiritual mission of the Church with the intellectual mission of the university. As Pope John Paul II put it, "the Catholic university's intellectual mission is characterized by a commitment to
the integration of various types of knowledge, a dialogue between faith and reason, an ethical concern, and a theological perspective." Outward signs of this integrated approach are often revealed on campuses where oaths of allegiance to the Church by university officials or the hanging of crucifixes on classroom walls are required. In short, a rigorous fidelity to the Catholic Church is expected by Church officials in order for a Catholic university or college to fulfill its mission.

Officials at Catholic universities and colleges, on the other hand, have long preferred that the Church remain on the sidelines and respect the educational autonomy and independence of Catholic institutions. This is in part because many institutions were concerned about economic collapse during the late-1960s and needed to focus on attracting a more diverse faculty and student body in order to survive. To stay viable and attract students, a number of Catholic institutions placed a premium on academic talent instead of religious affiliation in their hiring policies, replacing all-clergy boards of trustees and faculty with lay expertise. This approach was reinforced by the ecumenical spirit coming out of the Second Vatican Council during the 1960s, which encouraged academic freedom and independence in Catholic higher education. Under the leadership of Pope Paul VI, the Vatican advocated restraint in dealing with Catholic universities and colleges in order to preserve the distinctive character of these institutions. As a result, the faculty and student body at Catholic institutions changed drastically after 1960. According to Burtchaell, a shift began to appear after 1964-65 and “[t]he Jesuit presence in the faculty tumbled to 21 percent, only half of what it had been.” Burtchaell further added that “[p]erhaps even more significant, there was no notion of lay faculty were Catholic (who before World War II were 93 percent Catholic) because the university had ceased to ask faculty about their religious commitments.”
It wasn’t until 1978 and the election of Pope John Paul II that the Church's attitude toward Catholic Higher Education began to change. As Catholic institutions became more diverse, the Pope and other conservatives within the Church feared that the Catholic identity was being sacrificed on the alter of academic freedom. Thus, shortly after the new Pope took office, Catholic officials began to explore ways to ensure that Catholic higher education around the world stayed Catholic. In response to pressure from administrators and faculty at American Catholic institutions, the Vatican agreed that any new initiative would respect notions of academic freedom, cultural diversity and autonomy within Catholic institutions. However, it did not take long for some Catholic institutions to begin to feel the sectarian pressure advanced by the Vatican. For example, Boston College, the largest Catholic university in the United States, promised in 1986 a “reassertion” of its religious character and to be “a visibly Catholic and Jesuit university and … a preeminent center of Catholic intellectual activity.” The discussion regarding Boston College’s official move back to the religious mission of the institution was only a precursor to public international discourse that was generated four years later with the adoption of the Ex Corde Ecclesiae by the Catholic Church.

In 1990, the Vatican released the document Ex Corde Ecclesiae. The document was to serve as an overall guideline in which the Church and Catholic institutions of higher learning would pursue greater unity. In the opening section of the document, it states:

...a Catholic University is completely dedicated to the research of all aspects of truth in their essential connection with the supreme Truth, who is God. It does this without fear but rather with enthusiasm, dedicating itself to every path of knowledge, aware of being preceded by him who is "the Way, the Truth, and the Life", the Logos, whose spirit of intelligence and love enables the human person

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with his or her own intelligence to find the ultimate reality of which he is the source and end and who alone is capable of giving fully that Wisdom without which the future of the world would be in danger.\textsuperscript{14}

The dual mission of the Catholic university as a place where faith and reason are brought to life is evident throughout the document, and it becomes the basis upon which the Pope's controversial policy recommendations for change within Catholic higher education ultimately rests. In the section on the Catholic university's identity and mission, the document calls upon Catholic universities to possess the following essential characteristics:

1. a Christian inspiration not only of individuals but of the university community as such;

2. a continuing reflection in the light of the Catholic faith upon the growing treasury of human knowledge, to which it seeks to contribute by its own research;

3. fidelity to the Christian message as it comes to us through the [Catholic] Church;

4. an institutional commitment to the service of the people of God and of the human family in their pilgrimage to the transcendent goal which gives meaning to life.\textsuperscript{15}

At one level of analysis, these principles or characteristics are nothing new to Catholic colleges and universities. Similar language can already be found in most mission statements and charters. However, what is different about the Vatican's initiative is the way in which it seeks to incorporate these principles into the actual life of the Catholic university. For example, in the same chapter, the Pope calls upon all Catholic members of the university community to declare
their "fidelity to the Church with all that this implies." He also calls upon Catholic Bishops to play a more active role in the life of the Catholic university, and not be seen merely as external agents. In the second chapter of the document, it states that "Catholic teaching and discipline are to influence all university activities, while the freedom of conscience of each person is to be fully respected." It goes on to require courses in Catholic doctrine to be taught on all Catholic campuses and even mandates that the number of non-Catholic teachers not be allowed to constitute a majority within Catholic institutions.

It is one thing for a Catholic university to present itself as culturally diverse and autonomous in an operative sense, and simply make reference to the centrality of the Church's role in its mission statement or charter in order to preserve its Catholic identity. It is a much larger issue when the institution is actually expected to integrate Church doctrine into the classrooms, activities and hiring policies of the university. Under the former scenario, Catholic university officials have a right to expect that civil society will recognize and defend the university's institutional autonomy and academic freedom. They even have the legal authority to access public money necessary for the university's continued existence and development. In the latter scenario, however, their rights and authority give way to concerns over Church control, religious discrimination and government involvement in religion, which, in turn, can create substantial legal problems.

Thus far, the Vatican initiative has not been officially implemented in the United States, but it has received widespread support among American Catholic bishops and some university officials. At a recent gathering of bishops in Detroit last fall, Bishop Allen H. Vigneron, auxiliary bishop of Detroit, welcomed the Vatican initiative as "a solid mechanism for assuring Catholic identity of institutions." During this meeting, Catholic bishops proposed a modified
version of the Pope's plan for Catholic institutions of higher learning in the United States. The plan calls for a transfer of control of the 252 Catholic colleges and universities in the country from their boards of trustees to local bishops.\textsuperscript{23} It requires all Catholic institutions to rewrite their charters in a way that expressly places them under Vatican law and provides that a majority of trustees and faculty must be "faithful Catholics."\textsuperscript{24} Moreover, non-Catholic faculty could only constitute a minority and would have to "exhibit integrity of doctrine and good character," and would be encouraged to attend frequent lectures on church teachings.\textsuperscript{25} According to the bishops, they are simply acting in accordance with the Vatican's wishes.

College presidents, however, are more concerned about the loss of autonomy and the numerous legal problems that will emerge if these proposals are implemented.\textsuperscript{26} American church and university leaders have tried three times to spell out specific norms for Catholic colleges and universities. The first attempt was deemed overly binding. A second attempt was approved by the National Conference of Catholic Bishops in 1995 by a vote of 224 to 6. But the Vatican rejected it and directed the Americans to develop a more "juridical" version that explicitly addressed the relationships between church officials and Catholic colleges and universities. It is this version, presented last November, which has alarmed many university presidents and proponents of the "wall of separation".\textsuperscript{27} A final vote by on this matter by university administrators is expected later this year. The outcome of this vote could have a serious impact on all of American higher education.

\textbf{Part II: The First Amendment and Religion in U.S. Higher Education}

As the millennium approaches, conflict over religion and the role of religion in government remains at the forefront of policy concerns in many countries around the world. In
Yugoslavia, religious differences between Orthodox Christian Serbs and ethnic Albanian Muslims are at the core of a violent government effort in Belgrade to irrdate Muslim influence and control over the Yugoslav province of Kosovo. In Britain, the Government of Tony Blair is trying desperately to preserve a peace agreement between Catholics and Protestants over the fate of Northern Ireland, where political and religious violence has plagued Belfast communities for decades. In Turkey, Algeria, Egypt, Iran and parts of Indonesia, secular governments are struggling to prevent Muslim extremists from taking control and imposing strict Muslim law on the people. Throughout the world, the rise of sectarianism and sectarian conflict have been the source of domestic violence and turmoil as religious groups wage war against each other and seek to assert their influence over governmental and societal affairs.

Even in the United States, the rise of the religious right is threatening to tear down the "wall of separation" between church and state in the hope that a twenty-first century government will help bring Christianity to the workplaces and classrooms of America regardless of its effect on other religious groups. Much discord and ill will have already developed among various churches, sects and secular groups as abortion, vouchers, school prayer, religious home schooling and tax benefits for parochial schools have been widely debated. In an effort to diffuse tension and clarify the proper boundaries that separate church and state in these matters, the Supreme Court has managed to obscure it, thus fueling the flames of controversy surrounding the issue of separation. In short, the current movement by the government and the courts in the United States to respond to the pressures of Christian groups who are seeking to assert their influence on the national stage has cast an ominous cloud over the principle of separation of church and state that Thomas Jefferson and James Madison once envisaged for this nation.
The Foundational for The Establishment Clause

The effort to define the proper relationship between government and religion dates back to the founding of the country when the framers of the Constitution debated what kind of roles government and religion would play in the American experiment. In 1779, Thomas Jefferson drafted a Bill for Establishing Religious Freedom in Virginia, which stated that:

[N]o man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in nowise diminish, enlarge, or affect their civil capacities.\textsuperscript{38}

He also argued against taxation proposals aimed at supporting religion by writing:

[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose power he feels most persuasive to righteousness.\textsuperscript{39}

Underlying Jefferson's thinking was the Lockian notion, stated most eloquently in his Letter Concerning Toleration, that the "care of souls cannot belong to the civil magistrate because his
power consists only in outward force." True and saving religion, he argues, "consists in the inward persuasion of the mind."\textsuperscript{40} Jefferson's bill was eventually enacted into law in 1786.

At the same time that Jefferson proposed his \textbf{Bill for Establishing Religious Freedom}, another bill was introduced in the Virginia General Assembly which declared that "the Christian Religion shall in all times coming be deemed and held to be the established Religion of the Commonwealth."\textsuperscript{41} This bill, entitled a "Bill Establishing a Provision for Teachers of the Christian Religion", was put to a vote before the General Assembly in 1784 under the sponsorship of the great statesman Patrick Henry and defeated. In remonstrating against Henry's proposed bill, James Madison argued against the entanglement of government and religion no matter how small the tax:

\begin{quote}
Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease any particular sect of Christians, in exclusion of all other sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?\textsuperscript{42}
\end{quote}

Madison's \textbf{Memorial and Remonstrance} was truly a great document in the history of religious freedom. It went on to argue that a true religion did not need the support of law or tax payer money, and that cruel persecutions were the inevitable result of government-established religion.\textsuperscript{43} It conveyed a philosophy of separation that, along with Jefferson's hill, provided the logic and rationale for the "wall of separation" provisions of the First Amendment.\textsuperscript{44}

The First Amendment was adopted by the framers in 1791 with the same objectives and protections for religious freedom in mind as those set forth in the Virginia statute on religious
liberty. The amendment clearly states that "Congress shall make no law respecting an
establishment of religion, or prohibiting the free exercise thereof."\textsuperscript{45} In the famous cases of
Reynolds v. United States and Everson v. Board of Education, the "establishment of religion"
clause of the First Amendment was interpreted by the U.S. Supreme Court to mean that:

Neither a state nor the Federal Government can set up a church. Neither can pass
laws which aid one religion, aid all religions, or prefer one religion over another.
Neither can force nor influence a person to go or to remain away from church
against his will or force him to profess a belief or disbelief in any religion.\textsuperscript{46}

This was consistent with Madison's views on taxation for religious purposes set forth in his
Memorial and Remonstrance. The Supreme Court also stated in Everson that "No tax in any
amount, large or small, can be levied to support religious activities or institutions, whatever they
may be called, or whatever form they may adopt to teach or practice religion."\textsuperscript{47} The Court then
goes on to use Jefferson's phrase that the Establishment Clause was intended to erect "a wall of
separation between church and state."\textsuperscript{48} In sum, the adoption of the First Amendment was a
culminating event in American Constitutional history; an event that was supposed to put an end
to centuries of religious discrimination, civil strife and persecutions generated by established
religious sects from the Old World who were determined to expand their influence in the New
World.

\textit{Federal and State Aid to Religious Higher Education}

The Supreme Court's interpretation of the Establishment Clause in Reynolds and Everson
has never been overturned. But the line of demarcation separating what is and was is not a
violation of the clause has increasingly been blurred since then. This is largely due to the rather
conservative make-up of the Supreme Court, whose members have favored chipping away at the
"wall of separation" between church and state in a number of recent cases. The dissent of Chief
Justice Rehnquist in *Wallace v. Jaffree* best represents the current attitude of the Court on this subject. He argued that the "wall of separation" was a "metaphor based on bad history, a metaphor which has proved useless as a guide to judging" and that it "should be frankly and explicitly abandoned." This shift in attitude by the Court in recent years has reignited the flames of religious conservatives around the country who see the present time as an excellent opportunity to wage war on the Jeffersonian and Madisonian ideal of keeping government and religion separate under the law.

The battleground where this war between religious conservatives and supporters of the "wall of separation" is being fought is primarily in the domain of public education. The issue of federal and state aid to religious schools has been a controversial topic among educators, policy makers and private citizens in this country. The purpose of this paper is not to examine the entire history of Supreme Court rulings in this area nor to focus on the Establishment Clause in the context of primary or secondary education. Instead, this paper analyzes the law as it applies to federal and state aid to religious higher education and, in particular, to the question of whether or not the implementation of the *Ex Corde Ecclesiae* in this country will result in Establishment Clause violations for many Catholic universities and colleges:

*The Lemon Test and the Establishment Clause*

One of the most important Supreme Court decisions on the subject of church-related schools was that made in the case of *Lemon v. Kurtzman* in 1971. In *Lemon*, the Supreme Court held that two state statutes (Pennsylvania and Rhode Island) providing state aid to church-related elementary and secondary schools violated the Establishment Clause of the First Amendment. The Court focused on the difficult task of line drawing in Establishment Clause matters and established a three-part test to resolve conflicts arising from government programs that sponsor, support or become involved in religious education. First, the Court argued that for a law to be valid, it must have a "secular legislative purpose." Second, the law's "principal or primary effect must be one that neither advances nor inhibits religion." Third, the law must not
foster "an excessive government entanglement with religion." A violation of any one of these prongs, according to the Court, was all that was required to invalidate a law under the Establishment Clause. Thus, in applying the test to the two state statutes in this case, the Court held that both statutes violated the "excessive entanglement" portion of the test.

The Lemon decision was significant for two reasons. First, it clarified the importance of protecting the "wall of separation" between church and state in the area of education finance. Second, it provided a line-drawing test to aid courts and legislatures in their thinking about the relationship between religion and government in education. One of the Court's major concerns in the case was that children could subtly fall prey to religious influences at school with the support of the government even though this was not the intent behind the law nor the intent of school policy. "We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment", argued Chief Justice Burger. "We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." With the best intentions, Burger added, "such a teacher would find it hard to make a total separation between secular teaching and religious doctrine." In sum, the Court in Lemon reasserted the Jeffersonian and Madisonian idea that religion should be a private matter for the individual, the family and the institutions of private choice to decide, and that lines must be drawn to prevent government from entangling itself in these matters.

Tilton v. Richardson: Extending the Lemon test to direct aid in higher education

On the same day that the Lemon test was established, the Supreme Court addressed the question of federal aid to religious institutions of higher learning more directly in Tilton v. Richardson. The issue in Tilton was whether four church-related colleges and universities could receive federal aid under Title I of the Higher Education Facilities Act of 1963, which
provides construction grants for buildings and facilities used exclusively for secular educational purposes. The Court applied the Lemon test and held that direct Title I aid to these church-related schools did not violate the Establishment Clause because religious indoctrination was not a "substantial purpose" or activity of these schools. According to Chief Justice Burger, there was "no evidence that religion seeps into the use of any of these facilities." The Court emphasized the second prong of the Lemon test by stating that the crucial "question as to whether the legislative program violates the religion clauses of the First Amendment is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion." Moreover, in its analysis of the "government entanglement" prong of the Lemon test, the Court held that "[s]ince religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education." This, the Court added, "reduces the risk that government aid will permeate the area of secular education", thereby lessening the risk of entanglement between government and religion.

One of the underlying reasons for the Court's willingness to permit government aid to go forward in this case, and not in Lemon, was based on the premise that church-related institutions of higher learning and parochial elementary and secondary schools were fundamentally different. "The affirmative if not dominant policy of the instruction in pre-college church schools is to assure future adherents to a particular faith by having control of their total education at an early age." The Court also argued that primary and secondary school students were more vulnerable to being indoctrinated into a particular faith because they were younger and less experienced in the ways of the world than the average college-aged student. "There is substance to the
contention that college students are less impressionable and less susceptible to religious indoctrination", stated the Court. Moreover, the Court pointed out that even though these institutions were governed by Catholic organizations and had predominantly Catholic students and faculty members, the record showed that no one was required to attend religious services, each institution's curriculum was characterized by a high degree of "academic freedom", and that courses were taught according to the academic requirements of the subject matter and the teacher's concept of professionalism. In other words, the balance of evidence, in the Court's view, favored the secular aspects of the schools over the sectarian. This balancing test is an important aspect of the Tilton because it suggests that the Court may have had a different viewpoint on the issue if it could have been shown that sectarian influences outweighed the secular aspects of these institutions in their operations and activities.

The effect of Tilton on higher education finance around the country was significant. Within three years of the decision, several states amended their constitutions to permit direct student grant and loan aid to go to private religious institutions. It not only extended the Lemon test beyond the realm of public aid to primary and secondary schools, but it established a standard for courts to use in the future for analyzing cases or controversies involving federal aid to private religious schools brought under the First Amendment. In particular, it left open the question of whether the Establishment Clause would be violated if religion actually did "permeate" or "seep into" the use of facilities on college and university campuses. It also elevated the importance of the "primary effect" and "entanglement" prongs of the Lemon test as the two key factors for determining the constitutionality of state and federal funding schemes for higher education. For the time being though, the "wall of separation" for federal and state aid to
private religious colleges and universities was maintained at a much lower level than the wall that separated public money from private religious elementary and secondary schools.

**Hunt, Roemer and the "pervasively sectarian" standard**

In the wake of the Supreme Court's ruling in *Tilton*, challenges were brought in South Carolina and Maryland to test the Court's position on the issue of state aid to private religious colleges. In *Hunt v. McNair*, a South Carolina statute entitled the South Carolina Educational Facilities Authority Act was challenged as a violation of the Establishment Clause insofar as it authorized financing through the issuance of revenue bonds to benefit a Baptist-controlled college. Consistent with the Supreme Court's approach in *Tilton*, the Court applied the *Lemon* test and concluded that the statute's purpose was secular and that it did not have the primary effect of advancing or inhibiting religion, nor did it foster excessive government entanglement with religion. The Court based its holding on the fact that there was very little in the record that suggested that the college's operations were oriented significantly towards sectarian rather than secular education. It did say, however, that aid may have the primary effect of advancing religion "when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." This left open the possibility that an Establishment Clause violation may exist where public money is distributed to support institutions that are "pervasively sectarian".

In 1976, the Supreme Court again reviewed a First Amendment challenge to a state financing scheme for higher education in *Roemer v. Board of Public Works of Maryland*. In *Roemer*, a First Amendment challenge was brought against a Maryland statute that authorized public aid in the form of noncategorical grants given in the form of an annual fiscal year subsidy
to eligible colleges and universities within the state of Maryland.\textsuperscript{78} Again, applying the \textbf{Lemon} test, the Supreme Court held that the statute did not violate the Establishment Clause because the aid did not have a "primary effect" of advancing religion nor did it foster an excessive government entanglement with religion.\textsuperscript{79} The Court used a similar line of reasoning to that which was used in \textbf{Tilton} and \textbf{Hunt} to justify its decision. It stated that the primary effect portion of the \textbf{Lemon} analysis was not satisfied because the eligible private institutions were not so "permeated by religion" that the secular side cannot be separated from the sectarian side.\textsuperscript{80} It then went on to say, taking language from \textbf{Hunt}, that no state aid may go to institutions that are so "pervasively sectarian" that secular activities cannot be separated from sectarian ones, and if secular activities can be separated out, they alone must be funded.\textsuperscript{81}

Once again, the Court's decision was based on a balancing test which compared the level of religious activity to secular activity on eligible college campuses. Specific evidence presented at trial described the pervasiveness of religion on some campuses as opposed to others. The record showed that all of the religious schools in question employed Roman Catholic chaplains and were formally affiliated with the Catholic Church.\textsuperscript{82} The great majority of students at each of the colleges were Roman Catholic.\textsuperscript{83} The colleges employed Roman Catholic religious exercises on campus.\textsuperscript{84} Mandatory religion or theology courses were taught at each of the colleges, and some classes were begun with a Catholic prayer.\textsuperscript{85}

However, the Court, in defending the funding scheme, emphasized three aspects that it believed were critical to deciding whether the statute violated the Establishment Clause. First, the Court stressed that though the Catholic Church was represented on the governing boards of each college, there was "no instance of entry of Church considerations into college decisions."\textsuperscript{86} The Court appeared to be drawing an important distinction between symbolic oversight and
actual control in its analysis here. Second, the Court pointed out that apart from the theology
departments, faculty hiring decisions at these schools were not made on a religious basis.\textsuperscript{87} Hiring criteria, according to the Court, was primarily based on "academic quality".\textsuperscript{88} The Court agreed with the lower court's theory here that any effort by an institution to "stack its faculty with members of a particular religious group" would have been noticed by other faculty members, who had never been heard to complain.\textsuperscript{89} Furthermore, the Court closely scrutinized some of the day-to-day practices occurring on some of the campuses, such as prayer in class, the hanging of religious symbols in classrooms and even the "wearing of clerical garb" by some of the instructors.\textsuperscript{90} It reasoned that none of these factors were significant because there was "no actual policy" of encouraging these practices.\textsuperscript{91} These three elements helped shape the Court's attitude toward the Maryland statute in this case. In the majority's mind, there was obvious evidence of sectarian activity on these campuses, but not enough to overturn the state law on Establishment Clause grounds.

In \textit{Hunt and Roemer}, direct state aid to religious institutions was upheld because there was no violation of the "wall" separating church and state. The fact that these religious institutions were not pervasively sectarian was a key factor in the Court's decision in both cases. Unfortunately, it was left unclear what exactly constituted "pervasive" sectarianism. No one knew how far the Court would go before it would invalidate a federal or state aid program on Establishment Clause grounds under this standard. The ambiguity surrounding this phrase would remain unclear in the years ahead as well as the Court turned to the issue of indirect state aid to religious institutions of higher learning.
Indirect or Direct State Aid to Private Religious Colleges and Universities

Until 1986, the Supreme Court had dealt primarily with the issue of direct federal and state aid to religious colleges and universities in the United States. It had not addressed the question of indirect student aid to private religious institutions or vouchers. This question was first addressed by the Supreme Court in the case of *Witters v. Washington Department of Services for the Blind* in 1986. The issue in *Witters* was whether the First Amendment precluded the state of Washington from extending assistance under the state's vocational rehabilitation assistance program to a blind person who chose to study at a Christian college to become a pastor, missionary, or youth director. The Court held that the First Amendment did not preclude such assistance in this case.

The Court's rationale was interesting. Justice Marshall argued that state aid could flow to religious institutions "only as a result of genuinely independent and private choices of aid recipients", and as long as it was "not likely that any significant portion of aid expended under the program as a whole" would end up flowing to religious education. In this case, the program was deemed to be in no way skewed towards religion because a significant portion of the aid did not end up at a religious institution. This seems to suggest that had a significant number of blind students chosen to attend a religious college with the money from the program, the "significant portion of aid" test may have been satisfied. The Court implies that this scenario might violate the First Amendment. In any event, the case set an important precedent for future cases in the higher education finance area. It answered a basic question concerning the legality of vouchers by allowing federal and state money to be distributed indirectly to private religious institutions.

Over the years, the line of cases decided from *Lemon* to *Witters* has given those who support the separation of church and state reason to be concerned about the future of higher
education finance. Instead of maintaining the wall that Jefferson and Madison helped construct nearly two centuries ago, the U.S. Supreme Court has chipped away at its foundation by allowing federal and state finance programs to assist private religious colleges and universities. This trend towards the erosion of separation of church and state has been reinforced most recently by significant rulings supporting religious expression on public university campuses and the provision of public school teachers into parochial school classrooms at taxpayer expense. At present, the established rules for funding private religious institutions appear to be saying that as long as these institutions are not "pervasively sectarian", federal and state money can be distributed directly and indirectly insofar as the aid provided to these institutions does not constitute a "significant portion" of the overall aid provided to all eligible institutions, both public and private. As this paper will show in the next section, a "significant portion" of federal and state aid for higher education purposes has already ended up at private religious institutions, particularly Catholic institutions, thus presenting a serious Witters problem. This means that the new Vatican initiative advanced in the Ex Corde Ecclesiae to assert its authority over Catholic college and university campuses around the United States could likely cross over the threshold separating predominantly nonsectarian from "pervasively sectarian" institutions under the Supreme Court's Establishment Clause analysis if adopted.

**Part III: The Legal Implications of the Ex Corde Ecclesiae**

This section examines the validity of the Vatican's new proposal for Catholic colleges and universities in the United States, assuming that the Committee on Bishops and presidents of Catholic institutions implement the program in a strict sense. This analysis will focus on two important aspects. First, the Ex Corde Ecclesiae mandates a number of new changes in the way that Catholic colleges and universities operate. If these changes are implemented on Catholic
campuses, significant legal problems may arise with regard to the public financing of these institutions under the Establishment Clause. Second, the recent fiscal trend in higher education finance will also be explored in order to determine whether or not a "significant portion" of federal and state aid is distributed to Catholic institutions of higher learning in this country. If so, this could pose a serious problem for those institutions that consent to and implement the Vatican's new initiative.

_The Vatican's New Proposals and the Legal Implications for Aiding Catholic Institutions_

During a recent meeting of local Catholic officials in Cleveland, Ohio, Father Edward Glynn, President of John Carroll University, stated that "Catholic and Jesuit universities in the United States are more 'Catholic' and 'Jesuit' today than they were 30 years ago." Commenting on the _Ex Corde Ecclesiae_, Father Glynn told the audience that the question of how to serve the "universal Church" in a world of many different cultures "is not a brand new problem in the history of the Church" and would be solved in time. Father Glenn's prediction that the Catholic Church's troubles will soon be solved is part of larger pattern of optimism felt by Catholic officials that stems from the Pope's new initiative to reform Catholic higher education in the United States. Later this year, Catholic bishops and presidents of Catholic colleges and universities are scheduled to meet and decide how to implement the _Ex Corde Ecclesiae_ on Catholic campuses. The legal consequences of this decision will be significant for direct government aid schemes that support religious higher education.

Currently, the Supreme Court has been fairly permissive in allowing direct federal and state money to support private religious institutions of higher learning. In numerous challenges to the constitutionality of various funding programs, the Court has been flexible and consistent in its decisions to uphold these programs as long as the _Lemon_ test is satisfied and the money does not go to institutions that are "pervasively sectarian". Although the Court never clearly defined what it meant by "pervasively sectarian", inferences can be drawn from prior rulings. In _Tilton, Hunt and Roemer_, the Court placed heavy emphasis on the record in its analysis, attempting to
separate out evidence of sectarianism from secularism on religious campuses. In all three cases, the degree of religious pervasiveness was different depending on the college, but none seemed to cross the threshold that the Court has come to arbitrarily define as violating the Establishment Clause.

Recently, however, the Supreme Court ruled that Columbia Union College, a devoted religious college could not appeal to the nation’s highest court to overturn a state ruling that the institution was too “pervasively sectarian” for its students to qualify for direct student grant aid. This ruling essentially leaves decisions regarding state direct student aid to the state themselves.

The changes called for in the Ex Corde Ecclesiae, however, also arguably cross this "pervasively sectarian" threshold. Mandatory oaths of allegiance to the Church taken by presidents and faculty\textsuperscript{100} and the requirement that Catholic teaching and discipline influence all university activities\textsuperscript{101} are not factors that the Supreme Court has had to consider in previous Establishment Clause cases. Moreover, the proposal that Catholic institutions make a conscious effort to ensure that Catholic teachers constitute a majority within the institution\textsuperscript{102} goes right to the heart of the "religious purpose" prong of the Lemon test. The Supreme Court actually stated in Hunt that "what little there is in the record concerning the College establishes that there are no religious qualifications for faculty membership."\textsuperscript{103} The Court in Roemer also emphasized in its "primary effect" analysis that "academic quality", not religious persuas ion, was the principal hiring criteria for faculty positions at each of the colleges. Furthermore, the Court pointed to the fact that nontheology courses were taught in an "atmosphere of intellectual freedom" without religious pressures.\textsuperscript{104}

This dicta in past cases presents substantial problems for the Catholic Church Vatican and supporters of government aid to private religious institutions. It implies that religious institutions of higher learning can go too far by instituting religiously discriminatory hiring policies and mandatory oaths of fidelity to Catholic doctrine and discipline in the classroom, among other things. It also provides "wall" supporters with additional leverage to challenge federal and state programs that aid private religious institutions. The new Vatican initiative for
Catholic higher education is sure to invoke legal challenges that will test how permissive the Supreme Court's willing to be in its application of the Establishment Clause. This could have serious fiscal consequences for higher education.

*The Fiscal Consequences of Federal and State Aid to Religious Institutions*

Over the last three decades, federal and state direct student aid to students attending colleges and universities around the country has increased dramatically. In 1996-97, more than six billion dollars in grants and thirty-two billion dollars in loans were allocated to students through federal direct student aid programs.\(^\text{105}\) During the same year, more than three billion dollars in state need-based and merit-based grants were awarded to students through state grant programs.\(^\text{106}\) These increases in government aid have been a response to the rising cost of higher education\(^\text{107}\) and the reduction of legal barriers to government schemes which provide aid to public and private institutions.

Most of the federal and state direct student aid going to higher education disproportionately benefits students attending private colleges and universities because these institutions generally cost more to attend than public institutions. Depending on the program, cost of attendance varies in its significance as a formulaic variable. Federal student aid and enrollment statistics from 1995-96 show that students attending private colleges and universities constitute over 24% of the full-time student enrollment in higher education, while receiving nearly 35% of all federal grant aid and 62% of all federal loan aid.\(^\text{108}\) In addition, over 70% of private college and university students receive federal aid\(^\text{109}\) compared to approximately 50% and 30% among students attending four-year public institutions\(^\text{110}\) and two-year public institutions\(^\text{111}\), respectively. At the state level, students attending private colleges and universities received nearly 44% of all need-based grant dollars despite the fact only 31% of these grant aid recipients were enrolled.\(^\text{112}\) Public colleges and universities, on the other hand, enrolled 69% of all state grant aid recipients while receiving only 56% of all state grant aid funds.\(^\text{113}\)
Why is this data significant? It is significant for two reasons. First, it shows that private colleges and universities in this country benefit disproportionately compared to public institutions through federal and state direct student aid programs. Second, it poses the question as to how much of this publicly-financed direct student aid actually goes to private religious institutions, particularly Catholic institutions. There are more than 900 religiously affiliated colleges and universities in this country constituting 25% of all the non-profit institutions in the United States. Of these religiously-affiliated institutions, 28% are Catholic colleges and universities. Out of nearly 16 million students that are enrolled in postsecondary study in this country in 1995-96, more than 600,000 or 5% attend Catholic colleges or universities. Of these students, over 67% or 405,000 receive some federal and state direct student aid in one form or another (see Table 1). Overall, approximately $8.1 billion dollars flowed to students attending Catholic colleges and universities in 1995-96. Because Catholic institutions enroll a significantly higher proportion of the student population than do any other religiously affiliated institutions, it

<table>
<thead>
<tr>
<th>Aid Program</th>
<th>Average Award</th>
<th>Stand. Error</th>
<th>Percentage Granted</th>
<th>Stand. Error</th>
<th>Total Amount Award (est.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Fed. Grant</td>
<td>$1,907</td>
<td>($73.3)</td>
<td>20.8%</td>
<td>(2.2%)</td>
<td>$237,993,600</td>
</tr>
<tr>
<td>State Grant Aid</td>
<td>$2,262</td>
<td>($110)</td>
<td>20.3%</td>
<td>(1.3%)</td>
<td>$275,511,600</td>
</tr>
<tr>
<td>Fed. Work-Study</td>
<td>$1,393</td>
<td>($67.5)</td>
<td>11.7%</td>
<td>(1.2%)</td>
<td>$ 97,788,600</td>
</tr>
<tr>
<td>Stafford Loan</td>
<td>$3,589.7</td>
<td>($63.2)</td>
<td>35.2%</td>
<td>(1.6%)</td>
<td>$7,581,446,400</td>
</tr>
<tr>
<td>(Subsidized)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total Direct Student Aid (based on these programs)</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td><strong>$8,192,740,200</strong></td>
</tr>
</tbody>
</table>

*Source: National Postsecondary Student Aid Study, 1995-96.*
would not be an overstatement to conclude that public funding from federal and state direct student aid programs significantly aids Catholic colleges and universities considerably more than other religious sects and institutions. James Madison’s greatest fear of disproportionately aiding one religion with public resources over other religious groups appears to have materialized.

When compared to direct student aid awards allocation to students attending public colleges and universities, Catholic college and university students receive an average of $300 more in per student federal grants and $700 more per student in state grants. Also, 67% of students attending Catholic institutions receive federal and state aid assistance while only 43% of public college and university students receive aid.

With this in mind, Justice Marshall’s rationale in *Witters* might be used to overturn current funding patterns. Government aid that does flow to religious institutions "as a result of genuinely independent and private choices of aid recipients" would represent a "significant portion of aid expended under the program as a whole".115 Under these circumstances, the aid programs designed not to discriminate in favor of religious institutions intentionally would be skewed towards religion in effect, thus failing the second prong of the *Lemon* test. If a legal challenge of this kind were to take place, a heavy burden would be placed on Catholic institutions and other religious institutions that receive government aid to justify the amount of money they receive from various aid programs. As for many Catholic institutions that implement the Pope’s latest proposals for Catholic higher education, an even heavier burden is imposed. They have to argue why it is not a violation of the Establishment Clause for a newly reformed, "pervasively sectarian" institution to receive a "significant portion" of federal and state direct student aid, knowing that the public secular college down the road receives less money through the same fiscal policy mechanism. However, given the recent trend in Supreme Court rulings over the years to tear down the "wall of separation" between church and state, it is likely that these institutions will find some way to keeping feeding at the public trough.
CONCLUSION

The American people have witnessed a steady erosion of the "wall" that separates church and civil authority in higher education over the last three decades. The principles espoused by Jefferson in his Act for Establishing Religious Freedom and Madison in his Memorial and Remonstrance Against Religious Assessments have been reinterpreted and pushed aside by the Supreme Court in the interest of allowing public tax dollars to flow to private and parochial colleges and universities. The decisions in Tilton, Hunt, Roemer and Witters consistently reflect the Supreme Court's view towards the "wall of separation" and the relationship of government and higher education in society.

As a result of the recent trend in Supreme Court decisions, the Vatican, like many of religious sects, has moved to take advantage of the opportunity to reassert the Church into the life and operations of American Catholic colleges and universities. At the moment, the new proposals embodied in the Ex Corde Ecclesiae are being closely scrutinized by the National Committee of Catholic Bishops and Catholic university officials around the country in the hope that a compromise can be reached with the Vatican about how much influence the Church can have over American Catholic institutions. They are aware that these proposals will mean serious changes for a number of Catholic colleges and universities, but it is unclear whether they are prepared for the legal challenges that such changes will bring. The Pope is confident that his proposals will not have any effect on public funding for Church-related institutions. Catholic universities and colleges, he argues, "have the full right to expect that society and public authorities will recognize and defend their institutional autonomy" as well as protect the right to the "financial support that is necessary for their continued existence and development." Advocates of maintaining the "wall of separation" feel differently about the matter and are concerned that ultimately this trend towards erosion of the "wall" will filter over to the area of primary and secondary school finance as well. The recent passage of a state-wide voucher system in Florida appears to validate this concern.
There is hope, however, for "wall" supporters. If Catholic institutions go too far and implement the Vatican's new proposals, a new wave of challenges are likely to be brought before the courts to decide whether these institutions qualify for federal and state direct student aid. The courts will have to look hard at the evidence to see if the purpose and effect of government aid programs actually result in the advancement of religion. Assuming that the Supreme Court adheres to its previous language in earlier Establishment Clause challenges, it will have to ensure that no public money goes to support institutions that are "pervasively sectarian" in their operations and activities. The adoption of the new proposals set forth in the Ex Corde Ecclesiae will likely push an institution into this "pervasively sectarian" zone. Moreover, given the current trend in government direct student aid to higher education in this country, which greatly favors private over public institutions, private religious institutions in general may find themselves up against a wall of their own if the Supreme Court determines that public money provided to these institutions constitutes a "significant portion" of overall federal and state aid. The battle to preserve the "wall of separation" may not be lost after all.
FOOTNOTES

1 DIGEST EDUCATION STATISTICS 1998, National Center for Education Statistics.


3 Id. at 22.

4 Id. at 42.

5 At Brigham Young University, a Mormon institution, all employees must take an oath of allegiance to the Mormon Church as part of their annual employment review.


10 Id.

11 Freddoso, supra note 6.


13 Id. at 618-619.

14 Ex Corde Ecclesiae, supra note 2, at 6.

15 Id. at 13-14.

16 Id. at 23.

17 Id.

18 Id. at 39.
The education of students, according to the document, is to "combine academic and professional development with formation in moral and religious principles and the social teachings of the Church." \textsuperscript{19} \textit{Id.} at 42.

The document reads that "all Catholic teachers are to be faithful to, and all other teachers are to respect, Catholic doctrine and morals in their research and teaching." \textit{Id.} at 23.

The \textit{Ex Corde Ecclesiae} specifically states that "the university community should give a practical demonstration of its faith in its daily activity, with important moments of reflection and of prayer." \textit{Id.} at 30.

\textit{Id.} at 23.


\textit{Id.}

\textit{Id.}

\textit{Id.}

See Arneson, \textit{supra} note 5, at A20.


See "Who Picks Algeria's Next President," \textit{id.} at 49.

See "Islamists In Retreat," \textit{id.} at 15.


The first known mention to Jefferson's reference to a "wall of separation" can be found in the Englishman James Burgh's book \textit{Crito} written in 1767. This book was widely read throughout the colonies reflecting the philosophical views that grew out of the Enlightenment.

The Supreme Court's most recent decision in \textit{Agostini} has done the most to obscure the wall of separation between church and state in the area of education. \textit{Agostini v. Felton}, 521 U.S. 203, 117 S.Ct. 1997 (1997) (holding that the Establishment Clause did not bar the New York City Board of Education from sending public school teachers into parochial schools to provide remedial education to disadvantaged children under Title I of the Elementary and Secondary Education Act).
In 1879, the Supreme Court in Reynolds v. United States first invoked the famous dictum of Jefferson, calling for the erection of a "wall of separation between church and state." 98 U.S. (8 Otto) 145 (1879).

Virginia Bill for Religious Liberty, 12 Hening, Statutes of Virginia 85 (1823).

Id. at 84.


The bill required every person to enroll his name with the county clerk and designate a religious society that he intended to support for taxation purposes. Taxes would be obtained and distributed to the designated Christian organization accordingly. For those who did not register with a particular Christian organization, taxes would be spread across the various religious sects. See LEO PFEFFER, CHURCH, STATE AND FREEDOM 109 (1967).

Memorial and Remonstrance Against Religious Assessments, 2 WRITINGS OF JAMES MADISON 183 (G. Hunt ed., 1901) [hereinafter Memorial and Remonstrance]. Supra note 1, at 186.

Id.


U.S. CONST. amend. I.


Reynolds, at 164; Everson, at 1.

Id.


In Pennsylvania, the legislature adopted a statutory program that provided financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. The Rhode Island legislature adopted a statute under which the state paid directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary. Id.

Id.

Id.

Id.

Id.
At the time, all four schools were governed by Catholic religious organizations, and the faculties and student bodies at each were predominantly Catholic.

Title I authorizes "direct" grants and loans for facility construction on public and private campuses. The facilities must be used for defined secular purposes and expressly prohibits their use for religious instruction, training or worship. Pub L. No. 88-204, 77 Stat. 363 (1963). As noted by the Supreme Court, the Act was drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions. Tilton, at 679.

Virginia, Florida, Georgia, Massachusetts and Colorado were some of the states that amended their constitutions to permit public money to go towards grants and loans to support private institutions. See generally A.E. DICK HOWARD, STATE AID TO PRIVATE HIGHER EDUCATION (1977).

The Act established an Educational Facilities Authority to assist (through the issuance of revenue bonds) higher educational institutions in constructing and financing projects, such as buildings, facilities, and site preparation. The Act, however, did not include facilities used for sectarian instruction or religious worship.

The majority opinion in Hunt quoted Chief Justice Burger, who held open the possibility in Tilton that some institutions may not pass the pervasively sectarian test and could be challenged accordingly:

Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics.

Tilton, supra note 54, at 682.


Id.

Id. at 736.

Id.

Id. at 754.

Id. at 755.

Id. at 757.

Id. at 755.

Id. at 756.

Id. at 755.

Id. at 757.

Id.

Id.

Id. at 756.

Id.

474 U.S. 481; 106 S.Ct. 748 (1986).

Assistance under the Washington program is paid directly to the student, who then transmits it to the educational institution of his or her choice. Id.

Id.

Id.
In Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 115 S.Ct. 2510 (1995), the Supreme Court held that denial of funding by the University of Virginia to a Christian newspaper violates the First Amendment's guarantee of free speech. In support of the decision, the Court argued that it does not violate the Establishment Clause for a public university to grant access to its facilities on a "religion neutral basis" to a wide spectrum of student groups, including groups which use meeting rooms for sectarian activities. The Court distinguished between Madison's concern over taxation to support religion and the free-speech nature of this case in the opinion:

The neutrality of the program distinguishes the student fees from a tax levied for the direct support of a church or group of churches. A tax of that sort, of course, would run contrary to Establishment Clause concerns dating from the earliest days of the Republic. The apprehensions of our predecessors involved the levying of taxes upon the public for the sole and exclusive purpose of establishing and supporting specific sects. The exaction here, by contrast, is a student activity fee designed to reflect the reality that student life in its many dimensions includes the necessity of wide-ranging speech and inquiry and that student expression is an integral part of the University's educational mission.

Rosenberger, at 840.

Agostini v. Felton, 521 U.S. 203, 117 S.Ct. 1997 (1997). This case is the latest decision in a string of rulings that have managed to erode the wall of separation between church and state at the primary and secondary school level. In Agostini, The Supreme Court held the New York City Board of Education could send public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to a program mandated by Title I of the Elementary and Secondary Education Act without it being a violation of the Establishment Clause of the First Amendment. Id.

Father Edward Glenn, “Address to the First Friday Club of Cleveland, Ohio” (Jan. 7, 1999) <http://www1.jcu.edu/PUB_AFF/1stfri.htm>.

Id.

Ex Corde Ecclesiae, supra note 2, at 23.

Id. at 39.

Id. at 42.

Hunt, supra note 68, at 743.

Roemer, supra note 72, at 755-56.


Tuition increased significantly in the 1980s and early 1990s but have recently stabilized.

National Statistics, supra note 100.
109 Id. at F-18 tbl.F.12. The average amount of aid is received is almost $9,000 per recipient.

110 Id. at F-12 tbl.F.6. The average amount of aid received at four-year public institutions is slightly more than $5,000 per recipient.

111 Id. at F-11 tbl.F.5. At community colleges, one-third of the students receive aid, and the average amount received is over $2,000.


113 Id.

114 Arenson, supra note 5, at A20.

115 Witters, supra note 87.

116 Ex Corde Ecclesiae, supra note 2, at 29.