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THE NEW YORK STATE CONSTITUTION AND AID TO CHURCH- RELATED SCHOOLS

CHARLES E. RICE *

Some Historical Antecedents of the Convention of 1894

FROM ITS EARLIEST days the church and school were closely united in Dutch New Netherland. The elementary school of that colony has been well described as a "public parochial school" that never failed to teach the catechism.¹ The main purpose of such education was to train children in the principles of the Dutch Reformed religion.²

The English captured New Amsterdam in August, 1664, the Dutch retook it for a year in 1673, and the English made their conquest permanent in 1674. During their *interregnum* of 1673 the Dutch attempted to re-establish the Reformed religion in the schools and elsewhere.³ Significantly, when the English achieved complete control in 1674, they adopted an attitude similar to the Dutch in relation to the religious character of the public schools. The English permitted the Dutch religious schools to endure throughout the entire colonial era, and the Charter granted by William II to the Dutch Reformed Church in 1696 solidified that Church's control over the Dutch schools, with the schoolmaster and other officials to be nominated by the "Ministers with the consent of the Elders and deacons of the said Church."⁴ The English schools in the colony of

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¹ Kilpatrick, *The Dutch Schools of New Netherland and Colonial New York*, UNITED STATES BUREAU OF EDUC., 12 BULL. 34 (1912).

² CONNORS, CHURCH-STATE RELATIONSHIPS IN EDUCATION IN THE STATE OF NEW YORK xiii (Cath. Univ. of America, Educational Research Monographs 1951).

³ 3 LINCOLN, CONSTITUTIONAL HISTORY OF NEW YORK 482 (1906).

⁴ 2 HASTINGS, ECCLESIASTICAL RECORDS OF THE STATE OF NEW YORK (1901-06), cited in CONNORS, *op. cit. supra* note 2, at xiii n.4.

New York were similarly church-controlled from their inception. After 1685, English school teachers in the colony were required to be licensed by the Bishop of London.⁵ After 1701, English education in New York was under the principal direction of the Society for the Propagation of the Gospel in Foreign parts, which was an evangelical arm of the Anglican Church. English schoolmasters were enjoined by a Standing Order of the Society

[to] consider the end for which they are employed, viz., the instructing and disposing children to believe and live as Christians. In order to this end, that they teach them to read truly and distinctly that they may be capable of reading the Holy Scriptures and other pious and useful books, for informing their understanding and regulating their manners. That they instruct them thoroughly in the Church catechism; teach them first to read it distinctly and exactly, then to learn it perfectly by heart, endeavoring to make them understand the sense and meaning of it by the help of such expositions as the society shall send over.⁶

The religious control of public education in New York persisted through the colonial period. With the coming of Independence, however, there began a withdrawal of public education from church control. But this withdrawal was a gradual process. The New York State Constitution of 1777 ended the official establishment of the Church of England and provided for the free toleration of religious profession and worship by all persons. This guarantee

of religious toleration, incidentally, was a departure from the colonial practice and rule which, since 1691, had excepted "Papists" from the guarantee of liberty of conscience. Interestingly, the convention which framed the Constitution of 1777 rejected by a vote of nineteen to ten, after it was "debated at length," a proposed amendment by John Jay which would have required "the professors of the religion of the Church of Rome" to swear that the Church authorities could neither absolve them from their allegiance to the state nor absolve men from sin.⁷

In 1782, Governor George Clinton urged the establishment of a system of public education. The Act of May 18, 1784, establishing the University of the State of New York, authorized the clergy of each religious denomination to choose one of their number as a Regent of the University. Each religious society also had the right, upon making a minimum yearly donation of not less than 200 bushels of wheat, "to institute a professorship in the said university for the promotion of their particular religious tenets."⁸ Another act in 1784 permitted religious societies to incorporate, with the right to own real estate, to build schools and churches and otherwise to conduct their usual affairs.⁹ That the churches readily availed themselves of the powers conferred by this law can be seen from the large number of religious schools which existed in New York City in the early nineteenth century.¹⁰

⁷ 1 LINCOLN, CONSTITUTIONAL HISTORY OF NEW YORK 541-45 (1906).

⁸ N.Y. Sess. Laws 1784, ch. 51.

⁹ N.Y. Sess. Laws 1784, ch. 18.

¹⁰ CONNORS, *op. cit. supra* note 2, at xv.

⁵ See 3 LINCOLN, *op. cit. supra* note 3; CONNORS, *op. cit. supra* note 2, at xiv.

⁶ 3 LINCOLN, *op. cit. supra* note 3, at 564-65.

The Regents of the University urged the establishment of a system of public education in 1793, 1794, and 1795.¹¹ Finally, in 1795, the legislature enacted "An Act for the Encouragement of Schools," which appropriated twenty thousand pounds for the support of elementary schools, including "the several charity schools."¹² Many of the existing schools in New York City were such church-related "Charity Schools."¹³ It is in no way surprising that the public appropriations for education were then channeled as well to church-related schools. The policy of appropriating public lands for the support of the gospel and of church schools had been initiated by the legislature in 1781,¹⁴ and was continued by succeeding legislatures.¹⁵

The Act of 1795, with its support of religiously-conducted schools, expired by its terms in 1800. Private and religious schools received no further public sustenance until 1805 when the legislature, responding to Governor Morgan Lewis' plea that "Religion and morality cannot be too sedulously inculcated,"¹⁶ provided for the sale of state-owned lands and the

establishment with the proceeds of a permanent fund for the support of common schools.

It was not until 1812 that the legislature enacted a comprehensive and permanent system of common schools. The 1812 Act was cast in a spirit of hospitality toward religion and religious schools. It prescribed moral qualifications for teachers, urged Bible reading in the schools and premised the enactment upon the judgment that common schools "appear to be the best plan that can be devised to disseminate religion, morality and training through a whole country."¹⁷ When, in 1813, the legislature applied the provisions of the general 1812 Act to New York City, church-related schools in that city were specifically included in the distribution of the public funds.¹⁸ This cooperative arrangement, however, did not long endure. A conflict soon developed between the nonsectarian Free School Society and various religious societies over the issue of whether public funds should be channeled to the nonsectarian schools alone or also the church-related schools. In 1824, the legislature left the decision of the question up to the Common Council of the City of New York, where the controversy was most intense. After heated debate the issue was resolved by the enactment of an ordinance in New York City in 1825 depriving all church-related schools of any share in the public funds. A major role in causing this change in legislative attitude may be attributed to the militant Free School Society, which changed

¹¹ 3 LINCOLN, *op. cit. supra* note 3, at 502-03.

¹² N.Y. Sess. Laws 1795, ch. 75.

¹³ CONNORS, *op. cit. supra* note 2, at xv; 6 NEW YORK STATE CONSTITUTIONAL CONVENTION REPORT 229-30 (1938).

¹⁴ N.Y. Sess. Laws 1781, ch. 32.

¹⁵ See N.Y. Sess. Laws 1782, ch. 22; 1784, ch. 60; 1785, ch. 66; 1785, ch. 67; 1789, ch. 32; 1789, ch. 44; 1790, ch. 38; 1790, ch. 59; 1794, ch. 54; 1798, ch. 48; 1801, ch. 69; 1808, ch. 218; 3 LINCOLN, *op. cit. supra* note 3, at 449-500.

¹⁶ CONNORS, *op. cit. supra* note 2, at xvi, quoting from VAN STEERBERGH, SPEECHES OF THE DIFFERENT GOVERNORS TO THE LEGISLATURE OF THE STATE OF NEW YORK 84 (1825).

¹⁷ N.Y. Sess. Laws 1812, ch. 242; see CONNORS, *op. cit. supra* note 2, at xvi.

¹⁸ N.Y. Sess. Laws 1813, ch. 52.

its name to the Public School Society in 1826¹⁹ and which dominated the making of educational policy in New York City through 1840.²⁰

In the fifteen years following the Ordinance of 1825, only two religious institutions were permitted to share in the common school fund in New York City. The Protestant Orphan Asylum was included in the fund in 1825 and the Roman Catholic Orphan Asylum was included in 1832. But these exceptions were premised upon the nonsectarian character of the Protestant Orphan Asylum and the singular public benefit arising from the services which the Catholic asylum rendered exclusively to orphans. That the exceptions did not extend to church-related schools in general and were not based upon a relaxation of the exclusionary Ordinance of 1825 can be seen from the fact that a similar petition by the Methodist Episcopal Charity school was decisively rejected by the Board of Aldermen in 1832 after more than a year of public debate and agitation.²¹

The decade of the 1830's was marked in New York City by continuing conflict over the place of religion in public schools. Bishop John Dubois, the Roman Catholic Bishop of New York, sought unsuccessfully in 1834 to induce the Public School Society to eliminate certain sectarian features hostile to Catholicism from the school program, to permit Catholic children to receive catechism instruction in the schools after regular class hours and generally to achieve a more harmonious cooperation

between the Catholic Church and the public schools.²² In 1838, the committee on colleges, academies, and common schools of the state assembly rejected a petition for the enactment of a law prohibiting all religious exercises in public schools; the petition was based on the ground, among others, that "the Christian religion is thus supported or aided at the public expense."²³ Throughout the 1830's, the public controversy was characterized by an increasingly anti-Catholic tenor, born principally of the fear that rising Catholic immigration portended a papal intrusion into the political life of America. Indeed, the anti-Catholic "Nativist" influence was so strong that in 1837 the mayor and the entire Common Council of New York City were elected by the New York Native Americans.²⁴

The religious controversy over the public schools came to a head in the 1840's. Governor William H. Seward, in his annual message to the state legislature on January 7, 1840, urged the public establishment and support of denominational schools.²⁵ In the wake of the Governor's recommendation, the seven Catholic schools in New York City petitioned the Common Council for a share of the state education funds. After a year of vigorous debate, the Common Council rejected the Catholic claims by a vote of fifteen to one.²⁶ Having failed, thus far, to secure public funds for Catholic schools, Bishop

¹⁹ N.Y. Sess. Laws 1826, ch. 25.

²⁰ CONNORS, *op. cit. supra* note 2, at 15.

²¹ *Id.* at 10.

²² *Id.* at 12-13.

²³ 3 LINCOLN, *op. cit. supra* note 3, at 567-70.

²⁴ STOKES & PFEFFER, CHURCH AND STATE IN THE UNITED STATES 230-31 (1964).

²⁵ *Id.* at 231.

²⁶ See CONNORS, *op. cit. supra* note 2, at 17; STOKES & PFEFFER, *op. cit. supra* note 24.

John Hughes took the matter to the state legislature in an effort to lessen the sectarian and anti-Catholic atmosphere in the public schools and to obtain more equitable public treatment for Catholic schools.²⁷ In 1842, the legislature, acting largely upon the recommendation of Governor Seward, enacted the Maclay Act, which terminated the monopoly of the Public School Society over the public schools in New York City. The act generally extended to New York City the common school system then in use upstate, and provided for the popular election, in the wards of New York City, of public school commissioners, inspectors and trustees. Under the act, some church-related schools were specifically made district schools, subject to the jurisdiction of the board of education and entitled to share in public school money. The act went on, however, to provide that no school "in which any religious sectarian doctrine or tenet shall be taught, inculcated or practised, shall receive any portion of the school moneys. . . ." ²⁸ The legislature reinforced the mandate of this last provision by providing in 1844 that

no school shall be entitled to a portion of the school moneys in which the religious sectarian doctrine or tenet of any particular Christian, or other religious sect shall be taught, inculcated or practised, or in which any book or books containing compositions favorable or prejudicial to the particular doctrine or tenets of any Christian sect, or which shall teach the doctrine or tenets of any other religious sect, or which shall refuse or [*sic*] permit

the visits and examinations provided for in this act.²⁹

The Act of 1842 dealt only with the schools of New York City, and although its prohibition against public support of schools teaching sectarian tenets was, in effect, retained in the subsequent enactments of 1844,³⁰ 1851,³¹ and 1882,³² no similar statutory provision has ever been enacted to apply generally to the state as a whole.³³ This particular statute, outlawing sectarianism in the schools of New York City only, was on the statute books when the Constitutional Conventions of 1846, 1867, and 1894 took place. Incidentally, it was remarked in the debates at the 1894 Convention that in all cases where non-public schools in New York City had received public money, the law prohibiting sectarian instruction and the use of sectarian textbooks had been observed.³⁴ Subsequently, the prohibition was incorporated into the New York City Charters of 1897 and 1901, but it was not included in the 1938 New York City Charter.³⁵ It is useful to note that the original 1842 enactment was born of an effort to remove sectarianism from the public schools. However, it also reflected a climate of partial accommodation between the legislature and church-related

²⁷ STOKES & PFEFFER, *op. cit. supra* note 24, at 231-32; CONNORS, *op. cit. supra* note 2, at 31.

²⁸ N.Y. Sess. Laws 1842, ch. 150, § 14.

²⁹ N.Y. Sess. Laws 1844, ch. 320, § 12.

³⁰ N.Y. Sess. Laws 1844, ch. 320.

³¹ N.Y. Sess. Laws 1851, ch. 386, § 18.

³² N.Y. Sess. Laws 1882, ch. 410, § 1062.

³³ 6 NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE REPORT 257 (1938) [hereinafter cited as COMMITTEE REPORT (1938)].

³⁴ 3 REVISED RECORD OF THE NEW YORK STATE CONSTITUTIONAL CONVENTION 742 (1894) [hereinafter cited as REVISED RECORD (1894)].

³⁵ 6 COMMITTEE REPORT 257 (1938).

schools. This accommodation, however, was something less than all-embracing. In 1853, the assembly committee on colleges, academies, and common schools unanimously rejected a petition by Catholic citizens for a direct allotment of common school funds to church-related schools.³⁶ But the legislators' disinclination to aid religious schools directly was not strong enough to impel them to enact that disinclination into a mandatory statute. Thus, in 1854, the assembly did not pass a bill which would have specifically deprived denominational schools as such of any share in the public fund.³⁷ The 1842 act, excluding public aid to schools which included sectarian teachings or exercises, had no application outside of New York City. And in the three decades following 1842, there were examples of limited public support accorded to church schools. For example, commencing in 1847,³⁸ a series of enactments provided for grants by the state from the United States Deposit Fund to schools in orphan asylums. Many of these schools were denominational and, although they received public moneys and were subject to supervision by public educational officers, they retained their autonomy as to the instruction they offered.³⁹ Similar laws were enacted in 1850,⁴⁰ 1862,⁴¹ and 1869,⁴²

to apply to private institutions other than orphan asylums. In the late 1860's, the legislature made several modest appropriations directly to some parochial schools in New York City.⁴³ Then, in 1871, the legislature aided some Catholic schools in New York City which were exempted as "charitable institutions" from the prohibition against appropriations to "any institution or enterprise that is under the control of any religious denomination," contained in another 1871 act relating to local government in New York City.⁴⁴

Controversies over state support of sectarian academies developed similarly to those concerning elementary schools. The academy issue came to a climax between 1865 and 1873 and culminated in a restriction in the Appropriation Act of 1873, that "no part of this fund shall be distributed in aid of any religious or denominational academy of this state."⁴⁵ Another act passed the same day "in relation to academies and academical departments of union schools," provided that "no money shall be paid to any school under the control of any religious or denominational sect or society."⁴⁶

After 1875, academies declined in importance and were superseded by high schools and academic departments of union schools. Many of these were under church control and they did receive some public funds until the adoption of the Constitution of 1894.⁴⁷

³⁶ CONNORS, CHURCH-STATE RELATIONSHIPS IN EDUCATION IN THE STATE OF NEW YORK 93 (Cath. Univ. of America, Educational Research Monographs 1951).

³⁷ *Id.* at 92-93.

³⁸ N.Y. Sess. Laws 1847, ch. 485.

³⁹ 6 COMMITTEE REPORT 257 (1938).

⁴⁰ N.Y. Sess. Laws 1850, ch. 261.

⁴¹ N.Y. Sess. Laws 1862, ch. 258.

⁴² N.Y. Sess. Laws 1869, ch. 366.

⁴³ CONNORS, *op. cit. supra* note 36, at 93.

⁴⁴ See N.Y. Sess. Laws 1871, chs. 583, 869.

⁴⁵ N.Y. Sess. Laws 1873, ch. 643.

⁴⁶ N.Y. Sess. Laws 1873, ch. 642, § 7.

⁴⁷ See discussion in CONNORS, *op. cit. supra* note 36, at 102-03.

In the 1850's, numerous appropriations were made to denominational colleges and there was no significant controversy engendered thereby. With the exception of St. John's (now Fordham), the aided colleges were not under Catholic auspices. After 1859, the legislature provided only minimal and occasional aid to denominational colleges.⁴⁸

The center stage of the controversy over state support of religious bodies was held, throughout the century, by the elementary school. From the 1860's onward, the mood and tempo of public debate and opinion grew increasingly strident and bitter. The advocates of the public schools feared a Catholic plot to destroy those schools and Catholics, continuing their resistance to compulsive sectarianism in those schools, condemned them regularly as Godless.⁴⁹ There were, it is true, serious efforts made to compromise the dispute, notably under the so-called Poughkeepsie Plan, which included a limited incorporation of parochial schools into the publicly-financed school system.⁵⁰ Ultimately, such a compromise plan in Niagara County was ruled illegal in 1886 by the acting state superintendent of common schools because under it three nuns were retained as public school teachers.⁵¹ In 1887, the state superintendent similarly ruled that the employment in public schools of nuns wearing religious garb

constituted unfair discrimination in favor of Catholics.⁵²

Apart from the few local efforts to achieve a compromise between the parochial and public school systems, during the last third of the nineteenth century there was increasing bitterness over the issue of religion in public education. Nor was this bitterness a New York phenomenon. On the contrary, it was reflected nationally in the career of the Blaine Amendment. In 1875, President Ulysses S. Grant delivered an address to the Army of the Tennessee in which he cautioned against public support of sectarian schools.⁵³ In his annual message to Congress that year, President Grant called for a constitutional amendment requiring the states to maintain public schools and forbidding the teaching in them of religious, atheistic or pagan tenets.⁵⁴ In line with his request, the Blaine Amendment was introduced in the House of Representatives in 1875.⁵⁵ The amendment passed the House of Representatives by a two-thirds majority.⁵⁶ As introduced in the House it read:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted

⁴⁸ *Id.* at 104-05.

⁴⁹ The tenor of the period, including the sharp differences of opinion among the Catholic clergy, is well summarized in CONNORS, *op. cit. supra* note 36, at 105-07.

⁵⁰ See *id.* at 110.

⁵¹ *Id.* at 117.

⁵² *Ibid.*

⁵³ See STOKES & PFEFFER, CHURCH AND STATE IN THE UNITED STATES 272 (1964).

⁵⁴ 4 CONG. REC. 175 (1875).

⁵⁵ 4 CONG. REC. 205 (1875).

⁵⁶ 4 CONG. REC. 5189-92 (1876).

be divided between religious sects or denominations.⁵⁷

The amendment was rewritten by the Senate Judiciary Committee and, as debated in the Senate, it read as follows:

No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. No public property and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to or made or used for the support of any school, educational or other institution under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught. And no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit, and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization, or denomination, or to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair rights or property already vested.

Sec. 2. Congress shall have power, by appropriate legislation, to provide for the prevention and punishment of violations of this article.⁵⁸

The Blaine Amendment was defeated in the Senate by a vote determined largely by partisanship⁵⁹ and in which some sen-

ators were influenced by their belief that state constitutions already dealt adequately with the problem to which the proposed amendment addressed itself.⁶⁰ The Blaine Amendment was incorporated in the Republican Party's national platform of 1876 and, for a time, it was a burning political issue. The impact of the issue, and the general frame of public mind during the last quarter of the nineteenth century and the first years of the twentieth, is indicated by the widespread incorporation of similar provisions by 29 states into their own constitutions between 1877 and 1917.⁶¹ The Blaine Amendment itself was introduced in Congress twenty times between 1876 and 1929, but it never received the requisite two-thirds majorities and thus was never referred for ratification to the states.⁶²

The Convention of 1894

The climax of New York State's long nineteenth century contention over religion and public education was the adoption of the 1894 Constitution. In the Constitutional Conventions of 1821 and 1846, there was no mention of state aid to denominational schools.⁶³ In the 1867 Convention, a petition was presented by a group of citizens "in favor of the prohibition of donations of public moneys to

⁶⁰ See PFEFFER, *CHURCH, STATE AND FREEDOM* 131 (1953). See also concurring opinion of Mr. Justice Frankfurter in *McCullum v. Board of Educ.*, 333 U.S. 203, 218-19 (1948).

⁶¹ ZOLLMANN, *op. cit. supra* note 59, at 74-80.

⁶² Committee on the Judiciary, *Proposed Amendments to the Constitution*, H.R. DOC. No. 551, 70th Cong., 2d Sess. 182 (1929); see Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939 (1951).

⁶³ 6 COMMITTEE REPORT 257 (1938).

⁵⁷ 4 CONG. REC. 175 (1875).

⁵⁸ 4 CONG. REC. 5453 (1876).

⁵⁹ ZOLLMANN, *AMERICAN CHURCH LAW* 76 (1933).

sectarian institutions," but it was apparently ignored and, beyond a statement of sentiment as to religious freedom in the course of a debate on another subject and an argument against giving public funds to higher institutions of learning because they were sectarian, nothing was said in the Convention on the subject.⁶⁴

Prior to and during the 1894 Convention, many petitions were submitted to it in behalf of a constitutional amendment to bar public aid to sectarian schools. Several such amendments were introduced, generally designed to "prohibit all sectarian appropriations."⁶⁵ The Committee on Education recommended the following section:

Neither the State nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.

This Section shall not apply to schools in institutions subject to visitation and inspection of the State Board of Charities.⁶⁶

The Committee filed a report with its recommendation and stated that:

The first sentence of the last section of the proposed article needs no explanation or defense. In the opinion of the committee there is no demand from the people

of the State upon this Convention so unmistakable, widespread and urgent; none, moreover, so well grounded in right and reason, as that the public-school system of the State shall be forever protected by constitutional safeguards from all sectarian influence or interference, and that public money shall not be used, directly or indirectly, to propagate denominational tenets or doctrines. We have sought to give the clearest and strongest expression possible to these principles in the proposed section. The arguments in favor of such a provision are, in our opinion, conclusive, and the objection that it will result in making the schools 'Godless' or that such a constitutional prohibition would imply, on the part of the people enacting it, hostility, or even indifference, to religion, seem to us to be both groundless and absurd. In adopting this section the Convention will, in our opinion, most effectively aid all that is highest and best in religion; for by establishing the principle that State education must necessarily be secular in its character, the field is left open beyond question or misunderstanding for religious teaching in the family, the Sunday school and the church. The almost inevitable question has been raised in considering the language which we have adopted, as to whether the use of the words 'denominational tenets or doctrines' will in any way interfere with the reading of the Bible in public schools and institutions of learning. Our attention has been called to the case of the *State ex rel. Weiss v. the District Board of School District No. 8, in the City of Edgerton* (in the 76th vol. *Wis. Reports*, page 177), in which the Supreme Court of the State of Wisconsin decided that a prohibition of 'sectarian instruction' prevented the reading of the Bible. Without discussing the merits of the case or the soundness of the position taken by the Wisconsin court, it will suffice to say that, in the opinion of your committee the words proposed by us cannot, with

⁶⁴ *Ibid.*

⁶⁵ 1 REVISED RECORD 1, 25 (1894).

⁶⁶ DOCUMENTS OF THE NEW YORK STATE CONSTITUTIONAL CONVENTION No. 62, REPORT OF THE COMMITTEE ON EDUCATION, 5 REVISED RECORD 693 (1894).

any reasonable interpretation or construction, be taken to prohibit the reading of the Bible in the public schools. We are aware of the fact that explanatory words on the part of the committee, or even of this Convention, are in no sense binding upon a judicial tribunal in construing or interpreting a constitutional provision, but we, nevertheless, consider it proper to put on record our own interpretation of the words which we submit to the Convention for its adoption.

There is one exceptional case provided for in the first sentence of this section, in which public money may be used in connection with a sectarian school or institution of learning, and that is contained in the words 'otherwise than for examination or inspection' of such institutions. This exception, in our opinion, in no way affects the principle, except in so far as it emphasizes even more strongly the interest and latent power of the State, with regard to all institutions of learning. Without the words last quoted the question might be raised, whether the section would not prohibit even the trifling expenditure necessary for the inspection and examination of denominational schools which are now connected with the University of the State of New York, and this question necessarily raises the broader one, as to whether this connection should be maintained or prohibited as a violation of the principle sought to be established in this article. Your committee were unanimously of the opinion that the connection between denominational higher institutions of learning and the University of the State of New York is of the greatest advantage, not only to the institutions, but to the State, so long as this connection involves no further aid than is incidental to examination and inspection. The policy of the State, as has been heretofore referred to, is not to monopolize higher education, but to create one grand supervisory university, of which all academies and colleges should be part, acting

in concert under a common control, and yet admitting of every diversity demanded by the sentiments and conditions of the community in which they exist, and affording absolute freedom of instruction. Heretofore, no distinction has been made between sectarian and non-sectarian academies and high schools in the distribution of the proceeds of the Literature Fund, whereby every institution became entitled to a per capita allowance for every student who passed the Regents' examinations, and also to a suitable contribution to its library and scientific apparatus. This part of the State's assistance is, in our opinion, contrary to the sound principle of separation of church and State, and will be absolutely prohibited by the adoption of our proposed amendment. It is, indeed, a matter of comparatively trifling concern to the academies themselves, the whole amount so distributed to sectarian institutions in the year 1893 having been only \$5,361.09. It is not contended that heretofore any harm or injury to the State has come from this practice, but, being contrary to public policy in the highest sense, its discontinuance is demanded, not only for the sake of the State, but of the institutions and churches themselves. This, however, by no means necessarily implies that the supervision of the University and the system of regular examinations by which the efficiency of these institutions is tested, must be given up. We understand that the institutions themselves are very desirous of continuing the Regents' examinations, and of receiving the certificates of the University for such of their students as shall pass them. So far from injuring the educational system of the State, we are of opinion that the latter will be largely benefited by such a course, which extends the uniformity of excellence maintained by State institutions to those under private and sectarian control, and which, by causing the adoption, in many instances, of modern and thoroughly American text-books and methods,

necessarily tends to break down the barriers of prejudice by which our people may be divided. That there may be no question of the authority of the University to continue these examinations, the words last-above quoted have been introduced into this section.

The second sentence of the section, 'this section shall not apply to schools in institutions subject to visitation and inspection by the State Board of Charities,' has been inserted by a majority of the committee—a minority, consisting of Messrs. Durfee, Hirschberg, Hill, Tibbetts, Cornwell, Fraser and Holls, dissenting—and explains itself. It must necessarily be read in connection with the article which may be adopted upon the recommendation of the Committee on Charities and Charitable Institutions.

All of which is respectfully submitted.

FREDERICK W. HOLLS,
Chairman.

Dated Albany, August 23, 1894.⁶⁷

The Committee's report is noteworthy for the fervor and strength with which it supported the recommendation as a response to an overwhelming popular will and, as, in actuality, an aid rather than a hindrance to religion. Understandably, however, when the measure was presented to the Convention in Committee of the Whole, on August 31, 1894, it provoked a sharp and acrimonious cleavage of opinion. The first issue was raised by Mr. Joseph H. Choate, the President of the Convention, who moved to strike the last two lines which provided: "This section shall not apply to schools in institutions subject to the visitation and inspection of the State Board of Charities." The Choate motion was ultimately adopted after de-

⁶⁷ *Id.* at 705-07 (1894).

bate and the two lines were stricken.⁶⁸ Mr. Choate opposed the exception of such schools from the general prohibition on the ground that it would provide an opening for public funds to be channeled to such sectarian orphanages and other sectarian institutions as then or thereafter might be subject to the jurisdiction of the State Board of Charities. Choate feared that such aid would go to religious schools contained in such sectarian institutions and thereby that the plain intent of the main proposal would be frustrated. Choate quoted in his support from statements made by Frederick P. Coudert and Colonel George Bliss, two prominent Catholic laymen who were strong advocates of Catholic education. Mr. Coudert was quoted as saying:

My friends on the other side unanimously speak of the common schools as the palladium of our liberties, as the cornerstone of our institutions, etc. This language is very fine, and I am quite willing to indorse it, and I shall not today say one word in opposition to this plan of amendment so far as it relates to the common schools. Let it be understood that this system shall remain intact—that public opinion will not tolerate a diversion of any public moneys from their lawful object to encourage denominational education. Put it, if you are so inclined, into our Constitution.⁶⁹

And Colonel Bliss was quoted thusly:

As to the schools, I do not care what action you take in this Convention with reference to an amendment bearing upon

⁶⁸ 3 REVISED RECORD 780 (1894). Ultimately, they were, in effect, inserted in Article VIII, Section 14 of the Constitution, dealing with orphanages and similar institutions.

⁶⁹ 3 REVISED RECORD 741 (1894).

the common schools. Mr. Coudert has very largely anticipated what I had taken the pains, so that I might not be misunderstood, to write down, but I will take the liberty of reading it, so that there may be no mistake about it. I recognize that public opinion believes in using funds raised by taxation exclusively for the public schools, and that though these schools, as now conducted, do not meet the requirements which Catholics deem essential to education, it is useless to oppose public opinion as it now exists. . . . So, go on with any form of amendment you think necessary to prevent the withdrawal of public moneys from the public to parochial schools; you will find no present opposition from me or those I represent. You will, I think, find practically no opposition from any Catholic.⁷⁰

Mr. Choate also expressed his fear that retention of the exception would nullify the existing laws prohibiting sectarian instruction and the use of sectarian textbooks in schools receiving public funds. Mr. Choate feared that the exception could be argued to nullify that prohibition with respect to denominational institutions under the jurisdiction of the State Board of Charities.⁷¹ And the Choate address concluded with this peroration which drew applause from the delegates:

If the Roman Catholics want their priests and nuns to go as teachers into these corporate parochial schools of theirs, let them go, but let them be paid at their own expense, at the expense of that mighty church which draws upon the revenues of its adherents as almost no other institution does. If the Episcopal church wants its priests and deacons to indoctrinate the young inmates of the institutions which

they have founded with the peculiar tenets of the Episcopal church, let that church pay for it. They can well afford to do so. But let it not be said that we, a Constitutional Convention of the year 1894, dared go before the people of New York proposing that henceforth any money should be raised by taxation for teaching any child any doctrine or religion as distinguished from any other doctrine whatever.⁷²

In response, Mr. Owen Cassidy of Schuyler County unsuccessfully attempted to offer an amendment which would have barred public aid to all schools not owned and controlled by the state or a subdivision thereof, rather than merely to those schools conducted under religious auspices.⁷³ Mr. Cassidy's theory was that the exception only of religious schools constituted an unfair discrimination against religion. After his motion was ruled out of order because Mr. Choate's motion was properly ruled to have precedence, Cassidy bitterly attacked the basic idea of the entire proposed section 4 as a "surrender to bigotry and fanaticism" and a violation of the separation of church and state through its virtual imposition of a religious test for the reception of public aid:

But, Mr. Chairman, before the adoption of the Constitution of the United States, our own Empire State proclaimed in no uncertain tones her position on this subject. And in the first article of the Constitution adopted by her in the year 1777 we read the words: 'The free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed in

⁷⁰ 3 REVISED RECORD 741-42 (1894).

⁷¹ 3 REVISED RECORD 742 (1894).

⁷² 3 REVISED RECORD 743 (1894).

⁷³ 3 REVISED RECORD 744 (1894).

this State to all mankind.' Little did the framers of that Constitution, Mr. Chairman, dream of Mr. Holls and his amendment, little did they think that after a hundred years of religious liberty that there could be found any man or set of men, anxious to steer the ship of State back into the pathless and turbulent sea of religious persecution, and yet, if we are to adopt this amendment, all that has been gained in the struggles of the centuries will be lost. Now, Mr. Chairman, I am opposed to this amendment as proposed by the Committee on Education, because I believe it to be unconstitutional, a surrender to bigotry and fanaticism, and at war with the generally accepted doctrine of separation of church and State. It merely seeks to outlaw some of the agencies in the State, because of their religious character. The principle involved in the separation of church and State, is that the State, of right, exists merely for civil ends, that it should have nothing whatever to do with religion; that it should make no inquiries of its citizens, servants or agents whether such and such religious tenets are held by them or not. . . .

The principle here contended for it [*sic*] that as the State shall not make a grant to a school simply because it is a religious school, so it should not refuse a grant on that ground.

The State ought never to consent to run with the bloodthirsty dogs eager to chase down their religious prey.

The churches are not exercising the most deadly influences in government today, and yet from the manner these A.P.A. dogs are barking you would think that no other influences for evil could equal them.⁷⁴

Mr. Cassidy then proceeded to advance the "public purpose" argument

which has figured prominently in the controversies of our own day:

A church, though primarily a religious body, is also a civil corporation. And the State may make grants to it for civil reasons the same as to a peculiarly secular organization. For instance, if the State advertises for the use of a room or building, and the church offers one, the State may vote money to the church for the use of that room or building the same as it would for the use of a room in a railway depot. So, if the State makes grants to other parties for the shelter of the aged, poor and orphans, or for giving instruction in geography, mathematics and other secular branches, it may also make such grants to a church, asylum or school, just the same as to one under purely secular control. For in that case the State is dealing with the church not as a religious, but as a civil organization. When a church school renders the State a secular service by giving secular instruction, it may be given grants from the Regents funds, just the same as any purely secular school. . . .

If a church school renders the same secular service as a non-religious school, why should not the State make a grant to the former as well as to the latter? This amendment, however, proposes that the State shall establish a 'holy or unholy' inquisition, and shall hear and entertain charges that such and such doctrines are taught, and if such charges are proved, that such and such action shall be taken.

Now, the State, which exists merely for civil ends, has no more right to inquire into the religious character and teachings of school corporations than into the religious character and teachings of an individual. The State has nothing to do except with the civil character of a citizen, and it has nothing to do with the school except with its civil character and the nature of the secular instruction given therein. As the State could not rightly

⁷⁴ 3 REVISED RECORD 744-46 (1894).

refuse a pension to a soldier because he belongs to a church or taught certain religious doctrines, so it cannot rightly refuse a grant to a school corporation on any such grounds. As the State would have no right to inquire into the religious tenets or teachings of a man who is a candidate for the position of sheriff or senator, so it has no right to inquire into the religious character of a school which is a candidate of [*sic*] an agricultural college land grant or a grant from the Regents fund. The State has no right to discriminate in the matter of grants between two schools which render the State the same secular service, because of religious or ecclesiastical character or relations.

Those who urged this amendment, on the ground of the separation of church and State, are very much like the man who stood up so straight that he leaned over backward at an angle of forty-five degrees—they violate the very principle they claim to uphold.

The United States government gives newspaper and magazine publishers certain favors in the matter of postage, while the rest of us pay eight cents a pound on printed matter, they send their publications through the mail for one cent a pound. This is less than cost to the government. Indeed, newspapers are sent within the limits of their own county, free. This is equivalent to a government grant to newspapers. The ground on which this is justified, is that the circulation of newspapers increases popular intelligence, and is of service to the State. Now, the same privileges are given to religious newspapers established to disseminate certain religious tenets, some of these like the Methodist Christian Advocate being directly owned by the church. And this is right, for these religious newspapers do as much to elevate popular intelligence as political or commercial and other purely secular newspapers. But, if the government, in the matter of postal favors and aids, does not discriminate

between religious papers and secular papers, why should it distinguish in the matter of grants from the Regents fund, between religious schools and those which are purely secular. . . . The amendment is objectionable as being ambiguous.⁷⁵

Mr. Cassidy continued and he asked: Would it forbid the State to hire a building or room of a church and pay rent therefor? . . . If it be said that moneys paid for rent of a room are paid not to help the school, but to get the room, we might answer that the moneys given the school from the Regents fund are not primarily to help the school, but to help the State, and incidently the school, to give the instruction the State owes. . . .⁷⁶

This last remark, of course, was a further articulation of the public purpose doctrine. Mr. Cassidy continued:

If an academy was controlled not by the Catholic church as such, but by a board of trustees composed of Archbishop Corrigan, Mr. Coudert and other Catholics who would manage it in the interests of the Catholic church, would it be under the control of the Catholic church, or only under the control of the trustees? . . . What is meant by the words 'in which any denominational tenet or doctrine is taught.' Is the immortality of the soul a denominational tenet? . . .⁷⁷

The proposed amendment, Mr. Cassidy asserted,

would be pernicious in its working, because it is indefinite. Loosely constructed it would admit the extremes of sectarian teachings, while strictly construed it might be used to exclude all moral teachings whatever. No one has yet defined 'denominational tenet or doctrine.'⁷⁸

⁷⁵ 3 REVISED RECORD 747 (1894).

⁷⁶ 3 REVISED RECORD 747-48 (1894).

⁷⁷ 3 REVISED RECORD 748-49 (1894).

⁷⁸ 3 REVISED RECORD 749 (1894).

Mr. Cassidy then attempted to allay the apprehensions of the delegates concerning the potential misuse of Catholic power:

Nor is it true that the Catholic church has so great political power that it can perhaps do what other churches cannot. The Protestants outnumber the Catholics eight to one in the United States, and by a similar proportion in the State of New York. How absurd the idea that a tenth of the people can silence or control nine-tenths. Though one-tenth of the people, they do not hold anything like one-tenth of the seats in the national Congress, nor do they in any State hold more public offices than they might fairly be entitled to from their numbers, if equal in merit to Protestants. It is not a help to an aspirant to office, but rather the reverse, to be a Catholic. It would be next to impossible to elect a Catholic President of the United States or Governor of the State of New York. Where a candidate gains one vote for being a Catholic he will lose three. Whether it be reasonable or unreasonable, there is a jealousy against Catholics which will be sufficient to frustrate any plans which any of them may cherish of aiding their parochial schools by injury to the public school system. There need be no fear whatever that the Catholic church or any other church will ever be strong enough to overthrow or cripple the public school system. More than that, the Constitution of the State protects the common school funds, and as I began by quoting from the Constitution, so I will close: 'The capital of the common school . . . shall be applied to the support of common schools.' [Article 9, Section 1.]⁷⁹

In concluding his address, Cassidy introduced a letter to him from Professor Norman Fox, apparently a Protestant, and

chairman of the Board of Trustees of Cook Academy and Rochester University. In Professor Fox's opinion:

This amendment proposes that the State should institute an 'inquisition' and find out whether a school asking a grant does or does not teach this or that religious or ecclesiastical tenet. But for the State to do that is to go back to medievalism, to violate the principle of the separation of church and State. The State has no right to inquire as to the religious or ecclesiastical character of a school any more than it has to concern itself with the religious or ecclesiastical opinions of a citizen. . . . If it were proposed that no State grant be given to any institution not owned and controlled by the State, the amendment would be consistent and logical. But when it tries to discriminate between church schools and those managed by other private but purely secular corporations, it violates the principle of the separation of church and State by instituting an investigation into the religious character of an institution, and as the amendment does not, and, indeed, cannot, distinctly define church control and denominational tenets, its enforcement would be impractical or would lead to dishonest evasion.⁸⁰

Another letter introduced by Cassidy was from Professor A. C. Hill, a Protestant, who wrote,

The measure is an infringement upon personal liberty; a step toward union of church and State, an introduction of a negation of religion into our State Constitution. The measure ought to go further or be struck out altogether.⁸¹

Mr. John H. Peck, of Troy, a member of the Committee on Education, then rose

⁷⁹ 3 REVISED RECORD 750 (1894).

⁸⁰ 3 REVISED RECORD 751-52 (1894).

⁸¹ 3 REVISED RECORD 753 (1894).

to defend against Choate's attack on the exception permitting public aid to institutions under the supervision of the State Board of Charities. Peck defended this exception as a benefit and protection to the children in those institutions and responded to the charge that they would be indoctrinated in sectarian tenets:

Why, gentlemen, upon my honor, I would rather have a child taught to venerate the Great Spirit of the American Indian, I would rather have it taught any religion upon the earth than no religion. I do not want the homes of the dependent children of the State of New York to furnish the breeding places of the anarchists and socialists of the future. I want that they should have religious training during their tender years. And, certainly, I do not want to say that because they have no home they shall go ignorant in the State of New York.⁸²

Some indications of the religious friction which underlay the work of the Convention can be found in this remark by Mr. Peck:

You think there is a public sentiment demanding of you intolerance and bigotry, and that that public sentiment will injure the work of this Convention if you do not heed it. But I tell you, gentlemen of the Convention, there is nothing of the kind in the State of New York. These few agitators make a great noise. The shallows are noisy, but the deeps are dumb. We have had Masonic and anti-Masonic agitations in the State of New York, but they were not allowed to mar its institutions. We have had native American agitation in the State of New York, but it did not put its dirty hand on the Constitution. Shall we have this baseless, this senseless agitation which is now

being wafted in the air, very bitter it may be, but not reaching many people, reaching the lungs of no honest, strong American—shall we allow it to blot and stain the Constitution which is to be offered to the people of the State of New York? Are we going to send that kind of thing down over the people of the State?⁸³

As the debate continued, Mr. Edward Lauterbach, of New York City, an opponent of the Choate amendment, challenged the general assumption that there had theretofore been a continuing and large-scale distribution of state aid to sectarian schools:

Every one connected with this subject starts with the agreement that in response to a sentiment here, that has really no foundation in fact, there shall be a new clause inserted in the Constitution to the effect that no money shall be paid to any parochial, sectarian, or denominational school. One would imagine from the excitement that there were being spent vast sums of money upon denominational, parochial and sectarian schools; but actually the sums of money that have been paid out in those directions in the last year amounted to only about three thousand dollars, and in any year before that to not quite as much; and it is limited to a sectarian school in Poughkeepsie, and to a few other small sectarian schools where the trustees of the district have found it more to their convenience to make a contract with the existing Catholic school-house than in any other manner; and they would be sorry (and Mr. Arnold, of Poughkeepsie, will tell you so) if as a result of this constitutional amendment they were prevented from so doing.⁸⁴

⁸² 3 REVISED RECORD 756 (1894).

⁸³ 3 REVISED RECORD 757 (1894).

⁸⁴ 3 REVISED RECORD 761 (1894).

Lauterbach, however, agreed that such aid should be prohibited in the future, except for such institutions as orphan asylums:

But there have been political zealots in the Catholic church, whom no one has supported, whom I can find to have no encouragement whatever, who have through one journal and through one or more misguided men, said they wanted to have for their parochial schools some portion of the public school funds. We are all agreed, that whatever is necessary to be done to prevent the possibility of any such abuse in the future (because no such abuse exists at present) shall be put into this Constitution. We are all agreed upon that. That is, I think a unanimous agreement.⁸⁵

Incidentally, in the course of the debate on the next day, September 1st, Mr. John T. McDonough, of Albany, a Catholic and member of the Committee on Education, flatly stated:

I say there is not a parochial school in the State of New York drawing one dollar of the public money, notwithstanding all that the President said about diverting public school moneys to sectarian schools. Not one dollar, I say, is paid to a parochial school. The school at Poughkeepsie, so often alluded to, is not a parish school; the school at Poughkeepsie is a public school, under the Board of Public Instruction, and regulated by that board. The only thing about it that makes it look like a parish school is that the women who are teaching in it wear black dresses and carry at their sides a cross; that seems to be objectionable.⁸⁶

McDonough went on to deny any Catholic intent to obtain public funds for the support of parish parochial schools:

The Catholics are not drawing a dollar from the State for parish schools, and they are not asking a dollar. No one has yet spoken in this State, with authority to speak, asking a division of this school money. If some editor in New York has proposed it in his paper, with a view to putting some one in a hole politically, he had no authority to do it, and no demand was made here for such division. Their parochial schools are one thing; the schools in these institutions are another. Now, this article is very ingeniously drawn. What have the churches of this State done to the people that would lead us to think them so wicked, that we should condemn them in the Constitution? What offense, I say, have they committed? Are you afraid of your liberties? Are you afraid if children are educated in the religion of their parents that they will destroy your liberties? You are aiming here at religious bodies and religious bodies only. Why, three years ago, one of the most eminent gentlemen of this State, who was a candidate for the nomination for Governor, was turned down, in Republican Convention, because he had written against religion. Now, you propose to enact here an amendment in the Constitution that is an attack on all religious bodies.⁸⁷

And the McDonough address directly condemned the proposed section 4 as anti-religious:

Why, if you said there should be no State aid in any schools in which socialism is encouraged, or in any school in which

⁸⁵ 3 REVISED RECORD 761 (1894).

⁸⁶ 3 REVISED RECORD 774 (1894).

⁸⁷ 3 REVISED RECORD 775 (1894).

anarchy is encouraged, and you embodied that in a proposed amendment to the Constitution, and went to the people with it, every one in the State would say that your work amounted to a condemnation of anarchy, of nihilism, of socialism. What do you do now? You go to the people and say, 'Not a dollar of aid to any school in which religion is taught.' That is a condemnation of religion. I tell you that these religious bodies are not so far apart as you think they are. They got together and united at the polls in Wisconsin — Catholics, Lutherans, and others—and they carried the State. I expect as much opposition to this amendment from Protestants as from Catholics, and you will find it so, mark my words. It is a condemnation of the whole Christian religion. My learned friend, the chairman of the Committee on Education, says it does not prevent the teaching of religion in the schools. He says that the Bible may be read. Well, if the Bible may be read, hymns may be sung, and prayers said, and I think that is the sum total of some religions. But that is not true of others, and so this may be ingeniously construed to exclude some and admit others; and I am not sure but that that was the real object intended.⁸⁸

He then criticized the proposal, in words evocative of the controversy of today, as threatening to introduce a state-made religion into public schools:

Your proposed amendment says that no money is to be appropriated for 'institutions of learning wholly or partly under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.' Any denominational tenet or doctrine? Very well, take away the distinctive doctrines of the Baptists, take away the distinctive

doctrines or tenets of the Methodists, take away the distinctive tenets of the Presbyterians, of the Episcopalians, of the Catholics, etc., and what have you left? What will schools teach? They will teach a State-made religion. It is a union of the church and State, instead of a separation. The courts will have to tell what kind of a religion they shall teach. It will be some sort of religion, I know, because the chairman of the committee says the amendment does not prevent religion in the schools. Now, what is it? Who is going to tell us what this religion is? I don't know but it will be like that of Mr. Jones, the distinguished superintendent of the House of Refuge on Randall's Island, who, some years ago, in order to show that that institution was non-sectarian, got up a religion of his own. He took what he thought were the most beautiful prayers from the Episcopal church, the most eloquent from the Catholic, and hymns from the Methodist and Presbyterians, and he combined them all, and then claimed that, inasmuch as he had the best of each, he had something superior to any, and he blessed it and called it Jonesism. This new religion that we are to have under this amendment of ours, should, out of regard for the worthy chairman of this committee be blessed and called 'Hollism,' and thus have his name go down the ages as one of the great reformers.⁸⁹

One of the major arguments today for an equitable sharing of church-related schools in public funds is based upon the benefit accruing to the public taxpayer from the existence of those schools where children are educated without the enormous public cost that would result from their attendance at public schools. It is interesting to note the figures inserted into

⁸⁸ 3 REVISED RECORD 775-76 (1894).

⁸⁹ 3 REVISED RECORD 776-77 (1894).

the record of the 1894 Convention by Mr. McDonough on the comparative extent of Catholic parochial education in the State at that time:

There are in the common schools of this State, according to the census of 1890—I take the United States census—1,042,160 children. There are in public schools not common 7,810. There are in private schools, exclusive of parochial, 77,000. There are in parochial schools of this State 119,242 children educated. Of these, the Baptists have 1,991; the Catholics 108,152; the Lutherans, 8,620; the Methodists, 2,312; the Presbyterians, 848; Protestant Episcopalians, 3,736; all others, 3,147. Now, there are 108,000 Catholic children, about one-tenth as many as are in all the common schools of the State, educated in parochial schools, without costing this State one penny. Of these, there are 40,000 in New York city. It costs thirty dollars per head to educate a child in the common schools of New York city per annum. The Catholics educate 40,000 of them without costing the State one dollar. That is \$1,200,000 a year that the State is saved. If they had to erect buildings for these 40,000 children, the city of New York would have to build at least thirty new school-houses, and with the enormous cost on a fair estimate \$3,500,000. The annual interest on this sum is \$175,000 at five per cent interest.

There is saving, then, on interest, of \$175,000. Outside the city of New York the 68,000 children educated, at fifteen dollars per head, would cost \$1,020,000, and to provide them with school-houses would cost \$1,000,000, the annual interest of which, at five per cent, would amount to \$50,000 more; so that there is a total annual saving to the public by these parochial schools, of \$2,445,000; and Catholics ought to have credit for that. They are giving to the State of New York. They are paying their taxes for the

public schools also, and they do this for conscience sake.⁹⁰

Mr. John I. Gilbert of Malone rose to deny that the exclusion of denominational influences from the public schools would result in a state-made religion. Rather he argued, as some do today, that the State should affirm in the public schools and elsewhere a core of religious belief common to all religions:

But what is religion? Why, gentlemen, you may sweep away all these peculiar things, and the great eternal things of religion remain like the great sky above us when a conflagration has swept over a city. Now, what is religion? Why, appeal is occasionally made here, and properly to the oaths that we have taken. That oath was that we would be true to God, and true to man, within the sphere of our official duties. There was religion. The State has a religion. It believes in a God; it believes in our responsibility to him; it believes in the brotherhood of man, and the reciprocal duties of men. It believes in these things, and those are the great fundamental things of religion. Now, somebody has asked, when you get together these common things, what have you got? They say it is a State religion. I say, you have simply religion. And what is that, and what will it do? Why when we have taught the pupil obedience to God, and obedience to the Constitution and obedience to law, what becomes of anarchy? What becomes of darkness when the sun rises? Teach religion that is common, teach it to the child, but you need not teach him about baptism; you need not teach him about preordination, you need not teach him about a thousand things more or less that are peculiar to this and that and the other denomination; but teach him the

⁹⁰ 3 REVISED RECORD 778 (1894).

great fundamental things upon which all good things upon earth depend, and all our hopes beyond rest. Teach those. And so I would have our schools not godless schools; I would have the same religion enter into the school that enters into this Convention, and that is, loyalty to God and loyalty to men, the rights of men. That will leave no room for anarchy.⁹¹

This idea of a "common denominator" religion, of course, becomes untenable today if we accept the Supreme Court's 1961 definition of non-theistic beliefs as religions.⁹² In Mr. Gilbert's day, the common denominator of religion, in constitutional terms, was belief in a Creator.⁹³

Mr. Elon R. Brown of Watertown, a member of the Committee on Education, rose to explain that, in his opinion, the proposed amendment denying public aid to sectarian schools would not greatly change the existing situation in the State:

It was, after full discussion before the committee, stated very authoritatively that this proposed sectarian amendment was not intended to effect any fundamental change in the existing order of things; that there was nothing in the State of New York which it was necessary for us to overturn or to revolutionize. We found that there had been some petty innovations which the modern telegraph and newspaper had exploited throughout the State for the purpose of arousing the ancient bigotry that characterized man three or four centuries ago; and for the purpose of preventing the further spread of this feeling of bigotry, and as some excited gentleman said in the public appearances before this Convention, and

said before the committee, for the purpose of preventing a religious war, which, forsooth, we stood in danger of, the committee in its wisdom thought it wise, after great hesitation and deliberation and by a narrow majority, to make a declaration against the invasion of the common schools of the State by any religious denomination. There was not in the mind, I believe, of any man in that committee any such immediate danger, but people, with the old feeling of bigotry aroused by trifling incidents, stood knocking at the doors of this Convention, in large numbers, for the admission of a principle that was as old almost as the principle, "Thou shalt not steal."⁹⁴

The growing danger of religious division in the Convention was alluded to by Mr. Chester B. McLaughlin of Essex County:

We have arrayed upon one side feeling and upon the other side feeling, and the very spectacle which is here presented will be intensified in every part of the State. Fix this article so that now, and for all times to come, there shall be no question but that the State is engaged in just one cause, educating its children, making them good citizens. The State knows no religion; it has no religion. It seeks what? To make good citizens for the State, and nothing else. We know no Catholics; we know no Jews; we know no Methodist, and, I hope that time will never come when the State shall know one sect from another. I say to this Convention it will not do when we seek to create class or division among the citizens of this State. I hope to see this section so framed that we can go to the people of this State with an article which says that the school fund of this State shall be used for one purpose and one purpose only, and that is to educate all of the

⁹¹ 3 REVISED RECORD 784 (1894).

⁹² *Torcaso v. Watkins*, 367 U.S. 488 (1961).

⁹³ See *Davis v. Beason*, 133 U.S. 333, 342 (1890).

⁹⁴ 3 REVISED RECORD 786-87 (1894).

people, all of the citizens in the common schools of the State.⁹⁵

When Mr. Mirabeau Lamar Towns of Brooklyn then rose to argue for a continuation of state aid to denominational orphanages and similar institutions, he gave voice to another conception of religion as serving a public purpose for society:

Now, Mr. Chairman, all of us recognize that religion and that the religious denominations are the leaven which hold society together today. We all recognize that the Catholic church, that the Protestant denominations are the most efficient police force which society has today to withstand the onslaughts of atheism, anarchism and for the perpetuation of all that is good, moral and lofty in our lives. Why is it, then, that we should seek to hamper in any way those noble teachers of doctrines which hold our very fabric of society together, which are the foundation of the State, which are the foundation of all good and successful government—why should we seek to impair their efficiency by the insertion of an article which is covert, indistinct, but which, if it means anything in the world, means that children committed to their care, the children whom they foster, the children whom they seek to nurture and bring up and educate to good citizenship, shall not receive any instruction at all, if in the institutions where they abide any religious tenet, doctrine or denominational theory is taught? Mr. Chairman, what we need to-day is more religion. The different sects and denominations should get together, and the voice of the preacher should be heard proclaiming to the world that it is easier for a camel to go through the eye of a needle than that a rich man should get to heaven. That is the kind of

religion we want. We don't want the religion that comes from the voluptuous lips of well-fed ministers and priests, preaching to the rich, encouraging them in their onslaughts against society, against morality, against honesty, instead of trying to persuade them from the absorption of all the wealth and the riches of the world; we want those who go out into the fields, who preach on and up, proclaiming good, healthy, sound religious doctrine to the whole world, and we do not want anything, any religious doctrine that will curtail that spirit, that will cut it down, or that will deprive the coming generations of this world of its beneficent influences.⁹⁶

It is interesting to note that, although the procedural issues in the Convention did not primarily concern the main provision of the proposed section 4, but were rather over the proposed exceptions in favor of denominational orphanages and the like, nevertheless, there was considerable discussion of the fundamentals of the general issue of religion and the state. For example, Mr. Henry R. Durfee of Wayne County delivered an address in which he opposed any specific exception in favor of orphanages, on the ground that no judge could conceivably consider them to be interdicted by the proposed general prohibition against aid to schools, since an orphanage is obviously not a school. And in that speech, Mr. Durfee went to a basic issue:

We are here, Mr. Chairman, seeking to lay down a principle. Let us make it clear, definite, certain; let us not engraft or seek to engraft upon it any exception. We are here, standing for the protection and the defense of the common schools

⁹⁵ 3 REVISED RECORD 791 (1894).

⁹⁶ 3 REVISED RECORD 795 (1894).

of this State, the schools of the masses, as distinguished from the schools of the classes, the schools which have proved the crucible in which have been fused into one homogeneous mass the diverse elements of our citizenship; the schools which make for the safety, for the perpetuity of the State. Let us make our utterance here distinct, clear, emphatic, and by so doing we shall eliminate from all the discussions of the future in this Convention, and every succeeding Convention, any element of religious bitterness, and shall take away every occasion for controversy over matters of religious belief. For once let it be established in the fundamental law that the schools of the State are safe from invasion or attack by any denomination, and the main ground of religious dispute in connection with public questions is forever removed. Mr. Chairman and gentlemen, I trust that this Convention will recognize that in this article, at least, there is no place and no need for any exception, and that this amendment, and all amendments . . . in the first paragraph of this section, will be voted down.⁹⁷

Mr. Frederick W. Holls of Yonkers, Chairman of the Committee on Education, then rose to support the position of the Committee. Where the opponents of the cutoff of aid to sectarian schools had argued that a prohibition against such aid would violate the separation of church and state by requiring the state to pass judgment on religious matters, Mr. Holls presented the same argument in behalf of the cutoff:

Sir, the principle sought to be established by this section, as it now stands, and as I hope it will stand, because I know it will be endorsed by an overwhelming ma-

jority of the people of this State—that principle, so far as religion is concerned, is a simple one, and it is this, that any instruction given by the State must necessarily be secular; and to say that it is secular does not say that it is irreligious. It is senseless to use that argument. The State exists for one purpose; religious communities for another. One is necessary to the other, but their functions are entirely different; and the absolute proof that this principle is true, and that State instruction must be secular, is found, if we follow out the thought one step further; for then we see that, if the State can teach any religion, it must, in all honor and justice, teach all religion, and this means that it must decide what is religion and what is true religion. If the State of New York has the right, directly or indirectly, to provide religious denominational instruction for any child, it has the duty to see that even the very least of these poor children gets the whole truth, the whole revelation of God, not abating one jot or tittle, and gentlemen will see how absurd it is to ask the State of New York to decide what faith that shall be. It has been suggested that we would make the schools godless; that the persons who advocate this amendment here and who, I hope, will triumphantly carry it through this Convention and before the people, will go down to history as being the promoters of godless schools, as though that were a very terrible indictment. Sir, it would, indeed, be terrible if it were true that what we are doing is an act of hostility to true religion. But it is not. We simply establish and wish to maintain the principle of free, independent secular schools, and that is a very different thing. And that is the remark with which I close and yield the floor to my friend from New York, that secularity, in the opinion of all those who opposed this proviso, and who now ask this Convention to pass the section and the article as it stands—secularity is the

⁹⁷ 3 REVISED RECORD 797 (1894).

only principle, and, hence, the best policy for the State, for every church in the State, and necessarily for us here who hold the supreme power of State. If the church wants to go on, and I hope it will go on in its glorious career of making men better and purer and holier, the first condition is to 'render unto Caesar the things that are Caesar's.' It will not be until that is carried out to its full extreme and its full extent, as it will be by this new Constitution in the State of New York, if adopted—not until then, that the church and the people of this State will be in the true position to devoutly, humbly and freely to 'render unto God the things which are God's.'⁹⁸

Mr. Elihu Root of New York City concluded the argument for the supporters of the unqualified prohibition of aid to sectarian schools, and he finished on this note which was characteristic of the arguments on that side:

Therefore, I believe that every true American, of whatever religion, will be for this section as it stands now. It is not a question of religion, or of creed, or of party; it is a question of declaring and maintaining the great American principle of eternal separation between church and State.⁹⁹

When the entire education article came up for a third and final reading on September 15, 1894, some of the delegates addressed themselves strongly to the fundamental church-state issues involved in the education question.

Mr. Louis McKinstry of Fredonia opened the debate with a strong exposition of the peril of irreligion and attacked the

proposed educational article of the Constitution as discriminatory against religion. He said:

Mr. President, I shall vote against this educational amendment, as reported by the committee, because I am not one of those who consider the great danger menacing this nation by the union of church and State. That possibility becomes more and more remote each passing year, and the condition against which we may well feel the greater apprehension is of the time when we may have no church and no State. The forces with which civilization has to contend, even now, are not the religious organizations, but that great mass of ignorant desperate population transplanted to our shores, destitute of respect for law, and of every sentiment that even savors of religion.

I hear complaint that in some public school in this State the local authorities have seen fit to employ Sisters of Charity to teach a primary department. The proposed amendment will not stop that, for it does not forbid boards of education from employing teachers of any particular religious sect, nor proscribe their accustomed garments, and it is denied that these teachers are instilling any particular religious doctrine. But even if they should intimate to some ragged little boy that there is a life beyond, that there is a higher responsibility than forced obedience to a human teacher, that there are other faculties to be cultivated than those which master arithmetic and spelling, the sight of those devoted women in garb of black, is far more pleasing to me than the scenes which even the present generation in Paris has witnessed, of women in red, armed with incendiary torches and leading mobs imbued with the spirit which President Garfield aptly called 'The red fool fury of the Seine.'

I have comparatively few Roman Catholic constituents, and my ancestors lived in the region of old Londonderry, where it was considered an act of the

⁹⁸ 3 REVISED RECORD 802-03 (1894).

⁹⁹ 3 REVISED RECORD 805-06 (1894).

highest service to God to kill a Catholic. I have no predilections in favor of that sect, but I have lived long enough and traveled extensively enough to coincide with the conclusion of General Lew Wallace, the author of the greatest Christian romance of the age, when he says that 'Any religion is better than no religion.' Place your amendment on the solid ground of public school money exclusively for public schools, and then add your prohibition of religious teaching, and I will vote for it, because it does not discriminate unfairly but this amendment reported by the committee says to every private corporation now conducting or which may hereafter establish a school or academy in this State: If you are infidel or atheistic, if you have no religion about you, the State treasury is at your service; but if you are controlled by religious people of any sect, you shall be forever barred from receiving one dollar of public money. For such a discrimination as that I shall never vote.

Mr. President, gentlemen glibly talk of the absolute divorce of church and State. The English-speaking race has always recognized religion in the State. Would you uproot it? Then you must abolish our form of solemn oath in the halls of justice; no longer permit public officers to qualify with hands upon the holy Bible; cease the morning ministrations of clergymen upon yonder rostrum; never again recognize the priestly office in the rite of matrimony; cut from our school books the account of Washington's prayer at Valley Forge; omit the closing invocation from our National Hymn. Our Anglo-Saxon tongue speaks the chosen language of liberty. Wherever upon the face of the globe its accents are heard, there law and order and also religion are established.

Thirty-seven years ago the great historian Macaulay wrote to a friend in New York the following gloomy prediction concerning our future:

'Either some Caesar or Napoleon will

seize the reins of government with a strong hand, or your republic will be as fearfully plundered and laid waste by barbarians in the twentieth century as the Roman empire was in the fifth—with this difference: that the Huns and Vandals will have been engendered within your country by your own institutions.'

Mr. President, I trust that dire prophecy may never prove true, but I believe that the first step toward its realization will be the act of setting religious bodies against each other and filling the people with the insane idea that their great danger lies in recognizing religion in the State. With vice rampant and corruption triumphant in high places, the flood of ignorance and anarchy constantly increasing, let us welcome rather than repel every possible means of good to the human race. At least, let us not discriminate against them as this amendment proposes.¹⁰⁰

Mr. H. Austin Clark of Tioga County responded to Mr. McKinstry's attack upon the amendment. It is interesting to note that Mr. Clark's defense of the article was premised upon his belief that the article still permitted the teaching of theistic religion in public schools; therefore, he maintained, the article was not anti-religious but rather was designed merely to prevent the intrusion of inter-denominational rivalry into the public schools. It is hardly likely that Mr. Clark would have defended the article so vigorously, and perhaps unlikely that he would have even supported it, if he had foreseen the state of affairs in our day, in which the public schools are forbidden to teach even the fact of the existence of God.

¹⁰⁰ 4 REVISED RECORD 857-59 (1894).

Mr. Clark's comments included the following:

Mr. President, I do not understand this amendment as some of the other delegates seem to understand it. It has been said here upon the floor that it would prohibit the reading of the Scriptures even in the public schools of the State; it would prohibit the teaching of any religious doctrine in the public schools of the State. I must confess, in examining the language of this amendment, I do not construe it in that way. I do not believe that it means that the fact that there exists a deity should not be taught, or that the great principle of religion should not be taught, but, on the other hand, that denominationalism should not be taught in the schools of the State. It does not say anything about the great principles of religion. It means to say that Catholicism, Presbyterianism, Methodism, the doctrines of immersion, the doctrines of the different sects, should not be taught in the public schools of the State. I believe that the amendment is right; that the proposition as it stands should be adopted; that religion as a principle can be taught, not as a denominational doctrine, but as a great, broad principle that is believed by nearly all the people of the land. I hope that this article, as reported to this Convention, will be adopted, with the addition of the amendment of Mr. Foote, which I hope will also be adopted.¹⁰¹

Similar thoughts were voiced by Mr. John G. McIntyre of Potsdam who also voted for the article:

There was no agitation in our public schools about religious matters. When people get up here and say they will divorce church and State absolutely in education, I say it is an absurdity on its face. The very principles of our govern-

ment are founded on religion. There is not an educational board in the State which does not ask every applicant, who comes before it to be employed as a teacher, whether he or she is a professor of religion, and then they go on and question them, and before they get through they are apt to ascertain what church they belong to. When you say there is no such thing as religion in education, I contend that it is not so. Why, it permeates every single department of education and always will; and if the time ever comes when it does not you will find this is no longer a nation. You may talk against it, you may put into the Constitution all the laws you see fit, but it still exists, and it always will exist.¹⁰²

Mr. McIntyre went on to charge that the adoption of the proposed article would excite the very religious issues it sought to quiet and would lead, among other things, to a demand by Catholics that all religious instruction be removed from the public schools. Then, Mr. McIntyre accused the delegates of acting out of partisan motives:

I will tell you gentlemen, I do not think you really understand this. I think you have been looking too much for political favor, and not at the real interests of the people. It has been said that the people of the State of New York have come here and cried out against it. I deny it.¹⁰³

In explaining his vote against the article, Mr. William Deterling of New York City flatly asserted that its motivation was anti-Catholic and anti-Semitic:

Mr. President, according to the provisions of this proposed amendment, I believe it is aimed directly at the Catholics

¹⁰¹ 4 REVISED RECORD 861 (1894).

¹⁰² 4 REVISED RECORD 863-64 (1894).

¹⁰³ 4 REVISED RECORD 864 (1894).

and Hebrews for the purpose of preventing their seeking State aid. Although a Protestant, I am, nevertheless, desirous of being fair and just. I am of the opinion that all denominations should be treated alike, and I, therefore, vote no.¹⁰⁴

Mr. James P. Campbell of New York City, in explaining his vote against the article, complimented the Roman Catholic delegates for their self-restraint but he predicted that the article would prove to be a source of division in the state and he claimed that it was based upon groundless fears of sectarian raids upon the state treasury:

Mr. President, in explaining my vote, which will be against this section, I desire to say that I think this Convention is making a grave and serious mistake in throwing this fire brand into the political contests this coming fall. Very few know so well as I what magnificent self-restraint was exercised by the Roman Catholic members of this Convention during the discussion of this amendment, but the people of this State cannot restrain themselves. That is one reason.

Another is, that the article is based upon a pretended fear that church and State might some day be united. I say pretended fear, because I believe no man here has any real fear that any such union would ever be attempted or could be consummated. This pretended fear was attempted to be supported by statements that persistent and enormous raids were made upon the public treasury in the name of charity, but in reality to support one form of religion and to educate and support a priesthood, and that these raids were made in the interest of a so-called foreign hierarchy. But these statements have been found on investigation to be false, and were so pronounced to be by

the President of the Convention, and no man dissented from what he then said.

It comes to this, therefore, that we are now enacting a constitutional provision based upon statements of alleged facts and upon fears which are now conceded to be both groundless and false. I cannot, consistently with truth, subscribe to any such provision, and I, therefore, vote no.¹⁰⁵

Mr. Henry A. Powell of Brooklyn, in explaining his vote for the article, observed that "this Convention has not been able to rise to the dignity of settling this vexed question."¹⁰⁶

The Convention then voted, 108 to 37, to adopt the educational article as Article IX of the Constitution, including the prohibition in section 4 against public support of sectarian schools.¹⁰⁷

Developments from 1894 to 1938

In the years since the Convention of 1894, there have been very few cases directly construing the prohibition, in Article IX, Section 4, of public aid to sectarian schools.

In *Sargent v. Board of Educ.*,¹⁰⁸ the Court of Appeals held that a Roman Catholic orphan asylum was neither a "school" nor an "institution of learning" within the meaning of Article IX, Section 4. As an orphan asylum, the institution in question was held to be within another constitutional provision¹⁰⁹ permitting

¹⁰⁵ 4 REVISED RECORD 879-80 (1894).

¹⁰⁶ 4 REVISED RECORD 881 (1894).

¹⁰⁷ 4 REVISED RECORD 881 (1894).

¹⁰⁸ 177 N.Y. 317, 69 N.E. 722 (1904).

¹⁰⁹ N.Y. CONST. art. VIII, § 14 (1894); the same provision is now contained in article VIII, section 1.

¹⁰⁴ 4 REVISED RECORD 876 (1894).

cities, towns and villages to provide for the secular education of inmates of orphanages, correctional and similar institutions under private control.¹¹⁰ The New York State Education Law, incidentally, continues to provide for state aid to denominational orphan asylums¹¹¹ and denominational institutions for the deaf and blind.¹¹² The *Sargent* Court was influenced not only by the specific constitutional authorization for such aid in Article VIII but also by the unreasonableness of the argument that expensive and impractical alternate arrangements must be made to ensure the insulation of the orphans from any religious influence in the educational process:

But it is contended in behalf of the plaintiff that public moneys ought not to have been used for the education of children in an orphan asylum maintained by any church or religious organization. The plaintiff is evidently willing that the children should be educated but in some other place than the asylum. It is said that children ought to be removed from the influence of religious teaching in the asylum and especially the influence of female teachers who belong to some religious order and wear the garb of that order. It is quite clear, I think, that such objections do not rest upon any reasonable foundation. In the first place, it is perfectly obvious that these children could not receive instruction in any other place. They were under the exclusive control of the managers of the asylum. They were in a certain sense deprived of their liberty. Some of them may have been sent to the asylum after conviction

for crime, and in such cases they may, when of a certain age, be committed to such an institution by magistrates, courts and judges. (*Corbett v. St. Vincent's Industrial School*, 177 N.Y. 16). The children that were placed in the asylum otherwise, that is, by parents and guardians, were under the same discipline and control, and it is plain that they could not be discharged from such control or the discipline of the institution. In some sense it would be about the same as discharging boys from the county jail in order to permit them to attend the common schools. . . . When we look into the debates on this subject in the Constitutional convention when the provisions of the Constitution already quoted were the subject of debate it is clearly apparent that the members of that body understood that instruction in the case of orphan children detained in an asylum was neither practicable nor possible elsewhere than in the institution itself. The four teachers in question were licensed by the public authorities to teach. To license them as qualified teachers and employ them and receive the benefit of their services and then refuse to pay them upon the objection of some taxpayer would be a species of injustice unworthy of a great state.¹¹³

Article IX, Section 4, was specifically directed against aid to sectarian education and there have been some few cases in which we can measure the impact of the section where schools rather than orphanages and the like are involved. In *St. Patrick's Church Society v. Heerman*,¹¹⁴ the state supreme court held that a Catholic elementary school was en-

¹¹⁰ *Sargent v. Board of Educ.*, 177 N.Y. 317, 322, 69 N.E. 722, 723 (1904).

¹¹¹ N.Y. EDUCATION LAW § 4001.

¹¹² N.Y. EDUCATION LAW §§ 4204-07.

¹¹³ *Supra* note 110, at 325-27, 69 N.E. at 725.

¹¹⁴ 68 Misc. 487, 124 N.Y. Supp. 705 (Sup. Ct. Steuben County 1910).

titled to be supplied with water from the defendant company which had contracted with the Village of Corning to supply free water to "all schoolhouses" in the village. The court rested its opinion on the idea that plaintiffs were not seeking public moneys or property from the village, but were rather merely seeking private property, *i.e.*, water, from the defendant company which had agreed with the village to furnish the water to "all schoolhouses" free. In fact, the court noted that if plaintiffs were seeking to compel the village to perform a contract requiring the village to furnish free water to plaintiff's school, "defendant's contention would, perhaps, be correct. . . ." ¹¹⁵ The court similarly distinguished *O'Connor v. Hendrick*,¹¹⁶ where a teacher in a public school, wearing the garb of a religious order, was held not entitled to payment out of public funds.¹¹⁷

The Convention of 1915 made no change in Article IX, Section 4. Interestingly, Delegate Alfred E. Smith introduced a proposed amendment to repeal Article IX, Section 4, but the Smith proposal was referred, without debate, to the Committee on Education where it remained buried.¹¹⁸ At the time of the 1915 Convention, it was evident that public opinion

was at least not strongly in favor of, and was probably opposed to, any change in Article IX, Section 4.¹¹⁹

In *Smith v. Donahue*,¹²⁰ the court invalidated the free distribution of textbooks and ordinary school supplies by the city of Ogdensburg to parochial school pupils. Article 33-A of the Education Law authorized city boards of education:

to provide textbooks or other supplies to all the children attending the schools of such cities in which free textbooks or other supplies are lawfully provided prior to the time this act goes into effect.¹²¹

The court held that the parochial schools were not part of the educational system of the State and that they were not "schools of the city of Ogdensburg" within the meaning of the statute. Moreover, the court observed, in dictum, that if the governing statutes did permit the furnishing of school supplies to the parochial schools, "our opinion is that they would be unconstitutional."¹²² The court's reference here was to Article IX, Section 4 of the New York State Constitution, although the court also made a passing, and noncommittal, reference to the First Amendment of the United States Constitution.¹²³ Significantly, the court laid considerable stress on its rejection of the argument that the books were furnished

¹¹⁵ *Id.* at 492, 124 N.Y. Supp. at 708.

¹¹⁶ 184 N.Y. 421, 77 N.E. 612 (1906).

¹¹⁷ *St. Patrick's Church Soc'y v. Heerman*, 68 Misc. 487, 493, 124 N.Y. Supp. 705, 709 (Sup. Ct. Steuben County 1910).

¹¹⁸ 1 REVISED RECORD OF THE NEW YORK STATE CONSTITUTIONAL CONVENTION 375 (1915) [hereinafter cited as REVISED RECORD (1915)].

¹¹⁹ See CONNERS, CHURCH-STATE RELATIONSHIPS IN EDUCATION IN THE STATE OF NEW YORK 144-45 (Cath. Univ. of America, Educational Research Monographs 1951).

¹²⁰ 202 App. Div. 656, 195 N.Y. Supp. 715 (3d Dep't 1922).

¹²¹ Laws of New York, 1917, ch. 786, § 868 (4).

¹²² *Smith v. Donahue*, 202 App. Div. 656, 664, 195 N.Y. Supp. 715, 722 (3d Dep't 1922).

¹²³ *Id.* at 659, 195 N.Y. Supp. at 718.

to the pupil and not to the parochial schools:

In practice in the city of Ogdensburg the principal and a teacher of a parochial school have made requisitions for the number of books of each kind required for the school, for readers, arithmetics, spellers, geographies, English books and histories. These books have been procured by the board of education and delivered to the school; but the defendants say that books and supplies, while so procured and furnished, are furnished under the above section of the Education Law (§ 868, subd. 4) to the children attending the schools and not to the schools. Even though we accept the statute as meaning that the books and supplies are to be furnished to the pupils and not to the school, we think the act plainly comes within the prohibition of the Constitution; if not directly in aid of the parochial schools, it certainly is indirect aid. The scholars do not use textbooks and ordinary school supplies apart from their studies in the school. They want them for the sole purpose of their work there. There is no question but that the text-books and ordinary supplies are furnished direct to the public schools; there is no thought that they are furnished to the scholars as distinct from the schools; neither can there be such a thought in the case of the parochial schools.¹²⁴

It is possible to interpret the court's position here as an indication that, if the books had in fact been given directly and solely to the child, the gift would have been valid. However, it is more likely that, even had the books been given directly to the child, the *Smith* court would have invalidated the arrangement on the ground that Article IX, Section 4, prohibits the furnishing of public aid,

¹²⁴ *Id.* at 661, 195 N.Y. Supp. at 719.

"directly or indirectly" to sectarian schools. On the other hand, it is fair to assert that subsequent developments, which we shall discuss below, have rendered such a strict interpretation untenable.

In *Ford v. O'Shea*,¹²⁵ the court upheld the rental by public school authorities of classroom space from church schools, where

the curricula . . . of studies followed in the classrooms referred to in this action are identical with those followed in other public school classrooms throughout the city, and the teachers presiding over the classes are public school teachers.¹²⁶

Also, in none of the classrooms in question were there "any pictures . . . statues or other paraphernalia pertaining to or connected with any religious group, congregation or sect."¹²⁷

It is worth noting here that, in 1927, the New York Court of Appeals held that Article IX, Section 4, was not infringed by a released-time program under which public school pupils were released from school for one-half hour each week for the purpose of attending religious instruction classes in church schools.¹²⁸ The matter of released time is, of course, governed today by the *McCollum v. Board of Educ.*¹²⁹ and *Zorach v. Clauson*¹³⁰ cases which the Supreme Court of the United States decided under the first amendment and which we shall discuss

¹²⁵ 136 Misc. 921, 244 N.Y. Supp. 38 (Sup. Ct. N.Y. County 1929).

¹²⁶ *Id.* at 922-23, 244 N.Y. Supp. at 40.

¹²⁷ *Id.* at 923, 244 N.Y. Supp. at 40.

¹²⁸ *People ex rel. Lewis v. Graves*, 245 N.Y. 195, 156 N.E. 663 (1927).

¹²⁹ 333 U.S. 203 (1948).

¹³⁰ 343 U.S. 306 (1952).

later. The unanimous opinion of the Court of Appeals in *Graves* is useful, however, as a less dogmatic construction of Article IX, Section 4, by the highest court of the state only five years after the rigid opinion of the appellate division in *Smith*. The *Graves* decision overruled an earlier lower court decision on the constitutional point.¹³¹

In 1930, in *Cochran v. Louisiana State Bd. of Educ.*,¹³² the Supreme Court of the United States held that provisions of the constitution of Louisiana forbidding the giving of public aid, "directly or indirectly," in aid of any church, sect or denomination, and flatly providing that "no public funds shall be used for the support of any private or sectarian school,"¹³³ were not violated by a state appropriation for the lending of secular textbooks to children in church-related schools. The Louisiana constitutional provisions were very similar, in their phrasing and impact, to Article IX, Section 4 of the New York State Constitution. The interpretation by the Louisiana courts, sustaining the provision of the textbooks, is inconsistent with the interpretation by the New York court in *Smith*.¹³⁴ The principal issue

before the Supreme Court of the United States in the *Cochran* case was whether the Louisiana appropriation deprived the objecting citizens of their property without due process of law. The Supreme Court held that there was no violation of the due process clause and the Court's unanimous opinion, by Chief Justice Hughes, emphasized the public purpose rationale:

Viewing the statute as having the effect thus attributed to it, we can not doubt that the taxing power of the State is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded.¹³⁵

Significantly, the Supreme Court noted that it was "not of importance in relation to the Federal question" that it was "only the use of the books that is granted to the children, or, in other words, the books are lent to them."¹³⁶

It is important, in relation to *Cochran*, to append the cautionary note that, at the time of the decision, the Supreme Court had not yet adopted the view that the requirements of the first amendment were made applicable by the fourteenth amendment to the states. The Court has since adopted that view¹³⁷ and, therefore,

¹³¹ *Stein v. Brown*, 125 Misc. 692, 211 N.Y. Supp. 822 (Sup. Ct. Westchester County 1925). The tenor of the overruled *Stein* case can be seen in the court's finding there of a violation of section 4 in the printing of cards by public school authorities to be used by parents to specify the type of religious instruction they wished their children to receive. The cards cost a total of \$2.87. *Id.* at 697, 211 N.Y. Supp. at 825.

¹³² 281 U.S. 370 (1930).

¹³³ LA. CONST. art. XII, § 13 (1921).

¹³⁴ *Borden v. Louisiana State Bd. of Educ.*, 168 La. 1005, 123 So. 655 (1929); *Cochran v.*

Louisiana State Bd. of Educ., 168 La. 1030, 123 So. 664 (1929).

¹³⁵ *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370, 375 (1930).

¹³⁶ *Ibid.*

¹³⁷ See *Abington School Dist. v. Schempp*, 374 U.S. 203, 215 (1963).

the *Cochran* decision, while it is persuasive in its reasoning, would not be conclusive today in a case involving a similar factual situation.

Between 1894 and 1938 there were several amendments seriously proposed to relax the prohibitions of Article IX, Section 4, but none received enough support to be submitted to the people. Three types are of interest because of their contrasting approaches. One proposal was to legitimize affirmatively the extension of state aid to the secular activities of church-related schools. It would have amended Article IX, Section 4, to read:

[Neither the] *The* state [nor] *or* any subdivision thereof, [shall] *may* use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance of the secular education [other than for] including examination or inspection, of any school or institution of secular learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.¹³⁸

An earlier variant of this direct authorization was proposed in 1934:

[Neither the] *The* state [nor] *or* any subdivision thereof, [shall] *may* use its property or credit or any public money, [or authorize or permit either to be used,

directly or indirectly,] in aid or maintenance [other than for examination or inspection,] of any school or institution of learning wholly or in part under the control or direction of any religious denomination, [or in which any denominational tenet or doctrine is taught] *and in which children receive religious instruction.*¹³⁹

And a more detailed proposal of similar import was advanced in 1936 and 1937:

[Neither the] *The* state [nor any subdivision thereof,] shall *not* use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught; *but this action shall not preclude the legislature from authorizing and empowering any political subdivision of the state from appropriating and contributing from its public money to the maintenance, conduct, operation and upkeep of any such school or institution of learning to the extent of fifty per centum of the ascertained cost of the maintenance, conduct, operation and upkeep thereof, upon such terms and conditions as any such political subdivision may impose and require; provided, however, that in such event no appropriation or contribution of public money made by any such political subdivision to any such school shall vest or operate to vest in any such political subdivision or in any board, bureau, commission or official thereof any right of property in any such school or institution of learning or any power of supervision and regulation over its curricula or any part thereof. The legislature*

¹³⁸ 1935—S. Int. No. 503, S. Pr. No. 532, by Mr. Howard. Amended, recommended and not reported. A. Int. No. 1292, A. Pr. No. 1381, by Mr. Doyle. Not reported. 1936—S. Int. No. 128, S. Pr. No. 128, by Mr. Howard. Not reported. A. Int. No. 154, A. Pr. No. 154, by Mr. Doyle. Not reported. 1937—S. Int. No. 287, S. Pr. No. 293, by Mr. Howard. Not reported. See II REPORT OF 1938 CONSTITUTIONAL CONVENTION COMMITTEE 792.

¹³⁹ 1934—A. Int. No. 1510, A. Pr. No. 1633, by Mr. Dennen. Not reported.

*shall have power to enable appropriate legislation hereunder.*¹⁴⁰

A contrasting type of proposal would have permitted the state to reimburse localities on the basis of total school attendance, instead of only public school attendance:

Neither the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught. *The provisions of this section, however, shall not be construed to prevent the state from giving public moneys as state aid to cities and other political subdivisions for education on the basis of children in attendance in private and/or parochial schools.*¹⁴¹

A more explicit version of this approach was proposed in 1937:

§ 4. Neither the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught. *The provisions of this section,*

*however, shall not be construed to prevent the state from giving public moneys as state aid to cities and other political subdivisions for maintenance of private schools operated by religious denominations on the basis of children in attendance in such schools where the same are not operated for profit and conform to the standards of the state board of regents.*¹⁴²

A third approach would have sanctioned the introduction of religious training, and sectarian teachers, into the public schools:

[Neither the] *The state* [nor any subdivision thereof,] shall *not* use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning, wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught; *but this section shall not preclude the legislature from authorizing religious training for pupils in schools or institutions of learning, supported in whole or in part by public funds, under the direction of instructors professing the same religious faith, designated by duly constituted religious bodies. The religious training authorized shall be afforded at the times prescribed by the legislature and the instructors shall receive no compensation from public money.*¹⁴³

Judd v. Board of Education.

In 1936, the Legislature amended Section 206 of the Education Law so that it provided as follows, with changes and additions underlined herein:

¹⁴⁰ 1936—A. Int. No. 2345, A. Pr. No. 2804, by Mr. E. S. Moran. Not reported. 1937—A. Int. No. 2345, A. Pr. No. 2804, by Mr. E. S. Moran. Not reported by Rules Comm. (1938 Report, II, 793).

¹⁴¹ 1936—S. Int. No. 127, S. Pr. No. 127, by Mr. Hendel. Not reported. (1938 Report, II, 791).

¹⁴² 1937—A. Int. No. 41, A. Pr. No. 41, by Mr. Fitzpatrick. Not reported. (1938 Report, II, 792).

¹⁴³ 1937—A. Int. No. 351, A. Pr. No. 355, by Mr. McLaughlin. Not reported. (1938 Report, II, 793-94).

18. Whenever any district shall have contracted with the school authorities of any city, or other school district for the education therein of the pupils residing in such school district, or whenever in any school district children of school age shall reside so remote from the schoolhouse therein *or the school they legally attend* that they are practically deprived of school advantages during any portion of the school year, the inhabitants thereof entitled to vote are authorized to provide, by tax or otherwise, for the conveyance of any or all pupils residing therein (a) to the schools of such city, or district with which such contract shall have been made, or (b) to the school maintained in said district *and to schools other than public, situate within the district or an adjacent district or city. Whenever conveyance of pupils shall be so provided for by vote of the inhabitants, the school district and the school trustees shall provide, if need be, one or more routes so that all children of school age in said district shall equally be afforded transportation facilities.*

And the trustees [thereof] *of the district* may contract with any person, corporation or school district for such conveyance when so authorized in accordance with such rules and regulations as they may establish, *consistent with rules and regulations of the Commissioner of Education*, and for the purpose of defraying any expense incurred in carrying out the provisions of this subdivision, they may if necessary use any portion of the public money apportioned to such district. . . .¹⁴⁴

What this 1936 amendment did was to authorize the extension to parochial school pupils of transportation theretofore provided by school districts to public school

pupils only. Ultimately the church-state issue involved reached the Court of Appeals, and the Court, in *Judd v. Board of Educ.*,¹⁴⁵ ruled that the amended section 206, insofar as it authorized the use of public funds to provide transportation for pupils to and from parochial schools, was violative of Article IX, Section 4 of the State Constitution. The majority opinion in the Court of Appeals was written by Judge Rippey. Chief Judge Crane and Judges O'Brien and Loughran dissented in an opinion written by Chief Judge Crane.

In his opinion for the Court, Judge Rippey first stated that

private, denominational and sectarian schools, and schools or institutions of learning in which denominational tenets or doctrines are taught or those wholly or in part under the control or direction of any religious denomination are no part of and are not within . . . the *common school system* of the State. . . .¹⁴⁶

After reciting the early history of the common school system, the Court concluded, "thus *common school education* within the State came *exclusively under public control* and has since so remained."¹⁴⁷ Moreover, not only are sectarian schools not part of the common school system and not only are the common schools exclusively under public control, but also, as the Court noted, Article IX, Section 4, specifically forbids any use of public money "directly or indirectly" for the support of "church-related schools."

¹⁴⁴ *Judd v. Board of Educ.*, 278 N.Y. 200, 203-04, 15 N.E.2d 576, 579 (1938) (quoting N.Y. EDUCATION LAW § 206).

¹⁴⁵ 278 N.Y. 200, 15 N.E.2d 576 (1938).

¹⁴⁶ *Id.* at 205-06, 15 N.E.2d at 579.

¹⁴⁷ *Id.* at 208, 15 N.E.2d at 580.

“This section,” said the Court, “restricts the use of all public moneys or moneys raised by taxation for educational purposes exclusively to the common schools.”¹⁴⁸ The governing educational policy was summarized by the Court as meaning that

since our organization as a State we have clearly and unequivocally indicated that there must be a complete severance between denominational or sectarian schools on the one hand and the public common schools on the other.¹⁴⁹

It is interesting to note the way in which the Court majority in the *Judd* case interpreted the debates in the 1894 Convention. It will be useful to quote this extract in full from the Court’s opinion:

When the proposal to amend article IX of the Constitution was taken up in the committee of the whole (Revised Record of the Constitutional Convention, 1894, vol. 3, p. 689 *et seq.*), the report of the committee on education contained the clause that ‘this section [referring to section 4] shall not apply to schools in institutions subject to the visitation and inspection of the State Board of Charities’ (p. 739). This clause would have nullified the effect of the other provisions of section 4 as finally adopted. The clause was stricken out on the grounds, among others, that it ‘is in flagrant derogation of a sound and universal principle, that none but public schools shall receive the support of public moneys, and that the people of this State, or any section of this State, shall not be taxed for the support of education of a sectarian nature in any schools whatever.’ The arguments against the present constitutional provision, that

it was discriminatory, that it was contrary to the requirements of public welfare, and that support of religious schools was in fact given to the children rather than to the schools involved, were urged but without success, and proponents of the efforts to authorize denominational schools to receive State aid in connection with education were compelled to submit to the conclusion that it was contrary to public opinion and contrary to the theory under which the free common school system was founded.

As we have already noted, the proposed exception in favor of “schools in institutions subject to the visitation and inspection of the State Board of Charities”¹⁵⁰ was not rejected by the 1894 Convention on its merits but rather because it was thought better to incorporate that provision for institutional schools into the article relating to charities.¹⁵¹ It was apparently felt by most of the delegates that to leave the exception in Section 4 of Article IX could lead to a progressive dilution by implication of the general prohibition of that section against aid to sectarian schools. The elimination of the Charities exception from Section 4, however, does not justify an inference that the general desire to restrict public funds to public schools was so intense that the delegates actually took the extreme course of cutting off public aid to schools in denominational orphanages, reformatories and the like.

The *Judd* Court then further summarized the statutory and constitutional scheme in this way:

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ *Id.* at 209-10, 15 N.E.2d at 581.

¹⁵¹ See N.Y. CONST. art. VIII, § 14 (1894).

We furnish free common schools suitable for all children of the State regardless of social status, station in life, race, creed, color or religious faith. Any contribution directly or indirectly made in aid of the maintenance and support of any private or sectarian school out of public funds would be a violation of the concept of complete separation of Church and State in civil affairs and of the spirit and mandate of our fundamental law.¹⁵²

Then the Court discussed various arguments in favor of extending the transportation aid to pupils in parochial schools. First the Court disposed of the argument that the aid was extended to the children and not to the parochial schools:

The argument is advanced that furnishing transportation to the pupils of private or parochial schools is not in aid or support of the schools within the spirit or meaning of our organic law but, rather, is in aid of their pupils. That argument is utterly without substance. It not only ignores the spirit, purpose and intent of the constitutional provisions but, as well, their exact wording. The object of construction as applied to a written constitution is to give effect to the intent of the people in adopting it and this intent is to be found in the instrument itself unless the words or expressions are ambiguous (Cooley's Constitutional Limitations (8th Ed.) Vol. I, pp. 124-26). There is nothing ambiguous here. The wording of the mandate is broad. Aid or support to the school "directly or indirectly" is proscribed. The two words must have been used with some definite intent and purpose; otherwise why were they used at all? Aid furnished "directly" would be that furnished in a direct line, both literally and figuratively, to the school itself, unmistakably earmarked, and without circumlocution or ambiguity. Aid furnished

"indirectly" clearly embraces any contribution, to whomsoever made, circuitously, collaterally, distinguished, or otherwise not in a straight, open and direct course for the open and avowed aid of the school, that may be to the benefit of the institution or promotional of its interests and purposes. How could the people have expressed their purpose in the fundamental law in more apt, simple and all-embracing language? Free transportation of pupils induces attendance at the school. The purpose of the transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it. 'It helps build up, strengthen and make successful the schools as organizations.' (*State ex rel. Traub v. Brown*, 36 Del. 181, 187, writ of error dismissed, Feb. 15, 1938). Without pupils there could be no school. It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing of books, accommodations and other facilities are such an aid. In the instant case, \$3,350 was appropriated out of public moneys solely for the transportation of the relatively few pupils attending the specific school in question.

If the cardinal rule that written constitutions are to receive uniform and unvarying interpretation and practical construction is to be followed, in view of interpretation in analogous cases, it cannot successfully be maintained that the furnishing of transportation to the private or parochial school out of public money is not in aid or support of the school. A similar argument was advanced in *Smith v. Donahue* (202 App. Div. 656), in *State ex rel. Traub v. Brown (supra)*, and in *Williams v. Board of Trustees* (173 Ky. 708, reversing on rehearing, 172 Ky. 133) and discarded.¹⁵³

¹⁵² *Supra* note 145, at 211, 15 N.E.2d at 582.

¹⁵³ *Id.* at 211-13, 15 N.E.2d at 582.

It is significant that the Court relied on the prohibition in Section 4 of aid given "directly or indirectly" implying thereby that the provision of transportation to parochial school pupils would not amount to the giving of aid "directly" to those schools.

A most important aspect of the *Judd* decision is that it was rendered before the decision of the United States Supreme Court in *Everson v. Board of Educ.*,¹⁵⁴ which upheld, under the first amendment, a provision of public transportation to parochial school pupils. It is not idle conjecture to imagine that at least one member of the *Judd* majority could have been swayed had the extensive opinions in *Everson* been then available for consideration. Indeed, the *Judd* Court noted the scarcity of authority and indicated that it was influenced in its decision by two reported decisions, one from Wisconsin and one from Delaware:

We have found but two decisions upon the precise question involved in this case (*State ex rel. Van Straten v. Milquet*, 180 Wis. 109, and *State ex rel. Traub v. Brown, supra*), in both of which it was held that the furnishing of transportation at public expense to private or parochial school children was prohibited by the provisions of their respective Constitutions which were similar to ours. To like effect was Report of the Minnesota Attorney-General, 1920, page 300.¹⁵⁵

Judge Rippey properly observed for the majority that the United States Supreme Court decision in *Cochran v. Louisiana*

*State Bd. of Educ.*¹⁵⁶ did not involve any construction by the Supreme Court of the Louisiana Constitution, which was similar to Article IX, Section 4 of the New York Constitution. Rather, the Supreme Court in *Cochran* merely held that the Louisiana statute, providing secular textbooks at public expense for parochial school pupils was not such a taking of private property for a public purpose as would violate the due process clause of the fourteenth amendment. And, on the interpretation of the Louisiana Constitution, the *Judd* Court flatly sided with the three-man minority of the seven-man Louisiana court in the related case of *Borden v. Louisiana State Bd. of Educ.*¹⁵⁷ The three Louisiana dissenters were quoted approvingly by the *Judd* majority as follows:

To say the least, the appropriation of the public funds for the purchase of books for all the children of the State is an attempt to do indirectly that which cannot be done directly. The argument of resultant benefit to the state must and does fall before the rule of public policy established in the organic law itself that the welfare of the state can be best promoted by prohibiting appropriations from the public treasury in aid of any church, religious denomination, private charitable, or benevolent purpose, private or sectarian school.¹⁵⁸

The *Judd* Court next relied upon the absence of authority sustaining a public provision of tuition fees for pupils in parochial schools. And the Court implicitly rejected the child benefit theory in tuition cases:

¹⁵⁴ 330 U.S. 1 (1947).

¹⁵⁵ *Supra* note 145, at 213, 15 N.E.2d at 582-83.

¹⁵⁶ 281 U.S. 370 (1930).

¹⁵⁷ 168 La. 1005, 123 So. 655 (1929).

¹⁵⁸ *Supra* note 145, at 214, 15 N.E.2d at 583.

The courts of this country have been unanimous in prohibiting the use of public funds to pay, directly or indirectly, tuition fees of pupils in private or sectarian schools (*Williams v. Board of Trustees, supra*; *Otken v. Lamkin*, 56 Miss. 758; *Synod of Dakota v. State*, 2 S.D. 366; *Opinion of the Justices*, 214 Mass. 599; *People ex rel. Roman Catholic Orphan Asylum Soc. v. Board of Educ.*, 13 Barb. 400) in spite of the argument presented that tuition fees were for the benefit of pupils exclusively and not for the schools and the economic argument that it would be less expensive for the State to pay the tuition fees of these children in private schools than to provide for them in public schools.¹⁵⁹

Here again, it is questionable whether the one-man majority of the *Judd* Court would have endured if there had been then available for consideration the subsequent cases and legislation which will be discussed later in this study.

Rejecting the argument that the police power, especially as it includes a governmental capacity to protect minors, warrants the provision of bus transportation to parochial school pupils, the *Judd* Court stated this self-evident proposition:

No authority has been called to our attention nor has one been found in any jurisdiction to the effect that a statute purporting to be enacted in the exercise of the police power of the State may be held valid if repugnant to any constitutional provision or restriction.¹⁶⁰

Here, the Court appeared to beg the question. For the issue in *Judd* was, first, whether the bus transportation statute was within the police power and, second,

if it were within the police power, whether it was invalidated by the prohibition of Article IX, Section 4. It was hardly conducive to clarity for the Court to imply that the issues in the *Judd* case could be resolved merely by a restatement of the obvious rule that no legislative enactment can stand if repugnant to the Constitution. Then, in a strict interpretation, which implied a total rejection of the public purpose theory which later found higher favor in *Everson* and other cases, the opinion of Judge Rippey refused to moderate the strictures of the constitutional provision by any consideration of health or safety:

No claim, or right to transportation furnished by public funds can be asserted in the interest of the health, safety and welfare of the pupils of the private or parochial school for any such claim is moderated by the specific provision of the Constitution. . . .¹⁶¹

The three dissenting judges joined in a strong opinion written by Chief Judge Crane. The Crane opinion posed the chief question as "whether the Legislature has authorized a political subdivision of the state to use its money in aid or maintenance. . . ."¹⁶² (in the words of Article IX, Section 4) of a parochial school. If so, the legislation would be invalid and the majority opinion of Judge Rippey would be correct. If not, then the legislation would be valid.

The dissenters regarded the statute as properly directed toward the public purpose of implementing the existing laws requiring children to receive instruction

¹⁵⁹ *Id.* at 214-15, 15 N.E.2d at 583.

¹⁶⁰ *Id.* at 216, 15 N.E.2d at 584.

¹⁶¹ *Id.* at 217, 15 N.E.2d at 584.

¹⁶² *Id.* at 219, 15 N.E.2d at 585.

and recognizing their right to obtain such instruction in private schools:

Having made attendance upon instruction compulsory and having approved of attendance at certain schools other than public schools, the Legislature determined that the inhabitants of the district should have the power, under certain conditions, to provide for the transportation of the pupils to and from the schoolhouse in the district or the school which they legally attend. The object of such legislation is apparently to insure the attendance of the children at their respective schools for the requisite period of instruction and, perhaps, to safeguard the health of the children. The statute is not designed to aid or maintain the institutions themselves. Recognizing the right of the children to be sent to such schools, and enjoining upon them the duty of regular attendance, the Legislature gave the authorities power, in a proper case, to assist the children in getting to their school. The law says to the children and parents: Having chosen a proper school, you must attend regularly. The school district has been given the power to add to that: Where necessary, we shall assist you in getting there.¹⁶³

The dissenters regarded the transportation aid as given to the pupils and not to the parochial schools. And Chief Judge Crane emphasized that any resultant assistance to the schools was conjectural and slight at most:

In most cases those in parental relation choose the school at the beginning of the school year, and the arrangements for transportation cannot be initiated until the attendance figures show whether and to what extent such facilities may be needed. There is no benefit to the schools except, perhaps, as one may conceive an

accidental benefit in the sense that some parents might place their children in religious schools when they anticipate transportation provision, though they might hesitate to do so if the children were compelled to make their own way.¹⁶⁴

In concluding his opinion, Judge Crane obliquely implied that the majority opinion in *Judd* violated the intent of Article IX, Section 4, by placing an unfair and discriminatory burden upon church-related schools:

The constitutional provision is not designed to discourage or thwart the school where religious instruction is imparted. 'Denominational religion is merely put in its proper place outside of public aid or support.' (*People ex rel. Lewis v. Graves*, 245 N.Y. 195, 198).¹⁶⁵

The Convention of 1938.

The Convention of 1938 acted promptly to reverse the *Judd* decision. Although the record of debate on this question is sparse, we do have a clear indication of the Convention's attitude. On July 27, 1938, the Convention voted, 135 to 9, to amend Section 4 of Article IX by adding at the end, "but the legislature may provide for the transportation of children to and from any school or institution of learning."¹⁶⁶ Earlier, Mr. William J. Wallin, Chairman of the Committee on Education, read into the record this statement on behalf of the Committee:

The Court of Appeals decided in the case of *Judd v. Board of Education of*

¹⁶³ *Id.* at 220-21, 15 N.E.2d at 586.

¹⁶⁴ *Id.* at 221, 15 N.E.2d at 586.

¹⁶⁵ *Id.* at 221, 15 N.E.2d at 586, quoting from *People ex rel. Lewis v. Graves*, 245 N.Y. 195, 198, 156 N.E. 663, 664 (1927).

¹⁶⁶ 2 REVISED RECORD 1598 (1938).

Hempstead, reported in 278 N.Y. 200, that the provisions of Section 4, Article IX of the Constitution, prohibit the use of public funds to pay for the transportation of pupils to and from private schools or schools wholly or in part under the direction of any denomination or in which denominational tenets or doctrines are taught.

The proposal now offered continued in the Constitution the prohibition against the use by the State or any subdivision thereof, of its property, credit or any public money, directly or indirectly in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but expressly excepts from such prohibition the use of public funds to pay for the transportation of children to and from any school or institution of learning.

This meets the ruling of the Court of Appeals in the Judd case and allows the use of public money therein held void.

This is accomplished by empowering the Legislature to provide for such use of public funds, in language which the committee feels is apt, and which our bill drafting bureau also advises.

The Legislature twice passed a bill to effect the results sought by this proposal. The second of such bills was enacted into law and was the subject of the ruling of the Court of Appeals in the Judd case. Your committee feels that the proposal should be supported.¹⁶⁷

And Mr. Wallin is quoted elsewhere as saying:

To meet a decision of our Court of Appeals, that an act of the Legislature permitting transportation of children at public

expense to a denominational school violated the constitution, and to give effect to *an almost unanimous sentiment in the convention* that the aid was indirect and small and partook of the nature of a social welfare measure, it was agreed to recommend an amendment to the existing section reading 'but the Legislature may provide for the transportation of children to and from any school or institution of learning.'¹⁶⁸

When the amendment was voted on by the Convention, Mr. Irwin Steingut offered this explanation of his vote in favor of it. When Mr. Steingut's name was called he said:

Mr. President, I would ask to be excused from voting and briefly state my reasons. In 1936, Mr. President, the Legislature of that year passed a bill to carry out the intent of this proposal. Unfortunately, because of the constitutional prohibition, the Court of Appeals was compelled to hold that it was contrary to the Constitution of the State of New York.

The President: "With a dissent."

Mr. Steingut:

However, there was a Court of Appeals decision. That decision, I understand, was handed down on May 24th. Immediately thereafter, on May 25th, I introduced a proposal to carry out that which we are doing this morning, except that that proposal went further and calls for health service. I understand that that portion of my bill has been introduced by the Committee on Welfare and will be offered on this floor at a subsequent date. I am happy in the thought that the will of the Legislature of 1936, together with

¹⁶⁷ 2 REVISED RECORD 1055-56 (1938).

¹⁶⁸ CONNORS, CHURCH-STATE RELATIONSHIPS IN EDUCATION IN THE STATE OF NEW YORK 156-57 (Cath. Univ. of America, Educational Research Monographs 1951). (Emphasis added.)

the signature of the Governor of that year, to carry out the purpose of this proposal, will now place the Legislature of 1939 in a position to carry out that which we intended to do in 1936.

I vote Aye, Mr. President.¹⁶⁹

The proposal which Mr. Steingut introduced on May 25th would have added a new Section 6-a to the Bill of Rights in Article I as follows:

All children of this state without regard to race, creed, color or the school they attend shall have equal rights to all health and welfare services, transportation and secular text books provided with public funds. The state or a subdivision thereof providing any such services and benefits shall extend them equally to all children. Nothing in this constitution shall prevent the carrying out of the provisions of this section by the State or any subdivision thereof.¹⁷⁰

When Mr. Steingut introduced this measure it was referred to the Committee on Education.¹⁷¹ However, nothing further came of this proposal, which would have forbidden the exclusion of parochial school children from health and welfare services provided to children at both the state and local levels. Mr. Steingut's reference to the Committee on Welfare apparently related to an amendment,¹⁷² introduced by the Committee on Social Welfare, which was adopted by the Convention. This proposal of the Committee

on Social Welfare amended the renumbered Section 1 of Article VIII to provide:

Subject to the limitations on indebtedness and taxation applying to any county, city or town, nothing in this constitution contained shall prevent a county, city or town from making such provision for the aid, care and support of the needy as may be authorized by law, nor prevent any such county, city or town from providing for the care, support, maintenance and secular education of inmates of orphan asylums, homes for dependent children or correctional institutions and of children placed in family homes by authorized agencies, whether under public or private control, *or from providing health and welfare services for all children.* (Emphasis added.)

This amended Section 1 of Article VIII permitted, but did not require, the extension of health and welfare services to all children at the local level. No corresponding provision had been in the Constitution theretofore. When the Committee on Social Welfare in the 1938 Convention recommended this amendment, which ultimately was incorporated in Article VIII, Section 1, it said:

In substance the Committee on Social Welfare recommends to the Convention and urges that the revised Constitution provide for the following basic principles:

5. That the health and welfare of the child during the formative period of this school age shall be promoted by the State irrespective of the school he attends.¹⁷³

In the debates on this proposal there was no discussion of the provision authorizing health and welfare services for parochial school children. Mr. Steingut made

¹⁶⁹ 2 REVISED RECORD 1598 (1938).

¹⁷⁰ 2 Proposed Amendments, N.Y. Constitutional Convention (1938), Int. No. 505, Pr. No. 532. [hereinafter cited as Proposed Amendments (1938)].

¹⁷¹ 1 REVISED RECORD 242 (1938).

¹⁷² 2 Proposed Amendments (1938), Int. No. 687, Pr. No. 797.

¹⁷³ 2 REVISED RECORD 1083 (1938).

no recorded comments on the proposal and he voted for it when it was adopted by a vote of 146 to 2.¹⁷⁴

A similar provision¹⁷⁵ was introduced by the Committee on Social Welfare to authorize and not require the provision by the state legislature of "health and welfare services for all children." This proposal was ultimately adopted and inserted the following language in Article VII, Section 8:

Subject to the limitations on indebtedness and taxation, nothing in this constitution contained shall prevent the legislature from providing for the aid, care and support of the needy directly or through subdivisions of the state; or for the protection by insurance or otherwise, against the hazards of unemployment, sickness and old age; or for the education and support of the blind, the deaf, the dumb, the physically handicapped and juvenile delinquents as it may deem proper; or for health and welfare services for all children, either directly or through subdivisions of the state, including school districts; or for the aid, care and support of neglected and dependent children and of the needy sick, through agencies and institutions authorized by the state board of social welfare or other state department having the power of inspection thereof, by payments made on a per capita basis directly or through the subdivisions of the state; or for the increase in the amount of pension of any member of a retirement system of the state, or of a subdivision of the state. The enumeration of legislative powers in this paragraph shall not be taken

to diminish any power of the legislature hitherto existing.

This proposal was included in the report of the Committee on Social Welfare, mentioned above, in which the Committee urged that the Constitution follow the principle,

that the health and welfare of the child during the formative period of his school age shall be promoted by the State irrespective of the school he attends.¹⁷⁶

The amended Section 8 of Article VII was ultimately adopted by a vote of 108 to 42.¹⁷⁷ There was extended debate on various aspects of the matter as it related to health insurance, but there is no recorded debate in the Convention on the religious issue involved in extending health and welfare services to all children.

It seems clear that it was the intention of the Committee and of the Convention that health and welfare services at both the state and local levels could be extended to children attending church-related schools, regardless of the restriction in Article XI, Section 3, on other types of aid to those children and to their schools. Both Article VII, Section 8, which deals with state powers, and Article VIII, Section 1, which deals with local powers, provide in broad language that "nothing in this Constitution contained" shall prevent the extension of the health and welfare services to all children. This evidently was intended to mean that not even the stringent prohibitions of Article XI, Section 3, will prevent the extension of such health and welfare services to all

¹⁷⁴ 4 REVISED RECORD 3139 (1938).

¹⁷⁵ 2 Proposed Amendments (1938), Int. No. 686, Pr. No. 796.

¹⁷⁶ 2 REVISED RECORD 1083 (1938).

¹⁷⁷ 4 REVISED RECORD 3187 (1938).

children. If the Convention intended oppositely to provide that Article XI, Section 3 was not overridden by Article VII, Section 8 and Article VIII, Section 1, the Convention should have said in those sections, "nothing in this section contained" shall prevent the extension of the health and welfare services. If the Convention had so provided and if Article XI, Section 3 were, therefore, paramount, then Article VII, Section 8 and Article VIII, Section 1 could be argued not to authorize the provision of health and welfare services to children attending church-related schools. All that those sections would then authorize, it could be argued, would be the extension of health and welfare services to children attending public schools or non-church-related private schools.

The fact, however, is that the Convention used in those two sections the broad language to provide that "nothing in this Constitution contained" shall prevent the extension of health and welfare services to all children. The intention is quite clear that even Article XI, Section 3 is overridden by this authorization. Moreover, a revealing episode in the Convention occurred when delegate William J. O'Shea, Jr., moved successfully to restore this broad language to the amendment which became Article VIII, Section 8:

The Secretary: . . . Strike out the new matter . . . reading . . . 'This section shall not, however, and insert . . . "subject to the limitations on indebtedness and taxation, nothing in this Constitution contained shall.'

Mr. O'Shea: Mr. Chairman, the purpose of this amendment is to undo what was accidentally done by Mr. Moffat when he sought to include, properly, a reservation of this section to the consti-

tutional provisions on indebtedness and taxation, but unintentionally the amendment offered this afternoon overruled the decision in *Sargent v. The City of Rochester* and the present practice of the State, and the amendment is designed to cure that error of this afternoon. The amendment has been drafted by Mr. Moffat and is satisfactory to Mr. Moffat, Mr. Wallin and Mr. Corsi.

The Chairman: The question occurs upon the adoption of the amendment as offered by Mr. O'Shea. All those in favor signify by saying Aye; contrary, No. The Amendment has been adopted.¹⁷⁸

Mr. O'Shea was referring to the case of *Sargent v. Board of Educ.*,¹⁷⁹ in which the Court of Appeals held that the provision of secular education to inmates of a Roman Catholic orphanage did not violate the section now numbered Article XI, Section 3, because the orphanage was neither a school nor an institution of learning within the meaning of that section. Having found that the payment did not violate that provision, the court went on to find that it was otherwise authorized by Section 14 of Article VIII of the Constitution of 1894, which permitted the use of public money for the secular education of inmates of church-related orphanages. Mr. O'Shea apparently felt that the omission from Article VII, Section 8, of the broad language, "nothing in this Constitution contained," could jeopardize the basic holding of *Sargent* that the aid given in that case does not violate Article XI, Section 3. The adoption by the Convention of the O'Shea amendment is, at least in this respect, an indication that

¹⁷⁸ 3 REVISED RECORD 2200 (1938).

¹⁷⁹ 177 N.Y. 317, 69 N.E. 722 (1904).

the Convention intended the words, "nothing in this Constitution contained," to mean what they say, that is, that no provision of the Constitution, including Article XI, Section 3, would prevent the extension of health and welfare services to "all children" including those attending church-related schools.

Unfortunately, the New York State Attorney General ruled in 1943 that public funds cannot be granted for a non-educational child care project operated in a denominational school.¹⁸⁰ The premise of the Attorney General's brief opinion was that Article VII, Section 8, is subject to the limitations of Article XI, Section 3:

In arriving at my conclusions, I have also had in mind Article VII, Section 8 of the Constitution. There is no question as to the State's right to provide funds for health and welfare services for all children, but when those funds so granted are to be used in a manner 'directly or indirectly, in aid or maintenance . . . of any school or institution of learning wholly or in part under the control or direction of any religious denomination . . .' then that grant would be in violation of the Constitution.

In my opinion there is no prohibition against the granting of funds for child care aid in conformity with Chapter 196 of the Laws of 1943, to any organization, public or private, social or charitable, *providing* the child care project is not conducted or maintained in the same structure, building or edifice as any school or institution of learning wholly or in part under the control or direction of any religious denomination.¹⁸¹

In a subsequent opinion, five days later, the Attorney General invalidated, on the same grounds, the use of public funds for a nursery school conducted in a church-related community center:

In my opinion of May 12, 1943, I stated that the mere fact that a building is owned by a religious corporation does not prevent its use by public agencies or non-sectarian private agencies for non-educational projects; and that the use of a portion of a building for a Sunday School would not prevent a public agency or private social agency from conducting a child care project therein. My opinion, however, was predicated on the fact that the purpose of the child care program was to provide care and not instruction and that the program as stated in that Council's original inquiry, was not an educational one. The statement concerning the Church of All Nations refers to a 'nursery school' which, I assume, must have educational features.

In my opinion, a nursery school comes within the terms of my May 12th opinion, that a child care project can not be maintained in the building of a school or institution of learning conducted by religious agencies.¹⁸²

This view, that the restriction of Article XI, Section 3, against aid to church-related schools qualifies the authorizations of health and welfare services for all children, was adopted by the Supreme Court of Nassau County in 1963 in a case in which the court upheld the provision at public expense of home teaching to a parochial school student who was

¹⁸⁰ 1943 ATT'Y GEN. ANN. REP. 118.

¹⁸¹ 1943 ATT'Y GEN. ANN. REP. 118, 119.

¹⁸² 1943 ATT'Y GEN. ANN. REP. 118, 119-20.

confined to bed for several months with a rheumatic heart condition.¹⁸³ The court first held that Section 1709, subdivision 24, of the Education Law, under which the tutoring was provided, was authorized by Article VII, Section 8 of the Constitution. But then the court held that subdivision 24 must be measured against Article XI, Section 3, which, the court held, qualifies the authorization of Article VII, Section 8. On the merits, the court held that subdivision 24 did not violate the terms of Article XI, Section 3. It will be useful to quote here the passage in which the *Scales* court rejected the argument of the petitioner, the father of the child, that Article VII, Section 8 is not subject to the restrictions of Article XI, Section 3:

It would appear to be petitioner's view, if the Court does not mistake the implications of the arguments in its memorandum of law, that the portion of Section 8 of Article VII, of the New York Constitution which declares that 'nothing in this constitution contained shall prevent the legislature from providing for . . . the education . . . of . . . the physically handicapped' relieves subdivision 24 from the restrictive effect of any constitutional limitation including the limitation on direct and indirect aid to denominational schools in Section 4 of Article XI. The Court entertains serious reservations as to the soundness of this view. This provision in the second paragraph of Section 8, as the Court interprets its language, seems to have been designed to legitimize public expenditures for education of the physically handicapped as against con-

stitutional restrictions, like those in the first paragraph of Section 8, Article VII, forbidding the use of public money for private purposes. It does not seem by its language to have reference to a constitutional provision which, like Section 4 of Article XI, deals with prohibitions on aid to denominational schools and does not, on its face, prohibit public aid to the physically handicapped. 1943 Opinion Attorney General 119 seems to take a similar view of the relationship between Section 8 of Article VII, and Section 4 of Article XI. Thus the Court must reach the question of whether or not the application of subdivision 24 urged by the petitioner infringes Section 4 of Article XI, and must determine whether home teaching of petitioner's daughter is directly or indirectly in aid of or maintenance of the parochial school which she had been attending up to the time of her illness and which, according to petitioner's counsel on oral argument, she will attend again when she is well. Patently the furnishing of home teaching to Kathleen Scales is not '*directly*' in aid or maintenance of her parochial school and the definition of direct aid enunciated in *Judd v. Board of Educ.* (278 N.Y. 200, *supra*), corroborates this view. But does it constitute *indirect* aid to that school? The Court thinks not. The benefits of home teaching will inure solely to the pupil, petitioner's daughter, and it appears that these benefits may be physical as well as mental. It is difficult to conceive how the parochial school will obtain any real advantage from it. The fact that home teaching will enable petitioner's daughter to retain her level of achievement and earn promotion to the next higher grade in the normal course would seem to be no financial aid to the parochial school.¹⁸⁴

¹⁸³ *Scales v. Board of Educ.*, 41 Misc. 2d 391, 245 N.Y.S.2d 449 (Sup. Ct. 1963).

¹⁸⁴ *Id.* at 399, 245 N.Y.S.2d at 454.

It would seem fair to say that the construction adopted by the Attorney General in 1943 and by the *Scales* court in 1963 is not in accord with the intention of the 1938 Convention. It would also seem reasonable to suggest that the Convention to be convened in 1967 ought to rectify this apparent misconception.

It is interesting in passing to note some of the other proposals which were introduced in the Convention of 1938 but were not acted upon. There were several amendments introduced to legitimize the provision of bus transportation for parochial school children,¹⁸⁵ in addition to the one finally adopted by the Convention.¹⁸⁶ Another proposal, introduced by Mr. Poletti, would have allowed "the furnishing of transportation, health and welfare services and secular textbooks to pupils or students of denominational schools or institutions."¹⁸⁷ Another approach, embodied in an amendment introduced by Mr. Hefernan, would have permitted aid to such schools by local governments by adding to section 4 a proviso that:

but this section shall not preclude the legislature from authorizing and empowering any political subdivision of the state from appropriating and contributing from its public money to the maintenance, conduct, operation and upkeep of any such school or institution of learning to the extent of fifty per centum of the as-

certained cost of maintenance, conduct, operation and upkeep thereof, upon such terms and conditions as any such political subdivision may impose and require; provided, however, that in such event no appropriation or contribution of public money made by any such political subdivision to any such school shall vest or operate to vest in any such political subdivision or in any board, bureau, commission or official thereof any right of property in any such school or institution of learning or any power of supervision and regulation over its curricula or any part thereof. The legislature shall have power to enact appropriate legislation hereunder.¹⁸⁸

Another proposal, introduced by Mr. Murray, would have permitted religious instruction in the public schools by adding a new Section 5 to Article 9:

§ 5 Religious Instruction. Nothing in this constitution shall prevent the legislature from permitting religious instruction, under the direction of a duly constituted religious body, for pupils in the free common schools by instructors of the same religious faith as the pupils instructed. The religious instruction so permitted shall be given to a child only with parental consent and at the times prescribed by the legislature; but no compensation shall be paid from public moneys for such instruction.¹⁸⁹

It may be of interest today that it was also proposed that any school receiving state aid or enjoying exemptions from property taxes be forbidden to "deny the use of its facilities, or refuse admission, to any person otherwise qualified, by

¹⁸⁵ 2 Proposed Amendments (1938), Int. No. 656, Pr. No. 723, by Report from Comm. on Educ.

¹⁸⁶ See 2 Proposed Amendments (1938), Int. No. 551, Pr. No. 579, by Mr. Poletti; Int. No. 628, Pr. No. 656, by Mr. Osborne.

¹⁸⁷ 2 Proposed Amendments (1938), Int. No. 620, Pr. No. 648.

¹⁸⁸ 1 Proposed Amendments (1938), Int. No. 169, Pr. No. 174.

¹⁸⁹ 2 Proposed Amendments (1938), Int. No. 639, Pr. No. 667.

reason of his race, color, religion or political belief.”¹⁹⁰

The 1938 Convention, in sharp contrast to that of 1894, was marked by a hospitality toward church-related schools and toward all religions in general. Although the subject of taxation of religious enterprises is a subject of another study, it is worth mentioning here that the 1938 Convention formalized the long-standing policy of exempting religious properties from taxation by adding the following provision as Article XVI, Section 1:

The power of taxation shall never be surrendered, suspended or contracted away, except as to securities issued for public purposes pursuant to law. Any laws which delegate the taxing power shall specify the types of taxes which may be imposed thereunder and provide for their review.

Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit.

The New York State Constitutional Convention Committee recommended that the 1938 Convention continue this policy with a strong statement recognizing the public benefit derived from religious enterprises:

¹⁹⁰ 1 Proposed Amendments (1938), Int. No. 312, Pr. No. 331, by Mr. Hooper. See also 2 Proposed Amendments (1938), Int. No. 597, Pr. No. 625, by Mr. Halpern; 1 Proposed Amendments (1938), Int. No. 49, Pr. No. 49, by Mr. Gootrad.

Exemption of Religious Property.

Real property belonging to a corporation or association organized exclusively for religious, bible, tract, or missionary purposes, or for the moral or mental improvement of men or women, as stated, and used exclusively in carrying out thereupon these purposes, is exempt from taxation. The theory underlying all these exemptions, says the New York State Commission for the Revision of the Tax Laws, is that of desirable public purpose. In early colonial days when the church and the state were closely bound together, the church was granted exemption as a matter of course. It was the duty of the church in those days to relieve the state of much of its charitable burden and to assure public order by its teachings of morality and personal conduct. Here then was an arm of government considered by many to be as important as some of the other administrative agencies more generally connected with the public authority, and, as such, it was granted all of the privileges and immunities commonly granted these bodies.

The adoption of the Federal and State Constitutions guarantying religious freedom and giving formal assurance of separation between the Church and the State in the United States and every state therein has been made the basis of argument that all historical ground for the exemption from taxation of religious institutions was swept away by these constitutional provisions. But the exemption appears to rest on broader grounds. There was no alteration in the practice following the adoption of these constitutions. The need for the moral teaching and charitable efforts of the church was still felt. The old practice of exemption was so entirely in accord with public sentiment that it universally prevailed. The government thereafter continued to aid

the work of the church by means of tax exemption, and the church, through its teachings of morality and personal conduct, has contributed and contributes to public order and the observance of the law. It is not necessary to defend the exemption of its property upon its appeal to public sentiment. The chief concern of the State is public order.

To these basic reasons for the continuance of the policy of exempting religious properties from taxation are sometimes added the reasons that (1) churches and the surrounding open spaces belonging to them add beauty and dignity to a neighborhood, promote better utilization of the surrounding land and increase the value of the adjoining properties, thus reducing the tax rates of small property owners in the other parts of the locality; that (2) the church buildings cannot be used for any other purposes than those carried on in them by the church itself and have, therefore, little, if any commercial value; and that (3) the churches are generally poor and would be compelled to close their doors and discontinue their worthy services to their local communities, if they were subjected to taxation. The consequent losses to the communities would be immeasurable.

The total volume of exempt religious property in the State, exclusive of that classified under the title of 'moral and mental improvements' in 1936, was \$564,078,000, or approximately 37.5% of all private exempt realty. The distribution of this religious property as between different classes was as follows:

Buildings and grounds used as places for religious worship	\$553,654,000
Property of religious corporations occupied by officiating clergy- men	8,060,380

Property owned by
clergymen 2,363,930.¹⁹¹

The new Section 1 of Article XVI formalized the tax exemption of property used for religious, education or charitable purposes and it aroused no recorded controversy on that score in the 1938 Convention. There seemed to be general agreement with the observation of delegate Martin Saxe that the granting of such tax exemptions

has been the policy of the State because these religious and educational and charitable institutions perform a social function which otherwise might have to be taken care of by the State.¹⁹²

At the very least, it can be said that the Convention of 1938 was fairly hospitable toward religion and its actions reflected the growth of a more equitable public climate of accommodation in religious matters. The Convention of 1967 ought to reflect the continued development of that climate over the past three decades.

The Aid Prohibition in the Content of Major Relevant Judicial Decisions

The prohibition against aid which was inserted in Article 9, Section 4 of the 1894 Constitution was renumbered Article XI, Section 4 by the Convention of 1938. Subsequently, it was renumbered by vote of the people on November 6, 1962, as Article XI, Section 3. This Blaine Amendment reads as follows:

Neither the state nor any subdivision thereof shall use its property or credit or

¹⁹¹ 10 REPORT OF THE NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE 212-13 (1938).

¹⁹² 2 REVISED RECORD 1109 (1938).

any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning.

Before examining certain alternatives to this aid prohibition, it will be useful to survey the major judicial trends, before and after 1938, which cast doubt upon the desirability of retaining that prohibition as a part of the fundamental law of the State.

There are two basic constitutional provisions which must be considered here. One is the First Amendment of the United States Constitution, which provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." This amendment has been held to be "wholly applicable to the states," rendering them "as incompetent as Congress" to enact the forbidden types of legislation.¹⁹³ The other basic constitutional provision is Article XI, Section 3 of the New York State Constitution.

Also, Article VII, Section 8 of the New York State Constitution prohibits the use of state money in aid of private undertakings, but specifically exempts from that prohibition the state educational funds:

The money of the state shall not be given or loaned to or in aid of any private

corporation or association, or private undertaking; nor shall the credit of the state be given or loaned to or in aid of any individual, or public or private corporation or association or private undertaking, but the foregoing provisions shall not apply to any fund or property now held or which may hereafter be held by the state for educational purposes.

Another part of Article VII, Section 8, specifically permits state aid to private orphanages and other health and welfare institutions as well as to private schools. However, as far as schools are concerned, it is evident that Article XI, Section 3, singles out church-related schools as the only type of private schools which may not be aided by the State. On the local level, Section 1 of Article VIII forbids a city, town, village or school district to make a gift or loan in aid of "any individual, or private corporation or association, or private undertaking. . . ." This section, however, permits local aid to the support and education of inmates of private orphanages, correctional institutions and the like and also allows the provision of "health and welfare services for all children." Therefore, the only types of private schools which may be aided by local governments are those which are for the inmates of such private institutions as reformatories and orphanages. And, of course, under Article XI, Section 3, the legislature may provide for the furnishing of transportation by the state or local governments for children to and from any school, whether public, parochial or non-parochial private.

With reference to the First Amendment to the United States Constitution, the decisions of the Supreme Court of the United States appear to recognize a lim-

¹⁹³ *Abington School Dist. v. Schempp*, 374 U.S. 203, 215 (1963).

ited power in Congress or a state legislature to accomplish a public purpose through support of at least some non-sectarian activities of church-related schools. In 1899, in *Bradfield v. Roberts*,¹⁹⁴ the Supreme Court upheld a Congressional appropriation to erect a hospital building for an order of Roman Catholic nuns. The Court thus approved a direct appropriation, for the performance of the public function of caring for the sick poor, to an institution conducted under the auspices of a church which exercised, in the Court's phrase, "perhaps controlling influence" over it.

In 1930 in *Cochran v. Louisiana State Bd. of Educ.*,¹⁹⁵ the Court held it constitutional for Louisiana to provide secular textbooks for parochial school children. The decision indicates that the teaching of secular subjects in parochial schools is the performance of a public function and that it may, therefore, be governmentally aided. However, as we discussed above, the *Cochran* decision antedated the total application to the states, through the fourteenth amendment, of the requirements of the first amendment. The *Cochran* ruling, therefore, is persuasive in its reasoning but hardly conclusive on the first amendment question today.

In *Everson v. Board of Educ.*,¹⁹⁶ the Court held that a New Jersey statute providing for reimbursement of bus transportation costs by the state to parents of children attending parochial schools was constitutional. The reimbursement unde-

nably made it easier for the parents to send their children to the church-related schools and, therefore, it conferred a definite though unmeasurable benefit upon the religious institutions. The actual holding, then, reinforces the rule of *Bradfield* and *Cochran* that a financial benefit may constitutionally be conferred upon a religious body incidentally to the achievement of a public purpose. Mr. Justice Black, however, speaking for the Court, delivered unfortunately sweeping language that was not necessary to the decision of the case. He said in one place:

The 'establishment of religion' clause of the first amendment means at least this: 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.¹⁹⁷

Unhappily, another passage of the Black opinion in *Everson* is less frequently quoted:

On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or the lack of it*, from receiving the benefits of public welfare legislation.¹⁹⁸

This principle is compelling in its fairness and it could serve to validate certain forms of state aid to parochial schools or to parochial school pupils. It is significant that the Supreme Court reaf-

¹⁹⁴ 175 U.S. 291 (1899).

¹⁹⁵ 281 U.S. 370 (1930).

¹⁹⁶ 330 U.S. 1 (1947).

¹⁹⁷ *Id.* at 15. (Emphasis added.)

¹⁹⁸ *Id.* at 16.

firmed this principle, and quoted this very language from the *Everson* case, in a decision it rendered on the same day as the 1963 school prayer decision. The case was *Sherbert v. Verner*,¹⁹⁹ in which a Seventh Day Adventist sought unemployment compensation under the South Carolina law. Pursuant to her faith, however, she refused to accept any job which would require her work on Saturdays. The state officials found that this was a failure "without good cause . . . to accept available suitable work,"²⁰⁰ and, therefore, that she was ineligible for benefits. The Supreme Court, in an opinion by Mr. Justice Brennan, held that this was an invalid infringement upon the petitioner's free exercise of religion, in that the state denied her the benefits of public welfare legislation because she followed a dictate of her faith. It could readily follow that parochial school children could not be denied inclusion in public educational assistance programs because their faith impelled them to attend religious schools. Thus, it could be argued not only that the inclusion of such pupils in such a program would be constitutional, but also that their exclusion would violate their free exercise of religion.

The extension to parochial schools and their pupils of various public aids to the teaching of secular subjects could confer an incidental benefit upon the religious schools attended by the benefited pupils. This, however, would not of itself render that extension invalid under the United States Constitution. This conclusion is

reinforced by the decisions in which the Supreme Court in 1961 upheld various Sunday closing laws, although they conferred a benefit upon churches by making worshippers more readily available on Sundays, because the laws were "temporal statutes" with a valid secular public purpose.²⁰¹

If we apply the public purpose criterion of *Bradfield* (1899), *Cochran* (1930), *Everson* (1947) and *McGowan* (1961), we can find justification for various governmental aids to parochial schools and their pupils. One case in which the Supreme Court sought to create a climate of hospitality between government and religion was *Zorach v. Clauson*,²⁰² the 1952 case which upheld the New York released time program. Four years earlier, in *McCullum v. Board of Educ.*,²⁰³ the Court had nullified an Illinois released time plan where the religious instruction of the students was held on public school property. In the New York plan approved in *Zorach*, the instruction was held off the public school premises, but the favorable decision may also have been based upon the absence of the compulsion which the Court found inherent in the *McCullum* situation. More importantly, Mr. Justice Douglas, for the Court in *Zorach*, sanctioned at least some forms of government cooperation with churches and religion. Then in 1963 the Court attempted to define the requirements of the public purpose doctrine:

¹⁹⁹ 374 U.S. 398 (1963).

²⁰⁰ *Id.* at 401.

²⁰¹ *McGowan v. Maryland*, 366 U.S. 420 (1961).

²⁰² 343 U.S. 306 (1952).

²⁰³ 333 U.S. 203 (1948).

The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.²⁰⁴

The Supreme Court in this quotation did not really articulate a new criterion but rather gave to the public purpose test a new formulation, the limits of which have not yet been marked by the courts. One recent decision, however, is very important as an indicator of a possible future course of decision on this point. On June 2, 1966, the Court of Appeals of Maryland, the highest court of that state, ruled unconstitutional, in a four-to-three decision, grants by the state legislature to three church-related colleges.²⁰⁵ The court upheld, however, a similar grant to a fourth college.

The Maryland court in this decision, described herein as the *Horace Mann* case, ruled that the purpose of a legislative grant could be demonstrated from the effect of the grant. The court also bore down heavily on the need for an evaluation of the circumstances of each particular case. And the court gave its approval, again in reliance on the *Schempp* decision, to the further test that, if a statute furthers both secular and religious ends, it may be invalid if the state could

reasonably have attained the secular end by means which do not further the promotion of religion:

A state cannot pass a law to aid one religion or all religions, but state action to promote the general welfare of society, apart from any religious considerations is valid, even though religious interests may be indirectly benefited. If the primary purpose of the state action is to promote religion, that action is in violation of the Amendment, but if a statute furthers both secular and religious ends, an examination of the means used is necessary to determine whether the state could reasonably have attained the secular end by means which do not further the promotion of religion.²⁰⁶

The Maryland court in the *Horace Mann* case distinguished the direct grants involved there from the bus transportation involved in the *Everson* case:

It must be remembered that here involved are direct grants of tax-raised funds to the educational *institutions*, themselves, which will become the sole owners of the buildings if erected. If appellees' contention that there is nothing in the Establishment Clause which proscribes direct grants to aid and support sectarian educational institutions were correct, it seems that *Everson, supra*, would have been decided quite easily and without dissent, even though no direct grant was there involved. The funds here involved are entirely different from those in such cases as *Board of Education v. Wheat*, 174 Md. 314, and *Everson, supra*. In *Everson*, the Supreme Court ruled that a State could constitutionally finance bus transportation of children to parochial as well as public schools, on the ground that involved was 'public welfare legislation' (protecting *all* children from traffic hazards

²⁰⁴ *Supra* note 193, at 222.

²⁰⁵ *Horace Mann League v. Board of Pub. Works*, 220 A.2d 51, 61 (Md. 1966).

²⁰⁶ *Ibid.*

and dangers), and under the provisions of the first amendment no State could exclude individuals, *because of their faith*, from receiving the benefits of such legislation. In *Wheat*, this Court ruled constitutional a statute which required the Board of Education (under limitations as to distance, etc.) to carry parochial students to and from their schools upon the same conditions that public-school children were carried, on the ground that the statute protected the safety of the children while en route to and from schools. No direct grants of money or property to any educational institution were involved in either case, but the Supreme Court split 5 to 4 and this Court 4 to 3 on the issues, with vigorous dissents being filed in each case.²⁰⁷

Perhaps the most interesting feature of the *Horace Mann* decision is its adoption of the method of case-by-case evaluation, in extensive detail, to determine whether a particular grant improperly aids religion. One grant was to Hood College for the construction of a dormitory and classroom building. Hood is a liberal arts college for women and is loosely affiliated with the United Church of Christ. It has, however, a religiously heterogeneous faculty, administration and student body. There is no religious indoctrination of the students and no religious activities will be conducted in the buildings to be erected with the aid of the grant. The college permits outside groups, without regard to church affiliation, to use its facilities during the summer. The United Church of Christ does not control the administration of the school and provides only 2.2% of the operating budget of the school and

practically nothing in the way of capital gifts. The court cited additional factors:

The only physical structure of a religious character seems to be the Chapel, and it is open to all. Religion in the curriculum and in extra-curricular programs is at a minimum for any church-related school. We do not find that religion occupies a dominant place in the College's program, the record clearly showing that students are not required to attend and participate in many religious observances. It is, of course, accredited. The record does not disclose any great activity among the alumnae of a religious nature, and, although the image of Hood in the community is that of a good, sound, and efficient College, there is no showing that it is considered to be religiously slanted. Under the circumstances, it is obvious that neither the U.C.C. nor any other religion is running the institution, or has control over it.²⁰⁸

The court concluded that Hood is sufficiently uncommitted to be ruled non-sectarian in a legal sense:

Applying the criteria we named above, we are unable to say that the College is sectarian in a legal sense under the First Amendment, or to a degree that renders the grant invalid thereunder. The college's stated purposes in relation to religion are not of a fervent, intense, or passionate nature, but seem to be based largely upon its historical background.²⁰⁹

Western Maryland College, however, a recipient of a grant for the construction of a science wing and a dining hall, is controlled and supported by the Methodist Church. The Church contributes financial support of considerable value, "both oper-

²⁰⁷ *Id.* at 72.

²⁰⁸ *Id.* at 67-68.

²⁰⁹ *Id.* at 67.

ational and capital.”²¹⁰ The college faculty is designedly Christian and a significant number of students are Methodist preministerial students. The children of Methodist ministers are charged only half tuition. The facilities of the campus are made available at cost, to Methodist organizations. The administration and faculty are predominantly Methodist. Students are frankly indoctrinated with religion and all students must attend Protestant religious services. “The image of the college in the community is strongly Methodist.”²¹¹ The court ruled that the college “is sectarian in a legal sense under the First Amendment”²¹² and emphasized that the effect of the grant would be to aid religion:

We find nothing on the face of the bill or its legislative history to demonstrate a purpose to use the State’s coercive power to aid religion, but a careful consideration of all the facts impels us to the conclusion that the operative effect will be such, if the grant be effectuated. As stated in footnote 14, ‘the most effective way to establish any institution is to finance it. Financing a church either in its strictly religious activities or in its other activities is equally unconstitutional.’²¹³

The last quoted sentence was taken from the concurring opinion of Mr. Justice Douglas, of the Supreme Court of the United States, in the 1962 school prayer case, *Engle v. Vitale*,²¹⁴ which the *Horace Mann* court had already quoted in a prior

footnote. The last quoted sentence does not appear to be consistent with a broadly-construed public purpose doctrine.

Notre Dame College and St. Joseph College, two Roman Catholic colleges conducted and controlled by an order of nuns, were also held to be too sectarian to receive the state grants. In both cases the administration and faculty are predominantly and designedly Catholic priests or nuns. Both student bodies include candidates for religious orders and both are practically entirely Catholic. Both receive heavy financial assistance from the controlling religious orders. In each college, Catholicity pervades the entire program and students are indoctrinated and encouraged in their religion. The campuses are made available for use only by outside groups which are Catholic. The image of each college in the community is strongly Catholic. At Notre Dame, if the grant were to be approved, “each class in the new science building will open with a prayer”;²¹⁵ the projected science building at St. Joseph would house “crucifixes, ‘maybe’ statues and ‘very likely’ water-fountains. . . .”²¹⁶

The court ruled flatly that the operative effect of the grants to such sectarian schools demonstrates a purpose on the part of the legislature to use the state’s coercive power to aid religion:

Again, we find nothing on the faces of the two Bills or in their legislative histories to demonstrate a purpose to use the State’s coercive power to aid religion, but a consideration of the totality of attendant circumstances impels a conclusion that their

²¹⁰ *Id.* at 68.

²¹¹ *Id.* at 69.

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ 370 U.S. 421 (1962).

²¹⁵ *Supra* note 205, at 70.

²¹⁶ *Id.* at 72.

operative effect (if the grants be effectuated) demonstrates such a purpose.²¹⁷

The grants, therefore, were invalidated. The *Horace Mann* court then went on to rule that the grants which it had voided as contrary to the first amendment did not violate the constitution of the State of Maryland. Vermont and Maryland, incidentally, are the only two states which do not have explicit prohibitions in their constitutions against the appropriation of public money to schools controlled by religious organizations.²¹⁸ The effect of the court's ruling that the grants do not violate the Maryland Constitution is to frame the first amendment issue clearly for the Supreme Court of the United States. If the latter court were to rule on the merits of the *Horace Mann* case on appeal, it would have to deal directly with the first amendment question. For, according to the normal canons of judicial review, the Maryland court's opinion on the question of the state constitution would seem to preclude the Supreme Court from avoiding the first amendment issue by ruling, contrary to the highest court of Maryland, that the grants violated the Maryland Constitution.

The dissenting opinion by three of the seven justices of the Maryland court in the *Horace Mann* case emphasized the public purpose performed by church-related colleges in providing education in secular fields. And it noted that, at the present time, such private colleges could not continue to perform this public function without public assistance. The ben-

efit to religion, argued the dissenters, is incidental and there is no alternative way in which the state could promote the secular educational activities of such colleges without the conferral of such an incidental benefit upon religion. The dissenters also argued that the grants followed a practice established over one hundred eighty years, an argument which the court's majority had found not controlling on the constitutional question.

This recent Maryland case has been recounted here in some detail merely because it may foreshadow a new and more restrictive interpretation by the Supreme Court of the public purpose doctrine. However, it should be emphasized that the reasoning of the Maryland case has not yet been upheld by the Supreme Court and that the current state of constitutional interpretation by the highest Court does not at all preclude a more hospitable interpretation of the first amendment than we see in the *Horace Mann* case.

Perhaps the most important effect of the *Horace Mann* decision at this time should be an awakening to the difficulty and indeed the likely impossibility of achieving direct, substantial governmental grants to church-related schools without a substantial sacrifice by those schools of their independence and sectarian character. For it is quite clear that the recipients of substantial governmental subsidies can be bound by constitutional restrictions incumbent upon the subsidizing government.²¹⁹ It is fairly predictable,

²¹⁷ *Ibid.*

²¹⁸ *Id.* at 76.

²¹⁹ See *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Moses H. Cone Memorial Hosp. v. Simkins*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

moreover, that church-related schools receiving general government subsidies will ultimately be forbidden, for example, to give preference to parishioners in their admission policies and will ultimately be bound by at least some of the secularizing mandates which have followed upon the Supreme Court's public school prayer decisions. These considerations are relevant here insofar as they incline us to consider soberly the long-term results of subsidies which are attractive in the short run, and insofar as they lead us to consider more seriously the devices of parental tax credits and deductions for tuition which can indirectly but really alleviate the financial problems of private schools without entailing the pervasive governmental controls which inevitably accompany direct public subsidies. Such controls are absent under a tax credit or deduction program because when a parent is given a tax credit for tuition paid to a private school and the school raises its tuition correspondingly, the increased money which the school receives from the parent has never been government money. And the tax credit could be supplemented by a direct "G.I. Bill" type tuition grant to those parents who have insufficient income to benefit from a tax credit. The entire tax problem, of course, is the subject of another study and is mentioned here only to show its relation to and effect upon the problems posed by Article XI, Section 3 of the New York Constitution.

Two other Supreme Court decisions are important here in assessing the interrelations among the first amendment, private schools and parents. In *Meyer v. Ne-*

braska,²²⁰ the Court held that a state law forbidding the teaching in any elementary school of any other than the English language was unconstitutional as an unreasonable interference with the natural right and duty of parents to give their children a suitable education, in this case a training in a foreign language. In *Pierce v. Society of Sisters*,²²¹ in 1925, the Court held that an Oregon statute requiring all children to attend public schools was unconstitutional as a violation of the right of private schools to exist and "the liberty of parents and guardians to direct the upbringing and education of children under their control."²²² The statute also violated the right of the children themselves to attend private schools. The *Meyer* and *Pierce* cases recognize the rights of parents and children to resort to private schools and the right of those schools to exist. These are rights which the government may not abolish or unreasonably curtail. These prior rights assume great importance in view of the prospect that a prolonged continuation of the current exclusion of parochial school pupils from the benefits available now to public school pupils may drive many of these parochial schools out of competition and into extinction. A continued denial of educational benefits to parochial school children may consequently interfere in practice with the basic freedom of educational choice.

But whatever the problems which arise under the first amendment, a more dif-

²²⁰ 262 U.S. 390 (1923).

²²¹ 268 U.S. 510 (1925).

²²² *Id.* at 534-35.

ficult issue is posed by the New York State Constitution. The provisions of Article XI, Section 3, are much more explicit and restrictive than those of the first amendment. And it is argued that, when the 1938 Convention affirmatively allowed only transportation aid to church-related schools, all other forms of aid were implicitly excluded. However, the conclusion that the explicit sanction in 1938 of transportation had foreclosed other types of aid is deceptive in its simplicity. For we are not concerned merely with the law of 1938, but rather with that of 1966. Article XI, Section 3, must be viewed in the light of the developments of the quarter-century just concluded. In that period, there has been a significant relaxation of the rigors of section 3 by the New York courts. For example, in *64th Street Residences, Inc. v. City of New York*,²²³ the Court of Appeals held that Fordham University had received neither direct nor indirect aid, within the meaning of the constitutional prohibition, from its acquisition of Lincoln Square property at a reduced cost through a state-financed urban renewal program. The Court of Appeals in the *64th Street Residences* case denied that the arrangement was a gift or subsidy at all and in so doing the Court, to say the least, was far less preoccupied than was the *Judd* Court with the fact that Article XI, Section 3 prohibits indirect as well as direct aid:

Plaintiffs say that the condemnation of this land and the sale thereof to the university is completely void because

Fordham is a denominational school and the sale to it, according to plaintiffs, at \$7 per square foot of land for which the city will pay an estimated cost of about \$16 per square foot would thus be an unconstitutional grant or subsidy of public moneys to a religious corporation. The argument, however, proceeds on an assumption false in fact. Plaintiffs say that because the city arranged to sell this land at a price much below what the city will pay for it, this necessarily amounts to a subsidy or gift. But what the city is buying is not the same as what Fordham is buying. The city buys land and buildings. Fordham buys the same property but subject to its agreement to raze the buildings, relocate the tenants and use the cleared land for a collegiate campus and buildings only. What Fordham is paying for is the re-use value of the land. There is in this record no dispute of the fact, found by both courts below, that the \$7 per square foot which Fordham agreed to bid, and did, is at least equal to the re-use value as established by several appraisals, all of which reported figures lower than \$7 per square foot. Therefore, there is no substance to the assertion, on which this whole suit depends, that Fordham is getting a gift, grant or subsidy of public property. It is, of course, getting a benefit in the sense that it is being permitted to acquire valuable and desirable property at a price which is probably lower than it would have to pay if it had to negotiate with all the private owners, but the private owners are getting from the city the full value of the property in its present condition and use. The city benefits by the achievements of its valid municipal purpose of eliminating a slum. The State and Federal statutes contemplate that the purchaser from the city will pay less than the city pays since it will always be the case that the city is buying land

²²³ 4 N.Y.2d 268, 150 N.E.2d 396, 174 N.Y.S.2d 1, cert. denied, *Harris v. City of New York*, 357 U.S. 907 (1958).

and buildings and selling either cleared land or land which the purchaser must agree to clear and use for restricted purposes.²²⁴

Also, the Court noted that it might have been a violation of Fordham University's rights if that school had been barred from the bidding on account of its religious status:

Any collegiate institution could have been a bidder at the auction. Special Term pointed out, probably correctly, that Fordham would be deprived of constitutional rights if it alone were excluded from the bidding. Perhaps this is only another way of saying that, since this sale is an exchange of considerations and not a gift or subsidy, no 'aid to religion' is involved and a religious corporation cannot be excluded from bidding.²²⁵

It is this remark by the Court of Appeals which leads into the most significant developments in this area since 1938. For one thing, there is the general recognition by the Supreme Court, as seen in *Everson* and *Sherbert*, that the paramount command of the first amendment forbids the exclusion of persons, because of their religion, from the reception of a public benefit for which they would otherwise be eligible. Also, the first amendment now clearly permits the attainment of a public purpose through some forms of aid to pupils attending church-related schools.²²⁶ When these developments are coupled with the growing tendency to recognize that aid to the pupils is not necessarily,

even indirectly, aid to the institutions he attends,²²⁷ it may be fairly concluded that Article XI, Section 3 would not warrant today the inflexible approach taken in the 1938 *Judd* transportation case. Indeed, there is reason to suspect that even the *Judd* case might be decided differently today in light of the intervening decision of the *Everson* case in 1947, in which the Supreme Court specifically upheld for the first time, under the first amendment, the provisions of the sort of transportation involved in *Judd*.²²⁸

In summary, it is fair to say that to regard the rule of the *Judd* case as retaining its original vitality would be to lend undue credence to an erroneous construction of the 1938 amendment to Section 3 of Article XI of the New York

²²⁴ *Id.* at 275-76, 150 N.E.2d at 398-99, 174 N.Y.S.2d at 4-5.

²²⁵ *Id.* at 276, 150 N.E.2d at 399, 174 N.Y.S.2d at 5.

²²⁶ *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

²²⁷ *Ibid.* *Swart v. South Burlington Town School Dist.*, 122 Vt. 177, 167 A.2d 514, *cert. denied*, 366 U.S. 925 (1961), is not to the contrary since there the Supreme Court of Vermont invalidated a program of tuition payments by a school board where the payments were made directly to the schools. See also *Scales v. Board of Educ.*, 41 Misc. 2d 391, 245 N.Y.S. 2d 449 (Sup. Ct. 1963), upholding the provision by a board of education of home tutoring services to a physically handicapped parochial school pupil who was temporarily prevented by her illness from attending the parochial school.

²²⁸ See discussion in Note, 30 *FORDHAM L. REV.* 503, 508 (1962). In *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961), *cert. denied*, 368 U.S. 517 (1962), the Supreme Court of Alaska invalidated a statute providing free bus transportation for all pupils, including those attending parochial schools. In *Dickman v. School Dist.*, 232 Ore. 238, 366 P.2d 533 (1961), *cert. denied*, 371 U.S. 823 (1962), the Oregon Supreme Court struck down a statute providing free secular textbooks for parochial school children. Both cases were decided under the Alaska and Oregon state constitutional provisions and both relied, erroneously, on the *Judd* case.

State Constitution. For, although that amendment provided only for transportation of pupils, it should be construed in its true light as a reaction to the *Judd* decision which called it forth. As such it specifically validated only the provision of transportation which the legislature had enacted in 1936 and which the *Judd* Court had nullified. But it ought not to be regarded as a considered and sweeping condemnation of all other forms of public aid to those pupils who choose to attend parochial schools. The newer and fundamental developments since 1938 affirm the basic constitutionality and indeed the fairness, of achieving a public purpose through secular aid to all pupils, including those attending parochial schools.

It would be a mistake, however, to regard the generally more lenient trend of judicial decisions as having removed all need for the removal of Article XI, Section 3, from the New York State Constitution. The enduring vitality of this Blaine Amendment as a threat to efforts to accommodate the interests of government and religion was dramatized by the decision in *Board of Educ. v. Allen*,²²⁹ in which the supreme court in Albany County invalidated an amendment to the Education Law which empowered local school boards to lend secular textbooks

to children attending church-related schools. The court unnecessarily discoursed upon the First Amendment to the United States Constitution and construed the first amendment, in line with the views of Mr. Justice Douglas of the United States Supreme Court, as prohibiting the sort of financial aid to parochial schools which was involved in the textbook loans. The excursion into the first amendment was unnecessary because the court botomed its decision upon Article XI, Section 3 of the New York Constitution and rejected the "pupil benefit theory" in so doing, in reliance upon the 1938 case of *Judd v. Board of Educ.*²³⁰ and the 1922 case of *Smith v. Donahue*.²³¹ The court in the *Allen* case regarded the extreme position of the *Judd* case as retaining its full effect, save for the transportation exception adopted by the Convention of 1938, despite the events and trends of the past twenty-eight years as outlined above in this study. It may be that the *Allen* ruling will be overturned on appeal. But, in any event, the main effect of the *Allen* case may prove to be its dramatization of the need for a total elimination of the Blaine Amendment, an unfair embodiment of restrictive conceptions long since rejected by the majority of the people of this state and nation.

²²⁹ 51 Misc. 2d 297, 273 N.Y.S.2d 239 (Sup. Ct. 1966).

²³⁰ 278 N.Y. 200, 15 N.E.2d 576 (1938).

²³¹ 202 App. Div. 656, 195 N.Y. Supp. 715 (1922).

