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Aid to Education-State Style

Cover Page Footnote

See introductory note to companion article, Aid to Education-Federal Fashion, p. 495 *infra*. *Professor of Law, Fordham University School of Law

AID TO EDUCATION — STATE STYLE†

LEONARD F. MANNING*

The scholar-incentive plan—what is it? is it constitutional? Professor Manning traces the policy background of Governor Rockefeller's program for higher education and considers the objections raised by critics under the New York State Constitution. From an examination of the legislative policy regarding the role of private institutions in the higher educational system of the state and of the constitutional cases, he argues that the strict prohibitions of the state charter are inapplicable in the area of higher education.

WE ARE told, in Article I, Section 3, of the New York State Constitution, that "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind. . . ." The various sections contained in Article I of the New York State Constitution are under the general heading, "Bill of Rights."

Section 8 of Article VII of the New York State Constitution reads, in its pertinent part:

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.

Section 8 appears among those sections of the state constitution which are grouped under the article heading, "State Finances."

Section 1 of Article XI reads: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."

Section 4 of Article XI reads:

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, but the legislature may provide for the transportation of children to and from any school or institution of learning.

† See introductory note to companion article, Aid to Education—Federal Fashion, p. 495 supra.

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Article XI is entitled "Education." Section 2 of Article XI simply continues recognition of the "Regents of the University of the State of New York," and Section 3 of the same article relates to the depositing and application of school funds. Neither Section 2 nor Section 3 has any particular relevancy to the problem under consideration.¹

THE SCHOLAR-INCENTIVE PLAN

On December 21, 1959, Governor Rockefeller appointed Henry T. Heald, Marion B. Folsom and John W. Gardner as a "Committee on Higher Education"²

to review the higher education needs and facilities in New York State and to make recommendations on the steps that the State could take to:

- (1) assure educational opportunities to those qualified for college study;
- (2) provide the undergraduate, graduate and professional training and research facilities necessary for the continued development of the State as a leading business, industrial, scientific and cultural center; and
- (3) contribute its proper share of trained personnel to meet the nation's needs for education, health and welfare services.³

After a study in which the Committee had the assistance of over ninety leading educators in the United States (none of whom, incidentally, was on the staff of or connected with any church-related college or university),⁴ and which lasted almost a year, the Committee submitted its report to the Governor and the Board of Regents.⁵ The Committee pre-

1. For convenience's sake, Section 3 of Article I shall hereinafter be called simply Section 3. Section 8 of Article VII shall be referred to as simply Section 8 and Sections 1 and 4 of Article XI shall be mentioned simply as Section 1 and Section 4, respectively.

2. Dr. Heald having been designated as chairman by the Governor, the committee was commonly called the Heald Committee and the report subsequently submitted is more often referred to as the Heald Report.

3. Letter of Transmittal, in Committee on Higher Education, Meeting the Increasing Demand for Higher Education in New York State: A Report to the Governor and the Board of Regents (1960).

4. See list of consultants, *id.* at 71-74.

5. "The Board of Regents is responsible for the most comprehensive job of educational administration in the United States. In addition to its responsibilities in the field of higher education it supervises the elementary and secondary school education of 2,800,000 children in five thousand public schools; supervises all the museums, libraries, organizations and agencies for education officially recognized by the State; registers foreign and domestic educational institutions in terms of New York standards, and fixes the value of their diplomas and degrees; administers the licensing of eighteen professions; and is responsible for the operation of the State's Unfair Educational Practices Act. In the exercise of these responsibilities the State Education Department, including the Commissioner of Education and his staff, has a host of administrative duties, many of them mandated by law." *Id.* at 18.

Colleges and universities in New York are subject to visitation and inspection by the

dicted that enrollments in colleges and universities in the State of New York would more than triple by the year 1985.⁶ It found that

Many private colleges and universities will be unable to finance a rapid expansion at a time when faculty and other costs are rising sharply. Nearly all are operating at substantial deficits which have to be covered each year by gifts from corporations, alumni, and individual friends of the college. With present methods of operation, increased enrollments will result in even greater deficits and an even greater need for gifts. These gifts can be expanded, but not rapidly enough to permit large increases in enrollments.⁷

The report emphasized that "the bulwark of higher education in New York State for many years has been our private colleges and universities, and the great tradition of meeting the need for higher education through a combination of private and public institutions must be preserved for the future."⁸ On the same subject it added:

Private institutions of higher learning have important and unique functions to perform. They give American education a diversity and scope not possible in tax-supported institutions alone, and they have an opportunity to emphasize, if they wish, individualistic patterns of thought, courses of social action, or political or religious activity. In New York State, private colleges and universities have performed this function with great competency in the past.⁹

It "proposed" that the state inaugurate a program of direct aid to private colleges and universities and "suggested" that this aid take the form of a "per capita grant to each institution for each student graduated with a degree approved by the Board of Regents."¹⁰

Mindful of potential constitutional implications in its recommendations, the Committee added a cautionary paragraph:

We are advised that a contract plan would not violate the State Constitution where nonsectarian colleges and universities are concerned. We are not in a position, however, to say how sectarian institutions might fit into this State-aid program. The issue has never been decided specifically by the courts and we are informed that views as to its potential constitutionality are speculative.¹¹

Thus the Heald Committee felt concern for the financial plight of the private college and private university. But it is apparent that the Com-

Board of Regents. The Board sets the standards for all degrees, undergraduate, graduate and professional, for all colleges and universities, both public and private, in New York State.

6. *Id.* at 3.

7. *Id.* at 4-6.

8. *Id.* at 24.

9. *Ibid.*

10. *Id.* at 24-25.

11. *Id.* at 25.

mittee sifted only part of the first part of the Governor's commission "to assure educational opportunities to those qualified for college study."¹² What of the financial plight of the student? Surely that poses a problem equally as grave. The Committee gave no figures regarding the mounting increase, almost a multiplication, in tuition charges at private colleges in recent years. It did have, however, a three-fold recommendation for *student* assistance. It proposed¹³ to increase the number of state scholarships from five per cent to ten per cent of each year's high school graduating class,¹⁴ to increase the maximum scholarship awards to \$1,500, with the "honorary" minimum amount fixed at \$100 and the higher amounts dependent upon the financial needs of the recipient, and to reduce the cost of loans to students through the program of the New York Higher Education Assistance Corporation.¹⁵

Whatever reservations the Committee may have had regarding the constitutionality of direct subsidies for private church-related colleges were quite obviously dissipated in the case of the Regents scholarships and in the case of the student loan program. There was no caveat regarding the constitutionality of either, although both are available to students choosing to attend sectarian colleges.

The Governor had no comment on the Heald Report. The Board of Regents did.

In its legislative recommendations, made public on December 28, 1960, the Board of Regents confirmed the Heald diagnosis of the need for state aid to private colleges, but they were not ready to prescribe the Heald

12. Note 3 *supra*.

13. Committee on Higher Education, *op. cit. supra* note 3, at 45.

14. The scholarship aid here referred to is "Regents Scholarships." The New York State Regents Scholarship program, established in 1913, provides college and university tuition assistance each year to 5% of the high school graduating class, taking into account both public and private high schools. The scholarships are available only to New York residents. The scholarship covers a maximum of four years of study at any accredited college in the state. Each scholarship carries a stipend of \$250 to \$700 dependent on the recipient's financial need as computed on the basis of a statutory need formula. N.Y. Educ. Law § 601. Thus, wisdom is the price of the grant and the qualifying student, regardless of pelf or penury, is entitled to the minimum stipend of \$250 per year.

15. The Higher Education Assistance Corporation was created by the New York Legislature in 1957 as a nonprofit, public corporation to assist students, who are residents of New York, attending colleges either in New York or outside of New York, by lending or guaranteeing the loan of funds to help them meet their college expenses. The maximum loan for any school year is \$1000 and the over-all maximum is \$5000. The interest rates and terms of repayment are fixed by the corporation's board of directors. N.Y. Educ. Law § 653. The corporation has adopted the policy of guaranteeing bank loans to students rather than making such loans itself. Current loans are at an interest of 4% per annum.

formula for furnishing support. The Regents cited with favor an alternative measure, a plan proposed by the Association of Private Colleges and Universities of the State of New York. The latter, a private organization, sought tuition supplements for full-time resident students attending private colleges in New York—a proposal “somewhat like the G.I. Bill” which, it was noted, would permit the colleges to increase tuition in proportion to the student grants.¹⁶ Quite obviously the Regents, too, were thinking more in terms of college-assistance and less in terms of student-assistance.

Finally, on January 31, 1961, the Governor sent a special message to the Legislature entitled “Increased Opportunities for Higher Education.”¹⁷ The Governor made it palpably plain that he was concerned as much for the increased burden which the increased cost of higher education had imposed upon the student as he was for the expansion of facilities for higher education. In dealing with the latter the Governor made no mention of private colleges and universities, no mention of private higher education. It would appear that, by his silence, the Governor was, with polite and political prudence, rejecting both the Heald proposals and the Regents recommendations respecting public aid for private colleges. The Governor spoke of a “clear necessity for the higher education of all who have the ability and ambition to achieve it” and he noted that higher education “imposes rising burdens of expense upon the family and great responsibilities upon our colleges and universities.”¹⁸ His was a dual approach—“We need to approach this problem along two principal lines: First, greater financial assistance to help the student and his family meet the rising costs of higher education and, second, the expansion of facilities.”¹⁹ Then, under the heavy-captioned heading, “Student Aid,” he set out the core of his scholar-incentive program:

I recommend the establishment of a “New York State Scholar Incentive Program”, to provide each full-time, tuition-paying student attending an undergraduate college in the State, who is also a resident of the State and who makes application, with an annual grant up to \$200 to help him pay his tuition in excess of \$500 annually.

In addition, for graduate study, I recommend that to each full-time, tuition-paying student who is a resident of the State and is enrolled in an approved graduate program leading to an advanced degree, a similar grant up to \$400 be paid for students to the masters degree level; and for students in graduate work above the masters degree level, I recommend a grant up to \$800 per year.²⁰

16. N.Y. Herald-Tribune, Dec. 29, 1960, p. 1, col. 3.

17. N.Y. Legislative Doc. No. 9 (1961).

18. *Id.* at 5.

19. *Id.* at 6.

20. *Id.* at 7.

The Governor recommended that the grant should be payable to a student enrolled in a public institution as well as to a student in a private institution, wherever the tuition at the institution was in excess of \$500.

While he attached the label, *scholar-incentive*, to his proposal, the Governor was speaking—taking the words in their acquired rather than their root meaning—of *students*. He spoke of financial assistance to students who, though displaying no significant scholarship, were nonetheless entitled, in the Governor's opinion, to a chance at a college education at the college of their choice.²¹ The Governor did not ignore the more talented. For those whose scholastic achievement was worthy of note he suggested an increase in Regents scholarships from five per cent of the high school graduating class to ten per cent of the graduating class.²²

Neither of these recommendations contemplated financial assistance to the colleges themselves. The matter of assistance *to the colleges* was considered in the second half of the Governor's message. And there his only recommendation related to the enlargement of *public* college facilities.²³

21. To provide further assistance to students generally the Governor also advocated an expansion of the student loan program through the adoption of new measures to reduce the cost of such loans. *Id.* at 10.

22. *Id.* at 9.

23. In the way of institutional aid the Governor recommended expansion of the State University to provide for two comprehensive graduate centers and the broadening of facilities at the state colleges of education, including provisions for 324 new faculty positions and eight new science buildings; the enlargement of the state's two-year colleges; the preparation of a master plan for the expansion and improvement of the municipal colleges within the City of New York, and, generally, the improvement of educational techniques, college and university management and the utilization of facilities. *Id.* at 12-16.

The Governor also recommended an expansion of the powers of the Dormitory Authority. The Dormitory Authority was created in 1944 to finance the building of dormitories at public colleges. N.Y. Pub. Auth. Law §§ 1675-90. In 1955 and again in 1959 the Dormitory Authority Act was amended to permit the Authority to act as a medium for financing construction at private colleges and universities and to extend the act's provisions to include the financing of the construction of any academic building. N.Y. Pub. Auth. Law §§ 1676, 1680. The Governor proposed legislation to implement a proposed constitutional amendment increasing the Authority's borrowing power and further recommended that, since the Authority is already empowered to guarantee the financing of college buildings other than dormitories, the name be changed to the New York State College Building Authority. Since there is here a use of "state credit," there is presented a problem under Article XI, Section 4 of the New York State Constitution, considered *infra* p. 539 *passim*. Oddly enough, there has never been any criticism of this part of the Governor's proposals. It would seem that those who object to the Governor's scholar-incentive plan on the principle of "separation of church and state" are not perturbed by a principle, other than the principle of providing too much.

For the private colleges the Governor offered, literally, nothing but praise.²⁴

There were critics of the Governor's plan, some modulated, some vituperative.

The moderate segment of the criticism was aimed at the absence of a "means test" and a "merit test" in the scholar-incentive plan. Most of the critics were pacified when, on February 20, 1961, the Governor amended the proposal to include both a means and a merit test.²⁵ This final proposal—the only one under legislative consideration²⁶ and the only one in issue now—is stitched somewhat on the pattern of the Regents scholarships.

The means test is bottomed on the "net taxable income" of student and parents. It creates three categories. In the first are those whose net taxable income is less than \$1800 per year, in the second those whose net taxable income falls between \$1800 and \$7500, and in the third, those whose net taxable income exceeds \$7500 per year. Students in the first category will receive a grant of \$300 toward college tuition, those in the second category \$200 and those in the last category \$100. University students pursuing graduate studies will, if in the first category, receive \$400 for the first two semesters and \$800 for each two subsequent semesters; those in the second category, corresponding awards of \$300 and \$600; and those in the last category, corresponding awards of \$200 and \$400.²⁷

24. The Governor did propose the limited assistance set out in note 23 supra.

25. E.g., the New York Board of Rabbis said that the "merit test, the means test and the awarding of the scholarship directly to students on the higher school level remove this legislation from the area of church-state conflict." The Board had objected to the original proposal on the ground that it might be used to provide funds for sectarian colleges. *N.Y. Times*, March 2, 1961, p. 18, col. 5. The New York State Council of Churches, in the forefront of the critics of the original plan, withdrew its opposition to the revised plan, stating that it considered the revised bill a "sincere and successful" attempt to avoid any conflict with constitutional barriers. *N.Y. Herald-Tribune*, Feb. 23, 1961, p. 17, col. 4.

The "means" and "merit" tests serve only to individualize the grants. How the absence of either bears upon the "church-state" issue is a matter of conjecture.

26. *N.Y. Assembly No. 4169 (1961)*; *N.Y. Senate No. 2987 (1961)*. The bills are identical, hence future references will be limited to the Assembly number.

27. *N.Y. Assembly No. 4169, § 4 (1961)*. All grants are to aid students only to the extent that their tuition exceeds \$200. The tuition-charge base, thus lowered from \$500 in the Governor's original plan, makes state aid available to students in public colleges where tuition exceeds \$200 per year. There are 14,000 such public college students in New York State. Only 876 students at public medical schools in New York State pay tuition in excess of \$500 per year.

The entire program, detailed in *N.Y. Herald-Tribune*, Feb. 21, 1961, p. 1, col. 1, and

The merit test would appear to be a formality. It simply provides that the Board of Regents must certify that prior to enrollment the student applying for the stipend showed promise of completing successfully a college degree program of either two or four years' duration.²⁸

I have set forth in detail the foregoing sequence of events and, in some instances, the specifics of the various proposals, because the sequence itself and the various proposals and counterproposals have a direct bearing upon the principal argument heretofore directed at the constitutionality of the scholar-incentive plan.

CRITICS OF THE SCHOLARSHIP-INCENTIVE PLAN

No one, or hardly anyone, has been critical of the scholar-incentive plan because it provides aid to private nonsectarian colleges. The battle line has been drawn against church-related colleges. The crossfire has come from those who would man the parapets of the "wall of separation" between church and state. In brief, the fusillade is aimed not at aid to education per se, not at aid to private education, but at the inclusion within the area of private education of the education provided by church-related colleges. The argument, stripped to its essentials and put in its simplest terms, is that the state can do nothing which will in any way or in any measure redound to the benefit of a church-related college or university.

It has, therefore, been said that the scholar-incentive plan is "subvention by subterfuge,"²⁹ that the plan is an arcane attempt to provide assistance to church-related schools under the artificial flower of aid to the student. A second argument³⁰ accepts the assumption of the first and reasons that this subterfuge, already assumed, is as constitutionally unsound as the pretextured plans adopted in certain Southern areas to avoid the integration edict of the United States Supreme Court.

Both of these arguments³¹ have the built-in assumption that state aid to

N.Y. Times, Feb. 21, 1961, p. 1, col. 8, remains limited to New York residents attending New York colleges and universities.

The Governor's revised program also recommended an increase of Regents scholarships from a percentage (5% of the high school graduating class, which percentage provided 7,911 scholarships last year) to a flat 17,000 (which will amount to approximately 10% of the June 1961 high school graduating class). N.Y. Assembly No. 4169, § 3 (1961).

28. N.Y. Assembly No. 4169, § 4 (1961).

29. Editorial, N.Y. Times, Jan. 26, 1961, p. 1, col. 7.

30. See Letter of Professors Walter Gellhorn, Horace M. Kallen and Edmond Cahn, N.Y. Times, Jan. 30, 1961, p. 22, col. 5.

31. Other arguments against the scholar-incentive plan had a sort of mixed appeal and a mixed-up logic. There were those who, conceding the validity of the Regents scholarship program, nonetheless opposed the scholar-incentive plan as a subsidy of

church-related colleges—howsoever achieved—is unconstitutional. That such aid is not, under all circumstances, unconstitutional is the burden of this article. That such aid is not unconstitutional is, indeed, the very heart of the matter and, therefore, the end of the affair. It is, in other words, boot-strap logic to begin with an assumption of unconstitutionality. I do not understand why this type of aid, if aid it be, is unconstitutional. Nor do I comprehend why the scholar-incentive plan is an aid to church-related colleges in the first place or why it is said to have been secretly so intended. It is rather a serious matter to impute to the Governor of a sovereign state a scheme of "subvention by subterfuge," but, that aside, it would appear that the Governor said in unambiguous terms that he was interested in student-aid as well as college-aid. The Governor's message spelled out his program for institutional aid as a program of aid for *public* colleges alone. State aid for private colleges was the theme of the Heald Report. But the Governor politely rejected this aspect of the Heald Report and, in fact, Dr. Heald just as politely objected to the scholar-incentive plan precisely because it did *not* provide the necessary assistance to private schools of higher education.³²

church-related colleges. See, e.g., Editorial, *supra* note 29. The Regents grant eventually reaches the church-related colleges as does the scholar-incentive stipend—the former through scholars, the latter through students. The principle is the same. If the Regents scholarship program is constitutional, the scholar-incentive plan is likewise constitutional. The objection, if one is prepared to accept the Regents scholarship plan, is misplaced when placed on constitutional grounds. For the objection is really not directed at the ultimate terminus of the funds but at the form of the conveyance. Those who approve the Regents scholarship program but reject the scholar-incentive plan are really saying that the state can aid the gifted, but it cannot aid the needy—a proposition which, I am certain, no one would espouse.

There were those who would distinguish the G.I. educational bill from the scholar-incentive plan on the theory that the G.I. bill represented a form of contract compensation for services rendered. See, e.g., Gellhorn, Kallen & Cahn, *supra* note 30. In the case of military service no contract known to law is contemplated. It is somewhat naive to label the G.I. bill legal consideration for services rendered. The G.I. bill was a gift, an outright gift from Congress. A citizen has a duty to defend his country in time of war and for the performance of that duty he acquires no claim for compensation against his country. There is, therefore, no semblance of a contract between the Nation and its citizen-soldiers.

32. N.Y. Herald-Tribune, March 2, 1961, p. 5, col. 5. Dr. Heald said, "I consider it unfortunate that in the clamor about church-related institutions and the opposition of some people to spending any public funds in privately controlled colleges, the basic objective of strengthening all of the state's higher educational system has been largely lost." Dr. Heald noted that the scholar-incentive plan "calls for aid to students for payment of tuition. As such, it will be of assistance to many students and is worthy of support on that basis." He added that "it is moral, just and practical" for private colleges to receive state aid, and that the alternative could be an "intolerable" burden on the taxpayer.

Were we to suppose, in any event, that the Governor fashioned in his scholar-incentive plan a funnel for the flow of financial assistance to the colleges themselves, it is seriously to be questioned whether a court of law could consider that assumption. A court certainly has no power to psychoanalyze the executive or the legislature. Legislative motives are immaterial.³³ Judicial concern would touch only the actual or objective effect of the proposal.

In the case of the larger colleges and universities whose student bodies are fairly well proportioned between students resident in New York and those who are nonresident, it is, with a due sense of good judgment, granted that it would not be feasible for college presidents to use the grants as a measuring rod for commensurate tuition increases.³⁴ It is suggested, however, that the smaller colleges which attract predominantly New York residents have available this flexible funnel for receiving state assistance without disturbing the student's financial reserve. But the argument ignores the fact that there are church-related colleges among the so-called larger institutions of higher education³⁵ and that there are nonsectarian colleges among the so-called smaller institutions of higher education.³⁶ The argument is addressed actually against the smaller colleges and it would appear to be misplaced when it is buttressed on the inclusion of church-related colleges. Because all *small* colleges *might* benefit is no reason to exclude all *church-related* colleges. This, it seems to me, is equivalent to proposing the elimination of the fire department because there is a temple or a church in the fire district.³⁷

33. "Of course we cannot suppose the Act to have been passed for sinister motives." Holmes, J., in *Roschen v. Ward*, 279 U.S. 337, 339 (1929).

34. When the scholar-incentive plan was first announced, the four New York schools which responded to the question, Fordham (Catholic church-related), Syracuse (Methodist church-related), New York University and Columbia, announced that they had no intention of raising tuition to take advantage of the program. *N.Y. Herald-Tribune*, Feb. 1, 1961, p. 5, col. 1.

35. E.g., Syracuse (Methodist), St. John's (Catholic), Fordham (Catholic). The argument advanced also ignores the fact that certain church-related colleges draw out-of-state students simply because they are church-related—e.g., Wagner (Lutheran), Yeshiva (Jewish), Brandeis (Jewish), Marymount (Catholic)—and thus these colleges could not introduce an automatic tuition increase without prejudicing their out-of-state students.

36. I would suppose that Adelphi, Webb, or Hofstra, for example, would be considered smaller colleges.

37. There is also a tenuous inference drawn by the *N.Y. Times* to find in the scholar-incentive plan a college-aid motive simply because the grants are limited to students attending New York state colleges. It is argued that this limitation betrays a scheme to funnel state funds to New York colleges. Editorial, *N.Y. Times*, Feb. 16, 1961, p. 30, col. 2. But only New York colleges and universities are subject to visitation by the Board of Regents. Their standards are fixed by the Board. It is well within the province

On this somewhat implausible assumption of subterfuge there has been erected the crude analogy to *Brown v. Board of Educ.*³⁸ and to the Supreme Court's condemnation of state schemes to escape the effect of the *Brown* decision. It is said that the subterfuge here conceived is no different from the subterfuge embodied in a student placement project which has as its purpose the continuance of racial segregation and no different from a state's replacement of its public school system by a system of private, racially segregated education, that just as these two artifices cannot operate to avoid the Court's order in *Brown*, so also the scholar-incentive plan cannot employ the device of student grants to avoid the constitutional proscription of institutional grants. We have been reminded that the Court has said that the *Brown* case cannot be "nullified indirectly . . . through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'"³⁹

The double analogy, thus advanced, would equate an assumed evasion of the first amendment with an actual evasion of the fourteenth amendment. A student-placement plan whose operative effect is to promote racial segregation is quite a different thing from the scholar-incentive plan, even a scholar-incentive plan with a built-in assumption that it has been designed to aid church-related schools. There is nothing unconstitutional per se in a student placement plan. It becomes invalid only when it promotes racial segregation, and this it does only because there is racial discrimination in the *administration* of the plan.⁴⁰ The attack upon the scholar-incentive plan is directed not against any possible administrative irregularity but against the very purpose of the plan itself.

The second half of the analogy is taken a limping step further with the assumption that a state could not substitute a system of private education to accomplish what *Brown* forbids. It may well be that under those circumstances private education becomes public education because it receives its lifeblood from the state, and it may well be that racial segregation in a state-sustained private system would be in contempt of the *Brown* injunction. But we spin speculation when we assume that we must have a common school system,⁴¹ that a state

and the wisdom of the legislature to limit the grants to students attending colleges and universities automatically assured of qualifying under the standards fixed by the State of New York.

38. 347 U.S. 483 (1954).

39. *Cooper v. Aaron*, 358 U.S. 1, 17 (1958).

40. See *Shuttlesworth v. Birmingham Bd. of Educ.*, 162 F. Supp. 372 (N.D. Ala.), *aff'd*, 358 U.S. 101 (1958).

41. There is a distant analogy here to *Rice v. Elmore*, 165 F.2d 337 (4th Cir. 1947),

could not under any circumstances disestablish its public school system and substitute in its place grants to parents to enable them to send their children to the schools of their choice. No court of law has ever pronounced such an edict and, since the public school is not a creature of the U.S. Constitution, it is captious, indeed, to assume that one could.⁴² And it is as prudent to note that whatever command the Court may give to the states in the complex aftermath of *Brown v. Board of Educ.*, it need not give and cannot always give in the case of church-related schools. For the simple fact is that the church-related school is a school which the state has no power to abolish.⁴³ Nor has it the power to abolish the teaching of religious tenets.⁴⁴ But a state has the power to abolish a racially segregated school and not only the power but the duty to abolish racial segregation within the school.

It is the right to attend the school of one's choice which the scholar-incentive plan seeks to preserve. It is the exercise of this right which certain critics of the scholar-incentive plan seek, I believe, to stigmatize and penalize. The program, it is to be noted, does not offer an inducement to attend a church-related school. Nor does it seek pre-

cert. denied, 333 U.S. 875 (1948), and *Baskin v. Brown*, 174 F.2d 391 (4th Cir. 1949). After the Supreme Court had held in *Smith v. Allwright*, 321 U.S. 649 (1944), that the exclusion, by political parties, of Negroes from participation in state primary elections violated the fifteenth amendment (which guarantees Negro suffrage) because the political parties were actually performing state functions pursuant to state law under state provision and subject to statutory control, South Carolina repealed its statutes providing for control of primary elections and transferred the conduct of primary elections to "private" organizations, the political parties. The *Rice* and *Baskin* cases reasoned that the political parties had become state institutions, governmental agencies through which the sovereign power of the state was exercised, and that no election machinery could be sustained if its effect was to deny Negro suffrage. Thus the courts identified the conduct of a primary election, in and of itself, as a governmental act. Both *Rice* and *Baskin* were expressly approved by the Supreme Court in *Terry v. Adams*, 345 U.S. 461 (1953). It would be rather difficult to classify the conduct of a private school as per se a governmental act.

42. Mr. Justice Douglas, however, seems to have made this assumption in one of his nonjudicial moments. See *Two Faces of Federalism* 58-60 (Hutchins ed. 1961). Mr. Justice Douglas, with other distinguished scholars gathered together by the Center for the Study of Democratic Institutions, took part in the freewheeling discussion which followed the presentation of a formal paper by Dr. Robert M. Hutchins. Whatever merit the Justice's casual comment may have, I wonder about the propriety of a Justice of the Supreme Court engaging in a freewheeling discussion of issues which may very well come before the Court. Compare the refusal of Mr. Justice Brennan, when his appointment to the Court was being considered by the Senate, to respond to certain questions which he believed might come before the Court for determination. *N.Y. Times*, Feb. 27, 1957, p. 15, col. 4.

43. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

44. Such would be a quite obvious violation of the first amendment.

ferment for Jew, Methodist or Catholic. A Catholic who elects to attend New York University⁴⁵ or a Jew who chooses to attend Fordham University receives the same treatment from the state as the Jew at Yeshiva, the Catholic at Fordham, the Lutheran at Wagner, the Methodist at Syracuse and the agnostic at Columbia. The essence of the plan is equality. By its very nature there is an absence of preference. But to deny state financial assistance to a student, whatever be his creed, simply because he elects to attend a church-related school is not only to prejudice the church-related school but to prejudice the student himself in the exercise of a constitutionally recognized freedom. Is the imposition of this penalty upon the student's freedom of choice substantially any different than the penalty which an earlier Court discountenanced in *Wolf v. Colorado*⁴⁶ and a later Court discountenanced in *Slochower v. Board of Higher Educ.*?⁴⁷ The former would forbid the imposition of a penalty upon a citizen who exercised his right to refuse admittance into his home to a state officer who sought entry without a search warrant. A penalty cannot be imposed even though, said the Court, the fourth amendment does not in its broad terms operate to restrict state officers. The latter case held it improper to penalize the alleged Communist simply because he had pleaded his fifth amendment privilege against self incrimination.

To recognize the right of the *student* is only to recognize what the Governor proposed. The scholar-incentive plan—though we have *arguendo* thus far assumed the contrary—has been offered, by executive affirmation, not as a boon to the educational institutions themselves but as a limited subsidy to students whom the state would encourage to higher intellectual achievements at the colleges or universities of their choice. And objection on constitutional grounds becomes vacuous, indeed, when we recognize the plan for what it actually is.

We have travelled thus far down a corridor of assumption. The critics of the Governor's proposal, in their arguments heretofore considered, have assumed that state aid to church-related colleges would violate the New York State Constitution. I have assumed that state aid to church-related colleges would not violate the United States Constitution. I have assumed that there is no difference between college

45. It has been reported that New York University has the largest Catholic student body (10,000) of any college in the United States. Fordham and St. John's, among the larger Catholic colleges, have larger student bodies but, of course, not all students are Catholic. N.Y. Herald-Tribune, Feb. 12, 1961, p. 23, col. 1.

46. 338 U.S. 25, 28 (1949); see also *Elkins v. United States*, 364 U.S. 206 (1960); *Frank v. Maryland*, 359 U.S. 360 (1959).

47. 350 U.S. 551 (1956).

education and elementary schooling. And I have assumed that the issues presented are justiciable issues, capable of being raised in a court of law by a resident taxpayer of the state of New York. Only some of these assumptions are valid.

It is valid to conclude, by an a fortiori force of logic, that if government aid to church-related *elementary schools* does not violate the United States Constitution, certainly government aid to *college students* cannot do so. We might recall that it was the Supreme Court which distinguished Master Barnette's sin⁴⁸ from Mr. Hamilton's sin,⁴⁹ or rather the penalties paid for their refusal to sin. But remembering Mrs. Frothingham,⁵⁰ it is not valid to assume here that a taxpayer would have a standing to challenge the scholar-incentive plan in the courts of New York. Thus, two essential issues remain: Does the scholar-incentive plan violate the New York State Constitution? Does any taxpayer have a standing, a sufficient interest, to challenge its validity?

THE TAXPAYER'S STANDING TO SUE

In *Frothingham v. Mellon*,⁵¹ the Supreme Court left it to the state to decide whether it would permit one of its residents to challenge, in a taxpayer's suit, the constitutionality of a state statute. *Frothingham* was concerned with the right of a taxpayer, resident in the United States, to maintain what in effect was a suit against the United States. But even before Mrs. Frothingham went to the courts, the Court of Appeals in New York applied the *Frothingham* rationale to dismiss a suit brought by a New York taxpayer who sought to enjoin certain allegedly illegal acts of New York State election officers. The interest, reasoned the court in *Schieffelin v. Komfort*,⁵² which the New York taxpayer shares in common with other taxpayers is not such a special, peculiar or personal interest as to entitle him to challenge in court the legality or constitutionality of an act or an appropriation of a state officer or a state agency. The *Schieffelin* rule applies whether the

48. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (state could not expel elementary school pupil for refusal to salute flag); see discussion in *Aid to Education—Federal Fashion*, p. 512 *supra*.

49. *Hamilton v. Regents*, 293 U.S. 245 (1934) (state could expel college student who refused to take prescribed military course); see discussion in *Aid to Education—Federal Fashion*, p. 511 *supra*.

50. *Frothingham v. Mellon*, 262 U.S. 447 (1923) (taxpayer had no standing to challenge federal appropriation); see discussion in *Federal Aid to Education—Federal Fashion*, p. 502 *supra*.

51. Note 50 *supra*.

52. 212 N.Y. 520, 106 N.E. 675 (1914).

suit be in the form of an action for an injunction or in the form of an action for a declaratory judgment. After *Bull v. Stichman*,⁵³ decided in 1948, the rule is to the present issue now more apposite than ever. For in the *Bull* case the court dismissed the suit of a taxpayer who sought to raise the very arguments raised here, who sought to enjoin a state appropriation to Canisius College, a church-related school, on the ground that the appropriation violated Section 4 of Article XI of the New York State Constitution.

Thus, in its present context, the constitutional issues implicit in the scholar-incentive plan would appear to be matters only of legislative debate and public discussion. Whether the scholar-incentive program is or is not constitutional is, in all likelihood, a question which will never be resolved by the courts.

THE STATE CONSTITUTION CONSTRUED

Unfortunately we have had since 1894, the year in which it was added to the state constitution, but three cases in which the court of appeals took a direct and lingering look at Section 4. A fourth case gave it an oblique glance and got a slanted view. The first three cases were *Sargent v. Board of Educ.*,⁵⁴ decided in 1904; *Judd v. Board of Educ.*,⁵⁵ decided in 1938, and *64th St. Residences, Inc. v. City of New York*,⁵⁶ decided in 1958. The fourth case, but second in time, was *People v. Brooklyn Cooperage Co.*,⁵⁷ decided in 1907.

It is unfortunate also that the cases had little to say about a more fundamental issue implicit in Section 4, the answer to which is not only a complete resolution of the present problem but one which is of cardinal concern to the State of New York and to the people of the State of New York. The more fundamental issue is whether it is the policy of the State of New York to subsist on a system of public higher education alone or whether it is the policy of New York to promote a system which blends both the public and private in higher education. Does Section 4, in other words, operate to preclude state aid to church-related colleges, or is it operative only with respect to elementary education? For if it operates to preclude state aid to *church-related* colleges and if the exclusion of church-related colleges requires

53. 273 App. Div. 311, 78 N.Y.S.2d 279 (3d Dep't), aff'd, 298 N.Y. 516, 80 N.E.2d 661 (1948).

54. 177 N.Y. 317, 69 N.E. 722 (1904).

55. 278 N.Y. 200, 15 N.E.2d 576 (1938).

56. 4 N.Y.2d 268, 150 N.E.2d 396, 174 N.Y.S.2d 1, cert. denied, 357 U.S. 907 (1958).

57. 187 N.Y. 142, 79 N.E. 866 (1907).

the exclusion of *all private* colleges, we then have a policy in New York which fosters only *public* higher education and we have not only the common school but the common college as well. That issue, it seems to me, touches upon our way of life and merits our most serious deliberation. That issue is far more important than the precise meaning of precise phrases found in various parts of Section 4. The cases were concerned, however, with the precise phrases and with formulating a general rule of construction for Section 4.

Judd v. Board of Educ. had the most to say about what Section 4 means and what it meant to accomplish. *Judd* sought to define the adverbs "directly" and "indirectly" as they are used in Section 4 and sought to give us a rule of construction. *Judd* succeeded in formulating a rule and, though the result was absurd, the rule itself was a reasonable one. The court's reasoning also ran around the fundamental and more important issue: Is Section 4 limited in its application to elementary and secondary schools?⁵⁸ *Judd* was decided before the exception clause—"but the legislature may provide for the transportation of children to or from any school or institution of learning"—became a part of Section 4.⁵⁹ Indeed, the frightfulness of the *Judd* result led directly and immediately to its repudiation by the Constitutional Convention of 1938 and by the electorate. *Judd* held, by a four-to-three decision in the court of appeals reversing the five judges in the appellate division and the trial judge in the state supreme court,⁶⁰ that

58. There is nothing in the record of the Constitutional Convention of 1894, at which art. XI, § 4 was adopted, which throws any particular light—other than is expressed in the section itself and in the judicial interpretations—on either issue. Nor is there anything of significance in the record of prior or subsequent Constitutional Conventions. There was no mention of this subject in the Constitutional Conventions of 1821 and 1846. In the 1867 Convention a petition to prohibit the donation of public moneys to sectarian institutions was ignored. *Journal of the Convention of the State of New York* 573 (1867); *Proceedings and Debates of the Constitutional Convention of the State of New York* 2710-15, 2870 (Underhill ed. 1868). In the Convention of 1894 the present section was reported by the Committee on Education. 3 *Revised Record of the Constitutional Convention* 758 *passim* (Steele rev. 1900). While the language used is quite broad, it is to be noted that the same committee proposed what is now § 1 of art. XI. *Id.* at 690. Whether there was an intended relation between the two sections is not clear from the records. The relationship as it was found in judicial interpretations is discussed *infra*, p. 543. The best that can be said is that § 4 grew out of denominational disputes over what version of what religion would be taught in public elementary schools. For a history of the events bearing upon this subject prior to the 1894 Convention, see 3 *Lincoln, The Constitutional History of New York* 567 *passim* (1906).

59. Section 4 was included in Article IX of the Constitution of 1894. When the exception clause was added in 1938, the section was renumbered and included in Article XI.

60. 253 App. Div. 907, 3 N.Y.S.2d 394 (2d Dep't 1938), affirming 164 Misc. 889, 300 N.Y. Supp. 1037 (Sup. Ct. 1937).

the providing of bus transportation to children attending elementary schools, both public and private, violated Section 4 because it included children attending church-related elementary schools.⁶¹ We can look back now and wonder whether the extravagant conclusion at which the court arrived was not based on something other than logic. What the majority said and held was that the New York State Constitution and perhaps, too, the United States Constitution requires us—even as a safety measure—to deny transportation to a child simply because he attends a Lutheran school, a Jewish day school or a Catholic parochial school. Not only a healthy child but a crippled child as well.⁶² *Judd* said to the invalid child that he must attend the public school because our organic law denied him transportation to any private school which he might otherwise have chosen to attend. It can with complacency be said that *Judd* had a dialectic for the judiciary as well as the electorate to repudiate.

The amendment of the constitution, the addition of the exception clause, was the popular reply to *Judd*. The exception clause now tells us that bus transportation is not the type of aid Section 4 contemplated when it spoke of direct aid and indirect aid. It is obvious that some aid is permissible because some aid is inevitable. Some aid is inevitable so long as we have church-related schools.⁶³ The question is: when is aid neither direct or indirect?

Judge Rippey, speaking for the majority in *Judd*, had a flash of rhetoric rather than a sense of complete logic when he wrote:

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. . . . 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

61. The majority in *Judd* noted that it could find no case which sustained the validity of bus transportation for children attending church-related schools. Nine years later the New Jersey Court of Errors and Appeals and the United States Supreme Court, in *Everson v. Board of Educ.*, 330 U.S. 1 (1947), affirming 133 N.J.L. 350, 44 A.2d 333 (Ct. Err. & App. 1945), provided just such a case. One wonders now whether, had the *Everson* case preceded *Judd*, the *Judd* court would have decided as it did.

62. The statute challenged in *Judd* authorized local school districts to provide free transportation for the physically handicapped and for children who lived so remote from the school that they were practically deprived of an education. 278 N.Y. at 203, 15 N.E.2d at 578.

63. E.g., tax exemption, fire protection, police protection, incorporation.

"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, disguised, 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 promotion 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.⁶⁴

Chief Judge Crane, for himself and two of his colleagues on the court, dissented.⁶⁵ He reasoned that since the state had made school attendance compulsory and since it had approved attendance at private schools, it was valid for the state to insure attendance. Chief Judge Crane found no compulsion or encouragement to attend church-related schools since they had been freely chosen in advance by the child or parent.

The *Judd* case had the persuasive force of a judicial precedent. It left its mark upon the lower courts in New York⁶⁶ and upon admin-

64. 278 N.Y. at 211, 15 N.E.2d at 582.

65. *Id.* at 218, 15 N.E.2d at 585.

66. I do not mean to suggest that there were no lower court decisions before *Judd* which were not of the same sentiment. We can, in fact, "look before and after and pine for what is not." *Judd* opened the sluice for a flood of lower court decisions which followed the same course. There were, however, other lower court determinations made before *Judd* which carried in the same direction. There were others, including the two lower court decisions involved in the *Judd* appeal itself, which ran against the *Judd* current. In *Stein v. Brown*, 125 Misc. 692, 211 N.Y. Supp. 822 (Sup. Ct. 1925), for example, a case which has been reversed, incidentally, on its holding that the releasing of children from public school classes for attendance at religious instruction held elsewhere than in the public school buildings was unconstitutional, the court said that the printing of cards by a school district (at a cost of \$2.87), which cards were to be completed by parents to specify the religious instruction which the parents desired the children to receive, violated § 4. In *Smith v. Donahue*, 202 App. Div. 656, 195 N.Y. Supp. 715 (3d Dep't 1922), the court held that the free distribution of nonreligious textbooks to children attending parochial school was an indirect aid to the parochial school and, therefore, at odds with § 4. Citing *Judd*, the State Comptroller ruled that a town board may not open a town hall or town facilities to religious organizations offering religious instruction even though the facilities are made available to all religious faiths. 5 Op. N.Y. St. Compt. 137 (1949).

On the other hand, the Attorney General has ruled that the rental of noninstructional facilities of denominational schools by publicly supported youth work projects could not, as a matter of law, be said to be an aid to the schools themselves. It is not enough to say or to speculate, the opinion reasoned, that the parochial school would derive benefits which might be applied for the maintenance of its school facilities. 1950 N.Y. Att'y Gen. Ann. Rep. 210. The Attorney General ruled, however, that a contract by a state agency to provide for child care in the denominational school buildings would be a violation of § 4. 1943 N.Y. Att'y Gen. Ann. Rep. 118. Thus, the mere use of a school building without a

istrative agencies. Yet I rather suspect that the imprint was left not because of the rule it announced but because of its failure to follow the rule it announced. *Judd* distorted its own rule and it was the *Judd* result rather than the *Judd* rule which roused popular protest. The rule which *Judd* formulated was a reasonable one. *Judd* said, "Aid furnished 'directly' would be that furnished in a direct line. . . . Aid furnished 'indirectly' clearly embraces any contribution, to whomsoever made, circuitously, collaterally, disguised, or otherwise not in a straight, open and direct course. . . ." There is nothing profound in the rule. *Judd* was talking elementary geometrics.⁶⁷ It is difficult to understand how there can be a direct line, a curved line, a looping line or any kind of an indirect line when there is interposed between the legislative appropriation and the school itself the individual's expression of a free will. It would appear that the line is broken by the individual's

provision for religious instruction would, in the opinion of the Attorney General, contravene the constitution. To escape constitutional condemnation, apparently only the non-instructional facilities could be used by public agencies. Reasoning along the same lines, the State Comptroller ruled that the leasing and operation, under the supervision of a school board or a town board, of a parochial school playground for all children during after-school hours would not be, as a matter of law, unconstitutional. 8 Op. N.Y. St. Compt. 249 (1952).

These various Attorney General and Comptroller decisions are quite accurately summarized in a 1957 opinion of the Attorney General wherein it was said that the leasing of parochial school facilities for recreational purposes is valid "where there would be no religious instruction and where the amounts received by these organizations would cover only project operating cost and 'could not conceivably leave them a profit for any other purpose.'" 1957 N.Y. Att'y Gen. Ann Rep. 145, 146. This was also the rationale of *Ford v. O'Shea*, 136 Misc. 921, 244 N.Y. Supp. 38 (Sup. Ct. 1929), *aff'd*, 228 App. Div. 772, 239 N.Y. Supp. 877 (1st Dep't 1930), wherein a taxpayer sought to restrain the New York City Board of Education from leasing and conducting public school classes in premises owned by certain churches and by the Franciscan Order. The court said: "The cases cited by the plaintiff are not authority for the proposition that upon the facts existing in this case the defendant board of education or its superintendent can be said to be violating § 4 of Article IX of the New York State Constitution. That section prohibits public money to be used in aid or maintenance of any school or institution of learning wholly or in part under the control or direction of any religious denomination. In the present case the facts alleged in the complaint, as well as the facts in the affidavits of plaintiff's attorney, fail to substantiate the charge that the board of education in the city of New York is using or attempting to use any public moneys to aid or maintain the schools of any religious denomination, or that they are doing anything except providing suitable and proper classrooms for the children attending public schools to the end that those children may receive all the benefits of the public school system to which they are entitled." *Id.* at 923, 244 N.Y. Supp. at 40-41.

67. A straight line is the shortest distance between two points. A curved line, an angled line, or an arced line is not the shortest distance between two points. But they touch both points. A broken line does not conjoin both points. Thus the geometry of *Judd*. I cannot deduce anything more profound from Judge Rippey's rather lofty language.

exercise of his freedom to choose his school and that there is thereafter neither a direct line nor an indirect line but rather two disconnected points.

It may well be that the difficulties attendant upon the lack of transportation in rural areas, or the difficulties with which lack of transportation plagues the parent of the invalid child, would be taken into account by parents and would influence them in a choice of schools. But I do not believe that our law is dedicated to the proposition that we must do all we can to compel the child to attend the public school.

Judd was concerned only with elementary schools but its logic was tied inextricably to the larger question, the more fundamental question relating to the pertinency of Section 4 to institutions of higher education. The court emphasized that Section 1 of Article XI of the New York State Constitution requires the legislature to "provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."⁶⁸ The court emphasized the use of the adjective, "all." Did it do so with a purpose? The purpose might well emerge from a comparison of *Judd* and *Sargent v. Board of Educ.*⁶⁹

The *Sargent* case sustained an appropriation of public funds to the St. Mary's Asylum for Orphan Boys and the payment of salaries to four sisters of a Catholic religious order who were employed by the Rochester Board of Education to teach the inmates of the asylum. Instruction in religion was given to the inmates but only in the evening hours—after completion of secular studies which conformed to the requirements established by the Board of Education. There was thus a "direct" grant to the religious institution itself and an "indirect" grant to the institution by reason of the payment of the salaries of the teachers. The court reasoned that the orphan asylum was neither a school nor an institution of learning. The prohibition contained in Section 4, it was said, was irrelevant. The court also found that there was a "quid pro quo" for the services rendered to the Board of Education by the sectarian institution and it was noted that the Board of Education has no choice except to provide that the secular education of the inmates be given at the asylum itself. It appeared that certain of the inmates were placed there after conviction for crime and that they could not, so the court found, be released for matriculation at the public schools. Finally, it was said that Section 4 did not operate to repeal the system of statutory law which was in effect for the main-

68. 278 N.Y. at 205, 15 N.E.2d at 579.

69. 177 N.Y. 317, 69 N.E. 722 (1904).

tenance of charities administered by private corporations at the time the state constitution was adopted.

Sargent sanctioned state aid under circumstances where the state did not provide for public school education. The legislature, by the *Sargent* reasoning, was *not* compelled by Section 1 of Article XI to provide common schools for “*all*” the children of the state. Though *Judd* and *Sargent* are at odds regarding the absoluteness of the adjective in Section 1, they are in agreement regarding the application or inapplication of Section 4. *Judd* said that State aid is not available when Section 1 is operative. *Sargent* said that state aid is available when Section 1 is not operative. Section 1 speaks, quite obviously, only of elementary education. There is no duty imposed upon the legislature to provide free higher education.⁷⁰ It would appear, therefore, that there is a substantial issue as to whether Section 4 has any effect at all to deny state aid to church-related schools at the college or university level.

That Section 4 applies in the area of higher education *People v. Brooklyn Cooperage Co.*⁷¹ was ready to assume, although Section 4 was not in issue there. In issue was Section 8 of Article VII. The court held that a contract between the state and Cornell University was not in violation of the latter section. Referring to Section 4, it noted: “It is argued there would be no meaning in this prohibition of sectarian appropriation for educational purposes if there were no power to make such appropriations in aid or maintenance of educational institutions which are not sectarian, when a consideration for such appropriations exists in work done by the institutions under contract obligations assumed by the state.”⁷² And the court seemed to subscribe to this argument when it said, “It is the policy of the state to foster non-sectarian education in various directions by selecting some corporation to act as its subordinate governmental agency, undertaking to render services to the state in consideration of appropriations made.”⁷³

The language is at best ambiguous. The court had before it a *contract*⁷⁴ between the state and Cornell. It expressly noted the fact

70. See *College of the City of New York v. Hylan*, 205 App. Div. 372, 196 N.Y. Supp. 804 (1st Dep't), aff'd, 236 N.Y. 594, 142 N.E. 297 (1923).

71. 187 N.Y. 142, 79 N.E. 866 (1907).

72. *Id.* at 157, 79 N.E. at 871.

73. *Id.* at 159, 79 N.E. at 872.

74. The contract committed Cornell to institute and maintain a department of forestry and to develop certain lands as a forest preserve for public use. The lands in question were acquired by the state and title conveyed to Cornell to be held by it for thirty years at the end of which period title was to revert to the state.

that it was a contract. Since there was a quid pro quo given by Cornell the transaction did not involve a gift in the first place and references to Section 8 and Section 4 were, therefore, irrelevant. If what the court meant to imply was that a *gift* to a secular college is valid but a *gift* to a sectarian college is invalid it may have had some hold on the legislative intent, but it would be dangerous to universalize any such rule or generalize it beyond the facts of that particular case. It would appear that the *Brooklyn Cooperage* case talked too quickly. Both Section 8 and Section 4 are stamped with the imprint of the equal protection clauses of the United States Constitution and the New York State Constitution, and for that reason I do not believe that we can formulate a general rule that a general plan of state aid to private higher education must exclude aid to private higher education which is church-related. That, it seems to me, is a classification which is inherently unreasonable and, as such, inconsistent with both the equal protection and the due process clauses of both the New York State and United States Constitutions.

Whatever validity, if any, there be in such a classification in the case of elementary education, it is certainly dissolved at the college or university level. The contention that religion is not a subject of study but a matter of indoctrination in church-related schools becomes arbitrary, indeed, when we include in the latter church-related colleges and universities. Religion at the college level, like physics, Greek, calculus, chemistry, literature or any of the so-called secular subjects, is a legitimate and accepted subject of study. Study of the various religions or religious beliefs of the world or a course in comparative religions would be and is, I am sure, a standard course at New York University, Columbia or Cornell as it is at any church-related college. And it is impossible to suggest that religious indoctrination is present in a church-related law school or medical school, a school of pharmacy or a graduate school of analytical science where religion, even as a proper subject of study, is not taught at all.

I do not mean to suggest that any student seeking a college education has a claim upon any part of the educational treasury of the State of New York. I do not suggest that the state is required to provide a college education for its citizens or that if the state elects to provide *some* higher education without cost to its citizens it is required to provide any more than public education at public colleges. But I do say that if the state chooses to aid private education or chooses to assist its citizens who seek a higher education at its private colleges, it must do so in a way which is consistent with the equal protection of its laws and with due process of law. Reduced to its simplest terms,

this is to say that private nonsectarian colleges and universities are in no better position, as potential recipients of state assistance, than private sectarian colleges and universities, and that students attending the latter can be put in no worse a position than students attending the former.

It was, I am sure, this consideration of due process of law which was noted by the court in the *64th St. Residences* case.⁷⁵ But it was not necessary to resolve the issue since the court found that there was neither direct nor indirect aid given to Fordham University, the church-related college, in the first place. At the same time *64th St. Residences* implicitly accepted the rule of the *Judd* case and necessarily concluded that it was misapplied in *Judd*. Consider the facts and the decision in *64th St. Residences*.

The Lincoln Square development or urban renewal plan, a slum clearance project in New York City, contemplated the creation of a cultural and educational center within the heart of the city. Fordham University became interested in acquiring that part of the area which had, according to a previously approved plan, been allocated for educational purposes. Each sponsor, or party interested in the project, including Fordham, agreed to bid at an auction held pursuant to the New York General Municipal Law⁷⁶ and, if the successful bidder, to relocate prior occupants, clear its part of the site and redevelop that part of the site as required by the plan. Fordham agreed to bid for the parcel set out "for educational purposes" at a stipulated price per square foot. The city agreed to acquire that parcel, as well as the rest of the area, by condemnation and, if Fordham were the successful bidder, to convey the area to Fordham.

Two facts are paramount. Fordham did receive state or municipal aid. Its very participation in the redevelopment project was a form of municipal assistance. Fordham received, in the first instance, the aid of the city's power of condemnation. It thereby acquired the land at a price significantly less than that which it would have been required to pay had it undertaken to acquire the land without the city's assistance. Secondly, the receipt of the benefit was dependent upon an event which was beyond the control of the city. For, while the parcel set aside for educational purposes was available by bid to collegiate institutions only, Fordham had to be the successful bidder. In other words, the offer of the exercise of the city's power of eminent domain

75. *64th St. Residences, Inc. v. City of New York*, 4 N.Y.2d 263, 150 N.E.2d 396, 174 N.Y.S.2d 1, cert. denied, 357 U.S. 907 (1958).

76. N.Y. Munic. Law § 72-k.

was made to all private colleges, but the city could not predetermine that it would inure to the benefit of a church-related college.

The court found, first, that there was "no substance to the assertion, on which this whole suit depends, that Fordham is getting a gift, grant or subsidy of public property."⁷⁷ It did recognize that Fordham was 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."⁷⁸ And finally the court—cognizant of the very palpable fact, too frequently ignored, that church-related institutions have constitutional rights too—added: "Special Term pointed out, probably correctly, that Fordham would be deprived of constitutional rights if it alone were excluded from bidding."⁷⁹

I would conclude that there are in *Sargent* illustrations of both direct and indirect aid—direct aid which took the form of subsidies given directly to the sectarian institution itself and indirect aid which took the form of payments to the religious teachers engaged by the sectarian institution—although neither type of aid was, for other reasons, found invalid. I would conclude that there now is in *Judd* itself and in *64th St. Residences* an illustration of a third type of aid which does not come within the interdict of Section 4. The latter type of aid is necessarily neither direct nor indirect but rather an accidental aid because there is no connecting line, direct or indirect, straight or circuitous, between donor and donee, between state and sectarian college. The same reasoning would apply to the scholar-incentive plan. It is, it would seem, quite apparent that the scholar-incentive plan puts no compulsion upon the student to attend any particular college. The incentive offered is an incentive to attend some college. So long as that freedom of choice is recognized and preserved it is difficult to find any line, direct or indirect, of aid traced from the state to any church-related college or university. It may be that the tuition grant eventually reaches the college, but that is only to recognize that "even the weariest river somewhere reaches the sea." I would conclude, therefore, that the scholar-incentive plan is not in violation of Section 4, howsoever the latter section may be construed and applied. But I would also conclude that this conclusion is rather insignificant when placed beside the constitutional right of the church-related college recognized in *64th St. Residences*.

Since we cannot, consistently with the requirements of due process

77. 4 N.Y.2d at 276, 150 N.E.2d at 398, 174 N.Y.S.2d at 5.

78. *Ibid.*

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

of law, exclude church-related colleges from any plan of state aid for private colleges, we are left with a choice between a kind of Herodian enforcement of Section 4, enforcement in such a way as necessarily to decree a pogrom of all state assistance for all private colleges, whether or not church-related, or, with better sense, the alternative conclusion that Section 4 does not apply in the case of higher education.

CONCLUSION

In its editorials attacking the scholar-incentive plan, the *New York Times*⁸⁰ created two assumptions: first, that the plan was deliberately designed to aid church-related colleges and, second, that aid to church-related colleges is unconstitutional. The first assumption is manifestly fragile. The second is reckless and frightening. For the terminal point of the second assumption is the denial of assistance to all private colleges. This process of proceeding by assumption beclouds what is not only a constitutional issue of great consequence but an issue of policy of paramount concern for the State of New York and, perhaps, for the Nation. The *Times* would necessarily ordain that only *public* higher education in New York receive state assistance. It would necessarily constitutionalize the public colleges of New York. That is a result so diametrically opposed to the history and policy of higher education in New York that I cannot conceive that it could ever have been in the contemplation of the Constitutional Convention of 1894. I cannot conceive that Section 4 was ever intended to apply in the context of the scholar-incentive plan or of any plan of aid for the colleges themselves.

Judd v. Board of Educ. crystallized the reasoning that there could be no aid for church-related elementary schools because the legislature was required to maintain a system of common schools for the education of *all* the children of the state. *Judd* quite obviously talked only of elementary education.

Under this provision [Section 1], the schools provided must be sufficiently numerous so that *all the children of the State* may receive their education, whatever may be their race, creed, color, or condition. 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 that system.⁸¹

Quite obviously the legislature does not now feel nor has it ever felt compelled to provide public higher education for *all* the children of New

80. Notes 29, 37 *supra*.

81. 278 N.Y. at 205, 15 N.E.2d at 579. The italics are the court's.

York. Historically, traditionally, private colleges have been and are today within the system of higher education in New York. "Thus *common school education* within the State," Judd said further, "*came exclusively under public control* and has since so remained."⁸² Quite obviously higher education for *all* the citizens of New York has never come exclusively under public control.

Judd spoke of the severance of sectarian schools and "the public common schools" and it noted that "while education is *compulsory* in this State between certain ages, the State has no desire to and could not if it so wished compel children to attend the free public common schools when their parents desire to send them to parochial schools."⁸³ Thus the common school is the school which the legislature is required to provide to satisfy the compulsory education laws of the state. This includes no more than elementary and secondary education. There is nothing in Judd to suggest that the state is forbidden to foster a blended system of public and private *higher* education. There is much in Judd which suggests the contrary.

The Heald Committee recognized the historic policy of fusion of public and private in higher education. It specifically reported that "it has been the practice in New York State to permit private colleges and universities to enroll all the students they could handle, and to limit the expansion of public institutions to the balance."⁸⁴ The Heald Report recognized that "all colleges and universities incorporated in the State, *both public and private*, are 'members' of the University of the State of New York."⁸⁵ It called private colleges and universities the "bulwark of higher education in New York,"⁸⁶ recognized that "private institutions of higher learning have important and unique functions to perform,"⁸⁷ that they "give American education a diversity and scope not possible in tax-supported institutions alone, and they have an opportunity to emphasize, if they wish, individualistic patterns of thought, courses of social action, or political or religious activity."⁸⁸ And the report concluded that topic with the note that in New York

82. 278 N.Y. at 207, 15 N.E.2d at 580. The italics are the court's.

83. 278 N.Y. at 211, 15 N.E.2d at 582. (Emphasis added.)

84. Committee on Higher Education, Meeting the Increased Demand for Higher Education in New York State: A Report to the Governor and the Board of Regents 4 (1960).

85. *Id.* at 16. The italics are the Committee's. There are 126 private colleges and universities in New York State. *Id.* at 17.

86. *Id.* at 24.

87. *Ibid.*

88. *Ibid.*

State "private colleges and universities have performed this function with great competency in the past."⁸⁹

The Governor, in his special message to the legislature, re-emphasized the history which the Heald Report had noted, and the Governor added, "These institutions, *public and private*, are the present strength of higher education in New York."⁹⁰ Indeed, the whole history of Regents scholarships⁹¹ shows a medley of state concern for private higher education and state concern for the freedom of the scholar to attend the college or the university of his choice. The Governor simply proposed to make available to the needy student what the state already made available to the gifted scholar because, the Governor said, "the future progress of New York . . . relies importantly upon educational opportunity for all who have the desire and the capacity to make use of it."⁹²

Surely then it has been the historical practice and the established policy of New York to provide in the area of higher education a mixture of public and private. It is not the policy or the plan of the state to create now a system which will lead to *public* higher education for *all* its citizens. If the Heald auguries are correct, that may well be our destination unless the state does provide aid for private colleges and universities. If that is where the river runs, it is tragic, indeed. Years ago mere literacy was the norm of a required education. In years to come broadening vistas of human knowledge may require a compulsory higher education system. Even if that system be a system of exclusively public education, I do suppose Columbia and Fordham and Cornell will survive, though with greater financial difficulty. But their influence will certainly be less, and we might, indeed, eventually lose what Dr. Heald valued as their "individualistic patterns of thought."⁹³ Thus those who, like the *Times*, would in their assumptions pile Pelion on Ossa to strike at the gods are striking at something which may be destructive of our democratic way of life. For they are striking at something destructive of all private higher education.

In Sparta long ago the child was said to belong absolutely to the state. At the age of seven he was removed from the home to be trained in state schools under state officers. Sparta knew nothing of private education. The state school education continued until the youth reached

89. *Ibid.*

90. Rockefeller, *Increased Opportunities For Higher Education*, N.Y. Legislative Doc. No. 9, at 6 (1961). (Emphasis added.)

91. See note 14 *supra*.

92. Rockefeller, *op. cit. supra* note 90, at 5.

93. Committee on Higher Education, *op. cit. supra* note 84, at 24.

the age of twenty. He was trained in a rigid military tradition. The Spartan discipline produced great soldiers and deeds of matchless bravery. But the Spartan system is foreign to our civilization—except perhaps in Russia and Communist China today. To meet the challenge of the Soviet space explorations I do not think we must now imitate their educational system or their way of life. It is well to remember that Leonidas was history's singular example of Spartan bravery but that, however courageous and skilled in warfare he may have been, Leonidas perished in the pass at Thermopylae. It was, in the end, an Athenian, Themistocles, who rallied the fleet at Salamis and sent Xerxes back to Persia. Sparta itself served, after all, only as a garrison for the rest of Greece. Sparta itself left to the world no literature, no philosophy, no culture, because it had none to leave. The value of Sparta to the world lay in the fact that it helped save something better than itself. We have a primary duty to the world to save the something better which is in ourselves.