

St. John's Law Review

Volume 31
Number 2 *Volume 31, May 1957, Number 2*

Article 3

Education

John A. Flynn

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

EDUCATION

VERY REV. JOHN A. FLYNN,
C.M., S.T.D., LL.D., L.H.D.†

BECAUSE a Constitutional Convention may be held in 1959, it seems to be desirable and even necessary to review Article XI which deals with Education, and to suggest some amendments which may have some value in the light of changing conditions in both education itself and the economy which exists today. On this matter the Joint Legislative Committee which produced the revised Education Law of 1947 had this to say: "There seems to be little doubt in the mind of the public as to the necessity for rewriting the Education Law. Recodification is imperative because of changes in education from time to time without immediate and appropriate changes in the law."¹ The late and illustrious former Commissioner of Education, Frank P. Graves, commented on this statement as follows: "Due to the constant development in the facilities and concomitant demands of a democratic society and the resulting progress of legislation, statutory enactments on education are continually becoming obsolete and the organization of the law is bound to be constantly disturbed and upset by additions, removals, and modifications in legislation."² When an opportunity as favorable as a Constitutional Convention may shortly be present, the above opinions relating to the Education Law should be given serious consideration in the matter of amending the article which plays such an important role in the development of men for the part they must play as citizens

† President of St. John's University.

¹ 1942 LEG. DOC. NO. 67, INTERMEDIATE REPORT, N. Y. JOINT LEGISLATIVE COMMITTEE ON THE STATE EDUCATION SYSTEM 57 (1942).

² Graves, *Development of the Education Law in New York*, 1 MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK, EDUCATION LAW XIII (1953).

of the United States and as inhabitants of the great State of New York.

It seems not to be wasteful at this time to insert here the four sections of Article XI of the Constitution. At least it will provide the advantage of an easy reference to the constitutional article on Education, and it may be helpful in comparing the present article with the suggestions and comments which follow.

Constitution of the State of New York

Article XI

COMMON SCHOOLS

1. 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.

REGENTS OF THE UNIVERSITY

2. The corporation created in the year one thousand seven hundred eighty-four, under the name of The Regents of the University of the State of New York, is hereby continued under the name of The University of the State of New York. It shall be governed and its corporate powers, which may be increased, modified or diminished by the legislature, shall be exercised by not less than nine regents.

COMMON SCHOOL, LITERATURE AND THE UNITED STATES
DEPOSIT FUNDS

3. The capital of the common school fund, the capital of the literature fund, and the capital of the United States deposit fund shall be respectively preserved inviolate and the revenue of the said funds shall be applied to the support of common schools and libraries.

USE OF PUBLIC PROPERTY OR MONEY IN AID
OF DENOMINATIONAL SCHOOLS PROHIBITED;
TRANSPORTATION OF CHILDREN AUTHORIZED

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

It is suggested that section 1 of this article be amended to read as follows:

The legislature shall provide for the maintenance and support of a system of public elementary and secondary schools, wherein all the children of this State may be educated. Furthermore, the legislature shall provide for the number and kinds of units of a State University, which shall adequately supplement the existing private colleges and universities of the State and which shall charge tuition and fees in proportion to the economic status of students who are capable and desirous of attending the State University. Religious denominations shall have the right to establish elementary, secondary and post-secondary institutions of education. Parents shall have the right to send their children to approved schools of their conscientious choice. Parents shall have the right to avail themselves of released time, or any other legal method, for the religious instruction of their children.

Comment: Except for historical reasons, the term "free common schools" seems to have no place in a revised version of the Constitution. By this time, the term "a system of public elementary and secondary schools" has been practically constitutionalized by a sufficiently long period of usage and tradition. Nor is there any reason why this article should be restricted to the old "common school." The time has long since passed when the Regents supervised higher education and academies, and the "common schools" were left entirely to the local superintendent. The simple fact is that the Regents are the top supervising and co-ordinating authority in the area of education within the state. Consequently, it seems that this fact should be recognized by the Constitution by the actual admission that the state, under the authority of the Regents, maintains a system of public elementary and secondary schools. The same method of reasoning justifies mentioning the State University in the Constitution. It was created by an act of the Legislature. It was created to satisfy a need which exists in the state for more ample post-secondary facilities and for the economic

convenience of many who can benefit by it and who, through its use, can become better and more useful citizens. Not unlike the elementary and secondary schools, the State University is under the supervision of the Regents. It seems logical to accord it a place in a modernized Constitution. Placing in the Constitution such items as the right of parents to send their children to approved schools of their conscientious choice and the right of parents to avail themselves of released time, as it is defined in New York State, need no specific justification. These rights are founded in the Natural Law. Furthermore, two distinct decisions of the United States Supreme Court incorporated these rights within the framework of the Civil Law.³

It is suggested that section 2 of this article be amended to read as follows:

The corporation created in the year one thousand seven hundred eighty-four, under the Regents of the University of the State of New York, is hereby continued under the name of the University of the State of New York. It shall be governed and its corporate powers, which may be increased, modified or diminished by the legislature, shall be exercised by not less than one regent for each judicial district and three regents at large. The regents shall be elected by the legislature, on joint ballot of the two houses thereof. The objects of the University of the State of New York shall be to encourage, promote, plan, supervise and co-ordinate all types and levels of education, and shall have full authority to supervise and administer educational budgets of all types and levels of education.

Comment: Obviously there is a very much needed revision of section 2 of this article for the following reasons:

1. The number of judicial districts is ten. It is time that Section 202 of the Educational Law make provision for one regent from each judicial district, plus three additional regents who may be considered members at large. The same section further states that no less than nine shall govern the University. While the Constitution is perfectly clear as to the minimum number of regents, seemingly it would be better for it to mention the maximum number and to indicate the

³ See *Zorach v. Clauson*, 343 U.S. 306 (1952); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

fact of some being elected from the existing judicial districts and others being elected at large.

2. New York State has been singularly blessed in the fact that there has been a remarkable divorce of education from politics. It has been stated by the Regents, on more than one occasion, that discussions concerning politics and religion have never engaged the time and attention of this group of loyal public servants. At times one hears such expressions as "the Regents have no political or religious complexion." Some have said that the fact of a Republican controlled Legislature electing twelve Republicans and one Democrat definitely stamps the Regents as a political body. In this opinion there seems to be no truth. Governor Dewey sought to change the present plan of electing the Regents by proposing that the Governor appoint a certain number and the Legislature elect the rest. Recently, Governor Harriman proposed that not more than two-thirds of the Board be members of the same political party.⁴ It is the conviction of a great number that the present method of election is sufficiently sound to preserve the non-political attitude of the Regents toward educational policies and problems.

3. The present Constitution states that the powers of the Regents "may be increased, modified or diminished" by the Legislature. In view of the present complexity in which education exists, it seems that the Constitution should spell out explicitly the function which the Regents can exercise, *i.e.*, to encourage, promote, plan, supervise, and co-ordinate all types and levels of education. In a special manner such a statement would clarify the relationship which should exist between the tax supported and non-tax supported institutions of higher learning.

Section 2 of this article empowers the Regents to govern. However, to govern effectively requires that a body have the power to plan and co-ordinate. This is the reason for suggesting that Section 201 of the Education Law and section 2 of this article be amended so that the essential functions of

⁴ See Governor Averell Harriman, Annual Message to the Legislature, January 9, 1957, *McKINNEY'S SESSION LAWS OF NEW YORK A-122 (1957)*.

planning and co-ordinating be actually included in the power of the Regents to govern the University of the State of New York.

It is suggested that section 3 of the article be amended to read as follows:

The capital of the common school fund, the capital of the literature fund, and the capital of the United States deposit fund shall be respectively preserved inviolate and the revenue of said funds shall be applied to the support of public elementary and secondary schools. The legislature shall be empowered to use as many bases as are necessary for the equitable distribution of state moneys to the public elementary and secondary schools. The legislature shall also have the power to devise means, including, but not limited to, bond issues, to support adequately the various units of the State University.

Comment: The capital of the three funds mentioned above amounts to a mere pittance in comparison to what the state must expend on public elementary and secondary education. As far back as 1947, the state aid to public schools in New York amounted to an annual appropriation of approximately \$155,000,000. And if the appropriation for school lunches is considered, the total amount approximated is \$157,500,000.⁵ Obviously a more modern and practical method of financing the public school system should be constitutionalized. Moreover, it is strongly felt that the fact and methods of financing public post-secondary education, *i.e.*, units of the State University, should have a place in the Constitution.

It is suggested that section 4 of this article shall be amended to read as follows:

The State shall authorize funds for free denominational schools for textbooks and other instructional aids. The legislature shall provide for the transportation of children to and from any school or institution of learning. The legislature shall authorize the Board of Regents to contract with denominational colleges and universities for educational services according to an established cost for tuition and fees. Enabling legislation shall permit the Regents to authorize long-term loans at a low interest rate to non-tax supported colleges and universities for capital and current purposes.

⁵Graves, *supra* note 2, at XXIII.

Comment: It is almost unthinkable in this kind of economic democracy in which we live that the Legislature of New York would not regard the suggested amendment to section 4 as anything but a good capital investment. For example, there are over 600,000 children in Catholic elementary and secondary schools. Textbooks for such subjects as history, geography, etc., (religious texts are not contemplated) along with other instructional aids would cost approximately \$9,000,000 annually. This cost is calculated at \$15 per child. The capital and current plant expenses would be borne completely by the denomination. Certainly the denominations are rendering a service to the state. Certainly the parents of children are saving the taxpayers additional expenditures, while they assume the additional burden of supporting another school system.

The federal government has contracted, and is so doing at the present time, with non-tax supported colleges and universities for educational, research, and military purposes. Such arrangements have never been considered a violation of the principle of the separation of Church and State. The simple fact is that denominational schools on any and all levels are not exclusive or private institutions. They may be conducted by private corporations, but they render public service, in much the same fashion as utility companies which are owned and conducted by private corporations for the use and benefit of the public.

The same type of argumentation can be used when there is question of the State making loans to non-tax supported colleges and universities. Such institutions are really not private? They exist as a public service to the communities in which they are located and to other communities, principally in the United States. They must pass the test of state, regional, and professional accrediting agencies. They have all the burdens and obligations of the tax-supported institutions, but they share in scarcely any of the benefits and privileges accorded to their more opulent companions. The unique part of the whole matter is that the tax and non-tax supported institutions of higher learning share the same common and general objective, namely, to prepare men and women to develop themselves according to sound American

principles and to contribute their services to make the United States a better country in which men may live according to the pattern of economic, political, and religious freedom.

The State of New York is well known for its distinguished leadership. The Boards of Trustees of denominational schools and non-tax supported colleges and universities are supremely confident that the Legislature of the Empire State will discover means to establish and exercise equity for all educational institutions. It will require prudence and courage to enact legislation which bears resemblance to the suggestions contained in this article. The belief is that the delegates of the Constitutional Convention, the members of the Legislature and the persons in the State Department of Education charged with implementation of the several enactments will not be found wanting.