"Save Our Schools" - A Challenge Beyond the Courts

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“SAVE OUR SCHOOLS”—A CHALLENGE BEYOND THE COURTS*

On April 28, 1972, 30,000 students from Catholic elementary schools in New York City marched past Governor Rockefeller’s office chanting, “Save our schools.”1 During the past year a string of federal court rulings against state plans to aid parochial schools2 was broken by only one favorable holding.3 The children who paraded to save their schools were doing so in response to the opinion of a three-judge federal panel4 that New York’s Mandated Services Act of 1970 was unconstitutional because it violated the first amendment requirement of separation of church and state.

* This article is a student work prepared by Neil A. Nowick, a member of the St. John’s Law Review and the St. Thomas More Institute for Legal Research.
1 There has been a major decline in the number of parochial schools throughout the country. A vicious cycle has developed wherein the lack of sufficient funds has caused the schools to be less attractive, which, in turn, has caused enrollment to decline. The New York Times reported that, in 1960, there was a total enrollment of 4.3 million children in 10,372 Catholic elementary schools. Ten years later, in 1970, enrollment had dropped to 3.7 million and the number of elementary schools had dwindled to 9,947. Enrollment in Catholic high schools and colleges, on the other hand, has increased although the total number of high schools dropped slightly. N.Y. Times, Jan. 10, 1972, at 6, col. 6.

174
A combination of factors, some financial, some social and some religious, has caused the current plight of parochial schools. No single factor can be isolated for blame although there are many who feel that tuition increases have been the major cause of the dilemma. This assumption is not supported by scrutiny of the enrollment charts of Catholic schools across the nation since such examination reveals that the reduced attendance is caused, not by a withdrawal of children already enrolled in parochial schools, but by a refusal to enroll younger children as they reach school age. The charts demonstrate that the enrollment decline is highest in the elementary schools as opposed to the high schools and colleges. Since tuition has always been low or nonexistent in the elementary grades, tuition increases at that level can hardly be held accountable for the more than 20 per cent decline in enrollment since 1965. It is necessary to understand why parochial school facilities and population are dwindling before one can really appreciate the challenge that is presented each time a new state aid program is presented to the courts for constitutional consideration. Many of these programs, which will be discussed later, were formulated to achieve one objective: circumvention of the three-pronged separation of church and state test formulated by the Supreme Court.

Why are Catholic schools closing down? Some of the reasons are beyond the power of any Church-adopted educational policy decision or governmental program to correct. Such reasons include the decline in the Catholic birth rate during the past few years, a phenomenon that relates to Church loyalty, and changing parental tastes such as an increasing reluctance of younger, highly educated Catholic parents to send their children to parochial schools when the future of such schools is questionable and nearby public schools may offer a secular education that is academically superior. The latter problem is aggravated by the fact that the migration of the middle class Catholic to the suburbs has not been

6 Bartell, Good News and Bad for Catholic Schools, AMERICA, April 1, 1972, at 343 [hereinafter Bartell].
7 Id.
8 Note 1 supra. If present conditions persist, however, Catholic high schools will probably experience an enrollment decline as the smaller size elementary classes reach high school age.
9 In 1965, 7 million children (about 14 per cent of the school age total) attended private schools. Now, after a drop of 23 per cent in private school enrollment, approximately 5.4 million children or 10 per cent of the school age total attend nonpublic schools. N.Y. Times, Mar. 6, 1972, at 23, col. 1.

10 The test was expressed in Lemon v. Kurtzman, 403 U.S. 602 (1971):
First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster “an excessive entanglement with religion.”
Id. at 612-13 (citations omitted).
11 Ernest Bartell, a member of the President’s Commission on School Finance, administered a national economic study of Catholic elementary and secondary schools and found that the declining birth rates could be correlated with baptismal rates. Baptismal rates are sometimes used as an index of Church loyalty and, significantly for the future of Catholic education, they were found to be declining faster than birth rates. See Bartell, note 6 supra.
matched, or even closely paralleled, by the construction of Catholic schools in the newly populated areas. Many parents are antipathetic toward the Catholic school philosophy; some parents merely lack confidence in the schools’ stability and durability. These are not problems which are solved with government aid for, even if state aid was available, these attitudes might well persist.

Unfortunately, a grave financial crisis does exist. Operating costs for Catholic schools in 1975-76 are expected to increase to $575 per pupil at the elementary level and $950 per pupil at the secondary level. Deficits of $200 per pupil are likely to occur by 1976. Fifty per cent of the Church’s total operating revenues would be consumed by Catholic schools in order to educate a mere 20 per cent of the Catholic children in school. Ernest Bartell, a member of the President’s Commission on School Finance, sums up the problems by stating:

[Under] more plausible assumptions about the feasibility of Catholic school consolidation and equally plausible predictions of inflationary trends and church revenue patterns, the additional deficits required to educate those 20 per cent of Catholic children easily exceed the amounts that could be expected politically in aid from the public sector, even if constitutional barriers are surmounted.

Thus, it is apparent that a considerable question as to the viability of Catholic schooling would remain even if governmental aid were constitutionally approved. The answer lies in making the schools more attractive and “now-oriented.” Financial problems would most likely be relieved by an increase in enrollment and a change of attitude among Catholics. While the courts may allow some form of temporary financial relief, any long range solution must include educational innovations that will mold parochial schools into multi-purpose educational units serving both the secular and religious needs of the Catholic community.

In the interim, the recent decision in Committee for Public Education and Reli-

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12 Had some of the schools moved from the urban areas along with the middle class, thus offering a choice to suburban Catholic parents, parochial school enrollment might not have dropped so sharply.
14 Bartell, note 6 supra, at 343.
15 Id. at 345. The key to changing the present attitudes of Catholics is motivation. Administrators, educators, parents and students must be motivated to regard innovation in parochial schools as a group project. Catholic families now contribute only slightly more than one per cent of their incomes to parochial schools. With a new “now-oriented” parochial school system as a goal, such contributions could double.
16 The Presidential Commission on School Finance suggested 13 ways nonpublic schools could lighten their burden:

Several of its suggestions deal with meeting the ideological problem of the nonpublic school: clarify its unique identity, lead the way in integrated education, increase contact with others, establish partnership with colleges, accept greater risks, break the crisis image, adopt a vigorous recruiting program.

Self-help in finances was also recommended: practice greater accountability, increase income from private sources, pool resources in some areas, experiment with mobile units for classroom use, adopt firmer control over operating costs, intensify pupil-teacher and parent-teacher relationships.

gienic Liberty (PEARL) v. Nyquist, upholding the constitutionality of tax benefits while voiding a tuition assistance plan and construction grants, is evidence that the legal battle between the separatists and the "parochialaid" advocates will most assuredly continue. This Note will attempt to analyze the most recent cases in terms of the challenge or innovation the questioned pieces of legislation presented and the reasons that courts chose to frustrate or, in the case of PEARL v. Nyquist, uphold these efforts to provide parochial aid. Some solutions to the problems which face the parochial schools will also be suggested. A number of these solutions are currently being tested, some are at the drawing board stage and others are modifications of legislative solutions already rejected by the courts.

Throughout the country, advocates of parochial aid have been energetically devising and passing various types of legislation aimed at finding a breach in the constitutional wall the courts have erected. The result has been an appreciable increase in the number of "parochialaid" court cases of which those discussed below are the most significant.

Review of the 1972 Judicial Decisions

PEARL v. Nyquist

In an effort to save parochial schools from financial disaster, the New York Legislature, earlier this year, passed an Act which would have provided funds for (1) maintenance and repair of the schools, (2) tuition assistance to low-income families with children in private schools and (3) income tax benefits to families who send their children to nonpublic schools.\(^{17}\) The Act was immediately challenged in PEARL v. Nyquist,\(^{18}\) a three-judge federal panel finding that the tuition assistance program and the maintenance grants violated the establishment clause of the first amendment while concluding, 2-1, that the income tax benefit plan was constitutional.\(^{19}\) Each section of the statute will be discussed separately.

Section I provided for dollar grants from the state treasury to nonpublic schools for maintenance purposes. Such purposes included "the provision of heat, light, water, ventilation and sanitary facilities, cleaning, janitorial and custodial services, snow removal"\(^{20}\) and other services relating to the upkeep of nonpublic school buildings, grounds and equipment. The grant, in dollar terms, would have amounted to $30 per pupil with increases for certain named exceptions.\(^{21}\)

\(^{17}\) N.Y. Laws ch. 414 (1972).
\(^{19}\) Id. Relying on the assumptions that "the Legislature intended to provide a quality education for all children who attend nonpublic schools in low-income areas" and that "the Legislature intended to preserve the health and safety of children who attend non-public schools in low-income areas," the court set out to determine the constitutionality of the Act. Id. at —. Second Circuit Judge Paul Hays dissented from the panel's opinion on the tax benefit plan.
\(^{20}\) F. Supp. at —.
\(^{21}\) The grant would be increased to $40 dollars per pupil if a school were more than 25 years old. However, all maintenance grants would be restricted to "fifty per centum of the average per pupil cost of equivalent maintenance and repair in the public schools of the state on a state-wide basis, as determined by the commissioner [of education]." N.Y. Laws ch. 414, § 551(1) (1972).
In striking down these maintenance grants, the three-judge Southern District of New York panel relied on the Supreme Court's decision in *Tilton v. Richardson*.\(^2\) *Tilton* held that construction grants for buildings used for religious purposes were unconstitutional.\(^2\) Recognizing that a parochial school budget is far from divisible into secular and religious components, the *PEARL* court was able to reject an argument that janitorial services and snow removal are not aids to religion and, therefore, their neutrality permits a grant from the state treasury. The court noted:

Not having to pay the janitor makes it reasonable to assume that the money otherwise going to him can be used to increase the salary of a religious teacher or the fund for the purchase of objects of religious devotion.\(^2\) Janitorial services aid the parochial schools so they do not have a completely secular purpose. Light and heat are provided to classrooms where religion is taught. “There is no suggestion that heat is to be cut off while prayer or religious teaching is conducted in the same schoolroom.”\(^2\)

In holding that the program of maintenance grants to nonpublic schools involved an excessive entanglement of government and religion, the court also cited the reasoning used in *Walz v. Tax Commission*.\(^2\) In administering the grants, New York State would have to audit the financial reports of nonpublic schools to determine whether their expenditures were in proportion to the allotments granted. Government officials would have to decide whether the proportion of grant to total tuition was the same as the proportion of secular teaching to religious teaching. Thus, the *PEARL* court found it easy to agree with a statement made by Chief Justice Burger, speaking for the *Walz* majority: “Obviously a direct money subsidy would be a relationship pregnant with involvement.”\(^2\)

Section II entitled parents of elementary and secondary nonpublic school children to a tuition grant if their family incomes did not exceed $5000 per annum. For children in grades one through eight, the reimbursement would be $50 per pupil. This sum would be doubled for children in grades 9 through 12. The State Legislature also imposed a “constitutional” restriction aimed at giving this “Elementary and Secondary Opportunity Program”\(^2\) a better chance of surviving the inevitable court challenges. The tuition grant was restricted to a maximum of 50 per cent of

\(^2\) 403 U.S. 672 (1971).
\(^2\) *Id.* The *Tilton* court also held that payments *could* be made to certain church-related colleges for construction grants if the facilities receiving the grants were in no way engaged in the teaching or practicing of religion.
\(^2\) — F. Supp. at —.
\(^2\) *Id.*
the child's tuition. The legislature feared that a 100 per cent grant would be held an indirect government subsidy of the entire cost of religious education for some children. However, Section II's attempt to aid poor parents failed for the reasons discussed below.

The court decided that parochial schools were the ultimate recipients of the tuition reimbursements although parents received the grants directly. "The parent is simply a conduit,"20 declared the opinion. It was argued that, since State aid is constitutionally used to reimburse children's bus transportation26 and to loan textbooks,31 tuition grants should also be allowed. The court recognized the distinction between reimbursements to a family and reimbursements to a parochial school but concluded that, "there is no such distinction where the parent is a mere conduit for a payment of tuition."32

In adopting Section II, the New York Legislature relied on the theory that to deny needy families the "right" to a religious education for their children would be denying them free exercise of religion. But public support of the "right" to free exercise of religion was not the intention of our Founding Fathers. In fact, "[i]f the Founding Fathers had any intention about religion it was surely to separate the concern of the Government from the concern of the individual religious community."33

The PEARL court feared that there would be no end to religious aid if a state subsidy might be given for religious education.34 Although economic hardships and the bleak future of Catholic schools were considered by the court, it nevertheless stated that "economic hardship alone is not enough to overcome the strictures of the First Amendment."35 The PEARL opinion also noted that "the payment of tuition for its pupils makes the church school a State-supported school,"36 an arrangement foreign to the American way of life.

Section III, a tax benefit program,37 entitles parents of children attending nonprofit, nonpublic schools to subtract from their adjusted gross incomes certain amounts designated by the Act, thus affording an income tax reduction.38 There are restrictions, however. For example, the exclusion may be multiplied by the number of children attending nonpublic school but

20 F. Supp. at —.
32 F. Supp. at —.
33 Id. at —.
34 "If State subsidy may be given for religious education, why may it not be given to the poor for the purchase of sacramental wine, or a crucifix or a Torah, a printing press for Jehovah's Witnesses, or for a trip to a Baptist convention or to hear a favorite evangelist, or for a Muslim to take his pilgrimage to Mecca." — F. Supp. at —.
35 Id. at —.
36 Id.
37 Such a program is analogous to a tax credit program. However, there are certain distinguishing features. A tax credit is subtracted from one's actual income tax liability whereas the Section III allowance is subtracted from one's adjusted gross income. The higher your adjusted gross income, the lower your tax exclusion. A tax credit would be a fixed sum not exceeding 50 per cent of a child's tuition.
38 F. Supp. at — & n.6. The court cited the following table contained in the Act:
such attendance must be on a full-time basis and a maximum of three exclusions is allowed. A parent must also have paid at least fifty dollars in tuition for each child. Parents with adjusted gross incomes of from $5000 to $25,000 qualify for the exclusion which may reach $1000 for each child.\(^3\)

In an unprecedented decision, the three-judge panel, although split 2 to 1, upheld the constitutionality of Section III. The court equated the tax benefit program with that of real property tax exemptions for churches\(^4\) and income tax deductions for religious contributions.\(^4\) In differentiating Section III from the other two sections of the Act, the court found that a tax benefit program would cover “all nonprofit private schools in the State”\(^4\) and “does not involve a subsidy or grant of money from the State Treasury.”\(^4\) The court determined that any benefit to parochial schools would be remote, no danger of entanglement was present and the purpose of the section was purely secular.

It must be emphasized that this split decision deals with a state statute and an appeal to the Supreme Court is almost inevitable.\(^4\) Therefore, the argument for both pro- and anti-tax benefit positions deserve close scrutiny. The PEARL majority reasoned that if a tax exemption for church property was permissible under the Walz decision, then the New York plan of tax benefits is likewise permissible because “the grant of a tax exemption is not sponsorship since the government does not transfer part

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\begin{array}{ccc}
\text{If New York adjusted gross income is:} & \text{The amount allowable for each dependent is:} \\
\text{Less than $9,000} & $1,000 \\
9,000–10,999 & 850 \\
11,000–12,999 & 700 \\
13,000–14,999 & 550 \\
15,000–16,999 & 400 \\
17,000–18,999 & 250 \\
19,000–20,999 & 150 \\
21,000–22,999 & 125 \\
23,000–24,999 & 100 \\
25,000 and over & 0 \\
\end{array}
\]

The court's opinion also included an index of “estimated net benefits:”

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\begin{array}{ccc}
\text{ESTIMATED NET BENEFITS} \\
\text{Adjusted Gross Income} & \text{One Child} & \text{Two Children} & \text{Three or more} \\
\text{Less than $9,000} & $50.00 & $100.00 & $150.00 \\
9,000–10,999 & 42.50 & 85.00 & 127.50 \\
11,000–12,999 & 42.00 & 84.00 & 126.00 \\
13,000–14,999 & 38.50 & 77.00 & 115.50 \\
15,000–16,999 & 32.00 & 64.00 & 96.00 \\
17,000–18,999 & 22.50 & 45.00 & 67.50 \\
19,000–20,999 & 15.00 & 30.00 & 45.00 \\
21,000–22,999 & 13.75 & 27.50 & 41.25 \\
23,000–24,999 & 12.00 & 24.00 & 36.00 \\
25,000 and over & 0 & 0 & 0 \\
\end{array}
\]

\(^3\) See note 38 supra.
of its revenues to churches but simply abstains from demanding that the church support the state.\textsuperscript{45} Section III grants the exemption to individuals, not churches or church schools, thereby creating an even wider gap between the government and religion than the \textit{Walz} exemption.\textsuperscript{46} The court, in further negation of the idea that Section III constitutes a government sponsorship of religion, concluded that the section did not limit the exemption to parents who send their children to church schools. Rather, the tax break is to be provided to parents of those enrolled in any nonprofit, nonpublic school.

The court also found that Section III could be analogized to tax deductions for religious contributions. In providing tax benefits, the state loses revenue but the lost revenues do not aid parochial schools by being turned over to them as additional tuition payments. The parent is simply being compensated for tuition already paid. The court posed the following question: "If a parishioner made a contribution to his parish, and the parish school was entirely tuition free, would he be denied his income tax deduction because his child attended the school?"\textsuperscript{47} The majority would answer this question in the negative and thus concluded that the tax benefit plan, a different application of the same principle, is valid.

Second Circuit Judge Paul Hays presented a strong dissenting argument to the PEARL majority's approval of Section III. Judge Hays differentiated both tax exemptions for Church property and tax deductions for religious contributions from the tax benefits provided by the section. He theorized that "the tax benefit statute was quite frankly enacted as a substitute for partial subsidies to parents who pay tuition to religious schools."\textsuperscript{48}

Judge Hays asserted that there can be no analogy between a tax exemption of church property and a tax benefit program. It was decided in \textit{Walz} that the exemption at issue would cover a broad class of property owned by "non-profit, quasi-public corporations."\textsuperscript{49} Over 93 per cent of New York State's nonpublic schools, on the other hand, are religious institutions.\textsuperscript{50} In Judge Hays' opinion, \textit{Wolman v. Essex}\textsuperscript{51} is more applicable than \textit{Walz} to the PEARL situation. \textit{Wolman} stated that "the limited nature of the class affected by the legislation, and the fact that one religious group so predominates within the class, makes suspect the constitutional validity of the statute."\textsuperscript{52}

Turning to the majority's analogy to tax deductions, Judge Hays found that tuition payments made by parents are not contri-

\begin{itemize}
  \item \textsuperscript{45} 397 U.S. at 675.
  \item \textsuperscript{46} One wonders how much weight can be attached to the court's complaint, with respect to Section II, that "[t]he parent is simply a conduit." — F. Supp. at —. In considering Section III, the court seemed to think that the decisive difference between tax subsidies and tax benefits was that one involved a direct grant from the State Treasury to religious institutions and the other did not. It is interesting to note that the court did not consider the "parent as conduit" argument in relation to the tax benefit plan.
  \item \textsuperscript{47} \textit{Id.} at —.
  \item \textsuperscript{48} \textit{Id.} at — (dissenting opinion).
  \item \textsuperscript{49} 397 U.S. at 673.
  \item \textsuperscript{50} — F. Supp. at — & n.1 (Hays, J., dissenting).
  \item \textsuperscript{51} 342 F. Supp. 399 (E.D. Ohio), aff'd, — U.S. — (1972).
  \item \textsuperscript{52} \textit{Id.} at 412.
\end{itemize}
butions and, therefore, tax benefits under Section III are not given in lieu of a deduction for a contribution. Instead, the parent of a child enrolled in a nonpublic school pays tuition as consideration for the education of his child. Judge Hays noted, "[a] payment for services rendered is not a contribution and such payments are not deductible."

In an effort to prove that the tax benefit program under Section III had the same purpose and effect as the unconstitutional tuition assistance plan of Section II, Judge Hays quoted Mr. Justice Jackson, dissenting in *Everson v. Board of Education*:

> "The prohibition against establishment of religion cannot be circumvented by a subsidy, bonus, or reimbursement of expense to individuals for receiving religious instruction and indoctrination."

The benefits received under the tax exemption plan are quite similar to the benefits received under the tuition assistance plan. "In both instances the money involved represents a charge made upon the state for the purpose of religious education." An opinion in another famous establishment of religion case asserted that it is necessary to our laws that "what may not be done directly may not be done indirectly lest the Establishment Clause become a mockery."  

**Lemon v. Sloan**

After experiencing defeat of its Nonpublic Elementary and Secondary Education Act in *Lemon v. Kurtzman*, Pennsylvania promptly passed a new statute, this time omitting what the Supreme Court, in considering the earlier scheme, had found to be a fatal defect: provision of state financial aid directly to church-related schools. The new plan provided that, if a nonpublic school met the compulsory school attendance requirements and certain federal standards under Title VI of the Civil Rights Act of 1964, then parents would be eligible for tuition reimbursement for school years completed by their children attend-

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53 — F. Supp. at — (dissenting opinion). Judge Hays quoted the court in DeJong v. Commissioner, 36 T.C. 896, 899-900 (1961), aff’d, 309 F.2d 373 (9th Cir. 1962):

> We are satisfied on the record before us that at least a portion of the $1,075 paid by petitioners to the society was in the nature of tuition fees for the education which the society was expected to furnish to petitioners' children and was not in fact a true charitable contribution. Payments pledged and made by parents in circumstances disclosed by the evidence were not voluntary and gratuitous contributions motivated merely by the satisfaction which flows from the performance of a generous act; they were induced, at least in substantial part, by the benefits which the parents sought and anticipated from the enrollment of their children as students in the society's school.

Although the PEARL majority and Judge Hays apparently assumed the validity of deductions for charitable contributions, that question has never been reviewed by the Supreme Court.

54 330 U.S. 1 (1947).

55 Id. at 24.

56 — F. Supp. at — (dissenting opinion).


61 42 U.S.C. § 2000d et seq. Title VI forbids discrimination (on the basis of race, color or national origin) in programs which are receiving financial assistance from the federal government.
ing such schools. The act was carefully drafted by the Pennsylvania Legislature so as to include an express statement of secular purpose. In *Lemon v. Sloan*, the court concluded that such a purpose existed, i.e., stabilization of the cost of public education. It was found that if rising costs and inflation continued, parents of nonpublic school children would transfer their children into the public schools. Thus, "an enormous added financial, education and administrative burden would be placed upon the public schools and upon the taxpayers of the state." Despite its finding of a secular purpose, the court declared the act unconstitutional because of the lack of controls on the expenditure of the funds.

Clearly an unrestricted grant of funds by the state directly to church-related schools would constitute state support of religious instruction and worship in violation of the Establishment Clause.

The act was found to directly advance religion because it assisted parents in providing their children with a religious education. The result of the second *Lemon* challenge illustrates that the courts will not permit a result to be attained indirectly which could not be attained directly.

*Wolman v. Essex*

The parental reimbursement program was tested a second time before a three-judge federal district court in Ohio. In


It is necessary that any public assistance to nonpublic schools must be restricted to "secular, neutral or nonideological services, facilities, or materials." *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971).

deciding against that state's parental reimbursement program, the court made a statistical survey to discover exactly what class of citizens would benefit most from such a program. By determining the maximum benefit class, the court felt that it could decide whether or not the effect of the statute was to inhibit, advance, or remain neutral toward religion. The results showed that only 12 per cent of the entire student population of Ohio attend nonpublic schools and, of that percentage, 95 per cent attend Catholic schools. Thus, the court decided that the Ohio plan does not even purport to have a general, broad ranging reach but is instead restricted to a relatively small sample of the entire class of Ohio students. As with the Rhode Island and Pennsylvania statutes held unconstitutional in Lemon, the class within the ambit of the statute is overwhelmingly sectarian in character. A substantial beneficiary of the statute can only be organized religion.

Direct means of supporting nonpublic schools having failed, the parental reimbursement plans of Pennsylvania and Ohio were efforts to obtain financial aid for parochial schools by indirect means. Since these indirect, parental reimbursement plans have also proved unsuccessful, the Church must realistically deal with the fact that any constitutional scheme of aid to parochial schools must come as part of an aid package designed to benefit a class much broader than Church schools. Because the government must act under the aegis of a broad, impersonal type of public policy when dispensing financial aid to private religious institutions, it may be necessary for the Church to reevaluate its view of the problem and to seek aid from sources beyond the reach of the court decisions.

Americans United for Separation of Church and State v. Oakey

In Vermont, a state aid program provided a percentage grant of current expenses to parochial schools but only if the city or town school districts within which the parochial schools were situated chose to provide them with approved teachers licensed with the school district. In Americans United for Separation of Church & State v. Oakey, the aid did not run directly to the parochial school as it did in Lemon v. Kurtzman, but directly to the

70 See note 10 supra.
72 Id. at 413.
73 See Tilton v. Richardson, 403 U.S. 672 (1971) (building construction grants to church-related institutions of higher education); Walz v. Tax Commission, 397 U.S. 664 (1970) (government property tax exemptions). See also Bd. of Educ. v. Allen, 392 U.S. 236 (1968) (loaning of secular textbooks to parochial school students); Everson v. Bd of Educ., 330 U.S. 1 (1947) (state-financed busing). Everson and Allen upheld these limited aid programs since they were analogous to police and fire protection which are provided for people and property regardless of any religious beliefs.
74 A few such programs are: performance contracting, shared time and scholarship grants. See notes 120-25 and accompanying text infra.
76 403 U.S. 602 (1971). In Lemon, aid ran directly to nonpublic elementary and secondary schools in the form of state reimbursement for costs of teachers' salaries, textbooks and instructional materials in specified secular subjects. The Court considered church schools the principal beneficiaries under the statute.
public school district whose function was to decide whether parochial schools in that district should obtain aid. The innovation Vermont legislators hoped would prove the key to a finding of constitutionality was the provision for granting the aid to the public schools for their distribution to the parochial schools. The Vermont act was nevertheless declared unconstitutional because it fostered excessive entanglement of government and religion.77 The statute created a dual involvement situation. Vermont, through its public school districts, would have to police the hiring of teachers and the buying of secular materials, thus thrusting "the state not only directly into the physical plants of the schools but also into their operation and control."78 The Church, on the other hand, would inevitably become involved with government authorities on the questions of teacher-choice and teacher-determination, both turned over by the act to the public school districts and their superintendents. The court asserted that, "the potential . . . for involvement of the state, through the school districts, in religious affairs is not dispelled by its lack of articulation,"79 in the statute.

PEARL v. Levitt

New York parochial schools experienced a major court defeat when the Mandated Service Act of 197080 was declared unconstitutional by a three-judge panel of the same federal court that was later to validate parental tax benefits.81 This aid program provided $28 million a year to compensate nonpublic schools for secular services "mandated" by state law. Such services included "administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of pupil health records . . . and the preparation and submission to the state of various other reports as provided for or required by law or regulation."82 The major constitutional defect of the act was its failure to require that the recipient of the aid account for the manner in which the money was spent and return any amount in excess of that actually used.83 Thus, any excess amount could be utilized for the furtherance of religious ideals. Such a result would violate the requirement that the primary effect of a statute must be one that neither advances nor inhibits religion. In addition to utilizing the principal effect theory, the court struck down the Mandated Services Act on the same entanglement ground that defeated the Pennsylvania statute reviewed 81

339 F. Supp. 545. State control of teachers in parochial schools would undoubtedly become interwoven with religious control, and the "day-to-day instructional administration would of necessity be the result of close cooperation between the school's administration and the public school district's administration." Id. at 552.

78 Id. at 551.

79 Id. at 551-52.

80 See note 4 supra.


83 The statute suffered from another constitutional weakness. Because the program served such a large number of religiously oriented groups, it was evident to the court that an intensification of political division between parochial supporters and church-state separatists might well have resulted. Such a "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." 342 F. Supp. at 445, citing Lemon v. Kurtzman, 403 U.S. at 622.
in *Lemon v. Kurtzman.* The only apparent difference between the two laws was that the Pennsylvania statute permitted reimbursement for teaching and the New York Mandated Services Act allowed reimbursement for testing. In addition, the unconstitutional Pennsylvania statute required the nonpublic school to account for expenditures while the New York act did not require an accounting. The court concluded, therefore, that the New York law was unconstitutional under the *Lemon v. Kurtzman* rule.

[The] cumulative impact of the entire relationship arising under the statutes . . . involves excessive entanglement between government and religion.

**New Plans for Parochial Aid**

It is apparent from the discussion of these most recent cases that the courts are taking a firm stand when presented with questions of church-state separation. With the exception of the tax benefit plan approved in *PEARL v. Nyquist,* the programs presented to the courts were all found to have one or more constitutional flaws. The ends sought to be achieved by the various statutes were thus ultimately found unattainable.

A majority of the new and innovative programs for parochial aid have yet to be tested. However, unlike most of the aid programs just discussed, some of these new plans try to cope with the problem from within the nonpublic school systems. Although untested by the Supreme Court, it is quite likely that the financial answer parochial schools have been looking for is contained in one or more of the following proposals.

**Tax Credits**

Even though the courts have defeated several aid plans, parochial aid advocates in Washington have energetically set in motion certain bills in a desperate attempt to obtain financial relief for their schools. Nearly a dozen bills dealing with tax credits have been introduced in Congress this year.

In theory, a tax credit plan would reimburse parents of nonpublic school children for a portion of the cost of tuition. Under two of the major tax credit bills, "parochial parents could subtract from their federal income tax liability an amount for each dependent in parochial or private school not to exceed (A) 50 per cent of the tuition paid by the taxpayer during the taxable year for the elementary or secondary education of such dependent, or (B) $400." The mechanics of the proposed tax credit

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84 See note 10 supra.
85 Note 58 supra.
86 Note 10 supra.
87 342 F. Supp. at 443.
88 House Republican leader Gerald R. Ford and Rep. John W. Byrnes introduced a tax credit bill which would provide up to $2.24 billion annually to parochial and private schools (H.R. Res. 13020). Other major bills introduced earlier were H.R. Res. 12499 and H.R. Res. 12819. Recently, Rep. Wilbur A. Mills, Chairman of the House Ways and Means Committee, and Rep. James A. Burke, both Democrats, introduced H.R. Res. 13495, a tax credit bill quite similar to the bill introduced by Republicans Ford and Byrnes.
89 U.S. NEWS & WORLD REPORT, May 1, 1972, at 36.
90 H.R. Res. 13020; H.R. Res. 13495.
91 CHURCH & STATE, May 1972, at 6.
bills are simple. For example, a parent earning $20,000 would usually pay $3,000 in federal income taxes. If he has four children in parochial school with an average of $500 tuition for each child, he would be able to subtract $1,000 from his federal tax. The government would lose $1,000 in taxes, in effect paying a full one-half of the parent's parochial school tuition bill.\(^9\)

Advocates of the tax credit plan claim that it meets constitutional guidelines and, additionally, that it "will promote public good by sustaining current private investment in nonpublic education, will elicit public support and will bolster the morale of parents of nonpublic school children."\(^9\)

The opponents claim that not only will taxes rise but also, most assuredly, tuition at nonpublic schools will increase to gain maximum advantage of the tax credits. The poor, the childless and the elderly, who would receive no credit, would then be at a disadvantage if taxes were raised. The Presidential Commission on School Finance, realizing this weakness of the tax credit proposal, recommended a four point federal assistance program. Such a program would offer "supplemental income allowance for nonpublic school tuition to welfare recipients and the working poor," voucher plans, child benefit programs and urban education assistance programs.\(^9\)

However, even with the implementation of this four point program, many opponents feel that tax credits will increase "divisions in our society . . . with the public schools ultimately becoming nothing more than 'dumping grounds' for the poor and disadvantaged, religious and racial minorities, and problem children not wanted by the nonpublic schools."\(^9\)

Is the tax credit plan constitutionally pure?\(^9\) Although the court in *PEARL v. Nyquist* upheld the constitutionality of a related plan,\(^9\) that decision is certain to be appealed to the Supreme Court. There are certain aspects of tax credit plans that are constitutionally questionable. For instance, they would divert tax funds to Church schools. They may foster excessive entanglement of government and Church affairs.\(^9\) They would deprive the federal government of tax funds desperately needed by our public schools. They would, no doubt, stimulate the growth of parochial schools, but such growth would be at the expense of the public schools.\(^9\)

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\(^9\) Id.


\(^9\) Id. It is the government's contention that with the enactment of such a program, the poor would not lose the opportunity to attend nonpublic schools.

\(^9\) Note 91 supra.

\(^9\) A tax credit is not a tax deduction. A deduction is an item subtracted from either gross income or adjusted gross income. Business expenses, contributions to churches and charities, and some medical expenses are considered deductible. A tax credit is subtracted from the total tax due in order to fix one's actual income tax liability.

\(^9\) — F. Supp. —.

\(^9\) Note, *New Trends in Education and the Future of Parochial Schools*, 57 CORNELL L. REV. 256, 272 (1972) [hereinafter *New Trends in Education*]. The court in *PEARL v. Nyquist* stated: "As to administrative entanglement under part three of the statute, we see none beyond checking with the school simply to determine whether the tuition claimed to have been paid was actually paid." — F. Supp. at —.

\(^9\) At first the credit plan would favor existing
Supporters of the tax credit plan feel that tax credits to parents avoid excessive church-state entanglement because the parent, not the school, is the recipient of the aid. However, this argument has been sharply criticized.\textsuperscript{100}

As discussed earlier, the Ohio and Pennsylvania decisions\textsuperscript{101} clearly indicate that the courts will not buy a plan that simply shifts aid from nonpublic schools to the parents of children enrolled in those schools. As stated in \textit{Wolman v. Essex}:\textsuperscript{102}

Since the parents in this scheme serve as mere conduits of public funds, the State retains a responsibility of insuring that the public moneys thus provided and which retain their public character throughout the transaction, are used for constitutionally permissible ends and continue to be so used. . . . We conclude that it is of no constitutional significance that state aid goes indirectly to denominational schools . . . through the medium of parental grants. Since the potential ultimate effect of the scheme is to aid religious enterprises, the Establishment Clause forbids its implementation regardless of the form adopted in the statute for achieving that purpose.\textsuperscript{103}

The tax credit plan is sometimes compared with real property tax exemptions for Church property which were held constitutional in 1970.\textsuperscript{104} However, the government involvement in \textit{Walz} was far less than can be expected when implementing a tax credit plan.\textsuperscript{105}

It is apparent that there are drawbacks to a tax credit plan. Such a plan, if implemented, might seriously endanger church-state separation and the future of our public school systems.

\textsuperscript{100} Judge Hays, dissenting in part in PEARL v. Nyquist, stated, "There is no essential difference between a parent's receiving a $50 \textit{reimbursement} for tuition paid to a parochial school and his receiving a $50 \textit{benefit} because he sends his child to parochial school." — F. Supp. at — (dissenting opinion).


\textsuperscript{102} 342 F. Supp. 399 (S. D. Ohio 1972).

\textsuperscript{103} \textit{Id.} at 416-17.

\textsuperscript{104} \textit{Walz v. Tax Comm'n}, 397 U.S. 664 (1970). However, a tax credit plan benefits only those taxpayers with nonpublic school expenditures. Tax exemptions, on the other hand, may benefit a wide range of charitable institutions, thus avoiding the question of whether the primary effect of such a plan is to inhibit or advance religion. The tax exemption analogy was used by the majority in PEARL v. Nyquist to uphold the constitutionality of tax benefits. — F. Supp. —. \textit{New Trends in Education} at 272 (1972).

\textsuperscript{105} The government's involvement in \textit{Walz} was limited to ascertaining that church, educational or charitable property was the beneficiary of the tax exemption. However, a tax credit plan would involve a greater administrative burden and thus may present a problem of excessive entanglement of government and religion. For an excellent discussion of the Walz decision, see Kauper, \textit{The Walz Decision: More on the Religion Clauses of the First Amendment}, 69 Mich. L. Rev. 179 (1970). The majority in PEARL v. Nyquist did not find the question of entanglement a bar to determining that a tax benefit program was constitutional. See notes 42-43 and accompanying text \textit{supra}. 
Voucher Plans

Another approach, promoted by the Nixon Administration through the Office of Economic Opportunity (OEO), is the tuition voucher plan. Under such a plan, all schools would receive funds from government tax sources through the device of vouchers issued to parents but cashable only by schools. Schools must satisfy certain criteria in order to become eligible to receive vouchers. Educational standards must be upheld, records must be kept, equal opportunity to any student without regard to race must be practiced.

Our courts have adopted a constitutional standard of government neutrality on religious matters. Because of this stand, voucher systems would have to avoid any unconstitutional connection between government and religious institutions. Advocates claim that the voucher plan can be analogized to welfare programs or social security schemes. It is not unlikely that some welfare parents use their allotments to send their children to parochial schools nor is it unlikely that some of the elderly pledge their meager social security funds to the Church. However, both uses of government funds for religious purposes are constitutional because the aid is received for a purpose other than the advancement of religion and the gap between church and state is ample. Some feel that as long as parents have freedom to choose either a religious or non-religious school, the Religion Clauses would not be violated. However, the “primary effect” portion of the three-pronged Lemon v. Kurtzman test might prove a barrier to such a system of vouchers if the system, and arguments for Court held that the New York “released time” program did not violate the first amendment. In emphasizing the government’s neutral position, the Court explained that the “Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects.” (emphasis added).

See Center for the Study of Public Policy, Education Vouchers: A Preliminary Report on Financing Education By Payments to Parents (1970), reviewed, Ross & Zeckhauser, Book Review, 80 YALE L.J. 451 (1970). See also Areen, Educational Vouchers, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 466 (1971) (hereinafter Educational Vouchers); C. Jencks, Educational Vouchers, THE NEW REPUBLIC, July 4, 1970, at 19. There have been a few recent developments in voucher plan utilization: (1) OEO provided a $40,000 grant to a school district in New Rochelle, N.Y., for a study on implementation of a voucher plan; (2) a Seattle, Wash., school board rejected a voucher program after $123,000 was spent on research; and (3) a San Jose, Calif., school district is presently conducting a two-year voucher experiment for public schools with $2 million in federal aid. The San Jose plan originally called for the inclusion of a parochial school and a private school but the California legislature refused to enact any state tax aid legislation for parochial schools. Vouchers Suffer a Setback, CHURCH & STATE, June, 1972, at 10; O.E.O. Voucher Push Continues, CHURCH & STATE, May, 1972, at 17.

107 Id. at 264.
its first amendment validity, were based solely on parental freedom of choice.\(^{112}\)

It is obvious that both parents and parochial schools would profit from a tuition voucher plan. Parents would benefit from reduced tuition payments; parochial schools would benefit from increased enrollments and greater revenues; and both benefits would be the result of government provided funds. The constitutionality of a voucher plan will depend on its primary effect and the courts are certain to inquire whether the primary effect is increased enrollment for religious schools or the opportunity for parents, through lower tuitions, to send their children to parochial schools. In other words, does a voucher plan primarily aid the individual or the parochial school? The nondiscriminatory nature of vouchers, that is, their availability to parents of both public and parochial school students, may be the key to placing them within the guidelines of government neutrality set forth in *Lemon v. Kurtzman*. However, the plans have yet to be tested by the Supreme Court.

If the "freedom of choice" theory does not survive the scrutiny of the courts, advocates claim that the "no proscribed benefit" theory will,\(^{118}\) i.e., a voucher plan that would compensate religious schools only for the cost of teaching secular subjects. Because of its secular purpose, such a plan would meet the test formulated in *Board of Education v. Allen*.\(^{114}\) However, if the aid were restricted to purely secular activities, the state would be forced to a) make an initial determination as to the secular or religious nature of every parochial school program, b) ascertain the portion of tuition payments allocable to the cost of secular programs and c) continually police each approved activity to make certain that it remained secular. Such involvement would no doubt be considered an excessive entanglement of church and state.\(^{115}\)

Voucher systems would afford all families the same opportunity to send their children to religious institutions. However, taxpayers would eventually pay for this opportunity. Proponents of voucher aid meet this objection by stating:

As long as the state spends no more to educate a child at the parochial school than it would to educate the child in a public school, and as long as it receives secular services of equal value in either case, the taxpayer is not subsidizing the religious aspect of parochial education.\(^{116}\)

This view rests on the theory of absorption which assumes that, absent some form of aid, the public schools will be flooded with students transferring from closed parochial schools, thus increasing the school tax bite. Given these assumptions, it is conceivable that the taxpayer would suffer

\(^{112}\) See note 101 supra. To survive a constitutional test, a voucher plan, in addition to having a neutral purpose, must have a primary effect which neither inhibits nor advances religion.

\(^{118}\) *Educational Vouchers* at 496.

\(^{114}\) 392 U.S. 236 (1968). The Court in *Allen*


\(^{116}\) *Educational Vouchers* at 500.
less under a tuition voucher system. However, if the parochial schools can, in fact, solve their financial crisis from within and if the declining birthrate continues, the taxpayer would not only be at a financial disadvantage but would be supporting a system that is constitutionally questionable.

In order for a voucher system to succeed under the Lemon v. Kurtzman rule, aid would have to be channelled into secular activities in a manner that would not entail excessive governmental involvement. By allowing an individual freedom to choose whether or not he will use his voucher for religious education, it is conceivable that the "excessive entanglement" obstacle would be overcome. However, the question of "primary effect" would still have to be considered. The utilization of a "secular value theory," aid being directed only toward secular subjects, would be a necessary step in avoiding an effect that primarily aids religion. Standardized tests might be applied to determine the value of the secular education offered by parochial schools. If such value is found to be equal to that of public school curricula, then voucher payments to parochial schools would have a secular effect. To meet the constitutional test, a voucher program must incorporate all these approaches in the hope that the extensive proof required by the Lemon v. Kurtzman rule will be satisfied.

Performance Contracting

A third solution to the parochial school problem might conceivably be "performance contracting." Under this approach, as presently implemented, local public schools contract out a portion of their teaching burden to private companies. Usually the courses contracted away, often under a federal grant, are mathematics and reading.

If nonpublic schools were to contract with the same private concerns utilized by public authorities and transfer to those companies responsibility for teaching the same types of basic, secular subjects, it is difficult to imagine a solid constitutional objection to a state's picking up the tab for the resultant contractual obligations. No excessive entanglement would be involved; direct aid would not be an issue; and a secular purpose and effect are clear.

The major purpose of such plans is to increase the quality of student output through the introduction of a "profit stim-

117 See note 63 supra.
118 Such a program would advance both parochial and public education throughout the country. Government entanglement is reduced because it is the parent who would receive the voucher and it is the parent who would decide where the tuition award would go.
121 N.Y. Times, Jan. 11, 1971, at 68, col. 5.
122 Id. Firms which have contracts include: Singer/Graftlex, Inc.; Quality Educational Development; Westinghouse Learning Corporation Plan Education Centers; Learning Foundations International, Inc. and Alpha Learning Systems. Although certain firms have begun work on "performance contracts" this approach to education is new and undeveloped. Reaction from industry has been mixed. Schwartz, Performance Contracting: Industry's Reaction, NATION'S SCHOOLS, Sept. 1970, at 53.
ulus” into the schoolroom.123 This technique would undoubtedly transform parochial schools from pastoral to educational institutions.124 Because private enterprise would be handling most of the education, parochial schools would be able to compete with the newer, highly advanced public schools.125

128 New Trends in Education at 270. The introduction of the profit motive should inject a competitive aspect into our educational structure. It is the result of this competition (usually for student’s tuition) that advocates hope will increase student productivity.

124 Luettgen, Church Schools—in the American Secular State, AMERICA, May 27, 1972, at 567. By changing the structure of parochial schools, “the secular state would then have less reason to fear the spectre of a creeping church-state.” Id. at 569.

125 A radical possibility for educational change, one that combines aspects of performance contracting and vouchers, would see the abolition of public schools and parochial schools as we know them today. The country’s educational system would consist entirely of secular, profit-making schools with the Church school existing as a religious supplement to a child’s formal education. (By religious supplement is meant that the parochial school would exist just to serve the religious needs of the community. In this way, both secular and religious education could prosper.)

Government-issued vouchers would provide the financial backbone for the system of private, secular schools. By releasing Church schools from the burden of teaching secular courses and by injecting the profit motive into the school system, constitutional barriers that are evident in the other plans would be avoided. Such an approach is an offshoot and extension of the “released time” program tested in Zorach v. Clauson, 343 U.S. 306 (1952). Under that plan, students were allowed to leave public schools and attend parochial schools for religious instruction. Id. See Byrne, A Report on Shared Time in TRENDS AND ISSUES IN CATHOLIC EDUCATION (R. Hurley & R. Shaw eds. 1969); Note, Shared Time: In-

The Youngstown Plan, A Program for Self-Help

One of the newest approaches is a self-help program called the Youngstown Plan.126 It adopts a four-step evaluation technique to involve pastor, teachers and parishioners in a decision making process. Its goal is to stop needless closings of Catholic schools.

The “Process for School Closings, Consolidations and Probations”127 as this community action plan is formally known, includes the following steps. First, the Diocesan Board of Education considers any problem relating to a parochial school. Second, the board establishes a committee consisting of the pastor, two board members, one staff member and three to five parents or parishioners to study the case. Third, the committee draws up a provisional solution which is then introduced to interested members of the community.

direct Aid to Parochial Schools, 65 Mich. L. Rev. 1224 (1967). Neither public monies nor public schools were utilized, the only entanglement being the arrangement of public school schedules to allow the religious needs of Catholic school children to be satisfied.

Limiting the Church school to purely religious education would permit the development of a program of self-help to solve the financial and social problems of the parochial schools. See note 16 supra. However, the limited function such an approach visualizes for nonpublic schools would undoubtedly be opposed by many Church authorities who would feel that it is contrary to the philosophy that has supported the existence of the Catholic schools, i.e., the idea that children should be educated in a religious atmosphere.


127 Id. at 651.
Finally, the diocesan board either accepts or rejects the solution or offers an alternate proposal. This plan utilizes the entire community and avoids "the danger" of ignoring problems and "the danger" of panic.128 Incorporated in the plan are methods of consolidation and continuation to be utilized, if and when needed, by the parochial school. There are four possible decisions the diocesan board can adopt:

(A) Closing: If it is established that a school cannot reopen because of decreased enrollment and skyrocketing costs, the board will permit it to close down. Parents would be advised to enroll their children in other district parochial schools; (B) Consolidation: The board might recommend the reduction of four schools to a two-school operation; (C) Probationary Continuance: A school might be permitted to continue but its status would be reviewed regularly. Increased enrollment might result in such a school achieving a permanent continuance status. (D) Continuation: These schools would remain in operation while the board concentrates on increasing their enrollment and obtaining more funds.

This plan, although presently an unusual one, could provide a valuable working model for curbing the ever-increasing closings of Catholic schools throughout the country. Instead of Church schools falling victim to hasty, unplanned closings, Catholic communities could work together in a carefully planned operation to determine the fate of their schools.

Conclusion

By approaching the problem from within, utilizing self-help programs, private investors, consolidations and similar measures, parochial schools would avoid a constitutional confrontation with the courts. Although voucher plans and tax credits would add greatly to the financial stability of parochial schools, they are constitutionally questionable and may prove to have harmful effects that would exceed any good they might do.

Parents have the right to send their children to parochial schools.129 However, if they make such a choice, they should be able to support it themselves rather than seek aid in a manner that will undermine the school system they choose not to accept.

There will be more court cases, more proposed answers and more defeats as parochial education attempts to chart a course between a court-created "Scylla and Charybdis." On the one hand, a state cannot allocate funds which may be used for the sectarian instruction of the children in nonpublic schools. On the other hand, if a state imposes supervisory controls to ensure that public monies will not be spent to advance religion, the church-state relationship becomes one of excessive entanglement.130 As a review of this year's major

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128 Id. These "dangers" would result in unplanned, chaotic closings of Catholic schools.

129 Pierce v. Society of Sisters, 268 U.S. 510 (1925). The state cannot standardize children by "forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Id. at 535.

cases has disclosed, a majority of the aid programs have run afoul of one or both of these twin constitutional obstacles. Only a New York tax benefit plan was able to survive. Yet, the fate of such a plan is still in doubt as it has yet to be reviewed by the Supreme Court.

Perhaps the Church community could benefit from Odysseus' experience by applying his resourcefulness and spirit to the task of reevaluating its educational policies in light of its limited resources rather than cursing the fates of unfriendly court decisions.