

# The Scholarship Initiative: A Model State Law for Elementary and Secondary School Choice

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## I. Introduction

Around 1970 federal and state officials recognized for the first time that educational choice for all families might be desirable and achievable. The issue raised was whether government should pay for a child's tuition in order that families of all income classes might have access both to private schools and to public schools outside the child's district of residence. At that time the literature on the subject consisted of a few brief and contrasting sketches of "voucher" or "scholarship" plans by economists Milton Friedman<sup>1</sup> and Henry Levin,<sup>2</sup> by sociologist Christopher Jencks,<sup>3</sup> by educators Theodore Sizer and Phillip Whitten,<sup>4</sup> and by us.<sup>5</sup>

In the succeeding decades many advocates and opponents have argued about choice. For the most part, however, both sides have been content to discuss abstract and general proposals. This allergy to specifics on the part of academics has affected the quality of policy debate in a negative way. On the rare occasions when activists have drafted concrete proposals for the ballot or the legislature, they have tended to be laced with details distinctly wanting in sophistication. The pattern was set in the original school voucher, "demonstration" project of the War on Poverty in the early 1970s.<sup>6</sup> The enterprise was confined to a single public elementary

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1. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 85 (1962).

2. Henry Levin, *The Failure of the Public Schools and the Free Market Remedy*, *URB. REV.*, June 1968, at 32.

3. Christopher Jencks, *Is the Public School Obsolete?* *PUB. INTEREST*, Winter 1966, at 18.

4. Theodore Sizer & Phillip Whitten, *A Proposal for a Poor Children's Bill of Rights*, *5 PSYCHOL. TODAY* 58 (1968).

5. JOHN E. COONS, WILLIAM H. CLUNE & STEPHEN D. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* 256-68 (1970).

6. ALUM ROCK UNION SCH. DIST., *TRANSITION MODEL VOUCHER PROPOSAL* (Apr. 12, 1972) for the OFFICE OF ECONOMIC OPPORTUNITY; *TECHNICAL ANALYSIS PLAN, EVALUATION OF THE OEO ELEMENTARY VOUCHER DEMONSTRATION: TECHNICAL DISSERTATION* (1972); *EDUCATION VOUCHERS: THE EXPERIENCE OF ALUM ROCK* (RAND Corporation for the National Institute of Education, HEW, Dec. 1973).

school district (Alum Rock, near San Jose, California). The original plan promised to include private providers. This, in fact, was never allowed to happen; nor was the structure for their inclusion ever carefully articulated. Indeed, it was unclear throughout who was in charge of planning — whether it was to be the district superintendent, the board, the building principals, or the mini-school program heads. Official policies on school expansion, contraction, and failure were never debated, much less adopted. In short, the Office of Economic Opportunity (“OEO”) launched the plan with little attention to program design alternatives. This was apparently based on the belief that, if the OEO could convince even one public school system to try something with the label “choice,” that would be better than nothing. The intellectual habit continues. To this day the highly publicized endorsement of choice in 1990 by scholars at the Brookings Institution<sup>7</sup> remains so general as to defy interpretation. The media often leave the impression of a worked-out proposal, but to date there is none in existence.

The desirability of a specific proposal is an old theme with us. In 1971 we developed a detailed school choice model on which friends and critics could focus and disagree. The resulting book was a fully drafted legislative proposal with section-by-section commentary followed by economic analysis.<sup>8</sup> Although this proved to be a good teaching tool and an opportunity to learn a few tricks, the book did not make a political ripple. Nor did most of the other theoretical and practical material gathered and distributed in the 1970s and 1980s by us and others. America’s mind was elsewhere and remained elsewhere until the explosion of media attention given to school choice in the last three years.

The political climate in the 1990s has clearly changed. However vague President Bush and his Secretary of Education were, their commitment to the idea of “choice” helped to put the idea on the legislative agenda in both Congress and state capitals throughout the country. Talk of school choice ballot initiatives can be heard in several states. The polls have long suggested that the public might be inclined to support a well-tempered school choice proposal,<sup>9</sup> and one can hope again for an intelligent debate of the merits of specific alternatives.

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7. J. CHUBB AND T. MOE, *POLITICS, MARKETS AND AMERICA’S SCHOOLS* (1990).

8. JOHN E. COONS & STEPHEN D. SUGARMAN, *FAMILY CHOICE IN EDUCATION: A MODEL STATE SYSTEM FOR VOUCHERS* (1971); *see also*, John E. Coons & Stephen D. Sugarman, *Family Choice in Education: A Model State System for Vouchers*, 59 CAL. L. REV. 321 (1971).

9. For many years the Gallup Poll has asked the public about educational choice. In the early 1970s and again in the early 1980s it asked people whether they would prefer to send their eldest child to a public school or a private school if the private school were tuition free. In 1970/1971 those who said they would choose a public school slightly outnumbered those who said they would choose a private school. By 1981/1982 more favored private schools than public schools. At some point the

Yet, the models introduced by the political process since Alum Rock are no more promising than were their predecessors. Most have been ballot proposals hurriedly prepared in a cloistered atmosphere by groups with strong ideological focus. Their design has generally been flawed even from the point of view of their proponents, and it is not surprising that they have been soundly rejected in the political process. The 1978 Michigan choice initiative,<sup>10</sup> the 1981 District of Columbia tax credit initiative,<sup>11</sup> and the 1990 Oregon and the 1992 Colorado school choice initiatives<sup>12</sup> are examples. All were reluctantly opposed by many natural supporters, including us,<sup>13</sup> because of ill-conceived particulars that could have been corrected in a more deliberative drafting process. Though we support the celebrated 1990 Milwaukee program, it too exemplifies the problem of poor drafting. Many of the administrative, legal, and fiscal difficulties that this viable idea has encountered could have been avoided in the drafting.<sup>14</sup>

This article presents a specific model law establishing educational choice. The model law is called the "Scholarship Initiative" and it is cast in the form of a state constitutional amendment to be presented through the initiative process. This particular form of words, of course, would not apply everywhere. Indeed, a majority of states do not have the popular initiative process; in those states the process of constitutional reform generally starts in the legislature. The Scholarship Initiative nevertheless represents a framework that any legislature or advocacy group might consider before attempting to alter the state constitution. Moreover, the Initiative provides a basic framework and point of reference for the debate if reform is attempted through statutory change.<sup>15</sup>

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Poll began more directly asking people if they favored adoption of a voucher system in which the government would allot money for each child's education for the parents to use at the public, private or parochial school of their choice. By a narrow margin, more respondents favored than opposed the adoption of the plan in the 1987, 1986, and 1985 polls, the results of which are the most recent we have seen. See *Gallup Poll of the Public Attitude Toward the Public Schools*, PHI DELTA KAPPAN, Sept. 1982, at 47 and *Trends in Support for Parental Choice*, PHI DELTA KAPPAN, Sept. 1990, at 43. In a recent poll in California, supporters of a subsidized choice plan which included private schools exceeded opponents by between 11 and 31 percentage points depending upon the question asked (i.e., 53% versus 42%; 59% versus 28%). REASON FOUNDATION, SUMMARY REPORT: SURVEY OF VOTER ATTITUDES IN CALIFORNIA TOWARD A CHOICE SYSTEM IN EDUCATION (Oct. 1991) (on file with the authors).

10. Proposal C, Michigan state ballot, defeated Nov. 3, 1978 (on file with the authors).

11. Initiative 7, District of Columbia ballot, defeated Nov. 3, 1981 (on file with the authors).

12. Tax Credit Initiative, Oregon state ballot, defeated Nov. 7, 1990; Colorado Initiative #7, defeated Nov. 3, 1992 (both on file with the authors).

13. See generally, John E. Coons & Stephen D. Sugarman, *Educational Tax Credits Versus School Vouchers*, in *FAMILY CHOICE IN SCHOOLING* 169 (M. Manley-Casimir ed., 1982).

14. This program and some of the shortcomings of its design are described in Stephen D. Sugarman, *Using Private Schools to Promote Public Values*, 1991 U. CHI. LEGAL F. 171, 190-98.

15. In many states not all the provisions of the initiative could be legislatively adopted. State con-

Though our perspectives will be plain enough, it is not the main purpose of this article to present our arguments in favor of educational choice. The task of justifying choice as public policy has been the focus of many of our writings on school reform over the last twenty-five years.<sup>16</sup> What remains as a useful encore is the clarification of detailed alternative instruments. To that end we offer the Scholarship Initiative.

From where we stand there are three policy commitments fundamental to any responsible system of choice, the absence of any one of which is fatal.<sup>17</sup> These premises may or may not be politically helpful to a proposal made in a specific time and place. They have long been, and remain, matters of principle for us. Each policy can be stated broadly:

1. The provisions of any system of educational choice must "tilt" toward the poor to ensure both their opportunity to escape from schools that ill-serve them and their fair access to schools they prefer.
2. New options for families must include subsidized choices in both public and private schools.
3. Participating private schools must be protected from regulation in a manner that preserves their identity and the autonomy of their

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stitutions may, for example, bar the financial support to families expendable in any private school or at least in religious schools.

16. Our most sustained argument is JOHN E. COONS & STEPHEN D. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* (1978). For more recent joint work, see J. Coons & S. Sugarman, *The Private School Option in Systems of Educational Choice*, *EDUC. LEADERSHIP*, Dec. 1990, at 54; S. Sugarman & J. Coons, *Federal Scholarships for Private Elementary and Secondary Schools*, in *PRIVATE SCHOOLS AND THE PUBLIC GOOD* 115 (E. Gaffney ed., 1981). See also, S. Sugarman, *Part of the Solution Rather than Part of the Problem: A Role for American Private Elementary and Secondary Schools in the 1990s*, 31 *WM. & MARY L. REV.* 681 (1990); J. Coons, *Intellectual Liberty and the Schools*, 4 *J. LAW, ETHICS & PUB. POL'Y* 495 (1985); J. Coons, *Perestroika and the Private Provider*, in *LIBERATING SCHOOLS: EDUCATION IN THE INNER CITY* 181 (D. Boaz ed., 1991).

17. These three premises put the Scholarship Initiative in conflict with various "choice" proposals which rest upon other values or objectives. Among these are most forms of educational tax credits and schemes for distributing school vouchers in an amount that does not approach the full present cost of a public school education. Typically, such partial measures are aimed at providing financial aid to families already using private schools in order to avoid their "paying twice." The Scholarship Initiative would, in fact, be of great monetary assistance to exactly these families; but such is not the central purpose, and those children are not the primary intended beneficiaries. Other proponents of such partial vouchers and modest tax credit plans hope to shift more of the cost of education away from government; this is not a goal of the Initiative. Still more radical partisans of choice seek to phase out the public schools altogether. This is objectionable because many parents will prefer to send their children to the local public schools, and one of our chief objectives should be to improve those schools as one market alternative for children. Finally, we also disagree with those who place producer autonomy ahead of all other values. Although private schools must be able to protect their identities, the education of the disadvantaged should not be treated as the exclusive responsibility of the public sector, and the fate of the poor in a wholly unregulated market may be in danger. In providing specific protections for the poor (and for consumers generally), the Scholarship Initiative rejects a pure laissez-faire approach on the supply side.

operations. Public schools of choice must be assured similar freedom from regulation.

The extension of school choice to all families may proceed either in one step or gradually. One state may decide to give scholarships first to drop-outs; later it may extend these same rights to at-risk students, to minority students seeking integration, or to disabled students. The Scholarship Initiative proceeds in two steps. Low-income families would be the first to receive scholarships. Then the right would be extended to all children over a relatively brief transition period.

Following the text of the Initiative, printed in full, is an explanation of its provisions. The dates included in the text are used under the assumption that the initiative would be voted on in November 1992, simply in order to establish a point upon which to base phase-in dates and realistic dollar amounts.

## II. The Scholarship Initiative

The following section is added to Article \_\_\_ of the [state] Constitution:

**Purpose.** The people adopt this section to improve the quality and efficiency of public and private schools, to maximize educational opportunities for all children, and to increase the authority of parents and teachers.

(1) **New Classes of Schools**

In addition to public schools and private schools, there shall be two new classes of schools which together shall be known as Scholarship Schools.

(a) *Private Scholarship Schools*

Anyone may form a Private Scholarship School. Where appropriate and necessary, community groups shall be assisted in their founding by guaranteed loans and similar aids.

(b) *Public Scholarship Schools*

School districts, community colleges, public universities, cities, and counties may establish Public Scholarship Schools. Each shall be a public non-profit corporation governed by rules fixed by the organizing authority at the time of incorporation. Except as herein stated, Public Scholarship Schools shall operate according to laws no more restrictive than those affecting Private Scholarship Schools.

**(2) Children's Rights to Scholarships****(a) Scholarship Eligibility**

(i) *Low-income Children.* Beginning school year 1993-94, every resident low-income child of school age is entitled to a state scholarship redeemable by private schools in [the state] meeting those standards for hiring and employment, for curriculum, and for facilities which applied to private schools on July 1, 1990. "Low-income child" shall mean a child whose family is among the poorest twenty percent of [state] families with school-age children.

(ii) *All children.* No later than school year 1997-98, all resident children of school age shall become eligible under the provisions of this section for a state scholarship redeemable only by Scholarship Schools. This right shall not prejudice rights created under subsection (2)(a)(i).

**(b) Scholarship Value**

(i) *In General.* The average scholarship shall be worth approximately ninety percent of the average public cost per pupil enrolled in public schools. Public cost shall mean every cost to state and local government of maintaining elementary and secondary education in the relevant year as determined by the Department of Finance.

Scholarships shall be equal for every child of similar circumstance. For disabled children, they shall reflect the additional cost of education, and, for low-income children, the cost of reasonable transportation. Except for schools in which principal instructors of most or all pupils are their own relatives, no scholarship shall be less than eighty percent of the average scholarship for children of similar grade. In the case of transfer during the year, the scholarship shall be prorated.

(ii) *Provided, however,* until school year 1997-98, for low income children claiming scholarships under (2)(a)(i), the amount of the scholarship shall be the lesser of the amount determined under (2)(b)(i) and the tuition of the enrolling school.

**(3) Rules Governing Scholarship Schools****(a) Basic Eligibility**

Scholarship Schools shall be entitled to redeem the state scholarships of their students upon filing a statement indicating satisfaction of those requirements for hiring and employment, for curriculum, and for facilities which applied to private schools on July 1, 1990.

(b) *Admissions*

A Scholarship School may select students by criteria valid under applicable Federal law other than place of residence. Scholarship Schools shall reserve twenty percent of each year's new admissions for timely applications from low-income children. If such applications are fewer than the places reserved, all shall be admitted; if such applications exceed the reserved places, the school may select therefrom the reserved number.

(c) *Financial Charges*

Financial charges imposed by Scholarship Schools beyond the amount of the scholarship shall be consistent with the family's ability to pay and none shall be required of low-income children.

(d) *Curriculum*

No Scholarship School shall be ineligible to redeem scholarships because it teaches moral or social values, philosophy, or religion; but religion may not be taught in Public Scholarship Schools. Scholarship Schools may require a curriculum, but no pupil shall be compelled to profess ideological belief (or to participate in ceremony symbolic of belief).

(e) *Treatment of Students*

A pupil enrolled in a Scholarship School may continue therein unless she or he derives no substantial academic benefit or is responsible for serious or habitual misconduct related to school. With fair notice and procedures, each school may set and enforce a code of conduct and discipline and regulate academic dismissals. No enrolled pupil shall suffer discrimination by race, color, religion, national origin, or gender.

(f) *Limits on Regulation of Scholarship Schools*

No additional requirements may be imposed on Scholarship Schools except health and safety requirements adopted by an affirmative vote of two-thirds of the membership of both houses of the legislature.

**(4) Rules Governing All Schools Redeeming Scholarships**

(a) *Prohibited Conduct*

No school redeeming scholarships may advocate unlawful behavior or teach hatred of any person or group on the basis of race, color, religion, national origin, or gender.

(b) *Consumer Information*

No school redeeming scholarships shall deliberately provide false or misleading information. Each shall be subject to reasonable re-

quirements of disclosure, and the Legislature shall assure efficient dissemination of information.

(c) *Spending Restrictions*

Nonprofit schools redeeming scholarships shall use income from scholarships solely for the provision of educational goods, services, and facilities for its students.

(d) *School Process Rights*

No school shall lose eligibility to redeem scholarships except upon proof of substantial violation of this section after notice and opportunity to defend.

**(5) Promoting Choice Through Public Schools**

(a) *Choice Among Public Schools*

Beginning with the school year 1993-94, when school district assignments are complete, space remaining in any public school shall be open to children irrespective of residence, with reasonable preference given to low-income children. The legislature shall adopt a fair system for apportioning costs and savings of transfers.

(b) *Building Availability for Scholarship Schools*

Space in public schools not needed for district educational purposes shall be available to Scholarship Schools for rental at actual cost.

### **III. Analysis**

Assume that the voters approved the Scholarship Initiative in November 1992. The following discussion focuses on how the Initiative is meant to function and the reasons for many of the detailed design choices.

#### **A. A Structural Guide to Schools**

The initiative creates two new forms of schools called "Scholarship Schools." Existing public and private schools can be converted into "public scholarship" and "private scholarship" schools. New schools can be started and operated as scholarship schools by either public or private organizers. In addition to these two new types, there would remain the two existing types of schools — traditional public schools and traditional private schools. This section discusses how the Initiative affects those traditional schools.



## 1. *Traditional Public Schools*

### a. *Standing Pat*

Although school districts could convert any or all of their traditional public schools into public scholarship schools, they could also stand pat and operate schools as they traditionally have. If not required to change, many districts would not; their school boards would conclude that local parents are happy with things as they are and that any radical innovations would be unresponsive and competitively risky. Such districts would continue to function entirely under the existing provisions of state law. The education of children living in the district and attending local public schools would be controlled and financed in the traditional manner.

### b. *Inter-District Choice*

However, starting in 1993-94, such stand-pat districts would have to reckon with competition from traditional schools in the public sector. To the extent that public school districts would have unfilled places available in their schools, they would be required<sup>18</sup> to open their doors to out-of-district pupils wishing to attend.<sup>19</sup> Therefore, some districts would be actively seeking students. In this way, the establishment of inter-district transfer rights creates an opportunity as well as a threat. The Initiative requires that in selecting among transfer applicants "reasonable preference" be given to low-income children.

In practice, a moderate number of families will likely find a satisfactory choice through this option, and some districts will feel a measure of pressure to improve themselves in order to keep their student bodies from declining. Yet this is not likely to be a major incentive for self-reform of the public schools. There is generally not a great deal of space remaining in districts whose public schools are already popular. And where there is such space, it could often be camouflaged by a district bureaucracy that is determined, in accord with public school tradition, to exclude outsiders.

Whatever its actual impact, the right to transfer among public schools where space is available is important as a symbolic end to the historic

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18. Some might prefer merely to give districts the option to open up their available places to out-of-district pupils who would then be permitted to attend without obtaining the approval of the school district of their residence, a typical requirement today. In that case, the initiative would use the word "may" instead of "shall."

19. This feature of the initiative is tantamount to several proposals recently made (and some enacted) for inter-district transfer by choice. Minnesota, for example, has adopted such a system; a child can move out of district when he or she can find space elsewhere. Administratively the device is working well enough; so far the number of aspiring transferees is modest. For descriptions of Minnesota's various public school choice plans, see Sugarman, *supra* note 14, at 185-87.

xenophobia of our government schools. The Initiative does permit the continuation of traditional public schools in financially exclusive suburbs; but so long as excess space is open to all, their presence is defensible in an overall structure that includes subsidized public and private choices.<sup>20</sup>

### *c. Rental of Unused Space to Scholarship Schools*

If space still remains after out-of-district transfers are admitted, the Initiative imposes a second change on traditional public schools. The district must offer to rent unused space to scholarship schools at the district's cost.<sup>21</sup> Both private and public scholarship schools (including those formed by other districts) would be eligible tenants. This provision is a response to historic anti-competitive behavior of school districts. Educators seeking to start new private schools have often found the local public school district willing to rent to anyone but them. School districts would be required either to rent to competitors or to use the space themselves to launch a public scholarship school of their own. Of course, school districts could simply sell off this unused space (at the risk of underestimating their own future space needs), but new scholarship schools could be among the potential bidders. Moreover, where attaining space proves to be a stumbling block for community groups trying to set up new scholarship schools, the Initiative provides that the legislature arrange for guaranteed loans and other similar aid.

## *2. Traditional Private Schools*

A traditional private school might choose not to become a private scholarship school. Life in such an institution might remain formally unchanged from what it is now. Some private schools will always choose to remain outside the comprehensive scholarship system. Some will not wish to redeem any scholarships because of ideological objections to taking state money. Others will remain traditional private schools due to a desire to preserve greater autonomy (especially as to admissions) than is allowed private scholarship schools.

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20. The manner in which these inter-district transfers among public schools are to be funded is not dictated by the Initiative. The legislature is simply directed to adopt a fair mechanism. One possible solution is to treat transferring pupils as residents of the receiving district, making the district eligible for relevant state funds; another is to consider the pupils to be enrolled in their home districts for state aid purposes, while requiring that the home district reimburse the costs of the district that actually provides the education.

21. Precisely what amounts to "cost" would have to be worked out in implementing legislation or regulations, but the general objective should be clear enough. Moreover, implementing rules probably ought to assure tenants under this provision a lease of reasonable duration.

Traditional private schools could, however, admit low-income, scholarship-carrying children and redeem the scholarships for cash from the state. Indeed, starting in 1993-94, any such children already enrolled would become eligible for scholarships which the private school could redeem. As will be explained in more detail below, a traditional private school electing to redeem any scholarship becomes subject to some new, but very limited, regulations intended primarily to assure that certain types of extremist or sham schools would not qualify for public funding.

Once a private school declines the opportunity to become a scholarship school (one that redeems scholarships from all its pupils), it is a close call as to whether it should nonetheless continue to be able to redeem scholarships of the poor children it admits (as it is allowed to do during the first years of the scheme when only the poor are guaranteed scholarships). The Initiative would continue that right. So long as the only children in these schools who are state-supported are from poor families, the enrollment and other conditions that apply to scholarship schools should not be required.

### 3. *Public Scholarship Schools*

Starting no later than 1997-98 the traditional schools — both public and private — would face competition from the two new types of schools organized under the terms of the Initiative. Compared to existing public schools, public scholarship schools would be dramatically *deregulated*. Unlike traditional public schools, they could not favor local residents. They would be funded by the state scholarships provided their pupils.

#### a. *Formation*

School districts would probably be the main organizers of public scholarship schools, and they could form any number of them, shaping the management and mission of each to its assigned purpose. Every public scholarship school would be established as a separate not-for-profit public corporation with its identity designated by its articles of incorporation and by-laws. These schools would be roughly analogous to other independent public bodies carrying out a public function, such as the Tennessee Valley Authority, the Corporation for Public Broadcasting, port authorities, and the Satellite Corporation. In contrast to the rigidity of form imposed by the present education codes, these schools would be tailored to the function chosen by the organizing authority.

It is likely that, in exercising their power to create public scholarship schools, different school boards will have different goals and face different political incentives. Some, for example, will concentrate on meeting the competition of neighboring school districts that will themselves be for-

ming such schools to attract the scholarships of non-residents. Also, competition from the private sector will have to be reckoned with by every board.

It is likely that some district boards will simply wish to exercise their creative imaginations in ways now foreclosed to them by state law. The power to convert some (or portions) of a district's current facilities into smaller and relatively independent institutions may also encourage more energetic and thoughtful people to consider running for positions on district boards.

The twin spurs of competition and unfettered creativity would be strongly supplemented by a third factor — the new political authority of parents. Historically, those parents who have an idea for reform — or even for an experiment — have typically been lost in the endless procedures of district decisionmaking. Even the simplest change has required the patience and persistence of Job. District board elections have been the only credible threat — and, at best, a remote one. Although the democratic process may occasionally result in punishment of the board, it cannot produce a single institution that embodies a positive ideal such as Montessori, a classical curriculum, math and science, or whatever else the individual objectors may have wanted.

The Scholarship Initiative offers parents an opportunity to send a clear message to the district board. The message could run something like this:

You have ignored our requests for a public scholarship school to be located in your unused and suitable space adjacent to the Wildwood Shopping Mall where many of us are employed and where we presently have our preschoolers in private day care. This is to inform you that the Minnie Mouse Day Care Center is willing to open a private scholarship school in the Mall next September. If we have not heard from you by November 15th of this year, we intend next June to withdraw our children from their present unsatisfactory public assignments and commit ourselves to Minnie Mouse. P.S. Please note that the eighteen undersigned district teachers are also committed to this plan and have been offered contracts by MMDCC.

Market pressures of this sort should have a powerful effect on public schools, even without parents acting in concert. As with private schools today, public schools would have to be concerned about every child and family.<sup>22</sup>

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22. Some reformers feel that these market pressures should be supplemented by a new political mechanism that would bring additional forces to bear on school districts by allowing local people to convert their own individual public school (or portions of it) into a public scholarship school. One device available for that purpose is an initiative through which voters in the district could force the creation of one or more public scholarship schools. For example, the law might provide: "By initiative conducted according to general law, voters of any district may obligate the district board to

The Scholarship Initiative also permits city and county governments, community colleges, and public universities to create scholarship schools. The mayor and council, for example, may wish to establish work-site schools as part of a package of incentives for industry to locate in their area. The local university may wish to operate a lab school as part of the teacher training provided by its own education faculty; or it may wish to engage in research that can most effectively proceed if the university can itself set the character of the environment. These alternative public sources of supply should be encouraged.

This flexible and autonomous corporate structure of the public scholarship school would require that it be subject to the rules of bankruptcy and dissolution in case of market failure. A public scholarship school that proved fatally unpopular would be unable to meet its financial obligations. Unless the founding district had undertaken to protect them, both the school and its faculty would be at risk. Creditors could force the sale of the assets of the school and the faculty and staff would have to seek other employment.

From time to time commentators have asked whether these flexible and varied institutions envisioned by the Scholarship Initiative really deserve the name "public." There are at least two answers to this. The first is pejorative but true: The present system of government schools which exclude nonresidents and favor those who can afford to live where they choose are anything but public. Choice for all families through scholarships is a distinctive contribution to the accessibility, hence public quality, of government schools. Second, the decisions to create individual public scholarship schools will be made by a public body that is responsible directly or indirectly through the electoral process, and such decisions to create individual scholarship schools are as public as any other. It is difficult to predict how many traditional public schools will become public scholarship schools and how many entirely new public scholarship schools will be created. The total number of schools affected will be significant. Whatever their number, the scholarship schools will help families get more of what they want even from their traditional public schools, which will improve in order to survive.

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establish public scholarship schools in whatever numbers and capacity according to conditions to be specified in the initiative and subject to the terms of this subsection." Another scheme would have the plebiscite conducted among the parents of the children in a particular school. Under a third approach a specified majority of teachers at a local school (with the support of a specified majority of the parents) could be empowered to force the school district to turn their school into a public scholarship school. Just recently, Minnesota has permitted the creation of teacher-initiated "charter schools" which are likely to resemble this latter form of public scholarship school. T. KOLDERIE, CENTER FOR POL'Y STUDIES, ST. PAUL, MINN., MINNESOTA'S NEW PROGRAM OF CHARTER SCHOOLS (1991). It is important that the public school district board, through one such mechanism or another, be able to meet threats from private scholarship schools by liberating its own schools from the present codes.

### b. *Governance*

A school board might decide to establish a public scholarship school with a curriculum especially heavy in science and math. Let us call one such school the Copernicus School. In designing the governing body of Copernicus, the founding school board would have a great deal of discretion. Consider some possibilities: A five-member board consists of the principal, the local head of the teachers' union, and three others who serve by virtue of their jobs in the district office and at the will of the superintendent. A second approach makes every full-time teacher in the school a member of the board, with full and irrevocable authority to select the school's personnel in the future. A third model establishes a board consisting of the principal, three elected faculty members, three elected parents, three elected students, and a public member chosen by the rest of the school's board. A fourth option for Copernicus is an initial membership of seven persons selected from the faculty, the community, and the parent body; these individuals would hold terms with staggered endings, and the board would have the power to replace departing members with any individuals it prefers. Finally, although this by no means exhausts the possibilities, a five-member board could consist of people individually appointed (for overlapping terms of, say, three years each) by each of the five incumbent members of the board of education of the founding school district.

The public scholarship school would not issue stock. It would thus not be subject to leveraged buy-outs, although it could merge with other public scholarship schools if its charter so permits (the charter would also provide for the disposition of any remaining assets in the event of voluntary dissolution). Since the school will be directed by its charter, the founding district board may choose either to bind the school closely to itself or to set the school as permanently free as the district board desires. The school's charter may be as restrictive as the existing state educational code that governs public schools; or the school may be permitted to operate as if it had been formed by a private foundation or individual. Public schools thus could be self-regulating. Except for the founding agency that designs the charter and by-laws, all other agencies of the state — including the legislature and local government — would be extremely limited in their ability to regulate public scholarship schools.

## 4. *Private Scholarship Schools*

Private scholarship schools would be more regulated than traditional private schools, including those traditional private schools that choose to redeem scholarships only from low-income pupils. This additional regula-

tion of private scholarship schools concerns matters of admissions, finance, and the fair treatment of children enrolled in the school. As will be explained in more detail below, the core purpose of these restrictions is to assure that low-income children have fair access to scholarship schools. The advantage of private scholarship schools over traditional private schools is that the scholarship schools can redeem scholarships from all of their pupils. With this incentive, most private schools would eventually become private scholarship schools.<sup>23</sup>

The range of schools permitted by the Initiative to become scholarship schools would be limited only by the imagination of the provider and the taste of the consumer. For example, the Initiative would permit a public high school to associate by contract with a set of public scholarship schools on the same campus or even in the same buildings. In addition, the same site might house private Christian, Lutheran, Catholic, and "Independent" secular scholarship schools. A consortium formed by all these schools would own those particular facilities that are needed by all; these could be used sometimes in common and sometimes separately through negotiated leases. Great efficiencies would be enjoyed through a common heating plant, a football stadium, scientific laboratories, theaters, computer centers, and secretarial pools. And consider the social aspect. It is perhaps a question of taste, but we relish the idea that children would experience simultaneously the affirmation of their distinctive family beliefs and a humane and positive connection with outsiders.

This example lies at one end of the organizational spectrum. Near the other lies the work site school. Children could travel to the office or to the factory with their parents to a school that serves the needs of working parents for both education and child care. Work-site schools could be organized by several neighboring employers, all of whose interest are served by assuring commuting employees that the daily welfare of their small children is provided for.

A scholarship school might even consist entirely of a broker whose function is to connect the child with a set of specialized tutors in the neighborhood. In the morning the broker will arrange arithmetic with one instructor and writing and spelling with another. After lunch, the child is off to other homes for reading, music, and art.

The most obvious new school provider is the existing child care center. Today the family often puts the child in day care until age five. Although

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23. For various policy reasons that we have discussed elsewhere, the Initiative encourages the participation of virtually all forms of private schools. Private religious schools could become private scholarship schools without reservation or special condition. For constitutional reasons that we endorse, public scholarship schools could not teach religion.

this may be a place where the child is happy and prospering, the parents must tear him away and deliver him to strangers. Under the Initiative, the successful day care center would be able to establish an elementary school providing after-school care. The combination becomes a practical reality once the family is assured of financial support in the form of a scholarship.

The Initiative's provisions allow for profit-making schools, despite a prejudice against them expressed principally by public school educators. Occasionally this prejudice is conveyed in an image of "franchised" education, and, of course, that is a real possibility. But if someone can find a saleable model of schools that can be replicated, there is no harm in its designers being rewarded by grateful parents. Although education and hamburgers are different goods, denying a profit to providers of either kind of product is not a guarantee of quality. As with higher education and hospitals, although public and nonprofit providers are likely to predominate, there can be an important role for profit-making institutions.

## **B. Favoring the Poor**

### *1. Defining the Poor*

The Initiative defines poor children as those whose families are among the poorest twenty percent of families with school-age children in the state. This figure was chosen as a sensible approximation of the number of children who need and ought to be given special benefits. The right calculation requires a balance of various factors. Making the pool of eligible children too large could be harmful to the poorest children; but making it too small would risk excluding some of the truly needy from deserved benefits.

The Scholarship Initiative does not define precisely how the poorest families in the state are to be identified; in this respect, its sensible implementation is left to the legislature. One simple approach is automatically to include school-age children already eligible for certain "poverty-based" programs such as Aid to Families with Dependent Children, food stamps, free and reduced-price school lunches, and Medicaid. "Passport" eligibility from one or more of these other programs would not only facilitate administration; if carefully selected, it could almost precisely represent the entire low-income category.<sup>24</sup>

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24. The numbers of children represented by various programs is reported in M. WALD, ET AL., *CONDITIONS OF CHILDREN IN CALIFORNIA*, 49-61 (Policy Analysis for California Education, 1989).



## 2. *Initial Scholarship and Transfer Rights of Low-income Children*

As noted above, upon the passage of the Scholarship Initiative, initially only children of the poor would be eligible for scholarships. Even before the formation of scholarship schools, poor children could use their scholarships to pay the tuition (or part of it) in traditional private schools. Those schools will not be required to accept the scholarship-carrying pupils, although many may have committed themselves to do so. For the first four years, the amount of the scholarship will be the lesser of the private school's regular tuition and an amount established by the Initiative. As will be discussed in more detail below, that latter amount will average ninety percent of total spending per pupil in the state public schools.

Also, from the start, out-of-district public school choice rights are created. Traditional public schools can deliberately make available space that can be filled by out-of-district pupils. As noted already, if schools simply end up with extra space, they must admit out-of-district applicants. In either case, these schools must give reasonable preference to low-income children.<sup>25</sup>

The Initiative aims to get the poor off to a fast start with publicly funded choice — both in private schools and in public schools in other districts. Children of the poor are, all too often, those worst treated by the public schools, and many poor families lack experience in taking responsibility for selecting a school. These families can especially benefit from being able to try out choice before the scholarship benefit is extended to all families. These initial years will also give public school districts much needed experience with choice. In a gradually expanding market system they will risk losing larger numbers of their low-income children to other schools; and they will have increasing opportunity to attract children from other districts into their schools. These initial years will also give private schools valuable experience in enrolling poor children who are financed by state scholarships.

As already indicated, in the early years a private school will receive no more payment from the state for these low income children than it currently charges to the rest of its pupils. At present prices this often will be far less than the scholarship maximum, which is ninety percent of public school costs. This limit not only saves money generally, but avoids the risk

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25. We have not specified what "reasonable preference" means, leaving that to sensible regulatory interpretation. It is not our intention that all low-income applicants must necessarily be admitted ahead of others; but some decided advantage in the admissions process must be given to low-income applicants. The legislature is also required to establish fair financial terms as between the districts for such transfers.

that the public will pay above the market rate. Of course, new private schools could form to attract the newly empowered poor, setting their tuition at the scholarship maximum. This would still be less than the public school average and would remain so after the scholarship plan has been extended to everyone.

### 3. *Providing Scholarships for All Children*

The Scholarship Initiative extends the program to all children as a matter of right no later than 1997-98. The legislature is permitted to phase in the program earlier, in any reasonable manner it wishes.

Some have argued that educational scholarships should be available only to the poor, and there have been proposals drafted with that restriction. But so long as the interest of the very poor are protected, it is plainly desirable to extend subsidized school choice to lower-middle class and middle class families with school age children as well. The financial burdens on middle-income families paying private school tuition or moving to a new school district remain formidable. Furthermore, any plan that must pass muster at the ballot box probably has a far greater chance of adoption if, at least eventually, it provides scholarships to all families.

### 4. *Enrollment Protection of Low-income Children in Scholarship Schools*

With the extension of the program to the non-poor comes the risk that the poor will be the least effective consumers, justifying the set of regulations discussed below. As the program comes to cover all children who elect to attend scholarship schools, the Initiative offers an advantage for the poor in an enhanced opportunity to gain admission. In scholarship schools (public and private) twenty percent of new admissions are reserved for low-income applicants, if so many apply.<sup>26</sup> A simple example will illustrate how the preference would work. Suppose a scholarship school seeks to make 100 new admissions this year. The school is entitled to admit eighty according to any criteria it prefers — apart from residence and any criteria offensive to applicable federal law. For example, a school would be entitled to base admission of those eighty students on musical talent. In respect to the other twenty places, if twenty or fewer low-income children apply that year, the school must admit all of them in order to remain eligible to redeem its students' scholarships. If more than twenty apply, the school may choose among them. The Scholarship Initiative thus provides

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26. Twenty percent of new places for children of the poor is not an inflexible number so far as we are concerned. We believe that the underlying principle would be well served with a number ranging from fifteen to twenty-five percent.

a strong incentive to schools to recruit such children in order to achieve the maximum degree of freedom in selection. Were we not to give the poor this protection, they might often lose out to non-poor children in the competition for places in popular schools. For this same reason, however, the definition of who is poor for purposes of this provision ought not to be too broad. The poor constitute a distinctive, vulnerable group that often fares poorly in competition for selection even with the working class. A preference for thirty percent would, at the most popular schools, tend to disadvantage the hard core poor while preferring those just above them in income.

School choice supporters less concerned about the poor oppose this sort of admission control. Some respond to the problem by proposing larger scholarships for the poor; this, however, is insufficient protection.<sup>27</sup> Others have suggested that private schools be required to devote ten percent of their revenues to funding scholarships for the poor (the figure is based on the proportion of the income of elite private schools that is traditionally devoted to scholarships). This is also insufficient unless it is accompanied by a guarantee of places for poor applicants.

Some supporters of choice oppose enrollment protection for the poor on the pragmatic ground that the public at large would widely oppose the provision, thus jeopardizing the plan altogether. Yet a recent poll in California suggests that these concerns are unjustified; indeed, a small majority favored admissions protection for the poor even when the question used the charged word "quota."<sup>28</sup>

Note that the suggested twenty percent rule applies only to enrollment — the opportunity to attend the school. The very different question of the scholarship schools' right to dismiss or expel an enrolled pupil for academic failure or for disciplinary violations is discussed below.

##### 5. *Financial Charge Limitations in Scholarship Schools*

The next advantage for the poor under the Scholarship Initiative is the regulation of tuition and other charges that are imposed by the scholarship school over and above the amount of the scholarship. The Initiative permits scholarship schools to charge beyond the scholarship, but only to non-poor families and only according to their capacity to pay. The concern, of course, is that if scholarship schools could set their tuition at any

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27. Although larger scholarships may make the poor attractive to schools, other things being equal, it clearly does not assure their access. Indeed, if schools may charge non-poor families tuition beyond the scholarship amount, the fact that poor children bring larger scholarships may be of no particular attraction to schools that are not already inclined to seek out and enroll poor children.

28. REASON FOUNDATION, *supra* note 9.

level they chose, the poor (and, in some cases, the average family) would be priced out of the popular schools. Thus, in advocating this sort of protection for the poor, we are brought into conflict with some supporters of school vouchers.

As a general matter, additional tuition charges are not objectionable to us so long as these do not affect the family's capacity to choose the school. Indeed, there are advantages to price differentiation because it allows schools to cater to varied family tastes arising, for example, from differing judgments as to a particular child's need for formal instruction. And by graduating any extra charges, the proposal avoids any "notch effect"; there is no dramatic financial impact on those families just above the low-income level.

But permitting extra charges is not without problems. First, the child of any family that can be asked to pay little or none of the school's charges beyond the scholarship will be somewhat less attractive to the school, and there will be a temptation not to enroll him in the first place. Moreover, if extra charges are permitted, Initiative advocates can no longer assert that the income of scholarship schools will be less than that of public schools, thereby possibly running afoul of the "level playing field" arguments sometimes made against comprehensive choice plans. Of course, price differentiation could be allowed in the public sector. Although some may urge that such extra charges be permitted in public scholarship schools, there is considerable momentum against the idea. It is certainly arguable that the better way to protect the poor is a flat prohibition of tuition add-ons, and some choice advocates have endorsed that solution.

Yet a ban on add-ons is also problematic. It discourages participation by the existing, high-cost, elite private schools — schools to which many low income families would like access. And, of course, limiting add-ons does not deter those who can afford it from spending extra for after-school, weekend, and summer programs. Given the trade-offs involved, some might conclude that the question should be left to future politics. For example, the Initiative could start with a ban on add-ons but authorize legislative modification in a manner that protects the poor from being priced out.

### 6. *Scholarships of Substantial Value*

Concern for the poor also influences the size of the scholarship. The question of size will be given a more general discussion below; but it should be noted here that the scholarship is all that most of the poor will have to support their schooling. It would hardly be fair to provide small scholarships that were really only useful to families who could afford to supplement them from their own pocketbooks. They could do so either by

paying additional tuition (if that were allowed) or (if not) by purchasing a minimal formal education with the scholarship and then supplementing it with out-of-school educational programs. The amount of the subsidy, therefore, must approach what is now spent in public schools to provide all the services, facilities, and hardware necessary to good education. A suggested figure is ninety percent of the average expenditure in public schools (not counting federal money). In 1991-92 the average total spending per pupil in public education nationwide is estimated to be approximately \$5,800, of which about \$400 is federal money.<sup>29</sup> Assuming a small increase in public spending for 1992-93 and 1993-94, the average scholarship could be expected to have a value of around \$5,000. However, as explained below, it is intended that the actual scholarship value will vary according to the child's age and circumstance.

It is important also that new schools could be formed that appeal primarily to children of the poor. Perhaps these will be created by community groups and entrepreneurs from the neighborhoods, or by teachers in these areas now dissatisfied with public schools. But if the scholarship is not large enough by itself to run a satisfactory school, this source of supply is unlikely to materialize.

### 7. *Transportation Assistance*

The Scholarship Initiative adds a reasonable transportation increment as a further preference for the poor. This is obviously important if the system is to secure choice for all families, effectively threaten inefficient operators, and maximize the Initiative's potential impact upon class and racial segregation. The legislature would define "reasonable" in terms of dollars and miles. There are, of course, natural limits upon travel that are fixed by age and other factors. The cost will be considerable, although just how much will depend upon the so far unexpressed preferences of the poor, upon the ability of those forming scholarship schools to create attractive programs that are easily accessible, and upon the ability of local public schools to respond to this competition in ways that keep local children walking to their neighborhood school.

### 8. *Consumer Information*

Finally, the Scholarship Initiative's consumer information provision, though neutral in form, is of special importance to families who are unac-

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29. California is somewhat below the national average at approximately \$5,300 per pupil in average daily attendance. Sources and Uses of K-12 Education Funding Growth (Legislative Analysts's Office, 1991) (on file with the authors). In California the federal share is roughly seven percent.

customed to shopping for education. Although this group may consist of most families, the problem is most acute among the poor. The legislature is given sufficient discretion to require that scholarship schools provide to some agency designated by the state information that families will need concerning individual providers. The language does not plainly empower the legislature to make the school do anything beyond disclosure. However, despite the intent of the drafters, some might argue that the words "assure efficient dissemination of information" can be read to require participation in a statewide testing program, and this raises another issue. The legislature might well decide that it is important to educational consumers to know how a school's pupils are performing as measured in a uniform way. If such were the case, clearer language concerning the legislature's right to require testing should be included. Indeed, some might even insist that a strong accountability regime be mandated by the Initiative, although we would argue that family choice itself functions as a sufficient monitor of performance.<sup>30</sup>

In the end, government-required disclosure is unlikely to produce as much good information as does the private sector. Once ordinary people have a choice, many welfare agencies, churches, and community organizations will share in the information function. For the first time in this century, giving such information to ordinary families will be worth the effort.

### **C. Regulations Applicable to All Scholarship-Redeeming Schools**

Under the Initiative, private schools could remain free not to become scholarship schools. But as already explained, those that refrain would still be eligible to redeem scholarships from low-income children. They would be free from the regulations specifically directed at scholarship schools. However, by redeeming any scholarships at all, private schools would become subject to some minimum regulations.

First, all scholarship-redeeming schools would be forbidden to advocate unlawful behavior or hatred of any person or group on the basis of race, color, religion, national origin, or gender. The exclusion of racist academies is already enshrined in federal law.<sup>31</sup> The ban on "hate

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30. A California ballot initiative that will go to the voters in 1994 provides "The State Board of Education may require each public school and each scholarship-redeeming school to choose and administer tests reflecting national standards for the purpose of measuring individual academic improvement. Such tests shall be designed and scored by independent parties. Each school's composite results for each grade level shall be released to the public. Individual results shall be released only to the school and the child's parent. Drafts of the initiative had included a uniform statewide testing regime, and some supporters of the proposal had urged that schools not be permitted to redeem scholarships unless a certain minimum level was attained by their students (on average, or by a specified proportion of them). Other backers wanted to prohibit the state from requiring participating schools to test their children with state exams. The upshot is the quoted compromise.

31. 42 U.S.C. § 1981.

teaching'' will not likely generate any substantial political objection. To the contrary, virtually everyone — friends and foes of choice alike — has insisted on the inclusion of such a provision. Its validity may eventually be challenged on free-speech grounds. Although the provision would likely withstand such a challenge, the risk of defeat might justify including a severability clause in the Initiative.<sup>32</sup>

In truth, the practical effect of a ban on schools teaching racial hatred and the like will probably be minimal; the number of families wanting to send their children to such schools is minuscule. However, some marginal operators would cheat, perhaps successfully — at least temporarily. Critics of choice cheerfully predict the formation of Ku Klux Klan and Nazi schools; but the threat of evasion by such schools is not substantial. To the contrary, the Initiative promises to ameliorate the historic isolation and humiliation of racial minorities. Choice is an investment in social trust.

All schools that redeem scholarships would additionally be forbidden to provide false or misleading advertising; and they would be required to comply with reasonable consumer disclosure requirements. Finally, non-profit schools redeeming scholarships would have minor restrictions on the way money is spent.

A private school in substantial violation of these rules (or, in the case of a scholarship school, any of the additional rules established by the Initiative) could lose its right to redeem scholarships, but only after being given notice and an opportunity to defend itself. Presumably the legislature would establish an administrative procedure for resolving such disputes. The state would bear the burden of proof of violation. The main goal of this provision is to protect scholarship-redeeming schools from harassment by the state. Some might want to strengthen the protection even further by expressly requiring the showing of scienter on the part of the school and/or by guaranteeing a right to jury trial on the question of violation.

#### **D. Regulations Applicable Only to Scholarship Schools**

Schools that join the new system as scholarship schools would be subject to additional conditions. These would be the same for public and private scholarship schools, except that public scholarship schools could not teach religion. Whether they are to be constrained further than this by

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32. The severability clause might read: "If any part of this measure or the application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications which reasonably can be given effect without the invalid provision."

their own articles of incorporation is a decision for the district board, just as it is for the board of a private institution.

### 1. *The Underlying Philosophy Against Regulation*

The general strategy of the Scholarship Initiative is not to multiply legal structures and strictures but to remove them and to depend on the market. A scholarship school therefore needs no special act of recognition by the state; it becomes a part of the system merely by declaring its intention to abide by the rules that bind private schools today and by the few constraints added by the Initiative. All scholarship schools would be constitutionally protected against most further regulation. In order to assure scholarship schools that they will be able to operate in distinctive ways, the legislature (and other organs of government) are specifically disabled from enlarging controls upon curriculum, facilities, and school employment policies beyond the modest regulations that have traditionally applied to private schools. It is a practical motto of supporters of choice that whatever state laws have proved benign for the children of the rich should be adequate for everyone. One exception is allowed. Additional regulation concerning health and safety can be adopted, requiring a super-majority (two-thirds) which should suffice to avoid legislative abuse.

The focus is on freedom. In scholarship schools, matters concerning teacher tenure, content of the curriculum, or deployment of new educational technology will be decided by freely negotiated agreements between and among schools, teachers, and parents. The school will not be assured of a captive clientele; but it will be assured of the authority to maintain its own identity.

### 2. *Admissions*

Perhaps the most significant regulation of scholarship schools lies in the requirement that they give the poor preferential treatment in admissions. As discussed, the technical operation of this rule reserves twenty percent of new admissions for students from low-income families. The practical effect of this rule on the institution would vary among private schools. Many such schools already educate successfully a substantial percentage of low-income students; some, indeed, regard this as a primary institutional mission.<sup>33</sup> From the school's point of view, of course, it is of first importance that the school maintain its autonomy, and its goal typically

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33. For evidence of the role of Catholic schools in serving the poor, see, e.g., James S. Coleman, *Do Students Learn More in Private Schools Than in Public Schools?* Madison Paper No. 4, James Madison Institute for Public Policy Studies (1990).



would be to control 100 per cent of admissions. In practical terms this will still be possible. The well-administered school will recruit a substantial pool of low-income applicants and have its pick among them.

In any case, schools that are truly distinctive in religious, ideological, or pedagogical terms will have *very* few applicants — rich or poor — who do not suit their institutional identity. Would atheists really want to send their children to fundamentalist schools with an “integrated” and compulsory biblical curriculum? Will the ideological descendants of Dr. Spock covet a place for their child in a school that advertises its no-nonsense attitude toward discipline? In a diversified school economy the schools will have applicants who want what the school wants to give them — in most cases matching conventional tastes with conventional producers. In the end, most schools would likely welcome nearly all of those children who choose their product, even if not every one of them would have been enrolled were the school to have complete control over admissions.

We first addressed the question of a scholarship school’s control over admission decisions in 1971, advocating a selection process based largely on lottery.<sup>34</sup> Schools would announce the number of new places, and if there were that many or fewer applicants, all would get in; if a greater number applied, the winners would be chosen by lot from among all applicants.<sup>35</sup> In such a scheme, there appeared to be no special need to protect the access rights of poor children. Over the years we have been persuaded to modify our position. The Scholarship Initiative thus starts with the opposite presumption — that the school has the right to select its students. If the only interests at stake were the liberty rights of the family and the liberty rights of the school, the family’s right of inclusion would probably continue to be favored over the school’s right of exclusion. Providing education, however, is not like providing toothpaste; the talents and interests represented in the same classroom are far more important to each child than the numbers and characteristics of other children using the same brand of toothpaste. It is precisely in order to provide families with choice that the school itself must be able to shape its identity through admissions decisions. At the same time the school’s right (and parents’ preference) must be tempered in order to protect the access rights of the poor. A family’s preference for a school which excludes the poor is not one that society need honor with cash. Reservation of one in five new places for children of the poor seems a fair balance of the competing policies.

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34. COONS & SUGARMAN, FAMILY CHOICE IN EDUCATION, *supra* note 8 at 55. For a general discussion of alternative admissions policies, see COONS & SUGARMAN, EDUCATION BY CHOICE, *supra* note 16, at 135-45.

35. This is the rule recently adopted in Milwaukee’s small scale experiment with vouchers for low income children. See Sugarman, *supra* note 14, at 191.

What additional restrictions, if any, should apply to the scholarship school's ability to choose its pupils? The Scholarship Initiative imposes two. First, children are not to be refused solely on the basis of their residence. This is a crucial step toward eliminating the geographical barriers characteristic of public education; too often these barriers have served as proxies for social class. Second, scholarship schools are forbidden to discriminate in ways forbidden by applicable federal law. This, of course, is only a cosmetic feature. Scholarship schools could not exclude applicants in violation of applicable provisions of the federal constitution and applicable federal statutes, even if such exclusion were permitted by the Initiative. But the anti-discrimination provision is included both to discourage violation of the federal rules and to make clear that selection criteria not barred by federal law are in fact allowed. Thus, for example, although federal law would prohibit exclusion by race, it would allow single gender schools and, in the case of private schools, selection by religion.<sup>36</sup>

### 3. *Fair Treatment of Students*

The harmony of school and student will also depend considerably upon the freedom allowed the school once its pupils are enrolled. Under the Scholarship Initiative the school may require all of its students to successfully complete whatever courses it wants to require. Moreover, it is specifically authorized to require courses in "moral or social values, philosophy or religion." On the other hand, the school may not compel the student to profess belief or participate in any ceremony symbolic of belief. In short, it may not force the child's conscience.

The meaning and purpose of this limitation can be illustrated by an example. A Catholic school may find it impractical (or undesirable) to

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36. This is not the place for an extended discussion of the many complicated questions that would arise concerning what, if any, additional federal requirements might apply to participating private schools either merely because they redeem state-funded scholarships or because they accept additional federal funds in support of their pupils. We do note, by way of example, that, in connection with Wisconsin's new program to provide scholarships to enable poor children to attend private schools in Milwaukee, the U.S. Department of Education provided a legal opinion to the state concerning the application of federal laws protecting the disabled. The DOE view is that the "free appropriate public education" provisions of the Education of the Handicapped Act do not apply to private schools, which means that the participating private schools need not provide appropriate education for handicapped students where the schools do not offer programs designed to meet their needs. On the other hand, DOE believes that Section 504 of the Rehabilitation Act of 1973 does apply. This means that a school may not exclude a handicapped student if the student can, with minor adjustments, be provided an appropriate education within the school's program. Letter from Robert R. Davila and Michael Williams, DOE, to Wisconsin Governor Tommy G. Thompson, September 21, 1990 (on file with the authors). Since that time the Americans with Disabilities Act has become applicable to private schools making these matters even more complicated.

segregate a handful of non-Catholic children while the rest attend a weekly mass. The school is permitted to require the child's respectful presence in the chapel. It is not, however, allowed to exact a profession of the creed or any other active form of participation. The intention is to set an appropriate balance between the dignity of the individual and the interest of the school in maintaining its autonomy.

The Initiative also insists on the employment of a fair procedure by the scholarship school in regard to academic dismissals and discipline, and here again it strikes the balance in favor of the school's autonomy. The school is in full control of discipline, so long as the child has fair notice of the rules of behavior and a fair chance to explain apparent infractions. Any legal challenge by an aggrieved student would be limited to questions of notice and procedure. With respect to academic dismissal, the issue would be whether the child is deriving "substantial academic benefit;" however, so long as the fair notice and procedural requirements are satisfied, the Scholarship Initiative leaves the school as arbiter of that question. Of course, the school may wish to increase its responsibilities in these respects by contractual arrangements with its customers. A well-tempered set of academic and disciplinary standards and procedures may prove advantageous in the market.

#### 4. *Religious Schools and Constitutional Questions*

The participation of religious schools in the scholarship program no longer appears to pose a serious problem under the "establishment of religion" clause of the First Amendment to the federal constitution. Opinions in U.S. Supreme Court cases in recent years strongly suggest that subsidies to individuals may be properly spent in religious schools so long as the system of finance overall is reasonably neutral between secular and religious institutions and between public and private sectors.<sup>37</sup> With the authority to choose reserved to the parent, and with the provision of a wide array of similarly treated public, secular, and religious schools, the problem raised by financial aid directed to institutions is avoided.<sup>38</sup>

Of course, church and state must not be "excessively entangled" in the course of administering the system,<sup>39</sup> but the mere redemption of scholarship checks poses no such problem. Although the state could be called upon to determine such questions as racial discrimination or false advertising by the school, such issues are adjudicated today without forbidden en-

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37. *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986).

38. *See, e.g., Aguilar v. Felton*, 473 U.S. 402 (1985); *Grand Rapids v. Ball*, 473 U.S. 373 (1985).

39. *See Aguilar v. Felton*, 473 U.S. 402 (1985); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

tanglement. Conceivably an allegation of forbidden state regulation could arise under the provision of the Scholarship Initiative that specifically protects students from coerced profession of belief. Although such an allegation could lead to an adjudication by state authority, it is unlikely that such state activity is either the political or administrative involvement that the "entanglement" notion was meant to proscribe.

As mentioned earlier, the Scholarship Initiative also provides that non-profit scholarship-redeeming schools use all of the income from the scholarships for educational goods, services, and facilities. However, it is unlikely this is constitutionally required. It is included rather to provide assurances that scholarship proceeds will not be siphoned off, for example, to purchase liturgical supplies or equipment for an affiliated church. Once more, it might be argued that enforcement of this provision would involve forbidden "entanglement," but again this is not persuasive. For those concerned about the initiative's constitutional vulnerability on this issue, a severability clause should protect the rest of the structure.

### *5. Concerns About Kickbacks and Home Schooling*

It might appear that one of the charges most likely to be levied against a school would be that of financial corruption. An obvious incentive would exist for scholarship schools to offer kickbacks in order to recruit students. The parent who submits a \$5,000 scholarship could be promised \$500 in return. This risk is modest. Buying an education is not like buying a hot tub. Education is generally delivered to buyers in groups, and the resources for its accomplishment are consumed jointly by all the children. Cheaters would have to be extremely careful in selecting the parents to be offered a kickback. One honest parent could blow the whistle, and the incentive to do so is increased by the knowledge that, if other parents succumb to temptation, the child is robbed of the full measure of school dollars. The school would probably need to bribe either all or none.

This would not hold true in the same degree for home-schoolers. Hence, the Scholarship Initiative contains a provision concerning the magnitude of the scholarship in the case of schools in which "principal instructors of most or all pupils are their own relatives." In contrast to the general rule, in the case of home schooling the legislature is permitted to make the scholarship as small as it wishes. This is a difficult question. Home schooling is a legitimate choice and, in general, a benefit to both child and community. However, the chimera of widespread corruption would be politically disastrous. Hence, a solution is to validate home schooling in the Initiative, leaving its detailed treatment to the future. Once family choice has been accepted as the norm and new sorts of schools have emerged, attitudes about and by home schoolers could sharply change.

### 6. *Collective Bargaining and Professionalism*

The Scholarship Initiative is silent on collective bargaining except to declare the right of public and private scholarship schools to set their own hiring policies. The hiring policy of public scholarship schools could be fixed by the rules incorporated in the charter and by-laws; hence a school district could, if it chose, recreate whatever relation it presently has with the unions. On the other hand, it could leave this issue entirely in the hands of the school — or it could do something in between. The private scholarship school likewise could have whatever policy its founders choose, and its teachers would have organizing rights just as they do today with respect to private employers. All scholarship schools would be subject to the organizational pressures experienced by any business. Like the ordinary business, and unlike today's public systems, each scholarship school would experience those pressures separately.

It is unlikely that the teacher's unions would retain their present position. Their power to make life difficult for individual schools would have to be exercised with delicate restraint. Today the union is often in a position to shut down the entire district. A strike deprives many families in the district not only of education for their children but of safe custodial care as well. If the strike drags on, the lives of thousands of families are disrupted. Some will begin to look for private options. The rest cannot afford this course of action. For them the only recourse is to implore the board to settle. Recognizing the limited options of their constituents, the board is pressured to capitulate to union demands within budget limits. Sometimes, however, bravado on both sides leads to such a breakdown in negotiations that a strike of substantial duration occurs.

The phenomenon of the prolonged strike would be unlikely at *any* school following the adoption of the Scholarship Initiative. Long strikes would have a predictable effect; the families would take their scholarships and go elsewhere. Thus, both the teachers unions and school management would lose. With the strike threat less realistic, the union's power would be reduced, and, perhaps too, its popularity among teachers. Collective bargaining works to the public interest where concerned customers are able to discipline both management and labor by shifting to someone else's product or service. This does not mean that teachers unions will disappear. It does mean that they would have to survive without the advantages of monopoly.

By contrast with their unions, many teachers should support the Initiative for four separate reasons. First, public schools are notorious for spending their money on bureaucracy rather than on classroom teacher salaries and their direct classroom needs. In light of the contrasting experience of most private schools, the market pressures unleashed by the in-

initiative would shift public school district spending priorities in ways teachers prefer. Second, influential and affluent families now using private schools would now be included in the state-supported system because of the Initiative; this should generate more political strength on behalf of the financial support of schooling generally. Third, for the first time it would be realistic for teachers (indeed, for unions) to found their own schools. Finally, teaching in tax-supported schools could at last become a profession in the fundamental sense that the family and the professional come together in a voluntary relationship.

## E. Finance

### 1. *Average Value of Scholarships*

Once in operation, the Scholarship Initiative sets the value of the *average* scholarship at ninety percent of the average spending per child in public schools. The amount of spending used in making this calculation is not merely the average sum per pupil statewide for *current* expenditures by districts, which is the frequent basis for reporting educational expenditures per pupil. Rather, it includes expenditures for capital costs and spending at the county and state levels. It comprises not only unrestricted revenues, but also the cost of special categorical programs adopted by the state. Spending funded by federal money is excluded, however. Those funds may be added to the scholarship depending upon the rules of the specific federal program.<sup>40</sup> To summarize, the goal is to start with the current average of total public spending per pupil for all elementary and secondary school purposes from all state and local sources. It should be noted that this is an *average* figure and not an exact amount spent on any individual.

This number is multiplied by ninety percent, a proportion which balances two contrasting values. First, for reasons already explained, it is critical for the scholarship value to approach present spending levels in public schools. By contrast, it may be argued that, because of the competitive efficiency of choice plans, scholarship schools can do a good job

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40. For the California version of our Initiative, we also exclude the annual state contribution towards unfunded teacher pension liabilities on the ground that this money goes to pay past obligations. We also provide that under certain conditions employees in scholarship schools would be able to continue to participate in the teachers' retirement system. More precisely, a public scholarship school could elect to join the retirement system for all its employees, and individuals employed by private scholarship schools who currently belong to the retirement system could elect, on an individual basis, to retain their ongoing membership, provided that they and their employer together contribute a sum equal to what would have been contributed had they remained employed by the public schools. This is perhaps a special problem for California and a thorny matter altogether which is not further addressed here.

with somewhat less support. A ten percent discount is surely feasible considering that scholarship schools are freed from the regulatory net now encumbering public schools. Furthermore, it is politically advantageous that there should be some tax savings realized when children transfer from a public school to a scholarship school in either sector. Finally, the cost of administering the Scholarship Initiative must be accounted for.

The ninety percent figure is a matter of judgment, but any reduction below eighty-five percent may be detrimental. The dilution of the scholarship would discourage not only the formation of new private scholarship schools aimed at the poor, but also the conversion of existing public schools into public scholarship schools. If the school-site budget is to be decreased substantially, the attraction of the public scholarship school for public school teachers will also decrease. However, in view of bloated bureaucratic costs at higher levels, many individual public schools will find that financing based on the scholarships established by the Initiative would provide more funding for the school than it could obtain under the current regime.

Once the proposed regime is in operation, it would be unlikely that a school would charge less than the family's maximum allotted scholarship amount. In order to encourage families to choose lower-priced schools which will reduce the financial impact on the state in the short run, some observers have suggested an interesting wrinkle. If a child attends a scholarship school but does not use the full value of his scholarship, a credit balance for the difference would be established by the state in the child's name. This credit could be used in the future either to pay for a more expensive scholarship school or for the child's post-secondary education.

## 2. *Varying the Scholarship Amount*

Again, the ninety percent figure is only the value of the *average* scholarship. Variations from that average are both permitted and mandated by the Scholarship Initiative. The requirement that "[s]cholarships shall be equal for every child of similar circumstances" is intended to clarify the legislature's authority selectively to increase the scholarships for certain groups of students — for example, to provide more scholarships for high school rather than for elementary school pupils. This would allow the legislature to confirm the traditional spending pattern, or, if the legislature were daring, it would allow the opposite. Further, it would permit larger scholarships for those children now the target of categorical programs. These include, for example, the urban poor, those enrolled in vocational education programs, and limited-English-speaking children. All such preferences would be left to the ordinary politics of state government.

However, there are two types of situations where the Scholarship Initiative mandates that extra value be added to the average scholarship amount. First, as previously discussed, low-income children must be awarded additional scholarships to fund their reasonable transportation costs. Second, disabled children must have larger scholarships to reflect the extra costs needed to provide them with reasonable educational opportunities. The Scholarship Initiative here establishes a principle, but not a precise sum. The legislature would be required, in good faith, to add supplemental financing for alterations of the chosen school to accommodate disabled pupils, special instructional methods to accommodate learning disabled pupils, or unusual assistance needed by mentally retarded pupils. As with the other adjustments determined by statute, these increments would make children with special needs more attractive to scholarship schools because those schools would be provided with the funds to finance the necessary special services. Yet the Scholarship Initiative does not specify any way in which those extra dollars must be spent. That is left to the discretion of the families whose children get the higher value scholarships and the schools they select.

Of course, if the average scholarship is ninety percent of average spending in public schools and many children are to get more than average, then the base or regular scholarship for the ordinary child will fall below ninety percent. Home-schoolers apart, the Scholarship Initiative indirectly restricts the legislature's flexibility to order upward adjustments by imposing a floor on the funding provided to children without special needs. Scholarships must be at least "eighty percent of the average scholarship for children of similar grade level." To illustrate, assuming as before that the average scholarship overall is \$5,000, the legislature might set the average scholarship at \$4,500 for elementary school pupils and \$6,500 for high school pupils. Although the legislature would then be permitted to award more than \$4,500 for some elementary school pupils, there would be a limit because every pupil would be entitled to at least \$3,600 (eighty percent of \$4,500). The purpose of this restriction is to ensure that no children fall below an acceptable minimum of spending through the scholarship alone.

### 3. *Funding the Scholarships*

Under the Initiative the scholarship is funded by the state. If public schools were fully funded by state resources, the Initiative would be straightforward and non-controversial. Instead of sending money to a local public school district when it enrolls a child, the state would fund the scholarship when the child attends a scholarship school. But, in fact, despite twenty years of litigation and legislative reform efforts, public



education relies considerably upon local property taxes for its funding. In addition, some school districts are permitted to spend more based upon their greater local property value. Apart from residents of districts with wealthy tax bases, this irrational preference for children from wealthy school districts is everywhere deplored.<sup>41</sup> There is no justification for linking the size of the child's scholarship to the financial ability of the school district of residence, especially in a plan that bans discrimination on the basis of residence.

It is ludicrous for otherwise similar children to arrive at scholarship schools with different amounts to spend. Thus the recent proposals for a two-tier scholarship — part local money, part state — that would vary in value from place to place should be rejected. Note that this conclusion is consistent with the celebrated American preference for local autonomy. To empower the family with a fully funded state scholarship is the ultimate commitment to local control.

The next question is where the state will get the money to pay for the scholarships. The Scholarship Initiative is silent on this question, and alternative legislative solutions would be permitted. The best solution in most cases (at least in the short run) seems to be for the state simply to draw on the pool of money it now uses to provide aid to local school districts. But this only begins to resolve the problem. Since the state is not now paying for the full cost of schooling, to reduce its aid to a district because a child has transferred to a scholarship school would often not free up enough money to fund the scholarship. Moreover, it would, in effect, reward a local district for losing a child by spreading the locally raised funds over a smaller pupil base. Worse, because state aid now is generally larger for districts with less property wealth per pupil, this loss-of-state-aid solution would “cost” poor districts more than rich ones.

A better strategy would be to count any child using a scholarship as a pupil enrolled in the district of residence for purposes of initially determining the district's state aid. The state would then withhold from the district the full cost of that child's scholarship. Under this arrangement, while the state would be formally providing the scholarship funds to the child, the net economic effect would be as though the school district had enrolled this child and then contracted out and paid for the schooling at the scholarship school of the family's choice. This would provide a far greater economic incentive for the local public school district to hold on to its pupils.

This solution, it must be admitted, is not without problems that would have to be addressed in the long run by a revision of the underlying system

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41. See generally COONS, CLUNE & SUGARMAN, *supra* note 5.

of public school finance. For example, under the short-term proposal, where a district now spends considerably less than the scholarship amount, reducing funds for the full value of the scholarship would leave it with less money per pupil to spread over its remaining pupils. In addition, the short-term proposal would create the opposite result in higher spending districts. Perhaps a temporary answer to this, although admittedly complicated, would be for the state to charge each district for each resident who uses a scholarship an amount equal to the average spending per pupil by the district, while awarding to children scholarships that do not vary in value by district of residence.

Another problem is that in some states the very wealthy districts now get so little state aid that if more than a few local children elected scholarship schools, the state funds would be depleted. In those states, the legislature might require the local district (or at least wealthy districts) to finance the scholarships of its local children. This, of course, has its political difficulties.

The proposed solution also raises the issue of districts with differing current spending levels which thus would face different incentives to create public scholarship schools. Low spenders could find that the scholarship school would bring in more money per pupil, and vice versa for high spenders. Nevertheless, in the broader financial picture, it is perhaps both prudent and fair to provide to poorer, low-spending districts the right to create financially enhanced public scholarship schools as an escape route from their current monetary disadvantage.

Finally, some fair allocation of the financial burden, between the state and local districts, will have to be accomplished in order to deal with the cost of scholarships claimed by those children now in (or who would otherwise use) the private sector. A related issue, addressed below, is the question of the impact of paying for these private school children upon the overall cost of education to the public.

These difficulties are almost all the result of an unjust public school finance system. If the mechanism necessary to introduce choice causes discomfort to the present beneficiaries of state-created discrimination, that is not an indictment, but rather, a recommendation of the reform.

#### 4. *Prorating the Scholarship Value on Transfer*

Turning to another finance issue, families should be permitted, within reason, to transfer their children from one school to another during the year. Even today a family moving during the year typically is able to enroll its children in the new school district's public schools. Scholarships will reduce the number of school transfers caused specifically by change of residence. Families moving within the general area will be able to keep

their children in their current schools if that is their preference. There will, of course, be incentives for many to transfer, and that is basic to the system. Families, wherever they live, should not be denied the opportunity to change schools during the year.

The Initiative directs that in case of transfer the scholarship be prorated; the legislature is empowered to implement this provision in a reasonable manner. There is, of course, an argument against an unlimited number of transfers without notice. The sudden departure of children from schools could be disruptive to the school's financial situation. Perhaps the family should be limited to one transfer per year per child, or two every two years — at least where it does not change residence. In any case, except in emergency situations, substantial notice to the school might be required before the child could carry the scholarship elsewhere. Under a liberal interpretation of the provision that calls for prorating the scholarship amount, the legislature might choose to have the division favor the school first attended on the theory that a school gaining a pupil halfway through the year, for example, may not incur a full half-year's worth of additional expenses, whereas the school losing the pupil may not save a half-year's costs. The legislature would also have to adopt sensible prorating provisions for children newly entering or leaving the state during the year and for children moving between scholarship schools and non-scholarship schools (either public or private).

### 5. *Broader Cost Implications*

As already noted, providing an average scholarship of ten percent less than is spent on average on children in public schools should save a modest amount of public money as children shift from public schools to scholarship-redeeming schools. But offering scholarships to those children now in the private sector would cost the state new money. Some children will probably continue to enroll in private schools that are entirely outside the system; but a large proportion will eventually become supported by the public and not just by their families. Although this is not the point of the Scholarship Initiative, it is wholly proper that these children be included. It would be unfair to exclude permanently those who would not have used state-funded schools if a Scholarship Initiative had not been adopted. Moreover, apart from those now enrolled in private schools, it will not be possible to identify those who would have so enrolled in the future. There should be no principled objection to having more children supported by the public than are today supported in public schools.

On the other hand, many states currently face budget problems and there are always political pressures against increased public expenditures. What should be understood is that the prospect of providing the support

of additional children is financially not so ominous as it might initially appear.

Consider first the implications for the initial phase of the Scholarship Initiative, when only low-income children are eligible for scholarships. Proceeding on the basis of several reasonable assumptions, suppose first that twelve percent of the state's pupils now attend private schools.<sup>42</sup> Assume further that ten percent of them are from low-income families<sup>43</sup> and that eighty percent of those children of the poor immediately qualify for scholarships (not one hundred percent because some private schools will be unwilling to redeem scholarships, at least at the start, because of opposition to the regulations that would then apply to them). The result is that one percent of the state's pupils (amounting to a little less than five percent of low-income children) would be newly subsidized. But assume further that another one percent of the state's pupils (amounting to a little less than five percent of low-income children) would leave public schools for private schools in the initial year. (This would boost private school enrollment by less than ten percent, assuming that poor children are net additions.) Assume finally that tuition in private schools currently averages about half of spending in public schools.<sup>44</sup> Because scholarships in the early years are limited by the current tuition levels in private schools, the result is that in the first year the state should be able to fund the total cost of providing scholarships to low-income children already in private schools from the savings generated by the reduction in state spending that would be achieved as low-income children switch from public schools to private scholarship-redeeming schools.

Next, assume that in the second year still more low-income children switch to private schools that redeem scholarships. This change would generate financial savings to the taxpayer because of the difference between the money previously spent on these children in public schools and the value of the scholarships they obtain. But, assume that for a number of reasons the average tuition level in private schools will begin to rise in real dollars. This increase will apply not only to this year's newcomers, but will also elevate the cost of scholarships to the state for low-income children previously enrolled in those schools. Still, it is probably reasonable to assume that these increases and decreases in state spending will cancel themselves out. In short, on these assumptions, so long as a

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42. Private schools enrolled 12% of the nation's school children in 1982-83. James Catterall, *Private School Participation and Public Policy*, in 1 *COMPARING PUBLIC AND PRIVATE SCHOOLS* 50, table 1 (T. James & H. Levin eds., 1988).

43. For data on the income of private school users, see *id.* at 59-60, tables 7, 8.

44. For data on costs of private schools, see e.g., JAMES S. COLEMAN & THOMAS HOFFER, *PUBLIC AND PRIVATE HIGH SCHOOLS: THE IMPACT OF COMMUNITIES* 35 (1987); Catterall, *supra* note 42, at 61, table 9.

modest number of low-income children continue to switch to private schools, the taxpayers should be able to fund scholarships for the poor without any real cost increase to the state.

Financing the full scholarship plan for all children is another matter. But that is one of the reasons why the Initiative gives the legislature until the fifth year of the program to phase in the main structure of the scholarship plan. It is extremely difficult to predict what share of the pupils in the state will use scholarships once the complete plan is fully operational. Suppose, for purposes of illustration, the proportion is twenty-five percent, composed of seventeen percent in private scholarship schools and eight percent in public scholarship schools (as well as a nominal number of low-income children in private schools that elect not to become scholarship schools but redeem scholarships from low-income pupils). In this scenario, less than ten percent of current public school enrollment shifts to public scholarship schools and the private sector increases its intake by about forty percent. Finally, assume that three percent of children remain financially unsupported by the state (because they are in non-participating private schools).

On these assumptions, the estimated cost of funding for all the children now supported by scholarships who would otherwise be in private school and free to the state, less the savings from children shifting from public schools to scholarship redeeming schools, would amount to just over seven percent of the total state and local spending on elementary and secondary education.

There are two basic ways to deal with this cost increase. One is to increase the state budget for elementary and secondary education by this amount. If spending on public education is now, for example, fifty percent of all state and local spending, then this would amount to less than a four percent increase in the cost of government. At the other extreme, spending on public schools could be cut by about seven percent. This solution might be considered less harsh than it appears on first impression because (at least if the recent past is to be a guide) public schools have been enjoying real increases in spending (i.e., budget expansions greater than inflation).<sup>45</sup> Hence, in many states a seven percent decrease from what might otherwise be public school spending in 1997-98 might in fact amount to a larger budget per pupil than the current public school budget in real dollars.

As indicated earlier, some proponents of the school choice idea wish to use it to decrease the cost of government. In terms of the politics of getting the Scholarship Initiative adopted, those supporting the plan must con-

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45. See Sources and Uses of K-12 Education Funding Growth, *supra* note 29.

sider the potential negative votes from this group. This attitude appears to be motivated more by opposition to public spending than by the ideals of privatization and competition. One way to try to appease those voters is to impose an overall spending cap on the public cost of elementary and secondary education. This would, in effect, mean opting for the solution that cuts public school spending. One way to smooth that impact would be to reduce public school spending, other things being equal, by one and a half percent a year for the five years until the plan is fully implemented.<sup>46</sup>

Appeasing the anti-spending voters may not be politically savvy. A recent poll suggests that there may well be greater support for increasing public spending on education in order to extend subsidized school choice to all families.<sup>47</sup> Perhaps in the end the two principles would best be compromised; a very small increase in overall spending would be paired with a very small decrease in public school spending. After all, the efficiencies that emerge from the system through competition should permit schools generally, including public schools, to get more bang for their buck, permitting them to achieve as much or more than is available today, at less cost, if necessary.

Under the Scholarship Initiative, the legislature will have discretion to adopt any reasonable method to phase in scholarship schools. One such method, hardly the most effective, would be waiting until the fifth year. A more prudent policy would phase in public scholarship schools first, leaving the entry of private scholarship schools for possibly as late as the fifth year. The legislature might also phase in the eligibility of children at different grade levels. For example, in year three, kindergartners and first graders, new middle-schoolers, and new high-schoolers could become eligible; another few grades could come in the next year, and all children would be in by year five. Or the legislature might decide to phase in the

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46. For those favoring a cap on spending, we offer the following provision: "For school years 1993-94 through 1999-2000, the total public cost of elementary and secondary education shall not exceed that of 1992-93 adjusted for changes in the state's average personal income and total school age population." This provision guarantees that for the first seven years of its operation total public spending on elementary and secondary education will not increase except for increases in the numbers of children in the school-age population and for increases in average personal income in the state. The provision assumes that the present spending per pupil is defensible and assigns more funds as "workload" increases. It is also meant to permit more money to go into education as people become wealthier or as nominal income goes up because of inflation — both of which would be expected ordinarily to yield more money for schools. But the cap on spending does not permit a spending increase simply because children now in private school become eligible for state support.

47. REASON FOUNDATION, *supra* note 9. Although respondents agreed that there is a lot of waste in government spending on education, they tended to dislike the idea of imposing a limit on education spending in a choice plan; rather, as part of a choice plan, they (at a minimum) favored increasing spending to reflect inflation and enrollment increases.

system on a geographic basis, for example, rural areas or smaller districts first, or last. Yet another approach would phase in the value of the scholarship for non-poor children at the rate of twenty-five percent per year for four years. During that period many scholarship schools would presumably charge these families the difference between the school's regular tuition and the reduced value scholarship. (Low-income children would be able to claim full-value scholarships from those provisions of the initiative that would take effect immediately.)

One advantage of a gradual phase-in is that it would best facilitate planning for the acquisition of new space for scholarship schools. This would include space that is now available in public schools and either is not currently being used to educate school-age children or would become available as children withdrew from the district.

It is also to be expected that some existing private schools will adopt a wait-and-see attitude to determine when and if they will join. These various factors should enable the state rather easily to blend in whatever combination of public school spending reductions and/or school spending increases it prefers.

As intimated earlier, in the long-term the Scholarship Initiative should increase the financial support of public schools by changing the political climate for public spending on elementary and secondary education. Today, families that withdraw their children from public schools have little incentive to vote for higher taxes to support a government institution they have found sufficiently unattractive to warrant paying out of their own pockets for a substitute. Under the Scholarship Initiative, however, all families using public schools and scholarship schools would be linked together in a common financial bond. That is, not only should school users be less resentful about supporting public schools, but their children's own financial support would be directly linked to the level of spending in public schools. Making allies of adversaries may be precisely what is needed to recommit our society to generous support for elementary and secondary education.

