

IV

OTHER EDUCATIONAL REFORMS

FAMILY CHOICE: THE NEXT STEP IN THE QUEST  
FOR EQUAL EDUCATIONAL OPPORTUNITY?\*

STEPHEN D. SUGARMAN†

INTRODUCTION

Should families have more influence on the education of their children? It is widely believed that parents ought to be permitted to do as much for their children's education as they can. But since some parents may care more about education or have more resources to commit to education, their children may receive substantial advantages. Because other children are correspondingly disadvantaged, reliance on parental tastes for education may actually threaten our societal commitment to equal educational opportunity. At present we deal with this dilemma by having the state provide lengthy, compulsory free schooling. The public schools are professionally dominated and concentrate on things best learned outside of the home. The theory is that at least the negative impact of "inadequate" parents can be overcome. A major drawback of this strategy is that it has only partially worked. As a result, many policy-makers and educators argue that we must intensify professional efforts to deliver education to disadvantaged children in order to free them from the limits of family lethargy and background; some have argued that this response must come, if necessary, at the expense of children from more fortunate families.

An alternative solution has been proposed in recent years which suggests that further professional efforts are not necessarily the right approach to educational equality. Rather, it has been argued that allowing all parents to choose what they believe is best for their children will result in substantial advantages for children as a group. Many of those critics who favor increased family influence have proposed "voucher plans"—which I prefer

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\*This article is an outgrowth of work at which Professor John E. Coons, Professor William H. Clune III, and I have been engaged for the past few years. It is a prelude to a larger work on family choice which Professor Coons and I will publish together. See J. COONS, W. CLUNE & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* (1970); J. COONS & S. SUGARMAN, *FAMILY CHOICE IN EDUCATION: A MODEL STATE SYSTEM FOR VOUCHERS* (1971); J. COONS & S. SUGARMAN, *FAMILY CHOICE SYSTEMS: A REPORT TO THE NEW YORK STATE COMMISSION ON ELEMENTARY AND SECONDARY EDUCATION* (1971); Coons, Clune & Sugarman, *Recreating the Family's Role in Education*, in *NEW MODELS FOR AMERICAN EDUCATION* 216 (J. Guthrie & E. Wynne eds. 1971); and Coons & Sugarman, *Vouchers for Public Schools*, 15 *INEQUALITY IN EDUCATION* 60 (1973).

†Acting Professor of Law, University of California, Berkeley. Work on this article was partly sponsored by the Childhood and Government Project at the University of California, Berkeley. The Project, a part of the University's Earl Warren Legal Institute, is funded by the Ford Foundation and the Carnegie Corporation of New York. Jessica Pers of the Childhood and Government Project made numerous helpful suggestions which have been incorporated in this article.

to call family choice plans, although generally I shall bow to the more common nomenclature.<sup>1</sup> Simply put, a family choice plan is one which puts into the hands of families the funds which now go to pay for the education of a child attending public school. With those funds, the family may choose the kind of education it believes is best for its child. It thus creates a new form of equal educational opportunity; choice, which is now realistically available to a few, is to be made available to all.

This article is about such family choice plans. It is crucial to understand that reliance on the *parents'* desire for education for their child is not inconsistent with a *child's right* to have his or her parents ensure at least some minimum amount. After all, we do not completely defer to parents on other matters regarding treatment of their children; abuse, abandonment, and neglect with respect to feeding, clothing or medical attention, all invoke the state's social welfare and judicial machinery. The real issue, therefore, is how might the responsibility for the child's education be shared by parents and the state and not whether it ought to be wholly vested in one or the other.

The policy issues which must be resolved in allocating responsibility for the education of children are explored in this article. Who would provide schools under voucher plans (including the question of the participation of religious schools)? What rules would govern enrollment under voucher plans (including concerns about one-race schools)? What varieties of schooling would be permitted under voucher plans? How should voucher plans be evaluated? Should plans be limited to certain kinds of families (or children)? Voucher plans are also compared with other related educational reforms, and in particular, are considered in the more general context of school finance reform. Finally, federal efforts to experiment with voucher plans, such as the demonstration program in the Alum Rock Union School District in Northern California, are discussed in an Appendix.

## I

### PARENTAL AND STUDENT CHOICE

#### A. Choice Today

Although most American children are assigned to their educational experience by local public school authorities, family choice is certainly not unimportant in our present educational system. First, since a family can

<sup>1</sup> See M. FRIEDMAN, *CAPITALISM AND FREEDOM* 85-107 (1962); Areen & Jencks, *Education Vouchers: A Proposal for Diversity and Choice*, 72 *TEACHERS COLLEGE RECORD* 327 (1971); Arons, *Equity, Option, and Vouchers*, 72 *TEACHERS COLLEGE RECORD* 337 (1971); Jencks, *Is the Public School Obsolete?*, *PUBLIC INTEREST* No. 2, at 18 (1966); Levin, *The Failure of the Public Schools and the Free Market Remedy*, 2 *URBAN REV.* 32 (1968); Ross & Zeckhauser, *Education Vouchers*, 80 *YALE L.J.* 451 (1970). See also Berube, *The Trouble With Vouchers*, 3 *COMMUNITY*, Nov. 1970, at 1. There have been many critics of vouchers as well. See, e.g., Ginzberg, *The Economics of the Voucher System*, 72 *TEACHERS COLLEGE RECORD* 373 (1971); La Noue, *The Politics of Education*, 73 *TEACHERS COLLEGE RECORD* 304 (1971); Selden, *Vouchers—Solution or Sops?*, 72 *TEACHERS COLLEGE RECORD* 365 (1971). See also Solet, *Education Vouchers: An Evaluation*, The Washington Research Project, Nov. 1971 (on file with the author).

usually predict a child's public school assignment by where the family lives, changing its residence can change its children's educational experiences. Because many families exercise choice in this manner, today's residence-associated assignment plan is not entirely dissimilar from a voucher plan.

Despite the existence of some family choice and the superficial variety of public schools from place to place, some observers characterize the reality of the public school system as choiceless. One group of realists insists that in important ways all public schools are the same, so moving from place to place accomplishes nothing. Another group insists that because tracking is so widespread, family choice among schools is largely frustrated by the assignment of children within schools based on test scores, IQ, and the like.<sup>2</sup> While there is some truth to both of these assertions, it seems clear that a middle class family with one child about to enter school can have a substantial impact upon the kind of educational experience its child will have by its choice of residence.

On the other hand, moving is usually costly and carries some uncertainties, so it is an inefficient mechanism for promoting choice. For many families—particularly poor ones—the schools they might want to choose for their children are located in communities in which there is no housing available at a price they are willing or able to pay. Since moving requires substantial expenditures, frequent changes of residence are difficult to make. Also, outside changes—a racial balance plan adopted by a district or imposed on it by a court, the building of a new school or the closing of an old one—might upset a family's expectations after it has changed its residence in order to assure a particular school for its children.

Perhaps more importantly, a family will be simultaneously trying to maximize a variety of objectives by its choice of residence. Who the neighbors are, where the parents work, how much housing is available for the dollar, what other public services are provided by the municipality and so on, are factors to be weighed along with the desirability of the area's public schools. Further, a family may include more than one child, and each one may require different educational experiences, a variety that might be impractical to obtain by changing residences.

Families may also affect the educational experiences of their children by having them attend private schools. While this right is constitutionally guaranteed,<sup>3</sup> the state may regulate various aspects of private schools to insure that certain state interests in the education of the young are fulfilled.<sup>4</sup> The United States Supreme Court has never clearly defined either

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<sup>2</sup> For an excellent description and analysis of the prevasiveness of tracking in American public education and the recent legal attacks on student classification practices, see Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classification*, 121 U. PA. L. REV. 705 (1973).

<sup>3</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>4</sup> The Court's dictum in *Pierce* read: "No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." *Id.* at 534. The meaning of even these general phrases is quite ambiguous. While the Court has reaffirmed the continuing validity of the *Pierce* decision in a number of recent opinions, see, e.g., Cleveland

what those state interests are or what kind of regulation would be permitted in furtherance of those interests. Hence practices vary from state to state: some states require private school teachers to be certified and others do not; some permit home instruction by parents as a form of private schooling while others do not.<sup>5</sup> These are important matters to consider, from policy as well as constitutional perspectives, for they will influence the scope of family choice under a voucher plan.

Approximately ten per cent of school age children in America now attend private schools, and about eighty-three per cent of those attend Catholic institutions.<sup>6</sup> Tuition at Catholic elementary schools has been and continues to be rather modest;<sup>7</sup> it is often quite substantial in secondary schools. Although tuition is rising (largely due to increased use of lay teachers) Catholic elementary education cannot be considered beyond the pocketbook of most working class families. Rather, for most parents—particularly non-Catholics—it does not satisfy their taste.

Having eliminated Catholic elementary schools as alternatives, the remaining and miniscule portion of American private education is indeed quite expensive.<sup>8</sup> It is not simply that non-rich families cannot afford private alternatives; in many cases the price effect of having a free public school option available discourages the payment of private tuition in view of the marginal benefit perceived. Hence public subsidy makes unattractive what might otherwise be preferred choice. Of course, for indigent families the choice of private education is effectively nonexistent.

There is, of course, considerable untapped potential for choice within a public school district. A few exceptional systems have permitted individual families to choose among a number of schools within the school district that offer different educational experiences.<sup>9</sup> Internal school choices

*Bd. of Educ. v. LaFleur*, 414 U.S. 632, 640 (1974), it has not readdressed the school regulation issue since the 1920's.

<sup>5</sup> For descriptions of state regulation of private schools, see K. ALEXANDER & K. JORDAN, *LEGAL ASPECTS OF EDUCATIONAL CHOICE: COMPULSORY ATTENDANCE AND STUDENT ASSIGNMENT* 24-30 (1973); Elson, *State Regulation of Nonpublic Schools: The Legal Framework*, in *PUBLIC CONTROLS FOR NONPUBLIC SCHOOLS* 103 (D. Erickson ed. 1969). California requires that home instruction be carried out only by certified teachers, while it does not require that private school teachers be certificated—only that they are capable of teaching. CAL. EDUC. CODE §§ 12154-55 (West 1969).

<sup>6</sup> *PRESIDENT'S COMMISSION ON SCHOOL FINANCE, SCHOOLS, PEOPLE, AND MONEY: THE NEED FOR EDUCATIONAL REFORM* 53 (final report 1972).

<sup>7</sup> In 1970, "average yearly tuition in U.S. Catholic elementary schools was only \$42." In 1971, "it had jumped to \$120." Gary & Cole, *The Politics of Aid—And a Proposal for Reform*, 55 *SATURDAY REV.*, July 22, 1972, at 31, 32. See also *Wolman v. Essex*, 342 F. Supp. 399, 424-25 (S.D. Ohio 1972).

<sup>8</sup> See, e.g., *NEW YORK STATE COMMISSION ON THE QUALITY, COST, AND FINANCING OF ELEMENTARY AND SECONDARY EDUCATION, REPORT ON THE QUALITY, COST, AND FINANCING OF ELEMENTARY AND SECONDARY EDUCATION IN NEW YORK STATE* 395 (1973), which reports that New York tuition costs range from an average of \$391 at Jewish elementary schools to an average of \$1,993 at nonsectarian secondary schools.

<sup>9</sup> For example, in Berkeley, California, families are given a choice of a large number of schools as part of the district's federally funded experimental schools program. See Divoky, *Berkeley's Experimental Schools*, 55 *SATURDAY REV.* (Education), Oct. 1972, at 44. For the past ten years, families in Milwaukee, Wisconsin, have been able to choose any available public school under the district's open enrollment plan. Currently, about seven per cent of the district's children (about 10,000) attend schools other than the school in the attendance zone in which they live. Address by

about curriculum and teachers may also be offered. Yet even where such choice is formally available, it is often an illusion. While student course selection is the norm in high schools it may be that counselors, rather than families, are the real decision-makers. In some cases—particularly at the elementary school level—choice is rarely offered even as a matter of form. Since the great potential for variety and choice even within the existing public system has not been sufficiently realized, a voucher plan need not include private schools in order to present a wide range of options for family choice. Rather, as Mario D. Fantini has advocated, a voucher scheme may be directed toward developing “public schools of choice.”<sup>10</sup>

#### B. The Case for Greater Choice<sup>11</sup>

All voucher plans—whether or not they include private schools—attempt to place school choice in the hands of families without requiring them to move or be wholly dependent upon their own wealth to finance that choice. Hence such plans tend to expand the exercise of opportunities already available, but practically inaccessible. Voucher proponents have assumed that large-scale public support for education will continue. The debate about vouchers, therefore, is a debate about whether it would be more productive, in the long run, to give families greater choice in the expenditure of already committed funds.

Many reasons have been offered to support dividing the present education budget among families. One explanation is that a market-like distribution of educational services is more efficient than the present monopolistic system even in distributing what is essentially traditional American education. This assumes that the education students receive would improve if schools were required to compete for their clientele. Yet, it is unclear whether the market model would in fact be an improvement over the present system. Considerations of information costs and family choice-making ability discussed later in this article temper its theoretical advantages.

Other commentators have supported vouchers as a means for some families to opt out of the broad uniformity of the present public school system in order to create a variety in schooling experiences not now available. The arguments for diversity are as follows. First, diversity is healthy because it allows new ideas and values to enter the system and therefore protects society against mistakes which the state might make by acting as a monolith. Second, some children, in order to flourish, may need atypical experiences. If the state is institutionally unable to deal with exceptional children, perhaps families can better discover and define their needs. Third, the continuity of home values in school, which is more likely to occur if families choose their schools, may be better for the long-run development of the young child than school-home value conflicts, which are more likely to

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James Moody, Assistant Professor of Economics, University of Wisconsin, to the Childhood and Government Project, Apr. 19, 1974.

<sup>10</sup> See Fantini, *Schools of Choice*, 1 CITIZEN ACTION IN EDUCATION 3 (Winter, 1974).

<sup>11</sup> Professor Coons and I currently are analyzing why family choice might be better for children to the extent that their interests may conflict with interests of parents, the family, or society.

occur if the state provides schools. Family choice has also been urged to promote the mental health of both parents and children, particularly those in homes and communities which now feel powerless. In this respect voucher advocates share some ideology with community control proponents, although they have a different view of the community.

Common to these views about vouchers is a willingness to concede that some families will make mistakes and thereby disadvantage their children, together with an assertion, however, that more serious mistakes are made under present arrangements. There are, of course, counterarguments to those advanced in favor of vouchers. Because of the varieties of increased family choice that can be attempted, the various ways in which choice can be conditioned to minimize serious objections, and so on, opposing voucher schemes in the abstract has little meaning. I believe that those who claim to be opponents of vouchers in principle should support experimentation as much as do the proponents. For through experiments we might learn that the state should intervene in the parenting process, not less, but both earlier and more decisively.

### C. Choice Making and Evaluation of Choice Experiments

Consumer protection experts may doubt the utility of formally increasing family choice in education unless families are assisted in the choice-making process. In part this is a question of information and its costs, and many who have proposed voucher experiments stress the importance of providing information to families under any plan. (1) Providers of schools would have to prepare a document, similar to the prospectus required of a company issuing new securities, including information on school style, curriculum, teachers, school performance records, governance structure, and so forth. (2) These reports would have substantial uniformity so that comparisons could be made easily. (3) All families would automatically receive these school reports.<sup>12</sup>

Even with adequate information, what about the quality of the decision that is made? Voucher proponents necessarily assume that families will in fact make good choices—although their notions of “good” may vary. Because of the widely varying conceptions of a “good” choice, evaluation of a voucher experiment will be quite difficult. It is hardly appropriate to ask whether families chose programs that school professionals would have chosen for the children in question, and it is almost as inappropriate to test whether the children learned the things they would have learned had they attended school under the old system. Of course, we might be concerned at least that children learn the basic skills. Perhaps family satisfaction or the child’s happiness with schooling should be the

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<sup>12</sup> Such efforts may be unnecessary. Consider the system through which families of high school age students gain access to college catalogues and other information about colleges: bulletins are available at the high school; they may be obtained easily on request from the college; counseling is provided by the high school itself; and many colleges send around representatives to explain their programs. Perhaps voucher schools would make themselves even more accessible to families than do colleges as they will have a better idea of their market.

criterion by which a voucher plan is judged.

The problem of evaluation, in large part, stems from our uncertain expectations of the education system. This is one of the reasons given in support of family choice in the first place: when the meaning of "good" is unclear, the system cannot be expected to achieve the "good," and hence, the decision-making should rest upon the party most likely to make the right decision or to avoid the wrong one.<sup>13</sup> Still, some characteristics of schools today are widely criticized. The use of vouchers may prompt new kinds of school experiences, teaching personnel, and teaching methods. This is not to say that anything new is always good, but a program which opens up the educational system to change is probably healthy, even if some individual changes are unsuccessful. Overall, a choice system will have to be evaluated by asking how the market for education has worked.<sup>14</sup>

There are additional questions concerning the extent to which the state ought to shape a family's choice. It might want to intervene formally on behalf of high school-age children, for example, by allowing them to veto selections made by their parents.

It must be expected that some families will not secure their choice, at least not their first choice. This is bound to happen to some families under any admission system unless all schools agree to take everyone who applies. Even then, although the formality of first choice for everyone will be preserved, if a formerly small school has a sudden increase in applicants, and must accept them all, the increased enrollment may sufficiently alter the character of the institution so that families are not really receiving what they chose. Indeed, a reason for allowing schools to set enrollment limits is to preserve expectations of families.

If a family fails to gain access to its first choice, it may have by then foregone the opportunity to secure its second choice unless either a centralized admissions process is used or multiple applications are possible. Even then a family's second choice may be much less desirable, and dissatisfaction would probably increase as the child is forced to a third or fourth choice. Allowing families to put themselves on a limited number of priority transfer lists might help alleviate some of this unhappiness. Ideally, the market would be expected to respond and replicate examples of high-demand programs. Realistically, however, it may be difficult to duplicate the factors which contribute to a school's reputation.

Finally, some families might not have a first choice because of their distaste for the other students who wind up at any school they consider. One answer is that they can forego the voucher and send their children to

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<sup>13</sup> Professor Robert H. Mnookin has made a similar argument with respect to involuntarily removing children from their homes and putting them in foster care. Judges are not very good at making ad hoc determinations of the "best interests" of the child and should therefore, in general, leave the child with his family if he can be protected there; in the main, families can be expected to do as well as the state in raising children. State intervention into the family should rely primarily on providing services to assist family stability. See Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. EDUC. REV. 599 (1973).

<sup>14</sup> See RAND CORPORATION, TECHNICAL ANALYSIS PLAN, EVALUATION OF THE OEO ELEMENTARY EDUCATION VOUCHER DEMONSTRATION: TECHNICAL DISSERTATION (1972).

private schools which do not participate in the voucher plan. These may include prestigious private preparatory schools that elect not to come into the voucher plan because of restrictions that would be placed upon them. Could the state preempt the field and require that every child attend a voucher school in order to comply with compulsory attendance laws? Such an attempt may conflict with the policy favoring pluralism which underlies the Supreme Court's decision in *Pierce v. Society of Sisters*.<sup>15</sup> On the other hand, much of *Pierce's* objection to required public school attendance is undercut by the creation of a voucher plan, particularly if attendance at religious schools qualifies. As a practical matter, preemption is not seriously advocated by voucher proponents.

## II

### SCHOOL PROVIDERS

#### A. In General

To call plans designed to increase family choice in education "voucher plans" is to use a metaphor which is both instructive and insufficient. It is easy to comprehend a ticket to be cashed in for schooling; but what will the cashing-in places be? Had Milton Friedman, who seems most responsible for our use of the term,<sup>16</sup> been writing in another year, he might have called the idea "school stamps" to parallel the food stamp program. But again, just as food stamps are only valid in certain stores for certain kinds of items, school stamp redemption implies certain limitations.

Under Friedman's voucher plan, the public sector will withdraw from the business of providing education (presumably selling off school facilities to private enterprises) so that families eventually would find themselves with subsidized choices among private schools.<sup>17</sup> At the opposite pole, vouchers might be valid only at publicly owned and operated schools. The proposal prepared for OEO by the Center for the Study of Public Policy<sup>18</sup> assumes a mixed system, but even in the case of a mixed system questions arise. Is the choice to be among (1) the student's neighborhood public school and private schools, (2) any public school in the district and private schools, or (3) any public school in the state and private schools?

This third possibility, designed to permit families to cross school district lines, creates an option rarely discussed in the literature. If families in Chicago, unhappy about where their children now attend school were asked where they would want their children to go to high school, many would probably name New Trier Public High School in suburban Winnetka rather than any private school. If families were able to act on these desires

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<sup>15</sup> 268 U.S. at 510. See also *Norwood v. Harrison*, 413 U.S. 455 (1973), in which, although the Supreme Court struck down Mississippi's program of textbook aid to the extent that it went to children attending racially discriminatory schools, it acknowledged the interests of pluralism which were fostered by permitting such schools to exist.

<sup>16</sup> See M. FRIEDMAN, *supra* note 1.

<sup>17</sup> *Id.* at 97-98.

<sup>18</sup> CENTER FOR THE STUDY OF PUBLIC POLICY, *EDUCATION VOUCHERS* (1970).



and cross district lines, this might mean the end of local school districts, with power now exercised by the district reallocated between the individual school and the state.

Although I have no doubt that public schools of choice could be an exciting experiment, a successful public sector choice plan would require two kinds of responses which are quite uncharacteristic of the existing public education system. First, there must be mechanisms through which new kinds of educational experiences will be introduced when there is demand for them. Second, undesired programs must be discontinued when there is no longer a consumer demand for them. Because these two problems might severely limit a public-school-only choice plan, experimentation should include private schools as providers in order to learn about the type of schooling demanded that the public sector does not easily supply, and whether the private sector is any better than the public sector at adding and dropping programs and personnel based on consumer requests.

### B. Religious Schools

#### 1. *Introduction*: Committee for Public Education & Religious Liberty v. Nyquist<sup>19</sup>

In order to determine whether a voucher plan which does not prohibit the use of vouchers at religious schools violates the first amendment's establishment clause, it is necessary to apply the following three-part test: the law "must reflect a clearly secular legislative purpose, . . . must have a primary effect that neither advances nor inhibits religion, . . . [and] must avoid excessive government entanglement with religion."<sup>20</sup> The United States Supreme Court in *Nyquist* invalidated New York's combination tax credit-reimbursement plan which provided up to \$100 per child for families whose children attended private schools, including religious schools. Although labeled otherwise, the New York plan was certainly a kind of voucher scheme. There are, however, important differences between the New York plan and the typical voucher plan under discussion here. Whether these differences are of constitutional significance are explored in this section.

Clearly, a voucher plan would pass the "secular legislative purpose" test, since the plan struck down in *Nyquist* also passes that test. Indeed, as the Court has applied the test, apparently no plan would be rejected unless the funds were specifically directed to be used for religious instructions. General aid to education will probably always be judged as a sufficient secular purpose. Even if legislative leaders publicly announce that they are introducing a bill to assist parochial schools, that it has been drafted in a way which attempts to get around the previous Supreme Court cases prohibiting such aid, and all debate on the bill centers on the propriety of state assistance to parochial schools, the Court will ignore these matters, so long as the law on its face expresses concern for pluralism,

<sup>19</sup> 413 U.S. 756 (1973).

<sup>20</sup> *Id.* at 773.

diversity, family choice (particularly for the poor), and the public fisc (bribing families to stay out of public schools). This may be explained in two ways. First is the conventional objection to "motive" analysis:<sup>21</sup> if the Court seizes upon these indicia of "motive," then the next time (or perhaps in the next state) all of the public statements would be circumspect, at least where a clear legislative consensus for such aid exists. Second, purposes other than the legislature's professed secular purpose have a way of creeping back into the Court's analysis under the other two tests; that is, more careful scrutiny of purpose under the first part of the test becomes superfluous as a result of what the Court chooses to characterize as effects and entanglements.

Hence, while effects and entanglement will be important to the constitutionality of a voucher plan that includes religious schools, ultimately, only if its purpose can be seen to differ from the New York plan will it have a chance at constitutional viability. Thus, the purposes of the two plans must be more carefully compared.

The New York plan might have honestly served the interests of pluralism, diversity, and family choice, as well as preserved public funds (or alternatively, have helped public school children whose quality of education might decline if private school students flooded the public schools and the state provided no additional funds). Yet the manner in which these nonreligious purposes were to be served was exclusively through the maintenance of the attendance patterns of the existing dual school system. The exclusivity of this objective may be phrased in different ways. First, families already using private schools would be able to keep their children enrolled rather than having to withdraw them for financial reasons and put them in public schools. Alternatively, economic objectives can be put forth in support of the New York plan which assume that it would have no influence on present school choice patterns: (1) giving these funds to families allows them to pass them on to religious schools in the form of higher tuition rates; (2) the funds will not be passed on but are provided so as to equitably treat parents who pay taxes for public schools they do not use because they use existing private schools instead.

In theory, one would expect there to be families at the margin for whom even this small subsidy would be sufficient to stimulate changes in school choice, but there was no pretense that the program was targeted at such families. Indeed, not only did no one seriously argue that by providing \$50 or \$100 per child families would begin to leave public schools in order to attend private ones, but this response is also contrary to the professed "secular purpose" language of the law itself. Children presently attending public schools were not to leave, but rather were to be spared the impact of large-scale transfers which would result if private schools were forced to close.<sup>22</sup> Hence, it was well understood that the characteristics of the present private school system were meant to be preserved. Finally, and

<sup>21</sup> See, e.g., *Palmer v. Thompson*, 403 U.S. 217, 224-26 (1971).

<sup>22</sup> *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. at 765.

this is the key point, it was clear to everyone that the present private school system was comprised almost entirely of religious schools.

By contrast, the voucher plans under discussion here are supported in substantial respect by those who advocate diversity in education in general, and who do not base their case on the importance of education provided by religious organizations. More importantly, the voucher proposal is put forward with the explicit intent of changing the present schooling structure. It is designed both to allow and to induce families to *change* the educational experience now provided to their children. Indeed, it is self-consciously directed more toward those who currently attend public schools than toward those now enrolled in private schools. Thus the "secular purposes" of the two plans, the New York and the voucher plans, are not the same. To be sure, a voucher plan need not include those who in fact receive their schooling from religious organizations. Yet the inclusion of religious schools as valid places to cash the voucher is fully consistent with the overall objective of allowing families to decide where the child is to be educated, so long as he is educated.

In order to have a context in which to evaluate the "primary effect" and "entanglement" tests, one should consider this scenario:

At present in the voucher area the public schools enroll ninety per cent of the students; eight per cent are enrolled in Catholic schools, one per cent in secular private schools. After the voucher plan is put into effect, the public schools enroll seventy per cent of the students, fifty per cent attending their neighborhood school and twenty per cent attending other public schools of choice. The remaining thirty per cent attend private schools; fifteen per cent are now enrolled in religious schools, twelve per cent Catholic and three per cent other. Of the eight per cent formerly enrolled in Catholic schools, some have actually switched schools although some of them now attend other Catholic schools. Under the voucher plan rules (1) children present their vouchers to their schools and the schools redeem them at a state agency; and (2) there are a variety of regulations imposed on participating schools which relate to enrollment, tuition charges, curriculum, and other matters of the sort addressed elsewhere in this article. In short, as a result of the introduction of the family choice plan, it appears that more than one-third of the students attend schools other than those which they would have attended had the plan not been put into effect.

## 2. The "Primary Effect" Test

In *Nyquist*, New York's tuition reimbursement and tax credit provisions were held to fail the "primary effect" test. If the "primary effect" of the voucher plan described in my scenario is to be distinguished from that in *Nyquist*, it must grow out of a conclusion that the beneficiaries of the plan only incidentally include clients of religious schools and hence religion is only incidentally aided. It may be argued that the "primary effect" of the voucher plan is educational change or innovation in education, or that the "primary effect" is to enable families with a variety of tastes in education to satisfy those tastes. But these phrasings seem to be merely other labels which come down to the same initial proposition: unlike the situation in *Nyquist*, those who patronize the religious schools are not the main beneficiaries. Does this matter?

Chief Justice Burger in his opinion in *Nyquist* argued both that tallying up the beneficiaries should not count in the application of the "primary effect" test and that the majority opinion could only be distinguished from the earlier *Walz* decision<sup>22a</sup> on such a basis. Hence, he dissented.

The majority in *Nyquist* was deliberately, but unsuccessfully, ambiguous on the issue of beneficiaries. Mr. Justice Powell's opinion pointedly and repeatedly observed that a high proportion of those who would benefit from the tuition reimbursement and tax credit rules would be users of religious schools.<sup>23</sup> In a companion case, *Sloan v. Lemon*,<sup>24</sup> in which the Court struck down Pennsylvania's tuition reimbursement plan, the majority opinion states outright that "[t]he State has singled out a class of its citizens for a special economic benefit."<sup>25</sup> At the same time, the majority in *Nyquist* was careful to say that, although who the beneficiaries were "might have controlling significance,"<sup>26</sup> it was not voiding the plans solely for that reason. Rather, it argued, the tuition reimbursement plans were deficient on the two-step reasoning that (1) tuition reimbursement of families using private schools is no different from direct payment of the tuition to the schools themselves, and (2) there is no assurance that the tuition would be used for solely secular purposes as had been true in the earlier textbook,<sup>27</sup> transportation,<sup>28</sup> and construction assistance<sup>29</sup> cases. The tax credit provision was then, in turn, held to be indistinguishable in its effect from the tuition reimbursement provisions and hence also unconstitutional.

The "assurance of secular use" requirement had been invoked earlier in the *Nyquist* opinion to strike down that part of the New York program which provided funds to nonpublic schools for "maintenance and repair." In *Levitt v. Committee for Public Education & Religious Liberty*,<sup>30</sup> New York's plan for reimbursing nonpublic schools for expenses incurred in providing testing and related services was also voided because it failed to assure that the funds provided would be used for purely secular purposes.<sup>31</sup> The defendants in *Nyquist* had argued that both the maintenance and repair moneys and the tuition reimbursement and tax credit funds were small enough in amount in comparison with what the schools spent so as to provide a statistical guarantee that the funds would serve secular purposes. The legislature clearly had opted for this statistical guarantee approach after the Supreme Court, in an earlier case,<sup>32</sup> had struck down,

<sup>22a</sup> *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). In *Walz* the Court upheld New York's exemption of religious property from the property tax; the exemption was part of a scheme which exempted charitable, educational, and religious property. The majority reaffirmed its decision in *Walz* during the course of the *Nyquist* opinion; its efforts to distinguish *Walz* are discussed at p. 529 *infra*.

<sup>23</sup> 413 U.S. at 768, 774, 783 & 794.

<sup>24</sup> 413 U.S. 825 (1973).

<sup>25</sup> *Id.* at 832. That the beneficiaries of the Pennsylvania plan were seen almost entirely to be users of religious schools is made clear by the Court, *id.* at 830.

<sup>26</sup> 413 U.S. at 794.

<sup>27</sup> *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

<sup>28</sup> *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

<sup>29</sup> *Tilton v. Richardson*, 403 U.S. 672 (1971).

<sup>30</sup> 413 U.S. 472 (1973).

<sup>31</sup> *Id.* at 482.

<sup>32</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

as violating the "entanglement" test, administrative rules which were designed to insure that money would not be used for religious purposes. Thus the New York plan challenged in *Nyquist* seems to be one more effort to induce the Court to accept a theory that aid does not violate the establishment clause "so long as such aid does not exceed the value of the secular educational service rendered by the school."<sup>33</sup> The Court in *Nyquist*, however, rejected the statistical guarantee argument and hence the secular value-for-money theory, restricting aid to items which, if they are to be analysed in this fashion, are either inherently secular, such as bus rides or books, or can be assured of having a secular use without offensive entanglement, as in the case of buildings. It is clear that tax credits, tuition reimbursement, and vouchers fall outside the "inherently secular" category.

I have difficulty accepting the secular use requirement, however, as it was applied in *Nyquist*, independent of a prior conclusion about the plan's beneficiaries. The bus ride and textbook cases may be distinguished from the tuition reimbursement and tax credit cases on one of two bases: either (1) when the beneficiaries are essentially limited to religious schools and their users, then the strict test as to secular use applies—thereby upholding the bus rides and textbook programs but invalidating the tuition reimbursement and tax credit (and maintenance and repair and testing services) programs; or (2) since in the bus ride and textbook cases the beneficiaries of the programs are properly seen as all students, and not just users of religious schools, the inherently secular nature of the aid is superfluous to distinguish these programs from the others.<sup>34</sup> Either explanation may provide support for the above voucher plan scenario.<sup>35</sup>

It might be argued in response that both requirements—secular use and unrestricted beneficiaries—must be satisfied; this notion finds support in the construction financing cases where the Court emphasized that the governmental aid program which was upheld not only was made available to both public and private institutions, but also there were assurances contained in the programs that the funds would not go to support the construction of buildings which would be used for religious purposes.<sup>36</sup> Indeed, in *Tilton v. Richardson* the Supreme Court invalidated a provision of the Higher Education Facilities Act of 1963, which after twenty years would have turned federally financed buildings over to religious schools, on the ground that the buildings might then be used for religious purposes.<sup>37</sup>

Yet notwithstanding these construction cases, it simply is not true that state aid which results in the assistance of religious institutions must have an inherently secular nature in order to withstand attack under the "primary effect" test. Clearly, welfare recipients may donate to religious organizations the money they receive from the state, and the Court has given no indication

<sup>33</sup> Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 266 (1968).

<sup>34</sup> The Court now seems to see the textbook and bus ride cases as ones in which all children were the beneficiaries. See 413 U.S. at 781-82.

<sup>35</sup> See note 28 *supra* and accompanying text.

<sup>36</sup> *Hunt v. McNair*, 413 U.S. 734, 736-37 (1973); *Tilton v. Richardson*, 403 U.S. 672, 679-80 (1971).

<sup>37</sup> 403 U.S. at 683-84.

that it looks unfavorably on federal or state income tax "charitable" deductions for gifts to religious organizations. And, of course, there is the precedent of *Walz*. Proponents of voucher plans which include religious schools obviously will continue to point to these examples even after *Nyquist*.

One might be tempted to argue that, since the aid in the bus ride and textbook examples goes first to families, the support of religion is indirect rather than direct, which is clearly how the New York legislature had hoped the Court might view its tuition reimbursement/tax credit plan. Vouchers, too, are given to families. But surely the Court is right in concluding that a statute is not immune from constitutional attack simply because the family, rather than the religious school, deals with the state. One must be careful not to embrace a "child benefit" (or even "citizen benefit") theory which puts form over substance. On the other hand, the line must be drawn somewhere. Chief Justice Burger gives an example in his dissent of the state agreeing to pay a person \$10 if he attends religious services weekly—this, all would agree, would violate the establishment clause.<sup>37a</sup> Another example is a tuition reimbursement plan which is formally restricted to the users of religious schools. Observe that the line of unconstitutionality, when the benefit is given to the family, might have been drawn, as Chief Justice Burger seems to prefer, at the place where payments are made based on acts which, on the face of the statute, are limited to matters relating to religion. That is, so long as the *eligible* class is not restricted to religious school users, the aid to religion which results is merely incidental.

But the majority did not draw the line there. Observe further that it might also have drawn the line at cases in which the beneficiary is given unrestricted cash, so as to protect the freedom of the welfare recipient. In turn, tax deductions for charitable contributions to religious groups would seem to be justified only if they yielded at least their value in secular services from the donee religious group. But, as the Court seems disinclined to accept the secular value-for-money theory, for it to draw the line at cash would seemingly be to disavow both the hypothetical charitable deduction case and *Walz*, and this it plainly did not do.

Rather, because the beneficiaries of the New York plan were in very large respect the same persons who would have been beneficiaries had the statute on its face been restricted to religious school users, the program was seen by the Court as having the same primary effect as would a religiously restricted program. This necessarily puts the Court in the position of making the "primary effect" test a matter of numbers. In short, it drew the line not at who *might* be in the class of beneficiaries, but who *was* in the class.

This analysis perhaps leaves the construction assistance cases hanging as examples of judicial overkill, although they were *not* indirect aid cases. Moreover, it may not be stretching things too much to insist that there is something more offensive to the establishment clause about having a building about which it may be said "this chapel was built (and paid for) under a contract with (under a grant from) the state," than it is to be able to say

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<sup>37a</sup> 413 U.S. at 801.

that "the operation of this religious school is made possible through the tax deductibility of gifts to us, or, for that matter, from scholarships provided by the government to our students."<sup>38</sup>

Perhaps we are left, after *Nyquist*, with a sliding scale which depends upon both the nature and specificity of the program itself and the identity of the beneficiaries. Hence, if the government builds structures for voluntary membership associations, it may not build halls of worship for church groups simply because it builds most of its buildings for non-church groups. This is so because the item which the government provides itself is religious. On the other hand, the state would be able to build a hospital for a church group as part of a general program of building hospitals, even though this means that the church could now afford to build a chapel, and even though undeniably religious activities occur in the hospital along with health care. Since hospitals do in the main serve secular functions, and since the program in fact includes a substantial number of beneficiaries which are not religion-associated, further judicial scrutiny into whether the state is in fact getting full secular value for money may not be needed to protect the concerns underlying the establishment clause.

The purpose of the "primary effect" test is to help the Court discover whether the statute operates in a manner which is "neutral" toward religion. Neutrality is that delicately balanced safe ground between the impermissible assistance condemned by the establishment clause and the equally impermissible governmental hostility condemned by the free exercise clause. From this perspective, it is appropriate that the Court inquire whether the primary beneficiaries are religious institutions and their users, and if not, whether, in the main, the nature of the aid is secular. At least by concerning itself with either (1) whether the point of the program is distinctly religious at the beneficiary level or (2) whether the aid is religious in its very nature, it will protect taxpayers generally against plans which single out religion for benefit, at the same time not disadvantaging those who prefer to obtain secular services packaged together with religion. Whether such an inequity is judicially administrable is yet another matter.

If, after *Nyquist*, the "primary effect" test is to be applied, in part, by looking to the beneficiaries of a statute, it is crucial to decide what is the relevant statute. An important point to note here is that by having free public schools in the first place, the state already is non-neutral in certain respects. Not only do all families have to pay taxes for public schools, thereby reducing the funds they have available for private religious schools, but also the price effect of free public schools serves as a disincentive to attend private religious schools. Hence, in *Nyquist* the Court might have chosen to evaluate the entire state scheme for the financing of public and private schools. From this viewpoint the "primary effect" of that scheme might have been seen to be some kind of rough equity between users of

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<sup>38</sup> Or perhaps in *Tilton* the Court was carried away by Congress' own endeavor to separate out funding of religious buildings.

the different kinds of schools.<sup>39</sup> In fact, the Court chose to look only at the specific new statute relating to users of private schools. By contrast, in *Walz*, which was concerned with the tax exempt status accorded property used exclusively for religious, educational, or charitable purposes, the Court pointed to the entire provision relating to property tax exemptions, not just to the part relating to religious organizations.<sup>40</sup> Surely, this ought not to be a matter of the drafting style of the legislature—that is, whether there is a discrete statute. Viewing the voucher plan scenario under this approach to the “primary effect” test, the argument would be that, while the plan does assist religious schools since the beneficiaries are only in part religious school users, and since schooling is in the main secular, the assistance to religious schools, as in *Walz*, is only incidental.

In the scenario, more than forty per cent of the school population attends newly chosen schools. Of the fifty per cent attending other than neighborhood public schools, thirty-five per cent attend nonreligious schools. Where private schools are selected, half the students attend schools which are nonreligious. An approach which counts beneficiaries, however, immediately exposes additional issues. Who would be counted in deciding whether the beneficiaries are primarily religious school users and how many would make a plan “primarily” religious in nature? I suggest that the Court is likely to count all those who in fact select other than neighborhood public schools but not all families in the system, even though all are entitled to choose something else. The majority in *Nyquist* looks to the marginal change brought about by the passage of the New York law and argues that the tuition reimbursement/tax credit plan does not give “comparable benefits to all parents of schoolchildren whether enrolled in public or non-public schools. . . . The grants to parents of private schoolchildren are given in addition to the right that they have to send their children to public schools ‘totally at state expense.’ ”<sup>41</sup> Further, only if very few—perhaps less than twenty-five per cent—made nonreligious choices, is the plan likely to be said to be one which primarily aids religious schools? That is, a “majority” test should not apply. What would be crucial to the Court, under my interpretation, is what the political perceptions of the plan are. In other words, *Nyquist* seems to have blurred the “primary effect” test with what now appears to be one portion of the “entanglement” test—political entanglement of church and state.

<sup>39</sup> This idea is urged in their dissents by both Chief Justice Burger, 413 U.S. at 803, and Justice Rehnquist, *id.* at 812.

<sup>40</sup> The Court, noting that a conflict arises when the free exercise clause and the establishment clause of the first amendment are extended to their logical limits, declared that the constitutional course is one of “benevolent neutrality.” Furthermore, a tax exemption is not a sponsorship since the government does not transfer revenue to churches, “but simply abstains from demanding that the church support the state.” The Court indicated that involvement of state with church is far greater when a tax is levied than not, and an exemption tends to reinforce the desired separation of church and state. The Court noted that tax exemptions accorded libraries, art galleries, or hospitals do not make them an arm of the state, and police and fire protection must inevitably be furnished to houses of worship as to all persons and institutions within the state including other tax exempt organizations. The New York tax exemption did not therefore violate the Constitution. *Walz v. Tax Comm’n*, 397 U.S. 664, 669, 675 & 676 (1970).

<sup>41</sup> 413 U.S. at 782 n.38.



### 3. The "Entanglement" Test

While not basing its holding on "entanglement," the Court in *Nyquist* discussed the test and intimated that the New York plan failed on this point as well.<sup>42</sup> The concern over political entanglement seems to be that the New York tuition reimbursement/tax credit law was widely seen as a church-state issue, and that if the law were upheld, there would be further demands for funds for religious schools, which both had and would continue to produce political strife with respect to religion—both among religious groups and between those who favor and those who oppose state assistance (even indirectly) to religion.<sup>43</sup>

Comparing the voucher plan scenario in political entanglement terms with the New York plan, arguably substantial differences exist; (1) the voucher plan was presented as an issue of family choice in education and not as parochial school aid; (2) it was adopted by the legislature as an experiment in increasing the family role in schooling; and (3) as more than one-third of the children attend non-neighborhood schools which are not religious schools, the plan is not likely to cause religious strife. It is in this sense that the Court's attempt to distinguish *Walz* in the *Nyquist* opinion may be important. While acknowledging that the long history of exempting religious organizations from the property tax was insufficient to bar present-day constitutional inquiry, the Court plainly felt the long tradition was important. As religious groups generally are seen to do charitable work it would not be surprising that their inclusion in the list was, neither at the outset nor through the years, a political issue. A proposal to abolish federal income tax deductions for gifts to all charitable groups except religious organizations, however, might not fare so well.

Even if the voucher plan survives the political aspect of the entanglement test, it might run into problems under the other portion of the test—the administrative aspect. This was not an issue in *Nyquist*, as the plan did not appear to increase state administrative involvement with non-public schools.<sup>44</sup> The concern of the Court under this branch of the entanglement test is whether the state will be interfering too much with the operation of religious organizations. Here *Walz* stands out in sharp contrast to *Lemon v. Kurtzman*.<sup>45</sup> The *Walz* Court concluded that a property tax exemption actually fosters a decrease in administrative entanglements since the state would not be involved in appraising church property, in selling church property at foreclosure if it became necessary, and so forth. On the other hand, in *Lemon*, where the state sought to purchase secular services from religious schools, the statute failed the administrative entanglement test.<sup>46</sup>

<sup>42</sup> *Id.* at 794-98.

<sup>43</sup> *Id.* at 796-97.

<sup>44</sup> There might have been some state review of the bona fides of school tuition receipts which formed the basis for the reimbursement and tax credit benefits.

<sup>45</sup> 403 U.S. 602 (1971).

<sup>46</sup> The Court was also concerned about political entanglement, intimating that Pennsylvania's and Rhode Island's purchase of services plans failed both parts of the test.

Most voucher plans contain controls on participating schools which would require administrative supervision. Also, it is contemplated that the school, not the family, will cash the voucher, thus creating additional administrative involvement. However, the important concern about administrative entanglement should be whether the state interferes with distinctively religious matters. For example in *Lemon* the Court was concerned that public administrators would go into the private schools to determine whether teachers, whose salaries were partially paid for by the state, were teaching religion in their classes or allowing religious ideas to permeate the curriculum. In other words, since the administrative entanglement in *Lemon* was to be for the purpose of assuring secular use of the state money, close surveillance of the religious activities of the school was implied. This constituted a risk of excess governmental direction of churches.

The administrative entanglement that arises under a voucher plan arguably is for different purposes. No attempt to discover the extent to which religion is taught at the school is involved; rather, supervision will be for the same general child protection purposes that the state pursues today in its regulation of private schools. Even the state's tie to the school through the voucher cash-in procedure is an administrative convenience which is designed to assure that the family uses the state money for education and does not intrude into the school's religious affairs.

#### 4. *Alternative Outcomes*

Having now argued the case for the voucher plan under the "primary effect" and "entanglement" tests, it should be noted that some serious concerns do cut the other way, particularly if the reality differs from the proposed scenario. There are three possibilities that may well jeopardize the plan's acceptability under the "primary effect" and "political entanglement" tests: (1) only a few families change from the schools that they are attending prior to the institution of the voucher plan and most of those who change elect religious schools; (2) religious groups provide a large part of the political pressure for enactment of the voucher bill; and (3) during the legislative process the bill is most frequently discussed as a parochial school aid plan, notwithstanding the wishes and objections of other proponents of the bill. These possibilities also underscore the delicacy with which the Court will have to resolve a case falling between *Walz* and *Nyquist*.

In the end, if under a voucher plan the existing religious schools are the only schools outside of neighborhood public schools that are selected by families in any significant numbers, many voucher proponents will view the plan as a failure and will not resist its demise. On the other hand, if a great deal of choice is exercised, voucher proponents would argue against excluding religious schools from the voucher plan. Apart from their religious training, these schools are likely to be an important source of diversity in schooling.

## 5. *Additional Issues Regarding Religion*

### a. Access and Ritual

Normally, when an employer discriminates against a prospective employee on the basis of religion, we are properly offended because religion has nothing to do with the job. But it is far less offensive for a religious school to take as students only members of its faith, since one purpose of the school is religious training. On the other hand, we may wish to require all schools to maintain an open access policy, and indeed many students who are not believers may nonetheless wish to attend the school because of other attributes. In order to have an open access policy, some voucher planners may think it also necessary to insist that participation in religious ritual be optional.

The Court's approach to administrative entanglement in *Lemon* casts serious doubt on the viability of such rules. Yet it is not clear that the entanglement caused through the enforcement of these rules need constitute a violation of the establishment clause: the rules are designed to protect the associational and freedom of expression rights of individual students; they are not likely to involve substantial state supervision of the ongoing program, and religious schools unwilling to abide by such rules could remain outside the plan.

It might be argued that private voucher schools are subject to constitutional standards because (1) the involvement of the state, (2) state funding, and (3) the function that private voucher schools perform bring their conduct within the "state action" doctrine. For the government to discriminate on the basis of religion or to require religious ritual would be impermissible. It should be noted, however, that the offsetting constitutional norm favoring the free exercise of religion may put religious matters on a different footing from issues involving race or teacher and student rights.<sup>47</sup>

### b. Teacher Selection

If the religion of a teacher is relevant to the job, then it seems appropriate to permit such discrimination. Yet, for many positions at private religious schools, it is not clear that religious membership would be a proper occupational qualification. Even so, whether the state should interfere with the private discretion of the school is a delicate question. Such intrusion would limit the religious school's freedom, raise some administrative entanglement questions, and possibly run counter to the preferences of the school users. On the other hand, it would protect the rights of citizens to jobs supported through government funds.<sup>48</sup>

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<sup>47</sup> See Choper, *supra* note 33, at 322 n.436.

<sup>48</sup> It is noteworthy that Title VII of the Civil Rights Act of 1964 resolved this issue by fully exempting religious educational institutions from its coverage to the extent that they discriminate against their employees on the basis of religion. 42 U.S.C. § 200e-1 (1970). I have been assuming that these regulations of private schools with respect to students (and teachers) are optional matters for the legislature or school district adopting a voucher plan. Even if the Constitution applies to this area, it is still unclear what it would prohibit because of free exercise considerations.

### c. Exclusion of Religious Schools

Would exclusion of religious schools from participation in the voucher plan raise serious constitutional questions? Plaintiffs have already lost on theories that (1) state aid to parents wishing to exercise their *Pierce* rights at religious schools is constitutionally compelled by the free exercise or equal protection clauses,<sup>49</sup> (2) state aid which goes to users of private nonreligious schools denies equal protection to users of private religious schools,<sup>50</sup> and (3) state aid which benefits poor people is a valid device for enabling them to exercise freely their religious beliefs.<sup>51</sup> However, these decisions were based on the assumption that the free exercise and equal protection clauses may not require what the establishment clause forbids.

Suppose, however, the establishment clause does not forbid including religious schools in the voucher plan. Is it now not an unconstitutional act of hostility toward religion to exclude them? A variety of motives might lie behind the exclusion. Favoring exclusion would be persons who oppose full-time religious schools, those who see inclusion as constitutionally unacceptable, and those who seek simply to avoid the constitutional quagmire. For the legislature to act on the pressures of the first group is hardly a display of the neutrality which the Constitution demands. While it may be argued that there is sufficient nonhostile reason (for example, the quagmire fear) to protect the exclusion from attack, or that reasonable concern about the Constitution's coverage can justify limiting the plan to nonsectarian schools, these reasons and concerns go to matters which perhaps may be best resolved by the Court, particularly because of the fear that anti-religious school feelings may account for the exclusion and the effect that the exclusion has on exercise of religion. In short, the Constitution may allow the legislature no leeway on this question.

### d. Definition of Religious Schools

One additional complication is that if religious schools are excluded, either by statute or by the establishment clause, some religious schools might seek to transform themselves into qualifying institutions. This then requires constitutional or statutory definitions of what a religious school is. While the Court easily identified prayers,<sup>52</sup> Bible reading,<sup>53</sup> and even a ban on the teaching of evolution<sup>54</sup> as sufficiently religious to prohibit their inclusion in public schools, it may be more difficult to decide whether aiding a particular private school is aiding religion. Experience with conscientious objectors seeking an exemption from the draft on account of religious beliefs<sup>55</sup> and with institutions seeking tax exempt status as re-

<sup>49</sup> *Jackson v. California*, 460 F.2d 282 (9th Cir. 1972); *Brusca v. State Bd. of Educ.*, 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd mem.*, 405 U.S. 1050 (1972).

<sup>50</sup> *Sloan v. Lemon*, 413 U.S. at 833-35.

<sup>51</sup> *Nyquist*, 413 U.S. at 788-89.

<sup>52</sup> *Engel v. Vitale*, 370 U.S. 421 (1962).

<sup>53</sup> *School Dist. v. Schempp*, 374 U.S. 203 (1963).

<sup>54</sup> *Epperson v. Arkansas*, 393 U.S. 97 (1968).

<sup>55</sup> *See, e.g., United States v. Seeger*, 380 U.S. 163 (1965).

ligious organizations<sup>56</sup> may be of limited use as the private party in these cases is seeking to be characterized as religious.

The Supreme Court in *Nyquist* sets out with little comment the findings of the lower court as to the characteristics of schools to which parents could send their children and obtain tax benefits or tuition reimbursement.<sup>57</sup> Institutions could

(a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e)...[be] an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach.<sup>58</sup>

While a school with all these characteristics would certainly be a religious school, is any of these characteristics, standing alone, sufficient to qualify the school as a religious school? The Court uses the phrase "church-affiliated" at several points; if this is crucial what might it mean? Suppose, for example, a Catholic elementary school, now located on church grounds, is sold to a nonprofit corporation, none of the directors of which are clerics. Assume further that all the teachers are lay persons, that no religious exercise is carried on in the school, that the school certifies that it is not controlled by any church, and that it does not discriminate in its admissions or hiring on the basis of religion. Assume finally that it does have a released-time program of the type approved by the Court in *Zorach v. Clauson*,<sup>59</sup> in which Catholic pupils receive religious instruction in the church next door. If ninety per cent of the students are Catholic and nearly all of them participate in the released-time program, a very difficult problem arises as to whether it is a religious school.<sup>60</sup>

Finally, with regard to religious schools, state constitutions may prohibit state aid in language which on its face appears to go further than does the Federal Constitution's first amendment.<sup>61</sup> However, in view of what has been said earlier about the free exercise clause, the Federal Constitution may prevent the state "establishment clause" from reading more broadly than does the first amendment's.<sup>62</sup>

<sup>56</sup> See, e.g., INT. REV. CODE OF 1954, § 501(c)(3), as amended. This section exempts institutions which are organized and operated for religious purposes from taxation on related income.

<sup>57</sup> 413 U.S. at 767-68.

<sup>58</sup> *Id.*

<sup>59</sup> 343 U.S. 306 (1952).

<sup>60</sup> For more examples of where this issue has arisen in somewhat analogous settings, see W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL RIGHTS AND LIBERTIES 799-805 (3d ed. 1970).

<sup>61</sup> See, e.g., N.Y. CONST. art. 11, § 3 (the so-called "Blaine Amendment"), which prohibits "indirect" aid.

<sup>62</sup> See, e.g., Areen, *Public Aid to Nonpublic Schools: A Breach in the Sacred Wall?*, 22 CASE W. RES. L. REV. 230, 234-37 (1971).

## III

## THE EDUCATIONAL EXPERIENCE IN VOUCHER SCHOOLS

## A. School Variety

Voucher plans must resolve not only who is going to provide schooling under the plan, but also what kind of schooling can be provided. The first issue is how might and ought the state regulate what can be acquired with an education voucher. As a practical solution, schools participating in voucher plans might be required either to conform to the state's current rules for regulating private schools or conform to the more restrictive standards which apply to public schools. The plan might apply different standards to public and private participating schools, although public schools might be at a substantial disadvantage if they were too restrained.

As rules become more restrictive, it becomes more difficult to accommodate the preferences of families; in some states private school regulation is already too limiting for many voucher advocates.<sup>63</sup> Perhaps the policy decisions which may be faced by architects of voucher plans can be best explored by listing a number of questions about things people might want. Would mini-schools with less than fifteen students be allowed? What kind of health and safety requirements would be imposed on school buildings? Would the plan allow for schools which use the community as the school facility, similar to the Parkway Program in Philadelphia? Can a student split his time among a number of institutions so that his voucher is really divisible and indeed similar to food stamps? If "program-splitting" were permitted, would brokers be available to help people put together the pieces of their educational program? Would artisans, parents, community people, and others who do not hold teaching credentials be entitled to teach? Could schools be essentially one-subject schools such as art or music schools or would they have to offer a broad curricular range, particularly at the elementary level? Would teaching racism, communism, or any other political viewpoint be prohibited and if so, what consequences would follow? Might children of all ages be grouped together and taught at once or grouped so that older children taught younger ones? Many of these varieties of school experiences are not permitted under existing state laws and are rarely included in public school experimentation.

Voucher experiments with minimum restraints should be tried. Perhaps it would be most appropriate for the state to restrict only activities clearly dangerous to the child's health and safety, or directly threatening to the public welfare such as teaching or encouraging children to engage in criminal conduct.<sup>64</sup> At the same time, there are minimum restrictions

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<sup>63</sup> See, for example, the problems faced by the Santa Fe Community School described in D. KIRP & M. YUDOF, *EDUCATIONAL POLICY AND THE LAW* 48-52 (1974), and *New Schools Exchange Newsletter*, Feb. 15, 1974.

<sup>64</sup> These propositions are derived from J. COONS & S. SUGARMAN, *FAMILY CHOICE IN EDUCATION: A MODEL STATE SYSTEM FOR VOUCHERS* 60 (1971).

which the state might demand. Some might relate to curriculum, such as a requirement that at least reading and math be taught through the eighth grade.<sup>65</sup> There might also be requirements of minimum school day length and minimum length of the school year, although this is an area in which the experimental program ought to tread lightly.

A related matter is the extent to which the plan will regulate the relationship of participating schools—particularly private schools—and their teachers. At least three concerns are important to teachers: (1) employment discrimination, (2) academic freedom, and (3) unionization and collective bargaining. Participating public schools would probably undergo little change in these respects. Teachers could file discrimination claims pursuant to the nineteenth century civil rights acts,<sup>66</sup> Title VII of the Civil Rights Act of 1964,<sup>67</sup> and, assuming the school were receiving federal aid, Title IX of the Education Amendments of 1972.<sup>68</sup> Discrimination against teachers by private schools would also be covered by Title VII of the Civil Rights Act of 1964,<sup>69</sup> where jurisdictional requirements are met,<sup>70</sup> and by the Civil Rights Act of 1866.<sup>71</sup>

Academic freedom of public school teachers, to the extent covered by the first amendment, is largely protected by constitutional decisions relating to teacher conduct both inside<sup>72</sup> and out of<sup>73</sup> the classroom. Public school teachers are also likely to be protected against arbitrary firing by state laws which provide that tenured teachers may be terminated only for "cause." But unless participating private schools were found to be public enough so that their acts constituted "state action," the constitutional protections of academic freedom would be unavailable to teachers in those schools.<sup>74</sup> Perhaps the voucher rules could provide that schools must respect first amendment rights of teachers and grant due process hearings in connection with certain dismissals.

Public school teachers may be protected by collective bargaining agreements, or by school board rules which serve the same function in states where public employee unions are still technically illegal. A voucher plan would complicate bargaining arrangements, however. Individual public

<sup>65</sup> *Id.*

<sup>66</sup> 42 U.S.C. §§ 1981 (race), 1983 (1970).

<sup>67</sup> 42 U.S.C. §§ 2000e-5(e), 2000e-2(a) (1970) (race, color, religion, sex, national origin). In 1972, Public Law 92-261 extended Title VII to include both educational institutions and state and local employers. Pub. L. No. 92-261, § 2(1), 86 Stat. 103 (Mar. 24, 1972).

<sup>68</sup> See Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 235, 304-05 (June 23, 1972), which appears to apply to teachers although it was clearly aimed at students.

<sup>69</sup> 42 U.S.C. § 2000e-2 (1970).

<sup>70</sup> There must be fifteen or more employed and the employer must be engaged in interstate commerce. 42 U.S.C. § 2000e(b) (1970), as amended, Pub. L. No. 92-261, § 2(2) 86 Stat. 103 (Mar. 24, 1972). The amending legislation provides for a reduction in the number of employees necessary to qualify from twenty-five to fifteen. Many private schools may not satisfy the numerical test and, even if Congress has acted to the full extent of its constitutional authority, many private schools may not satisfy the commerce requirement either.

<sup>71</sup> 42 U.S.C. § 1981 (race) (1970). See *Young v. International Tel. & Tel.*, 438 F.2d 757 (3d Cir. 1971).

<sup>72</sup> See, e.g., *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970).

<sup>73</sup> See, e.g., *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

<sup>74</sup> See the discussion of "state action" at p. 537 *infra*.

schools might want negotiations at the school level, and might wish flexibility in pay schedules and staffing not now practically possible in the public sector, such as merit pay, high-paid master teachers, replacement of teachers with lower-paid paraprofessionals, and so on. To the extent that teachers' unions imposed uniform pay scales and class size limits on the public voucher schools, the responsiveness of those schools to family demand could be inhibited. On the other hand, individually participating public voucher schools might fear "whipsawing" and would seek to expand the negotiating unit to include the entire voucher area, even across current school district boundaries. The negotiating unit might be two-tiered, with certain issues dealt with on an area-wide basis and others decided at the building level.

Unless changed by voucher plan legislation, where private school teachers are concerned, the applicable collective bargaining rules would be those of the private sector. If the National Labor Relations Board took jurisdiction over private elementary and secondary schools, the collective bargaining rules might be more favorable to teachers than are those now covering public employees.<sup>75</sup> To date, unionization of private school teachers is not widespread, primarily because of the historic pattern of using teaching nuns and priests in Catholic schools. But with the increasing use of lay teachers in religious schools, unionization in private schools might become more common.

#### B. Access Rules: Families Versus Schools Versus Other Families

It is too simplistic to suggest that since voucher plans imply family choice, families will obtain what they want for their children. Two important competing factors are the providers' desire to have particular kinds of children in their schools, and the desire of families to have their children attend school with particular kinds of classmates. Since tastes will clash, limiting the freedom of some is inevitable.

##### 1. *Families Versus Schools*

If the voucher plan is to reflect the conditions of the free market, suppliers should provide education only for those students they wish to serve, and should adopt rules suited to what they perceive to be in their own best interests. They might take all students who applied, restrict their enrollment to the first X number who wish to attend, classify students on the basis of various criteria, select applicants by lot, and so forth. Such rule-making will obviously restrict the freedom of some families to send their children to the school of their choice. In order to meet the concern that some children will be arbitrarily labeled as undesirable and thereby precluded from enrolling in certain schools, it may be necessary to restrict supplier freedom.

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<sup>75</sup> Currently it appears that the NLRB will assume jurisdiction in disputes involving a private school when the school has annual revenues of \$1 million. *See* *The Windsor School Inc.*, 82 L.R.R.M. 1341 (1972). There also would be a question of the Board's power to exert jurisdiction over private voucher schools because of the "interstate commerce" requirement of the NLRA.



In addition, the issue as to what extent private voucher schools will be subject to constitutional restraints arises in connection with the enrollment, exclusion, and treatment of students. Aside from matters of racial discrimination, the existing line of judicial authority indicates that the administration of private schools does not constitute "state action," meaning that constitutional guarantees applicable to public school administration are not applicable to private school administration.<sup>76</sup> Notwithstanding these cases, the issue under a voucher plan is more complicated, since the government will have embraced family choice as public policy; hence, the private schools participating in the plan may be more clearly seen as performing a state function than do private schools today.<sup>77</sup> It might also be said that the state has abdicated the performance of an essential state function to private parties, who, by their assumption of the responsibility, become the state, at least for certain purposes.<sup>78</sup> Moreover, statutory regulation of private school conduct is likely to increase under a voucher plan, and hence state-private school ties will become more complex.<sup>79</sup>

On the other hand, considering the schooling enterprise as a whole, the adoption of a voucher plan may be seen as a retreat by the state from its current intervention in the lives of children and hence a strange step from which to find "state action" arising. From a different perspective, it may be argued that so long as vouchers are used at public schools as well as private schools, no monopolization of a state activity by private parties occurs as in other "state action" cases.<sup>80</sup> As for the "regulation" argument, it seems odd that additional regulation of private schools, which is for the purpose of giving students and their families greater protection against providers than they would have at common law, should be sufficient as a bootstrap to bring the "state action" doctrine into play; for this would then invoke yet additional restrictions which presumably were deliberately not included in the statutory scheme. In the end the question is whether the courts will view private voucher schools as essentially public schools with respect to which the state has simply delegated its authority. Perhaps the "state action" issue will have to be determined by the nature of the particular voucher plan involved.

It should be added that while recent right-to-education litigation is based on the argument that students may not be excluded from public schools on the ground of "inability to benefit" from education,<sup>81</sup> the considerations are somewhat different when many schools rather than one school are available. Hence while the state may not be able to deny a voucher to a

<sup>76</sup> See, e.g., *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968); *Bright v. Isenbarger*, 314 F. Supp. 1382 (N.D. Ind. 1970). See generally D. KIRP & M. YUDOF, *supra* note 63, at 86-87.

<sup>77</sup> See *Marsh v. Alabama*, 326 U.S. 501 (1946).

<sup>78</sup> See *Smith v. Allwright*, 321 U.S. 649 (1944).

<sup>79</sup> Cf. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

<sup>80</sup> See, e.g., *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944).

<sup>81</sup> See *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), *modified*, 343 F. Supp. 279 (E.D. Pa. 1972).

child if that is how schooling is to be financed, this does not mean that every student must be guaranteed his or her choice of schools, private or public. The "right to an education" would not seem to imply a constitutional ban on reasonable academic grouping, at least where racial considerations are not involved.

It is difficult to tell to what extent limits on "refusals to sell" will keep schools out of the voucher market. Clearly, elite schools will be disappointed if they cannot discriminate on the basis of academic talent. Even if suppliers are to be restricted, many access models are still possible. One is the state university model in which schools are entitled to restrict admissions on the basis of some previously announced and educationally reasonable criteria. This approach aims primarily at preventing arbitrariness and invidiousness. A second model is the telephone company model in which, just as all can obtain telephone service, schools are required, in effect, to make room for any student who wants to enroll. Some community colleges and the City University of New York have adopted this model. It aims to give much more power to families vis-à-vis providers. Of course, there are compromise plans—for example, a school could restrict its size and select a portion of its students as it wished as long as it also accepted a specified portion on demand or, if there is excess demand, by lot.<sup>82</sup> Choosing among the possible rules requires a careful weighing of (1) how much we ought to interfere on behalf of unwanted children, (2) what the behavioral response of providers will be, (3) the interests of others, and (4) how well the rule can be policed.<sup>83</sup> Finally, if admissions policies are restricted, the question is raised whether academic and similar decisions by these schools are to be similarly restricted.<sup>84</sup>

## 2. *Families Versus Other Families*

Other children will be seen by certain families as assets or liabilities, and hence resources to be sought out or avoided when families make choices concerning their own children. A family may not want its child to go to school with troublemakers or with ugly children or with children who are stupid. It may seek to band together with families having children with certain characteristics. This is the familiar, if difficult, problem of how tolerant we should be of freedom of association when a group wishes to exercise it in a way that seeks the freedom not to associate with cer-

<sup>82</sup> This is the proposal of the Center for the Study of Public Policy. See note 18 *supra*.

<sup>83</sup> Professor Coons and I have suggested a rule which would allow a school to set a ceiling on enrollment and to select the first fifteen pupils of its choice on any basis it desired (other than on race); others would be admitted on demand and excess demand would be settled by lot. J. COONS & S. SUGARMAN, *FAMILY CHOICE SYSTEMS: A REPORT TO THE NEW YORK STATE COMMISSION ON ELEMENTARY AND SECONDARY EDUCATION* (1971).

<sup>84</sup> Suppose a dancing school is prevented from refusing to admit those it judges to have limited potential. If a clumsy person enrolls and does not learn, may he then be excluded? Ought he be allowed to insist on progressing to the advanced classes despite his failure to master the basic steps? Not only is the satisfaction of teachers and managers of the dancing school at stake. What about the interests of others in the class? Perhaps in most cases the school and student will agree on what is best for the student or, what is much the same, the school will agree to the student's choice because of economic pressure. But this cannot be counted on in every instance and hence some policy decisions must be made.

tain people. A system which would permit exclusivity would permit the adoption of standards which might be constitutional, but might have the effect of causing many low IQ children, disruptive children, and ugly children to be relegated to places which they have chosen as last resorts. That is, the exclusivity by some families may close off the free choice of others. On the other hand, inclusivity may be seen to "ruin" it for the group;<sup>85</sup> sympathy for this problem must be substantial, although it may vary depending on the reasons the child is not wanted.

A rule of inclusivity with an exception for fifteen selected children is perhaps a good compromise. It would permit restrictive parents who wish very small schools for their children to have them on an exclusive basis, while assuring that any enterprise of a larger scale would be open to all. Turning this preference for inclusivity over exclusivity into a reality, however, may pose substantial difficulties as the informal system of counseling and other pressures will probably tend to deter families from sending children to places where they are not really welcome.

### C. Racial Integration

Critics of voucher plans are concerned about the impact of the plans on racial integration in schools. Clearly, unlimited choice and racial quotas are ultimately contradictory. Even if racial balance were a more important value than choice, it is inappropriate to compare estimates of racial balance under a voucher plan with a non-voucher world in which there is absolute racial balance in every school. The appropriate comparison must be with an objective appraisal of the prospects for racial integration in the schools without vouchers. Few school districts will voluntarily merge for the sole purpose of improving racial balance within their schools. Hence, in the absence of political pressures for district mergers, the best that can be hoped for is racial balance within school districts.<sup>86</sup>

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<sup>85</sup> The problem of disruptive children, for example, is a difficult one. Should they be involuntarily segregated or should they be distributed in the hope that exposure to others will not only change their behavior but also teach other children to cope with this kind of problem? Handicapped children may present a similar problem.

<sup>86</sup> This is especially true now that the United States Supreme Court has held that interdistrict busing cannot be ordered unless all districts involved are found to have engaged in racial discrimination. *Milliken v. Bradley*, 42 U.S.L.W. 5249 (U.S. July 25, 1974). Consolidation of attendance zones of the Richmond, Virginia, area was rejected by the Fourth Circuit after having been ordered by the district court. *See Bradley v. School Bd.*, 462 F.2d 1058 (4th Cir. 1972), *aff'd by an equally divided Court*, 412 U.S. 92 (1973) (Powell, J., not participating). Justice Powell's opinion concurring in part and dissenting in part in *Keyes v. School Dist. No. 1*, 413 U.S. 189, 238-48 (1973), suggests that he is opposed to remedies which involve long distance busing that would be required in metropolitan integration plans, and that he is opposed to the limits such a remedy would impose on the freedom of families who live in the suburbs to attend local community schools.

Nonjudicial pressures for district mergers could include financial incentives built into state school finance schemes. *See MICH. COMP. LAWS ANN.* §§ 388.267-68, 388.690, 388.1121(6), 388.1181(2), 388.1241 (1973). However, some financial factors usually stand in the way of school district mergers; reliance on local revenues for the financing of schools makes richer districts unfriendly toward poorer neighbors that are potential partners. *See Sweetwater County Planning Comm'n v. Hinckle*, 491 P.2d 1234 (Wyo. 1971). Pressures for some interdistrict cooperation are increasing; for example, vocational and special education programs are now commonly provided on a regional basis. *See MICH. COMP. LAWS ANN.* §§ 340.291a, 340.307a *et seq.*, 340.320a *et seq.* (1973). This is a long way from an actual merger, however.

With regard to the prospects of intradistrict integration, it seems likely that a number of northern cities will be found in violation of the *Brown*<sup>87</sup> and *Swann*<sup>88</sup> decisions, hence subject to racial balance orders, as a result of the Court's decision in the Denver case last year.<sup>89</sup> Hence, a realistic target of the integration movement might appear to be racial balance in most large school districts where minorities now attend racially isolated schools.

While integration appears presently feasible for most blacks, it is not so for most whites, since enormous numbers of whites live in suburban white segregated school districts.<sup>90</sup> The trend continues to be away from white attendance at city schools. Certainly in many large cities the prospect is that whites will be in the minority in most public schools.<sup>91</sup> In addition, once a district has been operating a unitary school system within the command of *Swann* for a period of time, it may no longer be under an obligation to maintain racially balanced schools.<sup>92</sup>

By way of contrast, what are the possibilities for integration under a voucher plan? One potential result, of course, is that whites would flee from integrated programs, set up private schools, and block the entry of black students, thereby setting back the limited progress toward integration that has already occurred. Alternatively, blacks might flock to currently all white suburban and private schools, reducing the heavy concentrations of blacks in the inner city public schools and bringing about integration in schools which would otherwise have remained all white. Either projection is too simplistic; there are pressures for and against both, and for an array of other possibilities. Moreover, the constitutional and legislative limits that formally constrain a voucher plan, plus any incentives that may be built into a plan, will be very important to the ultimate distribution of whites and non-whites among the schools.

In addition, racial balance in all schools is not so clearly an appropriate policy result. There are virtues of pluralism, of accepting family associational decisions even when they mean racial isolation, particularly if there are no formal barriers to students on account of race and there are clear opportunities available for integration. The Supreme Court itself, in *Norwood v. Harrison*, has shown that it adheres to these values through its recent and

<sup>87</sup> *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

<sup>88</sup> *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). *Swann* held that the district court could properly find that a neighborhood school policy was an insufficient remedy for past de jure segregation if the effect of neighborhood assignment was to continue one-race schools.

<sup>89</sup> *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973). *Keyes* suggests that any substantial past segregation is sufficient to make out a violation. *Id.* at 198-200. It is likely that some past attendance zone line drawing or new school site choice decisions of most large city school districts can be characterized as racially motivated. See Dimond, *School Segregation in the North: There Is But One Constitution*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1972).

<sup>90</sup> In New York in 1970-71, 74.4 per cent of the state's "white" pupils attended segregated schools—those with less than 10 per cent minority students. NEW YORK STATE COMMISSION ON THE QUALITY, COST, AND FINANCING OF ELEMENTARY AND SECONDARY EDUCATION, *supra* note 8, at 4.4.

<sup>91</sup> In New York City over 65 per cent of the public school population consists of minority pupils. Neighboring Nassau County has 9.2 per cent minority students. See N.Y. Times, Mar. 3, 1974, § 4, at 3, cols. 1, 3.

<sup>92</sup> *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 31-32.

continued affirmation of the viability of *Pierce*, together with its seeming recognition that private schools are not constitutionally forbidden to exist even if they discriminate.<sup>93</sup> Further, *Norwood* suggests that a legislature could not adopt a law which provided that attendance at a racially discriminatory private school would not satisfy the compulsory attendance laws.<sup>94</sup>

A variety of remedies appear to be available for blacks who are discriminated against by voucher schools on the basis of race. Of course, the fourteenth amendment's equal protection clause would continue to apply to racial discrimination by public voucher schools. But what about participating "private" schools? First, and perhaps most important, it now seems clear that blacks will be able to make an equal protection claim even if the discrimination is by "private" schools. The *Norwood* opinion voided Mississippi's textbook aid plan to the extent that books were provided to children attending private schools which discriminated on the basis of race.<sup>95</sup> Acknowledging that racially exclusive private schools may serve important associational interests, and conceding that the textbook aid plan's purpose might legitimately have been to assist in the education of all children (that is, regardless of whether their parents decided to enroll them in white-only schools), the Court concluded that the state may not lend its support to private discrimination in this manner. Indeed, as the state was providing tangible benefits, the Court did not really consider seriously whether there was a real "state action" issue. It swept aside the state's argument that the textbook aid should be upheld on the same basis as textbook aid to children attending religious schools.<sup>96</sup> The Court further rejected the argument that if textbooks may not be provided, then fire and police protection and other municipal services also could not be provided to these schools on the ground that such municipal services are effectively monopolized by government and cannot be obtained by the private schools elsewhere. Books, by contrast, could be obtained privately. Further, the Court called the books a "basic educational tool," which unlike fire services but like education tuition grants, were "provided only in connection with schools."<sup>97</sup>

The point of this seems to be that since, in the Court's view, the basic school system is public, the state may not then provide aid to the substitute private school sector if the effect of the aid is to support discrimination in schooling. The Court made explicit its approval of previous lower court opinions, some of which it had earlier affirmed without opinion, hold-

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<sup>93</sup> *Norwood v. Harrison*, 413 U.S. 455, 461-63 (1973).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 455.

<sup>96</sup> See *Board of Educ. v. Allen*, 392 U.S. 236 (1968). The Court in *Norwood* argued that in *Allen*, while the textbook aid did not amount to the establishment of religion, the effect of the state action was to enhance the free exercise of religion, a valuable right given independent protection in other contexts; by contrast, while the private white-only schools may have served interests in freedom of association, the effect of the aid was to enhance discrimination against others on the basis of race, an interest clearly not deserving constitutional protection.

<sup>97</sup> 413 U.S. at 465.

ing tuition grants to children attending private discriminatory schools to be invalid.<sup>98</sup> Thus the provision of vouchers to children attending schools which only admit whites will very probably be found unconstitutional.

Even without a finding of "state action," it appears that if blacks are excluded from private voucher schools on the basis of race, they have a private right of action against the school under section 1981 of Title 42 of the United States Code.<sup>99</sup> Inasmuch as the refusal to admit blacks is seen as the refusal to enter into a contract on the basis of race, it contravenes the provisions of section 1981, enacted by Congress in order to enforce the thirteenth amendment's prohibition against slavery and involuntary servitude.<sup>100</sup> This has led to renewed interest in actions attacking private discrimination. In *Gonzales v. Fairfax-Brewster School, Inc.*,<sup>101</sup> a federal district court in Virginia found section 1981 applicable and awarded black families, whose children were denied admission to a white-only private school, both damages and injunctive relief. As of this writing, the decision is on appeal; it does seem consistent with prior cases, however.<sup>102</sup> The Court has intimated that perhaps "truly private" discrimination would be immune from attack.<sup>103</sup> Yet notwithstanding the notion in *Pierce* that the state may not constitutionally eliminate the family's right to educate its child privately, it does not appear that a white-only school, which, as an institution, offers services to members of the white community, would meet the "truly private" test.<sup>104</sup> Perhaps a small communally run school in which the parents of the enrolled do the teaching would. The main hope for private schools would appear, ironically, to come from *Norwood* in which the Court stated that private schools which discriminate may exist, observing that such discrimination does not "invoke any sanction of laws."<sup>105</sup> The Court also noted the "other significant contexts" in which Congress had made unlawful discrimination involving private parties.<sup>106</sup> These dicta suggest that the Court either believes that section 1981 does not apply to private school discrimination or that it did not have that possibility in mind.

Finally, it is quite likely that participants in a voucher plan of the sort described herein would be protected by Title VI of the Civil Rights Act of 1964 which prohibits discrimination in programs or activities receiving federal financial assistance.<sup>107</sup> Not only are schools in experimental voucher plans likely to receive special federal assistance, but school districts gen-

<sup>98</sup> *Id.* at 463 n.6.

<sup>99</sup> As noted earlier, this provision is derived from the Civil Rights Act of 1866. See Larson, *The New Law of Race Relations*, 1969 WISC. L. REV. 470, 501-02.

<sup>100</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

<sup>101</sup> 363 F. Supp. 1200 (E.D. Va. 1973).

<sup>102</sup> Many of these cases, like *Mayer*, were brought under section 1982, but the Court, in *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431 (1973), has held that section 1981 and section 1982 are similar except that the former deals with contracts and the latter with property.

<sup>103</sup> See *Tillman*, 410 U.S. at 438; *Sullivan v. Little Hunting Park*, 396 U.S. 229, 236 (1969).

<sup>104</sup> See 26 VAND. L. REV. 1307 (1973).

<sup>105</sup> 413 U.S. at 469.

<sup>106</sup> *Id.* at 470 & n.10.

<sup>107</sup> 42 U.S.C. § 2000d (1970). Unlike section 1981, which is limited to discrimination on the basis of race, Title VI of the Civil Rights Act of 1964 applies to discrimination on the basis of race, color, or national origin.

erally would presumably continue to receive federal aid and would distribute it among the participating schools, including the private voucher schools. Were such schools to discriminate, not only would this invoke the threat of the cut-off of federal funds by HEW officials,<sup>108</sup> but it now appears that the prohibition may be privately enforced by injured students.<sup>109</sup>

A court might find that a voucher plan was adopted for the *purpose* of avoiding racial balance (or perhaps of allowing whites to avoid such balance) and hence hold it unconstitutional, regardless of effect.<sup>110</sup> But if the intent to discriminate cannot be shown, how will a voucher plan which results in some one-race schools be treated? *Swann* indicates that the response may vary. If a district is under a recent court order to desegregate or has just implemented a desegregation plan, then a voucher plan may not be allowed if, as a result, the district, including all voucher schools, fails the *Swann* tests. Even this situation may be distinguishable from *Swann*, however, since in that case some black students could complain that the neighborhood assignment plan *required* them to remain in their formerly all-black schools, while under a voucher plan, at least formally, the imbalanced schools would be by choice. While in *Green v. County School Board*,<sup>111</sup> the Court rejected the district's "choice" plan as inadequate, it is important to note that there (1) the schools were initially completely segregated, and (2) in its original form, the plan assigned students to their old schools unless they affirmatively chose others. And finally, *Green* again is a case of a district in the process of court-ordered desegregation, imposed as a result of past discrimination.

This leaves us with the toughest cases: racially balanced districts which become imbalanced as a result of the voucher plan.<sup>112</sup> In order to assess the results, the question must first be asked whether blacks still have ample opportunity for integration. If so, and if this can be documented not only by its theoretical availability through choice, but through the existence of integrated schools, then there is much less reason to fear that all-black schools represent anything but black choice. Moreover, assuming again that there are ample opportunities for integration, we should be cautious before surmising that where there are all-white schools, they secretly have discouraged black attendance; otherwise blacks may be forced to attend with whites at school X when they are happier attending with whites at school Y. In these circumstances, and where there

<sup>108</sup> See 42 U.S.C. § 2000d-1 (1970).

<sup>109</sup> See *Lau v. Nichols*, 414 U.S. 563 (1974).

<sup>110</sup> See *Griffin v. School Bd. of Prince Edward County*, 377 U.S. 218 (1964), in which the school district had closed its public schools and vouchers were made available to those attending private schools. *But see Palmer v. Thompson*, 403 U.S. 217 (1971), which suggests that the search for purpose is fruitless and that *Griffin* rests on the impermissible *effect* of the district's action. Still, since Prince Edward County had been ordered to desegregate its public school system and instead closed the schools and adopted a voucher plan for students at private schools which did discriminate, it is not clear just what effect the Court considered to be the crucial one.

<sup>111</sup> 391 U.S. 430 (1968).

<sup>112</sup> There is also the issue raised in *Swann* of the time period which must pass after a district has become a unitary system. 402 U.S. at 31-32.

are integrated schools available, to object to racial imbalance may now be a matter of social philosophy—that what is “best” is that whites and blacks attend together whether or not some blacks want schools in which they are predominant and whether or not they wish to attend with certain whites. Perhaps this is the view one “ought” to have (it is rather contrary to the notions about family and state inherent in vouchers); yet so long as blacks and whites have opportunities to attend together, it is not clear that the Constitution forbids or should forbid the racial imbalance which results.<sup>113</sup>

On the other hand, the legislature may constrain the voucher plan by requiring racial balance. A variety of approaches are possible. First, voucher legislation could provide that only schools which meet certain racial balance tests may participate in the plan. Each school need not necessarily mirror the district's (or area's) racial composition; rather some leeway (plus or minus fifteen per cent of the district average, for example) could be allowed. To stimulate rather than to command racial balance, integrated schools could be awarded a bonus. Another alternative would be to give minority race students first access to available places, or lotteries which are held in cases of over-enrollment could be undertaken separately by race with positions assigned pro rata so as to eliminate any imbalance arising from random selection.

#### D. Limiting Vouchers to Special Programs or Types of Students

While most voucher proposals assume that increased family choice would affect all children, it is obviously possible to limit the use of vouchers to families or children with specific characteristics. For example, if the central purpose of vouchers were viewed as increasing choice for poor families, state funded vouchers could be provided only to poor families.<sup>114</sup> While everyone else remained under the present rules, children of poor families could transfer out of their existing public schools to other public and private schools chosen by the family.

Under such a plan, it would be necessary to decide whether the private schools should be limited to voucher students, thus serving only poor families. If private school enrollment were not limited and existing

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<sup>113</sup> Such a situation surfaced not long ago in Berkeley, California. In the past, the Berkeley school district had voluntarily desegregated and also developed an elaborate experimental schools program in which a variety of alternative experiences were offered. One of those was called Black House, with an all-black teaching staff as well as student body (which comprised less than five per cent of the total black enrollment of the district). While whites apparently were not formally excluded, the nature of the school was such that it would be unlikely that whites would wish to attend—among other things it was very much oriented toward developing racial pride. In Berkeley, neither blacks nor whites find it difficult to obtain racial integration for their children. While some might believe that racial balance ought to be imposed on all students notwithstanding the views of some black families, such a policy goes beyond the kind of intrusion we have come to expect from the state, even on racial issues. For a description of the Berkeley situation and a constitutional analysis of “minority” public schools of choice, see Appleton, *Alternative Schools for Minority Students: The Constitution, the Civil Rights Act and the Berkeley Experiment*, 61 CALIF. L. REV. 858 (1973).

<sup>114</sup> See Sizer & Whitten, *A Proposal for a Poor Children's Bill of Rights*, 2 PSYCHOLOGY TODAY, Aug. 1968, at 58.



private schools could turn away voucher students and/or charge additional tuition, then these private schools would not be a real option for many poor families using vouchers. Architects of a poor-only voucher plan should also be concerned with determining who will qualify as a poor family and with insuring that voucher children are not unfairly stigmatized. Finally, they should consider the political realities of adopting a plan limited to the poor. Some opponents of vouchers generally would probably favor poor-only voucher plans, while some current proponents of vouchers would lose interest in, and in some cases oppose, their adoption if limited to the poor.

Vouchers could also be limited to children now inadequately served by the public schools because of certain characteristics of the child. Indeed, some states already provide vouchers for handicapped children.<sup>115</sup> Some states may offer vouchers for the handicapped today because the public schools do not want to educate these children. The question of whether these children have the constitutional right to public education, indeed a public education suited to their special needs, is currently being litigated.<sup>116</sup> Whether the public sector could meet its constitutional obligation toward such children—if a constitutional right to public education is recognized by the courts—through an “adequate” voucher might become an important question. On the other hand, there are families with exceptional children who are quite dissatisfied with the public schooling now available; if such children have a right to attend a public school, do they also have a right to a voucher if the program offered by the public school is not suited to their needs?

Similar questions arise if the use of vouchers is confined to non-English speaking students. They too are seeking a declaration of their constitutional right to adequate public education. The U.S. Supreme Court has held that under the Civil Rights Act of 1964 these children have an enforceable right to special instruction which recognizes their language problems.<sup>117</sup> Since the interest of these children and their parents is primarily in learning English, providing vouchers which could be exercised in private programs of their choice might be welcomed by most families, at least until the children learned to speak English and could understand what goes on in an ordinary classroom. On the other hand, may the school district satisfy its obligation by providing only the voucher option instead of setting up public school classrooms in which these children could understand and learn?

<sup>115</sup> See, e.g., CAL. EDUC. CODE § 6871 (West 1969).

<sup>116</sup> See Dimond, *The Constitutional Right to Education: The Quiet Revolution*, 24 HAST. L.J. 1087 (1973); Kirp, *supra* note 4.

<sup>117</sup> *Lau v. Nichols*, 414 U.S. 563 (1974). Pursuant to Title VI, section 602, of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970), the Department of Health, Education and Welfare issued guidelines in 1970 providing that “where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.” 35 Fed. Reg. 11,595 (1970). See Sugarman & Widess, *Equal Protection for Non-English-Speaking School Children: Lau v. Nichols*, 62 CALIF. L. REV. 157 (1974).

Another approach is to limit the vouchers to children with certain educational objectives, particularly those objectives for which the private sector may have more expertise and for which the public sector has obvious shortcomings. Vocational education (at least for some vocations) is a likely candidate for this approach.

A different approach would be to provide vouchers for children in schools that fail, or to individual children whom the schools fail. Two examples illustrate this idea. If the average reading score of students at a public school is sufficiently far behind national averages (or local averages, or historical averages, or averages of students matched by background), then the school would be declared "bankrupt" and the revenue of that school turned over to the families of the students in that school in the form of vouchers to be used as they wish.<sup>118</sup> This approach could also be adapted to classes or grades within a school. In the alternative, if a student, after a certain period of time, has not mastered the basic skills taught by the public school or has fallen so far behind his or her peers (due to the school's fault) then the family would be given a voucher to enroll the child elsewhere.

As a final example, vouchers could be used as supplements to the present public school system. For example, "school stamps" could be used for after-school, weekend, or summer educational experiences. There are special reasons for limiting these supplemental vouchers to the poor. Currently, an important way in which the lives of children of poor families differ from those of wealthier children is in what they do with their out-of-school time. Poor children typically do not have private music or dance lessons, private tutoring, opportunities for summer camp, and the like. It has been further suggested that summer experiences (or their lack) count for much of the school achievement variations between rich and poor children.<sup>119</sup> As a general matter, a political advantage of extra-school voucher proposals is that they do not so directly confront the existing public education establishment; a disadvantage however, is that they will do little to affect the major portion of children's educational experiences.

#### IV

##### VOUCHER PLANS AND OTHER SCHOOL REFORMS

###### A. Finance Reform Through Vouchers

School finance reform has been urged ever since education became publicly financed. In recent years, lawyers have led the reform efforts, having taken cues from the earlier writings of educators, education economists, and school administrators.<sup>120</sup> However, while much of the force behind educa-

<sup>118</sup> This interesting metaphor was proposed to me by Robert J. Singleton of the Education Finance Reform Project in Los Angeles.

<sup>119</sup> See, e.g., Hayes & Grether, *The School Year and Vacations: When Do Students Learn?*, Apr. 19, 1969 (paper presented at the Eastern Sociological Association Convention).

<sup>120</sup> See, e.g., C. BENSON, *THE ECONOMICS OF PUBLIC EDUCATION* (2d ed. 1968).

tional reform historically has been directed at increased spending for public education,<sup>121</sup> most current legal commentators have devoted their attention toward resource reallocation, with a view toward diminishing educational inequalities.<sup>122</sup>

Three categories of inequality have been attacked in the courts: inequalities among school districts, inequalities among schools within districts, and inequalities among students. These inequalities arise from different causes. Most of the legal attack has concentrated on interdistrict inequalities which arise because districts have access to widely varying tax bases for generating educational funds.<sup>123</sup> To some, the remedy for this inequality lies in assuring some notion of equality of educational spending.<sup>124</sup> This at least may be stated as a negative principle: spending from district to district should not vary as a result of local tax base or tax effort. This principle allows for variations based upon rational education policies, such as cost variations among districts and variations in pupil needs. To other reformers, a sufficient judicial remedy has meant eliminating variations in expenditures arising out of tax base differences, and not those arising out of tax effort differences.<sup>125</sup>

Whether vouchers would have any effect on the interdistrict disparity problem would depend in large part upon whether the plan permitted families to choose public schools located outside their present school district. If this were accomplished by having the state take over the entire school revenue raising function, then the problem of interdistrict disparities would disappear. It is difficult to see a revenue-raising role for school districts if there is to be choice across district lines. The system might employ transfer payments from "sending" to "receiving" districts as is done today in rather rare examples of approved transfers. However, if the amount of the payment were the amount spent in the receiving district, this could become an intolerable burden on poorer sending districts; and if the amount were the amount spent in the sending district, this could be enormously burdensome on receiving districts. Either rule would set up dysfunctional incentives to deter choice. It is unclear whether the long-run political chances for voucher plans are increased or diminished if district-crossing is allowed. Families in desired districts may protest district line crossing, as may teachers and administrators in less desirable

<sup>121</sup> See, e.g., E. CUBBERLEY, *SCHOOL FUNDS AND THEIR APPORTIONMENT* (1905).

<sup>122</sup> See, e.g., Yudof, *Equal Educational Opportunity and the Courts*, 51 TEXAS L. REV. 411, 472 n.322 (1973).

<sup>123</sup> From the viewpoint of the reformers, the high point thus far in the legal battle over interdistrict inequalities has been the California Supreme Court's 1971 decision in *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), when the court indicated that these inequalities are unconstitutional, while the low point was the U.S. Supreme Court's 1973 decision in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), which rejected that claim, at least on federal grounds. Despite the dismissal of the reformers' constitutional claims in *Rodriguez*, there has been significant reform carried out in many state legislatures, both before and after *Rodriguez*. For a discussion of such reform, see Grubb, *The First Round of Legislative Reforms in the Post-Serrano World*, 38 LAW & CONTEMP. PROB. 459 (1974). Yet, taking the country as a whole, substantial interdistrict disparities within states are still common.

<sup>124</sup> See, e.g., A. WISE, *RICH SCHOOLS, POOR SCHOOLS* (1968).

<sup>125</sup> We have attempted to capture this idea in what we have called Proposition I: "the quality of public education may not be a function of wealth other than the total wealth of the state." J. COONS, W. CLUNE & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* 304 (1970).

districts. In view of the current suburban-urban political power balance, inter-district choice may be effectively precluded. If dissatisfaction with public schools increases, particularly in the suburbs, the balance of power may shift.

Intradistrict inequalities arise due to district level policies concerning the allocation of district resources. There has been surprisingly little litigation on this question despite the 1971 victory by plaintiffs in *Hobson v. Hansen*<sup>126</sup> in the District of Columbia. *Hobson* ordered that per pupil expenditures in any single elementary school should not deviate more than five per cent from the mean, excluding Title I ESEA funds, UPO funds, and funds not from the regular budget. In the past year a similar suit has been filed in Los Angeles.<sup>127</sup> The typical systemic cause of intradistrict inequalities in expenditures per pupil is the allocation of teachers so that some schools have higher salaried teachers than others, although there may be no difference in the pupil-teacher ratios among the schools in a district. Often this allocation is due to the seniority transfer rule, under which openings go first to senior teachers in the district. In the long run, older teachers tend to concentrate in certain schools. To the extent that teacher salary differences are unrelated to teacher quality but are, for example, family security-based (those with years on the job deserve more pay because the families of older workers need more money than those of younger ones), it is seemingly more appropriate to allocate teacher positions rather than teacher salary dollars among schools. This is particularly so if schools themselves have little power over their teaching personnel, especially to discharge cost ineffective higher paid teachers. On the other hand, to the extent that salary differences reflect competence differences, the allocation of teaching slots together with a system of unequal distribution of teacher talent seems unfair to schools which wind up with more low paid (and less competent) teachers. Studies suggest that higher pay may correlate somewhat, but only somewhat, with teacher effectiveness.<sup>128</sup> Of course, teachers need not be distributed evenly by salary levels; schools with low paid teachers can simply be given more of them. Although a district must substantially reduce intradistrict inequalities in order to receive federal Title I funds,<sup>129</sup> the "comparability" among schools that is required under the Title I regulations is based on teacher salary dollars per pupil after the deduction of longevity payments.<sup>130</sup>

A voucher plan in which each child's voucher was worth the same amount would be consistent with the equal-teacher-salary dollar notion of equality. Hence, vouchers might be viewed as a way of eliminating the inequality attacked in *Hobson*. However, if a plan contemplates public sector choice with no substan-

<sup>126</sup> 327 F. Supp. 844 (D.D.C. 1971). This case followed an earlier decision emphasizing racial discrimination and tracking in which the district court did not order an equal-resource remedy, even though it found the existing resource patterns to be unconstitutional; it believed that the remedy for the other violations would deal with the resource problem. See *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hansen*, 408 F.2d 175 (D.C. Cir. 1969).

<sup>127</sup> *Arellano v. Board of Educ.*, Civil No. C27,836 (Cal. Super. Ct., filed Apr. 20, 1972).

<sup>128</sup> For a heroic attempt of a court to deal with the views of social scientists, see *Hobson v. Hansen*, 327 F. Supp. 844 (D.D.C. 1971).

<sup>129</sup> Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 241e(a)(3)(C) (1970).

<sup>130</sup> 45 C.F.R. 116.26 (1973). See LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, A MANUAL FOR ENFORCING TITLE I COMPARABILITY (1973).

tial increase in total spending, schools that start out with senior teachers would face a cost squeeze unless they can transfer out such teachers or attract substantial enrollment increases in the first year of the plan. Even if all extra teacher dollars meant extra teacher quality, some public schools, because of historic considerations, would have to maintain staffs largely composed of high paid teachers even if that school's consumers did not want such teachers. On the other hand, perhaps natural attrition plus some transitional financial assistance would solve this problem.

Related factors that give rise to intradistrict inequalities must also be considered under any voucher plan in which public school choice was permitted. Some existing schools necessarily have higher costs—for example, maintenance and repair costs are higher in older buildings. More significant problems are the varying quality and degree of indebtedness associated with existing physical plants of public schools and new private schools that want to participate but do not yet have buildings. These matters raise issues beyond the scope of this article but they illustrate that the simple rule of an equal value voucher for every child may, in reality, be very much unequal.<sup>131</sup> From another perspective, equality among schools may be seen as a question of the ability of schools to compete fairly with each other for students; subsidies beyond the voucher value may be needed to insure this ability.

Resource reallocation suits dealing with inequalities among children, the third category of inequality, have pressed for an equality based upon needs, which requires a disproportionate distribution of resources. For example, in *McInnis v. Shapiro*<sup>132</sup> the plaintiffs asked for a constitutional determination that resources must be distributed according to pupil needs, claiming that so-called culturally disadvantaged children need extra funds spent on their education. Clearly, this concerns a notion of output equality rather than input equality. Similarly, in exclusion suits brought by handicapped children, plaintiffs seek not merely admission to school, but access to a program suited to their needs, which in many cases will cost more than the ordinary program. Also, while the suits by non-English speaking children assert that appropriate education (for example, instruction in English) can mean using resources already devoted to these children in a different manner,<sup>133</sup> at least some school district opposition to such suits is based on educators' assumptions that successful suits will increase per pupil costs.<sup>134</sup>

Viewing broadly the matter of needy students, the question is where do compensatory programs—those in which additional resources are provided—fit in a voucher plan? One approach is to offer vouchers of different amounts to children with certain characteristics. For example, children with some handicaps would have vouchers worth twice the value of ordinary vouchers, others would have vouchers worth three times as much, and so on. One advantage of this approach, if the amounts are sufficient, is that families with handicapped children would be able to choose whether to put the children in an

<sup>131</sup> This problem is considered in J. COONS & S. SUGARMAN, *supra* note 64, at 70-76.

<sup>132</sup> 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom. McInnis v. Ogilvie*, 394 U.S. 322 (1969).

<sup>133</sup> See Sugarman & Widess, *supra* note 117, at 177.

<sup>134</sup> *Id.* at 177-78.

integrated program (that is, with non-handicapped children but where some supplemental services are provided to the exceptional child) or in a special school (or class) exclusively for the handicapped. In this way the family, through counseling, would be the arbiter of the on-going debate in the special education field as to whether there should be integrated or self-contained classrooms for such children.<sup>135</sup>

As for the disadvantaged child, he or she also could be given a voucher worth more than the voucher given to the average child, and this would give the school he or she attends greater resources to devote to the child.<sup>136</sup> The kinds of compensatory programs offered would be determined by the market, influenced by the enrollment rules. In general, schools should respond to parental wishes—some families might prefer that the extra resources be spent on their disadvantaged child alone, while other families might prefer it to be spent on the school as a whole. Concentrations of such children in certain schools would bring in larger amounts of money—indeed, a further variation on the plan would provide that a school with concentrations of disadvantaged children could receive a financial bonus from the state. In a sense, an individual disadvantaged child could choose between a school with extra funds (where there are others like him) and another school which has less revenue but where he would attend classes with more advantaged classmates. It has been urged that extra value vouchers be made available for the disadvantaged in order to make these children more attractive prospects to schools; yet enrollment rules and the restrictions imposed on the spending of this additional money (either by the market or by law) would substantially influence the impact of increased funds on the desire of schools to admit disadvantaged children.

Important problems with allowing extra value vouchers for disadvantaged children (and for handicapped or other such children) include: (1) selecting what kinds of children are to qualify, (2) identifying the children who qualify, and (3) deciding how much extra money is to be provided. Present programs for disadvantaged and handicapped children have faced these problems with rather unsatisfactory results.<sup>137</sup> Grave concerns about stigmatizing such children have been raised. Perhaps a family could choose to avoid the stigma (and the money) by deciding not to claim the extra value voucher for its child.

The discussion thus far has assumed that the voucher would cover all the costs of a family's choice of schooling, that vouchers would be of the same value (except in the case of special children as already described), and that user families would not pay for vouchers other than through general taxation. Yet voucher plans could include rules contrary to all of these assumptions and still be workable.

The Friedman model suggests that schools be permitted to charge any tuition they wish, not necessarily related to the voucher amount.<sup>138</sup> This aspect

<sup>135</sup> See Kirp, Buss & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CALIF. L. REV. 40 (1974).

<sup>136</sup> The Center for the Study of Public Policy proposed a "compensatory voucher" for disadvantaged children. See note 18 *supra*.

<sup>137</sup> See Kirp, *supra* note 4.

<sup>138</sup> Presumably they would not be able to charge less, collect the full voucher, and "kick back" the difference in cash.

of his plan is most criticized by liberal voucher proponents, but it is too simplistic to complain that rich families will have more money spent on their children's education than will the poor. Surely the rich would be able to supplement any voucher plan by purchasing purely private education; no voucher advocate proposes trying to stop this directly. And no one suggests that vouchers are to be so large that they exhaust all further demand for education. Rather, it is the side effects of allowing schools to charge tuition in excess of vouchers that are of concern. Economic class isolation may result; richer families might choose costlier schools in part to insure that their children do not attend schools with poor families.

Such segregation does violence to more than the theory of inclusivity. Since children themselves must be counted as part of a school's resources, tuition add-on requirements could operate to bar poor children from the benefits of association with richer children. It is also feared that higher cost schools will use their financial advantage to obtain better teachers and disproportionately better quality schooling than that available at lower tuition schools. This assumes an imperfect market in the supply of educational inputs so that with extra money the higher bidders can capture more than the amount of extra value in services. If the number of distinctly good teachers is limited, this point has merit. There is also a symbolic disadvantage if a publicly recognized association develops between the best schools and rich and upper middle class children.

If the main virtue of allowing higher tuition schools is to satisfy different tastes for education, this may be accomplished without putting the poor at a disadvantage. Vouchers of varying values could be sold at a price which relates to family income so that poor families would gain access to the more costly schools with the same relative financial effort as rich families.<sup>139</sup>

The purchase of vouchers need not be confined to the implementation of a scheme having vouchers of varying values; purchase could be required even under a uniform voucher model. In other words, the voucher plan could provide subsidies to poor families by the rich, but not to user families by non-users. At some point, however, a policy of charging for education vouchers could run into constitutional limitations. The Supreme Court intimated in *Rodriguez* that to charge tuition for public schools might unconstitutionally discriminate against the poor, if it had the effect of excluding them from a minimum or basic public education.<sup>140</sup> Even if this were so, an "ability to pay" schedule should survive judicial scrutiny, at least so long as the voucher was sufficient to purchase what would be deemed a basic education program.

Another school finance issue raised by the prospect of a voucher plan is

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<sup>139</sup> Professors John E. Coons, William H. Clune III, and I have dubbed this notion "family power equalizing" and it is discussed in J. COONS, W. CLUNE & S. SUGARMAN, *supra* note 125, at 256-68; J. COONS & S. SUGARMAN, *supra* note 64; Coons, Clune & Sugarman, *Recreating the Family's Role in Education*, in *NEW MODELS FOR AMERICAN EDUCATION* 216 (J. Guthrie & E. Wynne eds. 1971); Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 *HARV. L. REV.* 7 (1969).

<sup>140</sup> 411 U.S. at 25 n.60. In *Johnson v. New York State Educ. Dep't*, 449 F.2d 871 (2d Cir. 1971), *vacated and remanded for a determination of mootness*, 409 U.S. 75 (1972), it was alleged that a school textbook fee was unconstitutional if nonpayment resulted in denial of the books, since a child whose fee was not paid would be effectively without education.

whether the plan will increase efficiency and diminish pressure to increase school spending. In reality it appears that political forces opposed to vouchers (for example, public school personnel) may have to be "bribed" to accept even an experiment; hence vouchers may have to carry a heavy price tag at the outset.<sup>141</sup>

## B. Related But Alternative Reforms

Obviously vouchers are not the only means available to attack inequities in public education. Other reform efforts—some less drastic than vouchers—may also be considered. In addition, many reforms should be considered in conjunction with vouchers.

### 1. *Community Control*

School governance must be carefully considered under any voucher plan. It is fair to anticipate that a full-scale voucher experiment would tend either to leave much of the governance issue to market mechanisms or insure that a variety of governance arrangements were attempted, including those in which families have little official voice in the ongoing policy decisions of the schools. Hence, although under a voucher plan substantial power would be exercised at the school site level, it might be wielded by one person. Thus, one should not confuse decentralization of decision-making with consumer control; decentralization could also mean "principal" or "teaching staff" control.

Some have suggested that "voice" is more important to families than "choice" and that political efforts aimed at insuring school choice actually drain pressure and support from more needed school governance reform.<sup>142</sup> This sort of reform is generally labeled "community control."<sup>143</sup> The specifics of community control have taken various forms: election of school board members by neighborhood rather than at large,<sup>144</sup> division of school districts into subdistricts with independent governance structures,<sup>145</sup> district and school level parent advisory councils,<sup>146</sup> and so forth. These efforts seek to increase constituent influence in what is seen to be an unresponsive, "professionally" run bureaucracy.

<sup>141</sup> This appears to have been the case in the Alum Rock Union School District. For a discussion of this "voucher" plan, see Appendix *infra*.

<sup>142</sup> I am grateful to David Sonnenfeld, former research associate at the Childhood and Government Project, for compelling me to consider this issue. See Sonnenfeld, *The Education Marketplace: Toward a Theory of Family Choice in Schooling*, May 1973 (Draft 2, on file with the author). See generally A. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

<sup>143</sup> See Kirp, *Community Control, Public Policy, and the Limits of Law*, 68 MICH. L. REV. 1355 (1970). See also COMMUNITY CONTROL OF SCHOOLS (H. Levin ed. 1970); 15 INEQUALITY IN EDUCATION (1973).

<sup>144</sup> But see *Owens v. School Comm.*, 304 F. Supp. 1327 (D. Mass. 1969), where it was unsuccessfully argued that at-large elections were unconstitutional.

<sup>145</sup> This happened in New York City. See generally CONFRONTATION AT OCEAN HILL-BROWNSVILLE (M. Berube & M. Gittell eds. 1964).

<sup>146</sup> For an examination of the Los Angeles experience, compare Halverson, *L.A. Decentralization With Promise*, 15 INEQUALITY IN EDUCATION 39 (1973), with Gurule & Ortega, *L.A. Decentralization With Problems*, 15 INEQUALITY IN EDUCATION 43 (1973). Much of the push for parent advisory councils has come in connection with federal Title I funds. See Yudof, *Title I and Empowerment: A Litigation Strategy*, 5 INEQUALITY IN EDUCATION 11 (1970).



As long as school districts rely substantially on local property taxes for their financial support, the subdivision of city districts into wholly independent subdistricts is undesirable since the subdistricts will typically have widely differing fiscal capacities. Fiscal considerations aside, however, a major problem with community control is defining the community. This problem has a rather straightforward answer under a voucher plan: the community is a voluntary one made up of those who choose to associate with the school; those who dissent may exit. Communities are by choice.<sup>147</sup> When the community is a geographic one, the answer becomes more difficult. It is very hard to know what process should be employed in drawing a community's boundaries. The ballot box seems ill-suited to this sort of decision-making. Frequently, existing school attendance zones reflect considerations quite different from the notions of commonality of interest which underlie community control proposals. Moreover, within a geographic area that has community controlled schools, some families will surely disagree with school policies and programs and, unlike the voucher plan situation, the only realistic remedy may be to move. Indeed, as school variety increases, the intensity of displeasure felt by "trapped" dissenters may also increase. On the other hand, "neighborhood" decision-making may have special advantages; residents who share common concerns besides education may be able to create a strong web of ties and develop a system of ordering priorities on a variety of issues.

This point emphasizes the differences between voucher plans and community control in the typical case. Community control contemplates the advancing of *group* interests (through representatives) whereas vouchers emphasize *individual* family action. Community control advocates argue that community representatives better know what is desired by (or are more responsive to) the people in their community than do far-away bureaucrats or board members representing various groups. But perhaps individual families know better what is best for themselves than do community leaders.

## 2. *Within-School Choice*

Most proposed voucher plans allow families to choose among a number of schools, but a substantial portion of the current dissatisfaction with schools probably stems from objections to a particular teacher or a particular program with which the child has been associated. A system in which children would be able to choose among third grade teachers, or choose to join any reading group or education track offered, or choose curriculum offerings which they desired rather than those required by the school or dictated to them by counselors, may seem attractive to those who favor family choice. However, a public school system may not be able to provide this kind of choice. It would probably be undesirable and unworkable to require teachers at the elementary school level to take all students who wished them as teachers. Moreover, in public school buildings today, school classrooms are generally limited in the number of students they can accommodate, although in newer buildings variable size classes are available. Hence the problem of what to do about impossible "first

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<sup>147</sup> This idea is advanced in Coons, Book Review, 23 STAN. L. REV. 846 (1971).

choices" develops again. Beyond this, because of the existing power of public school teacher associations, public schools might not be able to respond adequately to within-school demand by eliminating teachers and courses that are not chosen and adding programs that are wanted, rewarding personnel who seemed especially popular, and bringing in new people who have desired characteristics.

Of course, within-school choice is not guaranteed under voucher plans either, and it remains to be seen whether the private sector would be any more effective in responding to these demands. In any event, the orientation of voucher proponents has not been toward voucher rules which would require certain kinds of in-school choice to be made available by all providers; again, there is an implicit reliance on the market to induce providers to offer the kinds of choices that attract customers.

The flexibility of within-school choice might be accomplished through changes in public school governance as well as through implementation of a voucher plan. Indeed, community controlled schools which have as an objective the maximization of within-school choice by students provide a very attractive alternative to the voucher approach.

#### CONCLUSION

Today we hear more and more about children's rights (or "kid lib"). Since one argument for the voucher plan is that it allows children to have increased voice in their schooling, it may provide a test of what children's rights can mean, particularly for younger children. Perhaps we shall come to believe that children's rights is an empty phrase for all but de facto emancipated youth. In that event, we are still left with the question of who best speaks for the child. From this perspective, vouchers result in more voice for parents. Few would deny that the state must, at a minimum, play a residual role in extreme cases. Rather the question presented by voucher proposals is whether our children and our society are better off with the current level of state intervention in the provision of education.

Experimental voucher plans offer an opportunity to determine whether substantial unsatisfied parental and student demand exists for various kinds of educational programs. At the same time, experimentation can show whether any full-scale voucher scheme is politically feasible. Some limited, federally promoted voucher experiments are now underway or being planned. These experiments are described in the Appendix to this article. However, these federally promoted experiments, while a hopeful sign for those who wish to see experimentation in increasing the family's role in education, are an insufficient exploration of the voucher concept. A large variety of other demonstration programs are needed before informed decisions can be made regarding the optimal quantum of family choice.

## Appendix

### VOUCHER EXPERIMENTS

#### A. California

##### 1. *The Alum Rock Voucher Plan: The Public Schools*<sup>148</sup>

The theories in regard to the use of vouchers are already being tested through a "voucher" experiment now underway in the Alum Rock Union School District in Northern California. The district receives substantial financial and planning support from the federal government, which initiated the experiment.<sup>149</sup> The Alum Rock plan was implemented in the fall of 1972 and an upcoming large-scale evaluation of the experiment has been funded by OEO. The discussion in this Appendix will not anticipate the evaluation, but will concern itself with some of the policy decisions made in Alum Rock as they relate to the issues raised in the article.

Although Alum Rock's contract with OEO contemplated that private schools would be included, as of this writing the plan's operation has been restricted to the district's public schools. The Alum Rock district offers education through the eighth grade (including kindergarten); its approximately 15,000 pupils attend 19 elementary and 6 middle schools. In the first year of the voucher plan (1972-73), 3,900 pupils attending 6 schools (5 elementary and 1 middle school) participated; in the second year, the number of participating students increased to 9,000 and the number of schools to 13 (3 middle and 10 elementary schools). Although an additional school or two may be added for the 1974-75 year, it is not currently contemplated that the entire district will participate in the voucher plan.

In order to increase the choices available to families, each school was required to offer at least two distinct programs. By the end of the first year there were 22 such mini-schools available within the 6 participating public school buildings. The 13 schools participating in the 1973-74 year offered more than 40 mini-schools. In principle, the mini-schools are to operate autonomous

<sup>148</sup> The bulk of this section on the Alum Rock experiment is taken from Levin, *Alum Rock: Vouchers Pay Off*, 15 *INEQUALITY IN EDUCATION* 57 (1973); National Institute of Education, *Vouchers: The Experience at Alum Rock*, Dec. 1973 (on file with the author); Alum Rock Union School District, *Transition Model Voucher Proposal*, Apr. 12, 1972, for the Office of Economic Opportunity, which sets out many of the policies governing the plan; Alum Rock "fact sheets" and documents provided to parents and on file with the author; many candid and helpful conversations with Dr. Joel Levin, Director of Alum Rock's Voucher Project; and the author's personal experience as a consultant for the Center for the Study of Public Policy with respect to the inclusion of private schools in the Alum Rock plan.

<sup>149</sup> The Office of Economic Opportunity financed a study of vouchers in 1968 and in 1970 by the Center for the Study of Public Policy (CSPP) in Cambridge, Massachusetts; the study group recommended federally supported experiments to test at least one type of voucher scheme. This study led to the publication of *EDUCATION VOUCHERS*, *supra* note 18. OEO then made grants to a number of school districts to undertake feasibility studies, and when Alum Rock agreed to try out a program patterned after the recommendations of the CSPP, OEO agreed to provide assistance for what is expected to be a five-to-seven year period. With the establishment of the National Institute of Education (NIE) and the reorganization of OEO, responsibility for the voucher project was shifted from OEO to NIE in July, 1973.

programs, but in practice there are a variety of sharing arrangements within schools relating to the library, physical education, and other facilities. Also, each building continues to have one principal in charge of all the programs offered.

Extensive efforts were made to inform participating families about the alternatives available. In the spring of 1973, each family was sent brochures including a description of the voucher plan, the enrollment rules, and one-page descriptions of each of the mini-school programs. These descriptions were in large part prepared by the mini-schools themselves, and emphasized a variety of things—for example, some schools named their teachers, apparently hoping to appeal to those families that would choose on the basis of personal reputations. Parents were also invited to ask for copies of evaluation reports of each program that had operated in the first year, to visit any mini-school, and to talk with parent counselors, part-time paraprofessionals who provide information to parents making school choice decisions.

The enrollment rules at Alum Rock are changing. For attendance during the 1973-74 year, every family that made its selection by May 25, 1973, was guaranteed its first choice of mini-schools. Families were not, however, guaranteed their first choice of physical location; if a particular mini-school was demanded by more students than the mini-school could accommodate in its present facilities, then the mini-school's program would be expanded by using portables or satellite locations in other school buildings with extra space as a result of either decreased demand or the general decline in elementary school enrollment.<sup>150</sup> There have been reports that undersubscribed schools did not comfortably accommodate the satellites of popular schools in their buildings. For 1973-74, a "squatters' rights" rule prevailed so that students who attended a school building in the prior year (and their younger siblings) would be given preference over other students if they wanted to remain in that building. Children living more than walking distance from their voucher schools are provided transportation financed out of the central district budget rather than the budgets of the individual schools.

For the school year 1974-75, the first choice guarantee, the satellite location, and the squatters' rights rules have been abolished. Instead, at the building level a first come-first served rule is being used, and families began to sign up in the spring of 1974. A child may choose to attend any mini-school within the host school building until that building's capacity is filled. Hence, within the building, spaces will be allocated to those mini-schools that building occupants prefer. This shift seems to increase the possibility of greater competition within schools but less competition among schools; the impact on family choice will probably be mixed. Some families that might have obtained their first choice in the past by demanding very popular mini-schools before the deadline will lose out; families that apply during the summer, on the other hand, will probably be able to gain access to mini-schools of their first choice. Perhaps the

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<sup>150</sup> Like many school districts around the country, Alum Rock is now experiencing an enrollment decline as a result of falling birth rates. However, transfers of children from non-voucher to voucher schools thus far seem to have prevented the voucher schools from having as much "excess capacity" as had been anticipated.

first come-first served rule will turn out to be roughly equivalent to the squatters' rights rule with a lottery for remaining places.

Thus far, when underdemanded programs find themselves with too many teachers, those excess teachers are given priority access to available positions in high-demand programs, provided that they are acceptable to the receiving program. Hence, students who seek to move away from unpopular teachers might find these teachers trailing along behind them to their new school or program. There has been too little experience yet to tell whether this may become a real problem. The presumption underlying this rule is that existing certificated teaching personnel will be able to adapt to what is demanded by families and students. Perhaps this presumption is unwarranted. The teacher-movement rule, however, does not presume that all teachers will be placed in other schools when demand for their mini-school declines. Indeed, if a teacher cannot be placed in another mini-school or in an Alum Rock school not in the voucher program or in the central office of the district, then the National Institute of Education (NIE) will pay his salary for at least a year. So far, all teachers have been placed somewhere in the district.

There are no formal rules for determining which teachers are to be selected to leave an underdemanded mini-school, although it would not be surprising if this risk falls most heavily on those with least seniority. The informal process of reallocating teachers first seeks volunteers and then turns to decisions either by teachers as a group or by the building principal. The families that continue to support the mini-school appear to be excluded from this decision process. The criteria which govern whether a teacher who is freed by an underdemanded school will be taken on by a mini-school with a vacant teacher position are also unclear. Schools with vacancies can voluntarily hire individual available teachers. As a practical matter, school principals may find themselves taking on some teachers that neither they nor any mini-school within their building wants. Already, there have been a number of teacher shifts under the voucher plan, including some moves from voucher schools to non-voucher schools in the district.<sup>151</sup>

In the first year, less than 5 per cent of the 3,900 participating children were enrolled in schools other than those to which they would have been assigned had there been no voucher plan. In the second year, however, about 15 per cent of the students chose schools other than the ones to which they would have otherwise been assigned. Interestingly, in the second year there was more movement away from neighborhood schools by those who had just entered the program than by those who had been in participating schools during the first year. Perhaps this was because some mini-schools had already established strong reputations and could attract new recruits. More than 60 per cent of families each year chose mini-schools which label themselves as nontraditional.

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<sup>151</sup> Since these teachers are probably least pleased with the operation of the voucher plan and report their feelings to colleagues, it is not surprising that district-wide teacher opinion about the plan seems markedly more favorable within the voucher schools. Also, because the schools in the plan volunteered, their teachers were probably substantially more favorable to the plan at the outset. Preliminary analysis also suggests that non-voucher school teachers have higher salaries, suggesting perhaps that innovation is favored more by younger faculty.

Also, substantial numbers of families with more than one child (reportedly about 40 per cent in 1972-73—although this number may be suspect) placed their children in two or more mini-schools. These figures suggest that the opportunity to choose has appealed to families. It is unclear whether most of the change is prompted by a deep dissatisfaction with traditional education or by curiosity about innovation. Surveys indicate that families usually give the latter reason for the change.

Thus far, family choices have not fostered racial isolation, either among school buildings or among mini-schools, with the possible exception of those programs that are designed to appeal to specific minority groups, such as bilingual-bicultural programs. On the other hand, neither has the plan significantly increased racial balance. While the schools participating in the first year were largely racially balanced to start with, this was not as true of the schools added in the second year.

To date the mini-schools are essentially teacher-initiated, although there was some surveying of family opinion at the outset. However, those teachers who are the leaders in most mini-schools are probably becoming better at market research and hence more attentive to the interests of their constituent families. Each school building is required to have a parent advisory committee; each separate mini-school has voluntarily established its own parent advisory committee. More time will be needed for the roles of these committees to evolve. The role played by school principals in initiating mini-schools—such as having a veto—is somewhat ambiguous. Clearly the principal must be concerned with the allocation of space within his building and, at least in the past two years, about losing some of his building space to more popular programs from other schools. A working rule of thumb, at least at the elementary school level, has developed to the effect that mini-schools are allocated one classroom for every 30 students they attract. No mini-school has yet folded, even though some have suffered a drop in enrollment between the first and second year.

The Alum Rock district's educational program continues to be subject to all of the provisions of the California Education Code relating to curriculum, and it is unclear whether this has inhibited program variety. A request to provide relief from statutory class size limits was rejected by the State Superintendent of Public Instruction.

The allocation of voucher funds in Alum Rock is different from that envisioned in most voucher plans previously described. In the first place, all mini-schools are required to use approximately \$300 per pupil of their voucher to buy services from the central district and to support district-wide operations. There is some flexibility with respect to the centrally provided services relating to nursing and psychological counseling—a school may reject them and use the money for something else or accept and pay for them—but these account for a rather small portion of the central services allocation. More importantly, a mini-school is charged for the teachers it employs at the average teacher salary cost within the district rather than at the actual cost of the specific person employed. Hence there is no way for a mini-school to substitute lower-salary teachers for higher-salary ones, even if it believed that this would be a good way to allocate its money. And, although schools have begun to be allowed to

substitute non-teacher resources for teachers, class size restrictions put a tight ceiling on the degree of substitution schools can introduce. Hence, since the normal budget of a school, after deducting central services and teacher costs, is really rather small, in reality there is little budget flexibility at the mini-school level except for funds provided by NIE.

As part of the experiment, NIE has funded a "compensatory voucher" of more than \$200 per pupil (about \$275 in 1973-74) which is provided to a mini-school for each of its enrollees who is eligible for a free lunch under the federal lunch program. Since more than half of Alum Rock's pupils are eligible, much of the innovations introduced will be financed by these additional funds. While the Center for the Study of Public Policy proposal to OEO contemplated that compensatory vouchers would be provided for disadvantaged children, it seems highly unlikely that the federal government would underwrite the costs of such vouchers on a large-scale, long-term basis unless Title I funds are converted for use in voucher programs as "compensating vouchers." Without state aid or federal aid, a compensatory vouchers policy would require a reallocation of present district funds. It is extremely doubtful that Alum Rock would have agreed to participate in the voucher program had it been required to produce the compensatory vouchers from its own funds, especially since Alum Rock is a property-poor district which spends a modest amount per pupil. In sum, it is unlikely that districts like Alum Rock, in the absence of additional funds, will adopt the compensatory voucher approach.

## 2. *Private Schools and S.B. 600*

For the first year of the voucher program, the Alum Rock school district took the position that participation of private schools was not legally permissible. The district's concerns were that it did not have statutory authority to contract with a private school to provide education pursuant to the voucher program rules, and that providing voucher funds to private schools was prohibited by the California constitution. The district now believes that these obstacles have been eliminated by Senate Bill 600 which was enacted in the late summer of 1973 and took effect in January, 1974.<sup>152</sup> However, S.B. 600 limits the manner in which private schools can participate and is plagued by difficult questions of statutory interpretation.

There appears to be wide agreement that California's Education Code is restrictive: local school district authorities do not have the power to do anything that is not explicitly or implicitly delegated to them by the Education Code. In November, 1972, California voters passed Proposition 5, now part of article IX, section 14, of the state constitution, which provides that the legislature may enact provisions reversing the presumption.<sup>153</sup> Following such legislative action, school districts would be permitted to carry out any

<sup>152</sup> Demonstration Scholarship Act of 1973, ch. 1159, [1973] Cal. Stats., CAL. EDUC. CODE §§ 31175-31198.2 (West Supp. 1974).

<sup>153</sup> CAL. CONST. art. IX, § 14. This section provides in part: "The Legislature may authorize the governing boards of all school districts to initiate and carry on any programs, activities, or to otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established."

educational activity unless it were expressly prohibited by the Education Code. There have been some serious questions raised as to whether, in those areas in which the Code is quite specific, prohibitions will be implied through the notion of preemption, but they have not yet been resolved because no legislation implementing Proposition 5 has passed.<sup>154</sup> Hence, most districts would be reluctant to undertake any unusual educational activity unless they were confident that their power to do so was already implied in the Code.<sup>155</sup>

A further problem is presented in section 8 of article IX of the California constitution, which provides, *inter alia*, that "[n]o public money shall ever be appropriated for the support of . . . any school not under the exclusive control of the officers of the public schools. . . ."<sup>156</sup> While the Alum Rock feasibility study was in progress, the forerunner of S.B. 600, then A.B. 150, was introduced in the California legislature. A.B. 150 would have enabled districts to participate in voucher plans of the type now going on in Alum Rock and would have permitted such districts to include private schools in the plan. But in addition to political hurdles, a legislative counsel opinion cast serious doubt on the constitutionality of A.B. 150 in the absence of clear provisions that participating private schools would be "exclusively controlled" by public officials.<sup>157</sup> This opinion is not easy to reconcile with existing state programs providing vouchers to handicapped children and scholarships to high school graduates to be used at private colleges and universities which clearly do not meet the "exclusive control" test.<sup>158</sup> Nevertheless, when A.B. 150 was reintroduced in 1973 as S.B. 600, changes were made in order to respond to the earlier legislative counsel opinion. S.B. 600 simply stipulates that all participating schools must be under the "exclusive control" of public school officials, and then it defines the powers a school district must have over participating private schools.

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<sup>154</sup> For example, A.B. 27, which would have implemented Proposition 5, failed to pass in 1973.

<sup>155</sup> Since school districts already acquire by contract educational services from so-called "educational technology corporations" (these corporations supply personnel as well as materials) and the services of experts of one sort or another (including accountants and management consultants), it might be argued that sufficient precedent exists for the acquisition of an entire mini-school program by contract. A major difficulty with this analysis, however, is that pursuant to section 13251, school districts are required to employ certificated persons for positions requiring certification (primarily teachers), and pursuant to section 13581, school districts are required to employ classified and nonclassified personnel for other positions. These two sections of the Code suggest that the personnel carrying out the education function in the school district are to be employees of the district rather than employees of a contractor. Indeed, this was precisely the opinion of the California District Court of Appeals in *California School Employees Ass'n v. Willits Unified School Dist.*, 243 Cal. App. 2d 776, 52 Cal. Rptr. 765 (1966), which held that a school district could not engage janitorial personnel by contract, since section 13581 contemplated that such positions would be filled by employees. While that decision could also be used to attack the hiring of firms which provide educational specialists, perhaps the latter can be justified under the district's power pursuant to section 1971(a) to carry on "research" since specialist firms typically provide either peripheral services, training services, or experimental programs which do not constitute the core of the school activity.

<sup>156</sup> In addition, section 24 of article XIII of the California constitution prohibits the use of public funds in aid of schools "controlled by any religious creed, church, or sectarian denomination. . . ."

<sup>157</sup> Letter to Hon. Leo J. Ryan, Educational Voucher Project—#9965, May 6, 1970.

<sup>158</sup> The special education vouchers are authorized by section 6871 and section 6770 of the Education Code (although only the former is used in practice), and scholarships for college study are authorized by sections 31201-31251. Legislative counsel distinguished these programs as limited in contrast to the voucher plan which would be available to any student (in the participating area). The opinion also noted that the constitutionality of the other programs had not been tested.



Legislative counsel this time concurred as to the bill's constitutionality on this point, at least if the powers given to public officials with respect to participating private schools were actually exercised.<sup>159</sup> These powers include:

- (1) The power to promulgate general rules and regulations regarding to [sic] use of demonstration scholarships [vouchers].
- (2) The power to establish the amount of the scholarship.
- (3) The power to prescribe rules and regulations which are binding upon participating schools.
- (4) The power to establish standards for teachers, instructors, and textbooks.
- (5) The power to review and approve the suspension or expulsion of a pupil of a participating school.
- (6) The power to make any appropriate use of participating school facilities, equipment, and supplies.<sup>160</sup>

S.B. 600, as passed, provides that four districts may participate in voucher experiments. This does not suggest that Alum Rock was acting illegally prior to the passage of S.B. 600, nor that Alum Rock's present plan may not be replicated by more than four California districts, but rather that the extra advantages of the law are to be available in only four experimental settings. These advantages include allowing private schools to participate<sup>161</sup> and allowing the Superintendent of Public Instruction to waive nearly every provision of the Education Code.<sup>162</sup> In order to qualify as a participating district under S.B. 600, teachers must play significant roles in the formation and operation of the public sector voucher schools.<sup>163</sup> In addition, all provisions of the experiment, including the participation of private schools, are subject to discussion (read "collective bargaining") with public school teachers' associations.<sup>164</sup> These benefits and safeguards for public school teachers probably explain the support the bill received from the California Teachers Association.

In general, the bill parallels the Alum Rock plan; private schools, if they participate, must accept students under the same rules as public schools<sup>165</sup> and may not charge tuition greater than the amount of the

<sup>159</sup> Letter to Hon. John L. Harmer, Demonstration Scholarships (S.B. 600—# 11788), Aug. 23, 1973.

<sup>160</sup> CAL. EDUC. CODE § 31196(c) (West Supp. 1974).

<sup>161</sup> S.B. 600, art. 4, CAL. EDUC. CODE §§ 31194, 31196 (West Supp. 1974).

<sup>162</sup> CAL. EDUC. CODE §§ 31186, 31187 (West Supp. 1974). The Superintendent may not waive provisions of S.B. 600 itself, so that legislative conditions on the operation of the voucher plan must be obeyed.

<sup>163</sup> CAL. EDUC. CODE § 31185.1 (West Supp. 1974).

<sup>164</sup> CAL. EDUC. CODE § 31181.5 (West Supp. 1974).

<sup>165</sup> CAL. EDUC. CODE § 31185(b) (West Supp. 1974). Actually, S.B. 600 provides for admissions rules which may be seen to be at odds with those which Alum Rock has used to date, since it contemplates that at least fifty per cent of a school's capacity will be filled by a lottery if there is excess demand for those positions. (This is the rule advanced in the original CSPP proposal.) The law does not deal, however, with the question of *when* determination as to whether there are excess applicants is to be made. Given the experience in Alum Rock, it is readily apparent that several interpretations are possible. Hence it is unclear whether Alum Rock's enrollment rules, old or new, comply. It should be noted further that section 31185(b) specifically provides that schools may not discriminate against students or teachers on the basis of "race, religion, color, national origin, economic status, political affiliation, or sex"; that "students from disadvantaged racial or bilingual minority groups be admitted in proportion as such students make application"; and that schools must take "an affirmative position to secure a racially, ethnically, and socioeconomically integrated

voucher.<sup>166</sup> Unfortunately, it is unclear whether under S.B. 600 participating private schools remain "private" or, through "exclusive control," actually become "public" schools. This is an important distinction in at least two respects. For example, the bill provides that participating private schools are to be subject to all of the provisions of "this code" (meaning the California Education Code).<sup>167</sup> Does this mean that the provision is applicable to private or to public schools? It is difficult to justify the inclusion of this language if it refers to private school provisions as they already applied. On the other hand, it seems unlikely that the drafters would want to force all private schools either to have certificated and classified positions for their employees or to fill jobs with properly credentialed persons as do public schools. Although under the bill the Superintendent of Public Instruction can waive code provisions, the interpretation of this issue will determine which provisions must be taken up with him.

On the other hand, if the participating private schools are still seen as private schools, the district may forfeit state aid funds with respect to pupils who attend them. This would require that the vouchers of private school attendees be funded solely from local property taxes and federal funds. Such a ruling would create a considerable disincentive to include private schools in the plan.

The reasons for the fear of funding cut-offs are dual: section 6 of article IX of the constitution provides that the entire state school fund shall be appropriated for the support of the public schools, and section 11251 of the Code provides that a district's average daily attendance (ADA), which determines how much state aid it receives, is based upon the number of its pupils who are under the immediate supervision and control of certificated employees of the district. It may be argued that this statutory provision was implicitly modified by S.B. 600, and presumably the Superintendent of Public Instruction could waive section 11251. But the constitutional roadblock is not so easily escaped. Again, there is a precedent since vouchers for handicapped children are allocated in the face of the same provision and these children still generate state school aid funds for their local district.<sup>168</sup> If districts proceed under the S.B. 600 program and include private schools, they will do so notwithstanding the constitutional provision on the assumption that the Superintendent of Public Instruction will construe the provision as not restrictive. Clearly, the drafters of S.B. 600 hoped to encourage voucher programs that would include private schools.

An interesting aspect of the Alum Rock experience thus far is the lack of local interest in including private school options. If nothing else, this has meant a lack of pressure on the district to cut through the adminis-

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student body which shall, to the greatest possible extent, reflect the racial, ethnic, and socioeconomic composition" of the students participating in the voucher program. It might be argued that some schools in Alum Rock are violating the provisos as to "proportionality" and "affirmative action" (for example, those schools appealing to ethnic minorities).

<sup>166</sup> CAL. EDUC. CODE § 31185(c) (West Supp. 1974).

<sup>167</sup> CAL. EDUC. CODE § 31194 (West Supp. 1974).

<sup>168</sup> CAL. EDUC. CODE § 6873 (West 1969).

trative, legal, and other barriers to their inclusion. Putting aside religious schools, the Alum Rock mini-schools may be providing most of the possible options in terms of personnel and programs that Alum Rock families desire.<sup>169</sup>

### B. Other Education Voucher Plans

In addition to the Alum Rock experiment, federally sponsored voucher experiments may be in operation by September, 1974, in the state of New Hampshire and in East Hartford, Connecticut.

#### 1. *New Hampshire*<sup>170</sup>

The New Hampshire proposal would include private schools on terms consistent with the Friedman voucher idea. Private schools would be able to charge tuition in excess of the voucher amount. While they can admit both voucher and non-voucher students, the tuition charge must be the same for all students. Private schools would also control their own admissions, so long as they gave assurances that they would comply with Title VI of the Civil Rights Act of 1964,<sup>171</sup> which prohibits discrimination on the basis of race, color, or national origin.

Nonsectarian private schools would be regulated and could participate if they met the standards now required of private schools. Furthermore, nonsectarian private schools could only join the plan in the second year of operation, so that at the outset the New Hampshire plan would be

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<sup>169</sup> This conclusion may not be wholly correct in view of the difficulties faced by the one private school in Alum Rock that has sought inclusion in the voucher program. Greater Resources Organized With Kids, Inc. (variously called GRO With Kids, GROW Kids, and GRO) has presented a plan to the district which offers an alternative educational experience for fourth through eighth graders, relying heavily on (1) community physical resources (students would spend much time outside the school building learning about the community and using public facilities), (2) community human resources (artisans, professionals, and other persons with specific skills, who are not traditionally-trained teachers, would provide substantial but part time instruction), and (3) student initiative (students would have a substantial voice in the governance of the school, the choice of their learning activities, and school budget deliberations). *See* GRO Proposal to Alum Rock Union School District, June 1973 (on file with the author). In short, GRO proposed a combination of free school techniques that have been written about or actually introduced in various places throughout the country. Like the district's mini-schools, GRO is teacher-initiated (although not by Alum Rock teachers) rather than family-initiated or community organization-initiated.

Although the Alum Rock Board of Education made a series of planning grants to GRO and finally approved entering into a contract with GRO which would bring its school into the district's voucher plan, the contract remains unsigned as of this writing, so it is unclear whether the GRO school will be part of the district's offering in the fall of 1974. During the year spent negotiating with the Alum Rock district, GRO has had great difficulty maintaining support among the district families that would provide it with a core of students. These students are naturally impatient and concerned about their status at their present schools. This experience suggests that unless some clear and quick procedures are developed for including private schools, any school such as GRO which does not have an ongoing independent financial base to carry it through a prolonged negotiation period will find it terribly difficult to get underway. And, because most community-initiated schools would be newly organized, they would probably lack outside financial support.

<sup>170</sup> *See* New Hampshire Educational Voucher Project Feasibility Study, approved by State Board of Education, Aug. 14, 1973, and draft of revised version (on file with the author), obtained from Mr. John Menge, Dartmouth College, member of the Economic and Budget Education Voucher Sub-Committee established by the New Hampshire Board of Education.

<sup>171</sup> 42 U.S.C. § 2000d (1970).

limited to public schools. Private sectarian schools would not be permitted to participate in the New Hampshire plan unless their exclusion is determined to be unconstitutional, presumably as a violation of the equal protection or free exercise clauses of the fourteenth amendment.

Only selected public school districts in New Hampshire would participate in the plan. However, the vouchers would be valid across district lines, and redeemable in schools in both other participating and non-participating districts. However, out-of-district receiving public schools would have discretion whether or not to accept applicants. Moreover, if the tuition in the receiving district (the charge made for nonresident students) is greater than a student's voucher, the family must make up the additional payment; hence, unless receiving districts award scholarships, this may present a serious roadblock to poor families.

### 2. *East Hartford, Connecticut*<sup>172</sup>

In contrast, the East Hartford proposal is modeled after the recommendations of the Center for the Study of Public Policy.<sup>173</sup> Its primary orientation is toward opening up all of the East Hartford public schools to the families of the district. Places in schools which were overdemanded would be distributed by lottery. There would be "squatters' rights" for those families whose children wished to remain in their pre-voucher plan neighborhood schools.

The East Hartford proposal contemplates that steps would be taken to include private schools pursuant to Connecticut's Public Act No. 122;<sup>174</sup> this statute, based on a model enabling act prepared by the Center for the Study of Public Policy, is similar to California's S.B. 600. However, unlike S.B. 600, aside from prohibiting private schools from discriminating on the basis of race, national origin, color, or economic status, Public Act No. 122 does not dictate private school admission rules, nor does it call for "exclusive control" by public authorities. It is not yet known to what extent the actual plan would restrict private schools, which are prohibited from charging tuition in excess of the voucher amount.

### 3. *Handicapped Children*

Many states already have "voucher" plans for certain handicapped children. California's program is not atypical. If no suitable public education program is available in the district, the family of a handicapped child may be given a voucher worth up to the amount of money that would

<sup>172</sup> See Extending East Hartford Parents' Choice of Schools (on file with the author). This proposal resulted in an NIE feasibility study grant to East Hartford. The proposal reports tentative voucher rules adopted and tabled by the East Hartford Board of Education on December 13, 1973.

<sup>173</sup> See note 18 *supra*.

<sup>174</sup> The Connecticut law is designed to permit religious schools to participate, but is drafted in a manner which would permit that provision to be severed, if found unconstitutional, leaving the remainder of the bill intact. East Hartford has some Catholic schools (and some former Catholic schools which have now closed), no non-religious private schools (at least with substantial enrollment), and its population is nearly all white.

otherwise have been spent on the child by the district. The voucher is then used to pay tuition at a private school chosen by the family.<sup>175</sup> Access to the voucher is by no means a matter of right and, absent litigation, if the child's district or another reasonably accessible district has a program which purports to deal with the child's special needs, the child's district can, if it wishes, successfully resist having to provide the voucher.<sup>176</sup>

Since the voucher a child receives is based on the amount his district spends on each child with his particular handicap, voucher amounts vary from district to district. This is different from the New York special education voucher plan, for example, where a statewide amount is determined—up to \$2,000 per child.<sup>177</sup> Tuition may be charged in excess of the voucher in both states. In California, private schools which accept special education vouchers must meet certain standards not required of schools that do not accept vouchers, but these requirements do not appear to restrict unduly the school's autonomy.<sup>178</sup>

Unfortunately, little is known about how the special education voucher program actually works. The program is not large; in January, 1974, approximately 2,000 vouchers had been issued for the 1973-74 year in the entire state of California,<sup>179</sup> compared with perhaps 112,000 children enrolled in public school special education programs.<sup>180</sup> Of course many families resort to private schools without the benefit of vouchers. It has been speculated that private schools engage in price discrimination; parents have been advised that when tuition is being discussed, they should not reveal to the private school that they have a voucher. For children with serious or multiple handicaps there simply may be not adequate private schools purchasable for the amount of the voucher. Moreover, little is known about the racial or socioeconomic characteristics of the participating private schools. In any event, despite the small scale and special nature of the schooling involved, a study of these special education voucher plans in a number of states would be worthwhile.

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<sup>175</sup> CAL. EDUC. CODE § 6871 (West 1969).

<sup>176</sup> See CAL. EDUC. CODE § 6871.5 (West 1969).

<sup>177</sup> N.Y. EDUC. LAW § 4407 (McKinney 1969).

<sup>178</sup> See CAL. EDUC. CODE § 6874.5 (West 1969); 5 Cal. Adm. Code 3122-3123.

<sup>179</sup> See letter from Jacque T. Ross, Chief, Bureau of School Apportionments and Reports, to County Superintendents of Schools and County Auditors, Jan. 22, 1974 (on file with the author).

<sup>180</sup> The 112,000 is comprised of about 12,000 trainable mentally retarded children, about 34,000 educationally mentally retarded children, about 65,000 educationally handicapped children, and about 1,000 multiple-handicapped children. These handicaps are the sort which are covered by the voucher plan. There are also a great number of children in other public school special education programs: about 6,000 deaf or severely hard-of-hearing, about 3,000 blind or partially sighted, about 10,000 with orthopedic problems, about 2,000 aphasic, about 3,000 pregnant girls, about 2,000 very low functioning in development centers, about 45,000 in remedial physical education, about 115,000 in speech therapy, and about 150,000 in programs for the mentally gifted. These are 1972-73 figures provided by Dave Dietrich of the California Department of Education (Statistics) to Ellen G. Widess of the Childhood and Government Project.