

## Using Private Schools to Promote Public Values

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Can we use private schools to promote public values? Advocates of education voucher plans, in which states provide families with scholarships to pay for the education of their elementary and secondary school children in private schools, believe we can. Public funding of private school “choice,” according to its supporters, is not merely the spending of taxes to subsidize private objectives. Rather, it serves important public purposes described here.

Yet, as I will show, voucher proponents emphasize varying public values, and differ over the appropriate details needed to implement any voucher scheme. For example, some people, including me, want to deploy vouchers primarily to improve the educational opportunities of those now worst served by our public schools—usually children from poor and minority families. Other supporters of private school vouchers have different goals, as described shortly, although they claim to want to help these children, too.

At the moment, “choice in education” for many means choice only among public schools. But while voucher supporters usually favor public school choice as part of the total package, and envision improved public education as one of the most important goals of a voucher plan, the inclusion of state-funded private school choice remains at the heart of their proposal.

Part I of this Article explores the case for choice, while Part II considers its alleged risks. Part III highlights the recent explosion of interest in public school choice, and Part IV makes the case for including private schools in a choice plan. Part V discusses limited or tailored choice plans that aim vouchers at certain categories of educationally needy children, in particular recent fascinating events in Milwaukee, Minneapolis, and Kansas City. Finally, Part VI focuses on the appropriate features an across-the-board choice plan would include to maximize the benefit to poor families. The

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universal voucher-like plan recently put to Oregon voters sets the context for that section.

### I. THE CASE FOR CHOICE

Proponents of educational choice rely upon several different arguments. I divide them here into two groups. The first group sees the goal as greater efficiency—more educational bang for the buck. The other group claims that choice will lead to social gains, but not necessarily as measured by conventional educational objectives. As the arguments and counter-arguments unfold, I will explain not only why the broad banner of “choice” makes for strange bedfellows, but also why friends of choice are sometimes sharply at odds with each other over the details needed to implement a voucher plan.

#### A. Efficiency

The conventional economic argument rests on ordinary assumptions about the market. In brief, choice means competition. Competition will help increase efforts by employees, more efficiently deploy resources, and encourage greater innovation, all of which should usually lead to sought-after outcomes such as higher test scores and fewer dropouts. This vision sharply contrasts with the traditional, quasi-monopolistic practice in American public education in which children are involuntarily assigned to their neighborhood school. The “efficiency” argument made by most supporters of choice, most prominently revived by economist Milton Friedman,<sup>1</sup> can be traced back to Adam Smith.<sup>2</sup> It appeals especially to the business community, which is ideologically committed to the virtues of competition. Most backers of choice envision voucher-promoted competition improving public schools, especially if it simultaneously frees them from certain existing regulations concerning hiring, curriculum, and budget, thereby enabling them to compete effectively. Only a few choice adherents favor the sale of public schools to the private sector, making education a publicly subsidized, but privately provided service.

A second string to the economist’s bow is the view that governmental provision, and especially monopolistic governmental

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<sup>1</sup> See Milton Friedman, *Capitalism and Freedom* (U of Chicago Press, 1962). For a discussion of the public educational system, see *id.* at 85-98.

<sup>2</sup> John E. Coons and Stephen D. Sugarman, *Education by Choice* 18 (U of California Press, 1978).

provision, is often financially wasteful. This argument emphasizes the ability of the private sector to deliver at least as good a product as the government for less money. Most private elementary and secondary schools now spend considerably fewer dollars per pupil than do public schools.<sup>3</sup> While private schools spend much less money on administration than do their public school counterparts, the main reason for lower costs in religious private schools—which dominate the private sector—is the practice of having large classes and low teacher salaries. Of course, the private school pattern reflects the need to limit the financial burden imposed on tuition-paying families.<sup>4</sup> Hence, it is unclear whether these schools would maintain low costs for long in a system in which their customers obtain educational vouchers of significant value. With their users able to “pay” more, perhaps they would emulate public school class size and salary practices. After all, private schools that cater to upper-middle-class and wealthy families are not notably cheaper than public schools.

Because Friedman suggests that the state provide a strictly limited voucher (for example, 50 percent of current public school spending levels),<sup>5</sup> he counts on families partially paying for their children’s education out of their own wallets. Therefore, his system of subsidized private choice could save a considerable amount of public money. Adherents of the taxpayers’ revolt movement seize on this aspect to support educational choice. Other advocates of choice, however, including me, favor valuing vouchers at nearly the full amount now spent on children by the public school system. While we may talk of modest financial savings over time, lower taxes is not one of our goals. Indeed, one may argue that the choice movement might actually link current users of both public and private education in support of greater public spending on elementary and secondary education, a coalition that is undermined in today’s setting where private school patrons must pay their own way.

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<sup>3</sup> For data showing the low level of private school tuition costs, especially in church-related schools, see James Catterall, *Private School Participation and Public Policy*, in Thomas James and Henry Levin, eds, *1 Comparing Public and Private Schools* 61 table 9 (1988).

<sup>4</sup> Although many private school-using families have modest incomes, overall, private school users are wealthier than public school users. *Id.* at 59-60 tables 7-8.

<sup>5</sup> Friedman, *Capitalism and Freedom* at 94-95. For analysis in a similar vein, see the writings of E.G. West, including E.G. West, *Non-Public School Aid* (Lexington Books, 1976); E.G. West, *The Public Monopoly and the Seeds of Self-Destruction*, in Michael Manley-Casimir, ed, *Family Choice in Schooling* 185 (Lexington Books, 1982).

Recently, John Chubb and Terry Moe advanced a different productivity-based argument for choice that has received a great deal of attention.<sup>6</sup> Drawing on their studies of what spawns effective and ineffective schools, Chubb and Moe conclude that success depends on autonomy at the school level—where the teachers and principal (or head) together set the school's mission and pursue it as a team. This pattern, they find, distinctively occurs in private education and in some small, suburban, public school districts. So, in order to turn most American schools, especially public schools in the large urban areas, into autonomous and successful providers, reformers must free them from the democratic control mechanisms that Chubb and Moe believe intrude too much into the school's activities. Simply put, the central problem is too much top-down governing, too much power in the hands of superintendents, school boards, and more distant levels of government.

Hence, instead of excessive micro-managing and inconsistent signaling from above, Chubb and Moe believe America should adopt a strategy of consumer accountability from below. In order to make such a mechanism work, and to ensure an adequate range of choice from independent providers, they would require subsidized access to participating private schools as well as to decentralized, publicly managed schools of choice.

It is important to appreciate that the Chubb and Moe theory does not value choice for itself, but as a method for both achieving radical decentralization and avoiding the petty tyranny that could occur if, for example, pupils were simply involuntarily assigned to a school that was otherwise virtually without external regulation. Choice supporters should welcome the support that Chubb and Moe bring, especially given the imprimatur of their sponsoring organization, the Brookings Institution, a liberal Washington, D.C., think-tank. Yet one may worry about the roundabout way that Chubb and Moe bring choice into their analysis and fear that the kind of evidence upon which they rely could also be used to justify the transformation of large urban school districts into hundreds of new autonomous school districts organized at the school level, each with a community-elected, but largely hands-off, board. The city of Chicago is now trying to implement such a scheme (although the school-level boards that it has created risk becoming far too intrusive for Chubb and Moe's taste). But if Chicago pupils generally

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<sup>6</sup> John E. Chubb and Terry M. Moe, *Politics, Markets, and America's Schools* (Brookings Inst, 1990).

must attend the school run by the mini-school district in their neighborhood, they hardly exercise choice.<sup>7</sup>

James Coleman offers a sociologically grounded argument for the effectiveness of choice.<sup>8</sup> He sees a decline in family functioning that parallels the decline of home-based production, first as fathers left the farm to work elsewhere and more recently as mothers left full-time homemaking for the paid labor force. As a result, the traditional local community, in which parents know and regularly see each other and each other's children, is fast disappearing. Without such traditional controls, geographic communities cannot establish and enforce norms of behavior, and the support and supervision of children by other parents dwindles. Community can be re-created, however, by like-minded parents selecting schools with whose mission and values they identify. With community re-established, the chance that schools will be effective is greatly enhanced, according to Coleman. As proof, he relies upon the greater academic success achieved by urban Catholic schools, as compared to public schools, with low income and often single-parent children. While one may doubt whether a true community is created when inner-city non-Catholics select Catholic schools, as is often the case, it does stand to reason that, where parents voluntarily place their children in a particular school, the school can and does make greater demands on the pupils to work up to their capacity. Also, the students and their families may acquire loyalty to the school, and an accompanying greater sense of responsibility for its success.

## B. Broader Social Values

The claims so far canvassed rest on the idea that there is a reasonable consensus about what outcomes we want from education—for example, higher test scores and fewer dropouts—and that choice would be a better way to obtain it. Some proponents of choice, however, have quite a different view.

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<sup>7</sup> G. Alfred Hess criticizes Chubb and Moe and uses their evidence in just the way suggested here—to defend the Chicago decentralization experiment. Hess has admitted, however, that, as the individual Chicago school districts diversify, additional choice options should be given to families who do not wish for their children to attend their neighborhood school. Remarks of G. Alfred Hess at the University of Chicago Legal Forum Symposium, Oct 27, 1990.

<sup>8</sup> James S. Coleman, *Changes in the Family and Implications for the Common School*, 1991 U Chi Legal F 153.

An alternative objective promoted through choice, which I have expressed, is pluralism.<sup>9</sup> This position allies itself with free speech values (the "marketplace of ideas" metaphor) and emphasizes the enormous ethnic, racial, language, and religious diversity in America today. It argues that there is no consensus about the range of things young Americans should learn, or about the most effective ways of teaching those core matters that most agree should be learned. In the face of this "indeterminacy," the wiser strategy should be to let a thousand flowers bloom—a strategy made possible through subsidized choice. In this way, for example, Hispanic-American families who want to preserve their roots can select bilingual-bicultural education for their children; at the same time, Hispanic-American families who are eager to assimilate can opt for other kinds of schools. The same principle applies to urban African-American families wanting to send their children across town to racially integrated schools and those who prefer to use mostly black schools in the neighborhood.<sup>10</sup>

Viewed from the perspective of diversity, it is dangerous for all schools to adopt suddenly "open classrooms," go "back-to-basics," reject the "new math," or whatever fashion sweeps the public school world. Instead, through more decentralized decision-making mechanisms, a wide range of schools will be likely to cater to a wide range of tastes. And, of course, subsidized choice could include on its menu private schools that appeal to families seeking religious-based education for their children, something that the Establishment Clause of the First Amendment forbids to public schools.

The argument from pluralism also emphasizes the potential gains to adult society when families with dissimilar views, many of whom presently have little control over much of their lives, are empowered to make important choices for their children. Being told by the power structure how to educate your own is arguably an important source of resentment today, particularly among poor and minority groups. By contrast, entrusting the poor with the ability to decide in the same way we now allow the rich—who can move to a school district they prefer or pay for private

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<sup>9</sup> Coons & Sugarman, *Education by Choice* at 89-108 (cited in note 2).

<sup>10</sup> The question of how much multicultural education and of what sort, discussed by others in this issue, ceases to be something that is resolved by majority vote and imposed on everyone. It becomes instead a matter to be decided upon by families one by one. For a discussion of multicultural education, see Robert K. Fullinwider, *Multicultural Education*, 1991 U Chi Legal F 75.

schools—could help close some serious wounds from which our society now suffers.

Finally, those who talk about pluralism may also fear the loss of variety in American life generally, given that, outside of school, the culture to which many young people are exposed may have become increasingly more uniform through the power of television, pop music, home video rentals, and the national advertising that comes along with them.

Educational indeterminacy provides yet another argument for choice. Who should decide what type of education is best for children? Champions of choice claim that families should decide.<sup>11</sup> Only a few base their view upon a preference for parental choice as a matter of natural rights philosophy.<sup>12</sup> Rather, the analysis compares family choice with the current method of decisionmaking by computer or geography, counsellors or teachers. Assignment rules of public education are unlikely to be attentive to the needs and desires of individual children. Overwhelming workloads and conflicts of interest hamper the individualization that school personnel might provide. In addition, teachers and counsellors can rarely direct a child to another school, even if they believe that school would benefit the child. The latter problem stems from the view that "our teachers and schools are largely the same," a view perhaps necessarily embraced by systems of involuntary pupil assignment.

By contrast, families are said to know their children better, to suffer along with them when a bad choice has been made, and as a result, to be more likely to make a change once a choice has gone wrong. While families are not education experts, in choice systems the experts, especially independent experts, will probably provide advice upon which families will draw in making their choices. Families make decisions about post-secondary education in this manner, and one would be hard-pressed to find many people calling for the adoption in the U.S. of a system of involuntary pupil assignment to colleges or trade schools. Young people largely, or at least partly, make their own post-high school schooling choices. But defenders of choice in elementary and secondary education also argue that the child's input is more likely to matter when the family decides than when those inside the government decide.<sup>13</sup>

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<sup>11</sup> Coons & Sugarman, *Education by Choice* at 33-87.

<sup>12</sup> See Virgil Blum, *Freedom of Choice in Education* (Macmillan, 2d ed 1963).

<sup>13</sup> At a deeper level, choice advocates argue that, at least in American society, children as a class are better off when each child has an individual sponsor, charged with the role of

One can draw an analogy to the food needs of poor people. Some may argue that nutritional experts would be better deciders. Yet it seems clear the poor today are considerably better off having food stamps, which permit them to decide what food to buy, than they were 25 or so years ago when governments distributed commodities directly to needy individuals, because outside considerations, such as what crops farmers had over-produced, too often interfered with the goal of delivering to the recipient a mix of foods that would help maintain a healthy, palatable, and familiar diet.

## II. THE RISKS OF CHOICE

Opponents of choice see the world quite differently, finding danger where the other side sees opportunity. In my judgment, most of the criticisms more aptly address the specific safeguards a choice system should have, rather than the desirability of choice altogether.

### A. Inequality

Critics of choice can assert that rich, white, and savvy folks will use their know-how, their money, their influence, and their experience in order to exploit the system at the expense of non-rich, non-white, and less savvy folks. To those who favor choice as a way to help children of the poor, this complaint is exasperating. The present system, after all, already clearly favors those with money who can more easily buy their way into schools of choice by paying tuition or purchasing a home in a public school district of their choice. And who can be proud of the scale of public education's current failures with regard to the children of the poor, or the historical record of public school hostility toward racial minorities, handicapped children, and non-English speakers?

The force of the complaint here would be greater were the critics of choice seeking to abolish both private schools and suburban public school districts, and to assign children randomly or otherwise involuntarily to public schools throughout a metropolitan area. But that, of course, is not normally suggested (and would be unconstitutional anyway).<sup>14</sup>

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promoting that child's best interests, than if one person or a group of people must simultaneously maximize the interests of a large number of children. Perhaps the argument would change if Americans no longer lived in families and did not, in fact, put the interests of their own children ahead of those of children at large. But that day seems a long way off.

<sup>14</sup> On the rights of private schools to exist and parents to use them for the education of their children, see *Pierce v Society of Sisters*, 268 US 510 (1925); *Meyer v Nebraska*, 262



Nonetheless, the inequality concern is not wholly without force. For instance, the wealthy might outbid the poor for desired school places with personal financial supplements to the voucher, or schools could simply discriminate in admissions against children of the poor (either openly or subtly). In addition, transportation costs might create an access barrier for the poor. Further, there might be no effort made to provide helpful information to families not now accustomed to making choices about education.

Those of us who believe that the most important function of choice is to improve the opportunities for working class and impoverished families now worst served by the public schools acknowledge these concerns but reject the scenario. Awareness and acceptance of these apprehensions about inequality make it important to include in a choice plan features that will assure poor families fair access to schools of their choice.

#### B. Fraud and Waste

Friends of government monopolies can point out that consumer choice imposes costs on both providers and shoppers. For example, the overnight mail and package shipping business seems to spend more on advertising, and probably operates with greater excess capacity, than the U.S. Postal Service. Opponents of choice also often express concern that sellers will fool buyers with false and misleading claims, undesirably molding their preferences so that they make selections on the "wrong" basis or adopt the "wrong" objectives.

These problems would certainly arise to some extent in a system of educational choice, as they arise in any market system. Most people in this country, however, would not want the government to take over the grocery trade, or the provision of architectural, legal, or medical services. Instead, one must choose among inefficiencies. Moreover, a system of school choice could incorporate consumer protection measures. Anyway, if they are permitted to compete on fair terms, public schools would probably continue to attract most American families. In California's system of higher education, for example, although public campuses attract the bulk of college students, most people think it is beneficial not only for applicants to be able to choose from among many branches of the

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US 390 (1923). But compare Mark Tushnet, *Public and Private Education: Is There a Constitutional Difference*, 1991 U Chi Legal F 43, 53-54, who suggests that, in the furtherance of desegregation, it might be constitutionally possible to abolish private schools altogether.

University of California, the State University system, and the community college network, but also from among schools such as Stanford, the Claremont Colleges, and the University of Southern California. Even the proprietary schools (often providing business and technical education) play an important role. In sum, as with the inequality issue, the advocate of choice can respond to concerns about fraud and waste through regulation maximizing the ability of choice to serve public values.

At the same time, advocates of choice certainly do not support all types of regulation—such as strict regulation of who may be hired as a teacher (this goes to issues of required credentials and tenure), what courses comprise the curriculum, what behaviors are to be required of students, and, of course, what is to be the mission of the school. In other words, through overregulation one might make private schools of choice “private” in name alone, thus missing the whole point behind choice.

Indeed, choice supporters sometimes find themselves divided precisely on this issue of the limits of regulation. Some operators of fundamentalist Christian schools, for example, may be so wary of governmental control that they would actually oppose subsidized private choice, anticipating that the terms on which the government would provide such subsidies would be unacceptable to them. Those who run the prestigious private independent schools that now cater primarily to financially well-off families may also be concerned about the regulation that could accompany voucher plans, a stance they are especially well positioned to take when, under today's regime, they often have relatively little competition for their niche in the market and more applicants than they can serve. Vouchers might not only mean more competition, but especially vigorous competition if the new schools accept vouchers (and any accompanying regulation) and the existing independent schools choose not to participate. So as to placate both existing and potential providers, choice advocates therefore often propose limiting governmental intrusion into private education as part of a state's constitutional framework, thereby hoping to free those schools from the pressures of ordinary politics in which she who pays the piper often seeks to call the tune.

A different concern about the costs of choice focuses on the more than twelve percent of children nationally who already at-

tend private schools at little or no cost to the public.<sup>15</sup> Plainly, to fund immediately the education of those children would, other things being equal, require new money. This problem presents two issues: one philosophical, the other practical.

The philosophical issue concerns the benefit that taxpayers presently gain when a family sufficiently dissatisfied with free public school opts for the private sector. Some might argue that private school users effectively "pay twice" under the current regime, and therefore are entitled to vouchers or tax credits. I do not find this argument persuasive. For example, few people would feel entitled to a public subsidy of their reading material simply because they choose to purchase it at the local bookseller instead of borrowing books and magazines from their local public library.

On the other hand, explicitly to exclude from any choice plan those who otherwise meet its general criteria just because they have already opted out seems unfair. Moreover, once a choice plan is underway it would appear to be mean-spirited and ultimately pointless to require, for instance, that a child enroll in public kindergarten before she qualifies for a voucher to pay for private education for the remainder of elementary school.

Nevertheless, it might well be wise to limit choice plans, at least at the start, to those categories of pupils who most need help, such as students two grade levels behind in reading or math, if such categories are also likely to include a disproportionately greater number of public school pupils.

In any event, given state fiscal problems generally, children now in private schools present a practical problem to educational choice plans. Yet this problem can probably be managed reasonably well through phase-in devices, for example, by bringing in public school choice two or three years before private school choice, and by phasing in various grade levels over time. In these ways public funding of new pupils will not come as a sharp and immediate shock. Another tactic is to keep the amount of the voucher sufficiently below the level of public school spending so that, as there is some switching from public to private voucher schools, substantial savings are realized that help pay for the expanding number of state-funded pupils (although, as explained below, this approach may run counter to equality-promoting goals of the plan).

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<sup>15</sup> Private schools enrolled 12.3 percent of the nation's school children in 1982-83 and the proportion was then on the rise. Catterall, *Private School Participation* at 50 table 1 (cited in note 3).

Of course, if a state were sufficiently pressed financially so that its total public spending simply could not increase with the incorporation of a choice plan, it might have to restrict otherwise normal per pupil spending increases in public schools. One might defend this move on the ground that competition will make more efficient those public schools that succeed.

### C. Divisiveness

Where devotees of choice see the joys of pluralism, skeptics see the dangers of divisiveness. This concern stems largely from differing attitudes towards social trust. One side points to the success of choice in, say, the Netherlands,<sup>16</sup> while the other fears the creation of the American equivalent of Lebanon.<sup>17</sup> Typically, critics of choice allege that extremist groups, especially hate groups and fanatic-led groups, will form schools and attract pupils, and that choice will promote separate attendance along race, religion, and other such lines.

Choice plans can, and should, draw a boundary that excludes the participation of certain extremes, such as those schools that would intentionally discriminate on the basis of race. But, in the end, this issue is largely a matter of tolerance. In the 1920s a wave of nativism swept across American elementary and secondary education, as established groups feared the education that certain minority groups wished to provide to their children—including, for example, Catholics and German and Japanese speakers.<sup>18</sup> Concern about Protestant fundamentalists and Spanish speakers is, perhaps, the 1991 equivalent. Understandably, some of the same sort of trepidation remains.

Yet for public school boosters to cry out about divisiveness has a somewhat hollow ring to it given the extensive race and class separation in public education today. Moreover, today's public school curriculum itself promotes divisiveness that a system of choice might escape. For example, during the past decade or so, outspoken conservative groups, often fundamentalist Protestants, have strongly objected to certain books and topics taken up in public schools. They have sought alterations in the curriculum, or

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<sup>16</sup> Warren Brookes, *Going "Dutch" on Education?*, Washington Times G1 (Oct 29, 1990).

<sup>17</sup> See Lonnie Harp, *Ballot Initiative on "Choice" in Oregon Holds Narrow Lead as Election Nears*, Educ Week 16 (Oct 10, 1990).

<sup>18</sup> See *Pierce v Society of Sisters*, 268 US 510 (1925); *Meyer v Nebraska*, 262 US 390 (1923); *Farrington v Tokushige*, 273 US 284 (1927).

at least the exclusion of their children from specified instruction. This has led to a considerable amount of conflict and litigation.<sup>19</sup> Were subsidized choice available to the objecting families, they would probably find a school more attuned to their beliefs, circumventing many of these battles.<sup>20</sup>

#### D. Child Neglect

Critics can mount a final important objection to choice based on a perceived high level of child neglect in America and an associated belief that many parents care little about their kids. This belief reveals the fundamentally different outlook toward people held by those against choice as compared to that held by those for choice. Of course, some degree of incompetent parenting will be empowered through choice; the question is how much. Choice supporters can counter that reports of poor attendance by parents (especially by poor and minority parents) at PTA meetings and back-to-school nights reflect the powerlessness of most families under the current regime and their alienation from it, not their intentional neglect. They can claim that subsidized choice will energize many parents to take a more active role in the selection and monitoring of their children's education. Moreover, one must realize that it only takes a relatively few buyers at the margin to police the market; that is, consumer demands of a minority of users can translate into superior products for other buyers who make no such efforts. In any event, supporters of choice acknowledge that those parents actually guilty of child neglect should risk losing their right to select their children's education; however, they reject the presumption of incompetence that is widely cast by the current regime.

### III. THE GROWING SUPPORT FOR CHOICE

George Bush entered office saying he wanted to be remembered as the education president.<sup>21</sup> Based on the first two years of his Presidency, this seems quite unlikely. Nonetheless, his Administration has marshalled considerable political support for the principle of choice in education, beginning with a White House

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<sup>19</sup> Michael Rebell, *Values Inculcation and the Schools: The Need for a New Pierce Compromise*, in Neal Devins, ed, *Public Values, Private Schools* (Falmer Press, 1989). See, for example, *Mozert v Hawkins County*, 827 F2d 1058 (6th Cir 1987).

<sup>20</sup> Rebell, *Values Inculcation* at 48-53.

<sup>21</sup> See, generally, *The Education President*, *New Republic* 5 (May 9, 1988).

Workshop on "choice" held in January 1989, near the start of his term.<sup>22</sup>

The Reagan Administration also spoke frequently about choice, most notably through then U.S. Secretary of Education William Bennett, but never gave more than half-hearted support to federal policy initiatives that might genuinely promote choice. Indeed, the Reagan Administration's proposal for providing a small federal tax credit to those paying private school tuition<sup>23</sup> was rejected by many in the choice movement who believe that such a policy almost exclusively helps those who have already chosen to leave public schools, does little to promote the further exercise of choice inside or outside the public sector, and would probably provide no benefit for the poor.<sup>24</sup> The one imaginative Reagan Administration initiative on educational choice—a proposal to convert into mini-vouchers federal funds that now support institutions enrolling disadvantaged children—was introduced, essentially, by ardently conservative Senators, thus assuring its quick political death in both Democrat-controlled houses of Congress.<sup>25</sup>

Aware of this history, the Bush Administration initially emphasized that it was pushing ideas rather than legislation. Moreover, for its first 18 months, the Bush Administration emphasized choice limited to the public sector.<sup>26</sup> This means giving families the opportunity to enroll their children in out-of-neighborhood and even out-of-district public schools. Some of these schools, often called "magnet schools," do not serve any particular neighborhood, but are specially created to attract those making a choice.

<sup>22</sup> "Perhaps the Single Most Promising" Reform Idea (excerpts from speech by President-elect Bush), *Educ Week* 1 (Jan 18, 1989); William Snider, *Parley on "Choice," Final Budget Mark Transition*, *Educ Week* 24 (Jan 18, 1989).

<sup>23</sup> 38 Congressional Quarterly Almanac 489-90 (1982); 39 Congressional Quarterly Almanac 18, 395 (1983).

<sup>24</sup> For the basic argument, see John E. Coons and Stephen D. Sugarman, *Educational Tax Credits versus School Vouchers: Comment on the California Tuition Tax Credit Proposal*, in Michael E. Manley-Casimir, ed., *Family Choice in Schooling* 169 (Lexington Books, 1982). On tax credits generally, see Thomas James and Henry M. Levin, ed., *Public Dollars for Private Schools* (Temple U Press, 1983).

<sup>25</sup> See S 1876, 99th Cong, 2d Sess (Nov 18, 1985), a bill to enact the Equity and Choice Act of 1985, informally called "TEACH," introduced by Senators Hatch, Gramm, Laxalt, Goldwater, Hecht, Wallop, Denton, Quayle, East, and Helms. For earlier proposals along these lines, see Stephen D. Sugarman and John E. Coons, *Federal Scholarships for Private Elementary and Secondary Education*, in Edward M. Gaffney, Jr., ed., *Private Schools and the Public Good* 115 (U of Notre Dame Press, 1981); Stephen D. Sugarman, *Education Reform at the Margin*, *Phi Delta Kappan* 154 (Nov 1977).

<sup>26</sup> See *Choosing Better Schools* 6-8 (US Dept of Educ, Dec 1990).

At about the same time that President Bush announced his support for choice, reports appeared showing that the idea of public school choice had already caught on with many state officials.<sup>27</sup> Indeed, some pillars of the educational establishment also have endorsed public school choice, although many of the major national educational organizations remain opposed.<sup>28</sup>

Less than two years after the White House Workshop, several states have passed new legislation promoting public sector educational choice, and many other states are now considering such bills.<sup>29</sup> In fact, the public school choice plan gaining the most attention—Minnesota's—was actually adopted before Bush took office.<sup>30</sup>

Minnesota's choice program contains several elements. The most publicized is the "open enrollment" scheme, which first went into effect as a pilot program. By 1990, more than three thousand pupils participated in the program, out of a total statewide public school enrollment of more than seven hundred thousand.<sup>31</sup> Under the plan, students may enroll in the public schools of districts outside of their own where there is room. Those families taking advantage of the option praise it.<sup>32</sup> Leaders in districts losing pupils often complain about the plan, and many fear that smaller

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<sup>27</sup> See, for example, Robert Marquand, "Choice" Schools Catch on With States, *Christian Science Monitor* 7 (Jan 17, 1989).

<sup>28</sup> In April 1989, AFT President Albert Shanker cautiously supported public school choice, finding "plenty of good reasons" to support it. Albert Shanker, *Tread Carefully on School Choice*, *American Teacher* 5 (Apr 1989). See also a series of Shanker's paid advertisements in the *New York Times*: *Shouldn't Parents?* NY Times E7 (June 18, 1989); *Truth in Advertising*, NY Times E9 (May 21, 1989); *But Will Schools Improve*, NY Times E7 (Feb 12, 1989); *But It's No Education Cure-All*, NY Times E9 (Jan 22, 1989).

Contrast with Shanker's the positions of both the National Education Association, presented in *Choice: Questions and Answers* (on file with the author); and Congressman Augustus Hawkins, Chair of the House Education and Labor Committee, presented in "Educational Choice: Panacea of Cheap, Quick-Fix to a Complex Problem," press release (Oct 12, 1989) (on file with the author).

See also Donald R. Moore and Suzanne Davenport, *Cheated Again: School Choice and Students at Risk*, *School Administrator* 12 (Aug 1989).

<sup>29</sup> Recently, Colorado, Maine, Ohio, Nebraska, Iowa, Illinois, and Arkansas have been reported as having public school choice plans in place, and bills are said to be pending in up to 20 other legislatures. Stuart E. Gothold, *The Choice Approach to Education*, *LA Times* M4 (Jan 14, 1990); Marquand, *Christian Science Monitor* at 7; William Snider, "Choice" Proposals Make Headway in Statehouses in 1990, *Educ Week* 26 (Sept 5, 1990); *Choosing Better Schools* at 6-8.

<sup>30</sup> Rogers Worthington, *Students' Right to Switch Puts Schools to the Test*, *Chicago Tribune* C1 (Mar 4, 1990).

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

<sup>32</sup> Priscilla Ahlgren, *Minnesota Delights Parents with Free Choice of Schools*, *Milwaukee J 1A*, 14A (Jan 15, 1989).

districts, rural districts especially, might have to close their high schools.<sup>33</sup> But others assert that children deserve the option to attend larger high schools with wider, and often academically stronger, curricula.<sup>34</sup> Furthermore, former Minnesota Governor Rudy Perpich, the political force behind the choice movement in his state, sees evidence that districts have responded to the plan by changing and improving their programs in an effort to stem an outflow of pupils and possibly attract new ones.<sup>35</sup> Interestingly, some private schools also have lost pupils to out-of-district public schools under the program.<sup>36</sup>

Under the rules of the Minnesota plan, the state denies the open enrollment requests of white students when granting them would upset racial balance targets in their current school.<sup>37</sup> Even so, minorities remain under-represented in the scheme, perhaps because of the rather low take-up rate in Minneapolis. That district of forty thousand pupils has a disproportionate number of minorities in its schools (51 percent as compared with 9 percent statewide)<sup>38</sup> and many choice options within its boundaries.

A second part of the Minnesota choice plan is a high school graduation incentive scheme aimed at students with special problems, such as drug dependency, pregnancy, or being significantly behind grade level in one's schoolwork.<sup>39</sup> This program includes private as well as public school options.<sup>40</sup> About nine hundred children now participate in the public school alternatives, and a similar number in private schools.<sup>41</sup>

A third part of the Minnesota plan permits high school pupils to attend college courses, in some cases full time.<sup>42</sup> By 1990, between six and seven thousand pupils in the state were participating

<sup>33</sup> Worthington, *Chicago Tribune* at C1.

<sup>34</sup> *Id.*

<sup>35</sup> Ahlgren, *Milwaukee J* at 1A. Gary Putka, *Parents in Minnesota Are Getting to Send Kids Where They Like*, *Wall St J* 1 (May 13, 1988).

<sup>36</sup> Worthington, *Chicago Tribune* at C1 (cited in note 30).

<sup>37</sup> Ahlgren, *Milwaukee J* at 14A (cited in note 32); Worthington, *Chicago Tribune* at C1.

<sup>38</sup> Worthington, *Chicago Tribune* at C1.

<sup>39</sup> *Minn Stat* §§ 126.22 and 126.23 (1990).

<sup>40</sup> See text accompanying notes 78-83 for a description of the private school portion.

<sup>41</sup> A related plan is the Area Learning Centers, which are typically cooperative efforts of two or more school districts and which altogether enroll 4000 high school pupils. Lynn Olson, *Study Documents Impact of Four Minnesota Choice Plans*, *Educ Week* 19 (Jan 9, 1991). This information is also based on a telephone interview with Peggy Hunter of the Minnesota Department of Education.

<sup>42</sup> William Myers and Michael Schwartz, *State of Choice*, *Policy Review* 67 (Fall 1990).



in this program.<sup>43</sup> Under the plan, high school pupils may attend, at public expense, private colleges, some of which are religious institutions.<sup>44</sup> The program has not yet been made available to high school pupils enrolled in private (including religious) high schools who wish to attend college part time; they must transfer to a public school first.<sup>45</sup>

It is too early to tell how much of the support for public sector choice should be seen as a preemptive strike, whereby public choice advocates wrest the "choice" label from proponents of subsidized private sector choice. Conversely, some might view the current trend as an effort to wedge the foot of public choice in the door, the first step towards a longer-run change that will include private schools. Others may believe that choice limited to the public sector is actually the right solution. For example, a recent Gallup poll reports that 62 percent of the public at large, and 72 percent of nonwhites, favor public school choice.<sup>46</sup> The unpredictability of where the choice idea might lead is probably responsible for splitting the educational establishment, which has long felt threatened by, and has vigorously opposed, subsidized private sector choice.

On the other hand, the private education sector may feel threatened by the public school choice initiative.<sup>47</sup> Not only may their idea be corrupted, but also public schools may become more vigorous competitors. For example, if families can select a high school in another school district that offers the sort of curriculum they want for their children at no cost, then, as in Minnesota, some may opt for certain public schools instead of the costly private school that they would have selected were their own district's high school their only free option.

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<sup>43</sup> Putka, *Wall St J* at 1 (cited in note 35); Ahlgren, *Milwaukee J* at 1A (cited in note 30).

<sup>44</sup> According to a telephone interview with Jolene Durkin of the Minnesota Department of Education, the Minnesota Federation of Teachers has sued to invalidate this inclusion of religious colleges. The suit is still pending.

<sup>45</sup> For a general discussion of the Minnesota program, see Myers & Schwartz, *Policy Review* 67.

<sup>46</sup> *Trends in Support for Parental Choice*, *Phi Delta Kappan* 43 (Sept 1990); Carol Innerst, *Minorities Overwhelmingly Favor Public School Choice*, *Washington Times* A3 (Aug 24, 1990).

<sup>47</sup> John E. Coons, *Don't Limit "Choice" to Public Schools Only*, *LA Times* 5-5 (Jan 22, 1989); John E. Coons, *"Choice" Plans Should Include Private Option*, *Educ Week* 36 (Jan 17, 1990).

## IV. WHY CHOICE SHOULD INCLUDE THE PRIVATE SECTOR

Several arguments exist for including private schools in the range of publicly subsidized choice. First, limiting choice to public schools will shield such schools from the competitive pressures needed to force their own improvement. For example, with competition limited, individual unpopular public schools are not likely to be permitted to go bankrupt; nor are tenured teachers at such schools likely to lose their jobs. Instead, they will probably be cushioned by the inability of popular schools both to expand and to control the hiring of their new staff in an unfettered way. Moreover, in inter-district choice plans especially (and often in intra-district plans as well), local neighborhood children will be likely to have first access rights, with the result that outsider families will be largely unable to access many of the most popular schools.

Second, public schools are unlikely to offer the diversity of curriculum that many families seek. For example, "Waldorf" schools (which follow the teachings of the Austrian philosopher Rudolf Steiner) will probably not surface even though private Waldorf schools exist throughout America. Nor, of course, could public Catholic, Christian, or Hebrew day schools exist. More generally, public schools of choice in most places, like public institutions generally, will be less likely to specialize and experiment than their private counterparts, seeking to cater to the many rather than the few. While this "vanilla" or "melting pot" approach may satisfy the majority of families who would probably stick with their current public school anyway, it would also too narrowly restrict the range of new options for those who would not.

Third, in many urban areas private schools are the only practical source of racially integrated education for minority children. In such communities, residential housing patterns result in large numbers of public schools containing mostly minority children. The other public schools in the district may be integrated, but permitting the substantial in-transfer of additional minority children risks driving the white families away, thereby undermining the integrated schooling that exists. Thus, the local school district alone has few integration-enhancing options, except perhaps creating new magnet schools to attract into the district white children from private schools and the suburbs. Courts handling school integration lawsuits in this setting tend to focus on (1) local school improvement without attempting to achieve integration, and (2) voluntary, integration-promoting transfer arrangements with the nearby suburban school districts. Unfortunately, in many areas

those nearby suburbs have been unwilling to participate. Furthermore, without new money from the state or federal government, local city school districts are also unlikely to participate in voluntary transfer plans, because school board officials and public school administrators typically are loath to spend their money educating their children elsewhere. But under a plan of subsidized choice, nearby private schools might agree to participate and could possibly absorb large numbers of minorities, while remaining both integrated and not overcrowded. The Catholic schools in many communities fit this model to some extent.

Integrated education, of course, is no longer the top priority for many minority families, if it ever was. Indeed, large numbers of urban minorities have already chosen to leave the public sector for frequently unintegrated private education. Inner-city Catholic schools, located in neighborhoods that used to be white ethnic and are now mostly African-American or Hispanic, best illustrate this point. These schools provide disadvantaged children a quality education at a considerably lower cost than spent by similar, nearby public schools.<sup>46</sup> Nevertheless, many poor families who might wish to enroll their children in these schools will find even the modest tuition requirements to be too burdensome. Furthermore, since these Catholic schools usually run at a loss to the parish, the Archdiocese naturally is reluctant, absent public support, to expand these schools to serve even more families who cannot pay the full cost. Subsidized choice, however, will enable more poor and minority families to opt for such schools.

Finally, subsidized private choice would provide opportunities to start new schools to leaders and entrepreneurs from communities that alone cannot finance private education. A good example of such groups are the black Protestant clergy who often have a substantial following, but presently find it too daunting financially to start a school for their congregation.

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<sup>46</sup> For data on the costs of private Catholic schools, see James S. Coleman and Thomas Hoffer, *Public and Private High Schools: The Impact of Communities* 35 (Basic Books, 1987). For information on how Catholic schools serve disadvantaged children, see James S. Coleman, *Do Students Learn More In Private Schools Than In Public Schools?*, Madison Paper No 4 (James Madison Institute for Public Policy Studies, 1990).

## V. LIMITED CHOICE EXPERIMENTS INVOLVING THE PRIVATE SECTOR

## A. Milwaukee's Vouchers for Poor Children

The idea of providing vouchers to children in poor families has caught on in Milwaukee.<sup>49</sup> The Milwaukee private school choice plan for low-income pupils passed the Wisconsin legislature in March 1989.<sup>50</sup> Its passage depended upon the vigorous support of Representative Annette "Polly" Williams. Williams, a black Democrat, had long criticized traditional school desegregation plans that she saw as premised on the wrong idea that black children had to be bussed out of their neighborhoods to more white schools in order to succeed. She championed instead the idea that blacks had

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<sup>49</sup> On several occasions in the past I and others have proposed restricting vouchers to children in poor families. For an early example, see Theodore R. Sizer and Philip Whitten, *A Proposal for a Poor Children's Bill of Rights*, 5 *Psychology Today* 58 (1968). My most recent effort, with my Berkeley colleague Professor John Coons, was contained in a report to the California Economic Development Corporation ("CEDC"). John E. Coons and Stephen D. Sugarman, *Returning Education to Public Control Through Family Choice: A Report to the California Policy Seminar* (May 1987); and John E. Coons and Stephen D. Sugarman, *Family Choice and the Future Education of Californians: A Report to the California Economic Development Corporation* (July 1987), both on file with the author. For the CEDC's endorsement, see California Economic Development Corporation, *Vision: California 2010* 25-28 (Mar 1988). Legislation to implement this idea was prepared, but despite general support from the CEDC, there has been no political momentum behind the idea in California.

<sup>50</sup> In 1987 and 1988, Wisconsin's Republican Governor Tommy Thompson endorsed a voucher plan that would have permitted one thousand children from low-income families in Milwaukee to attend private schools of their choice, including private religious schools. This plan won the support of some black parents and educators and the black press in Milwaukee. The Milwaukee public school officials opposed it, however, and it was defeated by the Wisconsin state legislature. Mikel Holt, *Governor Unveils New Parental Choice Plan*, Milwaukee Comm J 1 (Jan 11, 1989).

Thompson tried again, unveiling a two-prong plan for giving Wisconsin families more choice in their children's education in January 1989, at the White House Workshop on "choice." One part, modelled after the Minnesota approach, would have permitted a child to attend a public school in any school district in the state, provided that both the child's home district and the district of choice had agreed to participate in the choice scheme. The second part would have allowed low-income, elementary school children in Milwaukee to be able to attend, at public expense, any public or non-sectarian private school in Milwaukee County. John W. Kole, *Thompson Says Parents Should Choose Schools*, Milwaukee J 1A (Jan 10, 1989).

The most important change in the Milwaukee component from Thompson's prior proposal was the prohibition on participation by religious schools. The Milwaukee part of the plan drew immediate criticism from the Milwaukee School Board president, its incoming superintendent, the state Superintendent of Public Education, and the Democratic Speaker of the State Assembly; the Mayor of Milwaukee, however, supported it. David E. Umhoefer, *Norquist Is Receptive to School Choice Plan*, Milwaukee J 1A (Jan 24, 1989); *Hey Loftus: Try It, You'll Like It*, Wisconsin State J 7A (Jan 16, 1989). The version that eventually passed the Wisconsin legislature was somewhat modified, as the public school open enrollment proposal failed.

to have the power and responsibility to take charge of the education of their own.<sup>51</sup>

Williams's law<sup>52</sup> restricts eligibility to one percent of Milwaukee's public school enrollment (or about one thousand pupils) for 1990-91. The family income of participating children must be no more than 175 percent of the poverty level. The law sets each child's financial support at 53 percent of the average amount spent per pupil in Milwaukee's public schools, or between \$2500 and \$3000 per pupil. Further, participating schools may not charge the families with vouchers more than the value of the voucher, and must draw a majority of their pupils from students who are not participating in the family choice program.

Participating schools may not be religious schools, and must agree to comply with federal laws prohibiting discrimination on the basis of race, color, or national origin. The schools must also accept all applicants up to the space available for voucher-carrying pupils. If applicants to participating schools exceed the spaces available, they are to be selected by lot, subject to the requirement that more than half of the participating pupils must have been enrolled in Milwaukee public schools the prior year. The Milwaukee public school system must provide appropriate transportation for pupils to the participating schools. The funding arrangement for the vouchers is designed so that Milwaukee is not financially burdened by the loss of these children to the private sector where they are to be supported at state expense.

It is important to understand Williams's plan in the context of Milwaukee desegregation efforts. The district, which had gone from over 70 percent white in 1970 to about 30 percent white to-

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<sup>51</sup> Finding the Milwaukee public schools unresponsive to her ideas, Williams pushed for the private school choice plan. Since its adoption, the focus of media attention has been on her. The legislative coalition Williams and Thompson assembled to pass the measure consisted primarily of black elected officials and Republicans, with white liberal Democrats largely in opposition. The *Wall Street Journal* quoted Williams as saying in reference to the opposition, "They say they're liberal, but whenever it comes to empowering black people, they stab us in the back . . . We want self-determination, not handouts and dependency." *Up from Mediocrity*, Wall St J A12 (Mar 29, 1990). Williams is credited with organizing two hundred black parents who attended a legislative hearing clamoring for choice, reportedly a key factor in swinging the vote her way. Williams argues that "[t]his paternalistic idea that poor people can't make choices is ridiculous. Poor people are some of the best shoppers, most skilled at stretching a dollar, you'll ever see." John H. Fund, *Champion of Choice*, Reason 38 (Oct 1990).

<sup>52</sup> Williams's bill was titled AB 601 and is well described in a memo from Dan Clancy, Fiscal Analyst, Legislative Fiscal Bureau, to Representative Polly Williams, dated Feb 21, 1990 (on file with the author). For news of its enactment, see *Assembly OKs School "Choice" Plan*, Milwaukee Sentinel (Mar 14, 1990).

day, has put in place an elaborate desegregation plan, known locally as the Chapter 220 plan. Under that plan, about five thousand Milwaukee minority children are bussed to suburban schools and about one thousand suburban white children attend magnet schools in Milwaukee. For many of the black families supporting Williams, the voucher scheme is a more desirable alternative. These families do not want their children bussed away for integration; nor do they like mostly black neighborhood public schools.<sup>63</sup>

Legislative passage of the bill alone did not ensure its implementation. State Superintendent of Public Instruction Herbert Grover went to court seeking to have it declared unconstitutional under the Wisconsin constitution.<sup>64</sup> At the same time, parents seeking to participate in the plan sued Grover, charging him with illegally trying to undermine the plan by seeking to impose unfair and unduly burdensome regulations on schools wishing to participate.<sup>65</sup> Grover won the support of the main state teachers' union (the Wisconsin Education Association) and the Milwaukee branch of the NAACP, who joined his suit as plaintiffs. At the same time, Governor Thompson and 36 legislators filed an amicus brief in support of the law.<sup>66</sup>

While the issue was tied up in court, both sides appealed for support to Lauro Cavazos, President Bush's then-Secretary of Education. Grover wrote to Cavazos complaining that the Milwaukee plan provides no public educational oversight of the private schools that would participate and that those schools are not properly held accountable for how they would spend the public money they received.<sup>67</sup> Ann Lynch, president of the National PTA, wrote to Cavazos asserting that the Milwaukee plan goes too far, and that the "ultimate losers" in a full-blown choice plan would be

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<sup>63</sup> David Nicholson, *Schools in Transition*, Washington Post A1 (Aug 9, 1990). Williams, who was chair of Jesse Jackson's presidential campaign in Wisconsin in 1984 and 1988, has strong views on the desirability of bussing and the needs of the urban poor. She has said "I'm not an integrationist . . . I don't chase after white people." She is a uniform-wearing member of the "black militia" organized by Alderman Michael McGee, who has threatened violence in five years if the city's power structure fails to address the needs of poor people. Eric Harrison, *Milwaukee School Choice Proposal Ignites Bitter Racial, Political Battles*, LA Times A4 (Aug 3, 1990). For a long profile of Williams, see Norman Parish, *The Voice of Choice, Wisconsin*, Milwaukee J Mag 4 (Aug 5, 1990).

<sup>64</sup> Neil H. Shively and Amy Rinard, *Grover Seeks Halt to Choice Program*, Milwaukee Sentinel 1 (July 17, 1990); Mikel Holt, *Parents, Schools File Suit Against Grover*, Milwaukee Comm J 1 (June 27, 1990).

<sup>65</sup> Id.

<sup>66</sup> Id.

<sup>67</sup> Letter from Herbert Grover to Lauro Cavazos, May 18, 1990 (on file with the author).

"the same children that the Milwaukee plan is devoted to help."<sup>58</sup> Thompson wrote seeking the Administration's support.<sup>59</sup> In letters back to Thompson, Grover, and Lynch, Secretary Cavazos said that he and President Bush "welcome the new Milwaukee program,"<sup>60</sup> that it was fine with them if local communities decide to "include choices among private schools as well as public schools,"<sup>61</sup> and that they "support parents who care that much about involving themselves in their children's education."<sup>62</sup> Cavazos also said that his department, in response to Thompson's request, would evaluate the Milwaukee program.

A June 27, 1990, *Wall Street Journal* editorial on the issue generated considerable antagonism in the Wisconsin press when it compared Grover with Arkansas Governor Faubus and Alabama Governor Wallace, who, according to the *Journal*, had similarly blocked the schoolhouse door to black children.<sup>63</sup> Elsewhere in the national press, William F. Buckley, Jr., opined that the Milwaukee plan is "anemic" because it is so limited and so hedged in with restrictions, but launched most of his attack on the "Establishment" for its opposition to even this modest and "unprovocative" program.<sup>64</sup> William Raspberry, one of the most well-known black syndicated columnists, wrote warmly about Williams and her Milwaukee plan, emphasizing that school desegregation efforts in large cities have not worked and that the Milwaukee experiment reflects the frustration of black parents who want quality education for their children and feel the need to look outside the public schools to get it.<sup>65</sup>

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<sup>58</sup> Letter from Ann Lynch to Lauro Cavazos, Apr 17, 1990 (on file with the author).

<sup>59</sup> Letter from Tommy Thompson to Lauro Cavazos, June 14, 1990 (on file with the author).

<sup>60</sup> Letter from Lauro Cavazos to Tommy Thompson, July 17, 1990 (on file with the author).

<sup>61</sup> Letter from Lauro Cavazos to Herbert Grover, June 28, 1990 (on file with the author).

<sup>62</sup> Letter from Lauro Cavazos to Ann Lynch, June 12, 1990 (on file with the author).

<sup>63</sup> *Blocking the Schoolhouse Door*, Wall St J A12 (June 27, 1990). For angry Wisconsin responses, see *Grover Says Paper's Editorial Made an Unfair Comparison*, Milwaukee J A8 (June 29, 1990); *Grover Standing Where He Should*, Milwaukee Sentinel 8 (July 3, 1990); *Grover Unfairly Jabbed on "Choice" Issue*, Milwaukee J A8 (July 3, 1990).

<sup>64</sup> William F. Buckley, Jr., *Pick-your-school Plan Is Doomed*, NY Daily News 45 (July 1, 1990).

<sup>65</sup> William Raspberry, *Choice in Education*, Washington Post A11 (July 16, 1990). The Milwaukee controversy over including private schools in publicly funded choice plans highlights what some see as a contradiction between the teachers' union stance and the conduct of individual public school teachers. For example, Robert Woodson—a black activist from Washington, D.C., who is the president of the National Center for Neighborhood Enterprises and a supporter of Williams' Milwaukee plan—claimed that while 43 percent of Chi-

Finally, on August 7, 1990, a local judge ruled the Milwaukee plan valid and ordered Grover to simplify the requirements he had imposed on participating schools. The dismayed Superintendent was quoted in the *New York Times* as saying "Now we've got the President of the United States nuking the public schools . . . . We will have everyone fleeing the public schools now."<sup>66</sup>

The next day the *Milwaukee Journal* reported that somewhat more than one thousand children had applied for the program, but that the program had accepted only about four hundred, because of the limited places available in the schools that decided to participate.<sup>67</sup> Parents had to have applied by July 12, and at least one private school head complained that, because of the Superintendent's litigation, the uncertainty surrounding the program had caused many parents either not to apply or to withdraw their applications.<sup>68</sup> Although some observers had feared that poor white families would use the choice option to escape from Milwaukee's desegregation plan, it appears that most of the children who applied were from minority groups.<sup>69</sup> This result was to be expected, however, because many of the schools actually participating "have predominantly black or Hispanic populations with strong roots in the low-income community."<sup>70</sup>

Two participating schools have gained the most attention. One is the Harambee Community School, a 21 year old program with about three hundred children through eighth grade. In Swahili its name means "Let's work together." It has a Catholic sister as its principal and is located in a former Catholic school, but it is not

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cago public school teachers send their own children to private schools, their union opposes providing poor families with the money to make the same choice for their children. Mikel Holt, *Poor Children Held As Economic Hostages, Nat'l Activist Declares*, Milwaukee Comm J 1 (July 4, 1990). Data from the American Enterprise Institute indicates that, although private schools generally attract about 14 percent of America's schoolchildren, between 25 and 35 percent of the children of public school teachers attend private schools. Warren T. Brookes, *Education Choice Tide Rising*, Washington Times G2 (Aug 30, 1990). Indeed, it has been said that "nearly half of the children of Milwaukee's public school teachers attend private schools, double the average for all school-age children. Few send their children to non-magnet public schools." John H. Fund, *Milwaukee's Schools Open—To Competition*, Wall St J A14 (Sept 4, 1990).

<sup>66</sup> Amy Stuart Wells, *School-Choice Program Is Upheld in Wisconsin*, NY Times B6 (Aug 8, 1990).

<sup>67</sup> Priscilla Ahlgren and Richard P. Jones, *Teachers Union to Appeal Choice Decision*, Milwaukee J B2 (Aug 8, 1990).

<sup>68</sup> Id.

<sup>69</sup> *Judge Upholds Wisconsin Parental Choice Program*, School Law News 1 (Aug 16, 1990).

<sup>70</sup> Lynn Olson, *Milwaukee's Choice Program Enlists 391 Volunteers*, Educ Week 1 (Sept 12, 1990).



now a religious school. More than 80 of its pupils attend through the choice program. The other school receiving considerable attention is the Urban Day School, now 23 years old, with about five hundred pupils enrolled. Also started by Catholic nuns as a non-religious school, Urban Day is where Williams had sent her children and is mostly black. Over five hundred children applied to Urban Day through the choice program, but only 90 could be accommodated. Two other participating schools are Bruce-Guadalupe Community School, a predominantly Hispanic school with about two hundred students, 20 of which are in the choice program, and Woodlands School, a school of about 250 pupils that is 25 percent minority with about 30 pupils participating through the choice plan.<sup>71</sup> Only one participating school serves high school students.

Superintendent Grover and his allies appealed the trial court's decision, seeking an injunction to prevent the choice law from going into effect. That effort failed,<sup>72</sup> at least for the time being, and on September 4, 1990, as reported around the nation, about four hundred Milwaukee children began attending private schools under the plan.<sup>73</sup>

The Bush Administration lent even stronger support to the Milwaukee experiment when, on September 17, President Bush met with Williams in the Oval Office and later hailed her as a "courageous leader who brought choice to Milwaukee, Wisconsin's schools."<sup>74</sup> Vice-President Quayle, the Administration spokesman in this area, stated that "Polly Williams . . . knows what it takes to give 'her kids' a chance to break out of the cycle of poverty . . . . This fall, 'her kids' are winning; they finally have a chance to get a good education."<sup>75</sup> More recently, President Bush broadened his support for "choice" to include private schools generally, including religious schools. In several speeches in the early months of

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<sup>71</sup> Id.

<sup>72</sup> Richard P. Jones, *Choice Program Gets Go-Ahead from Court*, Milwaukee J 1 (Aug 21, 1990).

<sup>73</sup> Jodie DeJonge, *State Pays Way for 390 in Wis. Private Schools*, Philadelphia Inquirer A8 (Sept 5, 1990); Kevin Johnson, *Private-school Aid Put to Test*, USA Today 3A (Sept 6, 1990); Carol Innerst, *391 Milwaukee Pupils Make "Choice"*, Washington Times A4 (Sept 5, 1990); Walter Shapiro, *Pick a School, Any School*, Time 70 (Sept 3, 1990); Fund, Wall St J at A14 (cited in note 65).

<sup>74</sup> Remarks of President Bush (on file with the author). For a discussion of how education choice has made strange bedfellows of Bush and Williams, see Ben Wildavsky, *Hero of Choice*, New Republic 14 (Oct 22, 1990).

<sup>75</sup> Remarks of Vice President Quayle at the Hudson Institute, Washington, D.C., Sept 18, 1990 (on file with the author).

1991, the President also called for federal legislative initiatives that would encourage states to promote choice in education, including a proposal (much like the one earlier backed by the Reagan Administration) that would allow disadvantaged children to carry their federal educational aid with them to the private sector.<sup>76</sup>

Some schools have bumped up against the requirement that no more than half of a school's population may be made up of children in the choice plan. The plan's drafters primarily intended this rule to ensure that private schools would not spring up simply to take advantage of new state money. Such a rule seems plausible during an experimental period, but most choice advocates also hope to stimulate the creation of new providers, including those that might appeal primarily to low-income families eligible for the plan. The Milwaukee plan would thus seem unlikely to expand very much as long as this rule remains in place. Moreover, if participating schools find they have many low-income children enrolled, only some of whom are able to win the voucher slots, this is surely a recipe for trouble over time. On the other hand, Milwaukee politicians clearly understood just which schools would plausibly qualify for the program in the first year, and that those were the schools that the promoters sought to benefit. If new "all voucher" schools could have been created, some of them might have catered to poor whites, an outcome Williams and other supporters of choice—who would not want the plan vulnerable to the attack that it was promoting white flight—would hardly desire.

Over the longer run, the Milwaukee plan is problematic because of the limited amount of money it provides to each child. Fifty-three percent of what is spent in the Milwaukee public schools may suffice for the period of the experiment, but it may not be satisfactory on a permanent basis. First, to the extent that participating private schools will want to spend sums more comparable to what the public schools spend, the limited value of the voucher will require them either to raise the difference from private or charity sources, which could prove difficult, or to restrict the number of voucher-carrying children they take to even a smaller proportion than the program now allows. The limited value of the vouchers also makes it unlikely that new schools will be created with an eye to substantial participation in the plan unless

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<sup>76</sup> Susan Chira, *Bush Presses Bill Allowing Parents to Choose Schools*, NY Times A1 (Apr 19, 1991).

they either have independent sources of income or expect to run on a financial shoestring.

Even choice supporters who are most concerned about the poor might find at least two drawbacks to the way Wisconsin limits the plan to poor families. First, many families are ineligible to participate under the plan even though they are close enough to the income cutoff that many people would think them deserving of vouchers. Moreover, the value of the voucher to some of those who do participate may make them rather better off, overall, than some excluded families. Second, assuming that a family must renew its financial eligibility each year, highly negative consequences attach to earning a modest amount more if that puts the family over the eligibility level. This "poverty trap" or "high marginal tax rate" problem is endemic to all means-tested programs. Yet, an income eligibility phase-out (where the value of the voucher declines as income increases) might be complicated to administer, especially in an experimental plan.

Problems also exist in limiting participants in the Milwaukee plan to one thousand. Assuming that students entering the plan assure themselves a space for the full period of the experiment, an unyielding overall ceiling threatens quickly to bar any significant new entry. But to have the feel of an ongoing program, surely it would help if, for several years at least, significant numbers of new children enrolling in the participating schools could join the plan. Thus, perhaps it is just as well that fewer than four hundred joined the first year.

A further problem with the overall and individual school limits is that many eligible families who want to participate in the plan may find—as did more than half of the applicants this year—that the plan cannot accommodate them. Thus, the plan does not adequately serve the needs of the poor as a whole. One easy way to expand the pool of participating schools, and hence to enlarge the number of places available, would be to include the low-tuition religious schools in Milwaukee (primarily Catholic schools) that already cater to low-income families.<sup>77</sup>

The decision to prevent participating schools from being selective in their admissions was a bold one, and the agreement of

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<sup>77</sup> In October, in a possibly portentous move, a high-ranking official from the U.S. Department of Education who visited Milwaukee in order to study the plan also visited the Holy Redeemer Christian Academy, which serves low-income children but is ineligible for the choice program because it is a religious school. Letter from Jack Klenk, U.S. Dept. of Education, Oct 5, 1990 (on file with the author).

schools to participate on that basis is encouraging. But it remains unclear how well this very strong form of consumer choice can function over the long run. Moreover, so long as the program limits eligibility to children of the poor, it is not clear just how important it is for choice schools to admit by lot where they face excess demand. Perhaps the main argument is that it helps counter claims that voucher plans will lead private schools to "cream" top pupils from the public schools.

The Wisconsin legislature clearly wanted to move cautiously at the outset. But the program might sensibly be expanded along some of the lines discussed here after a year or two of experience, even before formal, longer-run evaluations have been made. On the other hand, there may not be long term experience with the Milwaukee plan. On November 13, 1990, the Wisconsin appeals court held the choice scheme illegal under the Wisconsin constitution because the legislature enacted the program as part of the state budget bill.<sup>78</sup> Plan supporters promptly appealed the decision to the Wisconsin Supreme Court, and the issue remains unresolved as of this writing. Of course, by enacting a new statute, the Wisconsin legislature could cure the particular legal defect relied upon by the appellate court, something a spokesman for the governor predicted the legislature would be willing to do.<sup>79</sup> In the meantime, the number of students participating in the program during the first year declined to less than three hundred, some schools dropped out of the program, and, as of March 1991, it appeared that fewer than a handful of schools had sought to participate in the second year of the plan, assuming there is a second year.<sup>80</sup>

#### B. Minneapolis Private Alternative Schools for Children at Risk

In addition to the various public school choice options previously described, Minnesota runs a little-publicized program in which public schools can pay for the education of pupils by private providers. This does not fall under the state's income tax deduction benefit program that the U.S. Supreme Court approved some

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<sup>78</sup> William Celis III, *State Plan For Choice Of Schools Is Voided*, NY Times B9 (Nov 14, 1990). For a *Wall Street Journal* editorial attack on the educational establishment's litigation effort against the Milwaukee plan, see *Poor Schools*, Wall St J A16 (Nov 14, 1990).

<sup>79</sup> Rogers Worthington, *Educators Debate School Vouchers*, Chicago Tribune 1-21 (Mar 17, 1991).

<sup>80</sup> Richard P. Jones, *School Choice to Go to Supreme Court*, Milwaukee J A1 (Mar 7, 1991); Amy Beth Campbell, *Principals Not Convinced by Advocate's Argument for Choice*, Educ Daily 3 (Mar 12, 1991).

years ago.<sup>81</sup> Rather, it is a special statutory scheme of recent origin, under which school districts may contract with private schools for the education of children residing in their districts.<sup>82</sup> Few districts have, in fact, contracted in this manner. Currently, the program functions primarily in Minneapolis, where it involves nearly twenty schools and about eight hundred children.<sup>83</sup> A much smaller program operates in St. Paul.

The Minnesota private school contract plan is part of the state's high school graduation incentives scheme that, as noted earlier, aims at children variously described as "at risk" or "having been failed by the regular public schools." To be eligible, children must be either alcohol or drug dependent, two grade levels behind in achievement, one year behind in credits, pregnant or already a parent, or specially referred by a public school district. Not having had success in the ordinary track, school districts may arrange to place these students in private schools.

During the early years of the program, state law prevented religious schools from participating in the plan. In May, 1991, however, under political pressure from religious advocates, the Minnesota legislature passed a new section permitting qualifying "at risk" children age sixteen and over to attend religious schools that contract with local districts. Participation is restricted, however, to pupils who were not enrolled in a private school during the prior year, and to schools that are willing to take all applicants eligible under the program (to the extent that each school has space).<sup>84</sup> With this authorization, it appears unlikely that Minneapolis could, politically or legally, refuse to contract with qualified religious schools.

Most of the private schools participating in the program in Minneapolis are connected to a social services organization with a wider mission, and emphasize social and recreational skills—such as getting along with others and showing mutual respect—in addition to traditional education. Each of the programs tends to appeal

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<sup>81</sup> *Mueller v Allen*, 463 US 388 (1983).

<sup>82</sup> Minn Stat §§ 126.22-126.23 (1990).

<sup>83</sup> The discussion in this section is based primarily on a telephone interview with Robert Jibben, Director of Alternative Programs of the Minneapolis school district, and on supplementary telephone interviews with Peggy Hunter and Jolene Durkin of the Minnesota Department of Education. I have also relied upon unpublished descriptions of the Minneapolis program including Robert E. Jibben and James W. Long, *The Minneapolis Federation of Alternative Schools*; and Robert A. Rutter and Ricardo R. Fernandez, *The Minneapolis Federation of Alternative Schools* (both undated and on file with the author).

<sup>84</sup> Minn Stat § 122.22(3a) (1991).

to a special category of children, such as pregnant teens or boys involved with gangs. Native American and African-American groups, such as the Urban League, have initiated a few programs serving student bodies of at least 90 percent of the same racial or ethnic group as the initiating community. The largest participating school is Heart of the Earth Survival School, a Native American school with about two hundred students. The rest of the schools typically enroll about 50 to 60 pupils, with the smallest school enrolling fewer than a dozen.

In contrast to the Milwaukee plan, the schools in the Minneapolis program generally cater exclusively to the children who are funded through the program. Nearly all the schools serve mainly high school pupils, although about 75 junior high pupils are enrolled. Just last year, an amendment to the authorizing law allowed the Minneapolis public school system to contract with private elementary schools as well.<sup>65</sup> Although public school officials identified and referred many of the participating pupils, in a majority of cases either the families learn of the program and then seek placement for their children, or the young people themselves hear of a school through a friend and seek admittance.

In theory, the schools in the program may select from among their applicants, but in practice the district creates waiting lists of students wanting to attend various schools, and assigns students from these lists. Only occasionally will a school reject a student. From time to time a young person especially in need, such as someone just out of a residential drug treatment program or just out of a residential institution attached to the juvenile justice system, may jump the queue. For those considering a school in the program, the district provides a general brochure and short written descriptions of each school. Counsellors at public schools are supposed to know about the program and the participating schools, and to be available for discussions with pupils and their families.

This program, on a smaller scale, has actually existed on a more informal basis for about twenty years in Minneapolis. It traditionally served only high-school age children (mostly drop-outs) and was once primarily supported by the United Way and other private charities. Over time the Minneapolis school system increased its share of costs, so that today it provides about \$2500 per pupil per year to participating schools.<sup>66</sup> Schools still rely on chari-

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<sup>65</sup> Minn Stat § 126.22(2)(e) (1990).

<sup>66</sup> The Heart of the Earth Survival school gets most of its money from a grant from the U.S. Department of Education. According to Jibben, a question has been raised about

table sources to support the remainder of their budgets. Families may not be required to pay extra tuition to send their children to these schools.

The Minneapolis program is slowly expanding, having started with fewer than one hundred students. Some participating schools have grown along with the program, even starting additional programs at a second site. The district almost always requires that a new school demonstrate its success for a year or two before offering it a contract. Therefore, schools that start with an eye towards joining the plan must provide their own independent funding at the outset. On the other hand, it does not appear difficult for a determined provider to join the program. Although Minneapolis formally imposes various financial, curricular, and reporting requirements on the participating schools through the contracts, it is by no means clear that these conditions actually require significantly more of the schools than they would voluntarily provide.

Pupils tend to stay in a school in the program for about two years. Some graduate, some drop out, some transfer to schools run by the Minneapolis school district. Although there has been little formal outside evaluation of this program, public school officials in Minneapolis believe that the program effectively uses private schools to further public needs.

### C. Integration Vouchers: The Kansas City Proposal

In Kansas City, Missouri, in 1984, a federal district court judge, Russell G. Clark, ruled in *Jenkins v State*<sup>87</sup> that the Kansas City school district and the state had perpetuated illegal segregation in the schools. The judge refused, however, to force other school districts to help remedy the problem.<sup>88</sup> And, since Kansas City public schools are predominantly black, Judge Clark declined simply to racially balance the district's schools as best he could.<sup>89</sup>

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whether the teaching of Native American custom and ritual in this school should be considered "religion," but it has been determined that this is rather "culture." A black Islamic group had shown interest in the program, but decided not to pursue it when told that it could not run a religious program. With the recent statutory amendment to include religious schools, perhaps this group will renew its interest.

<sup>87</sup> 639 F Supp 19 (W D Mo 1985), aff'd, 807 F2d 657 (8th Cir 1986).

<sup>88</sup> *Jenkins v State*, 593 F Supp 1485 (W D Mo 1984). The plaintiffs unsuccessfully appealed the 1985 decision, seeking a compulsory metropolitan remedy, to the Eighth Circuit. *Jenkins*, 807 F2d 657.

<sup>89</sup> *Jenkins*, 639 F Supp 19. As of the fall of 1989, the Kansas City School District had a minority representation of just under 75 percent. Michael Mansur, *Integration Slowing, School Figures Indicate*, Kansas City Star 1A (Sept 21, 1989).

That solution might well have prompted white flight and would have given black children limited integration in any case. Instead, Judge Clark ordered (1) more spending to upgrade neighborhood schools (which are often nearly all black), (2) the creation of magnet schools designed, in part, to attract whites from both private schools and public schools in the suburbs, and (3) the adoption of a voluntary integration plan with the surrounding, mostly white, suburbs.

Many of the magnet schools have not yet attracted their quota of whites so that, in order to assure their racial balance, many such fancy facilities are being run at far less than capacity. This has aroused the ire of some blacks in Kansas City who are currently suing to obtain access to these schools, even if it means that they become mostly black schools.<sup>90</sup> All but one of the suburbs refused to participate in the voluntary inter-district plan.<sup>91</sup>

On July 14, 1989, in *Rivarde v State*, several black families, most of whose children remain enrolled in the same undesirable black neighborhood schools that served their neighborhood prior to 1984, sued to obtain vouchers that would enable their children to attend private schools.<sup>92</sup> To strengthen their cause, the plaintiffs obtained the advance cooperation of about 50 private schools that promised to make available to Kansas City black children about four thousand places on the same terms that would apply to the suburban public schools should those schools participate in the voluntary integration plan.<sup>93</sup> Simply put, the private schools agreed to take all comers up to the number of seats promised (except children with documented serious past behavior problems), provided that the public authorities paid the school's regular tuition. Because the tuition costs in most of the private schools that have volunteered are considerably less than the cost of education in the surrounding suburban public schools, this option would actually be cheaper than if the pupils participated in the voluntary integration plan approved by Judge Clark.

While most of the private schools that have volunteered are religious schools, they have agreed not to select applicants on the basis of religion. Virtually all of these schools are presently com-

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<sup>90</sup> William Snider, *Voucher Plan for Disadvantaged Pursued in Kansas City Lawsuit*, *Educ Week* 1, 28 (Aug 2, 1989).

<sup>91</sup> Tim O'Connor, *Vouchers for Schools Supported*, *Kansas City Star* 26 (Oct 9, 1990).

<sup>92</sup> *Rivarde v State*, No 89-0671 (W D Mo, Nov 28, 1989).

<sup>93</sup> The information in this paragraph is based on *Rivarde v State*, No 89-0671 Complaint 13-18 (filed July 14, 1989).



prised of at least a majority of white students, with many having student bodies which are over 90 percent white. A few schools on the list, however, are more than half-populated by minority students. The named plaintiffs allege that each has a specific school that he or she wishes to attend, that this school has agreed to accept him or her, and that attendance at that school would promote integration.

The plaintiffs' lawyers charge that, where the district has been found liable for segregation but no integrated education has been made available, the plaintiffs have an independent constitutional right to a voucher if it is the only promising way of providing them with integrated education. The plaintiffs insist that their interests and goals are not represented by the lawyer representing the entire class and that they should not have to wait in the hope that Judge Clark's order eventually results in integrated education.<sup>94</sup>

Dismissing the plaintiffs' complaint on November 28, 1989, Judge Clark ruled that the plaintiffs have no independent cause of action, but must seek intervention in the original segregation lawsuit.<sup>95</sup> Treating the plaintiffs' complaint as a motion to intervene, he stated (seemingly as dicta) that the plaintiffs did not have a right to mandatory intervention and indicated that they would be refused permissive intervention as well.<sup>96</sup> Faced with this opposition, plaintiffs appealed to the Eighth Circuit.<sup>97</sup> In April 1991, the Eighth Circuit backed the defendants' claim that the *Rivarde* plaintiffs have not stated an independent cause of action, with the result that the plaintiffs now must return to Judge Clark formally to seek permissive, or if need be, mandatory intervention.<sup>98</sup>

The *Rivarde* claim has many attractive aspects. First, those minority families electing to participate in the proposed voucher scheme would obtain an educational opportunity for their children that they find preferable to that offered by the public authorities. This would be at least some compensation for the past discrimination by the district and the state. Second, all of these children (or

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<sup>94</sup> Interestingly enough, the lawyer who brought the original desegregation suit has, from time to time, toyed with demanding a limited private school voucher alternative so long as the suburbs were still not cooperating. He has not yet actually made that demand of the court.

<sup>95</sup> *Rivarde*, No 89-0671 slip op at 5.

<sup>96</sup> *Id* at 7-8.

<sup>97</sup> O'Connor, *Kansas City Star* at 26 (cited in note 91).

<sup>98</sup> *Rivarde v State*, No 90-1249 (8th Cir, Oct 8, 1990). Given Judge Clark's expressed views, the plaintiffs are likely to be back before the Eighth Circuit on the intervention issues.

nearly all, depending on how the judge were to rule) would obtain integrated education. Third, these students by their presence would help integrate the private schools they attend. Fourth, the willingness of private schools in their midst voluntarily to admit black children might finally prompt the suburban public school generally to participate in the inter-district transfer plan, thus opening even more choices to Kansas City black families and promoting even more integration. Finally, the exit of substantial numbers of minority children from the Kansas City public schools should make it easier for that district to provide integration opportunities to a greater proportion of its remaining minority children.

Whether the full four thousand places that the private schools have offered would be taken by minority transfer students remains to be seen. Possibly, in the end, relatively few families would make this choice. But since many African-American Protestant families throughout America's inner cities have already opted for Catholic school education for their children, there is reason to predict that many of those available seats would be filled.

The defendants so far refuse to acknowledge the advantages of the proposal. They oppose involving religious schools on constitutional grounds, although in the light of recent U.S. Supreme Court decisions, that opposition seems legally mistaken.<sup>99</sup> In any case, they probably fear that this remedy would be a foot in the door to the wider use of educational vouchers that they oppose. More generally, they simply seem uncomfortable with the idea that private schools, which historically and especially in the South have been viewed as the enemy of desegregation, can actually be employed to promote integrated education.<sup>100</sup>

## VI. A UNIVERSAL CHOICE PLAN

Milwaukee, Minneapolis, and Kansas City together provide a fascinating illustration of how public funds can be focused inventively on the private education of children least well served by the public schools. Were it mine to decide, I would strongly favor starting many experiments around the country that would employ

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<sup>99</sup> Professor Tushnet agrees. See Tushnet, 1991 U Chi Legal F at 50 (cited in note 14).

<sup>100</sup> For earlier proposals I have made to use private school choice to promote integration, see Carol Abrams, John E. Coons, and Stephen D. Sugarman, *School Integration Through Carrots, Not Sticks*, 17 *Theory Into Practice* 23 (Feb 1978); Amicus Brief Supporting Court-Ordered Voluntary Integration Plan in *Crawford v Los Angeles Unified School Dist.*, reprinted in *Parents, Teachers and Children: Prospects for Choice in American Education* 301 app B (Institute for Contemporary Studies, 1977).

"tailored" voucher schemes of these sorts. But many are now pushing for universal voucher plans that would provide a state scholarship to every child whose parents opt out of their local public school district. In this final section, I explore how such full-blown voucher schemes can be designed to assure a full range of new opportunities for the children of the poor.

#### A. The Oregon Initiative

Oregonians for Educational Choice, a citizens' group put together by leaders of the state's Libertarian Party, placed an educational voucher/tax credit initiative on the November 1990, ballot. Although a newspaper poll a month before the election showed the proposal narrowly ahead,<sup>101</sup> on election day the voters defeated the plan by a two-to-one margin.<sup>102</sup>

The initiative would have given Oregon families the right to choose among public schools pursuant to a statewide open enrollment scheme, the details of which would have been left for the state legislature to decide. In addition, the state would have subsidized a family's choice of a private school for its elementary- and secondary-school age children.<sup>103</sup>

In essence, the Oregon proposal would have provided a \$2500 voucher for each child. Those Oregon private schools charging less than \$2500 in annual tuition would have increased it to at least that amount. The subsidy would have taken the form of a state income tax credit in an amount up to \$2500 per student, which would have covered educational expenses incurred in church-sponsored schools, in private secular schools, and in in-home schooling.<sup>104</sup> Families with an Oregon state income tax obligation of less than their private schooling expenses would also have benefited because the tax credit would have been refundable.<sup>105</sup> The tax credit could have been taken by anyone who actually paid for the educa-

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<sup>101</sup> Lonnie Harp, *Ballot Initiative on "Choice" in Oregon Holds Narrow Lead as Election Nears*, *Educ Week* 16 (Oct 10, 1990).

<sup>102</sup> Robert Pear, *The 1990 Elections*, *NY Times* B1 (Nov 8, 1990).

<sup>103</sup> The proposed act referred to children ages five through eighteen and talked of basic education expenses. See § 3(3). For the tax credit to be claimed by May 1 of the prior year (or within 30 days of the family moving into a new district), the student's family would have had to tell the resident school district that the child would not be attending a government school that year.

<sup>104</sup> Section 3(10).

<sup>105</sup> See, generally, § 3. The plan was to be phased in with a maximum tax credit of \$1200 for 1991 and \$2500 starting in 1992. This presumably was meant to mesh the start up of the plan with the 1991-92 school year. See §§ 3(5) and 3(9) of the proposed initiative.

tional expenses of a qualifying child, provided that the sum of the credits claimed by anyone paying a child's schooling costs did not exceed the \$2500 maximum.<sup>106</sup>

Beyond this core funding provision, the Oregon initiative contained little by way of additional relevant detail apart from a provision that "neither the state nor local governments shall create any new laws or rules regulating nongovernment basic education nor make existing laws or rules more restrictive or burdensome."<sup>107</sup> Therefore, the drafters apparently intended participating schools to be able to select applicants on the same terms employed and permitted at present and to charge extra tuition of any amount.

Vice President Dan Quayle,<sup>108</sup> prominent pro-voucher authors (economist Milton Friedman and political scientist John Chubb), former Delaware Governor Pete du Pont, and U.S. Education Secretary Lauro Cavazos all endorsed the Oregon proposal.<sup>109</sup> The Chief Deputy Legislative Counsel of Oregon,<sup>110</sup> University of Chicago Law Professor Michael McConnell,<sup>111</sup> and the Landmark Legal Foundation<sup>112</sup> all concluded that the initiative should withstand a federal constitutional challenge on church and state grounds.

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<sup>106</sup> It is not clear why non-parents would have been allowed to take the tax credits. The promoters' publicity suggested that the benefit was directed towards those who, as acts of "charity," would pay for the education of eligible children. *Oregonians for Educational Choice, Some Questions and Answers about Measure 11* (Sept 12, 1990) (on file with the author). In theory, however, any family could have had the state pay the same amount as any charitable donor. Moreover, it is a special sort of "charity" the drafters had in mind when the contribution would have been one hundred percent reimbursed to the donor.

Possibly the drafters were worried, perhaps for good reason, that the refundable feature would be problematic for poor families because of cash flow difficulties they might face. If the word "person" in the act meant any tax return-filing party, however, a non-profit organization with an adequate endowment could, apparently, have stood ready to advance the educational expenses for all people who would be burdened by having to pay out now and be refunded later. At the end of the tax year, the sponsoring organization would presumably have gotten back from the state a sum equal to all of its payments, and could have turned around and used that same money for needy families next year. If organizations did not qualify as "persons" under the act, then presumably some civic-minded wealthy people could have performed this same function.

<sup>107</sup> Section 5.

<sup>108</sup> Statement by Vice President Quayle, Oregon Choice Initiative, Sept 24, 1990 (on file with the author).

<sup>109</sup> David Steves, *Feds Embrace Oregon Initiative*, Salem Statesman J 1A (Sept 17, 1990).

<sup>110</sup> Memo from Kathleen Beaufait, Chief Deputy Legislative Counsel to Lee Penny, Joint Committee on Education, Jan 29, 1990 (on file with the author).

<sup>111</sup> Opinion letter from Michael McConnell to Steve Buckstein, Aug 2, 1990 (on file with the author).

<sup>112</sup> Opinion letter from Clint Bolick to Martin Buchanan and Steve Buckstein, Sept 27, 1990 (on file with the author).

The *New York Times* opposed the initiative, complaining that it lacked attention to the information and transportation needs of families, and objecting generally to using tax money to subsidize private schools.<sup>113</sup> Perhaps more significantly for the voters, Oregon's Republican candidate for Governor, David Frohnmayer (who was later defeated), the Oregon state superintendent of public instruction, the PTA, the League of Women Voters, and Portland's Rainbow Coalition, among others, all opposed the measure.<sup>114</sup>

The Oregon initiative generated considerable controversy over its likely impact on poor families. On the one hand, proponents claimed that for the first time the poor now stuck in public schools could choose private schooling. Hence the measure was portrayed as extending to the less well off an option already available to families with money. On the other hand, opponents alleged that the poor "could end up in sub-standard private schools."<sup>115</sup> There are, however, more important concerns about how the poor would fare under a plan like that contained in the Oregon initiative.

#### B. A Choice Plan to Help the Poor

As I see it, an overall or universal choice plan should include certain provisions designed to make the plan especially promising to poor families.

First, the plan should include payment of transportation costs for reasonable distances, at least for the poor. Second, it should direct information toward those who presently cannot consider school options for their children. This information should include more than written information in English. One solution would be to provide some (or all) families with a mini-voucher to be used to pay for educational counselling. In any event, counsellors who are not attached to specific schools or districts can play an important role here. Perhaps this would be a good function for existing community organizations.

Third, so that they are not priced out of the choices they prefer, the schools selected by poor families ought to be required to accept vouchers as full payment for tuition. If higher tuition

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<sup>113</sup> *Wrong Fix for Public Schools*, NY Times 1-22 (Aug 25, 1990).

<sup>114</sup> Jeff Mapes, *Quayle Visit Sparks Clash, 43 Arrested*, Oregonian 1 (Sept 25, 1990); Bill Graves, *Group Says Private Education Measure Would Aid Poor*, Oregonian C4 (Oct 3, 1990).

<sup>115</sup> Graves, *Private Education Measure at C4*, quoting Jan Coulton, chair of a coalition fighting the measure.

charges are to be allowed for other families,<sup>116</sup> they should at least be income-linked for the near-poor.

Fourth, the dollar value of the voucher should approach the sum now spent on children in public schools, say, 80 to 90 percent of that sum. This provision would permit the creation of adequately financed new schools with a greater incentive to cater to poor families who cannot be expected to supplement the voucher. It would help make poor families welcome at schools, which might not be the case if the voucher were small. Finally, as shortly described in more detail, a voucher of substantial value would make feasible the creation of voucher-funded public schools of choice.

A related question is whether the voucher should be the same value for every type of child. Because schools typically spend, for example, more money on high school pupils than on elementary school pupils, the vouchers should probably be larger for older children. In the same vein, a state might be well advised to provide larger vouchers for other groups of pupils whose education is traditionally more expensive (such as disabled children), those in certain vocational courses, and non-English speaking children.

Fifth, to protect against the risk of children from poor families being disfavored by schools, even if armed with a voucher of significant value, additional admissions protection may be warranted. Several solutions are possible. For example, states may require schools to admit pupils by lot, as in Milwaukee. While this maximizes family choice at the individual level, it may also undermine the ability of a school to shape the kind of community it wants through the children it selects (by developing, for example, a "performing arts" school or a "science" school). While requiring admission by lot from otherwise "qualified" applicants is one response, this in turn invites disputes over the meaning of "qualified." Moreover, it risks that some schools would deliberately select certain, apparently neutral, qualifications for invidious reasons, knowing of their likely impact. A different solution is to provide children who are likely to be disadvantaged with vouchers of extra value, thereby making them more financially attractive to schools—an especially promising solution if schools were forbidden, across the board, to charge tuition on top of the voucher amount.

Yet another solution, and one that currently most appeals to me, would require schools to set aside a certain proportion of their open places each year to be filled on a priority basis by children of

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<sup>116</sup> There has been considerable debate among friends of choice on this issue.

the poor. Assuming that proportion were 20 or 25 percent, a school might well find it advantageous to recruit aggressively the poor children that it ultimately wants to fill its required places. Failing to attract a sufficient number of poor children it otherwise preferred, it would be required to accept all those poor children who applied. This provision would not guarantee that all schools actually enroll at least 20 or 25 percent poor children, but it would certainly assure poor children reasonable access to all schools. Of course, some might prefer the stronger rule that would actually require a school to achieve some minimum proportion of poor children before it could accept vouchers from non-poor families.

Sixth, states should allow public school districts to create officially designated public schools of choice funded with the educational vouchers brought to them by their attending pupils. These schools should be largely subject to the same limited regime of outside regulation that applies to private schools of choice. States should permit school districts to convert existing schools or to create new schools of choice. In either case, once left to their own financial self-determination, these schools should be permitted to expand and contract their enrollment as they choose, including the acquisition of new facilities and locations. States should enable the initiating district to select from a range of school managing regimes that it would put in place for any specific public school of choice.

If school districts resist converting existing schools to schools of choice, there ought to be some mechanism available to the families using a public school to petition for the school's conversion.<sup>117</sup> School districts should be encouraged as well to create out-of-neighborhood enrollment options among their schools even where individual schools are not formally made public schools of choice. Finally, where public schools have space available, rights should be granted to out-of-district children to attend those schools without cost to the families who transfer in. Where demand exceeds available spaces, admissions rules, as with private schools of choice, should be geared to the protection of children from poor families.

Alas, the Oregon plan contained none of these pro-poor protections. Therefore, too many poor children could have been turned away from private schools of their choice—in some cases because they simply could not afford the additional required tuition. Moreover, few entrepreneurs will be willing to create new pri-

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<sup>117</sup> I put aside for now whether a petition could force the conversion to a school of choice, or merely force a hearing on the issue.

vate schools, paying decent teacher salaries and with decent teacher/pupil ratios, in return for funding that is less than half of what the public schools spend per pupil—namely \$2500—even though many established private schools in Oregon now charge \$2500 a year or less. To be sure, new schools charging \$4000 per pupil might be an attractive venture. But the creation of many new schools like that, where parents are out \$1500 per child on a net basis, could easily lead to a disproportionate exodus from public schools of families with means.

Therefore, as interesting as it was to have a public vote on a nationally visible, across-the-board private choice plan, I have grave doubts about whether the Oregon measure would have been a desirable reform.

#### CONCLUSION

In the two decades following *Brown v Board of Educ.*,<sup>118</sup> many people believed that private schools stood in the way of the achievement of public values, as “white academies” sprang up as havens for those seeking to foil desegregation efforts. But in the past few years, many have begun to realize that, rather than the problem, private schools may be part of the solution to our nation’s educational woes. It is difficult at this moment to predict just how far the choice movement will go. Some will conclude that it is already stymied in view of choice advocates’ legal failures to date in Kansas City and Milwaukee and the political failure of choice in Oregon. But reading tea leaves is not an exact science, and perhaps instead we are witnessing what, in retrospect, will be viewed as the fits and starts of a dramatic change in American education—in which private schools are deliberately employed in furtherance of the public good.

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<sup>118</sup> 347 US 483 (1954).