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Family Choice: An Idea Whose Time Has Come and Gone?

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*But to go to school in a summer morn
Oh! it drives all joy away;
Under a cruel eye outworn,
The little ones spend the day,
In sighing and dismay.*

WILLIAM BLAKE¹

I. Introduction

EDUCATIONAL VOUCHERS are written or authorized certificates issued by a unit of government. They provide parents with the authorization to pay for their child's education at the school of their choice. Under a voucher system, parents choose schools according to their beliefs about the type of education they desire for their child and their perception of an individual school's quality. The school redeems the voucher by sending or returning it to the government unit in return for a predetermined dollar amount. Under this system, government support of education flows only to those schools to which parents have decided to send their children.²

The heart of the criticism of the existing educational system is the feeling that public schools no longer meet the needs of society, educational bureaucracies account to no one, parents have little say or choice in the educational options for their children, there is little diversity in public schools, and the public school establish-

1. *The School Boy*, in *THE POETRY AND PROSE OF WILLIAM BLAKE* (Erdman ed. 1965).

2. C. McGUIRE, *EDUCATIONAL VOUCHERS* 1 (June 19, 1979) (report prepared for the New York State Task Force on Equity and Excellence in Education).

ment has resisted any attempts at reform or distributing data that could be used to challenge the present system.³

The breadth of disquiet with the public schools is demonstrated by the exodus of whites from public schools, the increasing retreat of the middle class to private schools, and a long-term trend of middle class black and white movement to the suburbs.⁴ Dissatisfaction with education is exemplified by attempts to place a cap on public expenditures, the Proposition 13 mentality, the declining enrollment and support for public school systems and school budgets, and the turmoil of court-ordered integration. These factors have led to a search for alternatives to the existing public educational system and a serious interest in the voucher alternative.

Although vouchers have been used only in a few instances, such as providing educational possibilities for handicapped students, the educational voucher is not a new idea.⁵ Its underlying philosophical basis is the advantage of a free-market economy and individual choice in achieving quality education. The voucher is an eighteenth century idea and first appeared in Adam Smith's *Wealth of Nations*.⁶ Smith believed if teachers' creativity and energy were put to the test, they would stimulate the market, more efficient teaching would result and teachers would prosper. The choice of a school by parents would trigger a subsidy from the government to the school.⁷

Thomas Paine, another early voucher proponent, specifically suggested giving lower class families the opportunity for schooling through a negative income tax scaled progressively in favor of the poor. Paine believed that his plan would: (1) be easy to implement; (2) insure competition among schools; and (3) decentralize

3. Areen & Jencks, *Educational Vouchers: A Proposal for Diversity and Choice*, 72 TCHRS. C. REC. 327, 328-29 (1972); J. COONS & S. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* 19-20 (1978) [hereinafter cited as COONS & SUGARMAN]; LaNoue, *The Politics of Education*, 73 TCHRS. C. REC. 304 (1971).

4. Coons, *Of Family Choice and Public Education*, 61 PHI DELTA KAPPAN 10 (1979).

5. See Rebell, *Educational Voucher Reform Empirical Insights from the Experience of New York's Schools for the Handicapped*, 14 URB. LAW. 441 (Summer, 1982). The G.I. Bill, 38 U.S.C. § 1651 (Supp. III 1980), was a federal attempt to use vouchers for higher education. Higher education has never had the same community and government support as primary and secondary education.

6. 340 (Great Books ed. 1952).

7. COONS & SUGARMAN, *supra* note 3, at 20-34.

control of education, countering prevailing desires of aristocrats to maintain their power by depending on ignorance.⁸

Another great eighteenth century thinker, Milton Friedman, revived interest in voucher plans by proposing that parents be given a voucher equal to the cost of educating their child.⁹ All schools, public and private, would charge tuition on a per capita basis. Schools would compete to attract students. The government's role in education would be limited to the distribution of vouchers and the imposition of minimum education standards.¹⁰

Friedman's plan involves a completely unregulated voucher system. Wealthier parents could pay tuition amounts over the government voucher. The outcome would be an educational system more segregated along economic lines. Poorer families would not have the ability to supplement their vouchers. Under Friedman's plan, the schools could set their own admission policies and could systematically exclude minorities.¹¹

In recent years, other voucher proposals have appeared.¹² In 1970, the Center for the Study of Public Policy (CSPP) received a grant from the Office of Economic Opportunity and conducted a study of voucher possibilities.¹³ The CSPP proposal applied only to public schools and was based upon the belief that it would assist minority children and provide parents with greater diversity of choice. While several school systems considered the CSPP model, only the Alum Rock School District in East San Jose, California, agreed to implement a federally funded voucher experiment in 1972 based upon the CSPP model. The school district had approximately 14,000 students and twenty-one schools. The experiment did not involve private schools, and its results were mixed.¹⁴

8. West, *Thomas Paine's Voucher Scheme for Public Education*, 33 S. ECON. J. 378 (1967).

9. See M. Friedman, *The Role of Government in Education*, in CAPITALISM AND FREEDOM 85 (1962).

10. McGuire, *supra* note 2, at 3.

11. *Id.* at 4.

12. See Sizer & Whitten, *A Proposal for a Poor Children's Bill of Rights*, 5 PSYCHOLOGY TODAY 58 (1968); Coleman, *Toward Open Schools*, PUB. INTEREST, Fall 1967, at 20; Arons, *Equity, Option, and Vouchers*, 72 TCHRS. C. REC. 337 (1971); McGuire, *supra* note 2, at 2-6.

13. CENTER FOR THE STUDY OF PUBLIC POLICY, A PRELIMINARY REPORT ON FINANCING EDUCATION BY PAYMENTS TO PARENTS (1970); see also Areen and Jencks, *supra* note 3.

14. Levinson, *The Alum Rock Voucher Demonstration: Three Years of Implementation* (1976) (Rand Corp. Report No. P5631); Taylor, *Educational Vouchers: Addressing the Establishment Clause Issue*, 11 PAC. L.J. 1011, 1064 (1979); Coons & Sugarmann, *supra* note 3, at 216.

The most persistent, sophisticated, and persuasive proponents of educational vouchers have been John Coons and Stephen Sugarman, who previously had laid the intellectual foundation for the equal educational financing of public schools,¹⁵ which resulted in the *Serrano v. Priest*¹⁶ decision holding that financing public schools on the basis of the local property tax was an unconstitutional violation of the fourteenth amendment and parallel clauses in the California Constitution. More recently they have been advocates for the California Initiative, an attempt to place a referendum in support of educational vouchers on the ballot in California. Because of the care and conceptual richness of Coons and Sugarman's voucher concept, I will analyze educational vouchers through the prism of their proposal.

Under Coons and Sugarman's voucher concept, the "Family Choice in Education Plan," the family exercises the choice. The essence of their voucher concept is:

. . . that each year there are to be provided to each school-age child in the experimental area(s) a scholarship certificate entitling the child to education in public or private school of its family choice; that the child himself as he gains maturity, will be given increased formal power over the choice made; that families will not face significant schooling costs above the value of the scholarship (for example, no added tuition); that participating schools will be approved by the government, but requirements for approval will be limited largely to concern safety, fraud, and minimum educational inputs; that an effective information and counseling service will be provided to assist the family in making an informed choice; that subject to space availability, children will be admitted to schools of their choice, with admissions by a state conducted lottery when there is excess demand for a particular school; that adequate transport will be given free; and that the present population of teachers will be given substantial job protection in the transition years.¹⁷

Originally, a model in the Family Choice Education Act (FCEA) it eliminated family wealth as an influence upon the size of the voucher.¹⁸ Within limits the original FCEA made the size of the voucher vary according to the judgment of the family itself rather than of government alone. A family would make some contribu-

15. J. COONS, W. CLUNE, AND S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* (1970).

16. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

17. COONS & SUGARMAN, *supra* note 3, at 31-32. Coon's and Sugarman's views have changed over the years but the quoted passage is the essence of their program.

18. Coons & Sugarman, *Family Choice in Education: A Model State System for Vouchers*, 59 CAL. L. REV. 321, 329 (1971) [hereinafter cited as Coons & Sugarman, *Family Choice in Education*].

tion out of its own wealth towards the support of education.¹⁹ The initial proposal created a variety of schools at which tuition levels differed. Parents could choose the kind of school they would like to send their children to, based on educational expenditures. The advantages claimed for the FCEA plan are that it would create a new educational market offering of diverse schooling at differing levels of per-pupil costs; it would place a ceiling on a family's educational cost; it would benefit poor families through an increased voucher amount; the local property tax for education would cease; and family choice would benefit good schools and penalize poor ones.²⁰

Other benefits claimed by Coons and Sugarman's plan included: (1) neutralization of the effects bearing on wealth through power equalization;²¹ (2) decisional power would be vested in the family unit rather than a board of education; (3) the purchasing of educational goods and services would be accomplished with greater efficiency; (4) accountability through ease of transfer from school to school would increase and enable parents to exercise fate over schools;²² (5) education would be independent of spending from a tax referendum; (6) variety in the style and content of education would increase;²³ (7) greater experimentation would be encouraged; and (8) real community control would result and racial integration would be promoted.²⁴

In 1979 when Coons attempted to place a Family Choice in Education proposal on the ballot in California (the California Initiative),²⁵ he took advantage of California political winds against increased government, the level of taxation and public spending, and the climate against court ordered racial integration. Coons and Sugarman changed their plan to bring it in line with the political realities of 1980. Thus, power equalization is gone. Educational expenditures were limited to 1979–1980 levels; per-pupil cost in

19. Fundamental to the original Coons and Sugarman proposal was that: (1) the quality of publicly financed education would not be a function of wealth other than the wealth of the state as a whole; and (2) above an adequate minimum expenditure per pupil required by law, families might be permitted to choose among dollar levels of educational offerings. *Id.* at 329.

20. *Id.* at 330.

21. *Id.* at 336. Power equalization is uniformity of capacity to spend for something such as education.

22. *Id.* at 337.

23. *Id.* at 339.

24. *Id.* at 339–40.

25. An Initiative for Family Choice in Education (1980) [hereinafter cited as California Initiative].

public schools was limited to 90 percent of that of private schools;²⁶ and appropriations for administration of the State Department of Education were limited to one half of 1 percent of the total cost of education.²⁷ In an economic sense, the California Initiative offered a nineteenth century liberal ticket.

Both private and parochial schools could participate in the voucher plans.²⁸ The California Initiative established three classes of schools: public, independent and family choice;²⁹ and it enabled parents to redeem vouchers at private schools and at a new category of independent public schools which were governed by a combination of parents, teachers, trustees and others.³⁰ The public schools would continue to exist and parents would not receive vouchers for attendance at them.³¹ The California Constitution would be modified to eliminate property taxes as the major vehicle of funding elementary and secondary education.³² None of the three classes of schools could accept or charge tuition over and above the voucher fee,³³ although educational costs could differ. A private school participating in the program could limit its enrollment,³⁴ giving priority to present students and their siblings, and limit attendance to boys or girls.³⁵ Beyond that, schools would have to admit any applicant regardless of race, creed or scholastic achievement.³⁶ If there were too many applicants, admission would be determined by lottery.³⁷ Free transportation would be provided within limitations as provided by the legislature.³⁸ The California Initiative did not obtain the necessary signatures for placement on the California ballot in 1980, but supporters will resume the petition drive for the 1984 ballot.³⁹

26. *Id.* at § 15.

27. *Id.* at § 5.

28. *Id.* at § 13.

29. *Id.* at § 6.

30. *Id.* at § 10.

31. *Id.* at § 6.

32. *Id.* at § 1(b).

33. *Id.* at § 14.

34. *Id.* at § 15.

35. *Id.* at § 7.

36. *Id.* at §§ 2, 1(g).

37. *Id.* at § 7.

38. *Id.* (obviously a canard to anti-busing proponents).

39. Hoachlander, *Financing Public Education in the Wake of Federal and State Spending Cuts: Crisis and Opportunities*, 15 URB. LAW. 148 n.27 (Fall, 1982).

II. Philosophical Roots of Family Choice

Unlike many reformers, Coons and Sugarman have come armed with a full philosophical system underlying their proposals. From a philosophical perspective, they are grounded in the idealism of the eighteenth century that believed in the perfectibility of man. They establish two ideal types of persons that can be produced by educational systems: "conditioned" man versus "autonomous" man.

Autonomy is

the full development of the child's latent capacity for independent reflection and for judgment on issues of personal morality and social justice; it is the link between intellect and responsible action. The perception or moral possibility is humanity's principal distinction among the company of Earth.⁴⁰

The alternative to autonomous man is "conditioned man," an individual taught to believe in and to do good as his teachers view it.⁴¹ "Conditioned man" is the product of our current educational systems. The roots of the idea of "autonomous" man can be traced back to Plato's citizen of the ideal state, a position achievable by very few.⁴² Plato's elitism has been democratically transformed to the eighteenth century view that all persons can be trained to be autonomous.⁴³

Coons and Sugarman also have borrowed from John Stuart Mill, who believed that the government should enforce universal education, but should not provide one. Rather, the government should give parents the means to obtain the education they select for their children.⁴⁴ "Conditioned man" is straight Mill:

A general state education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which please the predominant power in the government . . . it establishes a despotism over the mind, leading by natural tendency to one over the body.⁴⁵

Like many reformers, Coons and Sugarman have tunnel vision about the institution they are trying to change. They place too much emphasis on the socializing import of education. Any educa-

40. COONS & SUGARMAN, *supra* note 3, at 40.

41. *Id.*

42. PLATO, THE REPUBLIC § 370c; G. SABINE, A HISTORY OF POLITICAL THEORY 49-54, 55, 71 (3d ed. 1961).

43. Kalodner, *Book Review*, 67 CAL. L. REV. 1224, 1225 (1979).

44. Miu, *On Liberty* in THREE ESSAYS 129 (Oxford ed. 1912).

45. *Id.* at 130.

tional system is but a reflection of the larger society. They are not only revolting against the educational system, but against the structure of modern life. It is their rejection of the present that links them to modern radical and reactionary thought. Their conception of conditioned man reminds one of Karl Marx's distinction, particularly found in his earlier writings, between alienated man under capitalism and unalienated man under communism.⁴⁶ In the twentieth century we can see analogies to "autonomous" and "conditioned" man in the work of Herbert Marcuse.⁴⁷

While some educational reformers have moved politically to the left,⁴⁸ the political program of Coons and Sugarman is clearly to the right of the new conservatism, which looks backward to a time when government was less intrusive and solutions to the problems seemed more attainable.

III. Family Choice and Family Control

Coons and Sugarman have concluded that the focus of educational decisionmaking should be in the family itself rather than in the professional educational bureaucracy.⁴⁹ In locating the source of control in the family, Coons and Sugarman return to an eighteenth century educational approach.⁵⁰ Families are not what they used to be. Nor is this a recent development. As Christopher Lasch has remarked: "The family has slowly come apart for more than 100 years."⁵¹ Voucher proponents ignore the importance of the breakdown of the family as a major source of additional burdens upon the school system and a reason why schools have not fulfilled their expected roles. Under the present educational system the importance of family background cannot be underestimated in explaining the variations of educational attainment.⁵² No school reform could assist in making adults more equal, for children are more influenced by what happens at home than by what happens in

46. See generally B. OLLMAN, *ALIENATION: MARX'S CONCEPTION OF MAN IN CAPITALIST SOCIETY* 131, 232, 247-48 (1971), G. LICHTHEIM, *MARXISM* 44 (1965).

47. See generally H. MARCUSE, *ONE DIMENSIONAL MAN* 2 (1964); H. MARCUSE, *AN ESSAY ON LIBERATION* (1969).

48. See S. BOWLES & H. GINTIS, *SCHOOLING IN CAPITALIST AMERICA* (1976).

49. COONS & SUGARMAN, *supra* note 3, at 42-54.

50. See L. CREMIN, *AMERICAN EDUCATION: THE COLONIAL EXPERIENCE 1607-1783*, 480-91 (1970).

51. C. LASCH, *HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED* xx (1979).

52. C. JENCKS, *INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA* 143 (1972).

school.⁵³ The problem of placing the focus of educational decision-making in the family is that those most able to make an informed choice are families that probably have made the best use of existing educational facilities or have moved their children into private schools. Can we be so certain that the parents will make the best judgment in the interest of the child?⁵⁴ Will poor parents have the information they need to make an informed choice?⁵⁵

IV. Competition and the Marketplace

For voucher proponents, the competition of the marketplace will bring educational accountability, quality and diversity.⁵⁶ An important part of the family choice concept and the California Initiative is the establishment of new schools accomplished with a minimum of regulation and oversight.⁵⁷ Does the marketplace analogy apply to education? If so, which industries should be the model—airline, automobile, steel, railroad or correspondence and trade schools?⁵⁸

However, it has been suggested that the market analogy is inappropriate to public education:

Public schools are not a noncompetitive monopoly like the postal service. They are highly decentralized and they do compete with private schools which enroll 15–35% of the students in most cities and with each other. (There is . . . no research which shows that public schools are “better” in cities where the greatest competition with private schools exists. Because of the “drainoff” of the middle class in these cities . . . the reverse is more likely true.) City schools also compete against suburban schools and with each other for appropriations, teachers, special projects, and status as well as in extracurricular activities.⁵⁹

In a time of declining enrollment and uncertainty as to what approaches really enable children to learn, who will be the entrepreneurs who will bring new schools into existence?⁶⁰ What kind of

53. *Id.* at 255.

54. *See Wisconsin v. Yoder*, 406 U.S. 205, 242 (1972) (Douglas, J., dissenting).

55. *See infra* note 66 and accompanying text.

56. Coons & Sugarman, *Family Choice in Education*, *supra* note 18, at 330.

57. California Initiative, *supra* note 25, § 10. Any public agency could establish a not-for-profit corporation, an independent school outside of the present public school system. A state agency would certify upon proper application an independent or family choice school, but the state could not increase the curriculum requirements and standards for teaching personnel beyond those in existence in 1979.

58. LaNoue, *The Politics of Education*, 73 TCHRS. C. REC. 304, 313–14 (1971).

59. *Id.* at 314.

60. Ginzberg, *The Economics of the Voucher System*, 72 TCHRS. C. REC. 373, 379 (1971).

expertise is required to run a school? Are knowledgeable people likely to have the start-up capital? The California Initiative provides that family choice schools will only be not-for-profit corporations.⁶¹ Under the model Family Choice in Education Act, individual entrepreneurs could open proprietary schools.⁶² The hustlers and "quick buck" artists rather than the educators may be drawn into opening new schools. Consumer protection may require increased regulation. As success will be measured by enrollment, education may become vaudeville. Extravagant claims, heavy advertising and other recruiting techniques will be used. Instead of promoting quality and diversity, competition may force schools to offer the lowest common denominator to attract students. Public schools will be forced to charge the lowest possible tuition and have the least enriched programs, but serve the students with the most expensive educational needs and disabilities.

V. Information: The Marketplace and Informed Choice

In the educational marketplace will the consumer have adequate information to make an informed choice? What information is appropriate? Under the California Initiative, certified schools would have to disclose information regarding their curricula, teaching methods, qualifications of teachers and use of resources.⁶³ The California Initiative does have provisions assuring parents adequate information through sources independent of any school or school authority.⁶⁴ Parents with special informational needs could obtain vouchers to retain the services of educational counselors.⁶⁵ There are no details offered on the nature of the independent sources, the workings of the educational counselor grants or how funding the information network will be accomplished.

Entrepreneurial educators will provide a surfeit of information to attract consumers, but if other social programs are any guide, the poor may not be able to make an informed choice.⁶⁶ The

61. Generally, a not-for-profit corporation cannot distribute dividends, but it can fix reasonable compensation. See N.Y. NOT-FOR-PROFIT CORP. LAW §§ 515, 202 (McKinney 1970).

62. Coons & Sugarman, *Family Choice in Education*, *supra* note 18, at 335, 394-95.

63. California Initiative, *supra* note 25, § 13.

64. *Id.* at § 16.

65. *Id.*

66. See generally Olivas, *Information Access Inequities: A Fatal Flaw in Educational Voucher Plans*, 10 J. L. & EDUC. 441, 453 (1981).

socially advantaged individual will have access to more information of educational alternatives compared to the disadvantaged. Thus, the marketplace may raise the information imperfections which occur most often among socially disadvantaged groups.⁶⁷

VI. Promoting Diversity of Schooling Opportunities through a Voucher Plan

Voucher proponents assume that the public schools exhibit a certain sameness, and that the adoption of a voucher plan would promote a diversity of educational opportunity that does not now exist.⁶⁸

In higher education, where a voucher-type approach through guaranteed student loans is used to finance education, diversity has not been promoted. Is there much diversity in private and parochial schools? Accrediting agencies, prestige and the marketplace all place pressures on schools to conform. Even without government regulation, professional accrediting bodies may intercede to stifle true diversity and originality. Unfortunately, the marketplace often works against diversity.

Will there be competition or will the educational marketplace become highly segmented? Elite private schools may not participate in a voucher program. They are already highly attractive. Their admission policies are often based on exclusivity and they may fear additional regulation. Parochial schools would participate and would grow somewhat, but as most of the poor and those remaining in the public schools are Protestant, growth might quickly reach its limits. The new schools will be competing against the public schools. A constant criticism of voucher proposals is that the remaining middle class and academically "normal" students will depart from the public schools, leaving only the problems. To some extent this has happened. To accelerate it will not foster competition, but will increase stratification based on race, class, religion and on learning or behavioral disabilities.

VII. Administrative Burdens and Financial Expense

Vouchers offer the siren songs of lower education costs, more efficient use of educational resources and, most attractive, an end to the educational bureaucracy. Yet as a practical matter, many of

67. *Id.* at 456.

68. COONS & SUGARMAN, *supra* note 3, at 42.

the savings and efficiencies of voucher proposals seem grounded more in wishfulness than in fact. One must seriously question whether the administration of vouchers would be less burdensome than the present educational bureaucracies, and whether a voucher system would give parents greater input into school and educational choices than at present. Despite the intent of the California Initiative to limit regulation,⁶⁹ a voucher system may lead to increased regulation of private schools, a reason why many would not opt to participate. In most states private schools are regulated leniently, with state concern in terms of certification, school attendance requirements and requiring nonpublic schools to meet building, fire, safety and health requirements.⁷⁰ Inevitably, school certification as proposed under the California Initiative and the infusion of state funds will lead to more state control of private education.

The administration of the vouchers themselves would be cumbersome. The use of existing resources would be inefficient, for instance, closing or leasing existing schools and equipment, and the shifting of teaching and administrative personnel. Moreover, because the idea envisions new schools springing up, they would not be cost-efficient and would have high start-up costs.⁷¹ More schools, each separately run, would lead to a greater percentage of the budget spent for administrative overhead. The possibilities of large annual shifts in student population would make planning difficult if not impossible.⁷² The administrative savings might be a mirage; the costs would merely be transferred to each school.

If vouchers are like any other government program (Medicare and the Guaranteed Student Loan Program are two useful comparisons), substantial state regulation would have to occur to guard against fraud. Abandoning local districts might make schools less accountable to parents than they are presently. In the remaining public schools, the diversity that exists might be ended. If the voucher proposal is not to discriminate against minorities, greater

69. California Initiative, *supra* note 25, at § 10.

70. See ELSÉN, STATE REGULATION OF NON-PUBLIC SCHOOLS: THE LEGAL FRAMEWORK IN PUBLIC CONTROLS FOR NON-PUBLIC SCHOOLS 104 (Erickson ed. 1969); SORGEN, KAPLIN, DUFFY & MARGOLIN, STATE SCHOOL AND FAMILY 15, 82, 84 (2d ed. 1979).

71. Ginzberg, *supra* note 60, at 376.

72. The original model statute provided that each January 15 a pupil would select his school, although a student could switch schools in the middle of the year. Coons & Sugarman, *Family Choice in Education*, *supra* note 18, at 354. See §§ 7 and 14 for transfer rights of students in the Initiative.

regulation than under the present system might be necessary.⁷³ Another problem is the sheer size of many urban school districts.⁷⁴ What may be feasible in a smaller district may become an administrative nightmare and horribly expensive in an urban environment. There will be hidden and not so hidden costs: monitoring schools—assuming that the accurate information is transmitted—and costs of transportation.

The California Initiative provides that the certificate shall reflect the costs of transportation⁷⁵ and the common or public schools shall “transport their pupils in accord with reasonable conditions and limits upon costs to be fixed by law.”⁷⁶ Given the furor over use of busing to promote racial integration, is it likely that a legislature will provide sufficient funds to enable the poor, locked in the inner cities, to transport themselves to schools that in all probability will not be in their neighborhoods? Transportation is of key importance if a child is to have more than a choice of his neighborhood school. Transportation limits the geographic distance of free choice. The transportation issue and the drawing of district lines are difficult and sensitive issues.⁷⁷

VIII. Legal Issues

Coons and Sugarman fail to specifically address the many legal issues involved in a voucher program.⁷⁸ Vouchers have fared unsuccessfully in the courts in two areas: the use of vouchers to avoid desegregation and aid to parents who send their children to parochial schools.⁷⁹

In the early 1960s several southern states enacted legislation offering tuition grants to parents who sent their children to “private schools.” The private schools were segregated and had been established to avoid dismantling dual school systems. Public schools were sometimes closed. Use of public funds to maintain

73. Areen & Jencks, *supra* note 3, at 332.

74. See Dentler, *Vouchers: A Problem of Scale* 72 TCHRS. C. REC. 383, 385 (1971).

75. California Initiative, *supra* note 25, § 14.

76. *Id.* at § 7.

77. Arons, *supra* note 12, at 355.

78. These points are made by Tractenberg, *Some Problems with Family Control*, 57 TEX. L. REV. 155 (1978) and Taylor, *supra* note 14, at 1065.

79. See *infra* note 84 and accompanying text.

these private schools was held unconstitutional as a violation of the equal protection clause.⁸⁰

Basically, the family choice plan offers freedom of choice. It is questionable that a voucher plan could be constitutionally introduced in a community that had been under a court-ordered integration plan. Coons and Sugarman are extremely optimistic that the voucher system would improve integration:

Integration that occurs by choice is both stable and enduring. Indeed, the only intelligible meaning of stability is that those involved at the least accept whatever integration has been achieved.⁸¹

If the past twenty-five years of attempted school desegregation have shown anything, it is that whites will migrate to other communities or attend private schools before they will go to school with blacks.

Freedom-of-choice plans have been found unconstitutional where there was a dual system previously segregated by law.⁸² Despite recent efforts by the federal government,⁸³ a freedom-of-choice plan introduced in a school district under a court order to integrate, or where free choice had been intentionally used to delay integration, might not pass constitutional muster.⁸⁴

Freedom of choice works only as an integration device when there are no other choices. *Green v. County School Board*⁸⁵ involved New Kent County in eastern Virginia. About one-half of the population was black and there was no residential segregation in the county. The school system had but two schools: the New Kent School on the east side of the county, which was white, and the Watkins School on the west side of the county, which was all

80. *Griffin v. County School Bd.*, 377 U.S. 218 (1964); *South Carolina Bd. Educ.*, 296 F. Supp. 199 (D. S. Car. 1968), *aff'd per curiam* 393 U.S. 222 (1968); *Coffee v. State Educ. Fin. Comm'n*, 296 F. Supp. 1389 (S.D. Miss. 1969); *Hall v. St. Helena Parish School Bd.*, 197 F. Supp. 649 (E.D. La. 1961), *aff'd per curiam* 368 U.S. 515 (1962); *Hawkins v. North Carolina Bd. Educ.*, 11 Race Rel. L. Rep. 745 (W.D.N.C. 1966); *Lee v. Macon City Bd. Educ.*, 267 F. Supp. 458 (M.D. Ala. 1967); *Poindexter v. Louisiana Fin. Asst. Comm'n*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam* 389 U.S. 571 (1978); *Poindexter v. Louisiana Fin. Asst. Comm'n*, 296 F. Supp. 686 (E.D. La. 1968), *aff'd per curiam* 393 U.S. 17 (1968).

81. COONS & SUGARMAN, *supra* note 3, at 116.

82. *Green v. County School Bd.*, 391 U.S. 430, 440-41 (1968); *Monroe v. Bd. of Comm'rs*, 391 U.S. 450, 458 (1968); *Raney v. Bd. Educ.*, 391 U.S. 443 (1968).

83. *U.S. Endorses Chicago's Proposal for Voluntary School Integration* N.Y. TIMES, February 13, 1982 at 1, col. 2.

84. *Dayton Bd. Educ. v. Brinkman*, 433 U.S. 406 (1977); *Keyes v. Denver School Dist.*, 413 U.S. 189, 202 (1973); *United States v. Omaha School Dist.*, 521 F.2d 530, 537 (8th Cir. 1975); *Morgan v. Kerrigan*, 506 F.2d 580 (1st Cir. 1974).

85. *Green v. County School Bd.*, 391 U.S. 430 (1968).

black. In three years under a freedom-of-choice plan, 115 black children enrolled in the predominantly white New Kent School, but 85 percent of the black children in the county still attended the all-black school. No whites had transferred to the Watkins School. In the Alum Rock voucher experiment, 80 percent of the children attended their neighborhood schools.⁸⁶ Thus, even if not constitutionally impermissible, efforts at desegregation would probably come to a halt under the free-choice plan. At best, the burden of integration would be completely borne by the minority community.⁸⁷

IX. The Impact of Vouchers on Private and Parochial Schools—State Action and the End of Private Schools?

Almost all applications of the fourteenth amendment to private conduct based on a finding of "state action" have involved an attack upon private racial discrimination.⁸⁸ This is particularly true in the context of educational institutions. Neither the regulation of educational standards nor tax exemptions has been held to be sufficient to trigger the state action clause of the fourteenth amendment against a private educational institution.⁸⁹ Given the additional administrative and fiscal oversight that will result under a voucher program, the question arises whether cumulatively this might involve state action⁹⁰ and whether schools that participate in voucher programs could in any sense be considered private.

X. The Establishment Clause Question

A more difficult issue is whether educational vouchers violate the establishment clause of the first amendment.⁹¹ Under the Califor-

86. See Levinson, *supra* note 14.

87. California Initiative, *supra* note 25, at § 9, provided that no pupil enrollment in a common school shall suffer discrimination on the basis of race, religion or gender.

88. Bright v. Isenbarger, 445 F.2d 412 (7th Cir. 1971).

89. Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); Greenya v. George Washington Univ., 512 F.2d 556 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 995 (1975).

90. In Rackin v. University of Pa., 386 F. Supp. 992 (E.D. Pa. 1974), the court held that tax exemptions, scholarships and loans, government support of research projects, contracts with Philadelphia and the construction, leasing and financing of buildings were sufficient to demonstrate that the Commonwealth of Pennsylvania had so far insinuated itself into a position of interdependence with the university that state action within the meaning of the constitution existed.

91. U.S. CONST. amend. I; see generally Taylor, *supra* note 14.

nia Initiative, parochial schools could participate in voucher programs.⁹² Under United States Supreme Court decisions, to survive constitutional scrutiny state aid to a parochial school (1) must have a secular purpose; (2) must neither advance nor inhibit religion; and (3) must not foster an excessive entanglement between government and religion.⁹³

In *Committee for Public Education v. Nyquist*,⁹⁴ the Supreme Court invalidated a New York statute that provided for direct money grants from the state to parochial schools to be used for maintenance and repair of school facilities and equipment. The Court felt this had the primary effect of advancing religion.⁹⁵ The Court also held that tuition reimbursement and tax relief limited to no more than one half of the tuition paid afforded to parents of children attending elementary or secondary nonpublic schools violated the establishment clause.⁹⁶ Voucher proponents believe that aid to parochial schools would survive constitutional attack because the assistance would be given directly to the parents rather than to the schools.⁹⁷ Yet, in *Public Funds for Public Schools v. Byrne*, a New Jersey statute that provided tax deductions to parents of children attending nonpublic schools was held unconstitutional.⁹⁸ Even if a voucher plan could survive the secular purpose and primary effect standards, it still would have to withstand the excessive entanglement test.⁹⁹ The Supreme Court divided 5 to 4 in upholding a New York statute that allowed reimbursement to nonpublic schools that had paid for mandated testing reporting services, but did so because the aid was very limited and the statute provided for a workable system to ensure that the granted funds were used for secular purposes.¹⁰⁰ The Court added: "under the relevant cases the outcome would likely be different if there were no effective means for insuring that the cash reimbursements would cover only secular services."¹⁰¹

92. California Initiative, *supra* note 25, § 13.

93. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

94. 413 U.S. 756 (1973).

95. *Id.* at 779-780.

96. *Id.* at 796-97.

97. Taylor, *supra* note 14, at 1074.

98. 590 F.2d 514 (3d Cir. 1979), *aff'd mem.*, 442 U.S. 907 (1979).

99. Taylor, *supra* note 14, at 1078; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 866 (1978).

100. *Committee for Pub. Educ. v. Regan*, 444 U.S. 646 (1980).

101. *Id.* at 659.

Under a voucher system, the amount of entanglement and administrative oversight would be great and would not necessarily be limited to secular purposes. The flow of so much public money to private schools would result in substantial reporting requirements and governmental oversight. A voucher program such as the California Initiative may have difficulty in surviving either the primary effect or excessive entanglement obstacles.¹⁰²

XI. Family Choice: Teachers, Unions and Administrators

Perhaps the most intractable problem in bringing a voucher program to reality is the united opposition of all sectors of the educational establishment: teachers, administrators and unions. In the words of Wilson Riles, Superintendent of Schools of California: "California needs a voucher system like Jimmy Carter needs another brother."¹⁰³

Perhaps the most rapid change in the structure of education in the past twenty-five years has been the widespread unionization of teachers.¹⁰⁴ Coons and Sugarman admit that family choice will be greatly resisted by educators, that—in the short run—the objectives of the "Luddite school" teachers and administrators cannot be erased but moderated. They suggest that economic guarantees will be the minimum necessary to diffuse the resistance of labor.¹⁰⁵ They believe that family choice will give individual teachers unprecedented control over the classrooms.¹⁰⁶ This may be wishful thinking, for when teachers had theoretical control over their classrooms before unionization, they had less power and were at the mercy of arbitrary administrators and local school boards.¹⁰⁷ They suggest that economic guarantees would be the minimum necessary to diffuse the resistance of labor.¹⁰⁸ That too may be overly optimistic. Certainly economic guarantees alone do not

102. Taylor, *supra* note 14, at 1082–83.

103. Dale Lane, *School Voucher Plan Resurfaces to Strong Welcome*, San Jose Mercury, Feb. 16, 1979, at 16, col. A1.

104. See Gee, *The Unionization of Mr. Chips: A Survey Analysis of Collective Bargaining in the Public Schools*, 15 WILLAMETTE L. J. 367 (1979).

105. COONS & SUGARMAN, *supra* note 3, at 174.

106. *Id.*

107. Gee, *supra* note 104, at 379.

108. COONS & SUGARMAN, *supra*, note 3, at 174.

protect other teachers' rights vis-a-vis administrators, students or the community. Surely the family choice plan would bring a lessening of teacher authority and control. Coons and Sugarman believe that teachers fear vouchers because of their concern for competition rather than the fear of arbitrary action by parents.¹⁰⁹ It was this lack of power that introduced unionization in the first place.¹¹⁰ It is hard to visualize that teachers' unions are willing to give back contractual rights once gained.

Coons and Sugarman recommend on a trial basis the relaxation of certification control in public schools.¹¹¹ Certification, like tenure and unionization, has moved beyond its original purposes.¹¹² Reducing controls on certification will be greatly fought by organized teaching groups for many of the wrong reasons. Attempts to apply credential criteria to private schools will be fiercely resisted and provide another reason for them to opt out of the voucher plan. Coons and Sugarman envision a long-term withering or shrinking of tenure rights as teachers move from school to school.¹¹³ The family-choice plan ignores the fact that factors other than teachers' competence, such as shifting demographic patterns, may cause changes in a school's population or a school's popularity with parents. Their suggestions for ways of lessening the trauma of severance would do little to promote teachers' security.

With state monies flowing into private schools, they too will become ripe for unionization. With the breakdown of the local school district, union power may actually increase.¹¹⁴ The strength of teachers' unions and teachers' own insecurity seem incompatible with a large-scale family choice program. Even if economic security can be insured, the resulting inefficiencies might make the family choice program substantially more expensive than present educational systems. The assumption that teachers, if they do not like the school environment, could move from school to school does not reflect the present educational market nor the ease of such movement.

XII. Vouchers and the Future of Public Education

Despite this criticism of the California Initiative and the family-choice education plan, Coons and Sugarman are to be con-

109. *Id.* at 173.

110. Gee, *supra* note 104, at 379.

111. COONS & SUGARMAN, *supra* note 3, at 170.

112. *Id.* at 170-72.

113. *Id.*

114. *Id.* at 176.

gratulated for providing serious, thoughtful alternatives to present educational structures. Some of their critics have claimed that voucher programs (and other support alternatives such as tuition assistance to parents who send their children to other than public schools)¹¹⁵ signal the end of public education as it is now known.¹¹⁶ This is overdrawn. Vouchers may drive out the most talented students and leave some schools, particularly in urban and rural areas, even more segregated and stratified than at present. The critics have overestimated the political influence of voucher proponents. Other attempts besides Alum Rock to introduce vouchers have not been welcomed by the public. In 1974, New Hampshire proposed to commence a less regulated voucher experiment than Alum Rock to assess public attitudes towards the voucher concept. Unlike Alum Rock, the New Hampshire proposal included private nonsectarian schools in their second year of operation. No school district in the state was willing to participate. Four districts overwhelmingly rejected the program by a vote of their citizens.¹¹⁷

Vouchers may be an idea in search of a constituency. In January 1976, an East Hartford, Connecticut, school district voted down its proposed plan to experiment with vouchers after two years of studying and planning.¹¹⁸ In 1978, a Michigan group, Citizens for a More Sensible Financing of Education, placed a voucher proposal on the November 1978 general ballot. It called for the legislature to provide an educational voucher to each child in attendance of public and nonpublic elementary and secondary schools, the prohibition of property taxes by local and intermediate school districts for any purpose other than retirement, and to establish a program of general state taxation. The proposal was defeated by a 74 to 26 percent margin.¹¹⁹

It is not surprising that despite such great dissatisfaction with public schools, voters have been unwilling to overthrow the educational structure completely. When faced with a choice, voters do

115. A Tuition Tax Credit Initiative sponsored by the National Taxpayers Union would provide a credit against state income tax of up to \$1,200 for every full-time student. See Taylor, *supra* note 14, at 1066. The Tuition Tax Relief Act of 1981 S. 550, 97th Cong. 1st Sess. (1981), sponsored by Senators Packwood and Moynihan, would provide a tax credit equal to 50% of a taxpayer's educational expenses up to a maximum of \$500 the first year, and \$1,000 after July 31, 1983.

116. Butts, *Educational Vouchers: The Private Pursuit of the Public Purse*, 61 PHI DELTA KAPPAN 7 (1979).

117. Tractenberg, *supra* note 78, at 160.

118. McGuire, *supra* note 2, at 9.

119. *Id.* at 11.

recall the centrality of education in American life. A voucher system would mark a return to a more atomized educational system of schooling reminiscent of the eighteenth century.¹²⁰ Vouchers will change the public's perception of education, particularly the central role of education in our political life.

Education is different. In an increasingly centralized society, the loci of power have become ever more distant. Local school boards are one of the few remaining ramparts of citizen democracy for all, whether or not the constituents have children in public schools. Even in large city school systems, the movement for decentralization of schools is a call to return to the traditional concept of community control of schools. Family choice places the locus of educational power into the hands of parents who may not have the expertise to run schools, may not have roots in the community and would operate apart from the political process. Education is too important to be left to parents and educators alone. Even those who have no children or have children in private schools have important interests in and impact on public education. They are affected by their local school system. Vouchers will disenfranchise those without school children¹²¹ and will atomize the broad lobby in favor of or interested in education.

The local property tax has been a source of inequality and unfairness. Thanks in part to much of the earlier work by Professors Coons and Sugarman, the inequalities of taxing have been remedied in many states. But the direct financial and political stake of the public at large in public education is an important reason why the present structure of education should not be completely dismantled. To dismantle the present educational structure would make education, particularly public education, just another social welfare program. Not all citizens will have a stake in public education and support for it will decline.

Yet, voucher ideas should not be rejected out of hand. It may be time to work within the present structure of education for reform. Schools themselves are focusing more on essentials. Attempts at integration seem ended for the time being. Schools are returning to educating the student. Within this context more experimentation involving vouchers is needed. Vouchers provide a particularly useful way to supplement educational opportunities using the tra-

120. CREMIN, *supra* note 50, at 400-404, 501-509, 544-46.

121. LaNoue, *supra* note 58, at 319.

ditional structure of education. Many of the advantages attributed to vouchers could be used more efficiently and be put to better use within the present educational structure. Sugarman has suggested the idea of school stamps to apply in a variety of ways to supplement educational experience.¹²² Now is certainly not the time to begin anew.

122. Sugarman, *Education Reform at the Margin: Two Ideas*, 59 PHI DELTA KAPPAN 154 (1977).