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Educational Alternatives for the 1980s: Common Schools and the Commoner*

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No text could have been more appropriate for my luncheon talk than Frank Macchiarola and Robert Bailey's observation about what they call equity:

If we are to allow our educational system to be fragmented among different groups we also will have lost an important ingredient in holding American pluralism together.¹

This sentence illustrates the difficulty of speaking to one another about schools in a mutually intelligible way. No one would quarrel with the principle that we should hold American pluralism together; and if a “fragmented” school system is a danger to national togetherness, surely we must reform it. Is their point, then, part of an argument that we should end the status quo in which the rich either go to expensive private schools or cluster in Scarsdale while the poor go where they are told?

Not quite. If you concluded that the sentence quoted was an attack on the establishment you were wrong. Macchiarola and Bailey are not attacking the establishment but defending it. Separation of families by wealth through residential assignment to “common” schools is for them an acceptable tool for cementing society; the poor will thereby learn to love both their country and the middle class. But is this because or in spite of their being sent by somebody who has never met them to populate a low-income school they did not choose? It is hard to grasp the argument. Does stripping the child’s parents of authority stimulate them to take their responsibility seriously and feel good about the society? Is it this that keeps American pluralism together? I confess I cannot tell.

*A substantial portion of the text is adapted from Coons, Making Schools Public, in PRIVATE SCHOOLS AND THE PUBLIC GOOD (Gaffney ed. 1981).
1. See Macchiarola and Bailey, Equity and Federalism: The Role of the Local Education Administrator, 15 Urb. Law. 3 (1983).
It would help if we could identify the real question. For me the issue is who gets to choose a child's school. Even this question can be made complex and mystifying, but it is essentially a simple one and I will try to keep it so. Put even more plainly: Is it good to rely upon stranger-professionals using a computer to assign Mary to her school, or can her mother and/or father do it, just like the rich people? Are the poor to be viewed as invincibly incompetent or are they to be given a chance to make their own mistakes like the rest of us and begin to learn by them? Reflecting upon the plight of the nonrich urban family one wonders whether the expression “common school” is to be taken literally to denote a holding tank for commoners. No amount of mystical talk can make the structure of education look democratic. That is my theme.

In the space allotted there is no possibility of my responding to every misunderstanding about family choice that is generated in the other papers. Let me simply admire the manifest good intentions and move on to something positive, noting only a few of the more instructive examples of confusion along the way.

Monopoly over the common family was justified by its nineteenth century designers on two premises. One was that education would, like physics, become a science; many thought us to be on the threshold of decisive interventions that would end illiteracy and ignorance. The other premise was that Americans agreed on the good life; we had a value consensus, and it would hold and increase. Thus, there was little embarrassment that the system was grossly illiberal and undemocratic; we were merely imposing with scientific efficiency what everyone wanted done anyway. It was, as David Tyack has described it, “the one best system.”

Neither premise remains today. Instead of one best system, twenty-five compete for teaching the three Rs. In place of one work ethic we have a dozen ethics, only some of which value work for its own sake. Of course, we agree that we should pursue the best interest of the child and foster learning, tolerance, consensus and racial integration, but there is little agreement as to what these ideals mean or how to achieve them. Education is indeterminate in its means and pluralistic in its ends. Nevertheless, we plunge on. In the narrow interest of a strategically located set of professionals

(not necessarily teachers) we impose systematic bias against the common family in a grossly elitist structure that we insist upon mislabeling as "public" or "common."

Beyond that vague minimum about which society does agree, who should decide what and where the child shall learn? There are two candidates for this authority, the educational managers and the family. Are there reasons to prefer one to the other, or some combination of the two?

The answer could be sought on the high plain of political theory. Here everything depends on the assumptions with which one begins. Starting from an aristocratic preference, one would favor decision by the few for the many. Of course, to the extent that the educational aristocracy is itself in deep conflict, such a paternalistic decision model would seem a bit arbitrary; it means handing children over to schools merely because their managers have acquired certain credentials and not because they are the guardians of any particular ideal or because they claim any particular skill.

Every teacher in every school today does, of course, hold some specific ideals of his own and does claim some specific skills, but the child does not come to that teacher's classroom for either of those reasons. The child comes simply because he lives on 34th Street and is told to come. And whether he gets a "touchy-feely" school or "back-to-basics" is the luck of the draw. Our present system thus fails even the historic definition of aristocracy, for it lacks a common cultural commitment among those in authority. I have just called the educational order elitist. I apologize. It is, indeed, Hobbes's jungle of petty tyrannies imposing private judgments. It is for the ordinary family an experience of chaos and coercion.

The alternative to Hobbes is basically Jeffersonian and democratic. Jefferson thought in terms of sturdy individual farmers. We must translate the eighteenth century image into one of individual families, few of them close to the soil and not all of them sturdy. But like it or not, family choice is the only democratic model available to an educational world so divided. If there were consensus upon specific learning goals and the tools to reach them, we could imagine an educational system that could be called democratic in the sense of majority rule. For better or worse—and I think better—America in 1982 cannot assemble a consensus for any but the very broadest set of educational objectives and no consensus whatsoever regarding means. The only sense, then, in which democracy is possible is that of the individual choice of free and equal citizens.
Yet, descending from political theory it may be possible to say something more practical about the proper allocation of power over children for the pursuit of such broad majoritarian aims as can be identified. I will try. What I say will not rise to the level of theory; nonetheless, I say it because it has helped me to think about the issue, and it might help others who are similarly puzzled.

Here are my candidates for these dimly perceived social objectives: Education should promote the best interest of the child, quality in learning, liberty and responsibility for the parent, social consensus, racial integration and the good of the teaching profession. I commence with by far the most important—the child’s own interest. It is the necessary (and perhaps sufficient) justification of any educational system. But, except for mastery of the three Rs and some sense of our political institutions, what can the “child’s interest” mean? In the absence of any social definition of a good education it means whatever the adult with power to choose a school for him would have it mean. And we are back in the circle again.

But not quite. I think it is possible in a rough way to evaluate decisionmaking about the child’s interest simply by observing and comparing the way decisions are reached by professional systems on the one hand and parents on the other. At least one primitive principle for the allocation of power emerges from that experience: By and large, individual assignments made by an adult familiar with the child are superior to assignments determined by the impersonal fact of residence. Human judgment may be fallible, but it improves upon random selection. I suppose it is too clear for argument that it is the parent who is in the better position to make a personal judgment about this child. Bureaucratic systems can provide individualization for only a very small portion of cases—and then only at great cost. If personalistic judgment is important, the parent has a great advantage.

Further, human judgment about children tends to be improved by three rather specific qualities that occur in different degrees among adult deciders. The first is the decider’s capacity to hear the child’s own opinion; Sugarman and I call this voice. The second is the degree to which such a decider is likely to act with altruism; we call this caring. The third is the degree to which the outcome of the decision is mutually baneful or beneficial for child and adult; we

4. Id.
call this responsibility.\textsuperscript{5} I won't restate all the arguments one can make for the family in terms of voice, caring and responsibility. They are mostly obvious. It is the parent who in most cases hears the child's own opinion; it is the parent who cares the most; and it is the parent who suffers with the child when the decision is bad. It is also the parent who is most likely to take the initiative to get the child out of a bad situation; it is seldom in the interest of the managers of the school system to see students disappear from the average daily attendance count.

These arguments are not antiprofessional. They merely recognize that professionalism only becomes possible when the client is free to sever the relation. Family choice, indeed, is the only way to introduce professionalism into government schools. Nor would I argue that parents do not need professional counseling in making decisions. That is precisely what they do need; what they do not need is subordination and domination by bureaucrats who have them as a captive audience. Under such conditions the interest of the child tends to become secondary to the interest of the system.

My conclusion so far is that the empowering of parents would not only make it possible at last to create a truly public system of education but would seem quite consistent with the best interest of the individual child. Before going on to ask whether family choice is consistent with consensus, integration and other broad social values, let us pause to ask what a sensible system based upon family choice might look like. There is no need to describe every possible model (though I would exclude some, such as tax credits which are useful principally to wealthier families)\textsuperscript{6} What I will describe is the plan for my own state that many of us think technically feasible and politically attractive. For convenience I will call it the California Plan. It is only to a limited extent the structure described by Professor Fishman.

This plan is, first of all, conservative, not in Fishman's terminology,\textsuperscript{7} but in the following sense of that word: Unlike other reform plans, it destroys no institutions and it favors the existing

\textsuperscript{5} Id.
\textsuperscript{7} Fishman discovers us to be on the “right of the New Conservatism.” See Fishman, Family Choice: An Idea Whose Time Has Come and Gone?, 15 Urb. Law. 113 (1983). The proposed initiative is the “19th Century liberal ticket.” No doubt this is humor and appreciated as such.
government schools. These at last could and would be labelled "public," since no child would be subjected to an assignment forced upon him by his family's circumstance. Those who wished not to attend existing public schools could attend any of three other types of schools. They could, as today, opt for the traditional private school financed by tuition. In addition, however, they could now choose either the private or public form of what we call the "new schools," both of which would be financed by state scholarships provided to families.

The important institutional innovation here is the new public school, which is a novel legal creature; I am sorry that only Gary Hoachlander saw any reason to give it even a passing nod, for it is potentially a great reform for public schools. Each such school would take the form of a separate public corporation organized and designed by a local school board (or public university) and financed by the scholarships of its patrons. Its counterpart in the private sector would be the new private school operating according to the same rules except for its entitlement to teach religion.

The public school—that is, the present model of state-owned school—would be relatively favored over the new schools, first, with more money. Scholarships for the new schools would be worth only 80 or 90 percent of what would be spent statewide in the public schools for children of similar age, grade and circumstance. Public schools could also, as today, prefer children who live in an attendance area chosen by the school board. Likewise, physically disabled children could be redirected to schools convenient to the system. New schools, by contrast, would be open to all children, regardless of residence and physical handicap.

Unlike the public schools, the new schools would also be required to set aside at least 25 percent of their spaces; for these spaces priority would be given to the applications of children from low-income families defined as the bottom 25 percent on the

9. Hoachlander's discussion of this may unintentionally mislead. The provision requires vouchers to vary according to need—indeed it requires that they reflect learning disabilities. But they will be 80% of what public schools spend on similar children. See supra Hoachlander, note 8, n.27 and text accompanying.
10. Hoachlander's criticism of this is partly supportable. See text accompanying Hoachlander, supra note 8, at n.5. It might well be preferable to open up the traditional public schools to easier interdistrict transfers. However, his discussion may tend to suggest that this is true also of public voucher schools under the initiative. This is not the case. All "New Schools" are to be open to all regardless of residence.
income scale. (These children would also be entitled to reasonable cost of transport.) The rest of the spaces in a new school would be filled by application of criteria valid under the federal Constitution other than residence and physical handicap.

The California Plan is, then, a way for families to choose freely among existing and new institutions. If change occurs in enrollment patterns, it will be because consumers did not like the services offered in a particular school. At last there would be a way for public institutions that have suffered brain death to expire peacefully as do moribund private schools, instead of having life sustained by artificial means, including a captive clientele. Conversely, there would be all the rewards of popularity for schools that people like. This phenomenon is called competition, and I believe that in our society it is regarded as normal and healthy.

Another special and important feature of the new public school is that it is permitted to operate as much like a private school as its founding school district desires. Its articles of incorporation can bind it to the parent district very closely or very remotely; thus its management could be lodged in the parents and children or, conversely, left in the hands of district administrators. Many models of governance could flourish, including management by the teaching staff. If permitted by its charter, each school could hire whom it chooses and deal with employees solely by contract instead of by statute and regulation. It could set its curriculum emphasizing different specialities, and it could set a code of discipline and enforce it.

California law has burdened its private schools very lightly. The fear of some opponents of vouchers has been that private schools would run too great a risk of heavy state regulation. With this fear in mind we have inserted the following language in the initiative:

New Schools shall be eligible to redeem state scholarships upon filing a statement indicating satisfaction of those requirements for hiring and employment, for curriculum and for facilities which applied to private schools on July 1, 1979; the Legislature may not augment such requirements.11

This language, which would become part of the California Constitution, not only would prevent such an outcome, but for the first time would offer private schools complete protection against legislative control of hiring, curriculum and facilities. The more important effect of this provision, however, is to open the possibility

11. See Private Schools and the Public Good, ch. 9 (Gaffney ed. 1981).
of deregulating some portion of the public sector; just how large a portion would depend upon the preferences of consumers. Some families will want public schools that continue to be heavily regulated; they are entitled to believe that such regulation contributes to child protection. Some by contrast will want new public schools that are deregulated to permit variation and flexibility. Consumers could have their individual ways without leaving the public sector.

Other than the admission rules the only significant regulation of the new schools—public and private—would come in the form of information requirements and limits upon the ways in which tuition can be added on top of the scholarship. The information demands are of course crucial if the market is to be self-regulating. Consumers must have adequate knowledge to make choices, and they must be able to punish the school that deliberately misinforms them. The California Plan would permit parents to levy that punishment by transferring the prorated portion of their voucher at any time to another school; it would permit the state to punish by terminating the school's eligibility to redeem vouchers upon proof of deliberate fraud.

The California Plan also requires an agency independent of any school to dispense information, and it guarantees an additional subsidy to families with "special information needs"—an information voucher—to purchase counseling services in the market. The initiative is based upon respect for the judgment of all parents, but it recognizes that some families will need to overcome barriers to full participation. Many will not speak or read English well. Some will be quite unsophisticated about education, since strangers have always decided for them. Personal counseling will be the most effective means for such families to raise their level of knowledge about schools, and the counselor should be of the parents' own choosing. It is expected that a new profession of educational advisors would arise; unlike the old counseling system it would answer to the family instead of to the school. It is also predictable that volunteer organizations ranging from the YMCA to the League of Women Voters would find counseling of nonliterate and immigrant parents a rewarding activity and private accreditation groups would make it their business to rate schools upon criteria to which different parents will give varying weight.

The new schools would be limited in another way. They could not charge extra tuition to low-income families, and the other families could be charged only according to their ability to pay. Unlimited freedom to charge add-on tuition would frustrate access
by the ordinary and low-income family; it would recreate the present system in a new form. There appears to be confusion about this in some of the other papers, and it is important that this be understood.

The scholarships would today average about $2,300 (though they would vary among children according to legislative judgment of need and other considerations). It is likely that some schools will be able to find families that are content to pay an extra thousand or two; though their payment would in part be a subsidy for others in the school, they would be paying far less than what it costs them today for private schools that spend at an equivalent level. The sole disincentive, if any, for such families would be the presence in the new schools of children from all classes and races; we hope that for most families this social mix will be viewed as an opportunity for their child. For unregenerate snobs there would still be the option to stay in the old private school and pay for it.

The new schools would be subject to one more limitation. They could not dismiss a child for academic reasons unless he or she were acquiring no substantial benefit; the school, however, could itself regulate the process of dismissal so long as its procedures were fair. Most schools would very likely establish an arbitration system for serious disputes. The school could also—with notice and fair procedure—set a code of conduct and enforce it.

For the child dismissed for academic or behavioral reasons, the California Plan represents new hope. Hitherto, he or she has been relegated to "opportunity" schools or "continuation centers"—some good, some not so good, but in any case with few options. There would now be a strong incentive for public and private providers to organize to serve such children in new and creative ways. We should remember the historic parallel of children with learning disabilities; until the recent interventions by the judiciary and Congress, the hope, if any, for such children lay largely in the private sector. For any child who is "special" in the many senses of that euphemism, the best system is the one that can adapt and reorganize flexibly whether the providers be public, private or both. One of the most interesting recent endorsements of this comes from the American Federation of Teachers, which now supports the issuance of vouchers to children who are failing in public school, allowing them to transfer to the private sector.  

Let me sum up what I have said about the California Plan. It delivers as much power to the consumer as our ingenuity could devise. And for the producer it guarantees as much liberty as is consistent with the primary right of the family. Such a system should truly put the family in the saddle. It will be public in the fullest sense and will serve the best interest of the child.

But will it serve the other broad goals of the social order? Let me add a word as to each, beginning with the need for consensus and tolerance. Some (Macchiarola and Bailey, for example) claim that giving ordinary families the choice that the wealthy now employ would divide us as a people. The assumptions underlying this assertion must be that we are presently sufficiently unified and tolerant and that ordinary people tend to be bigots. There is little to support either assumption, nor is there any reason to believe that government schools are efficiently fostering consensus. My own belief is that any government that despises the values of ordinary people and wishes to erase them by compulsion is likely to generate more conflict than it cures; conversely, a government that plainly respects the cherished differences among people is not necessarily divisive. Indeed, the manifestation of trust by government will beget trust in return from families. To know that the society supports the transmission of one's special values across generations is to have a reason to support the social order, not to upset it. *E pluribus unum* is not a statement of satisfaction that we have abolished all differences; it is a recognition that in human society—as in the biological order—variety is not weakness but strength.

As for racial integration, the question can be plainly put. When we have already done whatever it is we can do through the courts, should we deny opportunities for integration for those who will seek them beyond the judicial reach? Consider the District of Columbia. Would we have more or less integration if the children of the District were entitled to scholarships and a bus ride to the private school or public school of their choice—either in or out of the district? In many parts of California and elsewhere there are spaces in private or public schools within reasonable distance of children whose presence would be an integrating presence. I should add that the most stable integration our society has experienced is voluntary integration; and there is more of it today than is acknowledged by those committed to busing orders as the principal, or worse yet, the only idea in our legal quiver.
What would family choice do for teachers? I have already said it could make public school teaching a true profession. Let me add that it could make it a prosperous profession. At least it would do so in California where the cost per classroom is now approximately $90,000 and the teacher is paid less than $25,000. In a world of free consumer choice, state systems characterized by an enormous commitment to administrative and paraprofessional personnel who operate very large schools would begin to get competition. Families prefer smaller schools; given free choice they would get them. Such schools would be characterized by a heavier proportional investment in teachers as is characteristic of private schools today. Imagine a school of ten teachers serving two hundred children who bring, on the average, a $2,300 scholarship; it doesn't take a computer to perceive that teacher salaries could rise. To the objection that somebody else would then lose, I respond that the consumer is the best one to decide which laborer is worthier of his hire.

Teachers, by the way, could be expected to form many new schools acting either on their own or through their unions. In the present order teachers are not often entrepreneurs; some observers think they lack the temperament. I think they lack the capital. Who in his right mind would offer risk capital to finance a school today? But given a system of scholarships there would be every reason for private (and public) sources of capital to invest in good teaching. This would be assisted by a special provision in the California Plan making unused space in public schools available for rent at cost to the new schools. In an era of surplus capacity this is another important incentive. Finally, it is inevitable that the formation of new schools will be advanced by the expertise of unions and of management consultant types who will offer entrepreneurial services to teachers and to the families who wish to obtain their services in various kinds of schools. Fishman's comparison of education to the automobile or steel industries is a fantasy. The start-up costs for a school are very low, for the enterprise is labor-intensive.13 Competition can begin and develop swiftly.

It is crucial that this society do something for the teaching profession, which is in serious intellectual decline. Since we lost the

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indentured service of many of our brightest women through the women's movement, and since the baby bust wrecked the teacher market, few but the dimmest of our young intellects are pursuing the path to the teaching degree and certification. Unless we change the system, within ten years it will be entirely in the hands of well-meaning mediocrities. The frightening details may be read in the recent work of Professor Timothy Weaver of Boston University.\(^{14}\) The remedy may be read in the California Plan, which abolishes credentialing and tenure as requirements of law and which gives to teachers both the dignity of a free relation to a noncaptive client and the opportunity for economic gain.

I will shortly tell you why the plan is a blessing to taxpayers; let me now point out that the present scheme of things unnaturally depresses the level of national commitment to education. I wish I could convince Professor Fishman\(^{15}\) of the economic truth that so long as the public and private sectors are arrayed in mutual economic hostility, education will be shortchanged. It is today essentially a zero sum game. Every dollar spent for private schools diminishes the political and economic support for spending in the public sector—and vice versa. Conversely, a system in which the choices of families in both sectors are funded by the legislature would assemble the largest possible constituency for education. Unless change itself—any change—is perceived by the managers of the current monopolistic system as intimidating, one would have thought that they too would grasp this fundamental lesson in economics. For the initiative is in the best interests not only of the children they serve, but also of teachers and administrators in public and nonpublic schools alike.

As for impact on the institution of the family, consider first the effect of the present system on the parent of ordinary means. Until age five the child experiences that parent as authoritative and protective. At that vulnerable age in the child's life the parent is suddenly stripped of all power, and the child is directed by strangers to report to strangers who will teach him what the strangers


\(^{15}\) See supra Fishman, note 7, at n.121 and accompanying text. Professor Fishman's additional point that nonparents will be disenfranchised by vouchers also eludes me. They will, as before, vote for school board members and for the legislators who set the amount of the vouchers. One could plausibly hope that, once nonparents see that schools have at last reformed, they will begin to support them.
think best for him. Should we be surprised if he loses his healthy faith in the people who have been his primary advocates? Can we blame children for viewing their parents as impotent, when parents can do nothing to affect the basic character of the institution that claims the prime hours of their day? There could be no more efficient device for discrediting the family in the eyes of its own members than the present regime in education.

By contrast, the family that maintains control of education has a better chance of remaining effective in all of its functions. In such a family the opinions of both child and parent can count for something; they thus become worth discussing. The family can function as the political incubator in which important questions are aired and shared. This society could do nothing better for the battered and beleaguered American family than to give it the capacity to decide for its own children. Give it counseling; give it information; give it limits; but give it power and responsibility.

Therein lies sanity and stabler social order. Do not tell us that many poor families are apathetic, stupid and delinquent. Of course they are. Do not warn that they will make mistakes. Of course they will; the rest of us do, with embarrassing regularity. Perhaps the difference between us and the poor is that we are permitted to make our own mistakes—and learn from them. The poor are permitted no mistakes and thus have nothing to learn; their apathy and hostility is a perfectly rational response, just as the failure, violence, truancy and apathy of their children in school are responses to the indignity and foolishness of compulsory and often arbitrary assignments. If you want parents who try, and if you want children who try to learn, the surest medicine is to link them to their teachers by family choice.

I would be remiss if I said nothing about the economic cost of a system of family choice—the California Plan in particular. Let me say first that I am more interested in efficiency than cost. Let me also restate my belief that society ultimately will support education more generously if the private and public sectors can be brought more into economic harmony. But then let me stress that any plan can be designed to limit cost through a variety of devices. One is a simple ceiling on public expenditure; the California Plan, for example, would impose a six-year freeze on additional spending except for inflationary adjustments. Eligibility for scholarships would be phased in over that period, and the introduction of an additional percent or two of children drawn from the private sector each of those years would have minimal impact on average spend-
ing per pupil. Information and transportation would cost something, but their contribution to choice would be well worth the costs. These costs would in any case be minor. Even the enemies of choice have estimated the maximum added cost at less than 4 percent of the total public cost of education; and these critics have never begun to consider the savings.

These are potentially massive. There would be two important sources of efficiency: the size of the scholarship and the effects of deregulation. Since the scholarship is set at a percentage of the cost in the traditional public school, student transfers from public schools to a new public or new private school would offset some or all costs of private school entrants. More important, the elimination of heavy statutory controls over curriculum, credentialing, tenure and facilities would permit new schools to operate with the efficiency characteristic of private schools. Today spending per pupil in private schools is less than half that of their public counterparts; yet these low-budget schools achieve what James Coleman and Andrew Greeley tell us are consistently superior results in learning. While the costs of such schools will (and should) rise as they enter the system, competition will assure that their efficiency will be maintained with consequent benefits to their pupils and the society. Thus, a legislature that wished to maintain educational output at today's level could reduce spending; one that wished to increase output could expect to do so without changing the present public investment. In spite of deregulation there will be interesting and important decisions left for lawmakers.

If public education has a checkered past in this country, it certainly has a future. America desperately needs public education, and I am convinced that it is politically possible to achieve it.

[Professor Coons then entertained the following questions:]

Question: How do you preserve the rights of students under a voucher plan?

Coons: You put a clause in the law, which must be artfully drafted on the one hand to protect students from discrimination on grounds that are unfair, and on the other to protect the interest of the school in maintaining its own integrity. If you expect me to say that we should have a rule that prevents schools from kicking out ruffians, you're wrong. I think public schools and private schools alike ought to have the opportunity, with a fair and speedy pro-

16. This figure was used by various critics of family choice in public appearances during the 1979 signature campaign.
procedure, to get rid of people who are not prepared to carry on their work at the school.

Question: How would you preserve the public schools as the foundation of liberty?

Coons: The public schools are not a foundation of liberty; the public schools are a scandal. They are not even public. That is my whole point. Ask a person down in Harlem how much liberty he has to choose a school. I mean, from the point of view of liberty, what we have is liberty for the rich, and the rest take whatever they are given. That is not liberty. Now, perhaps you are wondering whether private schools that are today supported by low tuition and thus are full of low-income families teach liberal values? Do they teach liberty or do they teach fascism? Whatever they do they seem able to imbue their students with a greater respect for the Bill of Rights than is developed in the same kind of students who attend public schools. To be specific, Greeley and Rossi in their books on Catholic education have determined that there is a slight, but discernible, difference among Catholics who attend public schools and those who attend the parochial schools. The latter end up as more tolerant.17

Question: What effect will your proposal have upon democratic institutions such as parent-teacher associations and school boards?

Coons: First of all, ask yourself about the Beverly Hills School Board. Is it democratic? Is it even public? Now secondly, I have said nothing that would in any way eliminate any school board in the country. I mean, you could still have a thousand school districts in California, each of them still operating a school board. Each board would have to decide whether it would run neighborhood schools the way it used to or would run some new schools on a nongeographic basis, open to everybody from every district. That would be a new, larger, more exciting responsibility for school boards. Under such a legal structure I think school boards would at last be a democratic institution. More power to them.

Question: Didn’t you say that schools would be allowed to operate any way they wanted?

Coons: Yes, the way they wanted to according to the articles of incorporation that they provide for their own school. If the school district decided to establish a “touchy-feely-do-your-own-thing”

kind of school, it will indeed then be run by the parents and the kids. The board simply drafts the articles of incorporation so as to express that view. Now, what happens next is that nobody comes, so the school dies, or else it grows because people love it. But whatever the school board wanted as the motif for that school would be carried out according to the organic law of that corporation. It will be doing what it is designed to do.

**Question:** How will families be able to learn enough about the various schools to choose the best one for their children?

**Coons:** That is an important question; it is the question. It is a question of whom you trust to make the decision about where the child goes and how the decisionmaker can be supplied with enough information. First of all, you would want to design a public information system that would give people a fair description of the schools—like our consumer information systems we now have on the federal level. I think that is fine; sometimes it works, sometimes it doesn’t. In addition, where the family is particularly disadvantaged with respect to knowledge, such as inability to speak English, they ought to have a separate grant because of their special educational needs for information. For example, a parent just off the boat from Vietnam ought to have access to special counseling from someone they can trust, someone in their community. Thirdly, I think that a system of this sort would make possible the maximum utilization of volunteer agencies: the YMCA, the ACLU, the churches, the ethnic groups, the lodges—anybody who is interested in families understanding what their options are. I mean, that is what family services are supposed to tell us—what are our options and how do we find out about them? As far as hucksterism goes, you have it today in the public sector, and you would have it under this kind of a system as well. It will always be there, and sometimes it will succeed for a while. Nothing is perfect. The thing to remember is that in a market system the customer who has been misled can correct the problem himself by transferring the child. He does not have to move to Beverly Hills.

**Question:** What would you do for the child who is handicapped?

**Coons:** Under the drafts of our proposals, those children would, in fact, have new rights of access to schools that today would not take them. Any school that wants to participate would have to take children who have physical handicaps, and the legislature would have to make the voucher larger for such children, so as to stimulate schools in both the public and the private sector that will indeed respond to those children. If they apply, the schools will
have to take them. It is a very hard problem, just as it is under the present system. There is no perfect solution to the problem of multiple handicapped children, but it seems to me, in a system in which you have provided a variety of options, it is more likely that you are going to get a right connection than in a system in which everything has to be decided through a political and bureaucratic organization. At least that has been our experience.

Question: Will your plan involve a subsidization of religion in violation of the separation of church and state?

Coons: For the first amendment question, I would refer you to Mr. Justice Powell’s opinion and the footnote in Chief Justice Burger’s opinion, both in Committee for Public Education v. Nyquist. They said the systems the Court had reviewed all involved subsidies to private schools and the private schools were primarily religious schools. But, they said we will approach the problem afresh if we ever encounter a system designed as a general system to help families choose among schools, public and private across the board. By the way, Laurence Tribe and other constitutional scholars rely upon this same language to support the position that vouchers will indeed be valid under the first amendment. May I add that the proposed system would end most of the political branch of the “entanglement” problem; public and private schools would now approach the legislature shoulder to shoulder, for their interests would be linked instead of hostile.

19. Id. at 798 (Burger, C. J., concurring in part and dissenting in part).
Appendix

**DRAFT:** September 28, 1981

**AN INITIATIVE FOR EDUCATION BY CHOICE**

The following section shall be added to Article IX of the California Constitution:

**Section 17**

The people of California have adopted this section to improve the quality and efficiency of schools, to maximize the educational opportunities of all children, and to increase the authority of parents and teachers.

1. **New Schools**

   (a) In addition to the public schools and private schools presently recognized by law, there shall be two classes of schools together known as New Schools.

   (b) New Private Schools are private schools entitled to redeem state educational vouchers.

   (c) New Public Schools are schools organized as public corporations entitled to redeem such vouchers.

   School districts, community colleges and public universities may establish New Public Schools. Each shall be a public corporation governed by rules fixed by the organizing authority at the time of incorporation. Under this article such schools are common schools, and section 6 shall not limit their formation. Except as stated in this section, New Public Schools shall operate according to the laws affecting New Private Schools.

   (d) New Schools shall be entitled to redeem the state vouchers of their students upon filing a statement indicating satisfaction of those requirements for hiring and employment, for curriculum and for facilities which applied to private schools on July 1, 1979; the Legislature may not augment such requirements. No school shall lose eligibility to redeem vouchers except upon proof of substantial violation of this section after notice and opportunity to defend.

   No New School may advocate unlawful behavior or expound the inferiority of either sex or of any race nor deliberately provide false or misleading information respecting the school. Each shall be subject to reasonable requirements of disclosure. The Legislature may set reasonable standards of competence for diplomas.

   No school shall be ineligible to redeem state vouchers because it teaches moral or social values, philosophy, or religion, but religion may not be taught in public schools or New Public Schools; a curriculum may be required, but no pupil shall be compelled to profess ideological belief or actively to participate in ceremony symbolic of belief.
2. **Admissions**

(a) A New School may set enrollment and select students by criteria valid under the federal constitution other than physical handicap, national origin, and place of residence within the state.

(b) Each New School shall reserve twenty-five percent of each year's new admissions for timely applications from families with income lower than seventy-five percent of California families. If such applications are fewer than the places reserved, all shall be admitted and the balance of reserved places selected as in paragraph (a) of this subsection; if such applications exceed the reserved places, the school may select therefrom the reserved number.

(c) When district assignments are complete, any district with space remaining in its public schools may open such space to children irrespective of residence, giving reasonable preference to children described in (b). Children so enrolled shall be deemed residents of the receiving district for fiscal purposes.

3. **Finance**

(a) Every child of school age residing in California is entitled annually without charge to a state voucher redeemable by New Schools and adequate for a thorough education as defined by law. Vouchers shall be equal for every child of similar circumstance differing only by factors determined to be reasonable by the Legislature: they shall reflect the educational cost attributable to physical handicap and learning disability, and, for children of low income families, the cost of reasonable transportation. Except for children enrolled in schools in which parents or other relatives have primary responsibility for instruction of their own children no voucher shall be less than eighty percent of the average voucher for children of similar grade level. A nonprofit New Private School shall use income from vouchers solely for the provision of educational goods, services, and facilities for its students. The Legislature shall provide for an appropriate division of the voucher in the case of transfers. Nothing required or permitted by this section shall be deemed to repeal or conflict with section 8 of this article or section 5 of Article XVI.

(b) New Schools shall accept vouchers from low income families as full payment for educational or related services. Charges to others shall be consistent with the family's ability to pay.

(c) The average voucher shall be worth approximately eighty percent of the average public cost per pupil of pupils enrolled in public schools. Public cost here and in subsection (3)(d) shall mean every cost to state and local government of maintaining elementary and secondary education in the relevant year as determined by the Department of Finance according to law; it shall not include the costs of funding employee retirement benefits which are unfunded on June 3, 1982.

(d) For school years 1982-83 through 1987-88 the total public cost of elementary and secondary education shall not exceed that of 1981-82 adjusted for changes in average personal income and total school age population. The Controller shall authorize no payment in violation of this sub-section.

(e) Excess space in public schools shall be available to New Schools for rental at actual cost. Where appropriate and necessary, community groups shall be assisted in the founding of New Schools by guaranteed loans and similar aids.
4. Rights

(a) A pupil subject to compulsory education who attends a New School may continue therein unless she or he is deriving no substantial academic benefit or is responsible for serious or habitual misconduct related to school. With fair notice and procedures each school may set and enforce a code of conduct and discipline and regulate its academic dismissals. No pupil enrolled in any such school shall suffer discrimination on the basis of race, religion, gender, or national origin.

(b) The Legislature shall assure provision of adequate information about New Schools through sources independent of any school or school authority. Non-literate parents and others with special information needs shall receive a grant redeemable for the services of independent education counselors.

5. Transitional Provision

The Legislature shall promptly implement this section, ensuring full eligibility for vouchers of at least one-half of all pupils no later than the school year 1984–85 and all pupils in 1985–86.