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## Educational Choice and the Courts: U.S. and Germany

### INTRODUCTION

This essay compares the right of parents in the United States and the Federal Republic of Germany to choose the form and place of their child's education. My grasp of the law and culture of German schools is not that of an expert.<sup>1</sup> Still, the curiosity of amateurs can sometimes stimulate professionals to see familiar institutions in a new light or even an old light long forgotten. That experience is a familiar one for parents and teachers; when reintroduced to the world through the eyes of children, we experience more than nostalgia. Nor are lawyers and social scientists beyond such a reentry; and, if I cannot promise them the purity of a child's vision, I can at least offer middle-aged innocence.

My specific purposes will be, first, to describe the structural limits of parental choice in the U.S. (Part I) and to suggest that a weaker version of the American pattern may exist in Germany (Part II). Except for wealthy families and those subsidized by private schools, parents have limited control over school selection; this holds in spite of doctrinal commitments to parental authority in the organic law of both nations. This relative impotence of the ordinary family is, in my judgment, hurtful to quality in education and is destructive of important social values clustering about the institution of the family. After scanning the state of educational choice elsewhere in the West (Part III), I will explain how the legal structures and demographics of the individual American states have conspired to create this semi-monopoly by the state and describe the essentially passive role of the American Constitution (Part IV). Then I will turn with envy, and in greater detail, to the guarantees of the Basic Law (Part V). It will be urged that German private schools

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1. My young Austrian and German friends from the Berkeley LL.M. program have valiantly tempered my vision of the possible, and I am grateful to Dorothee Steurer, Joachim Zekoll Carsten Eggers, Hans-Peter Ackmann and H. Elizabeth Kroeger who have successively assisted me. I would add that both Professor Bodo Pieroth of Bochum and Dr. Helmut Siekmann of Köln kindly directed me to various basic materials and arguments. A dozen other German professors and lawyers have patiently tolerated my enthusiasm for exporting arguments about parental choice that are hard enough to sell at home. To all of them my thanks. Finally, I am grateful to the Liberty Fund which moved me to prepare the first draft for its 1985 conference in Baden-Baden on educational rights.

and their clientele can assert a plausible claim to public support, one rendering choice a reality for all economic classes. The most important feature of the legal argument for this claim may be an American state constitutional formula, "fiscal neutrality", by which the German judiciary could implement the claim without increasing public cost and with scant disturbance of the legislative and regulatory processes. In Part VI, I will scan the relevant German federal and state decisions. Finally in Part VII, I will touch upon the social arguments for and against such empowerment of ordinary families to choose their children's schools.

### I. THE AMERICAN SCENE

American schools provide a juicy target for Marxist analysis.<sup>2</sup> To be sure there is considerable mixing of social classes in the public schools of rural towns, but in the cities and suburbs separation of pupils by race and income is the norm. The reason for this is simple: Most children in the public sector are sent to the school in their own neighborhood, and neighborhoods tend to be rather homogeneous by class; to some degree they tend also to be racially and ethnically distinct. Wealthy families who for any reason do not like their assigned public school can move their residence or pay tuition in a private school. The family that cannot afford these options takes pot luck in education.

Many Americans seem resigned to this form of intellectual compulsion; it is not, however, popular. National polls indicate that a majority would prefer a system in which parents were given scholarships to spend in schools of their choice in either the public or private sector.<sup>3</sup> Not surprisingly, minority families are especially dissatisfied with their lack of choice. And a movement toward

2. Curiously the easy structural arguments are downplayed. Even the critique of Bowles and Gintis, *Schooling in Capitalist America* (1976) focuses less on class conflict and more on racial segregation and the plight of the very poor.

3. The 1983 edition of the Gallup Poll asked the following question: In some nations, the government allots a certain amount of money for each child for his or her education. The parents can then send the child to any public, parochial, or private school they choose. This is called the "voucher system." Would you like to see such an idea adopted in this country?

The results are reported in Phi Delta Kappan, 1983, p. 38; as follows:

National Totals	No Children in School	Public School Parents	Nonpublic School Parents
%	%	%	%

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"home instruction" is evident, though for obvious reasons this could never involve more than a fragment of the population, even if the law were to encourage it.<sup>4</sup>

Private schools enroll roughly 12% of the pupil population. More than 80% of private schools are religious schools and half or more of the total is Catholic; the proportion of fundamentalist Christian schools, however, is increasing rapidly, mostly in suburbia. The religious schools spend on the average perhaps \$1,000 per year per pupil at the elementary and \$2,000 at the high school level; this is roughly half the expenditure in public schools. Research by Coleman and others suggests that low budget inner-city private schools—mostly Catholic—are as successful as any in educating the most disadvantaged children of all racial groups.<sup>5</sup>

Reform movements in several states (and at the federal level) have begun to work politically for systems of subsidized parental choice. There are various, and sometimes conflicting, themes among the would-be reformers. Some, following the ideological lead of economist Milton Friedman, are driven largely by efficiency theory: they question the public provision of educational services.<sup>6</sup> The only clear role for government is to provide the poor a subsidy sufficient to enter the market and buy a basic education. Many of these critics would be content to see publicly operated schools disappear.

Other supporters of parental choice believe that for many families autonomy can be achieved only by providing consumers of education with subsidies that are coupled with modest regulation of the producers to insure fair treatment for all income classes. However, it is agreed that regulation should never exceed the minimum necessary to maintain choice itself.<sup>7</sup> Further, choice should include public schools, simply because many consumers will prefer them; and public schools should be strengthened by forms of deregulation allowing them to compete on equal terms with private schools and one another. To that end school districts would be allowed, though not compelled, to create new public schools that take the legal form of non-profit corporations; these would be free to employ every style of management and curriculum that is now permitted in the private sector. They would be open to all applicants regardless of their residence. Such public schools would be financed by state scholarships

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4. Devins, "A Constitutional Right to Home Instruction?," 62 *Wash. U. L. Q.* 435 (1984).

5. Coleman, Hoffer, & Kilgore, *High School Achievement: Public, Catholic and Other Private Schools Compared* (1982).

6. Friedman & Friedman, *Free to Choose* (1980).

7. Coons & Sugarman, *Education by Choice* (1978). And see Coons, "Making Schools Public," in Gaffney (ed.), *Private Schools and the Public Good* (1980), trans. and published as "Private oder Öffentliche Schulen?" (1984).

(or "vouchers") cashed in by the families that chose freely to enroll their children. These subsidies would be usable also in private schools.

In both sectors the subsidy for such schools would be somewhat smaller in amount than the average cost in those traditional and heavily regulated public schools which would remain financed by state subventions to the school district. This difference in the level of support would supposedly reflect the relative efficiency expected of voucher schools; it would also help maintain the quality of the traditional public schools for those who prefer them. By contrast voucher schools, both public and private, would be regulated in only three ways: (1) They would have to give priority to low-income families for some portion (say 25%) of their places; (2) any extra charges above the voucher would be means tested; and (3) each school would provide substantial information to potential consumers.

In recent years political efforts for "vouchers" have intimidated the public school management sufficiently to recast its vocabulary. "Choice" is now the by-word of every sophisticated American school superintendent, and no opportunity is lost to give the appearance of "options" in the public sector.<sup>8</sup> "Open enrollment" and "magnet schools" are the favorite terms offered for media consumption. In a few places these words denote some modest increase in choice. Most open enrollment plans, however, are limited to the places remaining after the neighborhood residents take their seats; such places are few in the "desirable" schools, and the increase in opportunity is largely an illusion. In any case students are seldom invited to cross district lines; and magnet schools are merely intra-district opportunities open to a limited clientele. Further, magnets generally entail the shift of important resources away from neighborhood schools in order to satisfy the families that are most vocal and political. Of course, for these latter children, there is in fact a measure of relief from the pattern of incarceration. On the whole, however, the intention and effect are more anaesthetic than remedial.

There is an occasional call for a voucher system limited to public schools. When pressed, however, the proponents turn out to mean nothing more than an open enrollment system in which idled teachers from unpopular schools simply get moved to popular schools.<sup>9</sup> Again, this may have some value. But the limitations are

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8. The most ambitious of these is the plan of Governor Rudy Perpich of Minnesota which would aim to open all unused space to children outside the attendance area.

9. See, e.g., the Alum Rock "experiment" of the 1970s. Levinson, *The Alum Rock Voucher Demonstration: Three Years of Implementation* (RAND Paper Series P-5631, 1976). The president of the American Federation of Teachers recently endorsed "public school vouchers". He candidly commended it as a way of diverting

plain; choice within the public sector remains essentially hypocritical until its two essential conditions are accepted: The unsuccessful public schools must not be protected from bankruptcy, and their teachers must not be guaranteed equivalent jobs in the system.<sup>10</sup> Competition must be permitted to have its effect. Otherwise, as the saying goes, we are merely shifting deck chairs on the Titanic.

The movement for choice has yet to produce any significant opportunities for the ordinary family in the private sector; parents are extremely difficult to organize, and, as we shall see, state constitutional barriers make legislative politics difficult. Nevertheless, serious efforts are afoot in Minnesota, Louisiana and California, and it is possible that one of the national political parties will eventually adopt educational choice as a serious objective.

## II. THE GERMAN SCENE

Superficially, the connection between child and school is somewhat different in Germany and the financing pattern more complex. Religious schools can, and in some cases must, by law, be subsidized. Furthermore, families in urban areas can choose among at least a few other forms of privately operated schools (most prominent being the Rudolf Steiner or "Waldorfschule"), which receive a substantial subsidy in various of the *Länder*.<sup>11</sup> Yet the patterns of control and the demography of the schools may not be so different from the U.S. as they first appear. Many of the schools operated by the churches, for example, because of heavy regulation, resemble—and are generally regarded as—state institutions<sup>12</sup>; they provide choice to the extent of the one-dimensional supplement of religious instruction. The automatic assignment of pupils to their neighborhood public school is common at the two elementary levels; where there is housing separation by class, the result resembles the American pattern. Provision is often made for transfers, especially during periods of surplus space, but this is limited to the public sector.

A bit more can be said about the vital statistics of the private sector. According to Peter Mason, private schools educate approximately 5% of German children.<sup>13</sup> There is, however, an apparent shortage of such schools; in some cities (as in the U.S.) parents at-

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and frustrating the demand for choice in the private sector. *Education Week*, 8 May 1985.

10. For a suggestion along this line, see Coons & Sugarman, "Vouchers for Public Schools," 15 *Inequality in Education* 60 (1973).

11. Mason, *Private Education in the EEC* 15 (1983). *Länder* are the states of the Federal Republic of Germany. As in the United States, German *federal* legislation and government (*Bund*) have limited significance in the area of school education. The Basic Law (or Constitution) may be a different matter, as is considered below.

12. *Id.* at 14.

13. *Id.* There are, however, extreme deviations from that figure. In Bonn, for

tempt to secure a place by enrolling their children at birth. The shortage is paradoxical in a period of low enrollment and may represent administrative hostility to new schools. Not all of these schools presently receive state subsidies; those that do are given widely varying levels of aid by the state. Some of the private *Grundschulen* and *Hauptschulen*,<sup>14</sup> for example, receive 100% of the current costs of comparable state schools; others are supported at a much lower level.<sup>15</sup> Apparently few if any receive capital assistance. In varying degrees these fiscal distinctions hold within individual states as well as between states. This will be relevant to our later consideration of the constitutional issues.

Schools operated by churches often make up any shortfall in resources from the proceeds of the unusual *Kirchensteuer* or "Church Tax." This is levied by certain churches and administered by the revenue service at church expense.<sup>16</sup> Seldom is there any tuition in church schools.<sup>17</sup> Non-confessional schools by contrast often must make up the difference between their subsidy and the schools' budget with fees which average perhaps 200 DM per month at the *Gymnasium* level.<sup>18</sup>

The states often draw a wavering line between "approved" and "recognized" private schools, and at this point an explanation of the terminology employed in the field of private schools may be helpful. The rough scheme below will serve this purpose. Its starting point is the word "approval" in Article 7, subsection (4) of the Basic Law which we shall have occasion later to construe. The word appears in the following sentences: "Private schools, as a substitute for state

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example, more than 50% of the newly enrolled children at the secondary level go to private schools, and the tendency accelerates.

14. *Grundschule*: Generally 1st to 4th school year (compulsory for all children). *Hauptschule*: Generally 5th to 9th school year (compulsory) and 10th year (voluntary). The *Hauptschule* was designed for that majority of children who do not attend the academic and university oriented "Gymnasium" or "Realschule". The separation is not so neat as it used to be. Some states have introduced the "Förder" (or "Orientierungsstufe"), sometimes compulsory, for the one or two year period after the *Grundschule* to help decide the further course of the child's education (by postponement). The compulsion stimulated political objection and some litigation. (See Oppermann, in von Münch (ed.), *Besonderes Verwaltungsrecht* 831-837 (6th ed. 1982).)

15. Id. at 15. Crockenberg puts the range of subsidy at between 77-98%. "An Argument for the Constitutionality of Direct Aid to Religious Schools," 13 *J. L. & Ed.* 1, 15 (1984). It is worth noting that in Germany (as in most European nations) the subsidy is paid the owner of the school; the parents do not exercise the enhanced forms of choice that would come with educational scrip or vouchers. Indeed, insofar as a right to operate private schools is recognized as constitutional in origin, it may be one enjoyed not by parents or children but the schools themselves. See text, *infra* at 16-17.

16. Art. 140 Basic Law incorporating Art. 137(6) Weimarer Verfassung—(German Constitution from 1919-1933) and respective state statutes.

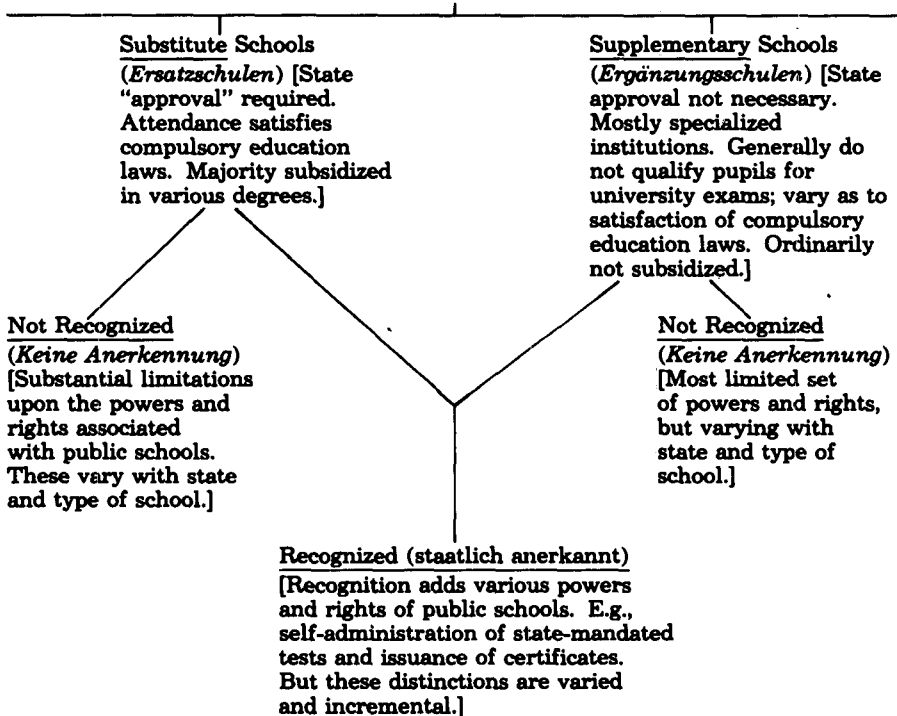
17. Boarding schools are an exception; families pay much heavier fees.

18. Mason, *supra* n. 10 at 15.

. . . schools, shall require the approval of the state. . . . Such approval must be given if . . . ,” and so forth. It would seem that, if a private school is to “substitute” for the functions served by public schools, it must first secure approval. But there is ambiguity here and conflict among the states. Certain unapproved schools in some states satisfy the compulsory education laws, though they may not, like public schools, qualify students for the university entrance exam. For the latter purpose—and various others—an additional “recognition” by the state administration may also be required. Recognition, however, also proves to entail different consequences in different states, and at least one state (Nordrhein-Westfalen) does not use the term even though it makes some of the same distinctions among its schools. Given a tolerance for impressionism, the following picture may be helpful:

### Private Schools (Privatschulen)

[Article 7(4), Basic Law]



General Source: Wolff, *Verwaltungsrecht II*, § 101, VIII 6 (3d ed. 1970).

	National Totals	No Children in School	Public School Parents	Nonpublic School Parents
	%	%	%	%
Favor voucher system	51	51	48	64
Oppose voucher system	38	37	41	30
No opinion	11	12	11	6

The "recognized" private schools in several states (*Länder*) receive higher subsidies than do the merely "approved" schools which in many cases receive nothing.<sup>19</sup> Generally only recognized schools can give the exam necessary for university admission. I should add, however—what will surprise no one—that schools that are both recognized and subsidized tend to be more heavily regulated. Indeed, at the extremes—especially in church schools—it is difficult to distinguish sharply between private and public schools. This confusion cuts both ways, for not all "public" schools seem to be administered exclusively by the state; some of my own children once attended a village *grundschule* that served as the local public school but was distinctly Catholic in its atmosphere—including the presence of nuns in habit. In two states on the primary level there still exists the *Bekenntnisschule*, a public school limited to children willing to accept a curriculum wholly grounded in the principles of one faith.

There is no immediate prospect (or need) of my discovering and ordering all the important and differing details of private education in the various *Länder*. Our primary interest is in finance and I will assume the few details necessary for developing an interpretation of the provisions of the Basic Law potentially relevant to subsidies. Let us, therefore, suppose the following general pattern: private schools are sometimes subsidized, sometimes not; some are subsidized nearly to the level of state schools, some much less; the pattern varies by state and within states; we confront a variety of treatment by government—variety of a sort that in the United States would almost unquestionably offend the guarantee of equal protection unless rational and legitimate distinctions could be drawn among the various classes of schools.<sup>20</sup>

19. This distinction is considered questionable by some writers. See, e.g., Vogel, *Das Recht der Schulen und Heime in freier Trägerschaft* 126 (1984).

20. According to Kloepfer & Messerschmidt, "Privatschulfreiheit und Subventionsabbau," 1983 *Deutsches Verwaltungsblatt (DVBl)* 193, 199, the diversity in treatment of private schools is a consequence of the constitutionally approved and intended "educational federalism" (*Bildungsföderalismus*). Art. 3 of the Basic Law (equal protection) as the more general rule, therefore, does not require absolutely equal treatment of private schools among the *Länder*. Insofar as this argument for pluralism among the *Länder* is extended to disuniformity within the *Länder*, it may be a non-sequitur.



III. EDUCATIONAL CHOICE IN OTHER WESTERN SOCIETIES<sup>21</sup>

Though this essay focuses on Germany and the United States, a picture of public support of parental choice in other Western countries may help to show the scale of the issue. This picture will not be comprehensive. These are mere sketches and glimpses; excluded altogether are such complex systems of subsidy as those obtaining in the various Canadian provinces, Great Britain and Eire.

Austria employs a system of assignment similar to that of her German neighbors. Outside some small ethnic enclaves the bulk of the children attend state institutions. A right of the individual citizen to use private schools or even home instruction to satisfy the duty of attendance is, however, guaranteed constitutionally.<sup>22</sup> Legislation and regulation have fixed the criteria for state subsidy of private education, and—as in Germany—only some of the private schools are “recognized” so as to qualify to receive the subsidy and to give the examination for the university. Here also the private/public distinction is not crisp, but official statistics suggest that about 9% attend private schools, most of them operated by the Catholic Church.<sup>23</sup> In these and in other “recognized” schools the entire cost of teachers’ salaries is borne by the Austrian government but, again, the schools are heavily regulated. Just how much real choice is available is not very clear; and whether private schools effectively exclude lower income children by unregulated fees or by other admission criteria probably differs from case to case. No constitutional rule seems to govern this aspect.

Denmark and the Netherlands are widely credited with commitment to family autonomy in the selection of schools. This is certainly true up to a point. Denmark has for a century permitted relatively small groups of parents to organize and operate schools with distinctive methodologies and/or ideologies. The cost of these schools is for the most part borne by the state. Hence, Copenhagen has witnessed the founding not only of various Montessori, Steiner and other familiar types but even a Buddhist, a Communist and a Koran school. In contrast to their American cousins, Danish public educators take pride in this policy of trust and openness. They are quick to point out that, in their exercise of this freedom, over 90% of the families decide to send their children to the state schools. It should be conceded, however, that the curriculum of private schools

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21. For the information in this section I rely again on Peter Mason and upon interviews of my own in 1974 in Germany, Austria, Denmark, Holland and England, in 1980 in Australia and New Zealand, in 1983 and 1985 in Germany, and in 1985 in Japan.

22. Art. 17 of the Austrian Constitution.

23. Austrians speculate that any strong government move toward comprehensive schools (*Gesamtschule*) would, as in Germany, swell the private sector.

in Denmark is in considerable part mandated by the state, as is the qualification of teachers. Parental influence centers upon teaching method and atmosphere and the adoption of courses such as foreign language, ethnic culture and religion, which are simply added to the basic state requirements.

The legal structure of the Dutch system is very similar to that of Denmark; internationally the Dutch schools are the preferred example of a society's devotion to family choice in education. The system originated in the 19th Century as a compromise between Protestant and Catholic interests after prolonged conflict. Today it can be interpreted either as a cause or an effect—or both—of the growth and triumph of tolerance in Dutch society. In strong contrast to the Danish experience, choice in the Netherlands has resulted in the shrinking of the public sector. Protestant, Catholic and state schools enjoy roughly equal slices of the pupil population. As in Denmark, the regulation of minimum standards is significant, but schools differ in what they choose to add and, of course, in their atmosphere and methods.

The Belgian response to the issue of choice is different in another important way. It has been driven by the historic tension between the Dutch and French speaking halves of the society. A partial victory for Flemish plaintiffs before the European Commission of Human Rights<sup>24</sup> helped to establish a language-based system of choice available to most families. It has even stimulated the appearance of schools for tiny minority groups (such as Germans) who have established publicly subsidized schools conducted exclusively in their own tongue. It is important to emphasize that the state in this instance has committed itself to basic instruction in the language of the parents.

The Belgian example may be unique. Except during a brief period in French Canada, linguistic insularity has not been a goal of enthusiasts for family choice. Even among Hispanic promoters of "vouchers" in California, it has been assumed that the state has a proper interest in assuring literacy in the national language. A limited exception to this is represented in certain ethnic schools in Austria; but these are aberrations which grew out of treaty obligations to Croatian and Slovenian minorities after the two world wars.<sup>25</sup> One more apparent exception should be noted: the state of South Australia supports an interesting response to ethnicity in grades K-3 in the public sector; a number of optional state schools are con-

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24. Belgian Linguistic Case (3.7.68, Series A6) ECHR.

25. Treaty of St. Germain, 10/9/1919, St. GB 1. No. 303/1920 Part III, Section V, Article 67; State Treaty for the Re-establishment of an Independent and Democratic Austria, BGBl No. 152/1955, art. 7. I am credibly informed that some promoters of Turkish culture schools in Germany aspire to linguistic isolation.

ducted exclusively in the language of immigrant parents—Greek, Croatian, Italian and Turkish.<sup>26</sup> The supporting pedagogical hypothesis, however, is that literacy comes easiest in the home tongue and that, once the child realizes he is capable of reading, he will be psychologically readier for the challenge of English as a foreign language. It is not an effort, as in Belgium, to satisfy a demand for political and cultural separatism.

In the private sector Australia, since the early 1970s, has been strongly committed as a nation to the support of schools. Both federal and state governments give large subsidies. Distinctions are drawn among private schools according to a complex formula; the less expensive schools receive the largest subsidy. Thus, the relatively low budget Catholic schools of New South Wales receive up to 60% of their costs, while the high tuition "independent" schools receive substantially less.<sup>27</sup> The schools are regulated with teacher credential requirements equivalent to public schools and must secure state approval for the building of new schools.

In the last decade New Zealand also has begun to support its private schools through a unique system of individual contracts between school and state. These are negotiated over substantial periods of time and in enormous detail. In theory a compact is concluded when the state is satisfied that the particular school will meet the standard expected of state schools. The extent to which these cumbersome treaties stifle individuality is unclear but must be significant. From direct observation the process appears to be heavily bureaucratic. I am not informed of the extent to which added tuition is regulated.

Japan has a variation of these "Western" schemes of limited support for choice. Its system of subsidies has little public visibility but is in fact very substantial. Private schools are partially supported by the prefectures in which they are located. The average national subsidy is 34% of public school costs; in Tokyo Prefecture it is roughly 50%. Private schools are very important at the high school level. Nearly 30% of high school students are in private schools.

Finally, it should be noted that the United Kingdom, France and Spain have all recently experienced substantial political upset over the issue of choice. In England this has focused upon a proposed voucher experiment in Kent which in the end was scuttled in the face of determined opposition by the teachers' unions. In Spain

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26. Per John Steiner, Minister for Education, South Australia, interview (1980).

27. *Program Guidelines 1985*, Commonwealth Schools Commission, Canberra, March 1985. Private pupils are roughly 25% of the total school population and are fairly evenly distributed by age and grade.

critics have attacked sharp class division represented by tuition-based religious private schools alongside "free" tax supported secular public schools; reminiscent of the American system, many doubt that it is an appropriate structure for a society hoping to move toward a more open democracy. Polarized proposals for reforms in Spain would either abolish the private alternative or extend choice through vouchers. Lastly, in France in 1984 the opposition of private schools and their parents to increased state control and the limitation of subsidies halted a major program of the Mitterand government.

Except, possibly, for Holland and Denmark, it is not clear to what degree these various countries should be characterized as offering choice in their present educational regime. None encourages ordinary parents through direct educational subsidies usable in any school with easy right of transfer. Perhaps parental preferences are in fact satisfied by the private schools the state now supports, but, if so, it may be because these schools principally serve the tastes of families that can afford the extra tuition. This is a source of criticism in Japan and elsewhere, and it is hard to rebut. Critics argue that such schemes favor the wealthy, and this seems true by definition wherever tuition is charged. The trade association that represents Japanese private schools claims that their clientele is representative of the total society. This could be true, however, only if lower income families have abnormally high preferences for private education or if tuition in these schools is systematically tailored to the family's means. There is no evidence of either. It must be conceded that everywhere in the "West"—just as in the United States—a large number of poor families manage somehow to enroll in the private sector. But it seems anomalous in a democratic state to invite participation of the poor only at ruinous cost.

Realistically, however, there is more educational choice for the common man in these societies than in the United States. Granted, such systems are not models of choice and competition; they are, nonetheless, symbols of a democratic faith and—in many cases—a dynamic element in national politics. It would not be surprising to see educational choice become an organizing focus for partisan politics left and right in the remainder of the century.

#### IV. EDUCATIONAL MONOPOLY AND THE AMERICAN CONSTITUTIONS

The institution of judicial review maintains the theoretical possibility that the legislated monopoly structure will not always be the final word. As we shall see, however, judicial intervention on behalf of choice in the United States is most unlikely; hope for change lies principally in politics. Relevant American constitutional law is,

nonetheless, worth recounting to illuminate the history of the problem and to help us appreciate the contrasting role that may yet be defined for German courts.

As in Germany, American education is largely a creature of the individual states. They establish and regulate schools under that familiar head of authority, the "police power". This is the broad residue of control left in the states after the concession to the federal government of the particular powers over war, commerce and so forth. In addition to this "natural law" of the state, many or most state constitutions deal very specifically with education. In some cases state guarantees have played a role in protecting the individual right to equitable financing of public schools;<sup>28</sup> in other cases they have set limits to the state's power either to assist or to regulate private schools and the families that would use them.<sup>29</sup>

Some state constitutional provisions are profoundly anti-choice, and their history is interesting. Various of the states had subsidized private schools until the wave of Irish-Catholic immigration in the 1840s. New York responded to these outsiders and their parochial schools with a constitutional prohibition of aid to private or religious institutions; and such nativist devices became the norm for the newer states.<sup>30</sup> From that time aid to private schools has been the rare exception in all states, while, until the 1960s, much of public education retained a strong Protestant flavor including prayer and Bible reading. Under the federal Constitution the U.S. Supreme Court has now forbidden these practices in public schools as well as most direct subsidies to private schools.<sup>31</sup> However, it is now probable that the high Court, which is plainly changing direction, would approve a state or federal system of educational scholarships or vouchers for families, so long as the scheme includes both public and private schools and is neutral among them.<sup>32</sup>

The problem for subsidized choice, then, is the combination of state constitutional prohibitions and the unlikelihood that the federal court would ever declare subsidies to be a positive right guaran-

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28. See, e.g., *Serrano v. Priest*, 18 Cal. 3d 728, 557 P. 2d 929 (1976); *Robinson v. Cahill*, 62 N.J. 473, 303 A. 2d 273 (1973).

29. *State of Ohio v. Whisner*, 47 Ohio St. 2d 181, 351 N.E. 2d 750 (1976).

30. See e.g. *Constitution of California*, Art 9, §8; Article XVI, §5, and see *California Teachers Association v. Riles*, 29 Cal. 3d 794, 632 P.2d 953 (1981).

31. *Engel v. Vitale*, 370 U.S. 421 (1962); *School District of Abingdon v. Schempp*, 374 U.S. 203 (1963). Regarding prayer in public schools cf. the decision of the Federal Constitutional Court, BVerfGE 52, 223, which allowed it with certain qualifications.

32. *Mueller v. Allen*, 103 S. Ct. 3062 (1983). For a concise history of the problem of the "Establishment Clause" see Johnson, "Concepts and Compromise in First Amendment Religious Doctrine," 72 *Calif. L. Rev.* 817 (1984). For a possible hesitation in this recent drift see *Grand Rapids School District v. Ball*, 53 U.S.L.W. 5006 (1 July 1985).

teed by the 14th Amendment. On the latter point it is helpful to consult history and to gain a sense of the Court's perception of its own role. The legal story is generally begun with *Meyer v. Nebraska*<sup>33</sup> decided in 1923. The nativist movement had produced a statute in Nebraska that made it criminal to teach a foreign language to a child of twelve or under. Meyer was tried as a criminal for teaching German to a child in a private school. The Court struck the conviction down under the 14th Amendment's Due Process clause as an unjustifiable burden on the teachers' liberty to teach and the parents' liberty to rear their own children.

*Meyer* was soon followed by *Pierce v. Society of Sisters*<sup>34</sup> testing an Oregon law which had gone all the way against the freedom to choose. By popular initiative (backed, among others, by the Ku Klux Klan) that state adopted a requirement that all children attend state schools. The expressed purpose of the initiative was to counter minority influence and produce "true Americans".<sup>35</sup>

The Court struck down the law, thereby inaugurating what has been called the "Pierce compromise."<sup>36</sup> The state may compel education; but parents may choose private schools. However, there are two more "buts" that need to be added to this statement of the compromise. One is that the state may substantially regulate private schools; the other is that nothing in *Pierce* requires the state to help those who choose a private school to pay for it. Hence the Court, the state constitutions and the class structure have together created the American scene that I earlier described. That is, the rich get choice, and the rest get sent.

There have been academic suggestions that the Constitution should be construed to require effective family choice.<sup>37</sup> The two-step argument runs like this: First, parents and children have a right under the 1st Amendment not to be indoctrinated by compulsion in ideologies (religious or secular) that are offensive to the parents. There is some slight substance to this constitutional claim. In 1941 Seventh Day Adventists managed to escape the duty to pledge allegiance to the flag in public schools.<sup>38</sup> More recently the Amish have escaped portions of compulsory high school,<sup>39</sup> and other decisions have supported access to library books and the students' right to

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33. 262 U.S. 390 (1923).

34. 268 U.S. 510 (1925).

35. *Oregon School Cases, Complete Record* 732-33 (1925).

36. Kirp & Yudof, *Education Policy and the Law*, 1-10 (2nd ed. 1982).

37. Arons, *Compelling Belief* (1983).

38. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

39. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). I am told that recent German lower court decisions have rejected the Amish claim with threats to remove the children from the parents.

wear political symbols so long as disruption is avoided.<sup>40</sup> That, however, is about as far as the 1st Amendment argument has gone. And, even if the argument against indoctrination were wholly successful, in itself this would not be much help. The child of, say, socialist parents might escape public school altogether on grounds of ideological oppression, but what then is his hope for an education?

The second step in the argument insists at this point that the Equal Protection clause of the 14th Amendment entitles the dissenting family to take its share of the school tax to a private school of its choice.<sup>41</sup> The logic of this is plausible. The reality of it is something else—at least for the foreseeable future. The provision of subsidies for families to use private, and especially religious, schools is counter to our practice of the last hundred years. No existing state subsidy aids particular private schools and not others so as to trigger a claim of discrimination. There has been state money for public schools only, and maintaining this distinction between the two sectors has been accepted as valid even if it is contemptuous of family autonomy. Hence the Supreme Court is not likely in the foreseeable future to move in this direction. Indeed, in dictum it has opposed the proposition.<sup>42</sup>

In my judgment this reluctance is, at least in part, a function of the literary form of our Constitution which is given to phrasing its guarantees in broad and ambiguous terms. The conversion of such broad language as “due process” and “equal protection” into a right of such consequence as here suggested is a task that might engage generations of litigants without great likelihood of success. The court would be readier to support subsidized choice were there a recent history of aid to particular private schools and had the Constitution enshrined the roles of education and family control in explicit terms. We will bear this in mind when we come to our examination of the German Basic Law in its potential application to the right of choice in education.

The American court's other role—as sculptor of the state's power to regulate private schools—could prove more supportive of choice, if only for those who can afford to exercise it.<sup>43</sup> There may be decisions in the next decade on such questions as whether a state

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40. *Bd. of Ed. of Island Trees v. Pico*, 457 U.S. 853 (1982); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969). Again, I am informed that recent lower state court decisions in Germany have protected the students' right to wear political symbols.

41. See Arons, *supra* n. 37.

42. *Maher v. Roe*, 432 U.S. 764 (1977). Of course, if a state were to fund one or more kinds of private choice in education and not others, a different question would be presented.

43. This story begins immediately after *Pierce* with *Farrington v. Tokushige*, 273 U.S. 284 (1927).

may impose the full set of public school regulations upon private schools. There have already been some decisions under state constitutions by state supreme courts;<sup>44</sup> in general these have frustrated the more ambitious efforts of public educational leaders to bring the private schools under the heel of the state. However, even if the private schools manage to retain their liberties by force of either state or federal constitutions, this will do little to assist the family that cannot afford to pay the tuition. There is certainly no threat in such decisions to the enduring monopoly of the public schools; unless the children of the non-rich family are rescued by politics, they will continue as conscripted clientele for the public providers.

## V. GERMAN POSSIBILITIES

I will now consider the relevant guarantees both of the Basic Law of the Federal Republic and of the constitutions of some of the *Länder* (states). As in the United States, these latter protections are important and should be kept in mind throughout; where legislation is inadequate or discriminatory, state constitutional provisions offer the first, and sometimes best, resort for claims to an educational subsidy.<sup>45</sup> Nevertheless, this article will concentrate primarily upon the "federal approach." The Basic Law of the *Bundesrepublik* is relevant to educational claims, and, of course, a decision of the Federal Constitutional Court recognizing a uniform principle in this area would be of critical consequence. In the event of conflict it would preempt state law.

I will approach the matter in a manner congenial to American academics, posing hypothetically the sort of case that might arise—and, in a few instances, already has arisen—before the German courts.<sup>46</sup> With a simple set of facts before us, the legal arguments are plainer. And, as occasion arises, the details can be altered to illustrate a new point or to raise a related but different question.

There is, however, a preliminary point about the form in which educational rights are expressed. As my own usage so far might suggest, American constitutional law, as if by instinct, pictures educational claims as those of individual persons. Thus, though neither a parent nor a child was a party in *Pierce*, the Courts' opinion, almost

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44. *State of Ohio v. Whisner*, 47 Ohio St. 2d 181, 351 N.E. 2d 750 (1976); *Kentucky State Board v. Rudasill*, 589 S.W. 2d 877 (Ky. 1979).

45. Several state constitutions contain special private school provisions; some of them deal especially with private school financing, most significantly the Constitution of Nordrhein-Westfalen (Art. 8(4)): "Approved private schools are entitled to state subsidies as far as these are necessary for the performance of their functions and obligations." All states have private school financing statutes. See the synopsis of the various and substantively diverse provisions in Vogel, *supra* n. 19 at 125-150.

46. See discussions of "The German Decisions," text, *infra* at 34-39.



without apology, slipped easily into a declaration of the rights of such individuals; ever since it has been so cited. The German lawyer by contrast speaks more easily of institutional guarantees of private schools and less perhaps of the individual parents and children who are the most significant beneficiaries of such rights. Article 7 of the Basic Law, however, speaks of "the right to establish private schools", which is taken by many to be a personal guarantee.<sup>47</sup> And Article 3, which is a rough counterpart of the 14th Amendment's "equal protection" guarantee, identifies "persons" as the locus of the right. The same is clearly implied by Article 6, which embodies the parental right. The reader will easily surmount whatever ambiguity is involved.

So—let us suppose—that in the mythical Land of *Ham-Pfalz* a group of like-minded politically active parents decides that the method and curriculum of the available schools (state and private) are unsatisfactory. The schools' message is seen as traditional, status-quo and (so they say) likely to snuff the potential idealism of their children. The atmosphere is attacked as stiff, formal and conventional; and the children in each school are for the most part from the same social class. These parents want a school that is informal, socially integrated, wholly secular, politically challenging and—to make the example real and simple—dedicated to the ideology of the Greens. They are not, however, opposed to teaching the subjects presently required by state law and regulation in private schools such as the *Waldorfschulen* and the church schools; nor, indeed, would they violate any of the canons applicable to any subsidized school.

These parents are mostly middle class. They can afford to and do engage a lawyer and an educational expert to draft and present a plan for a school to the Ham-Pfalz educational authorities. They request administrative approval and recognition and, further, ask that the *Land* support the Green school, just as it currently supports its own state schools. As a secondary position, the parents ask for the level of subsidy presently accorded the religious schools or at least that given to the *Waldorfschulen* in Ham-Pfalz. The administration in due course renders the decision (*Verwaltungsakt*) approving the school but denying their request for subsidies. After exhausting

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47. The German usage is the effect of a distinction often drawn (but criticized) between individual basic rights (*subjektive Grundrechte*) and institutional guarantees (*Institutsgarantien*). See Maunz, in Maunz-Dürig-Herzog-Scholz, *Grundgesetz*, Art. 7 ANN. 64, who insists that both individual basic rights and institutional guarantees derive from Art. 7(4) Basic Law. The schools enjoy the latter while founders and owners enjoy individual rights to found and sustain (and to obtain approval where justified). Those entitled to rear children (usually the parents) enjoy by implication the individual right to choose a private school. See also v. Mangoldt-Klein, *Das Bonner Grundgesetz*, Vol. I, Art. 7 VI 2 (2d ed., 1957).

their other non-judicial remedies (*Widerspruchsverfahren*) the parents pursue their claim in the administrative courts (*Verwaltungsgerichtsbarkeit*), making arguments under the Basic Law that will presently be specified. The case eventually comes before the Federal Constitutional Court (*Bundesverfassungsgericht*)<sup>48</sup> where the justices are presented with the full battery of constitutional theories.

At this point it is useful to place before us the relevant sections of Chapter I—the Basic Rights chapter—of the Basic Law. I will forego the temptation to present every imaginable legal claim they might suggest. Arguments, for example, could be developed on grounds of “free development of personality” (Article 2(1) of the Basic Rights),<sup>49</sup> freedom of association (Article 9),<sup>50</sup> freedom of expression (Art. 5) or—more plausibly—“ideological” or religious freedom (Article 4).<sup>51</sup> But by far the most direct route seems to lie through the Articles dealing with Education (7), the Family (6) and Equality (3).

Article 7 reads as follows in a widely employed English translation:

*Article 7 (Education)*

(1) The entire educational system shall be under the supervision of the state.

(2) The persons entitled to bring up a child shall have the right to decide whether it shall receive religious instruction.

(3) Religious instruction shall form part of the ordinary curriculum in state and municipal schools, except in secular (*bekennnisfrei*) schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious communities. No teacher may be obliged against his will to give religious instruction.

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48. Procedurally either by *Verfassungsbeschwerde* (Art. 93(1) 4a Basic Law) or by *Richtervorlage* (Art. 100 Basic Law).

49. Art. 2(1): “Everyone shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code.” Obviously a tendentious argument could be concocted from this broad concept to support choice in education. It is regarded as the weakest of the basic rights and generally is considered last in any systematic treatment.

50. Art. 9(1): “All Germans shall have the right to form associations and societies.” The freedom of association could, of course, be easily transmuted intellectually (and, possibly, juridically) into an interest in choosing classmates who share a common educational goal.

The spirit of Art. 5 is also relevant: “Everyone shall have the right freely to . . . inform himself.” 5(1).

51. Art. 4 (1): “Freedom of faith, of conscience, and freedom of creed, religious or ideological (*weltanschaulich*), shall be inviolable.” Again, there is the raw material here of an argument on behalf of families whose personal ideologies are incompatible with the available forms of education.

(4) The right to establish private schools is guaranteed. Private schools, as a substitute for state or municipal schools, shall require the approval of the state and shall be subject to the laws of the *Länder*. Such approval must be given if private schools are not inferior to the state or municipal schools in their educational aims, their facilities and the professional training of their teaching staff, and if segregation of pupils according to the means of the parents is not promoted thereby. Approval must be withheld if the economic and legal position of the teaching staff is not sufficiently assured.

(5) A private *Volksschule*<sup>52</sup> shall be permitted only if the education authority recognizes that it serves a special pedagogic interest, or if, on the application of persons entitled to bring up children, it is to be established as an inter-denominational or denominational or ideological school and a state or municipal *Volksschule* of this type does not exist in the commune (*Gemeinde*).

(6) Preparatory schools (*Vorschulen*) shall remain abolished.

Article 6 in its relevant parts is as follows:

*Article 6 (Marriage, Family, Illegitimate Children) . . . (2)*

The care and upbringing of children are a natural right of, and a duty primarily incumbent on, the parents. The national community shall watch over their endeavours in this respect.

And Article 3 reads thus:

*Article 3 (Equality Before the Law)*

(1) All persons shall be equal before the law.

(2) Men and women have equal rights.

(3) No one may be prejudiced or favoured because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions.

From the face of these provisions an argument for a right to subsidies for private education can be formulated. Before this is attempted, however, it will be well to examine the conditions under which a school is entitled to mere approval, quite apart from any subsidy.

*The Approval Question.* Consider first the language of Article 7. The right to establish private schools is guaranteed under subsection (4); such schools appear to "require the approval of the state" in or-

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52. *Volksschule* comprises what was *Grund- und Hauptschule* when the Basic Law was adopted. See *supra* n. 14.

der to "substitute" for public schools. Perhaps the state could allow an unapproved school to satisfy the truancy laws; but the school could not demand this substitute status without satisfying subsection (4). Approval and, thus, the right to substitute do not, however, appear to be subject to the discretion of state authorities. Although the state may supervise and set regulations, approval must be given wherever the proposed "private school:

- (1) is "not inferior" to those of the state in its "educational aims," facilities and faculty training;
- (2) does not promote segregation of pupils according to the wealth of their parents; and
- (3) assures sufficiently the teaching staff's economic and legal position.

In the process of seeking approval, how burdensome is the criterion that the proposed school be "not inferior" with respect to facilities and professional training? These two factors are objective, and the standard would be subject to rather ordinary techniques of proof.<sup>53</sup> There is, of course, the possibility that a hostile administration would construe the "facilities" requirement to mandate buildings already in place, not merely projected; if such a view succeeded before the *Bundesverfassungsgericht*, only well-heeled parent groups could expect to qualify, except, perhaps, where some satisfactory facility could be rented. (To date the relevant judicial decisions involving the subsidy issue suggest that, under the constitutional standard, no subsidy need be provided for start-up or capital costs.)<sup>54</sup>

A second hurdle to approval under Article 7(4) is the concept "not inferior . . . in their educational aims". This begs the question—inferior to what? Still, this seems unmysterious. Presumably the condition would be satisfied by an applicant's intention to achieve the aims set by law for state operated schools. These public goals are generally stated in a broad and uncontroversial form, tolerable even to dissenters. Most private schools will gladly undertake to teach literacy, numeracy and knowledge of German institutions. Of course, a special problem could arise if the administration chose to challenge the *addition* to the curriculum of a "Green", Islamic or other ideology on the ground that it *conflicts* with the basic standard, making the proposal inherently "inferior" within the meaning of Article 7(4). As a practical matter, however, such an outcome would be hard to support in a society specifically committed to tolerance. So long as the school provides the basic German curriculum, ideological favoritism would fly in the face of the declaration of neutrality in Article 3(3) and the similar protections of Articles 4 and 5.

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53. See Maunz, *supra*, n. 47, Article 7, ANN. 74-76.

54. See BVerwGE 27, 360, text, *infra* at 35-36.

None of these provisions is explicit, but their spirit favors diversity.<sup>55</sup>

A question would also arise whether, on the issue of approval, Article 7(4) casts the burden of proof of compliance upon the applicant or upon the state. In the contrasting forms of Article 7(4) and 7(5) there may be an inference that the state bears the burden. Under 7(5) the right to form a private *Volksschule* is expressed in the negative. That is, the criteria are stated as conditions precedent. The contrast of this style to that of 7(4) is so vivid that the latter might well be construed as directing administrative approval whenever a school's application is in regular form. The state would be entitled to reject the application only if it could demonstrate some specific failure.<sup>56</sup>

Section 7(5) does, of course, burden applicants to the extent that it imposes special conditions upon the formation of private *Volksschulen*.<sup>57</sup> These schools for the younger children "shall be permitted only if . . . ." Nevertheless, on close examination this language seems friendly enough. For, assuming that the applicant satisfies Art. 7(4), his additional burden under Article 7(5) is only to show *either* (1) that the applicants are parents, that the school is ideological or religious and that no state school of this type exists in the locale (*Gemeinde*), or (2) that the elementary school would serve a "special pedagogical interest", recognized by the administration.

The first ground of approval is logically related to and, perhaps, supported by the parental rights of Article 6 and the religious and ideological freedoms of Article 4 Basic Law. Our hypothetical "Green" school is parental, ideological and unique in the locale; it seems easily to fit this first criterion of Article 7(5), as would many another new school. The alternative test of "special pedagogical interest" might not so easily be satisfied, because it requires administrative recognition.<sup>58</sup> But satisfaction of *either* criterion is sufficient, and it is hard to believe that these or the other tests of Article 7 would impose unacceptable burdens upon the organization of schools.

Some Germans with whom I have discussed these questions predict that the state ministries would react defensively, laying every possible trap for applicants. This may be true; or it may be true in some states. I concede that a determined bureaucracy could find

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55. This view conforms essentially to that of Maunz *supra*, n. 47, Art. 7 ANN. 75, posing the hypothetical case of a Muslim school for Turkish children.

56. *Id.*

57. See *supra* n. 14.

58. That the special interest must be recognized by the administration (Art. 7(5)), need not mean the government has unlimited discretion but, obviously, there is some room here for the bureaucracy to move.

plausible excuses for non-cooperation; the ambiguities of Article 7 could be turned against applicants. This would mean costly litigation and delay; conceivably, however, such delay could be useful to state legislatures in phasing in a new system of parental choice. Bureaucratic resistance would provide the opportunity for a prudent gradualism.

*Article 7 and the Subsidy Issue.* This brings us at last to the issue of finance. In that regard it now must be asked, does Article 7 by itself embody the right to a state subsidy?<sup>59</sup> Note that everything imagined so far suggests only that Article 7 would require the state to "approve" (and, let us assume, "recognize")<sup>60</sup> a school. Does the same argument suffice to establish the subsidy? I think not. What has been said amounts to little more than the 14th Amendment argument which produced *Pierce*. That is, private schools are a legitimate choice of parents. But there is more in Article 7 than appears in the Due Process clause. Indeed, the invocation of Article 7 on behalf of subsidies is supported by two obvious propositions.

First, unlike the United States, the German states have for two generations supported many forms of private education. Thus, one view of Article 7 is that it is an affirmation of and support for a familiar element of German life.<sup>61</sup> If it were interpreted to mean no more than *Pierce*, this would ignore social and political reality.

Second, the private school provisions are concerned explicitly with the issue of economic discrimination ignored by *Pierce*. I will concentrate upon this aspect of Article 7(4). By its terms (at the end of the third sentence) the administration is under an obligation to approve a school only if "segregation of pupils according to the means of the parents is not promoted thereby."<sup>62</sup> Here is a strong

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59. The relevant German legal literature is in considerable conflict. Cf. Bernhard, "Zu den verfassungsrechtlichen Grenzen staatlicher Sparmassnahmen bei der Privatschulfinanzierung," 1983 *DVB* 299, at 302-03 and Klopfer/Messerschmidt, *supra* n. 20 at 197-201 (both affirmative) with Link, "Privatschulfinanzierung und Verfassung," 1973 *JZ* 1-8 and Weber, "Subventionierungspflicht des Staates zugunsten privater Schulen?," 1968 *NJW* 1978; *id.*, "Nocheinmal: Grundgesetzlicher Anspruch auf Privatschulsubvention?" 1968 *JZ* 779-783; Quaritsch, "Neues und Altes über das Verhältnis von Kirchen und Staat," *Der Staat*, v. 5, 451, 469 (1966). (negative). For a comprehensive recent view, see Gramlich, "Privatschulförderung in der Krise," 1985 *JuS* 607-611.

60. Unmentioned in the Basic Law, "recognition" is regulated only by state statute. See BVerfGE 27, 195.

61. See Gramlich, *supra* n. 59 at 608. This broad sort of argument may be drawn more easily from Art. 3(1) (Equal Protection) and Arts. 20 and 28 (the *Rechtsstaat* or—roughly—"due process" concept). It is exactly the kind of culturally determined idea that no foreigner should pursue, and I carry it no further.

62. This requirement has so far vexed German scholarship. See Maunz, *supra* n. 47, Art. 7, ANN. 77, giving the following account:

Private schools depend traditionally on the considerable 'school fees,' consequently a certain economic discrimination is inevitable. On the other hand the "social tendency" of the Basic Law requires, that Private Schools try, as

implication that, whatever right is "guaranteed" by Article 7, it must be available to all social classes in a meaningful and neutral manner. And, of course, this would be possible only if this right includes the instrument of its own fulfillment, namely the financial support required from the state for the ordinary family to exercise the choice to attend private school.

A careful reading of the whole of the third sentence of subsection 4 of Article 7 may seem to suggest a counter interpretation. That is, in context, the language dealing with "means" can be read as a part of a set of conditions to be met, not by the state, but by the applicant schools. It could be argued that the school could be approved only after it has shown that it will *on its own* enroll a significant (or even proportional) number of students from all social classes. So read, however, Article 7 would become in practical effect self-contradictory; it would set a condition which could be satisfied only by confining private schools to those families rich enough and willing to subsidize the poor.<sup>63</sup>

In this regard the last sentence of Article 7(4) is also subject to benign interpretation. Its aim, plainly, is to protect the teaching staff of approved private schools. But whether this aids or hinders the argument for subsidy is wholly ambiguous. Its sense may be either that only schools which protect their faculty deserve subsidies or, conversely, that schools which receive subsidies must protect their faculties.<sup>64</sup>

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far as possible, to balance economic inequalities (e.g., partial school fee waivers, reduction for brothers/sisters, scholarships, etc.).

The literature on the issue so far overlooks the possibility that Art. 7 (4) (plus Art. 3) embodies a norm of "fiscal neutrality" which prohibits the state from structuring educational opportunity in a manner that disadvantages the poor. It has not yet been perceived that this principle can be realized in practice without either overriding legislative prerogatives or raising the public costs of education. That this outcome is possible is argued below.

63. See in this respect, Sendler, "Teilhaberechte in der Rechtsprechung des Bundesverwaltungsgerichts," 1978 *Die Öffentliche Verwaltung* (DoV) 581, 583; who finds it anomalous that the Constitution would on the one hand guarantee private schools that must meet the same standards as public schools and, on the other, forbid the charging of higher school fees to achieve these standards. He compares this situation with that in which public agencies compete with private businesses. Here the Federal Administrative Court has held that private competitors may have a right to "compensatory subsidies".

A third interpretation would require the *proprietor* of the school through its own funds to keep tuition low or to adjust the charges to the capacity to pay. Still a fourth might overlook segregation in individual schools so long as the system as a whole provides access to families without regard to income. This latter interpretation does not strike me as consistent with the spirit of Art. 7(4).

64. Maunz, *supra*, n. 47, Art. 7, ANN. 88. This provision presumably could affect *approval* decisions as well. Indeed, if the subsidy claim fails under Art. 7, the teacher security provision could pose a serious threat to approval. If the claim succeeds, that criterion is merely one of the hurdles to be cleared with the aid of the subsidy.

It would be too much to assert that the drafters of the Basic Law clearly intended subsidies for private schools to be an Article 7 right. Some German writers in the early 1950s took exactly the opposite view. They felt that Article 7 left out such a provision precisely because subsidies would threaten the independence of private schools who would become pathologically dependent upon them.<sup>65</sup> The legislative history on this issue apparently is ambiguous. Not surprisingly the absence of an explicit provision is regarded by some as leaving the question open and by others as denying the right by implication.<sup>66</sup>

Whatever was historically intended, Article 7's concern for the poor could plausibly be read today as an assurance—unusual within the Basic Law—that the abstract right to a private school will carry with it a state subsidy sufficient to make that right a practical reality.<sup>67</sup> So interpreted the language about the parents' "means" would become wholly intelligible. For, by implication, it would limit the form in which private schools could charge tuition in addition to the state subsidy. Article 7 would not forbid such extra charges, but presumably these would have to be "means tested" so as to avoid "segregation of pupils according to the means of their parents." That is, families could be charged extra tuition only according to their capacity to pay.<sup>68</sup> Only in this way could every state-subsidized private school be open to families of all classes for an equivalent economic sacrifice. (Shortly we shall see this norm again but drawn as an implication of Article 3.)

Hence, Article 7 could be interpreted to embody a wholly sensi-

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65. *Id.* at n. 2.

66. For conflicting opinions see Gramlich, *supra* n. 59 at 608, n. 20.

67. In this respect the broad notion of *Chancengleichheit* (equal opportunity) ought at least to be noted. Its roots are claimed to lie in the "social state principle" of Art. 20(1) Basic Law. Some regard it as a kind of positive supplement to the more neutral and even negative principle of equal protection. The latter, as we shall see below, guarantees nothing but non-discrimination in existing state programs (in German a mere *Teilhaberecht* as opposed to the full right or *Anspruch*). The programs as such are wholly discretionary. It is an idea familiar to Americans. See, e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970).

Müller, *Das Recht der freien Schulen nach den Grundgesetz* 399 (2d ed. 1982), believes that the principle of equal opportunity under Art. 20 (1) is a stronger argument for subsidies than is the Art. 3 equal protection principle. The Federal Administrative Courts' decision of 22 Sept. 1967, BVerwG 1968 *NJW* 613 may agree. It cites Art. 20 for this general conclusion. Gramlich, *supra*, n. 59 at 609 stresses the recent decision of the BVerwG, 1985 *NVwZ* 111, *infra*, text at 36, which would reduce the social state principle to a minimum. Gramlich stresses that the "crisis" is widely perceived as one of a shortage of tax resources for various welfare programs. In the end this fear of new economic commitments is irrelevant to our concern. As will be shown below, an artful adaptation of the principle of "fiscal neutrality" will avoid any risk that social spending will necessarily increase in order to vindicate the right to choice. See text, *infra* at 28-29 ff..

68. For an American proposal with similar effect, see Coons, "Making Schools Public," *supra* n. 7 at 97-98.



ble educational policy securing choice for all families without regard to their wealth or class. Nevertheless, this argument remains incomplete in an important respect; it must attend to the question of the level of the subsidy. There is a *prima facie*, and very simple, argument that the text itself sets the subsidy at the level of the expenditure in state schools. Article 7, after all, uses the quality of the state schools as the measuring condition for approval of the private school. If the quality of the school is deemed to have any relation to its resources, that specific condition could imply a full subsidy. Taken abstractly, it is hard to imagine anything else that it could mean; however, let us postpone the issue, since we will encounter difficulty on this point when we come later to examine the decisions interpreting Article 7. Furthermore, in connection with Article 3 we will conclude that whether Article 7 implies 100% support may not matter greatly to the outcome, so long as some private schools are entitled to a full subsidy under the statutes.

*Article 3 and the Subsidy Issue.* The second form of the argument for our hypothetical plaintiff school moves beyond Article 7. At this point it ceases to be a direct claim that subsidies are required by the Basic Law. That is, for the moment we can assume that Article 7 is interpreted to guarantee only a *Pierce* right to attend private school and pay the full cost (or else that it provides only a partial or "survival" subsidy for the school).<sup>69</sup> Recourse must then be had to relativistic notions that may be suggested by Article 3. In other words, the argument for the school may have to rest upon the fact that the financing statutes of the *Länder* already substantially subsidize certain private schools and not others—and subsidize some more than others.<sup>70</sup> The question then becomes, not simply whether private schools have a right to a subsidy, but are these distinctions among them justified? Is a school not entitled to share neutrally in an existing program of subsidies enjoyed by others?

Holmes once remarked that equal protection was the resort of advocates with lost causes. I tend to agree with his bleak assessment where the argument is applied to economic classifications; whether farmers deserve a subsidy more than workers is a question best left to politics. Equality of treatment, however, becomes a more robust value where the object of the treatment is the minds and hearts of citizens; and, where that object is the minds of children subject to

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69. See *infra* text at 35-36.

70. There is an egalitarian argument that in theory could be based upon the discrimination between the *public* schools of a *Länd* on the one hand and the *private* schools on the other. If Art. 7 guarantees the existence of private schools where these are as good as the public schools, why does Art. 3 not entitle the private schools to enjoy the same resources? I am credibly informed that such an argument is inappropriate; in German equal protection theory state programs may not be used as the baseline for quantifying the guarantee; see BVerwGE 27, 360, 364.

compulsory schooling, the mandate of neutral treatment by the state can assume a crucial role in organic law. Perhaps government is entitled to subsidize some religious and political thoughts without subsidizing them all, but the ground of discrimination among various ideologies must be defensible, and government should bear the burden of defense. And where the state has explicitly recognized that private choice in education is a matter of constitutional significance (as in Article 7), this consideration assumes even greater importance.

That, it seems to me, is the context in which Article 3 might best be read. Here is a society that has declared itself to a considerable degree ideologically neutral and, at the same time, is committed to the survival of private education. That same society provides a very large subsidy to its church schools, an equal or smaller subsidy to the *Steiner* schools and (in some states) still less or nothing at all to others. In this context what is the effect of Article 3? Recall that it reads as follows:

(1) All persons shall be equal before the law.

(3) No one may be prejudiced or favored because of his . . . faith, or his religious or political opinions.

Under the state regime here assumed would not all groups be "prejudiced" except the church schools; and would the latter not be "favored"? If the interpretation of Article 3 were determined by common usage, this conclusion would seem inescapable. Of course, whether there is "prejudice" or "favor" within the technical meaning of Article 3 may be quite another issue. But we have at least sufficient raw material for enterprising lawyers.

In the United States equal protection argumentation is generally cast in either of two forms. The first and more general test of any legal classifications is whether it is rationally related to some purpose within the competence of the lawmaker; does it serve the intended end, and is the end a legitimate one?<sup>71</sup> Whether it serves the legislative end is generally a vapid inquiry. Every classification has some effect, but only rarely can we be confident what the law giver intended. If the "rationality test" were taken seriously, it would seldom threaten the status quo; in theory an iron-clad defense of any law would be simply that the legislature intended whatever effect it is getting. Under our factual assumption, for example, we would say that the German legislatures intended to benefit Christian schools more, the *Waldorfschulen* somewhat less and the rest not at all—and that is the end of it. The test is not so toothless as

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71. This perhaps is comparable to the German concept of *Willkürverbot*, *infra* n. 73.

this either in America or, as we shall later see, in at least some German courts, though it may be rather differently expressed.

This first and traditional test of discrimination may contain the additional requirement that the legislative objective itself be a legitimate one. But this would mean no more than that the state may not by means of a subsidy discriminatorily promote an end forbidden to it by some *other* provision of the constitution. It cannot mean that discrimination itself is a forbidden objective, for this would make Article 3 the enemy of all classifications however sensible and benign.<sup>72</sup>

Thus, the structure of the German Constitution easily drives us to a second familiar form of equal protection theory in which the Constitution is scanned for norms that are more explicit or of higher importance. This process is exemplified whenever American courts ask whether the case involves either a "suspect classification" of persons or some "fundamental interest" that is burdened by the classification. For example, do "parents" or "children" constitute a class which is constitutionally comparable to a racial minority; and is the interest in receiving an education one that is equal in constitutional dignity to, say, the right to marry or to vote? On such questions American judges must use their imagination, while the Basic Law tends to be much more explicit and German judges tend to stick closer to the text. However, if such a class or interest is found to be threatened, there is reason for a court to apply a test more demanding of the state than mere rationality. The state, indeed, would be required to show that there was at stake some public interest that was "compelling" in its importance; it would also have to show that this interest could not be satisfied by any alternative legal device that would be less onerous to the interest of the complaining class. In American constitutional theory there are various versions and levels of this approach which requires the court to scrutinize the law more strictly.

The structure of the Basic Law seems to invite a rationale of this general sort.<sup>73</sup> Article 3 itself introduces several possibilities.

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72. In an American court a preference for religious schools would of course, be struck down under the "Establishment" clause of the 1st Amendment to the Constitution; conversely, if it explicitly excluded religious schools it might run afoul of the "free exercise" clause. If the discrimination took the form of different levels of subsidies among non-religious private schools the question would reduce to the rationality of the distinctions drawn among the classes established by the statutory scheme.

73. Equality being so vague and mutable, the courts are reluctant to proceed explicitly beyond a general norm of rationality (*Willkürverbot*). Still the legislature is itself bound by the Basic Law to employ classifications that do not offend recognized constitutional norms. Presumably, at least where the Basic Law explicitly designates an interest as one of constitutional dignity, the sensitivity to discrimination burdening such an interest is heightened. Cf. Dürig, in Maunz-Dürig-Herzog-Scholz, *supra* n. 47, Art. 3, ANN. 208 with further references in n. 3 of cited work.

First, its form would permit us to treat the matter of education as special or, in the American sense, "fundamental"; the explicit references to faith, religion and politics suggest that opinion and ideology are constitutionally sacred interests. Regarding "suspect classes" a parallel possibility appears; for, simply by being disfavored in state policy, an ideology almost by definition becomes that of "a discrete and insular minority". That is, when employed as a classification, belief itself comes to define a class of persons, politically overridden, for whom this concept of official neutrality was originally designed. The exclusion or disfavoring of such a class could represent the forbidden use of a suspect classification. Or so it could be argued.

This sort of analysis is heavily bolstered, of course, by the specific terms of Article 7 that we have examined. Here the Basic Law enumerates what the Due Process clause scarcely intimates and which the *Pierce* opinion could discover only by remote implication. The German "Pierce" right thus has a solidity far beyond what has been successfully claimed for its American counterpart.

The equal protection analysis is furthered as well by Article 6's conclusion that, "The care and upbringing of children are a natural right . . . and a duty" of the parent. The parent is not merely a delegate of the state's mandate; his status is more than that of an agent to carry out the community's will to protect the child.<sup>74</sup> And if this "right" and "duty" is to have meaning with respect to the objectives of Article 7, the range of protected educational choices would have to be open to all. To the extent that a parent's incapacity to pay frustrates his Article 7 choice, the constitutional scheme fails of its purpose. This point is by no means conclusive; the discrimination is not against parents as such but against those parents who cannot afford tuition. Nevertheless, its practical effect is to disadvantage most families in respect to their Article 7 choices.<sup>75</sup> As

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Much of the troubling vagueness of "equality" is eliminated by identification of a clear sub-norm such as "fiscal neutrality". See text, *infra* at 28-34.

74. As occasionally is suggested within U.S. constitutional theory. See e.g., *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). Implicitly this seems to be done in Germany as well.

75. Petermann, "Die Verfassungspflicht des Staates zur Privatschulfinanzierung," 1982 *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* 543 at 544, does in fact purport to derive the parental right to demand financial support for private schools from Art. 6. In respect of a similar provision in the Bavarian Constitution (Art. 126, Sec. 1) the Bavarian Constitutional Court, BayVerfGH, 1983 *Bayerisches Verwaltungsblatt (BayVBl)* 430, held that the states' duty to support parents does not include a subsidized education in private school. (See text, *infra* at 38).

Note furthermore that the Federal Administrative Court BVerwG, 1982 *Deutsches Verwaltungsblatt (DVBl)* 728, in reviewing a Hessian Statutory provision for reimbursement of costs for the transportation of children to private schools, held that the limiting of the claim to the costs of transportation to the nearest public school regardless of whether the private school was farther was rational, hence con-

such it is a typical lawyer's makeweight and seems a plausible consideration in the calculus of rights.

*The Problem of Judicial Role.* The foregoing suggests the shape of an Article 3 argument for a right of non-discrimination in the distribution of subsidies. That argument, would, however, have no practical importance were it not for a regime of subsidies already in place. Article 3 secures nothing but neutrality, and neutrality could be satisfied at zero.<sup>76</sup> It is, however, this very feature which makes the approach attractive. The court may well wish to avoid construing Article 7. For if the educational subsidy is itself declared a right under the Basic Law, the judges would have to quantify it and describe its conditions. This would be no easy task. Even if the right were said to be satisfied at the level of school survival, knotty questions would persist. Should a moribund school be kept alive? Is the standard the same for new and for established schools? What is "survival"? Such a minimalist theory would involve the Court in the unenviable task of assessing the unique claim of every school.

These reservations about an Article 7 right serve to introduce the general (and crucial) problem of judicial role. The courts will have two fears regarding intervention on behalf of educational choice. The first is that there is no clear standard by which to determine whether the right has been violated; any claim under Article 7 threatens to become unpredictable, arbitrary and nominalistic. The second fear is its close cousin: The courts will worry that recognition of educational choice will require them to usurp legislative discretion by telling the state how much it must spend and for what kinds of schools. If there is to be a serious effort to establish family choice through litigation, the constitutional standard that is offered should be one that is clear, modest, and preferably negative in form.

Though it is often misunderstood, equal protection theory can be at least an interim solution for this problem of judicial administration. When the right is conceived not merely as absolute (under Article 7) but as relativistic (under Article 3), the judges' task may be simplified. It would be one thing—and a very confusing thing—to

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stitutional. The court found that Art. 7 (4) when read together with the Art. 20 social welfare-state principle may serve as a basis for a private school's claim to financial support. It does *not*, however, imply that the education of children should not cost the parents anything.

76. A similar question concerning an unequal distribution of subsidies arises in the context of subsidies to private businesses. According to Götz, *Recht der Wirtschaftssubventionen* 264 (1966), a violation of Art. 3 Basic Law does not give rise to a positive claim on the part of the non-subsidized party. All that can be contested is the unconstitutionality of the method of distribution. If courts do find that a way of distributing financial aid violates equal protection, then the legislature has the choice of revising the standard of distribution or of doing away with the subsidy altogether. Similarly Müller, *supra*, n. 66 at 398, points out that Art. 3 in itself has not been accepted as a basis for claims to subsidies. This seems to me wholly sensible.

try to measure what each school absolutely "needs". It would be another simply to forbid discrimination within those categories of schools that are subsidized. And this is the real hope offered by introducing Article 3 to the argument. The complaint of parents and of those who would either start a new school<sup>77</sup> or increase the subsidy of an existing school would be simply this: approved schools performing the same general task are funded at different levels, forcing the disfavored schools to charge tuitions that only the wealthy families can afford.

From the point of view of the court, it would be very important that, so far as Article 3 is concerned, the state could lower all private school subsidies to the same level or abolish them altogether. In fact, of course, this is unlikely to happen for sound political reasons and because Article 7 has been widely thought to require some level of support. It may also be that the present spending level for church schools is relatively secure under other aspects of positive law, including treaties. But this is not of great importance to the court's posture. What counts is that the Article 3 right would be indifferent to the question of spending levels. It would require only that schools that are performing the same general educational mission be treated similarly and that families of all classes have equal access to all of them.

Article 3 also casts the "right of educational choice" wholly in negative terms, thus avoiding the declaration of a controversial "positive social right". The claim would be stated thus: Choice among state-subsidized private schools may not be affected by the parents' capacity to pay. This formula would, by itself, solve the present private school issue, and in all probability the court would never have to face the task of shaping and explaining the supposed positive right under Article 7. For, so long as the political system could be relied upon to subsidize *some* private schools, all other schools of the same class would be entitled to a subsidy at that same level by virtue of the purely negative right—that is, the right that educational choice not be affected by parental wealth. For the same reason the subsidized schools could charge extra tuition only according to the individual family's capacity to pay.

There is a name for this negative principle in the United States.

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77. This assumes, perhaps without warrant, that disabling distinctions between existing schools and new applicants either could not or would not be drawn. In this respect see Bavarian Constitutional Court (Bay VerfGH, 1985 NVwZ 481, *infra*, text at 38) distinguishing existing from proposed schools under the equal protection clause of the Bavarian constitution, Art. 134(2). A statutory provision requiring a minimum time of operation as a condition of subsidy was upheld. Note the decision of the *Bundesverwaltungsgericht* discussed *infra* at 35-36, rejecting any constitutional right under (Art. 7(4) Basic Law) to a subsidy needed to *establish* a school.

It is called "fiscal neutrality", and—under this or another label—has become a workable part of the constitutional law of *public* education in a number of states.<sup>78</sup> If it were to be adopted in Germany, it would introduce that same principle into the law of *private* education, at least for approved schools.<sup>79</sup>

Assume, then, that the court were to ignore the argument for a positive right under Article 7 in favor of the "fiscal neutrality" solution. To what would this commit the German judges? Not a great deal. Distinctions among private schools in their entitlement to state support would still be valid wherever these had a rational *educational* explanation. Fiscal neutrality would disallow only those differences based upon capacity to pay, not those based upon distinctions in educational function. Such educational justifications would commonly exist; states would, for example, be entitled to spend more (or less—or nothing) for vocational, classical, scientific, experimental, or other curricula. Likewise, they could distinguish among children who attend schools for the slow, gifted, musically talented, or physically disabled; there would also be distinctions drawn among those individual students who differ from the norm in any educationally relevant way. Such distinctions are defensible and in themselves have nothing to do with wealth.

What would be condemned are subsidies which assist differentially schools of the same type. Access to all such schools must be equal irrespective of the family's ability to pay. This norm would leave the legislatures free to continue most of existing policy. They could not, however, discriminate among private schools of the same rational classification. This latter practice necessarily would cease because of variation in the parental ability to pay the added tuition. Many families that could afford the tuition in a school subsidized at 80% would be effectively excluded from a school subsidized at 50%.

This example emphasizes a second and less visible feature of fiscal neutrality—one that would regulate the schools themselves in the practice of charging tuition. We have said that schools of the same category would be entitled to equal subsidies. They would also be free either (1) to accept this subsidy as full payment, or (2) to add their own resources and/or (3) to charge extra tuition in whatever

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78. *Serrano v. Priest*, 18 Cal.3d 728, 557 P.2d 929 (1976); *Horton v. Meskill*, 172 Conn. 615, 376 A2d 359 (1977); *Washokie School Dist. v. Herschler*, 606 P.2d 310 (Wyo. 1980); *Dupree v. Alma School*, 279 Ark. 340, 651 S.W. 2d 90 (1983). See generally Coons, Clune & Sugarman, *Private Wealth and Public Education* (1970). Coons, "The School Finance Cases as a Window on Judicial Review," in Karpen (ed.), *Verfassungsrechtliche Fragen des Hochschulzuganges* (1978). Since *Serrano* and *Horton* a substantial number of states, even in advance of judicial intervention, have moved strongly toward fiscal neutrality in various forms of new legislation.

79. Note that there is no need for a rule of "fiscal neutrality" in German *public* education, because discrimination by wealth is insignificant.

amount. But note that the third option—tuition—would necessarily be restrained in the following way: Any extra charge by a subsidized school would have to be adjusted to the family's capacity to pay. Otherwise access to the school would remain a function of wealth. This is a significant limitation, but it no more than expresses in another form Article 7's explicit prohibition of segregation by means. Indeed, it fits like a glove. It would be hard to imagine a constitutional standard more congenial to the form and spirit of the Basic Law than is fiscal neutrality.

There is occasionally a confusion of fiscal neutrality with certain controversial techniques associated with the welfare state. It would be unfortunate if the regulation of add-on tuition should be mistaken as a typical subsidy of the poor. Whatever one's general philosophy about welfarism, this case is unproblematic. First of all, it is the state that has made schooling compulsory and then selected private schools as one of its chosen and subsidized instruments to serve this end. If the state went no further than this, it would already have departed substantially from neutrality, for the subsidy has created important opportunities available only to those who can pay. To insist that these institutions funded by the state adjust their add-on tuitions to the parents' capacity is not a regulation that *disturbs* but one that *restores* neutrality. If the state truly wishes to maintain a neutral position it must either forego the first step or take both.

Second, were this not so, the usual objections to preferring one adult over another through programs of redistribution would not easily fit this case. Children choose neither their parents nor their duty to attend school. To them all is compulsion. To subject a child to a state-subsidized regime in which his opportunities depend on his family's pocket is, therefore, a dubious practice. This doubt is aggravated by Article 7's specific concern about segregation. In short, the tuition restraints introduced by fiscal neutrality do not trigger the familiar objections to judicial intervention. Rather they represent a partial cure for restraints upon liberty that the state itself has created.

Though the context is different, the application of the principle of fiscal neutrality in California provides a useful window on the issue of judicial method. In 1976 the California Supreme Court issued its decision in *Serrano v. Priest* forbidding discrimination by wealth in the public sector of education.<sup>80</sup> Since that date the legislature has moved systematically to diminish the effect of differences among school districts in their capacity to raise tax money for schools. No longer are there immense peaks and valleys of expenditure respectively in the rich and poor districts. The pattern is im-

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80. See *supra* n. 28.



perfect; there are complaints that some invalid distinctions are still perceptible. But it is a new world, and it was achieved without confrontation between court and legislature. Having observed this easy transition in the giant public school system of California, I would not anticipate difficulty in applying fiscal neutrality to the relatively small private sector in Germany.

There is of course, a second and very different issue of "excessive intervention". This is the danger of *legislative* intervention to diminish the freedom of private schools. Apparently Article 7 was intended to preserve a substantial measure of liberty for educators. It is important to see that fiscal neutrality is compatible with that liberty. There would be no requirement that the state interfere with curriculum, teaching methods, hiring practices, salaries or choice of facilities.

The court may well fear that even such a qualified right to a subsidy would be costly to the state. What should again be stressed, however, is that fiscally neutral subsidies are compatible with any level of public spending on education. Spending in the public sector in California since *Serrano v. Priest* has been stable. Granted, reform of this sort could introduce new costs to the German states to cover students now enjoying smaller subsidies in private schools. But, if economy were desired, many devices to achieve it are available. For example, the tax-supported subsidy may be set at some percentage, say 80% or less, of public school expenditure. In that event, for every child who chose to leave public school for the private sector a saving would arise.

If the new system were introduced at one stroke for all children, various diseconomies of scale would raise the per pupil cost. The departure from a public school of a handful of children does not permit an immediate reduction in the school's budget. A slight decrease in average class size may save nothing at all. Furthermore, the civil service commitments to existing public teachers might keep the state from realizing the full difference as a saving. Presumably, however, the states would phase in the new system gradually, beginning, for example, with kindergarten and with the first year of the *Hauptschule* and *Gymnasium*, adding an additional grade at each level annually. With a normal rate of public teacher retirements and a modest increase in the size of the private sector, the result of an 80% subsidy for private schools could be a gradual decline in state investment, if that were desired. Note also that, to the extent schools chose to charge additional tuition, the total level of spending could be maintained or even increased out of *private* resources without further burdening the taxpayers. Of course, it could well be that the increased satisfaction of families would stimulate greater public support for education. In any case the point is that the court would

commit the state to no new spending but merely to neutrality among families in their access to the subsidized forms of private education.

## VI. THE GERMAN DECISIONS

Finally, regarding the hope for a subsidized "right to choice" under the German constitution, let me report what I know of existing German decisions on the subject. First, it appears that to date there is no decision on the point by the Federal Constitutional Court (*Bundesverfassungsgericht*);<sup>81</sup> and the few dicta of the high court are not helpful.<sup>82</sup> It is this rather open state of the general question that has emboldened me to pose the prior set of arguments. This unsettled condition may not, however, endure. A case now pending before the Federal Constitutional Court could well produce some relevant interpretations of the Basic Law. Presently I will turn to this case, but it will be helpful to proceed historically.

*The Federal Administrative Court.* The issue of the right to private school subsidies first surfaced in a 1966 decision of the Federal Administrative Court (*Bundesverwaltungsgericht*).<sup>83</sup> Though the report of the facts is thin, it appears from the opinion that the plaintiff operated a recognized school (*Ersatzschule*) for gymnastics and dance for which it claimed a subsidy to cover variable costs especially for personnel. The court asserted that the wording and genesis of Art. 7(4) Basic Law do not favor the idea of a constitutional claim to private school subsidies. Furthermore it suggested that Art. 7(4) was designed primarily to protect private schools from restrictive state regulation. In spite of this the court went on to note the unfairness of the economic pressure put upon private schools by the increasing tendency to provide for free public education (no school fees, free school materials, etc.); and it emphasized the public sav-

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81. The *Bundesverfassungsgericht* stands outside the regular judicial system rendering only final and decisive interpretations of the Basic Law. In this and other respects it is rather different in function from the United States Supreme Court.

82. See Gramlich, *supra* n. 59 at 608.

83. BVerwGE 23, 347 = 1966 *NJW*, 1236.

The status of decisions of the Federal Administrative Court should not be underestimated. For administrative law matters Germany provides a special judicial branch, labeled administrative courts (*Verwaltungsgerichte*). There are three levels: A (state) Administrative Court, then a (state) Administrative Court of Appeals (*Oberverwaltungsgericht* or *Verwaltungsgerichtshof*), and, at the top, a (federal) Administrative (Supreme) Court (*Bundesverwaltungsgericht*). Germany in general has no federal courts of first and second instance; so federal courts are generally Supreme Courts, each of them having final jurisdiction within its specialty. The decisions of the Federal Administrative Court like those of any court may be questioned by the *Verfassungsbeschwerde* (see *supra*, text at 18 and n. 48). In that event the Federal Constitutional Court (*Bundesverfassungsgericht*), which is not a regular step in the hierarchy of courts, decides whether the decision violates the Basic Law.

ings created by private school attendance. It also observed that fees can be borne only by those who can afford them. In the end it discovered in Article 3 a principle of equal opportunity and a right to subsidies for recognized schools. However, it left the level of the subsidy largely in the discretion of the legislature. And there is little in the opinion to suggest the exact shape or content of the principle of equal opportunity.

In 1968 the *Bundesverwaltungsgericht* rendered a second important decision.<sup>84</sup> Here the plaintiff operated a private engineering school. Receipts fell short of expenditures, and the plaintiff sought additional aid from the state of Nordrhein-Westfalen. For 1960 the state originally had granted the school 85% of its expenditure. (Apparently this was measured by costs in comparable public schools, though this is left unclear here and, sometimes, in other cases.) Later the state added another 7.5%. Plaintiff claimed a right to 100% of cost under Article 7 (4) Basic Law and was successful at the first level. On appeal the *Oberverwaltungsgericht* reversed and, in turn, was upheld on further appeal by the *Bundesverwaltungsgericht* which focused upon and decided two relevant issues:

1. Does a private *Ersatzschule* which is in financial difficulties have a constitutional claim to state subsidies under Article 7(4)?
2. What are the federal guidelines for state aid granted to private *Ersatzschulen*?

Referring to its 1966 decision the court answered yes to the first question. Although negative in tone, the court specifically avoided deciding that the plaintiff (who was losing money) had no claim for full compensation for the deficit. Instead the opinion declared that in principle a school which cannot keep up with the quality of the public schools and will eventually lose its recognized status has a claim to aid. This claim is based solely upon Art. 7(4), and the court viewed it as one of the rare instances where a "positive" right<sup>85</sup> to government payments is necessary to protect the important right of private school choice for families that could not otherwise afford the cost.

The court specifically noted the language of Article 7(4) respecting segregation by wealth and then invoked Article 20(1) of the Basic Law which expresses the general duty of the state to provide for basic financial needs (*Sozialstaatsprinzip*). The court, however, re-

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84. BVerwGE 27, 360 = 1968 NJW 613.

85. The distinction between defensive or negative rights and "positive" claims upon the state is familiar in both societies and a frequent theme of German constitutional laws. One of the few examples of a positive constitutional right under the Basic Law is the famous "Numerus clausus" decision, BVerfGE 33,303.

jected an Article 3 argument for a subsidy equal to that of public schools.<sup>86</sup> As far as appears the plaintiff did not raise the question of discrimination among private schools,<sup>87</sup> and I assume that the opinion is not to be regarded as authority on that issue.

The court, however, considered in some detail the nature and level of the subsidy triggered by the Article 7 right. It adopted a "minimalist" position tied to the applicant's need; the subsidy must be sufficient to avoid the school's economic decline and resulting collapse. It need not include start-up and capital costs. And much is to be left to the discretion of the legislature. Again, while it is impossible to harmonize this approach with a relativistic Article 3 standard of "fiscal neutrality", it would seem that neither the issue of discrimination within the private sector nor the standard of fiscal neutrality were even presented to the court and thus remain an open question.

In 1975 the *Bundesverwaltungsgericht* affirmed its now "well established rule."<sup>88</sup> Brusquely rebuking criticism, it declared the issue to be clear and settled in an opinion that provides little for analysis.

A decade later, however, the same court spoke again in tones which seem informed by a new concern about excessive potential cost to the state. In November 1984, it decided a claim against the State of Nordrhein-Westfalen which had provided the complaining school 85% of comparable public school expenditures in accord with its private school finance statute. The state statute would also have made an additional 13% available had the school met the special condition that exacting a higher private contribution be an "unreasonable" burden on the school.<sup>89</sup> The *Bundesverwaltungsgericht* held, first, that Article 7(4) does not guarantee the existence of any individual school but only of the institution of private schools. Making this distinction operational could be a challenging judicial task.<sup>90</sup>

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86. The court also jettisoned the lightweight arguments that taxpayers are discriminated against by having to pay tuition and the even weaker (though logically tenable) claim that the subsidy is merited because private schools save the state money in the performance of a constitutional responsibility.

87. The question of discrimination among private schools is seldom discussed. Even in the literature on private school subsidies one finds only rare and very general speculation that discrimination may be unconstitutional. See e.g. Link, "Privatschulfinanzierung und Verfassung," 1973 JZ 1, 6 in n. 73.

88. BVerwG, Buchholz Nr. 11 zu Art. 7 Abs. 4 GG.

89. BVerwG, 1985 NVwZ 111.

The Nordrhein-Westfalen statute was amended in 1982 eliminating the special additional grants but raising the basic grant to 90 percent.

90. Presumably this approach would entail the court's discovering some level of expenditure at which a hypothetical school of satisfactory quality would survive with ordinary luck and good management. The quest for this ideal standard would seem intimidating. Early and inevitably it would ramify into a network of sub-questions concerning the role of tuition, special curricula and so forth.

Second, the court denied any right to a special subsidy if the school was originally undercapitalized. Whether the decision endangers even the school's right to the 85% was left unclear under the Basic Law. (Without the Basic Law's protection, of course, the statutory amount could be reduced, unless the state constitution forbade.) Commentators<sup>91</sup> have seen the opinion as a judicial withdrawal from protection of the schools and have stressed the court's failure even to note the argument based upon the "social state" (*Sozialstaat*) clauses of the Basic Law (Articles 20, 28).

*German State Constitutional Decisions.* This concludes our review of the decisions of the Administrative Courts. Before turning to the *Hamburg School Case* now pending before the Federal Constitutional Court, it will be useful to scan a small sample of cognate cases that have arisen under state constitutions. The text of these organic state laws is often similar to that of the Basic Law and the analysis in the state constitutional courts may be instructive.

Two recent decisions of the Constitutional Court of the State of Bavaria (*Bayerischer Verfassungsgerichtshof*) suggest a strong concern for the supposed threat to the state treasury. In 1983 the Court had to decide the validity of certain exceptions in a program by which Bavaria reimbursed private school fees up to 50 DM monthly (an amount subsequently raised).<sup>92</sup> To qualify the child had to attend either a recognized (not merely approved) school or a school operated by a non-profit corporation and otherwise subsidized by the state. The objection by parents not qualifying for reimbursement was based, *inter alia*, upon state equal protection grounds, claiming invalid discrimination. The Court delivered a traditional statement of the "rationality" test, repeatedly stressing the broad scope of legislative discretion. The preferment of recognized schools was justified on the ground that they had to meet the standards of state schools and, therefore, were performing a "surrogate" function rationally distinct from that of merely approved schools.

Having established seemingly a low threshold of rationality, the Bavarian Court proceeded surprisingly to strike down the profit-nonprofit distinction. It declared that the distinction could be valid if applied to school subsidies but not in regard to reimbursement of parental fees. Profit, said the court, may be relevant regarding subsidies to the schools, for it is rational to prefer non-profit institutions. But this distinction is wholly independent of the parental need for support in making choices; parents were said not to choose a school on the basis of its legal structure. Why this assertion, if

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91. Gramlich, *supra* n. 59 at 609.

92. BayVerfGH, 1983 *BayVBl* 430.

true, overrides the state's policy to prefer non-profits is unclear, and the overall impression is one of unpredictability.

In 1984 the Bavarian court faced the two questions whether merely approved private schools had a right to subsidies and whether the state could distinguish between existing and new institutions in granting the subsidy.<sup>93</sup> It is noteworthy that the Bavarian private school provision, Article 134(2) of its constitution, is identical in form to Article 7 of the Basic Law. The court, nonetheless, held it to be hortatory only, merely an appeal to the state legislature to do its best considering the other needs of the state. Hence, presumably, *no* subsidy could be claimed by anyone as a matter of right. Further, said the court, the state equal protection clause allows a preference for private schools that are already in operation; the distinction is rational, and that is the end of the issue.<sup>94</sup>

Meanwhile Nordrhein-Westfalen in its own Constitutional Court, and under its own constitution, faced attacks similar to those previously mounted against it in the administrative courts under the Basic Law. In 1983 the State Constitutional Court was required to interpret the *state constitutional* guarantee of "necessary state subsidies" for approved private schools.<sup>95</sup> The finance statute had been amended in 1982, reducing the subsidy to 90% but bestowing a broad discretion upon the administration in certain cases to increase the amount. The State Court made no objection to any particular decrease in state subsidy; in this respect it merely warned in an obiter dictum that subsidies long-enjoyed may induce a protected reliance by the school and require a sensitive and gradual diminution. However, it struck down the broad administrative discretion regarding extra amounts, insisting that the state constitutional provision required the state legislature to be specific about who qualifies and for how much.

On the whole these few state decisions seem somewhat tentative in their treatment of the basic rights involved under state constitutions. Like the Federal Administrative Court, the state courts have yet to develop a standard which on the one hand will give sufficient leeway to the legislature and permit economy, while on the other protect the interest of lower-income families with limited ability to pay. The standard of fiscal neutrality would seem to serve these purposes under state constitutions as smoothly as it could under the Basic Law.

*The Federal Constitutional Court and the Hamburg School Case.*

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93. See 1985 NVwZ 481.

94. Recall that state constitutional courts render binding interpretations of their own constitutions; these may, of course, run afoul of the Basic Law.

95. VerfGH NW, 1983 DÖV 335.

This brings us at last to the case now pending before the Federal Constitutional Court (*Bundesverfassungsgericht*). On 31 October 1983, the Administrative Court of the State of Hamburg issued an opinion declaring certain portions of that state's Private School Law invalid under the Basic Law.<sup>96</sup> The procedure before it was thereby suspended, and the case was laid before the Federal Constitutional Court.<sup>97</sup> The facts in the Hamburg case are roughly these: Plaintiff operates several recognized schools which have been receiving financial aid since 1976. Beginning in 1920 and increasingly thereafter Hamburg had subsidized "religious and ideological" schools. After the middle of the last decade, in response to administrative court decisions, the state began to finance other schools, but at a considerably lower rate.<sup>98</sup> Thus, by statute the plaintiff's schools receive 25% of a per-pupil rate (*Schülerkopfsatz*) determined to be the costs in comparable public schools; the amount awarded by the state to religious schools in Hamburg is 77%.<sup>99</sup> Driven to charge high tuition and to pay low salaries (73% of the state level), plaintiff is rapidly losing both its money and its ability to compete for students; it also may offend the injunction of Article 7 to avoid segregation by wealth of the parents.<sup>100</sup> The court concluded that a 60% subsidy would be necessary to meet the standard.

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96. As far as I can determine, this decision has not been published. Its docket number is Az.4 VG2434/79.

97. The Hamburg state Constitution contains no provisions dealing with the issues of "basic rights" as they are labeled under the federal Basic Law (It is confined generally to issues involving relationships of local governments and the Hamburg parliament). And the Hamburg state constitutional court (unlike American courts in such a case) has no competence to decide such questions under the Basic Law. For these reasons the *Bundesverfassungsgericht* has exclusive authority to declare Hamburg statutes void in such a case as is described in the text. Art. 100, Basic Law.

98. *Privatschulgesetz der Freien unter Hansestadt Hamburg vom 12. Dez. 1977*, *Hamburgisches Gesetz-und Verordnungsblatt* 1977, Seite 389.

99. To qualify under § 18 of the statute a private school must be "economically indigent", meaning that expenditures exceed receipts and that a subsidy is necessary to prevent collapse. Sec. 20 sets the formula for the subsidy in terms of a percentage of public school expenditures: Number of pupils  $\times$  state per-pupil rate  $\times$  specified percentage (§ 20(2)). However, § 20(3) sets this specified rate for "normal" or "not privileged" schools at 77% (or even slightly higher). The distinction has no apparent connection with the not-privileged schools' actual minimum financial need. Rather the percentage is arrived at *a posteriori*; the state decides the total it will spend for private education and then sets a survival figure for privileged schools. The remainder of the budgeted total determines the percentage of cost to be awarded not-privileged schools.

Nationwide, the average expenditure in the German Gymnasium is DM 7800 in public and DM 6500 in private schools. Subsidies for private schools range from Hamburg's low of DM 1500 for not-privileged schools to virtually full cost. See the "Bundesverband Deutscher Privatschulen e.V." (nearest approximation: amicus brief) filed in the instant proceeding by the German private school association (on file with the author).

100. The administrative court estimated that the plaintiff schools had unconstitutionally overcharge their families by about 30%.

The claim of discrimination under Article 3 was presented to the court though not in terms of the limited standard of "fiscal neutrality" discussed above.<sup>101</sup> The court rejected the application of Article 3. It chose instead to rely upon Article 7 and dug at great length into the actual expenditures and "needs" of the plaintiff. In the end it determined that assistance must be granted by the state to this particular school to prevent its economic decline and eventual collapse. The court objected to the charging of fees that excluded many families. It also went so far into the details as to proclaim the proper level of salaries for the teachers, setting this at 85% of those in public schools. Since the Hamburg statute did not provide these judicially mandated minimums, it was held invalid.

It may well be that this rich set of facts and theory will induce the *Bundesverfassungsgericht* to settle these issues in a definitive way under Article 3, focusing upon the discrimination against lower-income families. To an American it would seem a curious outcome if the high court were to approve the approach taken by the court below, which, in effect, it commits the judiciary to assess the individual financial needs of every claimant.<sup>102</sup> The American experience would argue for the more modest norm of fiscal neutrality, leaving the legislature free not only to set the level of subsidy in the light of the state's budget but, if it chose, to make distinctions among types of private schools where justified by educational considerations and the Basic Law. Fiscal neutrality would avoid judicial usurpation of legislative or administrative functions while rectifying discrimination among income classes.

## VII. CHOICE, QUALITY AND SOCIAL TRUST

Choice in education may eventually come to the United States.

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101. Apparently the sole issue of discrimination presented to the Administrative Court was the favoring of religious and ideological schools. The court approved their being favored as a general class, so long as neutrality is maintained within the class. To an outsider this distinction seems dubious considering the purposes of Art. 3 and the provisions guaranteeing ideological liberty drawn from the old *Weimar Constitution*. See Appendix to the Basic Law, Arts. 136, 137.

Note that a finding of unlawful discrimination need not imply that the remedy be instant: The subsidy to the plaintiff class could be gradually increased; and/or that to the privileged schools could be gradually reduced. The phasing in period would be supported by the historic "reliance" of the presently favored class. Reliance, of course, could not support a permanent distinction; else the Basic Law could in effect be amended and narrowed by merely local devices.

102. To its enduring sorrow, the New Jersey Supreme Court did something approaching this in *Robinson v. Cahill*, 62 N.J. 473, 303 A 2d 273 (1973). The court agreed to determine the meaning of the term "thorough and efficient education" even to the extent of evaluating educational programs and the dollars allocated to them. Not suprisingly, the same case has come back to the court on at least six subsequent occasions. See generally, Coons, "Serrano Among the Social Scientists," *Educational Forum* 289 (March 1977).



If it does so, it will most likely arrive via the political process. In Germany by contrast, an increase in parental choice via judicial review appears to be a possibility in the immediate future. But, in any case, we must finally ask, what is the point of extending choice beyond the class of families that presently can afford it? Would it clearly be a change for the better?

I believe that it would, both in America and in Germany. The arguments for change in my own country have been made many times, and I have myself already written too much on this issue. There is no point in repeating it all here, but I should at least suggest the outline of my position on the two major issues of educational quality and social trust, even if it does not fit both societies in precisely the same manner or degree.

In regard to quality it is my impression that Germans are dissatisfied with the general state of learning in their public schools; and it is certain that a great many Americans regard many of our public schools as dismal failures kept alive solely by compulsion. By quality I do not mean anything fancy but simply the capacity of the school to serve as an instrument for imparting skills and information. Here there is much to be said on behalf of choice, for no system of education is likely to be efficient which is run as a monopoly. Insofar as the public schools of my country or Germany are in a position effectively to demand that children show up in a particular school (and a particular type of school) learning necessarily suffers.

Partly this is a consequence of the need to know the individual child before assigning him to a school. Children are different, and it is risky to treat them as if they were the same. That is why it is so helpful when live persons who actually know the child are empowered to choose the school—and to abandon it where the connection fails. Such persons exist, and they are called parents. They not only know the child, but they have a great deal at stake in his success or failure. It is only common sense to put them in a position where they can, with advice from professionals, select among an array of schools and then monitor the school of their choice to assure that things are going right. They are not educational experts; but neither should they be the mere tool of experts. The most effective role of the professional is to give advice, not to dominate the will of his client.

This thought suggests a second important relation between choice and quality. There is nothing more corruptive of a profession than a captive clientele. This is the fate of the American public school teacher today—and to a degree this holds for Germany. No matter how good or how bad the teacher, there will be a classful of children there tomorrow—and next year. And, in any case, the

present set of legal and economic compulsions that characterize the schools ensures that no teacher shall worry about his job. Such extreme security is a snare for the teacher and a loss for the child; for it cannot help but depress quality. A profession so protected eventually comes to take its customers for granted; in turn they will take the teacher less for a wise counsellor and more for an intellectual boss. Such a profession tends to attract people of small talent, and, granting exceptions, tends to perform an inferior job. If this is the state of German schools (I don't know), they are—like our own—cast in a pattern of failure. Parental choice could break that pattern by putting parents and teachers into the relation of dignity and equality that has long been enjoyed by the rich. What has been good for their education could be good for the education of all children.

But at what social price? Is choice in education a recipe for dividing a society into warring factions? Stephen Sugarman and I have taken quite the opposite position—that parental choice may be a way of maximizing tolerance and cohesion in a society that will in any event be pluralistic. This is not a scientific question. There is no way to be certain, because historic conditions can never be replicated and causes can never be traced. We may cite the Netherlands as a happy example of the blessings of parental choice. But Holland is neither Germany nor the United States; nor do we know in what degree the happy state of Dutch society is an effect of its educational system. All we have is opinion.

The contrary argument in the United States regarding the potential effects of introducing educational choice for ordinary families runs something like this: Choice (except when exercised by the wealthy) is a dangerous thing. Our country's stability rests in significant part upon the power of a bureaucracy to force very different groups of people to go to school together and to absorb a set of common values. The public school is as neutral in its ideology and practice as one can expect, and this tolerant neutrality teaches children to work together and respect one another. If you invite people to "do their own thing", they will separate into inward turning cultic groups, and the liberal society will be endangered.

Those who support choice for the ordinary family argue to the contrary that coercive treatment of the people is in fact a major source of social mistrust. In school its effects are hostility, apathy and dropping out. At home its effects are a sense of injustice and discrimination, as the ordinary parent sees those who can afford it get what they want. By contrast schools that are freely chosen (such as private schools) avoid such anti-social feeling while successfully educating even the most disadvantaged children. Doubtless, having the power to make one's own choice would cause some divisions; but, unlike the class segregation imposed by today's compulsory sys-

tem, they would be good divisions. People of like mind would choose to come together in private schools, but they would be grateful to the larger society for assisting them to follow their own preferences. They would more gladly accept the burden of learning the language and institutions of a nation which shows such respect for family autonomy. Many other parents, given choice, will prefer (as does the majority in Denmark) to attend state schools designed to be "neutral" in ideology, religion and culture; but, whichever schools prove more popular, society will be the stronger for having expressed its open confidence in the people.

