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## Book Review. Normative and Going Nowhere

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# REVIEW ESSAY

## NORMATIVE AND GOING NOWHERE

SCHOOL CHOICE: THE STRUGGLE FOR THE SOUL OF AMERICAN EDUCATION By Peter W. Cookson, Jr. New Haven: Yale University Press, 1994. Pp. vii, 174. \$20.00.

KEVIN D. BROWN\*

### INTRODUCTION

In the final chapter of his book, *School Choice: The Struggle for the Soul of American Education*, Peter Cookson makes this dramatic normative statement:

[W]e need an 'inner-directed' school reform movement that addresses the real needs of children and is committed to the preservation of democracy, the advancement of social justice, and the creation of schools that are oases of hope and intellectual ferment. This inner-directed school reform is based on a social covenant that states that every child, regardless of family background, has a right to health, safety, decent shelter, nourishment, and the best education we can offer. This covenant is based on trust and a commitment to the future. School choice does have a role to play in this transformation, but only insofar as it is tied to the knowledge that without purpose and direction, reform is like a rudderless ship in a storm of conflicting opinion.<sup>1</sup>

Cookson then articulates a plan to execute such reform and outlines how best to utilize both public and private schools.

The real strength of this book is its attempt to expand the debate about school choice by discussing how the implementation of school choice could further or inhibit the rise of the cult of individualism in American society.<sup>2</sup> Cookson notes that, since the pursuit of individual interest ultimately undermines our sense of community and civic responsibility, it may have drastic negative consequences for our society.<sup>3</sup> If America moves to a

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1. PETER W. COOKSON, JR., *SCHOOL CHOICE: THE STRUGGLE FOR THE SOUL OF AMERICAN EDUCATION* 121 (1994).

2. See discussion *infra* parts I.B., II.A.1.

3. COOKSON, *supra* note 1, at 9-14.

system of publicly financed private education, it will further the development of the cult of individualism.<sup>4</sup>

Unfortunately, the strength of Cookson's book is obscured by his putting forward a plan for restructuring how education is financed.<sup>5</sup> Cookson's plan fails to take account of the present American social context and our current legal structure for resolving education issues.<sup>6</sup> If he had taken these factors into account, Cookson would have recognized that his plan was utopian and largely irrelevant. Thus, the very plan that Cookson proposes has the effect of detracting from the ability of the book to highlight the role school choice will play in the critical debate about the ascendancy of the cult of individualism.

## I

### THE COOKSON PLAN

Cookson's plan incorporates three fundamental policy postulates: educational trust funds for children, which ensure equality of educational opportunity; managed public-school choice; and the creation of model schools.<sup>7</sup>

#### A. *The Mechanics*

Cookson calls for the establishment of an educational trust fund, or share, for every child, regardless of nationality, who enters the American educational system.<sup>8</sup> The share for each child would be paid directly to the child's school on an annual basis by the State Department of Education.<sup>9</sup> The amount of each child's educational share would be determined by a sliding-scale formula: the lower the family income of the child, the greater her share.<sup>10</sup> Funding for the shares would derive from restructuring the current financing system for public education.<sup>11</sup>

Public schools, as well as newly formed model schools that conform to certain guidelines, would be eligible to receive educational shares.<sup>12</sup> These schools would be required to disclose to the public their missions, curricula, and pertinent financial information.<sup>13</sup> The school would also have to make a commitment to accept at least 20 percent of its students from disadvantaged backgrounds.<sup>14</sup> Currently operating public schools would receive 70

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4. *Id.* at 103-107.

5. *See* discussion *infra* part II.B.

6. *See* discussion *infra* part II.A.

7. Cookson, *supra* note 1. A model school is any school founded by parents or teachers or both that meets the conditions of Cookson's proposal. *See id.* at 131.

8. *Id.* at 131.

9. *Id.* at 132.

10. *Id.*

11. *Id.* at 133.

12. *Id.*

13. *Id.* at 134.

14. *Id.* at 133.

percent of their revenue directly from the state education department;<sup>15</sup> the rest of their revenue must be raised through educational shares by attracting students.<sup>16</sup>

Teachers and parents, in collaboration with other educational providers, may found the model schools Cookson envisions.<sup>17</sup> While these schools remain subject to state health, safety, and student welfare requirements, they are relatively free to devise and implement their educational agenda. Model schools may institute whatever admissions criteria they wish, provided that they do not discriminate against students on the basis of race, ethnicity, class, or gender.<sup>18</sup> If these schools refuse to accept children with disabilities, they may become subject to limits on the funds they receive from educational shares. Model schools would also be prohibited from espousing hatred or hostility toward others on the basis of race, ethnicity, social class, religion, handicapping condition, or gender (sexual orientation was left off of this list).<sup>19</sup>

Cookson's plan provides parents with the freedom to choose the school their child attends. Although it includes funding for semi-private model schools, Cookson specifically rejects private-school choice.<sup>20</sup> He makes one exception, however. Private-school choice—including sectarian schools—would be allowed for disadvantaged students within the inner city.<sup>21</sup> This exception acknowledges the current disarray of most public schools serving this community.<sup>22</sup> Cookson recognizes that many of these private schools will need a financial boost in order to get started or to place their programs on a firm foundation. Therefore, he proposes that inner-city private schools—60 percent of whose student bodies come from families whose income is at or below the poverty line—be entitled to long-term, low-interest educational loans from banks and other lending institutions. These loans would be guaranteed by individual states and the federal government.<sup>23</sup>

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15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 134.

19. *Id.*

20. *Id.* at 128.

21. *Id.*

22. *Id.*

23. *Id.* at 129. Cookson rightly notes that the Supreme Court's current interpretation of the Establishment Clause makes it virtually impossible for religious schools to receive such funds. *Id.* at 128. The Court struck a similar proposal in Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973). There is a slight difference between Cookson's proposal and the program struck down by the Court in *Nyquist*. In *Nyquist*, a New York statute provided that repair and maintenance grants be paid directly to the school. In contrast, Cookson calls for the state to guarantee bank loans. It is doubtful, however, that this distinction will be constitutionally significant. Cookson's plan will undoubtedly suffer the same fate that awaited the *Nyquist* plan if the private schools that are to receive the funds are primarily religious schools. See *School Dist. of Grand Rapids v.*

### B. The Rationale

Cookson provides two justifications for rejecting broader public funding for private-school choice. The first is rather traditional. He claims that funding private-school choice would undermine public education. The ensuing anarchy<sup>24</sup> would be characterized by increased racial and ethnic segregation; increased opportunity for the upper and middle classes to purchase better education for their children; and increased disparity between more informed consumers, who would have superior knowledge about the choice of private schools, and others who would not have access to such information.<sup>25</sup>

Cookson's second justification is tied to the central theme of the book itself. Cookson views the heart of the debate about the public school system as a battle between two competing metaphors which relate to the structure of American society as a whole. The first metaphor, which Cookson prefers, is that of democracy. At the heart of the democratic relationship is the covenant that "important human interactions are essentially

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Ball, 473 U.S. 373 (1985). In *Ball*, the Court struck a program that sent public school teachers to classrooms located in nonpublic sectarian schools to provide extra assistance at government expense to students needing remedial and enrichment courses in math, reading, art, music, and physical education. The Court found the program unconstitutional because almost all of the funds went to religious private schools in low-income areas. The primary effect of the program amounted to a direct subsidy of religious activities of sectarian elementary and secondary schools in violation of the First Amendment. See also *Aguilar v. Felton*, 473 U.S. 402 (1985). In *Aguilar*, the Court struck down New York City's attempt to use federal funds available under Title I of the Elementary and Secondary Education Act, 20 U.S.C. § 2701 (1988 + Supp. IV 1992) to provide educationally disadvantaged children attending sectarian private schools with remedial instruction. Public school personnel instructed the children. They were required to avoid religious involvement and to keep their contact with private school staff to a minimum. *Aguilar*, 473 U.S. at 407. Monitoring was routine, with supervisors making at least one unannounced visit each month and program coordinators also making occasional unannounced visits to ensure that the public school employees were not providing religious instruction. *Id.* The Court held that the monitoring function violated the third prong of the *Lemon* test, which measures excessive government entanglement with religion. *Id.* at 412-13. See also *Lemon v. Kurtzman*, 403 U.S. 602, 612-14 (1971) (concluding that a statute will not be found to offend the Establishment Clause if: (1) it has a secular legislative purpose; (2) its principle or primary effect is one that neither advances nor inhibits religion; and (3) it does not foster an excessive government entanglement with religion). But see *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet* 114 S. Ct. 2481, 2495-2500 (1994) (O'Connor, J., concurring and concurring in judgment) (concluding that the state statute at issue violated the Establishment Clause by singling out a particular religious group for favorable treatment, but expressing the view that states providing on-site special education at public schools and at nonsectarian private schools should be allowed to provide on-site special education at sectarian schools as well).

Although Cookson is aware of the constitutional difficulties embodied in providing loan guarantees for private schools, he dismisses these concerns with the statement: "I believe that this position is too stringent." Instead, Cookson argues that "we ought to reconceptualize the constitutional issues related to the public funding of private schools." COOKSON, *supra* note 1, at 128. See also part II.B., *infra*.

24. COOKSON, *supra* note 1, at 124, 128.

25. *Id.* at 76, 95, 118.

communal.”<sup>26</sup> Democracy recognizes that the building blocks of society are comprised of groups with different amounts and forms of power; it protects those with the least power. The second metaphor is that of the marketplace, which prioritizes the primacy and efficacy of consumership.<sup>27</sup> At the heart of this metaphor is the pursuit of self-interest, which leads people to view human interactions as contractual exchanges to advance their own position. The cult of individualism promoted by the marketplace metaphor ultimately runs counter to democratic notions of sacrificing one’s own interest for the good of the group.

Cookson’s other justification for rejecting public funding of private-school choice is based on the fear that such a widespread program would lead to the commodification of education.<sup>28</sup> Market-driven educational reform would promote self-interest over social commitment and create communities where lifestyle loyalties supersede community loyalties. This situation would further the cult of individualism and undermine our sense of community and civic responsibility.

### C. *An Analysis of the Specifics*

Most of Cookson’s proposals implicitly advance a laudable agenda. Despite our society’s dedication to the concept of meritocracy, serious disadvantages accrue to students whose parents are economically deprived.<sup>29</sup> I therefore agree with Cookson that our society should attempt to counterbalance those disadvantages in the interest of fairness. Cookson’s proposals seek to accomplish this goal in two ways. First, he provides for public funding of private-school choice for inner-city children.<sup>30</sup> Second, he proposes that poor people receive higher dollar amounts for their educational shares.<sup>31</sup> This would create financial incentives for public and model schools to attract and maintain these students.

I also share Cookson’s concern about the possible segregative effects of school choice. I have long been a proponent of interracial and inter-ethnic harmony and cross-cultural understanding. These goals do not focus on cultural homogeneity or domination, but rather the appreciation of and respect for—though not necessarily agreement about—the beliefs embedded in different racial and ethnic cultures in our society. It takes considerable effort to understand different views of the world embedded in cultures different from one’s own. Most people consider views contrary to their native culture to be products of ignorance, mistake, bias, or lack of understanding rather than instances of cultural disagreements.

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26. *Id.* at 99.

27. *Id.*

28. *Id.* at 34-35.

29. *Id.* at 133. A student is disadvantaged for Cookson’s purposes if her family’s income is at or below the poverty line. *See id.* at 129, 131.

30. *Id.* at 128.

31. *Id.* at 132.

In order to instill appreciation and respect for the cultures of others, schools must provide for consistent and meaningful cultural exchanges that foster cross-cultural understanding. Such an educational environment requires more than the physical presence of a diverse racial and ethnic student body. Nevertheless, such a student body is a prerequisite for that environment.

The most direct way to assure racial and ethnic integration of student bodies is to require public and model schools to make diversity one objective of their admissions policies. In what I consider a second-best effort, Cookson requires at least 20 percent of public school students to be disadvantaged for the schools to qualify for funding from educational shares. Because of the high correlation between poverty, race, and ethnicity,<sup>32</sup> this requirement may produce at least a limited amount of integration. Unlike public schools, however, Cookson does not require model schools to be economically integrated to receive funding. Their only constraint is not to discriminate in their admissions policies.

On a separate point, I agree with Cookson that the concept of school choice benefits students and parents, whatever its impact on student test scores.<sup>33</sup> In chapters three and four, Cookson provides information regarding various school choice programs and analyzes the difference that choice makes. Cookson concludes chapter four by summarizing his findings:

[I]n terms of student achievement, choice makes little difference. In terms of school improvement, choice has secondary effects that can raise the level of schools' academic climates. . . . I have argued that choice has beneficial communal effects that are only marginally related to student achievement and school improvement. Schools are social organizations, and if they can influence families and communities to be more participatory, it makes sense to think

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32. According to the U.S. Bureau of the Census, 46.6 percent of African-American children and 39.9 percent of Hispanic children under the age of 18 lived in households where the income is below the poverty level in 1990. Only 16.9 percent of white children live in such households. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1994, at 476 (114th ed. 1994).

33. See John Dayton, *Correlating Expenditures and Educational Opportunity in School Funding Litigation: The Judicial Perspective*, 19 J. EDUC. FIN. 167 (1993). Dayton states, Quality cannot be defined wholly in terms of performance of state-wide achievement tests because such tests do not measure all the benefits and detriments that a child may receive from his educational experience. If standardized test scores were the only hallmark of quality educational opportunity, it would make little sense for the wealthiest schools to offer their diverse curricula with courses other than those needed to improve standardized test scores. Further, achievement and opportunity are not the same thing.

*Id.* at 178-79.

of choice as a way of creating community. . . . If choice does indeed create more social trust, then it is an experiment worth pursuing, within the context of improving and transforming public education.<sup>34</sup>

Thus, although school choice is one of the centerpieces of his proposal, Cookson does not endorse choice because of its potential impact on educational achievement. Rather, his support derives from the intangible effect school choice has in empowering students and their parents. When families choose schools for their children, that choice gives them a sense of ownership. When they have a voice concerning their children's school, they feel better about the education they receive.<sup>35</sup>

## II

### THE COOKSON PLAN IN THE CONTEXT OF AMERICAN SOCIETY

Although I enthusiastically support most of Cookson's main provisions, my affinity was checked by a strange sense that something in his plan was awry. Cookson clearly shares many of my concerns about American society and education. He reveals a sincere concern about the problems of public education, a regard for parental and student involvement and empowerment in education, an appreciation for the inherent disadvantages of the poor in a meritocratic society, and an awareness of the destructive potential of the cult of individualism that pervades our society. Cookson's proposals are not only normative, they are downright utopian. So why was my feeling of affinity tempered?

#### A. *The Social Trends of American Society*

A moment of reflection revealed the obvious. Timing is key to any scheme that advocates such a monumental task as the fundamental restructuring of education in America. For such a proposal to be seriously considered for implementation, American society must recognize the problems the proposal addresses. To quote from Cookson, "[since] society precedes school, we can see that major educational reforms pass in and out of favor depending on social conditions and how prevailing ideologies interpret these conditions."<sup>36</sup>

#### 1. *The Trend Toward the Cult of Individualism*

Cookson's proposal is acceptable for a society that is already moving in the direction of the democratic metaphor, one that views democracy as a mechanism for protecting those groups with the least power. Yet in chapters one and five, Cookson acknowledges that the developing trend of

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34. COOKSON, *supra* note 1, at 98.

35. *Id.* at 62, 97-98.

36. *Id.* at 9.



American society is, on the contrary, toward the cult of individualism.<sup>37</sup> Self-interested ideology runs counter to the democratic attitudes necessary for the acceptance of his proposal.

In the first and fifth chapters, Cookson discusses the cultural context not only of the present, but also of the late 1980s, when the movement for school choice gained a firm foothold on America's agenda for education reform.<sup>38</sup> Cookson explicates the ascendancy in our society at that time of the new conservative ideology fostered by former President Reagan. This ideology glorifies individualism, competition, and profit. The new power elite rejoices in materialism and the triumph of capitalism over socialism; its ideology updates social Darwinism for the white-tie generation. In the 1980s, markets seemed to dominate and individuals no longer had to feel guilty about pursuing their own personal interests. It was a time of cultural narcissism, when self-realization and self-fulfillment became a kind of collective obsession.<sup>39</sup>

At the same time that the culture of narcissism was gaining a firm foothold in our society, the middle class increasingly withdrew to safe suburban areas. White, middle- and upper-middle-class enclaves that were developed in the suburbs, essentially self-contained and isolated from the larger community. These residents could therefore disengage themselves from the discussion of public schools. The massive immigration to the cities of people from South America, Eastern Europe, and the Caribbean accelerated the withdrawal of the more affluent white community.

These cultural transitions have led to the ascendancy of a cult of individualism and the attenuation of both the melting pot ideology and its concomitant collective responsibilities. "We are in the midst of a profound cultural transition; the core consensus that united public opinion since the Great Depression has all but evaporated. An essential element of this consensus is the firm belief that public schools are the mediators of merit and the cradles of democracy."<sup>40</sup> Thus, values of consumption and personal fulfillment have replaced older values. Our traditional loyalties have been replaced by lifestyle loyalties based on individual preferences, not group affiliations. This market-oriented capitalist ideology, embedded in the conception of rationally self-interested consumers of educational products, gives the school choice movement its energy and cohesion.

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37. *Id.* at 10-11.

38. *Id.* at 6-7, 112-113.

39. See, e.g., Duncan C. Smith, *Total Quality Leadership: Building Your Team, Keeping Your Clients*, 19 *LAW PRAC. MGMT.* 34 (1993) (discussing how excesses of the 1980s negatively affected the legal profession).

40. COOKSON, *supra* note 1, at 9.

## 2. *The Impact of the Rise and Fall of Court-Ordered School Desegregation*

Although Cookson does not specifically focus on the influence of court-ordered school desegregation on American society and the school choice debate during the 1960s, 1970s, and 1980s, school desegregation influenced our society in two ways. First, avoidance of school desegregation decrees provided one of the most powerful motivations for white flight to suburban communities. In those newly formed communities, white children were generally not subject to court-ordered desegregation plans.<sup>41</sup> In this regard, school desegregation helped drive affluent whites to the suburbs, thus contributing to the attenuation of the democratic metaphor and the ascendancy of the cult of individualism. At the same time, however, the concept of school desegregation functioned as the primary application of the melting pot ideology to public schools. Hence, school desegregation was intended to serve as both a mainstay of the democratic metaphor and an inhibitor of the cult of individualism.

Since Cookson fails to discuss the implications of school desegregation, it is not surprising that he also does not discuss the impact that the termination of school desegregation decrees will have on either the American social context or the school choice debate. Two-thirds of African-American students and over 70 percent of Latino students currently attend schools in which minority students comprise a majority of the student body.<sup>42</sup> These percentages actually reflect increases in racial and ethnic separation from the late 1980s.<sup>43</sup> In a 1991 opinion, *Dowell v. Board of Education*,<sup>44</sup> and a 1992 opinion, *Freeman v. Pitts*,<sup>45</sup> the Supreme Court articulated the conditions for de jure segregated school systems to free themselves from the yoke of federal court supervision.<sup>46</sup> In so doing, it set

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41. *Milliken v. Bradley*, 418 U.S. 717 (1974), severely restricted the scope of school desegregation decrees. The Court concluded that to justify an interdistrict school desegregation decree, plaintiffs must show that a violation occurring in one school district caused a significant segregative effect in another. If school districts act independently, however, intentional segregation in one school district is simply not relevant. The consequence of this opinion was that while intentional segregation was often found to exist in urban school systems, that segregation could not be the basis of a court-ordered desegregation plan in the suburban school systems. Since newly formed suburban communities were of recent origin, they did not have a track record of intentional segregative acts. Hence, suburban school districts were seldom part of school desegregation decrees.

42. William Eaton, *Segregation Creeping Back in U.S. Schools*, S.F. CHRON., Dec. 14, 1993, at A15.

43. *Id.*

44. 498 U.S. 237 (1991).

45. 503 U.S. 467 (1992).

46. *Dowell*, 498 U.S. at 247 (holding that organization must operate in compliance with desegregation decree and that it must be unlikely that the board would return to its former pattern of desegregation); *Freeman*, 503 U.S. at 467 (outlining factors such as compliance with decree, whether there has been a good faith commitment to decree, and whether judicial control is necessary to maintain decree).

the judicial stage for the termination of federal court supervision of educational desegregation, which at one time encompassed over 500 school systems.<sup>47</sup>

With the termination of federal court supervision and the consequent dissolution of those decrees, many public school districts will regain plenary control over students' school assignments. The goal of student assignments in those districts will no longer be motivated by the compelled need to maintain integrated student bodies. Instead, the foreseeable future for our nation's public schools is one of increased racial and ethnic separation. To state it bluntly, we have already seen the maximum amount of integrated public schools that we are likely to see in our lifetime.

As America heads toward the twenty-first century, we are dismantling the primary institutional mechanism that provided much of the racial and ethnic integration in public schools. The growing realization that there are no longer any significant institutional forces pushing and maintaining integration is likely to have a profound impact on the discussion of school choice and the cultural context of that discussion. While school desegregation both advanced and attenuated the melting pot ideology and the democratic metaphor, the termination of school desegregation will not be so ambiguous. America's white, middle- and upper-class suburban enclaves are firmly in place. The elimination of desegregation will further attenuate the conception of community obligations upon which the democratic metaphor is based.

Cookson does note that the first American private schools that were indirectly publicly funded were "white flight" academies, established to allow white parents to avoid sending their children to school with African-Americans.<sup>48</sup> He fails, however, to develop the significance of this point for the school choice debate, in light of the termination of school desegregation decrees.<sup>49</sup> One of the principal objections to private-school choice over the last thirty years, while our society was busy desegregating public schools, has been its potential segregative effect. Many opponents of private-school choice were visionaries who believed that social integration

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47. See James S. Liebman, *Desegregating Politics: All-Out School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1470-71 (1990) ("Applied to many of America's cities, therefore, predictions of desegregation's extinction . . . are widespread and not without basis.").

48. COOKSON, *supra* note 1, at 27. For example, following the Supreme Court's decision in the landmark case of *Brown v. Board of Education*, Georgia enacted laws that allowed local school boards to suspend the operation of their public schools by a resolution of the majority of the board members. GA. CODE ANN. § 32-801 (1955) (repealed 1962). Later, in 1961, a voucher law was enacted to allow the state and local districts to fund private or out-of-state public schools through the use of vouchers to students. GA. CODE ANN. § 32-813 (1967), *recodified in* GA. CODE ANN. § 20-2-642 (1993).

49. See Kevin Brown, *Recent Developments in the Termination of School Desegregation Decrees*, 26 IND. L. REV. 867, 881 (1993) (discussing the Supreme Court's treatment of the implications of residential segregation in considering termination of school desegregation decrees).

should be achieved through the schools. Private-school choice was seen as anathema to that vision. These detractors of private school choice, however, are less likely to raise those objections as the racial and ethnic segregation in our public schools increases. The elimination of school desegregation decrees is likely to further the cult of individualism.

### B. *The Legal Hurdles to Cookson's Plan*

In addition to the social trends in American society, there are also significant legal impediments to Cookson's plan. His proposal revolves around the establishment of an educational trust fund for each child, with the amount allocated to poor children exceeding that allocated to middle- and upper-class children. The funding for these educational trust funds would come from restructuring the current system for financing education.<sup>50</sup> According to Cookson, this restructuring should be based upon "the premise that the present method of financing public education is unconstitutional because it denies students equal protection under the law. . . ."<sup>51</sup> Cookson therefore calls on the courts to implement his plan.

The first difficulty his plan encounters is the Supreme Court's contrary 1973 opinion in *San Antonio v. Rodriguez*.<sup>52</sup> In *Rodriguez*, the Court was faced "with nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues" for funding its educational system.<sup>53</sup> Texas, like many states, relies heavily on local property taxes as a means of funding education. Texas' school financing scheme produced significant disparities in the average funds available for the education of students who resided in different school districts.<sup>54</sup> The Court held that the test for determining whether educational financing schemes violate the Equal Protection Clause of the Fourteenth Amendment<sup>55</sup> is whether such schemes are rationally related to a legitimate state purpose.<sup>56</sup> Such a test is deferential to government authorities.<sup>57</sup> Applying that test, the Court upheld the Texas scheme, stating that it was rationally related to

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50. See *supra* part I.A.

51. COOKSON, *supra* note 1, at 132-33.

52. 411 U.S. 1 (1973).

53. *Id.* at 40.

54. The suit was filed by Mexican-American parents whose children attended the elementary and secondary schools in Edgewood Independent School District, an urban school district in San Antonio. The Edgewood School District was the least affluent district in the San Antonio area. For the 1967-68 school year, its per-pupil educational expenditure was \$356. In contrast, Alamo Heights—the most affluent school district in San Antonio—spent \$594 per pupil, over 67 percent more than the Edgewood School District. The difference was entirely attributable to the difference in funds provided through local property taxes. *Id.* at 12.

55. U.S. CONST. amend. XIV, § 2.

56. *Rodriguez*, 411 U.S. at 55 (1973).

57. *McGinnis v. Royster*, 410 U.S. 263, 276 (1973) ("legislative solutions must be respected if the distinctions drawn have some basis in practical experience or if some legitimate state interest is advanced").

the legitimate governmental objective of furthering participation in and control of each district's school financing at the local level.<sup>58</sup>

Given the *Rodriguez* opinion, Cookson's call to federal courts to revise the structure of education financing because it violates the Equal Protection Clause is impractical. More fundamentally, Cookson's interpretation of the Equal Protection Clause is based upon the notion of a social covenant that every child, regardless of family background, has a right to health, safety, decent shelter, nourishment, and the best education the state can offer.<sup>59</sup> If the courts accepted this covenant, there would be no reason to restrict the call for the restructuring of American society to education. Instead, pursuant to the Equal Protection Clause, the covenant would effectively grant new rights for poor children in numerous areas. The same constitutional right that would mandate increased government spending on poor children's education would also require increased spending for their health care, housing, food, and safety.

With exceptions in the area of the rights of indigents in criminal trials and appellate processes<sup>60</sup> and on cases rejecting wealth restrictions on the right to vote,<sup>61</sup> the Constitution has not been interpreted to require government action. Instead, the Bill of Rights assures a *negative* liberty for all. Our liberties are defined in terms of the freedom of the individual from interference by government, not the duties and obligations that the government must provide. Our Constitution restrains government from preventing a woman from obtaining an abortion, but it does not require that government assist her by paying for it;<sup>62</sup> it prevents the government from unduly constraining the right to free speech, but it does not require the government to assist them in the distribution of their message; it prevents government from unduly constraining an individual's freedom to worship, but it does not require that the government make donations to their faith. In a similar vein, the Supreme Court has not yet held that the government

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58. *Rodriguez*, 411 U.S. at 55. The Court upheld the Texas financing scheme without addressing the specific question of whether the state discriminated based on the wealth of individuals. In Texas, it could not be established that the poorer students resided in school districts that had less money to spend on their education. Poorer communities are often clustered around commercial and industrial areas, which provide the most attractive sources of property tax income for school districts. It was not clear that the state spent less on poorer students. *Id.* at 23.

59. Cookson, *supra* note 1, at 121.

60. See e.g., *Griffin v. Illinois*, 351 U.S. 12 (1956) (invalidating state law that prevented an indigent criminal defendant from acquiring a transcript for use at several stages of the trial and appellate process); *Douglas v. California*, 372 U.S. 353 (1963) (holding that when merits of appeal of an indigent are decided with counsel there has been discrimination which violates the Fourteenth Amendment).

61. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

62. *Harris v. McRae*, 448 U.S. 297 (1980) (upholding the Hyde Amendment, which prohibits use of Medicaid funds for abortions, except when the woman's life is endangered or the pregnancy resulted from rape or incest); *Maher v. Roe*, 432 U.S. 464 (1977) (upholding Connecticut welfare regulation allowing state subsidy for childbirth but not abortion).

has a constitutional obligation to provide any public assistance for education.<sup>63</sup> Our constitutional rights are conceptualized as the rights that self-interested individuals need in order to pursue their own plans and purposes, consistent with a similar liberty for others.

Cookson's social covenant, though laudable, would amount to a significant and fundamental reconceptualization of our individual rights under the Constitution. Under Cookson's plan, mandated constitutional obligations to the poor would increase. Whether he recognizes it or not, Cookson asks the courts to fundamentally restructure American society by abandoning the traditional constitutional concept of negative liberty and instead adopting a view of liberty that is conceptualized in affirmative terms. Thus, he is seeking a place to attenuate the dangers embedded in the growth of the cult of individualism. Yet, the place he comes to is a legal system that itself is deeply embedded in the very cult of individualism that he seeks to attenuate. Hence, Cookson is seeking a solution in one of the institutions which is actually part of the problem.

Like the federal constitution, most state constitutions contain guarantees of equality of treatment. But unlike the federal constitution, state constitutions normally provide provisions requiring the state to maintain a public education system.<sup>64</sup> These provisions also provide—within constitutional limits—that plenary power regarding the control and finance of public education is to rest with the state legislature.

A number of state supreme courts in recent years have relied upon these education clauses to overturn their state's school financing scheme.<sup>65</sup> By using the education clauses, state courts can limit their decisions to public education and thus avoid the potential impact on other areas of social welfare legislation that a ruling based on guarantees of equal treatment would produce. When courts use the education clauses to strike down financing schemes, however, they defer to the legislatures to develop alternative financing procedures because plenary power for financing rests with state legislatures.<sup>66</sup>

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63. See *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 462 (1988) (finding that certain differential school funding violates the Equal Protection Clause only if it is not related to a legitimate state interest); *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (finding that the Constitution does not require school districts to provide bus service); *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

64. See Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 134 (1989) (citing the language contained in the education clauses of all 50 states' constitutions).

65. For a thoughtful analysis of the judicial treatment of school funding, see generally John Dayton, *An Anatomy of School Funding Litigation* 77 EDUC. L. REP. 627 (1992).

66. See, e.g., *Washakie Co. School Dist. v. Herschler*, 606 P.2d 310, 317-18 (Wyo. 1980) (striking down public school financing system on equal protection grounds, but deferring to state legislature to establish a fair financing scheme).

CONCLUSION:  
FAILURE TO LEARN THE LESSONS TAUGHT

Despite these weaknesses, there are a number of strengths that still make this book worth reading. In the first five chapters—which comprise fewer than 120 pages—Cookson succinctly brings the reader up to date on a number of complex issues dealing with school choice. He is able to acquaint the reader with the terminology and different types of programs that pass under the rubric of school choice, the various political factions that have aligned in support of private-school choice, some of the educational arguments about choice, and a number of the more controversial school choice programs that are currently operating around the country.

Unfortunately, the last chapter reduces the potential impact of the preceding chapters. Cookson spends a considerable amount of time in the first five chapters of the book pointing out that our society's view of education is a product of developing trends in our society and placing education and educational reform against the larger background of our society. Yet, after recognizing that society precedes education, the final chapter ignores the implications of this very lesson. His utopian plan for restructuring education is developed in a vacuum and therefore ignores the force of societal conditions that will prevent acceptance of his plan. His proposal reminds me of the title of an article I read sometime ago by Pierre Schlag: *Normative and Nowhere to Go*.<sup>67</sup>

The real strength of Cookson's book therefore does not lie in the implementability of his proposal for restructuring education. Rather, its value lies in the opportunity it provides to enter the debate about the ascendancy of the cult of individualism and the danger it presents to our present and future society. Those of us who are concerned about these dangers must engage in the arduous and difficult process of trying to create a social context to mitigate them. There is no quick and easy solution to this struggle and the pay-off, if it is to come, may be so far in the future that only Americans who have not even yet been born may benefit. By suggesting an easy, though untenable, solution to the dilemma facing American society, Cookson makes it less likely that his readers will be able to understand America's potentially unstoppable movement toward an unrestrained cult of individualism and the consequences of this path for our society.

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67. 43 STAN. L. REV. 167 (1990) (discussing the ineffectiveness of normative legal thought in realizing its prescriptions or conclusions).