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PROMOTING RACIAL EQUALITY THROUGH EQUAL EDUCATIONAL OPPORTUNITY: THE CASE FOR PROGRESSIVE SCHOOL-CHOICE

Brian P. Marron^{*}

A brief satirical narrative illustrates the plight of too many students trapped in inadequate schools despite more than forty years of education reform.

A young boy rings a doorbell. A thin, old man with a white goatee and a red, white, and blue striped hat opens the door. "Hello, little fellow, are you lost?" the man asks.

"No, my mommy says I'm a big boy now," responds the child as he shows the man four fingers. "She told me to go see Uncle Sam for some school."

The man responds with a warm smile, "Well, you've come to the right place little man. What is your name?"

"Johnny."

"Well, Johnny, your mommy is a very smart woman. She knows that every boy and girl needs an education to grow up and have a nice job. Where do you live?"

"Anderson Homes."

"I know where that is. I send the boys and girls from that part of the city to PS-123."

Johnny replies, "Mommy says to ask you to send me somewhere else."

"Now why is that?" asks the old man, puzzled.

"Mommy went to school there. She says it was a bad school."

"You don't have to go there. Pryvatt Academy is a good school in your neighborhood."

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"I can't. Mommy says only rich boys and girls go there. We don't have enough money."

"Tell your mommy that she should move outside of the city. They have free schools there, too."

"Mommy says we can't afford to move."

"Well, Johnny, then you must go to PS-123."

"But my mommy said . . ."

"Now, Johnny, it won't be so bad" the man interrupted. "My friends in Washington are sending more money for that school to get better; in ten years it will be a good school."

"I go to school now. My mommy said getting any bad learning will ruin me and send me to jail" the boy explains with moistening eyes. "I don't want to go to jail!"

"There, there, Johnny. Don't cry. "

"Can you give my mommy some money? I want to go to a good school like Pryvatt Academy."

"I can't do that Johnny."

"Why?"

"Because my friends in Washington and in Capital City have friends that work in public schools. Their friends are afraid that if I give your mommy money that they won't get money" the old man replied. "My friends in Washington and in Capital City also have friends that don't want me to give you money because they are afraid you will use it to go to a church school. You see Johnny, my friends don't want to hurt the feelings of their friends because their friends helped them get their nice jobs in Washington and Capital City. Do you understand Johnny?"

"Not really. Does my mommy have any friends in Washington?"

"Yes, she does, Johnny. But her friends also have a lot of friends that work in public schools."

Seeing the boy frown, the old man continued. "Tell you what, Johnny, if you be a good boy and go to PS-123, I promise we will give your school more and more money every year. Then, when it is time for your kids to go to PS-123, it will be a good school."

As Johnny turned to walk home, his head hanging low, he kicked a small rock and mumbled, "That's what you told grandma, too."

This narrative illustrates how the United States' public education system denies poverty stricken children an adequate education. A sufficient public education provides the tools needed for each child to function in the modern economy and achieve at least a modest standard of living. Unfortunately, children in poverty in the U.S. are not getting those tools.

Instead of serving schools that are as equally impoverished as the children's neighborhood or home, Diane Ravitch, a research professor of education at New York University and the Brown chair in education policy at the Washington-based Brookings Institution, argues that adequate public schools should pull the child up out of poverty. She points out that while "[s]chools cannot create economic activity or jobs, only they can teach children the knowledge and skills without which they cannot improve their life prospects."¹ Without adequate education for all children, the American dream becomes a nightmare. The history of twentieth century public education in the United States proves that education reforms targeted at individual problems within the system's framework are largely unsuccessful. Consequently, an attempt at broad structural reform of the public educational system is needed. This paper proposes that a public education² system founded on "school choice," allowing parents to choose where their children attend school, provides the best solution to insure that all United States citizens, including children in poverty, are offered an adequate education.

1. *Brookings Papers on Education Policy: 1999* at 3 (Diane Ravitch ed., Brookings Instn. Press 1999).

2. The education policy debate should recognize an important distinction between the terms "public education" and "public school." Public education is the government commitment to ensure that each of its citizens receive an education. Governments have created public schools to meet the goal of providing public education. Public education can also be provided by the government through other means such as subsidizing the education of children at home, with tutors, or at private schools. The key to this definition of "public education" is the traditional egalitarian concept of education for all. Public schools are just one means to make this possible. Many commentators on education policy who staunchly support "public schools" are in fact touting the historical contributions of "public education" to American society. A major misperception held by school choice opponents is that the only way the government can provide public education is through public schools. This is not true. As long as the government is providing the means for the child to receive an education it is part of the public education system. In this way the government is still meeting its obligation to prepare its citizens for adulthood. Unfortunately, some choice opponents believe public schools and public education are synonymous.

The most promising educational reform that can be used as a means for achieving racial equality and poverty reduction is a progressive version of school choice.³ Generally, a public education system based on choice allows parents to select which school their children attend. This gives parents the freedom to move their children out of ineffective schools while at the same time motivating the ineffective schools to improve. An educational system based on school choice may provide the best way to ensure that all Americans enter adulthood with a functional education. By equipping all citizens with an adequate education, the government provides the equal opportunity that will in the long term minimize the racial and class inequalities prevalent in American society.

I. INTRODUCTION

A. Introducing "Progressive" School Choice

The debate surrounding school choice or "vouchers" has been traditionally led by the politically conservative. Until the 1990s, the "voucher" movement was based in conservatism and religion with prominent supporters including Milton Friedman and President Ronald Reagan.⁴ The conservative wing of the school choice movement advocated an education system relying solely on market principles—vouchers should be available to all children with little or no government regulation of the process.⁵ The conservative universalist approach gave rise to (and validates some) opposition to the use of vouchers.

3. Progressive school choice differs from what most people think of as "school choice." Traditionally school choice, usually described as "vouchers," has been thought of as a way for *all* children to be able to take their share of educational funds and apply them to tuition at a private school. Progressive school choice rejects this universal approach by acknowledging that most families already have school choice; they can afford to move to a different public school district or afford private school tuition. Progressive school choice is limited to the children that need choice—those from low income families who are trapped in inadequate public schools. Progressive school choice is a centrist alternative to the school choice/voucher philosophy advocated by political conservatives. See generally, Brian P. Marron, *The Final Reform: A Centrist Vision of School Choice*, 8 Geo. J. Pov. L. & Policy 321 (2001) (for more on this distinction see Part V *infra*).

4. See Terry M. Moe, *Schools, Vouchers, and the American Public* 32 (2001).

5. *Id.* at 35 ("Many conservatives in its ranks continue to see vouchers in universalistic and market oriented terms. In their view, all children should get vouchers, and the entire education system should be reformed via choice and competition.").

However, conservative voucher supporters have benefited greatly from the rise of another wing of the school choice movement. In the 1970s, sociologist Christopher Jencks and law professors John Coons and Stephen Sugarman began to write about the potential applications of school choice in promoting equity and social justice.⁶ They found that school choice could be useful in “giving greater control to families and in helping ameliorate the social inequities that . . . were rooted in the current system.”⁷ Yet, in the 1970s and 1980s, their innovative vision of school choice failed to gather much support as limited pilot programs were abandoned and ballot initiatives failed.⁸

Progressive school choice emerged again in the 1990s with a victory in Milwaukee led by State Representative Polly Williams and Marquette University professor Howard Fuller.⁹ They were able to push a limited voucher proposal through the Wisconsin legislature. This limited program, discussed more fully below in Part II, was based on progressive school choice principles that target participation of those children who need it the most. To members of this growing progressive wing of the school choice movement,

vouchers are not just about choice, competition and performance incentives. Nor are they necessarily for all children. They are about bringing equal opportunity to the children in greatest need, and about using regulations to channel markets in the right directions. The ideas of Jencks, Coons and Sugarman, once on the periphery of the movement, are now fueling its growth and diversity.”¹⁰

Unfortunately, school choice or “vouchers” has continued to be stereotyped by mainstream American political culture (including the mass media, major political parties and organiza-

6. *Id.* at 22-23.

7. *Id.* at 22.

8. *Id.* at 22-23.

9. *Id.* at 33.

10. *Id.* at 35.

tions) as a conservative program.¹¹ It fails to recognize the growing support for a more centrist approach to school choice.

The support for progressive school choice differs from conservative supporters in several ways. First, the progressive wing of the school choice movement recognizes that the current public education system serves most children well. Therefore, government subsidized choice is only needed for low income families who reside in districts with inadequate public schools.¹² This differs from the view of traditional conservative voucher supporters who believe that all children should receive vouchers.

Second, progressive school choice supporters are not focused on religion, *per se*. Religious schools should be included in school choice plans simply because they provide more options. Progressive supporters of school choice, like most Americans, are *not* anti-religion. They will accept the minimal risk of the mere appearance of government-religion entanglement for the sake of educating and restoring the promise of the American dream to society's at-risk children.¹³ Progressive school choice

11. A search of the LEXIS-NEXIS electronic database of United States newspapers over the past five years using Boolean search terms of "(vouchers or "school choice") w/5 conservative" resulted in the following error message: "This search . . . has been interrupted because it will return more than 1000 results." The mainstream political culture does not understand that school choice could be designed to promote more centrist or liberal values. Just consider the features of choice presented below: more spending, more government regulation, and targeted aid to the poor. These are hardly typical conservative ideas. Unfortunately, the progressive school choice position remains largely voiceless in the public debate as the Democratic Party remains beholden to the teachers' unions.

12. Moe, *supra* n. 4, at 301 ("[The modern progressive wing of the voucher movement] agree[s] that American society is fraught with inequities that can distort the operation of school choice, and that there are corresponding dangers to relying on free markets. But they also believe that, with the right regulations, choice and competition can greatly benefit poor and minority families and liberate them from a public school system that is not serving their interests.") (citing John E. Coons & Stephen D. Sugarman, *Scholarships for Children* (Inst. of Govtl. Stud. Press, U. of Cal., Berkeley 1992); John E. Coons & Stephen D. Sugarman, *Education by Choice: The Case For Family Control* (U. of Cal., Berkeley 1978); Christopher Jencks, *Education Vouchers: A Report on Financing Education by Payments to Parents* (Ctr. for the Study of Pub. Policy 1978); Christopher Jencks, *Giving Parents Money to Pay for Schooling: Education Vouchers*, *New Republic* 19 (July 4, 1992)).

13. A flawed argument against school choice, discussed later, is that it violates the separation of church and state by sending public tax dollars to private religious schools. This concern is answered by carefully drafting the program. The school choice funding process must put the decision clearly in the hands of the family. It should only be through the choice of private individuals that public tax dollars go to religious organizations. As the case law below indicates, this solely private decision effectively in-

supporters generally do not care that parents may choose to have their children taught to read the Bible, the Koran, or the Torah in school so long as the child graduates knowing *how* to read.

B. This Paper

I begin this paper by describing the standard of an “adequate” education and explaining how public education systems fail to provide an adequate education on an equal basis to children in poverty. Then, I address attempted reform plans including school finance reform, inter-district transfer, controlled choice, magnet schools, and charter schools. The discussion of reform plans concludes with an examination of school choice systems implemented in Milwaukee and Cleveland. Next, I will examine the *No Child Left Behind Act of 2001*,¹⁴ focusing on how it is a baby step in the right direction and how it highlights Congress’s continued resistance to school choice systems. Further, I identify legal and political barriers that frustrate the implementation of broad school choice programs. The legal barriers I discuss are desegregation concerns and questions of whether the inclusion of religious schools offends the First Amendment’s Establishment Clause. The political barriers I discuss include partisan politics, the inability of citizens from lower socio-economic backgrounds to exert any political power, and strong opposition from civil rights groups and education system policymakers. Finally, I propose a hypothetical broad school choice program that can conquer legal and political barriers, that provides adequate education to poverty stricken students, and that will eventually reduce inequality between high and low socio-economic classes and races.

II. THE SIGNIFICANCE OF EDUCATION

A. What is an “Adequate” Education?

Dr. James M. Comer, Professor of Child Psychiatry at Yale University, measures adequate education by determining

ulates the government from the appearance of endorsing religion. Such a system would only violate the Establishment Clause as much as Social Security checks ending up in collection plates.

14. H.R. Res. 1, 107th Cong. (2001).

“whether students are having experiences that will help them score adequately on tests and become responsible and disciplined in a way needed to be consistently successful in school and in life.”¹⁵ Consequently, the adequacy of an education is gauged by examining the results of standardized tests, such as The College Board SAT Test Program (SAT) or the National Assessment of Educational Progress (NAEP), and by considering dropout rates and grade point averages.¹⁶

Analysts compare schools in order to determine which schools provide adequate educations for students. Between schools in higher economic neighborhoods and schools in low income neighborhoods, there exist many disparities in education. Frequently cited differences between the schools include quality of books, access to computers, availability of laboratories, higher achievement standards, more qualified teachers, smaller class sizes, and condition of school facilities. Results from such comparisons evidence a correlation between adequacy of education and school funding. When children from a particular socio-economic class consistently perform poorly on tests and/or are consistently unsuccessful in school then one may reasonably conclude that the “experiences” are not adequate. Conversely, when a school system churns out a large number of good test scores and its students are successful in school, then we reasonably may infer that the “experiences” are adequate.

15. James P. Comer, *Creating Successful Urban Schools*, in *Brookings Papers on Education Policy: 1999*, supra n. 1, at 331; see also *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989). The majority opinion described what constitutes an “efficient” education as required by the Kentucky state constitution:

An efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

16. Daniel McGroarty, *Break These Chains: The Battle For School Choice 23-24* (Prima Publishing 1996).

The quality of the students' educational "experiences" depends on the financial resources of the school. More money means better books, computers, laboratories, achievement standards, teacher qualifications, class sizes and condition of facilities.¹⁷ Schools located in low socio-economic neighborhoods have limited financial resources, and schools in high socio-economic neighborhoods have expansive financial resources. Consequently, policymakers measure education adequacy by examining and noting differences in financial resources between schools.

B. The Unequal Distribution of Adequate Education

The disturbing correlation between adequacy of education and financial resources particularly afflicts racial minorities in urban areas. Studies indicate that a disproportionate number of inadequate schools are located in urban areas. A disproportionate number of poor and minority children live in these urban neighborhoods. While only 24% of all American students attend urban schools, 35% of the poor and 43% of racial minorities attend urban public schools.¹⁸ These studies illustrate the fact that a disproportionate number of children in urban areas are impoverished minorities. Roy Brooks, a law professor at the University of San Diego aptly describes the impact of this phenomenon:

Despite the fact that African American students today are more likely than any other racial or ethnic group to attend public schools, this relationship has been an unkind one, not unlike that of a badly abused child struggling to escape ubiquitous parental mistreatment, neglect, and violence, both physical and psychological.¹⁹

Despite attempts by courts to remedy racial discrimination, the United States' public education system denies adequate education to a majority of racial minorities in urban areas. Unfortunately, the vision of equal educational opportunity presented by cases like *Brown v. Board of Education* has not been

17. Linda Darling-Hammond, *Race, Education, and Equal Opportunity*, in *The African American Predicament*, 71, 73-74 (Christopher H. Foreman, Jr. ed., Brookings Instn. Press 1999).

18. Joseph P. Viteritti, *Choosing Equality: School Choice, The Constitution, and Civil Society* 7 (Brookings Instn. Press 1999).

19. Roy L. Brooks, *Rethinking the American Race Problem* 74-75 (U. of Cal. Press 1990).

realized.²⁰ Racial minorities and the poor attend substandard, urban, public schools at disproportionate rates.²¹ Although overt racial segregation by law has been eliminated, children from lower socio-economic backgrounds remain trapped in inadequate schools.

Many common-place features of urban public schools contribute to providing an inadequate education to students. First, many urban schools are housed in old and poorly maintained buildings, some dating back to the nineteenth century.²² Second, many of these ancient dilapidated buildings are oversized and overcrowded.²³ Third, inner-city children are also disproportionately likely to receive inexperienced teachers or teachers who lack the requisite credentials.²⁴ Given these conditions, it is no surprise that “[r]ace and class remain the most reliable predictors of educational achievement in the United States.”²⁵

Numerous measures of school performance support the statement that race and class are reliable predictors of educational achievement. A common way of measuring the effectiveness of a particular school or school system has been to gauge the performance of their students by standardized tests. A recent study found that only 40% of fourth and eighth grade students attending city schools met minimum basic standards on national exams in reading, math, and science. In contrast,

20. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 492 (1954) (“Here unlike *Sweatt v. Painter*, there are findings that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other ‘tangible’ factors. Our decision, therefore, cannot turn merely on a comparison of these tangible factors.” This implies that equality in the ‘tangible’ factors is a necessary component of a system of equal educational equality along with, as the court found in *Brown*, the absence of stigmatization caused by *de jure* racial segregation.).

21. See Dale Davenport, *Trapped by Mediocrity: Inner-city Schools Increasingly Segregated, Beset by Poverty*, The Patriot-News B15 (Harrisburg, Pa., July 22, 2001) (A recent Harvard study found that black and Latino students are segregated in poor urban school districts while whites attend more affluent suburban schools, which attract better teachers and more funding.)

22. Jean Anyon, *Ghetto Schooling: A Political Economy of Urban Education Reform 7* (Teachers College Press 1997).

23. Peter D. Ross, *Intradistrict Resource Disparities: A Problem Crying Out for a Solution*, in *Strategies for School Equity: Creating Productive Schools in a Just Society* 43 (Marilyn J. Gittell ed., Yale U. Press 1998).

24. *Id.* at 42 (“[The frequency of teachers lacking credentials] is the result of many of the same factors that produce disparities in teacher experience in urban schools: high turnover, inability to attract properly credentialed teachers, and the unwillingness of school districts to tackle the traditional prerogatives of seniority.”).

25. Viteritti, *supra* n. 6, at 1.

nearly two-thirds of students in suburban and rural districts met these standards.²⁶ Predictably, a clear disparity is also found when the performance of various races is compared. Despite significant progress since the 1970's, the average African American still scores below 75% of whites on almost every standardized test.²⁷

The sad truth is that in the half century since *Brown*, measurements based on available resources and pupil performance show that racial minorities still attend inferior schools.²⁸ While *Brown's* promise to realize racial equality through educational opportunity has been slowed by our inept and unjust school systems,²⁹ many school reform programs have been offered and implemented in recent years that could help the nation's schools become the driving force toward racial equality.³⁰

III. SCHOOL REFORM EFFORTS

A. School Finance Reform

Arguably, the most important factor in providing a quality education to the nation's students is adequate funding of the public schools. School systems must be able to pay expenses such as teacher and staff salaries, maintenance of facilities, and classroom equipment and materials.³¹ Unfortunately, there

26. *Id.* at 7.

27. Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap*, in *The African American Predicament*, *supra* n. 17, at 71, 73-74.

28. Viteritti, *supra* n. 6, at 11, 51 (citing Thomas J. Nechyba & Robert P. Strauss, *Community Choice and Local Public Services: A Discrete Choice Approach*, 28 Regl. Sci. & Urb. Econ. 51 (Jan. 1998); Margot Slade, *First the Schoolhouse, Then the Home*, N.Y. Times sec. 11, page 1, col. 2 (Mar. 8, 1998)) (Because they are disproportionately represented among the poor, racial minorities are in effect denied the freedom to seek sanctuary from dreadfully inadequate inner-city schools by moving to more prosperous districts with better schools or sending their children to private schools. The inequality is even more evident considering that the affluent and the majority of whites are able to exercise the privilege to choose an effective education for their children by their ability to move near better public schools or to afford private schools.).

29. Paul T. Hill & Mary Beth Celio, *Fixing Urban Schools* 4 (Brookings Instn. Press 1998) ("Nearly half of all urban public school students are still giving up on schooling before they can read and write well enough to make a living with anything other than their hands.").

30. Viteritti, *supra* n. 6, at 27.

31. Kirk Vandersall, *Post-Brown School Finance Reform*, in *Strategies for School Equity: Creating Productive Schools in a Just Society*, *supra* n. 23, at 11.

a significant inequality in funding still exists between predominantly minority, urban school districts and predominantly white, suburban school districts.³² A recent study found that advantaged suburban school districts spend up to ten times more than urban school districts.³³

The result of the gap in funding between urban and suburban school districts can be seen in the conditions under which urban minorities are educated. Poor schools have bigger class sizes, fewer course offerings, lower teacher qualifications, inferior support services, and dilapidated facilities.³⁴ Courts in many states have recognized that a difference in funding available to districts results in a difference in educational resources available for a child's education.³⁵

The financial inequality between suburban and urban school districts is a result of the school funding schemes adopted by each state. The prevailing trend is that most funds for schools are raised from local property taxes.³⁶ The combination of how school district boundaries are drawn and the phenomenon of "white flight" have isolated minorities who are predominantly poor in concentrated impoverished districts. Because urban and poor people live in areas with lower property values, the potential funds are quite limited.³⁷ Justice Marshall

32. Alison Bernstein, *Forward in Strategies for School Equity: Creating Productive Schools in a Just Society*, *supra* n. 23, at viii.

33. Anyon, *supra* n. 22, at 7.

34. Thomas Corcoran & Nathan Scovronick, *New Jersey's Quality Education Act, in Strategies for School Equity: Creating Productive Schools in a Just Society*, *supra* n. 23, at 56; Anyon, *supra* n. 22, at 7 ("[S]tudents in urban schools have only a 50% chance of being taught by a certified mathematics or science teacher.").

35. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 86 (1973) (Marshall, J., dissenting); see *Campbell Co. Sch. Dist. v. St.*, 907 P.2d 1238 (Wyo. 1995) (example of a state case that has examined school funding systems that have, in practice, distributed funds among schools/districts in a widely disparate manner).

36. R. Craig Wood & David C. Thompson, *Educational Finance Law: Constitutional Challenges to State Aid Plans - An Analysis of Strategies* 16 (1996); see Paula J. Lundberg, *State Courts and School Funding: A Fifty-State Analysis*, 63 Ala. L. Rev. 1101 (2000); Viteritti, *supra* n. 6, at 36.

37. Helen Hershkoff, *School Finance Reform and the Alabama Experience*, in *Strategies for School Equity: Creating Productive Schools in a Just Society*, *supra* n. 23, at 27 (Margaret E. Goertz of Rutgers University, testified in a recent Alabama case, that Alabama's school finance system prevents poor school districts from having the funds needed to provide basic educational opportunities and creates broad inter-district disparities.); see also Corcoran & Scovronick, *supra* n. 34, at 55 (Many districts attempt make up for this shortcoming by charging much higher property tax rates than suburban districts. However, these efforts still cannot match the wealth that the predominantly white, middle class districts can draw from. In New Jersey, "property-rich

recognized the problem that such finance systems pose in *San Antonio Independent School District v. Rodriguez*: "The means for financing public education . . . are selected and specified by the state. It is the state that has created local school districts, and tied educational funding to the local property tax and thereby to local district wealth."³⁸

Many states have recognized the disparities caused by their school finance system,³⁹ and several strategies have emerged to respond to these inequalities. The least intrusive method used focuses on the concept of adequacy. Rather than obligate states to provide the poorest child the identical amount of per-pupil funding that the child in the wealthiest district receives, the concept of adequacy requires that states adopt school finance systems that give every district the minimum level of funds necessary to ensure that every child gets an adequate education.⁴⁰

However, states have differed in defining what constitutes an "adequate" education.⁴¹ In 1989, in *Rose v. Council for Better Education, Incorporated*, the Kentucky Supreme Court outlined seven factors that every child must receive from an education.⁴² More recently, in *Leandro v. State*, the North Carolina Supreme Court held that "[a]n education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate."⁴³ The application of

school district could raise more money per pupil with low tax rates than urban districts could raise with very high rates. The real estate boom of the 1980s centered in the suburbs increased these disparities in tax capacity and spending."

38. 411 U.S. at 123 (Marshall, J., dissenting).

39. See, e.g., Opinion of the Justices, 624 So.2d 107 (Ala. 1993); *Matanuska-Susitna Borough Sch. Dist. v. St.*, 931 P.2d 391 (Alaska 1997); *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994); *Shofstall v. Hollins*, 515 P.2d 590 (Ariz. 1973); *DuFree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983); *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976); *Lujan v. Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982) (en banc); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *Coalition for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400 (Fla. 1996); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981); *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996); *Unified Sch. Dist. No. 229 v. St.*, 885 P.2d 1170 (Kan. 1994); *Rose*, 790 S.W.2d 186; *La. Assn of Educators v. Edwards*, 521 S.2d 390 (La. 1988).

40. Viteritti, *supra* n. 6, at 39-40.

41. *Id.*

42. 790 S.W.2d 186, 212 (see *supra* note 15 for a list of the Kentucky Supreme Court's factors composing an adequate education).

43. 488 S.E.2d 249, 254-55 (N.C. 1997). The court further held that:

an adequacy strategy is easier said than done especially because the measurement of adequacy is often tied to educational outcomes across several vague categories of achievement.⁴⁴

A more controversial approach of school finance reform involves the redistribution of funds by the state among the various school districts.⁴⁵ This politically unpopular strategy changes the system so that funds are collected from property taxes and distributed equally among the schools regardless of district lines. This decreases spending in the richer districts and redirects the funds to the poorer districts.⁴⁶ As a consequence, such a strategy is unlikely to be adopted by a politically-charged legislature that is responsive to a more affluent population of voters and special interests.

The final common strategy of school finance reform is to attack the constitutionality of the state's school finance system. Since *Rodriguez*, the federal courts have maintained that the Federal Constitution does not guarantee a fundamental right to education and have subjected claims of inequality to the Equal Protection Clause standard of whether the state action rationally furthers a legitimate state purpose or interest.⁴⁷ This "rational basis" standard is deferential to the state legislatures

Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools. For purposes of our Constitution, a "sound basic education" is one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

44. *Id.* at 255.

45. Vandersall, *supra* n. 31, at 19 (*citing Rose*, 790 S.W.2d 186) (In ruling the state's school finance system unconstitutional, a Kentucky court "ordered the General Assembly to devise an altogether new system in which the tax effort was evenly spread, uniform resources necessary for providing an adequate education provided, and proper management was assured.").

46. *Id.* at 39.

47. *Rodriguez*, 411 U.S. at 41; see e.g. *Plyer v. Doe*, 457 U.S. 202, 220-21 (1982); *Smith v. Severn*, 129 F.3d 419 (7th Cir. 1997); *Pontarelli Limousine, Inc. v. Chi.*, 929 F.2d 339 (7th Cir. 1991); *Craig v. Selma City Sch. Bd.*, 801 F. Supp. 585, 594 (S. D. Ala. 1982); *Fuller v. Decatur Pub. Sch. Bd.*, 78 F.Supp.2d 812, 822 (C. D. Ill. 2000).

and is difficult to overcome. Reform advocates have had better luck litigating inequities in funding under the provisions of state constitutions.⁴⁸

Inequality in school funding has led to lawsuits in over forty states.⁴⁹ The history of school-finance litigation has commonly been divided into three "waves." The first wave based claims of inequality in funding on the Equal Protection Clause of the Federal Constitution. This wave ended with the Supreme Court's decision in *Rodriguez*.⁵⁰ The second wave relied upon equal protection provisions in the state constitutions to enforce equality of funding between rich and poor districts.⁵¹ During this period, seven states overturned their school funding systems.⁵² However, the vast majority of the cases upheld the funding systems in favor of the state.⁵³ Finally, the current wave has focused on the specific right to an education provided in 49 state constitutions.⁵⁴ This wave focuses on the differences in educational quality resulting from a disparate educational finance system rather than an analysis centered only on unequal funding. This wave takes into account the inequality of education in a district that has invested substantial funding.⁵⁵

48. *Strategies for School Equity: Creating Productive Schools in a Just Society*, supra n. 23, app. To Part I, 70-83.

49. Kelly Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. Rev. 399, 400 (2000).

50. Deborah A. Versteegen & Robert C. Knoeppel, *Equal Education Under the Law: School Finance Reform and the Courts*, 14 J.L. & Pol. 555, 557 (1998).

51. *Id.*; William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. Rev. 597, 601-03 (1994).

52. Thro, supra n. 51, at 603; see e.g. *Dupree*, 651 S.W.2d 90; *Serrano*, 557 P.2d 929; *Horton*, 376 A.2d 359; *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973); *Seattle Sch. Dist. No. 1 v. St.*, 585 P.2d 71 (Wash. 1978) (en banc); *Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979); *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980).

53. Thro, supra n. 51, at 603; see e.g. *Dupree*, 651 S.W.2d 90; *Serrano*, 557 P.2d 929; *Lujan*, 649 P.2d 1005; *Horton*, 376 A.2d 359; *McDaniel*, 285 S.E.2d 156; *Thompson*, 537 P.2d 635; *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758 (Md. 1983); *Britt v. Bd. of Educ.*, 357 S.E.2d 432 (N.C.), aff'd mem., 361 S.E.2d 71 (N.C. 1987); *Robinson*, 303 A.2d 273; *Bd. of Educ. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982); *Bd. of Educ. v. Walter*, 390 N.E.2d 813 (Ohio 1979); *Fair Sch. Fin. Council of Okla., Inc. v. St.*, 746 P.2d 1135 (Okla. 1987); *Olsen v. St.*, 554 P.2d 139 (Or. 1976); *Danson v. Casey*, 399 A.2d 360 (Pa. 1979); *Richland County v. Campbell*, 364 S.E.2d 470 (S.C. 1988); *Seattle Sch. Dist. No. 1*, 585 P.2d 71; *Pauley*, 255 S.E.2d 859; *Kukor v. Grover*, 436 N.W.2d 568 (Wis. 1989); *Washakie County Sch. Dist. No. 1*, 606 P.2d 310.

54. Thro, supra n. 51, at 602, n. 29, 603 (Mississippi is the only state without an education clause that requires the states to maintain a free educational system.).

55. *Id.*

During this third wave of school finance reform litigation, state educational funding systems have been invalidated in eleven states.⁵⁶ For example, the Supreme Court of Wyoming, in *Campbell County School District v. State*, found that the education funding system violated the Wyoming Constitution based on the principle that substantially unequal allocation of funds leads to an uneven distribution of quality education.⁵⁷ At the time of the decision, the Wyoming funding plan created a per-student disparity ranging from \$1,600 to \$4,300.⁵⁸ The plaintiffs argued that the spending disparities were caused by “the arbitrary and irrational devices employed in distribution” that have no relation to educational costs. The plaintiffs claimed that the allocation of funding should be based on “need related to educational quality.”⁵⁹ In finding the state’s educational finance system unconstitutional, the majority opinion concluded by instructing the legislature how to create a system that would pass constitutional muster:

[C]onsidering all of these various factors, the legislature must first design the best educational system by identifying the “proper” educational package each Wyoming student is entitled to have whether she lives in Laramie or in Sundance. The cost of that educational package must then be determined and the legislature must then take the necessary action to fund that package. . . . The state financed basket of quality educational goods and services available to all school-age youth must be nearly identical from district to district. If a local district then wants to enhance the content of that basket, the legislature can provide a mechanism by which it can be done. But first, before all else, the constitutional basket must be filled.⁶⁰

56. See *Roosevelt Elem. Sch. Dist. No. 66*, 877 P.2d 806; *Rose.*, 790 S.W.2d 186; *McDuffy v. Sec. of Exec. Off. of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Helena Elementary Sch. Dist. No. 1 v. St.*, 769 P.2d 684 (Mont. 1989); *Claremont Sch. Dist. v. Gov.*, 703 A.2d 1353 (N.H. 1997); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *DeRolph v. St.*, 677 N.E.2d 733 (Ohio 1997); *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993); *Brigham v. St.*, 692 A.2d 384 (Vt. 1997); *Campbell Co. Sch. Dist.*, 907 P.2d 1238; *Edgewood Indep. Sch. Dist. v. Meno*, 893 S.W.2d 450 (Tex. 1995); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489 (Tex. 1992); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989).

57. *Campbell Co. Sch. Dist.*, 907 P.2d at 1263.

58. *Verstegen & Knoeppel*, *supra* n. 50, at 561.

59. *Campbell Co. Sch. Dist.*, 907 P.2d at 1263.

60. *Id.* at 1279-80.

The decision in *Campbell County School District* shows how the reasoning supporting school finance reform has shifted from comparing dollars distributed to comparing what those dollars have produced in the form of educational quality.

While there have been some indications of positive results, a strategy of generating equal educational opportunities through school finance reform has several disadvantages. First, it is difficult to construct a school finance formula that “enhances the equity of the system while meeting the fiscal and political needs of the state.”⁶¹ Citizens in wealthier districts are not likely to support bills to either cap their educational spending or redistribute their funds. On the other hand, a state’s effort to keep pace with the spending of the wealthy districts will end up burdening the state’s resources to dangerous levels.⁶² Seeking more federal aid to supplement state funding has its own disadvantage. A federalism issue is raised when Congress is able to attach terms on its funds that would allow it to impose its will on the local districts.⁶³

Secondly, much of the research shows that there is no consistent relationship between education spending and student achievement.⁶⁴ This problem resides in how poor and urban school districts spend the additional funds once they are granted. It may be that a significant amount of the money is not being properly devoted to educational resources that directly affect the education of the students.⁶⁵ For example, mismanagement of education funds was recently a major concern in the Washington, D.C., school system. By 1997, the D.C. public school system was allotted \$594 million dollars per year –

61. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. at 71 (Marshall, J., dissenting); see also Margaret E. Goertz, *The Courts and Reform in New Jersey*, in *Strategies for School Equity: Creating Productive Schools in a Just Society*, *supra* n. 23, at 111.

62. See Goertz, *supra* n. 61, at 111; Viteritti, *supra* n. 6, at 35-36.

63. Viteritti, *supra* n. 6, at 36.

64. *Id.* at 42 (citing Eric Hanushek, *Assessing the Effects of School Resources on Student Performance: An Update*, 19 *Educ. Evaluation & Policy Analysis* 141, 141 (Summer 1997)); see also James E. Ryan, *The Influence of Race in School Finance Reform*, 98 *Mich. L. Rev.* 432, 435-36 (1999).

65. *Id.* (“Large urban districts are notorious for wasting resources on overhead and administrative functions, while classrooms are denied basic materials such as textbooks, and school buildings rot in disrepair. . . . Settlements that award these districts with more money resemble a reckless driving case where the court offers compensation for the driver to purchase a bigger car, rather than address the losses of the injured party.”)

about \$7,389 per student – and still found itself lacking books, toilet paper, building repairs, and teachers. A *Washington Post* report found that from 1990 to 1995 the D.C. schools spent \$50 million more on personnel than they were authorized to by the D.C. Council and Congress. The report found that of the amount spent on personnel, the city spent a disproportionately high proportion on central administrators compared to other cities.⁶⁶ This is but one example of how spending additional funds may not necessarily lead to increases in the quality of education provided.⁶⁷ While a strategy of school finance reform certainly recognizes the obvious inequality in educational opportunity between poor urban districts and wealthy suburban districts, the problem appears to be too complex for such a simple and politically-difficult solution as equalizing funding.

B. Reform Plans Involving Forms of School Choice

The school reform plans involving school choice show the most promise for providing racial minorities and the poor with an equal educational opportunity. The common theme of these strategies is that parents are given the option to remove their children from ineffective schools. This essentially guarantees a privilege to poorer Americans a privilege that is taken for granted by affluent, predominantly white citizens: the ability to send their children to private or parochial schools or at least to move their residence to a district with better public schools.⁶⁸ These choice proposals seek to grant this freedom to the impoverished citizens who are predominantly members of a racial minority.

66. Sari Horwitz & Valerie Strauss, *A Well-Financed Failure: System Protects Jobs While Shortchanging Classrooms*, Wash. Post, A1 (February 16, 1997) (In recent years the D.C. schools had an average of sixteen teachers per central administrator compared to Los Angeles with 60 teachers per central administrator. Between 1979 and 1992 the number of students attending D.C. public schools decreased from 113,000 to 33,000; while the number of central office workers increased from 511 to 967.).

67. Frederick M. Hess, *Courting Backlash: The Risks of Emphasizing Input Equity Over School Performance*, 6 Va. J. Soc. Policy & L. 11, 24-25 (1998); Anyon, *supra* n. 22, at 6-7; Ernest G. Kelly, Jr., *School Finance Litigation: An Urban Perspective*, 61 Tenn. L. Rev. 471, 472 (1994).

68. Viteritti, *supra* n. 6, at 11 (“Most Americans have the economic wherewithal to live in or move to communities where the schools are at least adequate, and quite a large number have the means to afford private or religious schools that reflect their own values. The poor do not have ready access to the same kinds of institutions.”).

1. *Inter-district Transfer Plans and Controlled Choice*

State and local governments widely used school-transfer policies following the desegregation mandate of *Brown*. States also implemented minority-majority transfer policies to pursue their desegregation goals.⁶⁹ A notable inter-district transfer program was implemented in St. Louis. Beginning in 1983, urban residents could choose to attend any of the 120 suburban schools in St. Louis County. Thirteen thousand five hundred black students took advantage of this program which provided free transportation and prohibited the suburban district from turning away transfer students based on past academic performance.⁷⁰ Similarly, Minnesota, in 1985, adopted a plan that allowed at-risk students, in need of remedial instruction, to cross district lines and attend any school with vacancy.⁷¹ 8,500 students exercised this option by 1995. Seventeen states have implemented similar plans since 1987.⁷² However, despite the successes of these voluntary inter-district transfer plans, critics note that leaving such discretion to parents hindered the progression of integration in public schools.⁷³

In response to the desegregation concerns, school districts developed a controlled-choice program. Under a controlled-choice program, if certain standards of racial balance are not met the administration will assign students to a particular school regardless of the students' wishes.⁷⁴ The Cambridge, Massachusetts, school system was the first district to adopt a controlled-choice plan. Cambridge removed assignment zones, allowed families to rank their preferences for which school they wanted their children to attend, and retained the possibility of

69. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 241 (1973) (Powell, J., concurring) ("An optional majority-to-minority transfer program, with the State providing free transportation to desiring students, is also a helpful adjunct to a desegregated school system.")

70. Amy Stuart Wells, *African American Students' View of School Choice*, in *Who Chooses? Who Loses?: Culture, Institutions, and the Unequal Effects of School Choice* 29 (Bruce Fuller & Richard F. Elmore, eds., Teachers College Press 1996).

71. Viteritti, *supra* n. 6, at 62 (citing Amy Stuart Wells, *Time to Choose: America at the Crossroads of School Choice Policy* 96-128 (Hill and Wang 1993); Tim Mazzoni & Barry Sullivan, *Legislating Educational Choice in Minnesota: Politics and Prospects*, in *Choice in Education: Potential and Problems* (William L. Boyd & Herbert Walberg eds., McCutchan 1990)).

72. *Id.* at 62-63.

73. *Id.* at 58 (citing Christine H. Rossell & David Armor, *The Effectiveness of Desegregation Plans: 1968-1991*, 24 Am. Pol. Q. 267 (July 1996)).

74. *Id.*

mandatory assignments in schools lacking racial balance.⁷⁵ Although controlled-choice plans did have positive effects, some programs could not deal with the large increase in transportation costs and parents' general preference for local, neighborhood schools.⁷⁶

2. Magnet Schools

Magnet schools are another innovation created to foster integration and school choice. Magnet schools offer a distinct curriculum, theme, or method of teaching designed to attract students away from their neighborhood schools. Frequently, districts create magnet schools as part of a court order to enforce desegregation.⁷⁷ Magnet schools subject to a court order are often required to maintain certain racial quotas. Districts placed magnet schools in predominantly minority districts to attract white students or vice-versa.⁷⁸ However, some students requesting a transfer are denied admittance because they would upset that particular district's racial balance.⁷⁹

A common concern over magnet schools is that the desegregation focus takes resources from other urban public schools. School districts devote large amounts of money to attract white students to the innovative programs and facilities of a magnet

75. Viteritti, *supra* n. 6, at 58 (citing Peter W. Cookson, *School Choice: The Struggle for the Soul of American Education* (Yale U. Press 1994); Christine H. Rossell & Charles Glenn, *The Cambridge Controlled Choice Plans*, 20 Urb. Rev. 75 (1988)).

76. *Id.* at 59 (citing Christine H. Rossell, *The Convergence of Black and White Attitudes on School Desegregation Issues During the Four Decade Evolution of the Plans*, 36 Wm. and Mary L. Rev. 613 (1995); Amy Stuart Wells, *supra* n. 71, at 91) (The Richmond, California school district went bankrupt from the increased transportation and specialized programs cost. "[M]ost parents seek to avoid extensive travel unless there is an extraordinary academic benefit derived in the form of a magnet or specialized program.").

77. Kimberly C. West, *A Desegregation Tool that Backfired: Magnet School and Classroom Segregation*, 103 Yale L.J. 2567, 2568-69 (1994) ("Courts order the creation of magnet schools and districts implement them because magnet schools are perceived as capable of furthering the dual goals of desegregation and educational innovation.").

78. Susan E. Eaton & Elizabeth Crutcher, *Magnets, Media, and Mirages: Prince George's County's "Miracle" Cure*, in *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education* 269 (Gary Orfield & Susan E. Eaton eds., New Press 1996).

79. Jeffrey R. Henig, *The Local Dynamics of Choice: Ethnic Preferences and Institutional Responses*, in *Who Chooses? Who Loses?: Culture, Institutions, and the Unequal Effects of School Choice*, *supra* n. 58, at 114 ("Because minority transfer requests were more likely to run counter to than support racial balance, school officials found themselves forced to deny a higher proportion of requests from minorities than from majorities.").

school. Instead, the districts could use the same money to raise the quality of education of all students. For example, Kansas City spent \$1.4 billion on its magnet school plan. However, seven years after its implementation, Kansas City school districts still lagged behind the statewide scores on standardized tests.⁸⁰

3. Charter Schools

Charter school is another option available to parents.⁸¹ Charter schools are a compromise position between choice advocates and supporters of the current academic structure. The public education establishment finds charter schools acceptable because they differ from radical voucher systems. Unlike voucher schools, access to charter schools is open and no tuition is charged. Choice advocates endorse charter schools because they provide other options for parents and competition for public schools.⁸²

A group can create a charter school when the state or local governing body grants permission (through a charter) for the group to create a new school (or convert an old one) that will run nearly independent of the state. Charter schools are run at the school level where school personnel have wide discretion in budget, personnel, and school policies. In exchange for this freedom, the charter school faces a higher level of accountability as they must meet certain academic and financial standards set for them by the state.⁸³ Charter schools that fail to meet

80. Robin D. Barnes, *Black America and School Choice: Chartering a New Course*, 106 Yale L.J. 2375, 2402 (1997).

81. Thomas L. Good & Jennifer S. Braden, *The Great School Debate: Choice, Vouchers, and Charters* 119 (L. Erlbaum Assoc. 2000) (citing Bruno Manno, *Accountability: The Key to Charter Renewal*, <http://edreform.com/pubs/center_for_education_reform.htm> (accessed March 1999) (A charter school is "[a]n independent public school of choice, given a charter or contract for a specified period of time (typically five years) to educate children according to the schools own design, with a minimum of bureaucratic oversight. It may be a new school, started from scratch, or an existing one that secedes from its school district. It is held accountable to the terms of its charter and continues to exist only if it fulfills those terms. As a public school of choice, it is attended by students whose families select it and staffed by educators who choose to teach in it.").

82. Bryan C. Hassel, *The Case For Charter Schools*, in *Learning From School Choice* 33, 34-35 (Paul E. Peterson & Bryan C. Hassel eds., Brookings Instn. Press 1998).

83. See Viteritti, *supra* n. 6, at 65 (citing Joe Nathan, *Charter Schools: Creating Hope and Opportunity for American Education* (Jossey Bass 1996)) (Charters are released from all regulations except those concerning civil rights, health, and safety);

these standards are shut down.⁸⁴ As of 1999, there were about 1,400 charter schools in operation across the nation.⁸⁵

The funding of charter schools is provided directly by the public school system. The money allocated to charter schools is tied to enrollment – the more students a charter school attracts the more funds it receives. This induces schools to develop and maintain high levels of student performance and innovative programs in order to remain in operation.⁸⁶

However, charter school programs come in numerous forms. Each state that authorizes charter schools has its own distinct system of creating and running charter schools. For example, Arizona's charter law is designed in a way that favors the creation of a large number of charter schools that effectively compete with the traditional public schools. In Arizona, a charter school can be established by any organization or group. The charter school can be new or converted from an established public or private school. The initial charter is granted for a term of 15 years and is subject to reviews every five years thereafter. Arizona charter schools are granted a waiver from state and local education laws and regulations except for those that govern health, safety, and special education.⁸⁷ Arizona's law does not require that teachers in charter schools receive certification by the local board of education. Finally, all students in the state are eligible to attend the charter schools.⁸⁸ This strong charter law has led Arizona to develop the most

Breaking Away: The Charter School Revolution, 15 Education Week (Special Report, November 29, 1995); Hassel, *supra* n. 82, at 35.

84. Hassel, *supra* n. 82, at 36-37 ("If a charter school fails to deliver on its promises (perhaps regarding absolute levels or improvements in student achievement scores, dropout rates, college attendance, and so on), the relevant public authority can revoke its charter. In the current lingo, the school is 'accountable for results'—not just to parents, but to the public as well.").

85. Good & Braden, *supra* n. 81, at 114.

86. Hassel, *supra* n. 82, at 35.

87. Paul E. Peterson, *Top Ten Questions Asked About School Choice in Brookings Papers on Education Policy: 1999*, *supra* n. 1, at 371, 372; Good & Braden, *supra* n. 81, at 130-31.

88. Good & Braden, *supra* n. 81, at 130-31; David Harmer, *School Choice: Why You Need It – How You Get It* 107 (1994) (Qualified professionals with expertise in the subject being taught are denied teaching positions because they lack certification held by current teachers who may have little knowledge of the subject they are teaching. "In California, for example, highly qualified aerospace engineers are unemployed because of defense industry layoffs. Many would make good math and science teachers, which the state desperately needs. It makes no sense to bar them from the classroom simply because they lack a state credential.").

prolific charter school system in the nation with a total of 408 charter schools enrolling 55,000 students for the 2000-01 school year.⁸⁹

However, the Arizona charter school law is far from typical of those passed by other states. In most cases, the legislative compromise necessary just to get the charter law passed causes it to be enacted with provisions that undermine its ability to provide abundant choice for parents and competition for public schools.⁹⁰ Generally, in passing charter laws, legislators have done the following three things: 1) placed limits on the number of charter schools that can be opened;⁹¹ 2) allocated to charter schools a portion of the per-pupil funding allocation used to educate that same student in a regular public school;⁹² and 3) have given local school boards the power to decide whether a charter is granted.⁹³

Given the novelty of the charter school concept, and that it has been implemented in relatively limited instances and in various fashions, the conclusions that can be drawn from the resulting data are imperfect.⁹⁴ However, this caveat has not prevented the ensuing discussion of results reported from initial studies. The general trend among the studies is that students attending charter schools show as much academic improvement as do students in regular public schools. However, many studies note that when schools are compared on an individual level, some charter schools showed higher results than public schools in the same district.⁹⁵ This result reminds us that charter schools are each unique; there really is no such

89. Kelly Pearce, *Arizona's Charter Schools Evolving Into Mainstream: No Longer Cater to Niche Students*, The Arizona Republic B1 (August 19, 2000).

90. Bryan C. Hassel, *Charter Schools: Politics and Practice in Four States*, in *Learning From School Choice*, *supra* n. 82, at 249, 257-58.

91. *Id.* at 259.

92. Viteritti, *supra* n. 6, at 75 ("Under the typical law, the charter school is entitled only to a portion of the per-pupil local operating expenditures and is rarely given resources to cover capital costs."); Hassell, *supra* n. 84, at 259 (Only nine states give charter schools full per-pupil operating funding.).

93. Hassell, *supra* n. 84, at 258-59 (Only Arizona, Colorado, Michigan, and New Jersey have charter school laws that allow many charter schools to open *and* allow entities other than local school boards to approve charters.).

94. Good & Braden, *supra* n. 81, at 138 ("First, charter schools differ from state to state, and variation within a state can be tremendous. Second, defining the impact of charter schools is difficult, because only a few studies have been conducted, and generally, charter school research has not benefited from the advantages of peer review.").

95. *Id.* at 154-55.

thing as a “charter school system.” A major principle of the charter school concept is to allow parents the choice of sending their child to a specific school that they believe is more successful than the public school that their child would otherwise attend. Research evaluating charter schools should be designed to determine whether a specific charter school is more effective than public schools in the same district rather than draw conclusions from the aggregation of all charter schools in the state. Regarding charter school evaluation, it is probably not true that the whole is greater than the sum of its parts.

4. School Choice Systems in Milwaukee and Cleveland

The most notable experiments with a system of school choice occurred during the 1990’s in Milwaukee, Wisconsin and Cleveland, Ohio. These plans, while not full choice systems, illustrate the potential benefits of an educational system built around parental choice. They also show the strength of the opposition to choice-based reforms and the problem of collecting accurate measures of the effectiveness of the programs.

i. The Milwaukee Parental Choice Program

In 1993, the Wisconsin legislature enacted the original Milwaukee Parental Choice Program (MPCP) that, after a 1993 amendment, allowed students below a certain poverty level to attend any private, non-sectarian school within the City of Milwaukee. The legislature limited the number of students who could participate in MPCP to 1.5 percent of the student body of the Milwaukee Public Schools.⁹⁶ To be eligible for the MPCP, a student had to be in grades K-12, belong to a family whose income did not exceed 1.75 times the federal poverty level, and “. . . either enrolled in a public school in Milwaukee, attending a private school under this program, or not enrolled in school during the previous year.”⁹⁷ The legislation also required private schools participating in the MPCP to comply with anti-discrimination regulations, health and safety regulations, and to meet certain performance criteria.⁹⁸

96. *Jackson v. Benson*, 578 N.W. 2d 602, 607 (1998) (citing Wis. Stat. §119.23 (1993-94)).

97. *Id.* at 608.

98. *Id.*

In 1995, the MPCP was amended again by the Wisconsin legislature. The amendment expanded the program to include sectarian schools as options for school choice.⁹⁹ The legislature also increased the number of students the program could accept to 15 percent of the Milwaukee Public School student body. The amendment, to withstand state and federal constitutional scrutiny, required the state to submit the tuition payment to the student's parents who would then turn the money over to the school of their choice.¹⁰⁰ The amendment also included an "opt-out" that allows a student to opt out of religious activities held at religious schools.¹⁰¹

While the Milwaukee program provides many students with an adequate education, it has several limitations that exclude it from being a good model of a full-school choice system. Therefore, analysis of the data provided by the Milwaukee system provides, at best, a skewed evaluation of the effectiveness of a school choice system.¹⁰² Various studies relying on this same data have reached different conclusions. A group of researchers led by John Witte was appointed by Wisconsin State Superintendent Herbert Grover, a well-known opponent of school choice, to conduct the state's official evaluation of the MPCP.¹⁰³ Witte led a five-year study of MPCP that ultimately found that "[s]tatistical analyses generally indicated that choice and public school students were not that much different. If there was a difference, [Milwaukee Public School] students did somewhat better in reading."¹⁰⁴

99. *Id.*

100. *Id.* at 608-09.

101. *Id.* (citing 1995 Wis. Act 27, §§ 4002-4009).

102. Jay P. Greene, Paul E. Peterson & Jiangtao Du, *School Choice in Milwaukee: A Randomized Experiment, in Learning From School Choice*, *supra* n. 82, at 335, 339; Good & Braden, *supra* n. 81, at 106 (The Milwaukee program recently has become in danger of being scaled back by the Wisconsin legislature.); Ruben Navarrette, Jr., *Children: Choices & Lessons*, Milwaukee J. Sentinel 01J (June 24, 2001); *School Vouchers Are the Clear Choice*, Wis. St. J. A6 (June 20, 2001) ("Milwaukee's school choice program has never been a favorite of Democratic Party leaders in Madison, so it's no surprise they want to starve the private voucher program into an early grave. Senate Democrats aspire to cut individual grants in half, cap the number of students and require more accountability through student testing.")

103. Viteritti, *supra* n. 6, at 101, 105.

104. Good & Braden, *supra* n. 81, at 105 (citing John Witte, Troy D. Sterr, Christopher A. Thorn, *Fifth-Year Report: Milwaukee Parental Choice Program*, <<http://www.lafollette.wisc.edu/research/publications/fifthYear/fifthYear.html>> (Dept. of Pol. Sci. & The M. LaFollette Inst. of Pub. Affairs, U. of Wis. Madison Dec. 1995).

A study headed by Jay Greene and Paul Peterson found that “data derived from a natural experiment that allocated students randomly to test and control groups suggest that students in choice schools in their third and fourth years scored on average from three to five percentile points higher in mathematics than a randomly selected control group.”¹⁰⁵ Greene and Peterson’s research identified a flaw in the methodology of the Witte study. Witte’s analysis compared students in choice schools with a randomly selected control group of students in Milwaukee city schools. This comparison is flawed because the groups are composed of different populations regarding important characteristics such as race, income, family structure, and past educational performance.¹⁰⁶ Unfortunately, the MPCP provides no dependable research evidence to conclude that a broad system of school choice impacts favorably on student achievement.¹⁰⁷

ii. The Cleveland Grant Program

In 1995, the Ohio General Assembly enacted the Cleveland Scholarship and Tutoring Grant Program (CSTGP). The CSTGP provided 1,500 scholarships chosen on a lottery basis that covered up to 90 percent of a child’s tuition.¹⁰⁸ The program partially favored poor families because the amount of the scholarship depended on family income, and the first year’s lottery was only open to families below the poverty line.¹⁰⁹ The

105. *Id.* at 106.

106. Viteritti, *supra* n. 6, at 106 (citing Bob Davis, *Dueling Professors Have Milwaukee Dazed over School Vouchers*, *The Wall St. J.* (Oct. 11, 1996); Paul E. Peterson, *A Critique of the Witte Evaluation of Milwaukee’s School Choice Program* (Ctr. for Am. Pol. Stud., Har. U., Occasional Paper 95-2 Feb. 1995) (Differences included: “72 percent of the choice students were black, compared to 55 percent of the MPS control group; 20 percent of the choice students were Latino, compared to 10 percent of the MPS control group. . . . Choice students reported family incomes of about half the average [MPS] family. . . . 24 percent of the choice students came from two-parent households, as compared to 51 percent of [MPS] students; 57 percent [of choice students] were on public assistance, compared to 39 percent [of MPS students].”).

107. Good & Braden, *supra* n. 81, at 106.

108. Jay P. Greene, William G. Howell, & Paul E. Peterson, *Lessons From the Cleveland Scholarship Program*, in *Learning from School Choice*, *supra* n. 82, at 357, 358-359.

109. Viteritti, *supra* n. 6, at 110; Greene, Howell & Peterson, *supra* n. 108, at 359; see Margaret A. Nero, Comment, *The Cleveland Scholarship and Tutoring Program: Why Voucher Programs Do Not Violate the Establishment Clause*, 58 *Ohio St. L.J.* 1103, 1107-1110 (1997).

CSTGP granted scholarships to children in kindergarten through third grade but permitted students to retain the scholarship through the eighth grade.¹¹⁰ Students could use their scholarship at any secular, religious, or private school within the city.¹¹¹ It also gave tutoring scholarships for those students who chose to remain in Cleveland's public schools.¹¹²

The CSTGP was the first program in the nation that allowed students to choose to spend government-granted funds at a religious school.¹¹³ Predictably, litigation alleging violation of the Establishment Clause soon followed. However, the Ohio Supreme Court held the CSTGP to be constitutional.¹¹⁴ The litigation then went to federal court where District Judge Solomon Oliver found that the CSTGP violated the Establishment Clause and enjoined the state from administering the program.¹¹⁵ The United States Court of Appeals for the Sixth Circuit affirmed the district court finding on appeal.¹¹⁶ By granting a stay of the injunction pending the outcome of its decision, the United States Supreme Court allowed the CSTGP to continue.¹¹⁷

Kim Metcalf of the Indiana University School of Education led a team that conducted an official state study of CSTGP one year into its inception.¹¹⁸ The study focused on the effects of the program on 183 third-graders who used vouchers to attend private schools during the 1996-97 school year and who attended public schools during the previous year. The study found that "students' academic achievement was not significantly affected

110. Nero, *supra* n. 109, at 1108.

111. Greene, Howell & Peterson, *supra* n. 108, at 358.

112. Nero, *supra* n. 109, at 1108.

113. Greene, Howell & Peterson, *supra* n. 108, at 358.

114. See *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999).

115. *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 865 (N. D. Ohio 1999) *aff'd* 234 F.3d 945 (6th Cir. 2000), *cert. granted Zelman v. Simmons-Harris*, 122 S. Ct. 23 (2001) and *cert. granted Hanna Perkins Sch. v. Simmons-Harris*, 122 S. Ct. 23 (2001) and *cert. granted Taylor v. Simmons-Harris* 122 S. Ct. 23 (2001) ("Because of the overwhelmingly large number of religious versus nonreligious schools participating in the Voucher Program, beneficiaries cannot make a genuine, independent choice of what school to attend. A program that is so skewed toward religion necessarily results in indoctrination attributable to the government and provides financial incentives to attend religious schools. For both of these reasons, the court finds the Program to be in violation of the Establishment Clause.")

116. *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000).

117. See Kim Cobb, *School Vouchers Continue in Ohio Amid Uncertainty*, *Houston Chron.* A10 (Mar. 25, 2001).

118. Good & Braden, *supra* n. 81, at 107.

after approximately eight months in the scholarship program.”¹¹⁹

This study of the CSTGP, like the study of the Milwaukee program, cannot translate into a reliable extrapolation of the capabilities of a complete school choice system. As was the case in Milwaukee, the sample size was too small to produce reliable conclusions. Of the 183 students the researchers studied, complete data was available for only 94 students.¹²⁰ Furthermore, the study’s authors cautioned against drawing suitable conclusions about school choice from this study because of the short time period and limited data examined.¹²¹ And, it may be unreasonable to expect significant change in just eight months from a child who received an inadequate early education.

The research experiences in Milwaukee and Cleveland show the difficulty in drawing conclusions about the potential of a full school choice plan from an evaluation of local-choice experiments. Thomas Good and Jennifer Braden emphasized this problem of testing the theory of school choice, stating: “Across both the Milwaukee and Cleveland choice programs we see that inadequate research design and incomplete data sets have rendered comparisons of student performance in choice and non-choice schools difficult to interpret.”¹²² The evidence of

119. Kim K. Metcalf, William J. Boone, Frances K. Stage, Todd L. Chilton, Patty S. Muller, & Polly Tait, *An Executive Summary of a Comparative Evaluation of the Cleveland Scholarship and Tutoring Grant Program: Year One: 1996-97* <<http://www.aft.org/research/Vouchers/clev/metcalf/Metcalf.htm>> (Am. Fedn. Of Teachers, AFL-CIO March 16, 1998).

120. *Id.* (The executive summary noted the small size of the sample group: “ODE records were updated to reveal that, only 45 of the students who had been believed to be participating in the tutoring grant program or on the waiting list to participate in tutoring were doing so. Due to the small number of students in this group and difficulty locating CCSD background and prior achievement records for many of these students, it was decided that the tutoring grant program should not be included in the present analyses. Further, 37 of the 183 public-private scholarship students attended the HOPE schools which did not participate in the evaluation testing (see data collection), and necessary background data could not be located on another 52 students. Thus, the final sample includes third-grade students for whom all necessary data (i.e, current achievement test scores, previous achievement test scores, and background data) were available: 94 public-private scholarship students and 449 non-participating Cleveland public school students.”).

121. Good & Braden, *supra* n. 81, at 107.

122. *Id.* at 109 (Good and Braden continue: “However, it is useful to remind readers at this point that the voucher movement, like other reform movements (open classrooms, new math, etc.) is a large and vague concept under whose umbrella many variations operate. It is time to stop comparing only voucher and non-voucher schools and to examine high- and low-performing schools within each group.”).

the effectiveness of a broad choice system, as drawn from limited local choice experiments, is inconclusive.¹²³ Therefore, substantial supporting evidence of the success of a broad choice program is not available.

C. No Child Left Behind Act of 2001

When the current federal education reform legislation was proposed, it contained a broad school-choice experiment.¹²⁴ However, the initial promise of the plan has been deflated because of significant changes.¹²⁵ The Act does make some progress in its breadth of ideas and in real accountability. The plan significantly increases funding, standardizing testing requirements, establishes some consequences for consistently failing schools, and provides opportunities for students in these failing schools. Interestingly, meaningful school choice is missing from this Act. Despite this, the No Child Left Behind Act makes some progress in breadth of ideas, if not real accountability.

1. Annual Testing and Accountability

The most progressive part of the recent education legislation is the standardized testing mandate. The Act requires states to develop and administer yearly tests in reading and math to students in grades three through eight.¹²⁶ It requires

123. *Id.*

124. On January 8, 2002, President George W. Bush signed the No Child Left Behind Act. The 1,200-page Act was the result of broad bipartisan compromise balancing Democratic demands for increased funding with Republican demands of accountability. See Mike Bowler, *Hope for Best in 1,200 Pages*, Baltimore Sun 2B (Jan. 9, 2002); Ronald Brownstein & James Gerstenzang, *Bush Signs Education Reform Bill in Major Bipartisan Achievement*, L.A. Times A6 (Jan. 9, 2002); Elisabeth Bumiller, *Focusing on Home Front, Bush Signs Education Bill*, N.Y. Times A16 (Jan. 9, 2002); Dana Milbank, *With Fanfare, Bush Signs Education Bill*, Wash. Post A03 (Jan. 9, 2002); see also H.R. Res. 1, 107th Cong. (2001).

125. Lizette Alvarez, *House Votes for New Testing to Hold Schools Accountable*, N.Y. Times A1 (May 24, 2001); Lizette Alvarez, *Senate Passes Bill for Annual Tests in Public Schools*, N.Y. Times A1 (June 15, 2001); Krista Kafer, *Last Chance for Congress to Redo Education Bills*, Houston Chron. 47 (June 15, 2001) ("Polls show that a clear majority of Americans back President Bush's education reform plan. What a shame, then, that the legislation being debated in Congress is about as close to his original proposal as a first-grade book report is to a doctoral dissertation. It didn't take long for the president's education plan . . . to go from 'No Child Left Behind' to 'No Lobbyist Left Behind.'").

126. *No Child Left Behind Act of 2001*, H.R. Res. 1, 107th Cong. § 1111(b)(3)(A) (2001) (to be codified at 20 U.S.C. § 6301 *et seq.*) ("Each State plan shall demonstrate

states to concisely compile and widely disseminate the results of the tests to the public.¹²⁷ This data must be “disaggregated” to describe how “economically disadvantaged students; students from major racial and ethnic groups; students with disabilities; and students with limited English proficiency” are performing.¹²⁸ The Act requires states to develop tests that are “consistent with widely accepted professional testing standards, objectively measure academic achievement, knowledge, and skills, and . . . do not evaluate or assess personal or family beliefs and attitudes, or publicly disclose personally identifiable information.”¹²⁹

The tests are a step in the right direction because they are necessary to develop an accurate measurement of the adequacy of each school. To effectively reform education, parents and administrators must know which schools and students need additional help. A specific and accurate diagnosis through testing will aid in deciding which course of treatment is needed for individual schools and will help both policy makers and courts target reforms where they are needed.

However, some people question the usefulness of the tests for a variety of reasons. Dennis K. Chaconas, Oakland, California, Superintendent of Schools cautions that the tests are simply a means of analysis and cannot be seen as the cure in itself. “I can get on the scale and it’ll tell me how much I weigh, that part’s easy. But if I don’t get on the scale and analyze how I got to that weight, I don’t think it helps me to change my behavior.”¹³⁰ Therefore, as Chaconas suggests, reform must not stop with testing.

Another concern is the impact of yearly testing in the classroom. Some critics argue that teachers will teach to the test at

that the State has implemented a set of high-quality, yearly student academic assessments that include, at a minimum, academic assessments in mathematics, and reading or language arts, that will be used as the primary means of determining the yearly performance of the State and of each local educational agency and school in enabling all children to meet the State’s challenging student academic achievement standards.”); see George Archibald, *Education Reform Faces Hill Hurdle*, Wash. Times A2 (June 16, 2001); Helen Dewar, *Senate Passes Major Revamp of Education*, Wash. Post A1 (June 15, 2001).

127. See *No Child Left Behind Act*, H.R. Res. 107th Cong. § 1111(b) (2001).

128. See H.R. Res. 107th Cong. § 1111(b)(2)(C)(v)(II) (2001).

129. See H.R. Res. 107th Cong. § 1111(b)(3)(C)(xiv) (2001).

130. Megan Garvey, *Trouble May Lurk in Details of Education Bill*, L.A. Times A12 (June 16, 2001).

the expense of a more demanding curriculum.¹³¹ Others notice a sense of resentment of testing by parents who may choose to have their children boycott the tests.¹³² These concerns can be minimized as long as states design their tests to be short, accurate, and aligned with proper achievement standards.

The commonly-quoted goal of the Bush Administration in pursuing education reform is to require accountability. The original proposal sought accountability by imposing standardized tests, creating consequences for failing schools, and instituting private school choice through a \$1,500 voucher for students at consistently failing schools.¹³³ As the legislation worked its way through Congress, the accountability theme diminished.

The voucher proposal died in committee and was replaced by a limited form of public school choice. Once a school has failed the state's standardized tests for three consecutive years, students are granted their share of that school's Title I funds to transfer to either another public school within the same district, or the student can use the funds to purchase private tutoring.¹³⁴ After yet another year of failure, despite additional federal funding, the school would be required to reconstitute itself by becoming a charter school or by bringing in new teachers or principals.¹³⁵

However, true accountability requires assessment and consequences. The Act falls short of providing significant and immediate consequences. The compromise legislation seems to

131. *Testing . . . Testing . . . Testing: Bush has Inspired a Radical Shift in Education Policy*, Newsday B1 (Editorial, June 24, 2001) ("Having so many [tests] will take a big bite out of class time. And, since money will ride on the outcomes, schools will avidly prepare kids for the tests."); Lorraine Woellert, *The Shape of School Reform*, Bus. Week 84 (May 14, 2001) ("[S]chools try by any means necessary to get test scores up. Such efforts have included narrowing instruction, cheating, pushing students into special education classes, or forcing them out of school altogether."); Linda Lutton, *Testing, Testing: The Miseducation of George W. Bush*, In *These Times* (Chi.) 20 (June 25, 2001).

132. *A Tutorial in Compromise*, Pittsburgh Post-Gazette A18 (Editorial, June 1, 2001).

133. Lisa Fine, *ESEA, Minus Voucher, Easily Passes House*, 20 Educ. Week 24 (May 20, 2001).

134. Alvarez, *House Votes for New Testing to Hold Schools Accountable*, *supra* n. 125; Dewar, *supra* n. 126; see H.R. Res. 1, 107th Cong. § 1116(b)(1)(E) (2001).

135. See H.R. Res. 1, 107th Cong. § 1116(b)(7)-(8); see generally Lizette Alvarez, *Testing Requirement to Stay in House Bill on Education*, N.Y. Times A22 (May 23, 2001); Alvarez, *Senate Passes Bill for Annual Tests in Public Schools*, *supra* n. 125; Fine, *supra* n. 133; Michael Greve, *School Reform Yields to Politics*, L.A. Times M1 (June 24, 2001).

bend over backwards to accommodate the needs of the schools, yet offers little from the perspective of the students and parents. From the family's point of view, once their school is labeled "failing" they are offered no recourse for three years. Just imagine the impact of three years of inadequate schooling on the child, and imagine the parents' frustration that a federally mandated school report card tells them that the school is giving their child an inadequate education, yet the law leaves them powerless to do anything about it.

2. *The Ongoing Resistance to Any Form of School Choice*

The education reform bill contains little in the way of supporting parental choice. Aside from the limited public school choice provision, Congress has continued to shy away from any meaningful form of school choice. While the original proposal of the Bush administration did contain a provision for a private school voucher experiment, the administration quickly acquiesced when it became clear that opponents in Congress would kill the entire education bill if even a limited voucher plan were included.¹³⁶ Required compromise combined with powerful entrenched interests tends to land any reform adjacent to, if not in the middle of, the status quo.¹³⁷

Voucher proposals again arose in the form of amendments before the full chambers.¹³⁸ House Majority Leader Dick Armey proposed two school choice amendments: one reinserting the Bush administration's \$1,500 voucher proposal; the second, creating a pilot voucher program.¹³⁹ Both amendments were easily defeated. In the Senate, Senator Judd Gregg of New Hampshire offered an amendment to create a voluntary pilot program in ten cities. The amendment would have used \$50 million to fund vouchers for low-income students attending fail-

136. See Helen Dewar, *Bush's Education Plan Moving Ahead Again - But not Quickly*, Wash. Post A2 (July 23, 2001); Greve, *supra* n. 129; Ruben Navarrette, Jr., *Children: Choices & Lessons*, Milwaukee J. Sentinel 01J (June 24, 2001); Scott Lehigh, *Democrat's Illogic on Vouchers*, Boston Globe A27 (June 15, 2001).

137. Chester E. Finn, Jr., *Revolutions Likely From this Education Bill*, Houston Chronicle 27 (July 18, 2001) (Finn, the architect of the Bush administration's original proposal, stated: "The spinners would have us believe that this measure will transform American education. The more likely outcome is that little will change.").

138. See generally Congressional Record May 23, 2001 for the House amendment and June 12, 2001 for the Senate amendment.

139. See *id.*; Alvarez, *House Votes for New Testing to Hold Schools Accountable*, *supra* n. 125; Fine, *supra* n. 133.

ing schools. The proposed funds would have come from money already earmarked for education.¹⁴⁰ This modest proposal was easily defeated as opponents reacted with sharp disapproval to every proposed test of the voucher concept.¹⁴¹

3. *Verdict: How Does this Bill Help Students?*

The *Leave No Child Behind Act of 2001* is a step in the right direction, yet falls far short of being a major education reform. The testing requirement is its silver lining. Any school choice system requires the information provided by mandatory testing to function effectively. Despite growing resistance from the education establishment, this Act integrates the concept of testing and outcome measurement into the mainstream American education policy. That is a step in the right direction. Perhaps years from now, when the results of these tests come pouring in, the majority will be shocked into supporting significant education reform rather than believing the spin and cries of the entrenched educational establishment.

IV. BARRIERS TO CHOICE-BASED EDUCATION REFORM

A proposal for restructuring the educational system based on the theory of school choice faces significant legal and political barriers. The major legal obstacles to school choice are issues concerning desegregation and the separation of church and state. A system of school choice also faces strong political opposition from many powerful organizations and policymakers with an interest in maintaining the status quo.

A. *Legal Obstacles to School Choice*

Despite the good intentions of education professionals and policymakers, efforts for change are constrained by several prevailing legal doctrines. The most daunting roadblocks to

140. Fine, *supra* n. 133; Lehigh, *supra* n. 136.

141. Mathew Miller, *Denying School Vouchers Hurts Kids*, Charleston Gazette 4A (June 18, 2001) ("Here's how ideologically constipated the debate over schools has become: New Hampshire Republican Sen. Judd Gregg's call for an unbelievably tiny and inoffensive voucher pilot program was considered too radical to include in the hollow education reform endorsed by the Senate."); see Lehigh, *supra* n. 136 (Some arguments against testing the voucher concept rely on highly circular reasoning leading to "a conceptual Catch-22: We shouldn't fund research to see if vouchers work because there's no research to show that vouchers work.").

school reforms based on school choice include: 1) adherence to a policy of strict desegregation to such an extreme as to forget the original goal of integration; and 2) continuing a policy of strict separation of church and state that denies assistance to families who choose to send their children to parochial schools.

1. A Pyrrhic Desegregation Policy

Ironically, reform efforts to ensure equal educational opportunity have faced opposition from people pursuing a strict desegregation enforcement policy. These well-intentioned people have confused the means with the ends in providing for equal education through the desegregation doctrine established in *Brown v. Board of Education*.¹⁴² The Court's reasoning in *Brown* implied that the purpose of integration was to ensure that racial minorities received an equal educational opportunity. The court asked, "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?"¹⁴³ The Court implied that equal, "tangible" factors are necessary elements of an equal opportunity education, and then ordered integration so that racial minorities could attend the effective and quality schools that were previously open only to whites.¹⁴⁴

Instead of following the principle of equal educational opportunities, many strict desegregation proponents have confused the issue and focused on integration as the goal.¹⁴⁵ The Court in *Brown* found that a state mandate of separate schools for different races imposes a significant and harmful feeling of inferiority on racial minorities.¹⁴⁶ The elimination of explicit, state-mandated segregation by law since *Brown* has addressed this issue. But merely being able to sit in the same classroom with whites has not resulted in the equal education envisioned by those that support a policy of strict desegregation.¹⁴⁷ Legal

142. See generally Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470 (1976).

143. *Brown*, 347 U.S. at 493.

144. *Id.*

145. See Bell, *supra* n. 142.

146. *Brown*, 347 U.S. at 494.

147. Denise C. Morgan, *The Less Polite Questions: Race, Place, Poverty and Public Education*, 1998 Annual Survey of Am. L. 267, 274 (1998).

scholar Derrick Bell addressed the problem committed by groups pursuing a strict desegregation agenda, noting: "This theory of school desegregation, however, fails to encompass the complexity of achieving equal educational opportunity for children to whom it so long has been denied."¹⁴⁸ Bell describes how those focusing on desegregation goals have lost sight of the original purpose of desegregation—to ensure that minority students receive a quality education.¹⁴⁹

Adherence to a strict desegregation policy frequently denies improved educational opportunity to the very people desegregation seeks to protect.¹⁵⁰ For example, North Carolina regulates the racial composition of its charter schools. As a result, North Carolina closed 22 schools because they contained too many African-American students fleeing ineffective public schools.¹⁵¹ A program in Detroit designed to create three all-black male schools was challenged by the American Civil Liberties Union and the National Organization for Women as unconstitutional. The program was later struck down as unconstitutional.¹⁵²

While integration remains an important social goal, many now agree that it should not be sought at the expense of a quality education for poor and minority children. In a recent national survey, eighty percent of African American parents stated they would prefer schools to focus on achievement rather than integration.¹⁵³ This preference combined with most parents' preference that children are educated in their neighborhood schools should emphasize the wisdom of avoiding a policy of strict desegregation.¹⁵⁴

148. See Bell, *supra* n. 142, at 477-78.

149. *Id.*

150. Henig, *supra* n. 79.

151. Viteritti, *supra* n. 6, at 70 (citing David J. Dent, *Diversity Rules Threaten North Carolina Charter Schools That Aid Blacks*, N.Y. Times, B8 (December 23, 1998); Lynne Schnaiberg, *Predominantly Black Charters Focus of Debate in N.C.*, 17 Educ. Week 22 (August 5, 1998)).

152. Barnes, *supra* n. 80, at 2377-78 (citing *Garrett v. Bd. of Educ.*, 775 F. Supp. 1004 (E.D. Mich. 1991)).

153. Viteritti, *supra* n. 6, at 70.

154. *Id.* at 33.

2. A First Amendment Issue: School Choice and Religious Schools

The doctrine of separation of church and state also created a barrier to complete freedom of school choice. The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."¹⁵⁵ Those that interpret the First Amendment as a ban on any connection between the state and religious institutions ("separationists") oppose government funding of families to send their children to sectarian schools.

The recognition of a strict separation between church and state in the context of aid to schools can be traced to the Supreme Court decision of *Everson v. Board of Education*.¹⁵⁶ In *Everson*, the Court upheld a New Jersey statute that provided reimbursement of transportation costs to parents of children attending parochial schools. In doing so, the Court noted the existence of a delicate balance that must be struck in providing state funding to religious institutions and individuals. "New Jersey. . . cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation."¹⁵⁷ By striking this balance in *Everson*, the Court recognized that people of faith cannot be denied access to publicly granted welfare services. Thus, the Court held that parents who exercise their option to send their children to religious schools are protected by the First Amendment's Free Exercise Clause and cannot be denied the aid and services granted to others.¹⁵⁸

Unfortunately for school choice proponents, subsequent courts restricted funding of religious schools using the First Amendment's Establishment Clause. In *Abington School District v. Schempp*, the Supreme Court outlined a strict standard to determine what government action violates the Establishment Clause:

155. U.S. Const. amend. I.

156. 330 U.S. 1 (1947).

157. *Id.* at 16.

158. *Id.* at 17. ("Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools.").

The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.¹⁵⁹

Eight years later, the “purpose and effect” reasoning of *Abington School District* was expanded into a restrictive and imprecise test in *Lemon v. Kurzman*.¹⁶⁰ The Supreme Court constructed a test to determine if a state statute supplementing the salary of private school teachers and reimbursing private schools for books and teaching materials violated the Establishment Clause.¹⁶¹ In finding this funding unconstitutional, the Court created the “Lemon Test.” The “Lemon Test” states that government action violates the Establishment clause when it: 1) has no “secular purpose,” 2) has a “primary effect” of advancing religion, and 3) fosters “excessive entanglement” between church and state.¹⁶² This strict-separationist standard soon inhibited state aid to students attending parochial schools.¹⁶³

In 1973, in *Committee for Public Education and Religious Liberty v. Nyquist*, the Court struck down a New York statute that, *inter alia*, granted tax relief to parents who sent their children to a parochial school. The Court found that even an indirect-aid program “cannot be squared with the principle of neutrality” and runs counter to the Establishment Clause.¹⁶⁴ After *Nyquist*, the Court continued to perceive religious interests as suspicious and strictly construed the Establishment Clause to deny any public assistance for religious educational needs.¹⁶⁵

159. 374 U.S. 203, 222 (1963).

160. 403 U.S. 602 (1971).

161. 403 U.S. 602, 606-07 (1971); See R. Craig Wood & Michael C. Petko, *Assessing Agostini v. Felton in Light of Lemon v. Kurzman: The Coming Age in the Debate Between Religious Affiliated Schools and State Aid*, 2000 BYU Educ. & L. J. 1 (2000).

162. *Lemon*, 403 U.S. at 612; see also Viteritti, *supra* n. 6, at 135.

163. See Viteritti, *supra* n. 6, at 135.

164. 413 U.S. 756, 793 (1973) (“[I]nsofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable affect are to aid and advance those religious institutions.”).

165. See *Beggans v. Pub. Funds For Pub. Schools*, 442 U.S. 907 (1980); *Fran. Tax*

Over the past eighteen years, the Court has gradually softened its rigid separationist regulation of public educational aid to children attending religious schools. The Court drew a distinction between direct and indirect aid to religious institutions in *Meuller v. Allen*.¹⁶⁶ In *Meuller*, a Minnesota statute granted a tax deduction for books, tuition, and transportation to parents of children attending both public and non-public schools.¹⁶⁷ The Court found that the Minnesota statute met the three prongs of the *Nyquist* test despite the fact that the funds were indirectly given to parochial schools.¹⁶⁸ This ruling marked a significant change from the holding in *Sloan v. Lemon*.¹⁶⁹ In 1986, in *Witters v. Washington Department of Services for the Blind*, a student used a public scholarship to attend a Bible college. The Court held that since the aid was offered to all students, the fact that some individuals chose to exercise their faith and attend parochial schools does not cause the program to run afoul of the Establishment Clause.¹⁷⁰

Through the 1990s, the Rehnquist Court continued the trend of moving away from a strict separationist interpretation of the First Amendment. In *Zobrest v. Catalina Foothills School District*, the parents of a deaf child requested the public school district to provide a sign language interpreter for their child at the Roman Catholic high school he attended, claiming that the school district was financially responsible for such a service under the Individuals with Disabilities Education

Bd. v. United Ams. for Pub. Schools, 419 U.S. 890 (1974); *Leutkemeyer v. Kaufman*, 419 U.S. 888 (1974).

166. 463 U.S. 388 (1983).

167. *Id.* at 391.

168. *Id.* at 395 (In finding the secular purpose of the Minnesota statute the Court stated: "A state's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a state's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the state's citizenry is well-educated.")

169. 414 U.S. 881 (1973); see Viteritti, *supra* n. 6, at 137; Wood & Petko, *supra* n. 155, at 4-5.

170. 474 U.S. 481, 488 (1986) ("As far as the record shows, vocational assistance provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice. Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.")

Act.¹⁷¹ The Court ruled that providing a publicly-employed interpreter did not violate the Establishment Clause.¹⁷²

Finally, in 1997, the Court explicitly overturned its previous decisions regarding the Establishment Clause in *Agostini v. Felton*. The Court found that a program that sends public school teachers into private schools to teach remedial lessons does not violate the Establishment Clause.¹⁷³ In this 5-4 decision, the Court recognized the recent shift in Establishment Clause jurisprudence by noting that its previous decisions were “not consistent with our subsequent Establishment Clause decisions.”¹⁷⁴ The majority opinion expressly rejected several presumptions the Court had previously relied upon. First, the Court rejected the presumption that “the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion.”¹⁷⁵ Second, the Court discarded the presumption that *all* public aid is unconstitutional which directly benefits education in religious schools because the aid might create a financial incentive for parents to choose a parochial school education.¹⁷⁶ The Court declared that:

[t]his incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion.¹⁷⁷

Agostini also secured the principle that a government program is insulated from a violation of the Establishment Clause

171. 20 U.S.C. 1400, et. seq. (West 2001); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 3 (1993); See Wood & Petko, *supra* n. 155, at 6.

172. *Zobrest*, 509 U.S. at 13-14.

173. 521 U.S. 203, 208-09, 218 (1997) (A “Shared Time” program where the public school district provided remedial classes to students attending nonpublic schools to be a violation of the Establishment Clause overturning *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985). Likewise, the Court found that a New York City program that sent public school teachers into private schools to provide remedial education to disadvantaged students pursuant to Title I of the Elementary and Secondary Education Act of 1965, violated the Establishment Clause overturning *Aguilar v. Felton*, 473 U.S. 402.).

174. *Id.* at 209.

175. *Id.* at 223.

176. *Id.* at 225-227.

177. *Id.* at 231.

when private citizens make the decision whether to direct public funds to religious organizations. The Court explained:

In our view, this transaction [is] no different from a State's issuing a paycheck to one of its employees, knowing that the employee would donate part or all of the check to a religious institution. In both situations, any money that ultimately went to religious institutions did so "only as a result of the genuinely independent and private choices of" individuals.¹⁷⁸

Based on these recent United States Supreme Court's decisions, it is likely that a properly drafted school choice program that includes a parochial school option could be found constitutional.¹⁷⁹

In contrast, many state constitutions contain provisions for explicitly strict separation.¹⁸⁰ The "Blaine Amendments" were adopted in the mid-nineteenth century, often as a requirement for a states' admission to the union, reflecting the anti-Catholic fervor.¹⁸¹ Thirteen states still have constitutional provisions narrowing public funds to public school use only.¹⁸² As a result, school choice opponents often seek to litigate in state courts under state constitutional arguments.¹⁸³

However, this does not mean that school choice opponents are guaranteed victory in state courts. Recently in Wisconsin, the state's highest court found a school choice program constitutional based on reasoning similar to Justice O'Connor's opinion in *Agostini*. The Wisconsin Supreme Court held:

178. *Id.* at 226 (citations omitted).

179. See *Mitchell v. Helms*, 530 U.S. 793 (2000); Linda Greenhouse, *White House asks Court for Voucher Ruling*, N.Y. Times, 19 (July 8, 2001); see also *Nation Needs Ruling on Voucher Legality*, Indianapolis Star A06 (Editorial, July 16, 2001).

180. Viteritti, *supra* n. 6, at 17; see Alaska Const. art. VII, § 1; Ariz. Const. art. II, 12; Cal. Const. art. IX, § 8; Colo. Const. art. V, § 34, art. IX, § 7; Del. Const. art. X, § 3; Fla. Const. art. I, § 3; Ga. Const. art. I, § 2, P VII; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 5; Ill. Const. art. X, § 3; Ind. Const. art. I, § 6; Ky. Const. § 189; Mass. Const. art. XVIII; Mich. Const. art. VIII, § 2; Minn. Const. art. I, § 16, art. XII, § 2; Mo. Const. art. IX, § 8; Mont. Const. art. X, § 6; Neb. Const. art. VII, § 11; N.H. Const. pt. II, art. 83; N.M. Const. art. XII, § 3; N.Y. Const. art. XI, § 3; N.D. Const. art. VIII, § 5; Okla. Const. art. II, § 5; Or. Const. art. I, § 5; Pa. Const. art. III, § 29; S.C. Const. art. XI, § 4; S.D. Const. art. VI, § 3; Tex. Const. art. I, § 7; Utah Const. art. I, § 4, art. X, § 9; Wash. Const. art. I, § 11; Wis Const.. art. I, § 18; Wyo. Const. art. I § 19.

181. *Id.* at 153 (citing Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal History 38 (1992)) (Blaine's amendment sought to undermine "the viability of schools run by religious minorities.").

182. *Id.* at 169.

183. *Id.* at 168.

[E]ducational assistance programs do not have the primary effect of advancing religion if those programs provide public aid to both sectarian and nonsectarian institutions (1) on the basis of neutral, secular criteria that neither favor nor disfavor religion; and (2) only as a result of numerous private choices of the individual parents of school-age children.¹⁸⁴

If drafters skillfully design the school choice program, it is foreseeable that this decision can be replicated in other states as well.

This optimistic outlook is partially based on the court's reasoning in the most recent voucher decision in *Simmons-Harris v. Zelman*.¹⁸⁵ In *Simmons-Harris*, the Sixth Circuit Court held that the Ohio Pilot Project Scholarship Program violated the Establishment Clause and provided guidance on how to craft a school choice program that would pass constitutional muster. The Court's decision turned on the issue of whether the program provided parents with sufficiently wide and diverse ranges of options between parochial and nonsectarian schools to avoid the effect of overwhelmingly funding religious institutions. The Court held that the particular structure of the Ohio voucher program discouraged participation of non-sectarian schools, thereby limiting school choices predominantly to religiously-affiliated schools.¹⁸⁶ The Court held that the Ohio voucher program impermissibly advances religion under the *Lemon* test because the Ohio voucher law does not limit the uses of the funds to non-religious activities.¹⁸⁷

Contrary to the beliefs of anti-voucher activists, this holding does not conclude that *all* voucher programs that include religious schools are unconstitutional. The decision only held that the particular Ohio program violated the Establishment Clause. In fact, the Court's decision in *Simmons-Harris* sheds some light on what the court would find to be a permissible

184. *Jackson*, 578 N.W. 2d at 617.

185. 234 F.3d 945.

186. *Id.* at 959, 961.

187. *Id.* at 958 ("We find that *Nyquist* governs our result. Factually, the program at hand is a tuition grant program for low-income parents whose children attend private school parallel to the tuition reimbursement program found impermissible in *Nyquist*. Under both the New York statute in *Nyquist*, as well as the Ohio Statute at issue, parents receive government funds, either in direct payment for private school tuition or as a reimbursement for the same, and in both cases, the great majority of schools benefited by these tuition dollars are sectarian.").

voucher system – one with diverse options and limits on the school's use of the tuition grant.

B. Political Barriers to School Reform

Having examined the court-established barriers to school choice, we can now identify daunting obstacle to implementation by political process.¹⁸⁸ The first obstacle is how to politically empower the section of the populace that the reform is designed to help. People living in poverty traditionally have not had the ability to generate a large, effective political movement.¹⁸⁹ This political disadvantage is compounded when one considers that the more politically-potent, white, middle-class suburbanites tend to believe that their schools are effective and tend to be less sensitive to the concerns of urban parents, who are not nearly as content with their schools.¹⁹⁰ It is easy to see how the relatively weak voices of the poor, urban residents are drowned out by a broad coalition of large well-financed interests opposing structural education reform.

The second obstacle is the perpetual American partisan battle for power which significantly impedes school choice reform efforts. The Democratic Party, seen as the party strongly favored by minorities and the poor, strongly opposes most choice-centered school reforms.¹⁹¹ On the other hand, the Republican party of big business and “small government” gener-

188. Viteritti, *supra* n. 6, at 38 (citing William N. Evans, et al., *Schoolhouses, Courthouses, and Statehouses After Serrano*, 16 J. Policy Analysis & Mgmt. 10 (1997)).

189. See Morgan, *supra* n. 147, at 281 (“People. . . in these communities of concentrated poverty are not well positioned to bring about change. [They] lack mid-class and working class families necessary to spearhead political activism or maintain institutions that provide quality services.”).

190. See *id.* at 281-284 (Opponents of choice have caught on to this fact. They are able to mobilize opposition to change by scaring the suburbanites with claims that reform proposals will fund underperforming schools at the expense of more affluent schools.).

191. Lehigh, *supra* n. 136 (“The failing schools disproportionately serve students from minority families of modest means – families the Democratic Party counts as a key constituency. But vouchers are anathema to the educational establishment, which helps power the party's electioneering efforts.”); Peter Schrag, *The Voucher Seduction: The Issue Liberals Can't Ignore*, 11 The Am. Prospect 46 (Nov. 23, 1999) (Former Berkeley law professor John E. Coons, a Democrat, remarked: “Where are those Democratic politicians who so constantly assure us of their deep concern for the not-so-rich? So far as I can tell, the Democrats (my own party) are either running these state schools that warehouse the poor or—with the help of the teachers' unions—are busy in the legislatures and Congress making sure that nothing in this system changes except its ever-expanding cost. The rich choose; the poor get conscripted.”).

ally supports choice-based school reforms.¹⁹² Partisanship further complicates reform efforts as the minority community's Democratic partisan leanings make that community skeptical of any reform plan offered by members of the Republican Party.¹⁹³ Likewise, members of the Democratic Party reject reform plans beneficial to urban minorities simply because they are plans offered by the opposition.¹⁹⁴

At the same time, some Republicans support school choice to draw minority votes away from the Democrats without intending to implement a broad, effective choice plan once elected. Critics also point out that the powerful "Religious Right" Republican constituency strongly supports some school-choice plans to increase attendance and funding at parochial schools.¹⁹⁵

In this partisan tug-of-war, politicians frame the school choice issue to their best political advantage at the expense of blurring the truth about various school choice plans. As a result, misinformation infects the general public, which votes according to party preferences rather than independent analysis of the issue on its merits.¹⁹⁶ For example, in Michigan and California, various referenda proposed school choice reforms, including voucher programs; however, partisanship undermined the viability and success of these referenda.¹⁹⁷ The two major parties' struggle for power impedes the implementation of choice-based school reforms.¹⁹⁸

192. Gary Rosen, *Are School Vouchers Un-American?*, 109 *Commentary* 26 (February 2000).

193. Bruce Fuller & Richard F. Elmore, *Policy Making in the Dark: Illuminating the School Choice Debate*, in *Who Chooses? Who Loses?: Culture, Institutions, and the Unequal Effects of School Choice* 3 (Bruce Fuller & Richard F. Elmore eds., Teacher's College Press 1996) ((This skepticism may also be due to the fact that school choice originally developed in the South as a white response to integration orders. Years later it again became popular in the 1980's among political conservatives who sought to "advance the cultural and political homogeneity of particular communities."))

194. See Schrag, *supra* n. 191

195. Lynette Clemetson, *A Ticket to Private School*, *Newsweek*, 30 (March 27, 2000).

196. See Elizabeth Garrett, *The Law and Economics of "Informed Voter" Ballot Notations*, 85 *Va. L. Rev.* 1533 (1999); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 *Yale L.J.* 71 (2000); Cass R. Sunstein, *Group Dynamics*, 12 *Cardozo Stud. L. & Literature* 129 (2000); Tom Bray, *Debate at the Voucher Frontiers*, *Wash. Times* A21 (Nov. 10, 2000).

197. Thomas D. Elias, *School Vouchers Set Back at Polls; Billionaire Backers Ready to Try Again*, *Wash. Times* A16 (Nov. 8, 2000).

198. See Miller, *supra* n. 135.

The perception of the voucher/school choice issue in the general political debate is the common myth that vouchers are a conservative cause. Describing an issue as conservative, right-wing, or religious alienates a broad spectrum of the voting population. Mainstream media tends to characterize issues in terms of partisanship.¹⁹⁹ For example, Cynthia Tucker, a journalist, framed the issue as a conservative cause:

199. See Michael A. Fletcher, *A Good Report Card—Self-Administered*, Wash. Post A21 (July 31, 2001) (“Conservatives are steamed about the concessions – including the elimination of private school vouchers – made in President Bush’s plan to overhaul federal education policy.”); Jack Germond, *Bush Can’t Please All Republican Factions*, L.A. Times M1 (July 22, 2001) (“Bush has disappointed conservatives on the school voucher question.”); David Broder, *Education Reform; Bush is in Danger of Losing His Most Cherished Plan*, The Dallas Morning News 9A (July 16, 2001) (“From the National Education Association . . . to the Heritage Foundation and other pro-voucher conservatives who complain that Mr. Bush already has allowed the standards to go limp . . . - all of those conflicting views and agendas remain to be resolved.”); Michael Fletcher, *Paige Denies Retirement Rumors, Unhappiness With Bush*, Wash. Post A31 (June 28, 2001) (“Paige linked the rumors to the mounting criticism from conservatives unhappy with Bush’s compromises on his education plan. The plan, which calls for annual testing of students in grades three through eight and for the first time ties federal money to student performance, was stripped of the measure that most warmed conservative hearts: education vouchers. The White House caved on the proposal to offer \$ 1,500 vouchers to students in failing schools, even while Paige continued to publicly support it.”); Thomas B. Edsall, *With Primary Looming, New Jersey’s GOP Parts*, Wash. Post A02 (June 25, 2001) (“Bret Schundler . . . appears to be on the verge of defying the state’s GOP establishment and winning Tuesday’s gubernatorial primary. The 42-year-old Harvard graduate, who combines hard-right conservative stands on abortion, school vouchers and gun control with a record of striking policy and political achievements in gritty, majority-minority Jersey City, is running ahead of former U.S. representative Bob Franks.”); Tucker, *infra* n. 200; Megan Garvey, *Senate Won’t Even Buy a Diluted Version of Voucher Remedy*, L.A. Times A16 (June 13, 2001) (“It was one of the cornerstones of President Bush’s campaign: vouchers for low-income students caught in failing schools. But on Tuesday—to no one’s surprise—the Senate defeated, on a 58-41 vote, a last, modest effort by conservative Republicans to include a voucher provision in education reform legislation sought by Bush.”); Lizette Alvarez, *Senate Rejects Tuition Aid, a Key to Bush Education Plan*, N.Y. Times A26 (June 13, 2001) (“But conservatives, who have battled for years to pass vouchers, said Democrats were callously condemning poor children to horrible schools, denying them the same kind of escape hatch afforded to wealthier students who can pay private and parochial school tuition.”); Diana Jean Schemo, *Bush-Backed School Bill Advances in Senate*, N.Y. Times A13 (Mar. 8, 2001) (“The bill put off consideration of divisive issues like student vouchers that were dear to conservatives.”); see also Jodi Wilgoren, *Education Plan by Bush Shows New Consensus*, N.Y. Times A1 (Jan. 23, 2001) (for an example showing how it is possible for a reporter to accurately portray the voucher issue without tainting it as ‘conservative.’ “On education, it seems, the political spectrum is collapsing into near consensus, with the goal of helping a constituency long represented by liberals using methods—competition, accountability and a focus on fundamentals—that are conservative at their core. Disputes remain over whether to expand taxpayer-financed vouchers for private-school tuition and over the power of teachers’ unions, but broad swaths of common ground exist in between.”).

While President Bush may not win the taxpayer-financed school vouchers he wanted in his education bill, vouchers remain a popular idea among conservatives. Along with a few new converts among liberals, conservatives claim that vouchers can save black and brown children stuck in failing public schools.²⁰⁰

Pieces like this contribute to the skewed polarization of the school choice issue. Because the issue is labeled as 'conservative,' it is hardly surprising that voucher initiatives are soundly defeated on Election Day.

1. Institutional Opposition to School Choice

The most powerful and direct opponents of school reform are groups with a vested interest in the current educational system: teachers' unions, school boards, and superintendents.²⁰¹ The bureaucratic structure of public school systems in itself is an institutional barrier to reform. Teachers seek to protect job security. Local political pressure on superintendents, school boards, and administrators impedes progress toward implementing school choice programs by inducing limited terms and by promoting short-term rather than long-term reform. Bureaucratic actors balk at the broad, structural changes that a school-choice system will necessitate in the current educational system.

i. Teachers' Unions

One would normally expect teachers' unions to be strongly in favor of efforts to improve schools. However, the unions oppose school-choice reform efforts for reasons other than education quality. The union primarily seeks to protect the jobs of its members and to prevent the diversion of funds from public

200. Cynthia Tucker, *Where are Rich Conservatives When Catholic School Needs Help?*, Atlanta J. -Constitution 12A (June 20, 2001).

201. Viteritti, *supra* n. 6, at 87; James A. Peyser, *School Choice: When Not If*, 35 B.C. L. Rev. 619, 622 (1994) ("The loudest critics of choice are the teachers unions and school district administrators, who together with school committees and university education departments comprise the core of the education establishment . . . [T]hey have a vested interest in the status quo. Public school systems have a virtual monopoly on elementary and secondary education in this country, and like all monopolists they want to protect their franchise.").

schools.²⁰² A recent editorial in the *Atlanta Journal and Constitution* stated:

Teachers' organizations would have you believe they are dedicated to only one thing: ensuring the best possible educational environment for the students they teach. Yet, if you watch local teachers' groups closely enough, you will see a pattern of behavior that suggests a very different mission – ensuring the highest wages and laxest standards for schoolteachers.²⁰³

The teachers' unions continue to advance the interests of their members, often at the expense of the quality of education received by their students. For example, in 1998, the NEA defeated a proposal by the superintendent of the Dayton, Ohio, schools to turn over management of five underperforming schools to the Edison Project, a for-profit school management corporation. The union articulated fears that Edison would require teachers to work longer hours, extend the school year, and promote contractual agreements between teachers and schools outside of those negotiated by the union.²⁰⁴ Recently, the following provision was included in the No Child Left Behind Act of 2001:

SEC. 9530. LIMITATIONS ON NATIONAL TESTING OR CERTIFICATION FOR TEACHERS.

(a) MANDATORY NATIONAL TESTING OR CERTIFICATION OF TEACHERS—Notwithstanding any other provision of this Act or any other provision of law, no funds available to the Department or otherwise available under this Act may be used for any purpose relating to a mandatory nationwide test or certification of teachers or education paraprofessionals, including any planning, development, implementation, or administration of such test or certification.

202. See Harmer, *supra* n. 88, at 58-60, 139-43; Jeffrey R. Henig, Richard C. Hula & Desiree S. Pedescleaux, *The Color of School Reform: Race Politics and The Challenge of Urban Education* 116-17, 127-37, 152-53 (Princeton U. Press, 1999).

203. Henig, Hula & Pedescleaux, *supra* n. 202, at 116 (citing Cynthia Tucker, *Kids' Interests Come Second*, *Atlanta J. & Const.* A13 (Oct. 20, 1993); see also Andrew Mollison, *Unions Fighting Federal Teacher-Testing Legislation*, *Chattanooga Times* A1 (June 23, 2001).

204. Viteritti, *supra* n. 6, at 69.

(b) PROHIBITION ON WITHHOLDING FUNDS—The Secretary is prohibited from withholding funds from any State educational agency or local educational agency if the State educational agency or local educational agency fails to adopt a specific method of teacher or paraprofessional certification.²⁰⁵

It is hard to deny the fingerprints of the powerful teachers' unions on that provision. The teachers' unions, armed with budgets in the millions, pose a formidable obstacle to the promotion of school choice programs.²⁰⁶

ii. Superintendents

The limited term served by superintendents stifles progress toward school-choice programs. The average term of a superintendent in large cities is less than three years.²⁰⁷ Since they are not typically in office long enough to implement lasting reform, superintendents are apt to reject any structural changes in favor of short-term, "fad" initiatives in order to show some improvement.²⁰⁸ Also, upon the superintendent's departure, the new superintendent quickly dismantles or supercedes his or her predecessor's reform programs, often despite signs of positive results.²⁰⁹ High turnover rate makes it virtually impossible to rely on the leadership of superintendents to implement a structural transformation.

205. See H.R. Res. 107th Cong. § 9530.

206. Christopher D. Pixley, *The Next Frontier in Public School Finance Reform: A Policy & Constitutional Analysis of School Choice Legislation*, 24 *J. Legis.* 21 (1998) (The National Education Association has an annual budget of \$750 million and an annual political action fund of \$22.5 million.).

207. Frederick M. Hess, *Spinning Wheels: The Politics of Urban School Reform* 14 (Brookings Instn. Press 1999).

208. *Id.*; see also Henig, Hula & Pedescleaux, *supra* n. 202, at 13 (Small school-based programs have become the dominant and continuing response. The constant implementation of 'fad' initiatives may be adding to the problems faced by failing schools. "A natural concomitant to the multiplicity of the programs, however, is that they are often uncoordinated and may even be counterproductive in terms of student learning. The addition of new programs on top of old ones may result in a disjointed and fragmented set of experiences for students. . . . Much of school life seems to follow an endless cycle of soliciting funds, implementing new initiatives, and then going out to solicit more funds for even newer initiatives to replace current ones.").

209. Hill & Celio, *supra* n. 29, at 3.

iii. School Boards

School boards also contribute to the opposition of school-reform plans that include choice. In many inadequate urban school districts, the status quo and its proponents have captured vulnerable school boards. Many school boards tend to be focused on “the employment and career needs of administrators and employees” to the detriment of the quality of education offered to the children of their district.²¹⁰ For example, in districts where the legislatures have allowed the founding of charter schools with the approval of the school board, the board has given charters to very few that apply.²¹¹ This has the effect of maintaining the current system by further repressing competition with public schools.

iv. Bureaucratic Structure of School Systems

The districts organize public school systems into large bureaucracies.²¹² Traditional bureaucratic structure has a built-in bias favoring the preservation of the status quo. Thus the highly bureaucratic nature of the educational system inherently works against any proposed structural changes such as school choice. “Since bureaucratic organizations have been established to impose a degree of order on an otherwise unplanned and chaotic environment, there is a certain drive toward permanency and self-perpetuation at the heart of rational bureaucracy.”²¹³ Consequently, local political pressure conflicts with, and essentially thwarts, the goal of educating children. The entrenchment of antiquated methods retards the development of a school choice system.²¹⁴

210. Aaron Saiger, *Disestablishing Local School Districts as a Remedy for Educational Inadequacy*, 99 Colum. L. Rev. 1830, 1869 (1999) (citing Wilbur C. Rich, *Black Mayors and School Politics* 4-5 (Garland Publ. 1996)).

211. Viteritti, *supra* n. 6, at 70, 72, 75; Neal R. Pierce, *Charter Schools—and Those Who Resist Them*, *The Baltimore Sun* 11A (Nov. 6, 1996) (“In state after state, local school boards and teacher unions are trying to quash charters. The reason: The spirited, upstart charter schools – usually created by groups of teachers, parents or local colleges – are a threat to established school bureaucracies and unions’ exclusive bargaining rights.”).

212. See Diane Ravitch, *supra* n. 1; Daniel U. Levine, *Concepts of Bureaucracy in Urban School Reform*, in *Transforming Urban Education* 99 (Joseph Kretovics & Edward J. Nussel eds., Allyn and Bacon 1994).

213. Levine, *supra* n. 212, at 101.

214. *Id.*

A system of patronage plagues the administrative bureaucracy and averts progress. Combined, the patronage system and the resulting lack of qualified administrators erect major obstacles to structural school reform. In urban cities, people seek positions as administrators in the public school system because of the high pay rate, especially for African-American workers.²¹⁵ As a result, recent studies of large cities have shown that the school system has essentially become a job program under a system of political patronage where local government rewards campaign supporters with administrative jobs in the public schools.²¹⁶ Using a system of patronage to fill administrative positions results in political decisions rather than decisions for educational improvements.²¹⁷

2. External Opposition to School Choice

Another somewhat surprising form of opposition to granting choice to poor and minority students stems from various civil rights groups. These civil rights groups, including the NAACP,

215. James E. Ryan, *Schools, Race, and Money*, 109 Yale L.J. 249, 295 (1999) (citing Amy Stuart Wells & Robert L. Crain, *Stepping over the Color Line: African-American Students in White Suburban Schools* 130 (Yale U. Press 1997)); see also Agostini, 521 U.S. at 202 ("For example, Willard H. Murray, an African-American Democrat who represented Compton, California, for eight years until he retired in 1996, believes that school boards in some poor minority communities have become centers of patronage because they are one of the only large employers in town. As a result, Murray suggests, 'the focus becomes political, not educational.'").

216. Ryan, *supra* n. 215, at 295; Saiger, *supra* n. 210, at 1858-59 n.137 ("District officials, dependent on and close to the local electorate, but functioning with relatively little visibility or media attention, thus face demands for employment, and sometimes for patronage and nepotism, that can be at least as strong as demands for quality education. Temptations and opportunities for corruption may also be greater at the district than at the state level."); Peter Applebome, *Failure Calls Illinois City Home Turf*, N.Y. Times A16 (Oct. 30, 1994) (noting that "contracts and jobs [are] apportioned to friends or relatives of school board members" in East St. Louis, Illinois).

217. For example, during the 1970's and the 1980's in Baltimore, an alliance developed between black professional educators, City Hall, and the school system. Henig, Hula & Pedescleaux, *supra* n. 202, at 123-24 (citing Kenneth Wong, *City Choices*, 115 (St. U. of N.Y. Press 1990); Horwitz & Strauss, *supra* n. 66) ("Increasingly, the school district resembled a patronage base. Personnel that orchestrated mayoral activities were put on the school system's payroll." Evidence of rampant patronage has also been recently reported in the Washington, D.C. public school system. *The Washington Post* conducted a study of the family and personal relationships among school employees finding "a host of connections," between principals, assistant principals, administrators and other employees. "[S]chool board member Angie Corley, who made \$15,000 a year was joined on the payroll by her daughter, Gwenellen, a \$49,096-a-year vice principal, and her son, William, a \$35,054-a-year science teacher.").

the National Urban League, the Southern Christian Leadership Conference, and the Rainbow/PUSH Coalition, criticize school choice as promoting resegregation and eroding separation of church and state. The civil rights groups argue this is accomplished by draining money from the public schools, not holding choice schools accountable, and including schools that do not accept all applicants.²¹⁸ The civil rights groups, pursuing a strategy of strict desegregation, point to defective plans as examples of how all possible school choice programs would operate.

Unfortunately, these civil rights groups are in disagreement with the very people for whom which they are fighting. Recent polls show that choice plans are gaining support among poor urban parents and also among such groups as the Black Alliance for Educational Options.²¹⁹

Opponents to school choice who object on the basis of possible resegregation base their reasoning on several faulty assumptions.²²⁰ Opponents critique policymakers deciding to implement a universal school choice system where *every* child receives a “voucher.”²²¹ For example, a recent article stated:

218. Salim Muwakkil, *School Choice: Do Vouchers Help of Harm Black Children?*, In *These Times* 11 (Jan. 11, 1998).

219. Matthew Franck, *Black Parents Have Growing Role in Debate Over Public School Alternatives*, St. Louis Post-Dispatch B4 (July 22, 2001) (Support for school choice among African Americans “isn’t likely to result in a shift in public policy” because “black advocacy groups like the NAACP still oppose vouchers, as do older African Americans – who are more likely to vote. . . . The Black Alliance for Educational Options, armed with a stockpile of private donations, is rousing support nationally among African-Americans for alternatives to traditional public schools.”); Rosen, *supra* n. 192 (“Unsurprisingly, given these results, interest in school choice has risen greatly over the last few years among inner-city families. One survey found that 85 percent of the urban poor now favor vouchers; another put support for the idea at 59 percent among blacks and 68 percent among Latinos. As if to prove these figures, when the Children’s Scholarship Fund, the largest of the private voucher programs, recently announced its first national lottery for 40,000 scholarships, applications poured in from an astonishing 1.25 million children, all from low-income households”); Marjorie Coeyman, *Vouchers Get a Boost From Black Alliance*, *The Christian Science Monitor* 19 (July 10, 2001) (In a 1999 survey by the Joint Center for Political and Economic Studies, 76 percent of African Americans between the ages of 26-35 support private school choice.).

220. Mark R. Killenbeck, *Pushing Things up to Their First Principles: Reflections on the Values of Affirmative Action*, 87 Cal. L. Rev. 1299 (1999) (A properly designed school choice system, like affirmative action policies, specifically helps those suffering the most from the lingering effects of discrimination throughout society’s history. Both seek in the long term to bring a historically oppressed community to the socioeconomic position that they would have occupied but for the historical public and private discrimination.)

221. Lisa M. Fairfax, *The Silent Resurrection of Plessy: The Supreme Court’s Ac-*

Whereas the desegregation movement combats racial isolation and inadequate resources through achieving racial balance, the school choice movement seeks to improve educational quality through maximizing school choice at all levels and without constraints . . . the kind of private choice that is involved in school choice generally means maximizing choices that increase segregation. Because the emphasis is on lack of constraints,²²² these policies could lead to increase in school segregation.

The choice-causes-resegregation argument is faulty because the reasoning behind the criticism assumes that the choice plan adopted would be available to every student. For example, there are choice plans where “vouchers” would be available only to those children with need.²²³ Under such a design, middle- and upper-class whites would not be given a voucher to use as a tool to resegregate. Critics often emphasize that the first school choice programs were implemented in the south during the 1960’s as an effort to resist desegregation.²²⁴ However, it is possible to steal the idea of southern racists, and ironically, adapt it to a better use as a tool for racial justice.

Another set of powerful interest groups such as the People for the American Way (PFAW) and the American Civil Liberties Union (ACLU) strongly oppose school choice citing the constitutional issue of government funding touching religious schools. These groups have adopted a philosophy that there should be a strict separation of church and state under the First Amendment.²²⁵

Next to the teachers’ unions, PFAW has become the nation’s leading opponent of the “voucher” component of any school choice reform.²²⁶ A perusal of PFAW’s literature reveals that their opposition to vouchers stems mainly from a fierce po-

quiescence in the Resegregation of America’s Schools, 9 Temp. Pol. & Civ. Rights L. Rev. 1, 56 (1999).

222. Raquel Aldana, *When the Free-Market Visits Public Schools: Answering the Roll Call for Disadvantaged Students*, 15 Natl. Black L.J. 26, 49 (1998) (citing David J. Armor, *Forced Justice: School Desegregation and the Law* 226 (Oxford U. Press 1995)).

223. For an example of how a school choice plan can be properly drafted to virtually eliminate resegregation concerns see Part V *infra*.

224. See Aldana, *supra* n. 222, at 51; see also McGroarty, *supra* n. 16, at 189-90; Viteritti, *supra* n. 18, at 29.

225. See Schrag, *supra* n. 191; American Civil Liberties Union, *Church and State*, ACLU Briefing Paper (ACLU updated Summer 1999) (available at <http://www.aclu.org/library/church_state99.pdf>) (accessed Nov. 22, 2000).

226. Schrag, *supra* n. 191.

litical opposition to the Religious Right and any issue that it supports.²²⁷ PFAW's use of scorched earth tactics in its war against right-wing extremists severely damages the fertile territory in which the seeds of true racial equality may be planted. PFAW's valid opposition to right-wing extremists unfortunately blinds them to the potential of improving education through a system of school choice.²²⁸

The ACLU promotes the principle of strict separation of church and state by opposing school choice reform where vouchers are redeemable at parochial schools.²²⁹ The ACLU "oppose[s] school vouchers for parochial schools because they take taxpayer funds away from the public school system and give them to religious institutions in violation of the separation of church and state."²³⁰ However, in the ACLU's effort to maintain a separation, it practices overkill by opposing any form of vouchers. Like PFAW, the ACLU sacrifices some of the same values it cherishes. For example, the ACLU supports affirmative action in order to remedy past discrimination.²³¹ School-choice vouchers could also serve the same purpose in righting past wrongful discrimination. The ACLU has sponsored nu-

227. People For the American Way, *About the Religious Right*, <<http://www.pfaw.org/issues/right/>> (accessed Nov. 22, 2000) (The People For the American Way devotes a large portion of its website to its opposition to the Religious Right, including:

[PFAW] has been tracking the activities of the Religious Right political movement for 19 years, in that time amassing the nation's largest resource of Religious Right materials. Our National Resource Center contains a variety of Religious Right documents, audio tapes, videotapes and more. People For the American Way Foundation is the nation's pre-eminent expert on the day-to-day activities of the Religious Right. This essential "watchdog" work involves keeping exhaustive records of what ultraconservative groups communicate to their own target audiences; being there to tell the truth when they deceptively tailor their messages for the mainstream media; and helping to organize other groups and communities to defeat the Religious Right.)

228. In fact, the PFAW supports the values that underlie the theory behind a progressive school choice system. Educational reform based on progressive school choice seeks, to a large degree, to remedy the effects of past discrimination (here, the historic and continuing isolation and impoverishment of a disproportionate number of minorities in urban areas) against minorities and "thus to open the doors of opportunity to all Americans based on individual experience and ability." See People For the American Way, *Statement of Position on Affirmative Action*, <<http://www.pfaw.org/issues/equal/affirmative-action.shtml>> (accessed Nov. 22, 2000).

229. American Civil Liberties Union, *supra* n. 225.

230. American Civil Liberties Union, *Affirmative Action*, ACLU Briefing Paper (ACLU updated Fall 2000) <http://www.aclu.org/library/affirmative_action99.pdf> (accessed Nov. 22, 2000).

231. *Id.*

merous lawsuits against school choice-based education legislation and is very active in the political debate against choice programs.²³²

3. *The Confluence of Political Barriers to School Choice*

The recent passage of education reform bills in Congress demonstrates the effects of the confluence of all of the political barriers to school choice described above. The fierce and often unsubstantiated opposition to any form of choice creates a background of false assumptions and rhetoric (primarily centered around the evil 'voucher') that any form of choice-based education reform must overcome. The Congressional debate over the Bush Administration's attempt to experiment with private school choice provides numerous examples of this problem.

Many false assumptions about school choice or 'vouchers' prevent policymakers from creating meaningful education reform. First, voucher critics misunderstand the basic concept of public education.²³³ These critics believe "public schools" and

232. The PFAW and the ACLU are only two of many examples of the powerful organizations opposed to any school choice plan that includes vouchers. The bases for their opposition to vouchers is significantly grounded in faulty assumptions and as a result places them in a position opposite to the values that the organizations strongly hold. This shows how the nature of politics in contemporary America can impede the acceptance of policies aimed at social progress.

233. There are several examples of this fallacy during the Congressional debates over voucher experiment amendments. Congresswoman Lynne Woolsey (D-CA), 147 Cong. Rec. H2593 (daily ed. May 23, 2001) ("Mr. Chairman, a sound public school system is the backbone of our Nation, and it is the way to prepare all children for the high-skill, high-wage jobs that will ensure America's leadership in the world marketplace and will prevent at the same time dependency on welfare here at home. Public education is the backbone of our country. It is why we are a great Nation. Public education is available to all. It does not discriminate, and it must be strengthened, not weakened."); Congresswoman Sheila Jackson Lee (D-TX), 147 Cong. Rec. H2599 (daily ed. May 23, 2001) ("Mr. Chairman, I can answer the question what do we have to lose. Primarily what we have to lose is this country's basic commitment to the little red schoolhouse. That is what America was built on. As communities organized, they formulated the public community school. It opened the doors of opportunity. And as the slaves were freed, and even before so, they knew that education was a key element to their success, and they moved themselves to the little red schoolhouses and other schoolhouses that were promoted by local governments. As immigrants came, they were able to improve their status in life as we opened the doors of education . . . There is a long tradition in the United States that supports the notion of a free public education for all of our nation's children."); Senator Patty Murray (D-WA), 147 Cong. Rec. S6070 (daily ed. June 12, 2001) ("Our public schools are the cornerstone of our democracy, our communities, and our economy. They are entrusted with giving more than 90 percent of our children the education they need to be productive citizens."); Senator Hillary Rodham Clinton

“public education” are synonymous, and they cite the historical success and tradition of public schools. However, public education does not necessarily equate to public schools. Public education is the government’s commitment to provide each of its young citizens the socialization, knowledge, and skills necessary to become a productive member of society. Public schools are a means to this end, but contrary to popular belief, public schools are not the only means of providing public education. A student can receive a public education even though he/she attends a private institution or is taught at home. As long as the government is providing the funds for the child to receive an education, the government *is* providing public education.

Opponents of school choice fight to maintain the public school system because they perceive it to be a fundamental tradition. School choice opponents thus mistakenly place their loyalty in the public school system rather than placing loyalty in the nation’s commitment to free public education. They fail to see that preservation of this “tradition” is worthless to those children trapped in ineffective schools.

Second, school choice opponents frequently assert that vouchers take money away from public schools.²³⁴ However, a

(D-NY), 147 Cong. Rec. S6075 (daily ed. June 12, 2001) (“Public schools, for me, are the distinguishing characteristic that sets us apart from many other societies. They are the bedrock of our democracy. I don’t think we would be giving up on any of our fundamental freedoms so easily. I don’t think we would be turning our back on our Constitution or our Bill of Rights. Yet without a strong public school system, we could, in effect, be doing just that.”); Senator John Corzine (D-NJ), 147 Cong. Rec. S6085 (daily ed. June 12, 2001) (“I believe this amendment is misguided because it would undermine the public education system that is the very tie that binds our society. . . . If we adopt this vouchers measure, we would drain limited resources from our public schools and send a signal that we are prepared to erode the historical purpose and position of public education in America.”).

234. Again, the recent Congressional debate provides ample examples of this assumption. Congressman George Miller (D-CA), 147 Cong. Rec. E96 (daily ed. Feb. 1, 2001) (“Let me clear about the differences between our bill and the approach taken by President Bush. Our bill would not divert public funds from public schools to private and religious schools, through vouchers or through any other means.”); Congresswoman Betty McCollum (D-MN), 147 Cong. Rec. H2402 (daily ed. May 7, 2001) (“Vouchers take away scarce resources from our children and provide no accountability for our tax dollars.”); Congressman David Price (D-NC), 147 Cong. Rec. H2408 (daily ed. May 7, 2001) (“We will face an amendment to provide public funding for private school vouchers, which would siphon money away from public education, not strengthen it.”); Congresswoman Loretta Sanchez (D-CA), 147 Cong. Rec. H2409 (daily ed. May 7, 2001) (“This bill also removes provisions diverting funds from public schools, whatever the newest name for them are, including private school choice.”); Delegate Donna Christensen (D-VI), 147 Cong. Rec. 2409 (daily ed. May 7, 2001) (“Mr. Chairman, our public schools are plagued with enough problems already. We don’t need to

progressive school choice program can and should couple vouchers for students with an increase of funding for the inadequate public school. The twisted logic that money not spent on public schools is money drained from public education is just

add to those problems by taking funding away from our schools in the form of vouchers.”); Congressman Lacy Clay (D-MO), 147 Cong. Rec. H2592 (daily ed. May 23, 2001) (“Mr. Chairman, I rise in opposition to the amendment being offered by the gentleman from Texas. At a time when public schools are struggling to rebuild antiquated and crumbling school facilities and deal with a record enrollment of over 52 million students, we should not be considering proposals that divert scarce taxpayer dollars from our public school systems to subsidize private and religious schools.”); Congresswoman Lynn Woolsey (D-CA), 147 Cong. Rec. H2593 (daily ed. May 23, 2001) (“Why is it that voucher supporters go on and on about our poor-performing public schools and do not have a plan to make all schools the best in the world? Instead, they support vouchers that take precious education dollars out of our public school system and give them to private and religious schools.”); Congressman Joe Baca (D-CA), 147 Cong. Rec. H2593 (daily ed. May 23, 2001) (“What it will do, it will simply drain our resources from those schools most in need of help, while providing minimum benefits to students. It will raid the system, bleeding and hemorrhaging, when we should be funding education at the highest level.”); Congressman David Wu (D-OR), 147 Cong. Rec. H 2593 (daily ed. May 23, 2001) (“It is bad policy because this amendment would propose to strip-mine public resources away from public schools and give them to private institutions. I think that is wrong.”); Congressman George Miller (D-CA), 147 Cong. Rec. H2596 (daily ed. May 23, 2001) (“The harm it does is in draining the resources that are necessary.”); Congressman Donald M. Payne (D-NJ), 147 Cong. Rec. H2598 (daily ed. May 23, 2001) (“It is ironic that the sponsors of this legislation are fighting for voucher provisions while the title of the bill is Leave No Child Behind. If we take dollars continually out of the public school system, we are going to leave many, many children behind.”); Congresswoman Sheila Jackson Lee (D-TX), 147 Cong. Rec. H2599(daily ed. May 23, 2001) (“Vouchers divert scarce funds away from public schools—which 90% of all students in this country attend. Siphoning off limited public school funds from low-performing schools leaves the children in those schools with even fewer resources.”); Congressman Gene Green (D-TX), 147 Cong. Rec. H2602 (daily ed. May 23, 2001) (“Vouchers go the opposite way of the intent of this bill. It takes money away from public schools.”); Senator Ted Kennedy (D-MA), 147 Cong. Rec. S6068 (daily ed. June 12, 2001) (“Supporters of this amendment also claim that the \$50 million to fund this program will not come from Title I. If not from Title I, then from where? This investment in vouchers has been portrayed as an investment that would not siphon funds in the federal budget away from education. Where in the world is this magic \$50 million coming from? I don’t know where it is. It is out here. They keep referring to it. I think we ought to take that magical pot with a never-ending fountain, invest it, and try to do something that is going to make a difference; that is, address the problems of failing schools. That is what we ought to be doing. But that is not the proposal here. This \$50 million is, of course, money that could otherwise be spent in terms of helping and assisting schools. Under this amendment, schools in need of assistance would lose.”); Senator Barbara Boxer (D-CA), 147 Cong. Rec. S6073 (daily ed. June 12, 2001) (“That is why I strongly oppose the Gregg amendment. I think any effort in this Chamber to pull money away from our public schools before we know whether they are qualified, before we know that we are giving every child what he or she deserves to have, anything that pulls that money away from the public school system is absolutely wrong on its face.”); Senator Christopher Dodd (D-CT), 147 Cong. Rec. S6084 (daily ed. June 12, 2001) (“Instead, vouchers take scarce resources from public schools that desperately need them.”).

that, twisted. As demonstrated above, the government designates the funds, whether for use in home schools, private schools, or public schools, for the benefit of public education. An effective school-choice reform would not fund vouchers *instead* of public schools, but adds vouchers *in addition to* increasing the funding of inadequate public schools.

The third common misconception about school choice is that the ultimate choice of which school the student will attend rests with the private schools and not with the student because the private institution can refuse admission for virtually any reason.²³⁵ A related argument is that private schools are not accountable in the same way public schools are.²³⁶ Both of these arguments are premised on the assumption that the government cannot regulate private schools. This is not necessarily true.

While critics correctly point out that the most recent voucher manifestation failed to guarantee access to and accountability from private schools, that does not mean that it is impossible to craft legislation that does. The truth is that the government already regulates private schools,²³⁷ and more coercive governmental regulation is justified by compelling governmental and societal interests in providing adequate education for the most at-risk children.²³⁸

To quell the access and accountability fears of school choice opponents, states should require private schools to meet basic educational standards and prohibit private schools from rejecting the few underprivileged students exercising state- or federally-funded choice.²³⁹ However, recent debate perpetuates the false assumption that it is impossible to mandate accountability from, and access to, private schools for the few students who are eligible for government funded choice.²⁴⁰ A recent statement

235. See Moe, *supra* n. 4, at 302.

236. See *id* at 297-300, 341-42.

237. It is quite a stretch for choice critics to suggest that the government has no power to regulate private schools. For example, Maryland requires all schools to obtain a certificate of approval from the State Board of Education. See Md. Educ. Code Ann. § 2-206 (2001).

238. See Moe, *supra* n. 4, at 297-300, 341-42, 355.

239. *Id.*

240. The following statements illustrate the assumption that private schools are not or cannot be regulated by the government: Congressman Tim Roemer (D-IN), 147 Cong. Rec. H2590 (daily ed. May 23, 2001) ("This amendment has no accountability in it. We take the money with the voucher from the public school to a private school, and

then there is no accountability there. No test, no trail, no nothing. As a student, as somebody who went to Catholic schools, I am not sure that we want those Catholic schools having to be accountable to the government for curriculum, for testing, for other things.”); Congressman Earl Blumenauer (D-OR), 147 Cong. Rec. H2592 (daily ed. May 23, 2001) (“There has been a lot of talk on the floor about access; but unlike public schools, which serve all children, private schools are not obligated to accept any student. Students that are the most vulnerable and the more difficult and expensive to educate are left out. . . . In fact, the Department of Education report shows that if required to accept special needs students, 85 percent of the private schools said they would not even participate in a voucher program. It is wrong to divert critical funding from our public schools, especially when all children will not have equal access.”); Congressman Joe Baca (D-CA), 147 Cong. Rec. H2593 (daily ed. May 23, 2001) (“When we talk about accountability, there will be accountability in our public schools. When we talk about accountability in our private schools, there will not be accountability.”); Congressman Earl Blumenauer (D-OR), 147 Cong. Rec. H2603 (daily ed. May 23, 2001) (“Unlike public schools, which serve all children, private schools are not obligated to accept any student. Students who are most vulnerable and are often more difficult and expensive to educate are left out. In fact, a Department of Education report showed that if required to accept special needs students, 85% of private schools said they would not participate in a voucher program.”); Senator Ted Kennedy (D-MA), 147 Cong. Rec. S6068 (daily ed. June 12, 2001) (“They do not have to take your child. And they don’t, more often than not. If your child has a disability, forget about going because they do not have to take your child. IDEA doesn’t apply to this. There is reference in here that IDEA applies. But it doesn’t apply to private schools. If they are disabled, forget about going. If they have a disability, forget about bringing your child in. If you are a homeless or migrant student, you will not be guaranteed services. You have no guarantee. Forget about going to that school. . . . Private schools are not required to have assessments in their programs in the manner that the President has talked about. They are able to be selective about who will attend their schools.”); Senator Patty Murray (D-WA), 147 Cong. Rec. S6070 (daily ed. June 12, 2001) (“In the bill before us, we are insisting on accountability for the use of Federal funds. This voucher program would funnel taxpayer dollars into schools that are not accountable to the public at all. Beyond lack of accountability, let’s remember that private schools don’t even have to meet the same academic standards required for all public schools. Not all private schools are created equal. There are a lot of good ones, but there are some with lower quality and lower standards, and our tax dollars would go to them as well with no accountability.”); Senator Jack Reed (D-RI), 147 Cong. Rec. S6068 (daily ed. June 12, 2001) (“First, giving a voucher to a family for their child does not ensure that child can go to the school the family chooses. Frankly, the nature of private education is they exclude students. They exclude students because they are not smart enough. They exclude students because they just do not fit in with their approach to education. They exclude students because, frankly, they are difficult or have discipline problems. Public education cannot do that. Public education has to be inclusive. Public education has to reach out and embrace every child—those who are difficult and those who are honor students.”); Senator John Kerry (D-MA), 147 Cong. Rec. S6085 (daily ed. June 12, 2001) (“Voucher programs create the potential for discrimination. Awarding a voucher to a family does not guarantee that the student will be accepted into a private school.”); Senator John Corzine (D-NJ), 147 Cong. Rec. S6085 (daily ed. June 12, 2001) (“Contrary to the rhetoric, vouchers would not ensure parental choice, because private schools can and do reject applicants for private reasons—including disability or language skills. In fact, the only real choice vouchers will create is in the hands of the private schools. . . . In addition to vouchers setting up a false choice, vouchers provide no accountability.”); Senator Ted Kennedy (D-MA), 147 Cong. Rec. S6087 (daily ed. June 12, 2001) (“The voucher

on the Senate floor by Senator Patty Murray advanced this false assumption: "While parents may remove children from public schools, *no voucher system* guarantees admission to the school of their choice. Private schools will still choose which students they will admit."²⁴¹ Again, the assumption that state and federal governments cannot and have not regulated the private schools is untrue. Imposing access and accountability requirements on private schools is certainly possible and perhaps necessary for broad choice-based education reform. The imposition seems harsh to private school administrators, but such requirements are justified by the compelling need of the government to educate its most at-risk citizens.²⁴²

The various legal and political hurdles mentioned in the preceding sections make the implementation of any broad, choice-based educational reform very difficult. Choice-centered education reforms will continue to seem impossible as long as the debate in Congress and the states remain beholden to protectionist interests and mired in rhetoric of false assumptions. Policymakers must design a school-choice system that addresses these concerns and debunks the myths held by critics of school choice proposals.

V. PROPOSAL: CONSTRUCTING A FEASIBLE SCHOOL CHOICE SYSTEM

Policymakers need plenty of courage and patience to overcome legal and political resistance to providing equal educational opportunity to each child regardless of his or her racial, economic, or religious background. A proposal for an education system based on school choice must be designed to address the legal issues and political concerns that have traditionally impeded similar reform measures.

issue isn't about the choice of a child. It is the choice for the school. . . .The Senator from New Hampshire is going to modify his amendment to make sure children who have some disability or special needs will be able to be included, and that children can be selected on the basis of lottery. Still, it will be up to the school, but that is certainly an improvement.").

241. Senator Patty Murray (D-WA), 147 Cong. Rec. S6070 (daily ed. June 12, 2001).

242. See Moe, *supra* n. 4, at 297-300, 307-08, 341-42, 355.

A. Overcoming Legal Barriers

1. Religious "Choice" Schools

To be effective, a choice-based education system needs to include religious schools among the choice options. It is possible to do so in without violating the Establishment Clause and state constitutional provisions calling for a separation between church and state.

School-choice systems that seek to develop equal educational opportunities for each child regardless of socio-economic background must include religious schools for several reasons. First, excluding parochial schools from a school-choice program causes difficulties that are unique to minority and urban communities. Viteritti explains the premise of the difficulty in the following way: "Separation of church and state is a white middle class legal and social construct that is out of step with the ethos of the black community and undermines the black community's most significant local institution."²⁴³ Many black leaders emerge from the local clergy and are subsequently denied permission to start charter schools. However, the few clergy members who have been granted permission to open charter schools have demonstrated that there is no foundation to separationists' fears because there is no evidence that clergy members promote religion in school.²⁴⁴

Impoverished members of highly religious minority groups are not only denied equal educational opportunity by school-choice plans that exclude parochial schools, but are denied their constitutionally-protected right to free exercise of religion.²⁴⁵ While middle-class parents are allowed to make value-

243. Viteritti, *supra* n. 18, at 20 (citing Robert Woodson, *The Triumphs of Joseph: How Today's Community Healers Are Reviving Our Streets and Neighborhoods* (Free Press 1998); *Signs of Hope in the City: Ministries of Community Renewal* (Robert D. Carle & Louis A. DeCarlo eds., Judson Press 1997); Samuel G. Freedman, *Upon This Rock: The Miracle of a Black Church* (HarperCollins 1993); C. Eric Lincoln & Lawrence H. Mamiya, *The Black Church in the African-American Experience* (Duke U. Press 1990); Taylor Branch, *Parting the Waters: America in the King Years, 1954-63* (Simon & Schuster 1988); David Garrow, *Bearing the Cross: Martin Luther King and the Southern Christian Leadership Conference* (Morrow 1986); Aldon M. Morris, *The Origins of the Civil Rights Movement: Black Communities Organizing for Change* (Free Press 1984); Hart M. Nelson & Ann K. Nelson, *The Black Church in the Sixties* (U. Press of Ky. 1975)).

244. *Id.* at 206.

245. Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 Catholic L. 25,

based choices on which school their children will attend, less affluent children may be trapped in public schools that promote ideas contrary to their religious beliefs.²⁴⁶ In that way, it is easy to see how the denial of Free Exercise argument is valid.

Another reason why parochial schools should be included in school-choice plans is because they work. A study by sociologist James Coleman found that parochial schools have more effectively reduced the performance gap between students of different socio-economic backgrounds than public schools.²⁴⁷ A study by the Rand Corporation in 1990 of low-income minority students found similar results.²⁴⁸

Finally, allowing parochial schools in choice plans will add more schools for students to choose from, especially in urban areas.²⁴⁹ A large percentage of private schools are linked to religious institutions. Excluding religious schools from a school-choice program will severely limit the options available to parents, especially considering the restrictions in place to the development of charter schools. For a choice plan to be effective there must be numerous options available.

2. Desegregation and School Choice

Many scholars argue that a school-choice or voucher system will disrupt the racial balance found in the public schools and eventually lead to a resegregation of American education. While these critics overlook the current prevalence of de facto segregation in public schools, especially within urban districts

48-56 (2000); Catherine L. Crisham, Note, *The Writing is on the Wall of Separation: Why the Supreme Court Should and Will Uphold Full-Choice School Voucher Programs*, 89 Geo. L.J. 225, 237 (2000).

246. Viteritti, *supra* n. 18, at 120.

247. *Id.* at 81.

248. Jason T. Vail, Comment, *School Vouchers and the Establishment Clause: Is the First Amendment a Barrier to Improving Education for Low Income Children?*, 35 Gonz. L. Rev. 187, 207 (2000) (citing Nina H. Shokraii, *Why Do At-Risk Students Thrive In Catholic Schools?*, USA Today, May 1, 1998, at 62) ("The study found that the Catholic schools, which had student populations of 75-90% African-American and Hispanic, graduated 95% of their students each year, as compared to a just over 50% graduation rate for similar public high schools. Not only do Catholic students graduate at a higher rate than their public school counterparts, they do so having achieved a stronger academic experience. Over two-thirds of graduates from Catholic schools in the study received the New York State Regents diploma, which represents completion of a highly demanding college preparatory curriculum, whereas only five percent of public school graduates received the same diploma.")

249. Viteritti, *supra* n. 18, at 83.

and within schools using “tracking,”²⁵⁰ their argument is quite justified when applied to a worst-case scenario, open, universal school-choice program. However, the resegregation argument clearly fails when confronted with a school-choice system designed to promote equal educational opportunity across socioeconomic classes. These critics apply a shallow analysis of school-choice and consequently fail to see how a properly designed school-choice system can be used similarly to affirmative action programs to promote short- and long-term racial desegregation of schools and American society.

School-choice and affirmative action are fraternal twins born together from the same principles and bearing few differences. Both seek to promote racial equality and rectify the effects of past and present discrimination. A properly designed system of school-choice should only be open to children from historically disadvantaged classes who would otherwise be assigned to an inadequate public school so that they can have the same access to quality education; and as a result, careers; as more affluent, predominantly white children. Affirmative action programs have essentially sought the same goal: to deliver access to quality education and/or employment for members of groups that have suffered the effects of the nation’s history of discrimination.²⁵¹

B. Designing a Progressive School Choice System

It has been asserted throughout this paper that a carefully-designed educational system based on school choice can successfully overcome legal and political barriers to implementation and provide a great tool to ensure that poor and minority students receive a quality education. A progressive school choice system should have the following features:

250. Aldana, *supra* n. 222, at 49 (1998) (citing William Celis III, *Study Finds Rising Concentration of Black and Hispanic Students*, N.Y. Times A1 (Dec. 14, 1993) (“[A] r[e]cently published report of a study of American public education reveals that racial segregation in our schools has reached the highest levels since 1968, the year that the Court decided *Green v. County Sch. Bd.*, 391 U.S. 430 (1968), The Harvard Project on School Desegregation reports that 4.6 million of the nations’ 6.9 million African American and 3.7 million of the 5 million Hispanic public school students attended predominantly minority schools in the 1991-92 academic year.”).

251. See Killenbeck, *supra* n. 220.

1. Targeted Participation

The government should only open the school-choice program to families who 1) demonstrate economic need and 2) whose children are assigned to inadequate public schools. By narrowing the scope of participants in the choice program, the proposal answers those critics who claim that choice will lead to resegregation, will damage public schools with a mass exodus, and will overburden the government fiscally.

2. Maximum Number of Available Options

A system of school choice should allow parents to decide to send their child to any school they wish.²⁵² The school-choice program should include all public schools in any district or any private schools, including parochial schools.

States should provide charter school laws that promote the opening of many charter schools, yet continue to hold them to high academic standards. One possibility for spurring the growth of charter schools would be to offer low-interest loans to those wishing to found a school. This would likely help urban communities who wish to create a new, effective neighborhood school. Allowing for the creation of a large number of charter schools will spur competition for innovation within public schools and provide more options for parents to choose from.

Parochial schools should be included among the options with a requirement that parents be allowed to have their children opt out of religious instruction and prayer. To avoid constitutional issues, public funds for education must first be made available without regard to the institution benefited. Thus, funds should be made available on a basis that neither favors nor disfavors religion and be distributed directly to families who can then make the private, independent decision to apply the government educational grant to a religious school. To take advantage of the benefits of educational competition, a school choice system should allow for the maximum possible options for parents.

252. Of course, considering transportation costs, the school must be within a relatively close distance from the child's home. It is not reasonable to expect the government and taxpayers pay to send a child who lives in Washington, D.C. every day to a school in Denver via private plane.

3. Funding School Choice for Disadvantaged Children While Protecting Existing Public Schools

When the state bestows upon itself the burden of providing free public education, it should do so on an equal basis. The state should not shirk this responsibility. The costs a state pays to educate a public school student should be paid for a school-choice student as well. The state covers more than just the tuition cost of public schooling. The government grant given to impoverished students for school choice should cover all educational expenses for that underprivileged child including tuition, books, transportation, and uniforms. In order for choice to be free and effective, families should not be faced with additional financial burdens resulting from choosing a better education.²⁵³

In providing full educational funding for choice students, the government is faced with an increased financial burden. It is important to note again that a progressive school choice system would only subsidize the choice of a limited number of children: those below a certain family income level who would otherwise attend a known inadequate school. While this does mitigate the financial burden posed by such a system, it does leave a large number of students in the public school system. Therefore, the rate of funding for the public school system should be maintained. Public school systems that adopt school choice should sever any link between actual enrollment figures and individual school funding. Thus, when a child chooses to go to a private school his decision will not adversely affect the district he/she left behind. This funding arrangement should serve as a catalyst for improvement, as the failing school would in fact receive *more* funds to educate *fewer* students. However, this still leaves the government with a significantly increased cost of the new school choice system.

The state has a moral and financial interest in providing an education despite short-term increased costs. The proposed plan limits school-choice system to low-income families with children attending inadequate schools. Financially, the state

253. See *Recess on Vouchers*, The News & Observer (Raleigh, N.C.) A30 (Editorial, June 17, 2001) (Most voucher proposals to date do not provide even the full amount to cover tuition at the average private school. The recent Bush administration proposal of approximately \$1,500 falls short.)

already covers the cost of unemployment, welfare, incarceration, and disability. These costs can be avoided in the future through education. One should also consider that poverty is a multi-generational phenomenon. Children who have received an inadequate public education have grown up to have their own children who, like their parents and grandparents, are trapped in inadequate schools. Breaking this cycle is not only the right thing to do; it is the cheapest thing to do. The long-term, cost-benefit analysis justifies increased investment for impoverished children currently trapped in inadequate schools.

C. A Hypothetical School Choice Budget

To demonstrate the cost of a robust school choice system, consider the following statistics and hypothetical choice program. A properly designed school choice system must pay for all educational expenses typically provided by traditional public schools. Recent estimates show the average private school tuition varies widely, ranging from \$3,000 to \$7,500.²⁵⁴ Therefore, erring on the side of caution, a fully-funded "voucher" for all education expenses allocates up to \$8,000, per student, per school year.

The second part of the cost equation determines how many students will receive the \$8,000 per year grant. Again, a properly drafted school choice system should only benefit children below a certain poverty level and who would otherwise attend an inadequate public school. For this proposed plan, the number of students eligible for reduced price lunch provides the count of impoverished students. The use of Texas, a large state, and Maryland, a medium state, is appropriate for this hypothetical because these states have provided ample data to the National Center for Education Statistics. According to recent data, in Texas, 1,776,756 public school students were eligible for reduced price lunch. In Maryland, 256,441 public school students were eligible for reduced price lunch.²⁵⁵

254. See Andrew Goldstein, *Setback for Vouchers*, Time 142 (Dec. 25, 2000); The Center for Education Reform, *Elementary and Secondary Education Statistics at a Glance*, <<http://www.edreform.com/pubs/edstats.htm>> (accessed July 25, 2001); Dan D. Goldhaber, *School Choice as Education Reform*, Phi Delta Kappan 143 (Oct. 1997); Judy Walton, *Scholarship Foundation Supports School Vouchers*, Chattanooga Times A1 (Nov. 3, 2000).

255. See National Center for Education Statistics, *Overview of Public Elementary and Secondary Schools and Districts: School Year 1998-1999*, NCES 2000-333R (U.S.

The next step in calculating the number of participants is determining how many of the underprivileged students actually attend or would be assigned to attend an inadequate public school under the current school system. Although there is no standard nor mandatory measurement of individual school performance, assume for present purposes 40 percent of these impoverished students attend inadequate schools.²⁵⁶

The final calculation of the cost of this hypothetical school-choice program multiplies the number of eligible students by the maximum allocated grant. To fully fund the education of choice students in such a program would be \$5.7 billion in Texas and \$820 million in Maryland. To put these numbers in perspective, consider that in 1999 the total state and local government education appropriation in Texas was \$23.8 billion and in Maryland \$6.3 billion.²⁵⁷ That amounts to increases of 24 percent in Texas and 13 percent in Maryland. However, if the federal government agrees to increase its commitment to education by providing additional funding to impoverished students in failing schools – assume a dollar for dollar contribution – the state's burden is reduced significantly. In the federal matching funds scenario, Texas state and local governments together would only have to appropriate an additional \$2.85 billion (a twelve percent education budget increase) for a properly drafted school choice program and Maryland \$410 million (a seven and a half percent increase).²⁵⁸ With the commitment by state and federal government, this can be done while continuing to increase the funding to traditional public schools.

D. The Choice Process

The ability to successfully bring together an impoverished child and the effective school of his or her choice depends on

Dept. of Educ. June 2000) (available online at <<http://nces.ed.gov/pubs2000/2000333.pdf>>).

256. While this may seem like a gross overestimation of the number of failing schools, keep in mind that the poorer students disproportionately attend substandard schools. Therefore, the percentage of poor children attending inadequate schools should be higher than the percentage of inadequate schools overall.

257. See *Statistical Abstract of the United States: 2000*, 172 (U.S. Census Bureau, last revised Feb. 14, 2001) (full text available online at <<http://www.census.gov/statab/www/>>).

258. *Id.* at 221, 388 (To further put this school choice budget in perspective consider that Texas spends \$6.485 billion annually on unemployment benefits and prison costs combined annually; while Maryland spends \$1.482 billion.).

quality information and equal access to choice schools. In order for parents to make good decisions regarding the quality of education they wish to provide for their children, they must have access to complete and accurate information about the options available. The government, as part of a school choice system, must establish a mechanism for providing parents with the knowledge to make an informed decision. A separate governmental unit may have to be created to collect, record, and communicate the information about the schools to the families in the choice program.

Since the choice program would only include impoverished families, the information must be communicated in an accessible and understandable method/way.²⁵⁹ Posting the information on a website will not suffice. The information should be disseminated in different languages and via multiple media mediums in order to assure dissemination to the diverse parents found within impoverished communities.

A choice plan should ensure that all families have equal access to the school of their choice. Admission should be granted on a first come-first serve or lottery basis. This feature addresses the 'skimming' concern whereby a private school selects only the students who are academically or athletically successful. This policy is necessary for a school-choice program to achieve its goal of providing an equal educational opportunity.

E. Evaluating a School Choice System

Virtually upon the day of its implementation, a school-choice system will be subject to intense scrutiny by proponents and opponents alike to see whether the program has its intended effect. However short and impatient American society's attention span is, the public must keep in mind that systemic reforms such as school choice are designed to promote long-term change, and consequently, will not produce results overnight.²⁶⁰

Evaluators should consider that the transition period following the implementation of a new educational system based

259. See Aldana, *supra* n. 222, at 43-46 ("The information will need to be available in the various languages and will require that it be explained in lay-terms and in the language of the recipient. The dissemination of this information will also demand intensive outreach efforts in the less traditional channels (i.e. ethnic radio stations, newspapers, community workshops, and churches).").

260. Peterson, *supra* n. 87, at 396.

on school choice may dampen the results in the short term. For example, even school-choice proponents fail to explain that the effectiveness of any reform effort will be diminished significantly by the fact that the current generation of students, especially those from lower socio-economic backgrounds that the choice system is specifically designed to help, have unfortunately been under the auspices of an inadequate educational system for years. Being educated in an inadequate system pollutes a student's ability to accept and perform under a "new" educational method.

This point was illustrated in *Educational Opportunity in an Urban American High School*, in which author Patrick James McQuillan described the reaction of students when a new educational method was attempted by teachers.²⁶¹ McQuillan observed the effort of three teachers implementing a U.S. history curriculum that differed significantly from the students' previous educational experience. He observed that the students actively resisted the new program by drawing collectively on their shared sense of "real school" and a definition of reasonable teacher expectation to justify their rejection of the changes. McQuillan concluded that by resisting changes the students "enacted their informal power so as to implicate themselves in their own educational failure – in terms of the grades they received, the skills they never developed, and how their actions reinforced faculty perceptions of student indifference."²⁶²

Such resistance by students moving into choice schools will initially impede the positive results of any broad school-choice program. This will, in effect, provide heavy ammunition to choice opponents seeking to curb the spread of such a plan to other states.

McQuillan's work brings into question the usefulness of the common methodology that has been used to evaluate previous choice programs.²⁶³ To determine whether school-choice programs successfully provide equal educational opportunity, the studies should be designed to address the question: "Does the choice school successfully give the child from the lower socio-

261. Patrick James McQuillan, *Educational Opportunity in an Urban American High School*, 23-56 (St. Univ. N.Y. Press 1998).

262. *Id.* at 24.

263. See the discussion of the evaluations of the Milwaukee and Cleveland school choice programs *supra* at Part III (B)(4).

economic background a better quality education than the public school they would have been assigned to?" The previous studies fail to answer this question because their methodology did not include a real control group. The choice school students that were used in the comparison frequently entered the choice school with the imprint of an inadequate public education provided at the school they chose to leave. A more accurate study would compare students at a choice school who had never set foot in a regular public school with students at a public school where the choice students would have been assigned. The effectiveness of this proposed school-choice plan needs to be judged on a long-term basis, especially by measuring the performance of the next generation of students who have not been exposed to inadequate public schooling.

Because a school-choice system is likely to take years to show positive effects, it should be supplemented with programs to improve equal educational opportunity in the short-term. Educational policy-makers must address the education needs of the children who are currently confined in failing schools at the same time as they design and implement a system of school choice for future generations. The recent book, *Fixing Urban Schools*, provides one example of a program that can be used to supplement a school choice system in the interim:

Educationally, the short-term issue is almost always one of student reading proficiency. . . School boards and civic leaders can address students' direct reading problems even as they are considering more fundamental structural reforms in the public education system. As participants in the decision-making stimulations used by the Brookings study have suggested, reading scores can be raised on an emergency basis by creating special triage programs for children whose reading scores are near enough to meeting state standards so that a period of accelerated work might put them over the top.²⁶⁴

Such a program could help alleviate the immediate shortcomings provided by the inadequate schools as the public waits for the benefits of a school choice system to materialize.

Finally, the fact that school choice reform is a long-term solution poses a problem because the issue of education is highly entangled with the political process. Elected officials demand swift results as the public, and especially their opponents, want

264. Hill & Celio, *supra* n. 29, at 63-64.

to know: "What have you done for me lately?" The officials who have the courage and the will to implement a school choice system must emphasize that school choice is not a quick fix. While time is a luxury that many individuals cannot afford, its cost is dwarfed by the expense faced by society for perpetuating a system that denies equal educational opportunity to America's underprivileged children. By providing underserved populations with choice and removing restrictions that may limit those choices, the nation will promote racial justice by providing an equal educational opportunity for all.

VI. CONCLUSION

Uncle Sam's conversation with little Johnny under the proposed school choice plan outlined above could look like this. . .

"Every boy and girl needs an education to grow up and have a nice job. So, okay, Johnny, you do not have to go to PS-123. Pryvatt Academy and St. Praivette's School are both excellent private schools in your neighborhood."

"Really?!" Johnny exclaims, "How do you know?"

"From their test scores and evaluation reports. If you like, we have a book, video, and webpage on the schools in multiple languages that your parents can look through to understand which school is the best match for your needs."

"Aren't those schools a lot of money?"

"Yes, but my friends on Capitol Hill will help pay for your education."

Johnny blurts out, "That's great!" After a moment, Johnny thoughtfully asked, "Not everyone from my school can go to Pryvatt or St. Praivette's; what about my friends still going to my old school?"

"We'll make sure they are taken care of also. That school will get the same amount of money, if not more, that it received when you attended from my friends on the Hill. The money that was used to teach you will now help your friends. You will still be neighbors, so you can still play ball together."

Johnny looked at Uncle Sam warily, "This seems too good to be true." Then a smile broke across Johnny's face, "My mommy will be so excited!"

Uncle Sam also smiled but pointed out, "You will still have to work hard because you might not like how things are taught

at your choice school. But, after time your children and you friends' children can choose any school in the neighborhood and get an excellent education.”

In order to realize Johnny's successful education, broad structural reform of the public education system is necessary. An educational program based on the progressive school choice program proposed herein will more equitably distribute quality education with the long-term effect of diminishing our society's lingering racial inequalities.