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Local Autonomy, Educational Equity, and School Choice

Constitutional Criticism of School Reform

James J. Hilton

Many critics of America's public education system hail parental or school choice, a program that allows public school systems to compete against one another and, under some proposals, against private educational institutions, for students and educational funding, as the answer to America's educational crisis. Proponents argue that competition will force public schools to offer students a quality education or close. This article does not evaluate the claims of the parental-choice proposals; rather, it examines the difficulties inherent in funding such a system through traditional school finance mechanisms.

Allowing parents to determine where their children will attend school — which some believe can contribute to the solution of the crisis in U.S. education¹ — undermines local control of a school system. States traditionally pay for public schools through local property taxes.² While detractors criticize the property tax for generating inequities in the distribution of education dollars,³ supporters claim that the benefits of local control over education outweigh its inequities.⁴ A parental-choice program, however, vests control over education not with any particular locality, but with an individual. Without local control, it becomes difficult to justify traditional educational financing.

The rationalization for parental-choice programs also clashes with funding mechanisms established to secure educational equity. The highest courts of several states have deemed traditional financing mechanisms unconstitutional,⁵ holding that the right to educational equity outweighs the benefits of local control.⁶ Under a choice program, competition provides the incentive for school districts to improve. Because this necessarily implies that some school districts will fare better than others, states which recognize a right to educational equity must be concerned with the education at those schools which fare poorly under such a program.

This article examines the parental-choice program as enacted in Massachusetts. It next turns to court decisions citing local control over educational systems as the

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justification for a state's educational funding system and shows that parental choice undermines local control over education. It then examines the right to educational equity found in several state constitutions and the effect a choice program will have on educational equity. Finally, it concludes that legislatures should be wary of enacting school-choice programs without corresponding reform in educational financing.

I. School Choice

The term "school choice" encompasses a broad range of programs, including (1) interdistrict choice programs, which allow a student to attend any school within the student's community,⁷ (2) voucher programs, in which the government provides a student with an educational voucher that the student may redeem at any public or private school at the government's expense,⁸ and (3) specialty schools, where students attend a particular institution in the school district in order to specialize in fine arts, languages, and so forth.⁹ Rather than discuss theoretical reform proposals, I discuss school choice as adopted in Massachusetts. The Massachusetts program differs slightly from each of these, but most closely resembles a voucher program. The commonwealth's program allows any student to attend a public school outside the youngster's own district at the expense of the district in which the student lives.¹⁰ The place where the student resides is termed the "sending" district; the place where the student attends school is termed the "receiving" district. Presently ten states allow this type of choice program,¹¹ including Massachusetts.¹² The legislature enacted the Massachusetts program in the spring of 1991; the first students participated in the program during the 1991-1992 school year.

Massachusetts's school-choice program is rooted in Milton Friedman's *Capitalism and Freedom*,¹³ in which Friedman argues that government-sponsored schools should be allowed to compete with private schools for education dollars. Currently, private and public schools can compete only on a limited basis. Parents who choose to send their children to private school must bear the cost of their child's education in addition to paying taxes that finance the public schools. Friedman proposes a system under which every child would receive a voucher redeemable for an education at any institution the government approves.¹⁴ Schools would compete for students. Parents would choose only the best schools for their children, encouraging schools to provide better education. Parents who wish to provide more education for their children than the voucher buys might supplement it with additional funds.

Members of the Republican Party, especially Ronald Reagan and George Bush, have expounded on the virtues of school choice. When Bush announced his intention to be remembered as the "education president," he made school choice a central focus of his plan.¹⁵

Under the Massachusetts school-choice program, any student may choose to leave his or her home district to attend public school in another district. Although a school district may vote not to accept students under the program, it cannot vote to keep all its students within the district.¹⁶ Once it chooses to participate, a district may decide how many students it will accept, based on available space, but may not discriminate in admissions. This prohibition extends to discrimination based on race, color, religious creed, national origin, sex, age, ancestry, athletic performance, physical handicap, special need or academic performance, or proficiency in the English language.¹⁷

When a child chooses to attend school outside the home district, the sending district becomes responsible for paying tuition to the receiving district.¹⁸ The tuition charge equals the average per pupil expenditure at the receiving district.¹⁹ Because students do not leave high-spending districts to attend classes in low-spending districts,²⁰ the sending school pays more to the receiving district than the receiving district would have spent had the child stayed in the home district. Some of the problems resulting from this financing mechanism are explored further below.²¹

Normally, a school district must provide transportation to all students residing more than two miles from school.²² Students participating in the school choice program are responsible for their own transportation to the receiving district school.²³

II. Local Control as Justification for Educational Funding Systems

That parental choice undercuts local control over the educational system does not mean that such parental choice plans contain flaws. Educators must debate the relative virtues of local control and parental choice. Rather, local control serves as the justification for present educational funding mechanisms. If one removed local control as a justification, one should also reconsider the funding mechanism.

The Supreme Court, in *San Antonio School District v. Rodriguez*,²⁴ explains how local control justifies using local property taxes to finance public education.²⁵ The plaintiffs in *Rodriguez* challenge Texas's educational funding system under the equal protection clause of the Fourteenth Amendment to the federal Constitution. Plaintiffs claimed that funding the school system through a tax on property created disparities between school districts and, consequently, deprived them of an equal education, to which the Constitution entitled them.

The Supreme Court began its analysis by deciding that the Texas financing system would not be subject to strict scrutiny.²⁶ Under a "strict scrutiny" test, the Court invalidates a statute unless a state demonstrates a compelling interest in retaining the statute as written.²⁷ Traditionally, the Court reviews a state's laws strictly when those laws prejudice those "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."²⁸ The Court held that those living in districts without a large property-tax base constituted too "large, diverse, and amorphous" a class to be the object of judicial protection.²⁹

Strictly judicial scrutiny applies not only to laws infringing on certain groups, but also on laws infringing on certain fundamental rights.³⁰ Plaintiffs also contended that education, like voting, travel, and other rights guaranteed in the Constitution, established a fundamental right. Because the Texas system of financing education detracted from their ability to receive a quality education, it should be subject to strict scrutiny. The Court also rejected this argument, holding that although important, education did not rise to the level of a fundamental right under the federal Constitution. Such status remained reserved for those rights expressly protected within the Constitution itself.³¹

Concluding that the Texas school-financing system should not be subjected to strict or heightened scrutiny, the Court then proceeded to analyze the Texas statute under traditional equal protection doctrine, which requires only that the statute be

rationally related to a legitimate state purpose to be valid.³² The Court found that local control of the educational system constituted a valid state purpose and that the Texas funding system related rationally to this purpose. For this reason, the Court found the Texas system of financing constitutional.³³

State courts also endorse local control over education as a legitimate justification for allowing cities and towns to raise revenues at the local level.³⁴ Different courts recognize different aspects of local control as legitimate, including: local control over educational content;³⁵ local control over educational spending;³⁶ and local control over municipal spending priorities.³⁷

Courts acknowledge that students living in different communities possess varying educational needs. The residents of a particular municipality, rather than a state, are better able to shape a school's curricula to its students' needs. Parents living within a community feel strongly about the way their local schools are run and thus ensure that they are well managed. One court stated:

Traditionally, not only in Idaho but throughout most of the states of the Union, the legislature has left the establishment, control and management of the school to the parents and taxpayers in the community which it serves. The local residents organized the school district pursuant to enabling legislation, imposed taxes upon themselves, built their own school house, elected their own trustees and through them managed their own school. It was under these circumstances that the "Little Red School House" became an American conception of freedom in education, and in local control of institutions of local concern. In the American concept, there is no greater right to the supervision of the education of the child than that of the parent. In no other hands could it be safer.

The American people made a wise choice early in their history by not only creating a forty-eight-state system of education, but also by retaining within the community control of the educational program. This tradition of community administration is a firmly accepted and deeply rooted policy.³⁸

Another legitimate reason for local control over education is that cities and towns can, for themselves, decide how to balance educational expenditures against expenditures for other public services. Local control allows individual cities and towns to determine on which services local tax dollars are spent. "Some communities might place heavy emphasis on schools, while others may desire greater police or fire protection, or improved streets or public transportation."³⁹ These communities are allowed to reflect these decisions by determining how much of their tax dollar to spend on education.

Finally, local control of education also allows a municipality to determine at what level it chooses to tax its residents. Similar to choosing which public services a municipality values most highly, local control of education and other services allows a municipality to decide whether it values public services enough to tax its residents. Locals may decide that money is better left in individual hands, with minimal spending on services. The New York Court of Appeals states:

Throughout the State, voters, by their action on school budgets, exercise a substantial control over the educational opportunities made available in their districts; to the extent that an authorized budget requires expenditures in excess of State aid, which will be funded by local taxes, there is a direct correlation between the system of local school financing and implementation of the desires of the taxpayer.⁴⁰

States justify the use of educational funding mechanisms that create disparities in local districts as a means of providing local control over local schools. Many courts have upheld these funding systems, declaring them rationally related to legitimate legislative ends.⁴¹ The school-choice program, however, undercuts the locality's control over educational content, over educational spending, and over its tax dollars. If the rationale behind allowing a school finance system that generates education resides in local control over education, one cannot simultaneously rationalize a school-choice program which forces municipalities to surrender funds to neighboring school districts.

Under the Massachusetts school-choice program, school districts may vote to accept students into its schools. The right to leave a local school district to attend another school, however, does not depend on the school district, but belongs to "every child in the Commonwealth."⁴² A locality may not vote to keep all its students within its schools. Although it may choose not to participate in the school-choice program by admitting students, a school district may participate to the extent that it must allow its students to attend classes in other districts.⁴³

The philosophy behind this program directly contradicts each of the versions of local control outlined above. First, localities lose control over the content of a student's education. While local control of a school system allows a municipality to determine the content of a student's education, the municipality loses this ability as soon as a student leaves its school district. Once a child chooses to attend another school district, that district's school committee takes charge of the curriculum, graduation requirements, and so on.⁴⁴ Although parents gain control over the content of their child's education, in that they determine where their child will attend school, parental control over education does not justify a system of local financing of education.

Second, localities lose control over the cost of a child's education. Because of the structure of the Massachusetts school-choice program, a sending district must pay the receiving district the cost of educating the student in the receiving school.⁴⁵ Because students do not leave high-spending schools to attend lower-spending schools,⁴⁶ this means that the sending school district has to spend more on education than it would otherwise choose to do. This comes at the expense of other public services the locality has chosen to maintain.⁴⁷

Finally, the sending school district, if a significant percentage of its students choose to leave its system, loses control over its taxing decisions. To the extent that the receiving school district's tuition rate exceeds that of the sending school, the sending district is forced to raise its taxes to make up any difference between its level of spending and that of the receiving district.⁴⁸ Of course, the sending school could, and probably will, choose to take these funds from the existing school budget, decreasing the funds available to everyone else. This action has a comparable effect. Rather than choosing to increase taxes to maintain the same level of services, the community has simply chosen to maintain the same tax burden and decrease services. In either case, the taxpayers lose control over the level of services they choose to provide. These taxpayers, then, have no control over the school budget for which they are paying.

One must bear in mind why the issue of local control of education is central to this analysis. The state constitution does not condemn the school-choice program because it constrains local control of education. The state constitution vests the state with responsibility for education.⁴⁹ The state could choose to bring all the local

school districts under its direct control without violating the mandates of the constitution. Local control, rather, figures centrally in justifying the present financing mechanism for education.⁵⁰ The legislative goal of providing local control of education justifies a funding system that generates disparities throughout the state. The school-choice program, however, severely undermines the legislative purpose of local control of education. Under the program, a municipality may lose control of the content of a student's education, of the funding of a student's education, and of its own tax rate.

Because it advocates local control of education, the legislature need not remove itself completely from the educational sphere. Legislative pronouncements on school curriculum, mandatory attendance, the length of the school day and school year, are all valid under a system whose purpose is to provide local control of education.⁵¹ Although these regulations detract from local control, they are of a qualitatively different nature than the school-choice program.

First, legislative regulations are the product of legislative debate. All localities participate, through their representatives, in the state's legislature and have equal opportunity to participate in the formation of these rules. Under the school-choice program, the decision as to how school dollars are spent no longer rests with the sending district, as confined by legislative pronouncements; it becomes the decision of another district, whose actions are completely independent of the sending district.

Second, legislative regulation is a limiting factor on local control of education. School choice fundamentally contradicts the notion of local control of education. Legislative regulation sets boundaries within which a municipality may act as it chooses, providing the level and type of education it deems appropriate. Under school choice, the boundaries are reversed; the choice program mandates that a locality shall have no voice over any aspect of some (or all) of its residents, even though the locality pays for their education.

III. School Choice and Educational Equity

Not only those states which have upheld local funding as a constitutional method of financing education, but also those which have rejected the traditional school-funding system must consider the implications of adopting a choice program. The program works well only if school districts compete against one another for students and funding. Absent any differences among schools, there is no competition. Acknowledging that differences exist, however, may be an admission that because the quality of a student's education depends on where he or she attends school, the system violates a student's rights to educational equity.

State courts have overturned educational funding systems both because the funding system conflicted with the equal protection clause of the state constitution⁵² and because the funding system violated the right to an education guaranteed by the state constitution.⁵³ In *Serrano v. Priest*,⁵⁴ the California Supreme Court found that the state's method of funding education violated the state's equal protection clause. Unlike the Supreme Court decision in *Rodriguez*, the California court found that students living in property-poor school districts constituted a suspect class. Because the financing system burdened this class, the court subjected it to strict scrutiny. For the system to be constitutional, it needed to fulfill a compelling state purpose.

The court found that local control of education did not constitute a compelling state purpose.⁵⁵ As structured, the system actually frustrated the objective of providing individual cities and towns control over their educational systems.⁵⁶ While property-rich districts could afford to provide the quality of education they chose, property-poor districts did not enjoy the same options. Unlike rich districts, poor districts were confined in the amount of money they would raise for education. The funding system, according to the California court, did not allow individual districts to control education.

Other states, rather than finding that students in property-poor districts constituted a suspect class, subjected school-financing laws to strict scrutiny because they infringed upon a fundamental right to education guaranteed by their state's constitution.⁵⁷ When subjected to strict scrutiny, state courts found no compelling state interest in a local school-financing system. The result in such a case, where a court relies on the state's equal protection clause in conjunction with a constitutional education clause to overturn a school financing system, differs from the result in a case where a court overturns a funding system based only on the state's equal protection clause. While a court protects a student's right to an equal education when acting under an equal protection clause alone, a court protects a student's right to a thorough and efficient education only when protecting a fundamental right.

This distinction becomes significant when discussing a school-choice program. For such a program to succeed, schools must compete against one another for students and dollars. Because school funding will follow students from district to district, those schools which attract more students will have more money to spend than those which attract fewer students. While this is the result choice proponents favor, it may violate a student's right to an equal education. In those states which guarantee each student an equal education, this system cannot succeed. By creating a system that works only if schools differ in quality, a legislature acknowledges that some children will not receive as good an education as some others.

Most states, however, do not recognize a student's right to an equal education, but only to a certain base level of education. While moving money from one district to another may vary the quality of education an individual receives at a school, in order to violate a state constitution the degradation in the student's education would have to be so great that it fails to meet the minimal constitutional criteria.

One might respond that although students may be guaranteed a quality education over the course of twelve years in a school system, they are not guaranteed that in any one particular year they will receive an education comparable to that which they might have received had they chosen to attend another school. Because they can change schools if they are dissatisfied with the education they receive, their right to an education is protected. This fits nicely with the economists' view of competition. While in the short run a system may generate inefficiencies, in the long run the market is efficient.

These short-run problems are, however, quite significant. A child is in school only for twelve years. If that child fails to learn how to read in the first grade, he or she will not necessarily be able to learn how in the second. If a student chose a bad school one year, there is no guarantee that his or her next choice will be better than the first. In fact, it is likely that if a child and her or his parents cared little enough about the education to pick a bad school in the first place, together they will either make another bad choice or choose to stay with the bad school.

While in either case a legislature must consider the impact of adopting a school-choice program in the educational financing system, the chances of creating an unconstitutional system are far greater where a constitution guarantees educational equality than where it simply guarantees a base level of education. These problems will not resolve themselves through "competition," as school-choice advocates hope. The education market differs from the "free" market in many ways.

Milton Friedman developed the "market rationale" behind the school-choice movement early in the 1960s.⁵⁸ The school-choice program, advocates contend, will foster competition between school districts. Schools unable to attract students will not receive public funds, which will force them to improve their programs. As they improve, they will attract more students.⁵⁹

Advocates contend that schools with inferior educational programs will lose students to schools with superior educational programs. This means that schools which begin with less money will lose money to schools which began in a relatively stronger position. Although this will generate incentive for the weaker schools to improve their programs, they will be left without the means to accomplish their end.

Poorer schools will attempt to enrich their educational programs at the same time as they are losing funds to their competitors. Faced with a similar situation, a business might choose one of several options. It might decide to invest new capital and radically alter the way in which it does business. With new capital or a new marketing plan, the business, better able to compete, will win back customers and stay in the market. A public school, of course, cannot do this. Municipalities cannot borrow funds to pay short-term expenses.⁶⁰

Simply amending the law to allow municipalities to borrow funds will not solve this problem. A private company that attempts a comeback — and fails — is responsible for its debts. The consumer loses nothing. This is not true of a city or town. If a school district borrows funds to improve its educational program and is still unable to attract students, it cannot simply go bankrupt.⁶¹ The town is still responsible for the debt of the school district.

School districts face another problem that businesses in the free market will never encounter. If a businessman produces a mediocre article at low cost and a competitor produces a better version at a higher cost, the first businessman never has to pay for the customer's purchase from the competitor. Although the businessman may lose customers' trade, he is not required to ensure that customers acquire the competitor's product. But that is exactly what sending school districts must do. If a student chooses to leave a school district, that district must pay for that student to attend a school elsewhere. Unlike most goods sold on the market, the consumer in this situation has a protected right to receive quality merchandise, and the government has the responsibility to ensure that the consumer receives this "merchandise."

Once it begins to lose students, a school starts down the slippery slope toward extinction. It will lose funds. Its programs will suffer and it will lose more students, leading to a larger loss of funds. One would expect the cycle to end with all the students leaving. But this will not happen. Some children will continue to attend their community schools, no matter how bad they become. This might be because they cannot afford transportation to a neighboring school district, because neither they nor their parents care enough about their education to leave their school district for another, or simply because the local school is convenient. These are the students who will suffer under the choice program.

Proponents argue that the effects on poorer school districts will not be this drastic. Although schools are losing money, they are also losing students. The district is left with unchanged average expenditures.

There are several problems with this argument. The first, which concerns the structure of the Massachusetts program, could be solved. Sending school districts are forced to pay receiving school districts the latter's average per pupil cost. This means that sending districts will usually lose more than their average per pupil cost when a student leaves its school. Therefore the average per pupil cost for the remaining students will decrease.

Much more difficult to correct, however, are the effects of marginal cost. When a receiving school adds one pupil to its enrollment lists, its costs do not increase by the per pupil average cost. The receiving school already has a building, a school superintendent, a school principal, and may even have, if few enough students enroll through the choice program, sufficient teachers to educate more students. When a student leaves a sending school, however, it does not save the per pupil average cost of educating that student. It must continue to employ a superintendent, heat the building, and so on. If enough students leave, it may be able to reduce its teaching costs.⁶²

This means that schools which receive students under the choice program can use the extra tuition funds to expand offerings to all their students. Such offerings make a school even more appealing, allowing it to attract more students. The sending school, however, will be forced to eliminate programs for all its students, making it less attractive for those who remain. One school superintendent noted that the money his school sent to another school district under the choice program was used to fund foreign language classes and a lacrosse team; at the same time, his school was forced to eliminate its foreign language classes.⁶³

While legislatures search for ways to improve the quality of education students receive, they must bear in mind the constitutional implications of their actions. While a school-choice program may provide one method of heightening educational quality, through competition for students and educational dollars, such a program, unless accompanied by a corresponding reform in traditional methods of school funding, may run counter to existing constitutional decisions.

Applying free market rationale to distribute scarce resources can be quite efficient. Competition between businesses ensures that prices remain at a tolerable level and that the market provides quality goods. Education, however, should not be considered a scarce resource. State constitutions guarantee each child a basic level of education and vest the responsibility for providing this education in state legislatures. The legislatures must not abandon their responsibility to the whim of the market. ❁

This article was written prior to the passage of the Massachusetts Education Reform Act of 1993. However, nothing in the act invalidates or contradicts the author's argument.

In March 1994, in the nation's most dramatic shift in a century in the way public schools are financed, Michigan voters approved a plan to use sales and other taxes, not property taxes, to pay for its 3,286 schools.

All told, twenty-eight states are in state courts over the way they finance public education. In most cases, civil rights groups and coalitions of parents have alleged

that state aid to supplement property taxes does not close the gap between rich schools and poor ones.

In the case of Michigan, the consequences of its initiative on educational standards and performance will take some time to be evaluated. Meantime, the debate goes on.

— P.O'M.

Notes

1. See, for example, G. Carl Ball et al., "In Search of Educational Excellence: Business Leaders Discuss School Choice and Accountability," *Heritage Foundation Policy Review*, Fall 1990, 54; "Better Schools: The Presidents Choice," *New York Times*, August 27, 1992, A-22; Robert J. Vickers, "Program Will Help Poor Kids Go to Choice of Private Schools," *Atlanta Journal and Constitution*, August 10, 1992, 1; Thomas Toch et al., "The Exodus," *U.S. News and World Report*, December 9, 1991, 66.
2. See note, "Unfulfilled Promises: School Finance Remedies and State Courts," 104 *Harvard Law Review* (1991): 1072, 1073–1075; see also *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17 (1973).
3. See note, "Unfulfilled Promises"; see also *San Antonio School District v. Rodriguez*.
4. See Section 2 for a discussion of local control as a justification for local educational funding.
5. See Section 3 for a discussion of state cases overturning local systems of education finance.
6. *Ibid.*
7. For a description of current Massachusetts intradistrict choice programs, see Abigail Thernstrom, *School Choice in Massachusetts*, 1991, 19–36.
8. *Ibid.*, 94–112.
9. Charles Glenn, *School Choice: Doing It Right*, 1991, 8–10 (my file).
10. See 1991 Mass. Acts ch. 138 S 304. Although Mass. Gen. L. ch. 76 S 12B states that the commonwealth will pay the tuition of students choosing to leave their home districts, the state reduces a community's local aid by an amount equal to the amount of tuition it pays for the home district's students attending school in other communities.
11. Thernstrom, *School Choice*, 64.
12. Mass. Gen. L. ch. 76 S 12B.
13. See Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), especially Chapter 6, "Government and Education."
14. Friedman does not take his free-market argument to its logical conclusion, however. Children are not allowed to redeem their vouchers for cash.
15. See "Bush Backs Latitude in Choosing Schools," *Boston Globe*, January 11, 1989, 33.
16. Mass. Gen. L. ch. 76 S 12B.
17. This may allow receiving districts to discriminate based on past disciplinary records. See Thernstrom, *School Choice*, 84.
18. See note 10.
19. Massachusetts has recently enacted legislation that will allow cities and towns to apply to receive up to 50 percent of the funds lost because of the school-choice program during 1991–1992. See 1991 Mass. Acts ch. 493 S 2 item 7066-1010.

20. In total, 834 students chose to participate in the first year of the school-choice program. While only 28 of the commonwealth's 361 school districts will get tuition as receiving schools, 108 districts will lose tuition money as sending schools. While most districts hosted fewer than 40 students, 9 school districts will receive 81 percent of the total \$4.3 million paid in tuition under the program. Seven municipalities of the 108 sending school districts will pay 51 percent of the tuition under the program. The two biggest shifts are from the city of Brockton to the town of Avon and from the city of Gloucester to the town of Manchester.
- Avon will receive almost \$1 million in tuition from Brockton. The current per pupil expenditure for high school students in Avon is \$10,139. In Brockton, the figure is \$4,780. Manchester will receive \$400,196 in tuition from Gloucester. The current per pupil expenditure for high school students in Manchester is \$7,777, in Gloucester \$4,416. All figures come from the memorandum from William Crowley and Thomas Collins, Massachusetts Department of Education, to Rhoda Schneider, Acting Commissioner of Education, November 19, 1991 (my file).
21. See Section 3.
22. Mass. Gen. L. ch 71 S 7A.
23. The legislature debated legislation to have the state pay the transportation costs for these students. See Senate Bill 1691, 1991 Session of the Massachusetts General Court.
24. 411 U.S. 1 (1973).
25. *Ibid.*, 44–55.
26. *Ibid.*, 28.
27. *Ibid.*, 17.
28. *Ibid.*, 28.
29. *San Antonio School District v. Rodriguez*.
30. See, for example, *Griswold v. Connecticut*, 381 U.S. 479 (1965).
31. *San Antonio School District v. Rodriguez*, 29–44.
32. *Ibid.*, 40.
33. *Ibid.*
34. See *Thompson v. Enellking*, 96 Idaho 793, 803, 537 p. 2d 635, 645; *Hornback v. Somerset County Board of Education*, 295 Md. 597, 653, 458 A.2d 758, 788 (1983); *Board of Education, Levittown Union Free School District v. Nyquist*, 453 N.Y.S. 2d 643, 651–652; 439 N.E. 2d 359, 367–368; *Board of Education v. Walter*, 390 N.E. 2d 813, 819–820; *Kukor v. School District of the City of Cincinnati*, 58 Ohio St. 2d 368, 390 N.E.2d 813; *Lujan v. Colorado State Board of Education*, 649 P.2d 1005 (Colo. 1982)
35. For court comments stating that determining educational content at the local level is more appropriate than determining educational content at the state level, see *Thompson v. Enellking*, *Hornback v. Somerset County Board of Education*, *Board of Education, Levittown Union Free School District v. Nyquist*; *Board of Education v. Walter*.
36. *Hornback v. Somerset County Board of Education*, 654–655, 458 A.2d 758, 788; *Olsen v. State*, 276 Or. 9, 554 P.2d 139 (1976).
37. *Board of Education, Levittown Union Free School District v. Nyquist*, 453 N.Y.S. 2d 643, 651, 439 N.E. 2d 359, 367.
38. *Thompson v. Enellking*, 645.
39. *Hornback v. Somerset County Board of Education*, 295 Md. 597, 654–655, 458 A.2d, 758, 788.
40. *Board of Education, Levittown Union Free School District v. Nyquist*.
- 41.

For state supreme court cases holding that local control over education provided a sufficient justification for disparate financing, see *Shofstall v. Hollins*, 110 Ariz. 88, 515 O.2d 590 (1973) (en banc); *Lujan v. Colorado State Board of Education* (en banc); *McDaniel v. Thomas*, 248 Ga. 632, 285 S.E.2d 156 (1981); *Thompson v. Enellking*; *Hornback v. Somerset County Board of Education*, A.2d 758; *Board of Education, Levittown Free Union District v. Nyquist*, 57 N.Y.2d 27, 39 N.E.2d 359, 453 N.Y.S.2d 643 (1982); *Board of Education v. Walter* (1979); *Fair School Finance Council, Inc. v. State*, 746 P.2d 1135 (Okla. 1987); *Olsen v. State*, 27 Or. 9, 554 P.2d 139 (1976); *Danson v. Casey*, 484 Pa. 415, 399 A.2d 360 (1979); *Kukor v. Grover*, 148 Wis.2d 469, 436 N.W.2d 568 (1989).

42. Mass. Gen. L. ch. 76 S 12B.
43. For legislation establishing the school-choice program, see Section 23 of Chapter 6 of the Acts of 1991 (codified at Section 12B of Chapter 76 of the General Laws) and Section 304 of Chapter 138 of the Acts of 1991. For an explanation of the system, see memo to School Committee Chairpersons and Superintendents of Schools from Harold Reynolds, Jr., Commissioner, Massachusetts Department of Education, July 22, 1991.
44. For the general powers entrusted to the school committee, see Mass. Gen. L. Ch. 76 s. 1 and Mass. Gen. L. Ch. 43 s. 33.
45. According to St. 1991 Ch. 138 s. 304, the sending district does not actually pay the receiving district from its school budget. Rather, the state deducts any tuition owed the receiving district by the sending district from aid the state would otherwise pay the sending district.
46. See note 20.
47. Of course, the analysis works the other way, too. If a student chooses to attend a school that spends less on education than her or his home district, a community, with more available funds than anticipated, would be able to spend more than it was willing to raise through taxation. This, however, is unlikely to occur.
48. The commissioner of the Department of Education stated, "The law does not address what happens in the event that the total deduction from a sending community's . . . aid exceeds the amount that was originally scheduled to be paid to the community"; see Memorandum from Harold Reynolds, Commissioner of Education to Superintendents of Schools, School Committee Chairs and Other Interested Parties, August 19, 1991, 4 (my file).
49. "Wisdom; and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of the commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns." Mass. Const. Part. 2, Ch. V, SII.
50. See *McDuffy v. Robinson*, Mass. 90-128, Answer, 5 ("If funding for the plaintiff's schools is inadequate, the remedy is through the local appropriation process, and, therefore . . . the state defendants are [not] responsible for the alleged violations."); see also *Shofstall v. Hollins* (en banc); *Lujan v. Colorado State Board of Education* (en banc); *McDaniel v. Thomas*; *Thompson v. Enellking*; *Hornback v. Somerset County Board of Education*; *Board of Education, Levittown Union Free School District v. Nyquist*; *Board of Education v. Walter*; *Fair School Finance Council, Inc. v. State*; *Olsen v. State*; *Danson v. Casey*, 484 Pa. 415, 399 Abate 360 (1979); *Kukor v. Grover*.
51. See *Board of Education v. City of Boston*, 386 Mass. 103, 434 N.E.2d 1224 (holding that the Massachusetts Department of Education has the authority to order a city to spend beyond its budget in order to comply with educational regulations). See also Mass. Gen. L. Ch. 76 s. 1 for a list of subjects the legislature mandates to be taught in public schools.

52. See Section 2.
53. Ibid.
54. 135 Cal. Rptr. 345, 557 P.2d 929 (1977).
55. Ibid., 951.
56. Ibid.
57. See, for example, *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973).
58. Friedman, *Capitalism and Freedom*, 85–98.
59. While this is not the only justification for a choice program, it is the rationale put forth by the Massachusetts legislature and governor. For another justification for school choice, see John E. Coons and Stephen D. Sugarman, *Education by Choice: The Case for Family Control* (Berkeley: University of California Press, 1978); for the reasoning behind the Massachusetts program, see “Joint Panel Is Urged to Halt School Choice Law,” *Boston Globe*, November 13, 1991 (Governor William Weld states that he will not support amendments to the choice program which would remove the incentive for school improvements).
60. Mass. Gen. L. ch. 41 S 7.
61. Although this was commonly thought to be universally true, a city may declare bankruptcy if a state authorizes it to do so. See *In re City of Bridgeport*, 128 Bankr. 688 (U.S. Bankr. Ct. Conn.) (1991). Massachusetts, however, has not allowed cities and towns to declare bankruptcy. The state has instead appointed a receiver for districts experiencing grave financial difficulties, who exercises the authority of the mayor and city council. See St. 1991 ch. 200, through which the state appointed a receiver for the fiscally distressed city of Chelsea.
62. In Massachusetts, however, tenured teachers must be notified by August 15 if they are to receive layoff notices for the upcoming school year, so even this flexibility may not exist.
63. See testimony before the Joint Committee on Education (my file).