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CLEVELAND AND MILWAUKEE'S FREE MARKET SOLUTION FOR THE "PEDANTIC HEAP[S] OF SOPHISTRY AND NONSENSE" THAT PLAGUE PUBLIC EDUCATION: MISTAKES ON TWO LAKES?

An education established and controlled by the State should exist, if it exists at all, as one among many competing experiments, carried on for the purpose of example and stimulus, to keep the others up to a certain standard of excellence... [I]f the country contains a sufficient number of persons qualified to provide education under government auspices, the same persons would be able and willing to give an equally good education on the voluntary principle, under the assurance of remuneration afforded by a law rendering education compulsory, combined with State aid to those unable to defray the expense.²

I. INTRODUCTION

The topic of school vouchers has reemerged³ as a hotly debated issue in our country's federal⁴ and state legislatures⁵ over the past few years. Recent

1. ADAM SMITH, *THE WEALTH OF NATIONS* 733 (Edwin Cannan ed., Random House 1939) (1776); see *infra* note 42 (reviewing and reflecting upon Smith's prophetic vision of the educational paradigm that would develop in a system void of market forces).

2. JOHN STUART MILL, *ON LIBERTY* 98-99 (David Spitz ed., W. W. Norton & Company, Inc. 1975) (1859). This statement sounds so timely one could easily believe it was recently made by Ohio Governor, George Voinovich, or Wisconsin Governor, Tommy Thompson. It was in fact written by John Stuart Mill approximately 140 years ago in his seminal work, *On Liberty*. *Id.* at 109 (discussing the five year period, from 1854-59, in which the manuscript underwent several revisions).

3. See *infra* notes 39-54 and accompanying text (reviewing the origin and the halting development of the school voucher concept).

4. On May 23, 1991, President Bush's America 2000 Excellence in Education Act was introduced to the 102nd Congress. Carol L. Ziegler & Nancy M. Lederman, *School Vouchers: Are Urban Students Surrendering Rights for Choice?*, 19 *FORDHAM URB. L.J.* 813, 815 (1992). It proposed an allocation of \$200 million for fiscal year 1992 to assist state educational voucher programs. *Id.* The Democratically controlled Senate defeated this proposal, and passed an alternative educational reform bill sponsored by Senator Edward Kennedy (D-Mass.) that authorized \$850 million for the existing public education system. *Id.* at 816; see *infra* Section II (contrasting the competing views of educational reforms, and the political alliances comprising their support). In a rare bipartisan move, during the tempestuous and historic 104th Congress, Democratic Senator Joseph Lieberman (Conn.) and Republican Senator Dan Coats (Ind.) proposed an amendment to the District of Columbia Appropriations Act, entitled the Low-Income School Choice Demonstration Act. 142 *Cong. Rec.* S1321-01 (Feb. 27, 1996), available in 1996 WL 81567, at *S1327. It would have earmarked \$30 million dollars for 10 to 20 inner city voucher programs. *Id.* at *S1327. Participants could have used the vouchers to send their children to private religious or non-religious schools. *Id.* The measure was ultimately not approved.

5. The prototype program most frequently touted by voucher advocates is the Milwaukee Parental Choice Program. WIS. STAT. ANN. § 119.23 (West 1991 & Supp. 1996) (amended 1993 and 1995). The plan only permitted non-religious private school participation, when it

changes in the political landscape,⁶ coupled with an objectively measurable decline in the quality and efficiency of public education,⁷ makes the likelihood of a return to meaningful parental choice in education a real possibility for the first time in several generations.⁸ Much has been written about the constitutional and

started in the fall of 1990. Frank R. Kemere, *The Constitutionality of School Vouchers*, 101 Educ. L. Rep. 17, 28 n.47 (West 1995). Although no more than 1.5 percent of the Milwaukee Public School District's total enrollment has ever been eligible to participate in any year, students wishing to escape the public schools have consistently been turned away -- because of the limited number of non-religious private schools. *Id.* To remedy this problem, the Wisconsin legislature expanded the program in July of 1995, creating a number of vouchers that would ultimately to be equal to 15 percent of the district's enrollment, and permitting religious private school participation. George F. Will, *What School Choice Could Do in Milwaukee*, WASH. POST, Sept. 10, 1995, at C7. Curiously, although 95 percent of the students benefited by the program are black or Hispanic, the Milwaukee chapter of the National Association for the Advancement of Colored People [hereinafter "NAACP"] filed an amicus brief, supporting the Wisconsin chapter of the American Civil Liberties Union's [hereinafter "ACLU"] Establishment Clause challenge to the expansion. *Id.* The Wisconsin Supreme Court issued an injunction, halting the program until the constitutional issue was adjudicated. *Id.* In August of 1996 the injunction was lifted on increasing the number of students permitted to participate, but remained on the issue of permitting religious private schools, pending the outcome of the court challenge. *Id.* In January of 1997, both provisions expanding the program were struck down, effective the 1997-98 school year. Tom Heinen & Curtis Lawrence, *Children Left Hanging in School Choice Fight*, MILWAUKEE J. SENTINEL, Jan. 20, 1997, at 3. Between 100 to 150 students who chose to leave the public system were compelled to return to it as a result of this ruling. *Id.* Appeals are ultimately expected to reach the state supreme court. *Id.*; see *infra* notes 139-58 and accompanying text (further discussing the Milwaukee program and the recently enacted Cleveland, Ohio voucher program).

6. Upheavals in the political status quo have contributed to turning Ohio into a fertile testing ground for educational reforms.

For several years, school [voucher] issues have sprouted on the landscape of American education, but interest took off in the last two years with the climb of Republicans to power in Congress and state legislatures.

In Ohio, the GOP took over the Ohio House in the 1994 elections for the first time since 1972. (The state Senate has been dominated by Republicans since 1984.)

In addition to being touted by state legislators elected in 1994, school [voucher] issues were highlighted in the campaigns of seven governors who won election or re-election that year. Their ranks include Ohio's Gov. George Voinovich, who led the charge for the Cleveland voucher program

Paula Schleis & Ron Kirksey, *Education Issues Big Deal in Ohio*, AKRON BEACON J., Sept. 1, 1996, at B1; see *infra* notes 36, 153-58 (reviewing the Akron, Ohio School District's "open enrollment," public school choice program and extensively discussing the Cleveland School District's pilot voucher program).

7. See *infra* notes 16-30 and accompanying text (examining the alarming decline in the quality of public education that has accompanied increased per pupil spending -- in constant dollars).

8. "Wide-spread, state-wide, organized, public education as we know it today has only existed for the past 125 years." Cynthia Bright, *The Establishment Clause and School Vouchers: Private Choice and Proposition 147*, 31 CAL. W. L. REV. 193, 205 n.86 (1995) (citing 2 GEORGE B. TINDALL, AMERICA: A NARRATIVE HISTORY 796-801 (1984)).

policy ramifications of voucher programs.⁹ Today, many -- even bitter opponents of vouchers -- concede the Supreme Court will likely uphold an appropriately drafted plan that allows religious school participation in voucher programs.¹⁰

This Comment summarizes the existing comprehensive analysis of federal and state constitutional challenges to voucher programs. It examines how the groundbreaking Cleveland and Milwaukee plans addressed these critical issues, and makes suggestions for legislators wishing to implement similar plans in their states. The suggestions are intended to: 1) facilitate the passage of such measures; 2) mitigate the most divisive arguments of voucher opponents; 3) allay the fears of the legislators and their constituents; and 4) fortify such plans against probable legal challenges.

Section II of this Comment explores the topic of educational reforms generally, and reviews the origin and development of the school voucher concept.¹¹ Section III synthesizes the voluminous analysis of federal and state constitutional issues and policy arguments such programs invariably face.¹² It suggests a unique method for analyzing inevitable challenges based on state constitution education clauses.¹³ Section IV examines the existing plans in Cleveland and Milwaukee. It identifies several specific provisions lawmakers should incorporate from these when drafting their own programs.¹⁴ Section V proposes the novel idea of creating "Education Enterprise Zones," to expand the opportunities offered by voucher programs, while further insulating them from legal and political assaults.

9. One commentator observed that legislative reluctance to implement bold voucher programs has delayed inevitable court challenges, while providing ample time for law reviews to fill their pages with articles speculating on the outcome of the Establishment Clause challenges. Jonathan B. Cleveland, *School Choice: American Elementary and Secondary Education Enter the "Adapt or Die" Environment of a Competitive Marketplace*, 29 J. MARSHALL L. REV. 75, 136 (1995). Employing "Scalia-esque" cynicism, he further noted like most "constitutional issues, the conclusion on the constitutional question generally coincides with the conclusion on the underlying policy. As such, those favoring (voucher programs) fail to identify an Establishment Clause problem, whereas those who oppose (voucher programs) find that the Constitution provides a convenient backstop to prevent such a plan." *Id.*

10. Bright, *supra* note 8, at 195 ("Unfortunately, the current Supreme Court view of the Establishment Clause seems likely to permit such aid by analyzing a system of school vouchers through rose-tinted glasses that recast state legislation as neutral programs where private individual choice sends aid to religious schools."). "The current Court would find that tuition vouchers ... (1) have a secular legislative purpose, (2) do not have as their principal or primary effect the advancement of religion, and (3) do not foster an excessive entanglement of religion." David Futterman, *School Choice and the Religion Clauses: The Law and Politics of Public Aid to Private Parochial Schools*, 81 GEO. L.J. 711, 725 (1993).

11. See *infra* notes 16-54 and accompanying text.

12. See *infra* notes 55-138 and accompanying text.

13. See *infra* notes 121-38 and accompanying text.

14. See *infra* notes 139-73 and accompanying text.

State tax amnesty provisions, and performance bonuses are suggested to stimulate the creation of new competitive private schools.¹⁵

II. Educational Reform Initiatives

Public education in the United States is in critical condition. Despite massive funding increases over the past four decades,¹⁶ student scores on objective tests have steadily declined.¹⁷ More troubling, American children are falling behind their foreign counterparts in educational testing¹⁸ -- a disturbing harbinger

15. See *infra* notes 174-83 and accompanying text.

16. "Total expenditures on public elementary and secondary education have increased more than 200 percent since 1960." WILLIAM J. BENNETT, *THE INDEX OF LEADING CULTURAL INDICATORS: FACTS AND FIGURES ON THE STATE OF AMERICAN SOCIETY* 90 (1994) (citing statistics compiled by the U.S. Department of Education). Using 1989 dollars, \$67.5 billion was spent on public elementary and secondary education in 1960, compared to \$216.8 billion in 1992. *Id.* This increase occurred despite a decrease in the numbers of students in the system, caused by the aging of the baby boom generation. *Id.* at 87. "The dropout rate has fallen over the last decade. In 1972, the annual event dropout rate was over 6 percent. By 1991, the rate was 4 percent. The decline in the dropout rate over the last decade occurred at each grade level and at each age." *Id.*

17. Results from the Scholastic Assessment Test (formerly known as the Scholastic Aptitude Test) [hereinafter "SAT"], illustrate a disturbing trend. The SAT "is designed to predict success in the freshman year of college, and to track the performance of groups of students who intend to enter college over time." *THE CONDITION OF EDUCATION* 1996, at 86 (National Center for Education Statistics, U.S. Department of Education 1996). The exam appraises student verbal and mathematics abilities, and assigns each a score. See *id.* In 1960, the average student garnered a 477 on the Verbal portion and a 498 on the Mathematical portion, for a Combined score of 975. BENNETT, *supra* note 16, at 84 (recounting statistics gathered by The College Board). By 1995, the average student's scores dropped to a dismal 428 on the Verbal portion and 482 on the Mathematical portion, for a Combined score of 910. *THE CONDITION OF EDUCATION* 1996, at 86. It must be noted, however, that a portion of this decline is unquestionably attributable to the increasing percentage of all students taking the exam. See *id.* (noting that the proportion of students taking the exam fluctuates, and the number has been increasing recently -- particularly among minorities).

18. Comparisons of United States student performance with that of international students in mathematics and science, indicate our educational system performs marginally in these areas.

Recent international assessments of mathematics and science have highlighted the relatively low level of achievement of U.S. students, particularly older students, compared with their peers in other countries.... In a 1990 science assessment that was administered to nationally representative groups of 9-year-olds in 10 different countries, U.S. students scored *lower than Korean students but about the same as students from Taiwan, Canada, Hungary, Spain, and the former Soviet Union*. In a mathematics assessment, U.S. 9-year-olds had averages that were *below 5 of the 9 other countries*.... The U.S. 13-year-olds placed in the middle group of countries with nationally representative science achievement data.... In the mathematics assessment of 13-year-olds, the U.S. students were higher than *only 1 of 14 countries (Jordan) and about the same as Slovenia and Spain*. *The remaining 11 countries all had average test scores that were significantly higher than the U.S.*

...

for our ability to compete in the rapidly developing world economy.¹⁹

Parents are increasingly alarmed by the public school system's inability to provide a safe environment for their children.²⁰ Drug usage and the presence of weapons are commonplace on school grounds.²¹ Measures implemented to combat these problems have recently produced several absurd high profile incidents -- making school officials appear not only impotent, but foolish. Pursuant to a "zero-tolerance" drug policy, two students were expelled for exchanging Midol, an over-the-counter pain-killer, formulated to ease menstrual cramps.²² In separate cases, two children were punished for sexual harassment, despite being so young it is unlikely they could spell what they were accused of, and less likely they understood what it meant.²³

DIGEST OF EDUCATION STATISTICS 1995, at 3 (National Center for Education Statistics, U.S. Department of Education 1995) (emphasis added).

19. "The technical skills of a nation's workers are a crucial component of its economic competitiveness. The youth of today will be tomorrow's workers and will be competing in the global marketplace." THE CONDITION OF EDUCATION 1996, *supra* note 17, at 88.

20. Robert Peterkin, *Choice as a Vehicle for the Revitalisation of America's Inner City Schools*, in FREEING EDUCATION 28 (Fiona Carmie et al. eds. 1996). The Gallop / Phi Delta Kappa Poll of the Public's Attitudes Toward the Public Schools, found that "America's schools were seen as violent, lacking in discipline and fiscal resources, drug-ridden and as having questionable standards and quality of education." *Id.* Teachers are not insulated from the escalating violence. A Washington D.C. teachers union's unscientific poll indicates that 45.2 percent of area teachers reported that they had been the victim of violence in the class. *Mayor Barry, Vouchers and More*, WASH. POST, June 28, 1995, at A20. Nearly 30 percent reported that "threats of violence had kept them or their coworkers home from work." *Id.*

21. "[I]n recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems." *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985); Tim Collie, "Tired of Running," SUN-SENTINEL (Ft. Lauderdale), Jan. 29, 1997, at 1A (a fourteen-year-old boy shot another fourteen-year-old to death outside of their West Palm Beach school, in a dispute over a wristwatch). The North Carolina Department of Public Instruction compiled the following list of violent acts that occurred during the 1995-96 school year in Guilford County Schools: "Possession of a weapon - 147; Assault on school personnel - 75; Possession of a firearm - 14; Assault with serious injury - 11; Sexual assault - 8; Assault with a weapon - 5; Robbery - 2." John Newsom, *School Crime Report Shows Mixed Results*, GREENSBORO NEWS & REC., Dec. 4, 1996, at A1.

22. Fourteen-year-old honor student, Kim Smartt, gave thirteen-year-old honor student, Erica Taylor, a Midol, resulting in both girls' expulsion from school. Mark Fisher, *School Defends Action*, DAYTON DAILY NEWS, Oct. 2, 1996, at 1A; Mark Fisher, *School Expels 8th-Grader Who Gave Classmate Midol*, DAYTON DAILY NEWS, Oct. 4, 1996, at 1A. This absurdity arose pursuant to the school's drug policy, which failed to distinguish between legal and illegal drugs, and automatically suspended students in violation for ten days, followed by a recommendation for subsequent expulsion. *Id.* Drug-kingpin, Smartt, was originally expelled for four and one half months for distribution of the tablet. *Id.* Taylor avoided expulsion by "voluntarily" submitting to a drug screening and education program. *Id.*

23. In Lexington, North Carolina, six-year-old, Johnathan Prevette, was punished for sexually harassing a classmate by kissing her on the cheek. *Kiss and Tell; Alas, What Fools These School Officials Be*, COLUMBUS DISPATCH, Sept. 28, 1996, 8A. By the time the impressionable child was nationally branded a sexual deviant, "school officials denied his discipline was

These incidents have convinced most Americans our educational system should be reformed.²⁴ Unfortunately, the consensus shatters when solutions are posed. Some favor the simplistic, and easily assailable, solution of increased funding²⁵ -- essentially doing more of what has already failed. Others propose allowing minor reforms to occur in the existing public system.²⁶ Growing numbers support competition between private and public schools.²⁷

Average citizens do not fully comprehend the terminology used in the educational reform lexicon, or the policy ramifications it implicates. The terms

because of sexual harassment. It was, uh, something else, something that wouldn't make the dunderheads look like the laughingstock of the nation. But earlier in the day, the principal had been on national television, talking about sexual harassment in the workplace" *Id.* A second, similar incident, occurred just weeks later. Seven-year-old, De'Andre Dearinge, was suspended for sexually harassing a classmate. *2nd School Suspension for a Stolen Kiss is Cut Short*, L.A. TIMES, Oct. 3, 1996, at A14. "The little boy said he kissed the unidentified classmate last week because he liked her, and yanked at her skirt button as an homage to his favorite book, 'Corduroy,' a teddy bear who's missing a button." *Id.* The child's uncle summed up the absurdity of the underlying charge, stating, "He's a 7-year-old who doesn't know what the hell sexuality's about." *Id.*

24. Interpreting the trends presented in a twenty-six year series of polls intended to measure the public's attitudes concerning American education, a heightened "demand for school reform, including greater flexibility in school choice," has been identified. Peterkin, *supra* note 20, at 28. Upwards of 70 percent of those polled express support for some form of greater choice for students. *Id.*

25. See *supra* notes 16-17 (contrasting the massive increases in educational spending with the steady decreases in student standardized testing performance). Professor Eric Hanushek, from the University of Rochester observed:

Since the mid-Sixties there have been around 200 studies looking at the relationship between the inputs to schools, the resources spent on schools, and the performance of students. These studies tell a consistent and rather dramatic story Result 1 is that there is no systematic relationship between expenditures on schools and student performance. Result 2 is that there is no systematic relationship between the major ingredients of instructional expenditures per student -- chiefly teacher education and teacher experience, which informally drive teacher salaries, and class size -- and student performance.

BENNETT, *supra* note 16, at 93 (quoting, Eric Hanushek, "How Business Can Save Education: A State Agenda for Reform," Heritage Foundation Conference, Apr. 24, 1991). The absence of a positive correlation between educational spending and student performance may be gathered from the 1991 National Assessment of Educational Progress testing of eighth-graders' math skills. "North Dakota, ranked 32nd in the nation in terms of per-pupil spending, performed the best while the District of Columbia, which spends the most per student, finished second to last." Justin J. Sayfie, *Education Emancipation for Inner City Students: A New Legal Paradigm for Achieving Equality of Educational Opportunity*, 48 U. MIAMI L. Rev. 913, 934 (1994). "Utah spent less money per student than every other state in the union in 1992, \$2,993, yet ranked 4th and 8th respectively among all states in SAT and NAEP scores." *Id.*

26. See *infra* notes 31-38 and accompanying text (reviewing "Public School Choice").

27. See *infra* notes 39-54 and accompanying text (reviewing "School Vouchers").

“school vouchers” and “school choice” are used interchangeably. Confusion surrounding these similar sounding concepts is understandable, considering the vast quantity of disinformation and rhetoric to which the public has been subjected.²⁸ Nonetheless, this confusion is troubling considering their fundamental differences, and the electorate’s power to cast votes for reform plans,²⁹ and politicians who advocate them.³⁰

28. Recounting the events that inevitably occur when voucher programs are seriously considered in a particular district, thirty-year veteran of voucher implementation battles, Milton Friedman, stated, “The public at first is in favor of it, but then the educational establishment gears itself up. It is able to outspend people who are in favor of choice, and it is able to destroy and beat down the attempt to get a voucher system adopted.” VOICES ON CHOICE: THE EDUCATION REFORM DEBATE 98 (K. L. Billingsley ed., 1994) [hereinafter “VOICES ON CHOICE”]; Charles J. Sykes, *Why Educators Fear School Vouchers*, SAN DIEGO UNION & TRIB., Sept. 12, 1996, at B11 (claiming the “education establishment” distributes “misleading” research to discredit the success of school voucher pilot programs); Editorial, *Choice Politics*, WALL ST. J., Oct. 15, 1993, at A10 (citing the California Teachers Association’s plans to spend roughly 12 million dollars on a television ad campaign to discredit Proposition 174 - a state-wide school voucher initiative); see also *infra* notes 30, 35, 38.

29. One month before Proposition 174 was voted on in California, a private poll conducted for a University of California at Berkeley think tank found that while 56 percent of the voters “supported the concept of vouchers for both public and private school,” only 40 percent supported this proposal, which implemented such measures. *Id.*

30. High levels of public support for voucher programs encourage politicians, who prefer other types of educational reform, to make ambiguous statements that could be construed as support for either. Campaigning in the hotly contested, electorally rich state of Ohio, one week before election day 1996, President Clinton artfully proclaimed that parents should receive “‘school-by-school report cards’ to help them decide where to send their children.” David Goldstein, *Educational Values Split Clinton and Dole: They Agree Schools Need Help, But Differ Greatly On Strategy*, KAN. CITY STAR, Oct. 31, 1996, at A1. “If that sounds like school choice, one of the education hot buttons this year, it is. Clinton favors school choice, but only for public schools. He opposes vouchers.” *Id.* (Emphasis added). This comment was especially ambiguous, because the state implemented its voucher program just two months earlier. See *infra* Section IV (discussing the Cleveland Plan); see *infra* Sections II(A) & (B) (detailing the differences between “public school choice” and “school vouchers”).

A. Public School Choice

Some educational reform initiatives dictate changes that exclusively occur within the existing structure of public education.³¹ “Magnet schools,”³² “charter schools”³³ and “open enrollment”³⁴ are all such reforms. For clarity, this

31. The National Education Association [hereinafter “NEA”] “supports a variety of choice options *within the public school* -- alternative programs such as magnet schools attracting students from throughout a school district, programs for students with special learning needs, and other options within school districts, in particular those developed in tandem with comprehensive school improvement plans.” VOICES ON CHOICE, *supra* note 28, at 81 (quoting the NEA publication, “School Choice: Questions and Answers.”) (emphasis added). Researchers, John Chubb and Terry Moe, argue that making reforms within the confines of the existing educational framework is futile. JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS & AMERICA’S SCHOOLS 216 (1990). They believe such changes are only supported by the education establishment because they retain total control over the educational system -- and the accompanying tax dollars -- and because the public demands action. *Id.*

Even when choice is an important part of the package, the result is not really a choice system at all. It is a more decentralized version of the traditional system of democratic control in which parents and students have more options.

Politics is of course partly responsible for this. A true choice system strikes at the foundations of democratic control, and the established interests have every reason to throw their weight behind a more conventional grab-bag of marginal changes.

Id.

32. Magnet schools are “[p]ublic schools that offer specialized programs, often deliberately designed and located so as to attract students to otherwise unpopular areas or schools.” PETER W. COOKSON, JR., SCHOOL CHOICE: THE STRUGGLE FOR THE SOUL OF AMERICAN EDUCATION 15 (1994). They “are often created to promote racial balance.” *Id.*

Characterized by specific thematic foci, parental choice, heightened teacher expertise and selection, and additional programmatic resources, magnet schools have generated so much interest in their communities that good ones are frequently over-subscribed and school boards are increasingly asked to replicate the most popular themes in other schools in the district. Some themes include math and science, performing arts, gifted and talented and college preparatory. Magnet schools generate great enthusiasm in their cities, with governmental and business organizations often touting them as city assets much in the manner of museums, baseball parks and historical sites.

Peterkin, *supra* note 20, at 26-27.

33. Charter schools function within the public school system, but are organized and operated by entities *other than* the community’s School Board. *Free at Last: Charter Schools*, ECONOMIST, July 2, 1994, at A26. The curricula, teaching methods and school hours are all tailored to fit the specific needs of the area they serve. *Id.* They may be founded by “parents, teachers, public bodies such as museums and universities, or in some cases profit-seeking private enterprises.” *Id.* Because they are classified as public schools, they must: 1) accept everyone who applies; 2) not teach religion; and 3) not charge tuition. *Id.* Unlike traditional public schools, however, they are not subject to the public school bureaucracy, resulting in predictable strong opposition from self-interested teachers’ unions and school boards. *Id.* Recognizing the

Comment will refer to these plans collectively as “public school choice.”

Public school choice generally involves permitting minor reforms to occur in the existing system, introducing limited market competition.³⁵ Students are given the opportunity to choose to attend government-run schools within the same³⁶ or neighboring districts.³⁷ Schools attempt to keep their students, and *their* tax dollars. The opportunity to gain, coupled with the fear of losing money, causes improvement.³⁸

B. School Vouchers

“School voucher” plans, similarly, are founded on the theory that quality will improve if competition is introduced into the education system.³⁹ Students are assigned certificates, redeemable for the cost of tuition at the school of their

inevitable demise of the existing educational structure, and the electorate’s support of voucher programs, these organizations have, nonetheless, begrudgingly begun to support charter schools, seeing they “have an interest in being constructively involved.” *Id.*

34. Open enrollment, in the context of public school choice, refers to a “student assignment policy that permits parents and children to participate in selecting a (public) school” that has been designated as a participant in the program by the state legislature. COOKSON, *supra* note 32, at 14; *see infra* notes 36-37 and accompanying text (examining variations in open enrollment schemes).

35. “[S]ome members of the educational establishment have been trying to co-opt the idea of choice but limiting it to government schools.” VOICES ON CHOICE, *supra* note 28, at 94 (arguing voucher opponents have subscribed to the concept of “public school choice” in a cynical attempt to confuse the public, and blunt the movement for more comprehensive reform); *see infra* note 39 (discussing the concept of the free market in the context of educational reform); *see also supra* note 31.

36. This innovation has been called “intradistrict-choice.” COOKSON, *supra* note 32, at 14. “Depending on the specific plan, the range of choice may include a few to all schools in a district.” *Id.*

37. This variation of choice has been dubbed “interdistrict-choice.” *Id.* at 15. “Tuition funds from the state follow the student, and transportation costs are usually provided. Unlimited interdistrict choice is equivalent to statewide open enrollment.” *Id.*; *see Developments in Akron’s Open Enrollment Policies to Date*, AKRON BEACON J., Aug. 29, 1996, at A6 (discussing the implementation, expansion, and legal clashes Ohio’s largest public school “open enrollment” program has endured in its first five years of existence).

38. Interestingly, by permitting such innovations, the education elite tacitly acknowledges the power of market competition to improve education quality. Such actions make political sense. They appear to be doing something *and* they still get 100 percent of the educational funding pie -- it is just sliced a little differently. Only when competition with private schools is introduced do they dismiss market solutions as simplistic and troublesome. True competition would not only cause the pie to be sliced differently, they would likely get fewer pieces. This is an unacceptable result.

39. The free market theory contends that “goods and services are provided most efficiently and at the highest quality in a market setting, where consumers can compare prices and quality and make informed decisions about how best to allocate the money they have available to spend.” JEFFREY R. HENIG, RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR 57 (1994). “[I]f parents are freed to act as rational education consumers -- able to

choice.⁴⁰ Voucher plans are distinguishable from “public school choice” in that students may attend any participating school - public or private.⁴¹

Vouchers starkly contrast with most Americans inherent conception of the educational paradigm, but they are far from new. Adam Smith introduced them

take their business elsewhere if unsatisfied with the product that their local school provides - schools will be forced to increase the quality of education and the efficiency with which they deliver it, or else risk going out of business.” *Id.*

40. Futterman, *supra* note 10, at 713 (recounting several provisions included in President Bush’s ill-fated “America 2000” educational reform bill); *see supra* note 4; *see infra* note 172 and accompanying text (explaining that in both programs operating today, the voucher provides transportation to the recipient at no cost).

41. Under the prototypical voucher program, parents are “free to redeem the voucher at (their) school of choice, be it public or private, secular or religious.” Futterman, *supra* note 10, at 713.

42. SMITH, *supra* note 1, at 716-40 (generally discussing the problems caused by government support of institutions for the education of youth). Smith’s argument, that propping up the educational system and insulating it from direct competition fosters inferior teaching and the introduction of pseudoscience into the curriculum, rings true today. Public school children are increasingly taught subjects that do not prepare them for the job market. The Los Angeles Times reported that suburban Northridge Middle School had classes in baseball card collecting, jigsaw puzzles, crocheting, playing board games and watching videos. John Johnson, *Hard Lessons: A Year in School Special Report*, L. A. TIMES, Sept. 19, 1993, at 4. One teacher postulated, “The most important job in junior high is not subject matter, but morale.” *Id.* This is precisely what Adam Smith predicted and warned against, when he wrote:

Were there no public institutions for education, no system, no science would be taught for which there was not some demand; or which the circumstances of the times did not render it either necessary, or convenient, or at least fashionable, to learn. A private teacher could never find his account in teaching, either an exploded and antiquated system of a science acknowledged to be useful, or a science universally believed to be a mere useless and pedantic heap of sophistry and nonsense. Such systems, such sciences, can subsist no where, but in those incorporated societies for education whose prosperity and revenue are in a great measure independent of their reputation, and altogether independent of their industry.

SMITH, *supra* note 1, at 733. This 220 year old comment, which undoubtedly would seem like common sense to administrators of private schools, would likely be lost on the Board of the Oakland (California) School District. The Oakland School District recently decided to recognize slang as a second language, and to use it as a tool for teaching Standard English. Natasha Gauthier, *Ebonics Language Controversy Has Familiar Ring*, MONTREAL GAZETTE, Feb. 2, 1997, at D5. They renamed this slang -- formerly known as “jive” -- “ebonics.” *Id.* Critics of the decision claim it was a money grab. *School Officials Face Senate in Debate Over ‘Ebonics’; Some in Congress Want to Cut Aid to Calif. District*, BALTIMORE SUN, Jan. 24, 1997, at 12A. By classifying ebonics a distinct second language, the school district unsuccessfully attempted to obtain extra Federal funding available to schools that have bilingual programs. *Id.* Regardless of the arguments for and against the use of ebonics, and the Oakland School District’s motivations, there is no doubt that such a measure would never be implemented in a private school. A primary objective of elementary and secondary education is teaching children the proper use of the language. Elevating slang -- elements teachers are supposed to eliminate from school children’s vocabulary -- to the stature of a second language, and using it as a legitimate teaching tool, is “a mere useless and pedantic heap of sophistry and nonsense.”

in his 1776 book, *The Wealth of Nations*.⁴² Political icons, Thomas Paine⁴³ and John Stuart Mill,⁴⁴ further considered the concept. Today, Nobel laureate economist, Milton Friedman, convincingly argues educational vouchers may be employed to maximize educational quality,⁴⁵ by breaking up the public school's "monopoly."⁴⁶

School vouchers were discredited shortly after the Supreme Court's decision in *Brown v. Board of Education*.⁴⁷ Segregationists attempted to use them to circumvent the decision and to effectively maintain racial separation.⁴⁸ Contemporary voucher opponents still argue their operation would cause segregation,⁴⁹ although as will be explained, constitutional and political realities render these charges meritless.⁵⁰

SMITH, *supra* note 1, at 733.

43. THOMAS PAINE, *THE RIGHTS OF MAN* (1792) (HERITAGE PRESS 1961).

44. JOHN STUART MILL, *ON LIBERTY* 97-99 (David Spitz ed., W.W. Norton & Company, Inc. 1975) (1859) (assessing the state interest in promoting educated citizenry); *see supra* note 1 and accompanying text.

45. MILTON FRIEDMAN, *CAPITALISM & FREEDOM*, (1965). This book includes Friedman's 1955 article first proposing widespread implementation of voucher programs. VOICES ON CHOICE, *supra* note 28, at 91. Nearly forty years later, in a 1992 conference on educational reform, Friedman compellingly argued for implementation of voucher programs, by contrasting the reputation of the United States system of higher education with its system of elementary and secondary education. *Id.* at 92. He observed that the United States is a "magnet for people from around the world who want to go to colleges and universities," but that we are widely considered substandard in elementary and secondary education. *Id.* This is true, he argued, for "the same reason that the Soviet Union (was) a disaster and the United States is an affluent country. At the higher level (there is) competition. There are government schools but there are also private schools." *Id.* at 92-93.

46. Friedman, and other voucher proponents, argue "public schools have become lazy public monopolies." HENIG, *supra* note 39 at 59. "Public schools are monopolies because most parents are impeded from exercising their option to switch to alternative, private providers by the hefty price tag that tuition represents when added to the continued legal obligation to support public education through their taxes." *Id.*; *see supra* Section II(B) (examining the problems with state constitutional guarantees of educational quality these "market-resistant" entities create when incorporated into a voucher-based system).

47. 347 U.S. 483 (1954) (striking down the doctrine of "separate but equal" in public elementary and secondary schools).

48. "Southern states and school districts had turned to freedom-of-choice and voucher plans as a way to avoid the implications of *Brown v. Board of Education*, forging in many Americans' minds a permanent link between educational choice and racial bigotry." COOKSON, *supra* note 32, at 80.

49. "Critics of school choice fear that school choice policies will increase education inequality" and "school segregation by class and race." Michael Heise, *An Empirical and Constitutional Analysis of Racial Ceilings and Public Schools*, 24 SETON HALL L. REV. 921, 923 (1993) (citing JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (1991)). The Milwaukee branch of the NAACP fought against the expansion of the Milwaukee voucher program on the grounds that it would "foster segregation." Curtis Lawrence, *NAACP vs. Choice: Segregation Issue Causes a Divide*, MILWAUKEE J. SENTINEL, Sept. 8, 1996, at 1; *see also supra* note 5.

50. *See infra* Section III(A)(2).

Ronald Reagan's presidency ushered in an era of government decentralization.⁵¹ This trend became more pronounced following the Republican Congressional victory in 1994.⁵² Americans clamor for decentralization today.⁵³ This sentiment lies at the heart of the voucher movement. Several states are on the verge of implementing voucher programs.⁵⁴ Their legislators must scrutinize the Cleveland and Milwaukee plans, if they hope to draft a plan capable of successfully maneuvering through the legal and constitutional obstacles such programs will inevitably confront.

III. CONSTITUTIONAL CONSIDERATIONS

Voucher plans that allow private school participation are vehemently opposed by groups with a stake in the status quo.⁵⁵ Propagation of disinformation

51. In Ronald Reagan's 1981 State of the Union Address, he boldly proclaimed his "intention to curb the size and influence of the federal establishment and to demand recognition of the distinction between the powers granted to the federal government and those reserved to the states or to the people." Rob Portman, *Let's Hope the President Means What He Said*, GOV'T PRESS RELEASES Jan. 26, 1996, available in 1996 WL 8640678.

52. Republican candidates for the House of Representatives in 1994, ran on a document called the "Contract With America." Harris W. Fawell, *Promises Made, Promises Kept: Contract With America*, GOV'T PRESS RELEASES Apr. 10, 1995, available in 1995 WL 14248092. This "contract" promised, within 100 days, if a Republican majority was elected, they would bring each item listed in the document to the floor for a debate and vote. *Id.* Several provisions were based on the idea that the size and intrusiveness of the Federal Government should be reduced. *Id.* The Republicans completed their promise on the 93rd day. *Id.* Despite a vitriolic campaign season, largely focused on the "contract," Americans voted for continued Republican control of Congress in 1996. Howard Gleckman et al., *Split Decision*, BUS. WK., Nov. 18, 1996, at 36.

53. If the cynical claim that presidential candidates campaign exclusively on the advice of their pollsters is true, judging by Bill Clinton and Bob Dole's comments, the existence of this sentiment is unassailable fact. Despite pushing for, and narrowly failing to achieve a government take over of the health care industry, Bill Clinton triumphantly proclaimed in his 1996 State of the Union Address, "The era of big government is over." John Kasich, *There He Goes Again ... More Misstatements, Distortions, & Contradictions, From President Bill Clinton*, GOV'T PRESS RELEASES Jan. 24, 1996, available in 1996 WL 5167234. In a Ladies Home Journal interview of Bob and Elizabeth Dole, Senator Dole asserted:

I also believe that we ought to send more power back to the states. I carry a copy of the Tenth Amendment to the Constitution in my pocket. It's been around a couple of hundred years, and it says, in effect, that unless power is given to the federal government, it belongs to the states and to the people. I trust the American people.

On the Campaign Trail, LADIES HOME J., Nov. 1, 1996. Political junkies heard slight variations of these "applause lines" incessantly during the lengthy presidential campaign.

54. See *infra* note 139 (discussing state legislative activity in the area of vouchers).

55. The NEA, which "represents 2.1 million educators nationwide and is the largest and most powerful union in the U.S. today," is a formidable opponent of voucher programs. VOICES ON

and scare tactics⁵⁶ by these organizations make winning referendums more difficult, but not impossible. While policy based challenges are vexing,⁵⁷ voucher programs most formidable obstacles are legal. The federal, and the many state constitutions, pose real, but surmountable, problems for implementation of certain variations of these programs.

CHOICE, *supra* note 28, at 81. "The NEA remains unalterably opposed to any mechanism promoting the kinds of choice -- such as tax credits or tuition vouchers -- that would transfer public funds to private schools." *Id.* at 82 (recounting materials found in the NEA's publication, *School Choice: Questions and Answers*).

The one major obstacle ... is the [teacher's unions]. Not the Teachers.... I have over and over again talked to teachers in public schools who have been all in favor of the voucher system. It's the trade union leaders and the trade union bureaucrats ... and the educational bureaucracy....

Again, it is not because they are bad people. It's because there is one thing you can depend on everybody to do, and that is to put his interests above yours. That's what we are doing, and that's what they are doing. And they are right to be concerned.

If ... voucher initiative[s are] adopted, if we can get a competitive school system going, total cost of schooling will go down drastically, the amount of money available for paying their salaries will go down, but the quality of schooling available to children will go up.

So they are right to be concerned.

Id. at 101 (taken from Milton Friedman's comments at a May 1992 conference on educational choice). "Teacher's unions have always been among the chief opponents of educational vouchers. Voucher schemes potentially harm teachers by subjecting them to the open marketplace, leading to reductions in salaries and benefits." Michael J. Stick, *Educational Vouchers: A Constitutional Analysis*, 28 COLUM. J.L. & SOC. PROBS. 423, 428 (1995).

56. See *supra* notes 28-30 and accompanying text.

57. A paternalistic and arrogant argument frequently asserted by voucher opponents is, parents either don't care, or are unqualified, to make rational decisions concerning their child's education. See *infra* note 169. This argument illustrates the exact type of coerced assistance the Court insulated parents from in the landmark case, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Recognizing a parental right to direct the education of their children, the Court struck down legislation that interfered "with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35. Justice McReynolds, making an assertion custom tailored for this argument, wrote:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Id. at 535 (emphasis added). Regardless of the intentions of this arguments proponents, attempting to prevent implementation of a voucher program based on the belief that parents are too ignorant or calloused to take advantage of it, is paramount to unconstitutionally denying

A. Federal Constitutional Problems

1. Establishment Clause

Voucher plans primary conflict with the United States Constitution is implicated when religious schools are permitted to participate. Opponents claim their inclusion contravenes the Establishment Clause of the First Amendment.⁵⁸ This clause states, “Congress shall make no law respecting an establishment of religion”⁵⁹ The Fourteenth Amendment makes the Establishment Clause applicable to the states.⁶⁰ The existing large number of religious private schools is the impetus underlying voucher proponents support for their inclusion.⁶¹ Increases in the size of the private school market putatively translates to more effective programs.⁶² Some voucher advocates, however, condition their support

them right to direct the education of their children. Another argument espoused by voucher opponents is that the objective of such proposals is to cause the collapse of the public school system, by giving students an opportunity to leave. Noting the blatant hypocrisy and insincerity of the education establishment in making this argument, demonstrated by the fact that over 50 percent of the public school teachers in Milwaukee sent *their* children to private schools, Democratic state representative, Polly Williams, announced she was going to sponsor legislation compelling public school teachers to send their children to public schools, as a condition of employment. VOICES ON CHOICE, *supra* note 28, at 45. Williams chose not to proceed after receiving several death threats. *Id.*

58. Kathleen M. Sullivan, *Parades, Public Squares and Voucher Payments: Problems of Government Neutrality*, 28 CONN. L. REV. 243 (1996) (arguing voucher programs that include religious private schools are contrary to the Establishment Clause). William D. Anderson, *Religious Groups in the Educational Marketplace: Applying the Establishment Clause to School Privatization Programs*, 82 GEO. L.J. 1869 (1994) (discussing Establishment Clause concerns in the context of religious school participation in the school district privatization). Robert E. Horach, *Proposition 174: Private School Aid or a Lesson in Form Over Substance*, 13 GLENDALE L. REV. 46 (1994) (arguing California’s ill-fated voucher program, which allowed religious private school participation, would not have violated the Establishment Clause).

59. U.S. CONST. amend. I.

60. *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947). Justice Black, writing for the Court, stated:

The broad meaning given the [First] Amendment ... has been accepted by this Court in its decisions concerning an individual’s religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the “establishment of religion” clause.

Id.

61. It is estimated that 85 percent of all private school students attend religious schools. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 194 (1993); *see infra* note 145 (noting that approximately 90 percent of private schools are religious based).

62. Insightfully explaining how voucher plans should be framed, so as to achieve the optimal results offered by the free market, one commentator argued;

for religious school inclusion upon the plan's continuing legal viability.⁶³

The Supreme Court decided *Lemon v. Kurtzman*⁶⁴ nearly three decades ago. This case (much maligned, but still controlling) promulgated a three-pronged test for identifying Establishment Clause violations.⁶⁵ All three prongs must be met for a challenged statute to be deemed constitutional.⁶⁶ The statute must: 1) have a secular purpose;⁶⁷ 2) have a principal or primary effect that neither inhibits nor advances religion;⁶⁸ and 3) not foster excessive government entanglement with religion.⁶⁹

Allowing religious school participation in voucher programs is unlikely to be found in violation of the first *Lemon* prong. The Court will typically uphold a statute if *any* secular purpose for it can be given.⁷⁰ Legislative attempts to

For the benefits attributable to a competitive market to materialize, [voucher programs] cannot be diluted by barriers that inhibit competition. [One] critical aspect[] will be a large number of suppliers.... The education establishment has strategically targeted [this] aspect[] to dilute the efficacy of school choice proposals. For example, the argument to exclude religious schools from a voucher plan is really an effort to diminish the supply of competing institutions, thus making school choice exist only in theory and not in practice.

Cleveland, *supra* note 9, at 117.

63. Researchers John Chubb and Terry Moe prefer the inclusion of religious schools, if "their sectarian functions can be kept clearly separate from their educational functions." CHUBB & MOE, *supra* note 31, at 219. Milton and Rose Friedman also argue for the inclusion of religious schools. MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 163-64 (1980). They contend religious schools could sever their religious activities from their secular. *Id.*

64. 403 U.S. 602 (1971) (striking down two statutes providing for state supplementation of the salaries of public teachers who also teach secular subjects in religious schools).

65. The Court has moved away from the *Lemon* test, but have not expressly overruled it. Merely one year after its development, the Court described it as being "no more than [a] helpful signpost[]" in construing the Establishment Clause. *Hunt v. McNair*, 413 U.S. 734, 741 (1973). In *Texas Monthly, Inc. v. Bullock*, the Court declined to use it, and instead asked whether the legislation at issue constituted "an endorsement of one or another set of religious beliefs or of religion generally." 489 U.S. 1, 8 (1989) (emphasis added). "The problem with (and the allure of) *Lemon* has not been that it is rigid, but rather that in many applications it has been utterly meaningless, validating whatever result the Court would desire." *Board of Educ. of Kiryas Joel Sch. Dist. v. Grumet*, 114 S.Ct. 2481, 2515 (1994) (Scalia, J., dissenting). "[T]he slide away from *Lemon*'s unitary approach is well underway. A return to *Lemon*, even if possible, would likely be futile...." *Id.* at 2500 (O'Connor, J., concurring). *But see id.* at 2494-95 (Blackmun, J., concurring) ("I ... note my disagreement with any suggestion that today's decision signals a departure from the principles described in *Lemon v. Kurtzman* I remain convinced of the general validity of the basic principles stated in *Lemon*....").

66. *Lemon*, 403 U.S. at 612-13.

67. *Id.* at 612.

68. *Id.*

69. *Id.* at 613.

70. The Court is reluctant "to attribute unconstitutional motives to the States, par-

improve our failing educational system are certain to be designated a "secular purpose."⁷¹

Meeting the second prong is more difficult. It prescribes an examination of the program's results, requiring their effect to be primarily secular. Constitutional Law scholar, Laurence Tribe, claims "the constitutional requirement of "primary secular effect" has ... become a misnomer; while retaining the earlier label, the Court has transformed it into a *requirement that any non-secular effect be remote, indirect and incidental.*"⁷²

A loose pattern has developed over the last twenty-five years, in cases based on religious schools receiving state aid.⁷³ The constitutionality of voucher

ticularly when a plausible secular purpose for the State's program may be discerned from the face of the statute." *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). "A statute that ostensibly promotes a secular interest often has an incidental or *even a primary effect* of helping or hindering a sectarian belief. Chaos would ensue if every such statute were invalid under the Establishment Clause." *Wallace v. Jaffree*, 472 U.S. 38, 69-70 (1985) (O'Connor, J., concurring in judgment) (emphasis added). "The nonsectarian aims of government and the interests of religious groups often overlap, and this Court has never required that public authorities refrain from implementing reasonable measures to advance legitimate secular goals merely because they would thereby relieve religious groups of costs they would otherwise incur." *Texas Monthly*, 489 U.S. at 10.

71. See *infra* note 158 (Ohio State Solicitor, Jeffery Sutton, compellingly argues one simply needs to look at the abysmal state of the Cleveland School District to ascertain the Ohio Legislature's motives for implementing their voucher program). Reversing a District Court decision that enjoined the city of Pawtucket, Rhode Island from displaying a Christmas display that included a nativity scene in their park, Chief Justice Burger wrote:

The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, *but only when it has concluded there was no question that the statute or activity was motivated wholly by religious consideration.... Even where the benefits to religion were substantial ... we saw a secular purpose and no conflict with the Establishment Clause.*

Lynch v. Donnelly, 465 U.S. 668, 680 (1983) (citations omitted) (emphasis added). In a decision upholding a Louisiana statute that provided secular textbooks to all of the state's students, including those attending private religious schools, Chief Justice Hughes characterized the individual state's interest in education as follows: "Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded." *Cochran v. Board of Educ.*, 281 U.S. 370, 375 (1930). Given the broad discretion states have in fashioning an education system, allowing participation of private religious schools in a voucher program will not prevent it from being characterized as having a secular purpose.

72. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-10, at 1215, (2d ed. 1988). Use of the word, "primarily," on its face, undermines the extreme mantra repeated by advocates of the separation of the church and state, that the Federal Constitution prohibits religion from benefiting in *any* way from the government.

73. *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, (1973); *Mueller v. Allen*, 463 U.S. 388, (1983); *Witters v. Washington Dep't of Services for the Blind*,

programs permitting religious school participation is illuminated by these decisions. Cases involving statutes that confer tax benefits to parents for defraying educational costs, are particularly enlightening.

In *Committee for Public Education v. Nyquist*, a statute granting tax credits⁷⁴ to the parents of children enrolled in private schools, including religious schools, for the purpose of offsetting tuition, was found to violate the Establishment Clause.⁷⁵ The Court reasoned the statute impermissibly aided religious schools, because parents with children in public schools were unable to participate.⁷⁶

A decade later, the Court decided *Mueller v. Allen*.⁷⁷ This case concerned the constitutionality of a statute permitting deductions⁷⁸ for limited educational expenses⁷⁹ incurred by parents with children in public *or* private schools. The statute was upheld,⁸⁰ despite the fact its benefits could be applied to expenses incurred at religious schools.⁸¹

474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 115 S.Ct. 2510 (1995); *see infra* notes 74-96 and accompanying text.

74. "A tax credit is a dollar-for-dollar offset against a tax liability. A credit is quite different from a deduction, since it directly reduces the tax liability itself, whereas a deduction simply reduces the base amount subject to the tax." JAMES W. PRATT & WILLIAM N. KULSLAND, *INDIVIDUAL TAXATION* 1-9 (12th ed. 1994). To illustrate, imagine an individual taxpayer in the 31 percent rate bracket. "An additional \$100 tax deduction would result in a tax reduction to (taxpayer) of \$31 (31% X \$100). If the \$100 qualified as a tax credit, however, (taxpayer) would have a \$100 tax reduction -- the equivalent of a \$323 tax deduction at a marginal tax rate of 31%." *Id.* (second parenthetical in original).

75. *Nyquist*, 413 U.S. at 791. The statute in *Nyquist* provided tuition reimbursements to parents with children who attended private schools *only*. *Id.* at 764. The legislators were not secretive about the goals of the program -- providing exclusive assistance private schools. One section, entitled, "Health and Safety Grants for Nonpublic School Children," was implemented to repair the facilities of the private schools. *Id.* at 762-63. The statute created a complicated formula for reimbursing parents in varying manners, depending upon their income levels. *Id.* at 789-90.

76. *Id.* at 794 ("[W]e hold that neither form of aid is sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools.").

77. 463 U.S. 388 (1983).

78. A deduction is defined as "a reduction in the gross (total) amount which must be included in the taxable base. For instance, when an individual taxpayer incurs expenses such as medical expenses ... he or she generally will be allowed to deduct these expenses to arrive at taxable income for Federal tax purposes." PRATT & KULSLAND, *supra* note 74 at 1-7.

79. MINN. STAT. § 290.09, subd. 22 (1982), provided deductions for the amount a taxpayer had paid a school, "not to exceed \$500 for each dependent in grades K to 6 and \$700 for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school...." *Mueller*, 463 U.S. at 390 n.1.

80. *Id.* at 391.

81. Plaintiff's case was based on the claim that MINN. STAT. § 290.09, subd. 22 (1982) violated the Establishment Clause, because deductions for expenses incurred in religious schools were permitted. *Id.* at 390.

In concluding the statute did not have a principal or primary effect of advancing religion, the Court made several important points.⁸² Extending the statute's benefits to the parents of public school children altered its nature, rendering it distinguishable from the constitutionally infirm statute struck down in *Nyquist*.⁸³ Although parents of private school children primarily benefited from the statute, it was viewed as a partial return of the taxpayer windfall that resulted from not being required to pay for their child's education.⁸⁴

The fact that money did not flow *directly* to the schools was also an important factor in upholding the statute.⁸⁵ Parents who freely chose to enroll their children in private schools received the money.⁸⁶ Justice Rehnquist characterized any benefits bestowed upon religious schools as incidental, arguing that the indi-

82. *Id.* at 396-402. Justice Rehnquist first argued that the statute had a secular primary effect in light of the other deductions permitted under Minnesota law. *Id.* at 396. The statute was "only one among many deductions -- such as those for medical expenses, § 290.09, subd. 10, and charitable contributions, § 290.21, subd. 3 -- available under the Minnesota tax laws. Our decisions consistently have recognized that traditionally '[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes.'" *Id.* (citing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 547 (1983)) (footnote omitted); *see supra* notes 83-87 and accompanying text (discussing the other two reasons the statute was found to have a secular effect).

83. "Most importantly, the deduction is available for educational expenses incurred by *all* parents, including those whose children attend nonsectarian private schools or sectarian private schools.... In this respect ... this case is vitally different from the scheme struck down in *Nyquist*." *Mueller*, 463 U.S. at 397-98.

84. Justice Rehnquist asserted that if parents with children in private schools receive the greatest benefit from the statute, it is the natural result of "the fact that they bear a particularly great financial burden in educating their children.... [W]hatever unequal effect may be attributed to the statutory classification can fairly be regarded as a rough return for the benefits ... provided to the State and all taxpayers by parents sending their children to parochial schools." *Id.* at 402. Approximately 27 billion dollars in taxpayer savings are realized each year, due to the 5.4 million children who attend private schools at their own expense. Richard Daugherty, *Choice Initiatives: Historical Perspectives on the Issue*, 71 EDUC. L. REP. 585, 591 (1992). In a scathing dissent, Justice Marshall mocked the majority's decision to distinguish the statute in *Mueller* from the one in *Nyquist*, claiming "[o]ne might as well say that a tangerine bears less resemblance to an orange than to an apple." *Mueller*, 463 U.S. at 413 (Marshall, J., dissenting). He exhorted that the statute violated "the Establishment Clause for precisely the same reason as the statute in *Nyquist*: it has a direct and immediate effect of advancing religion." *Id.* at 405 (Marshall, J., dissenting).

85. *Id.* at 399. Justice Rehnquist claimed regardless of any benefit conferred upon religious schools, "by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject." *Id.* By directing benefits to the parents, "public funds become available *only as a result of numerous, private choices*" *Id.* (emphasis added).

86. Opponents claimed although the statute was facially neutral, the largest percentage of benefits went to parents with children in religious schools -- 96 percent in the 1978-1979 school year. *Id.* at 400-01. Quickly dismissing this argument, and effectively adopting the position that if aid is routed via private choices, *who* receives the greatest benefit is irrelevant, Justice Rehnquist said, "We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Id.* at 401.

rect path of the aid prevented any “imprimatur of state approval” from being reasonably asserted.⁸⁷

The pattern that has evolved for determining whether the second prong of *Lemon* has been violated is as follows: Where religious schools benefit from state aid *directly* distributed to them, there is a violation;⁸⁸ but where religious schools benefit from state aid *indirectly* distributed to them through private choice, there is no violation.⁸⁹ This pattern was utilized to uphold benefits outside the narrow context of taxation in *Whitters v. Washington Department of Services for the Blind*⁹⁰ and *Zobrest v. Catalina Foothills School District*,⁹¹ bolstering the argument for the constitutionality of voucher programs.

The decision in *Rosenberger v. Rector and Visitors of the University of Virginia*⁹² further strengthens the argument for voucher programs. In this case, the Court upheld a policy permitting religious student organizations to be reimbursed for the costs of printing religious materials.⁹³ Because similar reimbursements

87. *Id.* at 399.

88. *Committee for Public Educ. v. Nyquist*, 413 U.S. 756 (1973). In *Nyquist*, even though the benefits were given to the parent, because *only* private schools -- predominantly religious private schools -- were involved, *and* because parents could only receive it if they supported the school, the program was deemed to directly benefit religion.

89. Recognizing exceptions to, but stressing the importance of the indirect path of benefits, Justice Rehnquist stated in *Mueller* that in all but one of the Court's “recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the state to the schools themselves. The exception, of course, was *Nyquist*, which, as discussed previously is distinguishable from this case on other grounds.” *Mueller*, 463 U.S. at 399; *see supra* note 88.

90. 474 U.S. 481 (1986) (permitting *Whitters* to use state aid for vocational rehabilitation training at a Christian College, where he planned to become a pastor, missionary, or youth director). Justice Marshall stated it would be inappropriate to consider the aid that ultimately made its way to the Bible College “as resulting from a state action sponsoring or subsidizing religion. Nor does the mere circumstance that (*Whitters*) has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion.” *Id.* at 488-89.

91. 509 U.S. 1 (1993) (requiring a school district to provide an interpreter for a deaf student who was attending a religious private school). The Court held that the Individuals with Disabilities Education Act created “a neutral government program dispensing aid not to schools but to individual handicapped children. If a handicapped child chooses to enroll in a sectarian school ... the Establishment Clause does not prevent the school district from furnishing him with a sign-language interpreter there in order to facilitate his education.” *Id.* at 13-14.

92. 115 S.Ct. 2510 (1995).

93. Declaring the policy facially neutral, and not violative of the Establishment Clause, the Court asserted that requiring officials to read materials in order to determine whether there was a religious bias, would be a “denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.” *Id.* at 2524-25.

were available to non-religious groups, *and* were payable to a third party, the program was deemed neutral, and not violative of the Establishment Clause.⁹⁴ Hence, a voucher program permitting students to choose between public schools, non-religious private schools, and religious private schools, should be considered neutral, and within the dictates of the second *Lemon* prong.

The final *Lemon* prong prohibits excessive governmental entanglement in religion. As with the first, it should pose no obstacle to the implementation of a voucher program.⁹⁵ Government oversight of participating private religious schools would not be substantially increased from its current level.⁹⁶

94. Justice Kennedy claimed the Establishment Clause is not violated when a university allows, "on a religion-neutral basis," a wide variety of student groups to use their facilities, and such facilities are in fact used by a religious group for devotional purposes. *Id.* at 2523. He further contended there was no substantive difference between a school permitting such activities and "a school paying a third-party contractor to operate the facility on its behalf," which is what the printers were doing. *Id.* at 2524. "Any benefit to religion is incidental to the government's provision of secular services for secular purposes on a religion-neutral basis." *Id.*

95. Recounting the rationale behind government oversight of private school education quality, Justice White said, "if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function." *Board of Educ. v. Allen*, 392 U.S. 236, 247 (1968). Justice White also stated that since *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) had been decided,

a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instructions.

Allen, 392 U.S. at 245-46 (footnote omitted). Although written five years prior to the decision in *Lemon*, implicit in this discussion is the fact that government oversight of private religious schools, in and of itself, is not violative of the Establishment Clause. The existing voucher plans in Cleveland and Milwaukee require private schools to meet various performance and qualification standards in order to participate. Intrusion is minimal, but failure to meet the standards results in the school losing eligibility. See *infra* notes 140, 154 (WIS. STAT. ANN. §§ 119.23(7)(a), (B) (West 1991 & Supp. 1996); OHIO REV. CODE ANN. §§ 3313.976(A)(3), (B)(Banks-Baldwin 1995 & Supp. 1997)).

96. Aggressively arguing the third prong of *Lemon* would not act as a bar to the constitutionality of voucher programs, one commentator mocked the arguments posited by opponents, claiming they liked to "pretend" the state does not currently have an "involvement with religious schools, and that the voucher will suddenly lead to substantial state oversight. Thus, (a voucher plan) presumably fails *Lemon's* third prong. Yet, states already heavily involve themselves with accreditation, reviewing textbooks, monitoring attendance and scoring state required tests taken by students of religious schools." Cleveland, *supra* note 9, at 138.

2. Equal Protection

Voucher opponents disingenuously argue their operation would violate the Equal Protection Clause,⁹⁷ since private schools may be selective in admitting students.⁹⁸ Legislators may quickly dispose of this argument by requiring participating private schools to adhere to anti-discrimination statutes, simultaneously insulating proposed programs from serious constitutional challenge, while making them more politically palatable.⁹⁹

Voucher opponents frequently make a second, similar racially volatile argument.¹⁰⁰ They claim even if participating private schools do not discriminate openly, they can subtly through “price inflation” -- effectively screening out poor children by raising tuition costs above the voucher amount.¹⁰¹ This fear is

97. U.S. CONST. art. XIV.

98. “There is little proof that private schools and suburban public schools readily accept minority children from the city even when choice is an option.” Philip T.K. Daniel, *A Comprehensive Analysis of Educational Choice: Can the Polemic of Legal Problems be Overcome?*, 43 DEPAUL L. REV. 1, 31 (1993).

99. The Cleveland program prohibits participating schools from discriminating “on the basis of race, religion, or background.” *See infra* note 154 (OHIO REV. CODE ANN. § 3313.976(A)(4) (Banks-Baldwin 1995 & Supp. 1997)). The Milwaukee plan requires private schools to comply with 42 U.S.C. § 2000d. *See infra* note 140 (WIS. STAT. ANN. § 119.23(2)(a)(4) (West 1991)). This section says, “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d (1994); *see also infra* notes 164-65 and accompanying text (admonishing legislators to incorporate similar participation requirements for private schools).

100. On the 100th anniversary of the decision in *Plessy v. Ferguson*, Ohio Senate minority leader, Ben Espy, likened school reform to Jim Crow laws. Ben E. Espy, “*Separate But Equal: Public Funding for Vouchers and Charter Schools Will Create Academic Segregation in Ohio*,” PLAIN DEALER (Cleveland), June 17, 1996, at 9B. Tacitly impugning the motives of legislators supporting such measures, Espy asserted that:

Vouchers and charter schools will segregate students according to academic ability, behavior, parental involvement and a host of other factors, with public schools continually coming up short.

At their best, vouchers and charter schools are a misguided, piecemeal attempt at reform and a distraction from the real task at hand. At their worst, they serve to undermine the very foundations and goals of public education itself.

Id. In what can only be characterized as an irresponsible attempt to stir up racial tensions, Senator Espy claimed “vouchers and charter schools, if allowed to run their course, will lead to the creation of two separate and unequal school systems, to the detriment of our state’s children and its future.” *Id.*

101. One opponent claimed vouchers were “the North’s version of segregation,” and if imple-

not baseless, but it *is* overstated. Public education is currently provided by state government, with tax dollars.¹⁰² Parents may send their children to private schools, but most are financially unwilling or unable.¹⁰³

The following example illustrates the scenario warned of by voucher opponents. If private school tuition is \$2,500 today, parents must come up with that total amount to send their child there. A program providing \$2,500 vouchers would theoretically permit everyone to send their children to the private school at no additional cost. However, "price inflation" dictates that some private schools will raise their tuition to \$3,000 under the program. Consequently, parents would need an extra \$500 for tuition, effectively barring the poor, while permitting middle-class students to attend better schools.¹⁰⁴

Voucher opponents overstate the extent to which this would happen, and underestimate the power of the free market. Parents accustomed to receiving their child's education for "free" are unlikely to start spending substantial amounts of money for it, when they can continue to get it "free."¹⁰⁵ As with any market of goods, the private school market will ensure parents have a wide selection of quality educational institutions from which to choose.¹⁰⁶ Competition will keep prices competitive and quality high. Some stratification is inevitable, but competition and state constitutional guarantees of educational quality¹⁰⁷ will eliminate

mented they would "continue to contain and isolate children by race and economics...." Ellen Debenport, *A Test for School Vouchers*, ST. PETERSBURG TIMES, Oct. 13, 1995, at 1A. Even some voucher advocates are wary of this possibility, arguing that by allowing parents to supplement their vouchers with personal funds threatens "to produce too many disparities and inequalities within the public system, and many citizens would regard them as unfair and burdensome." CHUBB & MOE, *supra* note 31, at 220.

102. See *supra* notes 46, 84 (economist, Milton Friedman, explaining the economics of how the average parent is compelled by financial realities to leave their children in the "free" public school system, and Justice Rehnquist tangentially discusses the economics of "choosing" public education).

103. "[P]arents are not now prevented from sending their children to private schools. Only a highly limited class can or does so" FRIEDMAN, *supra* note 45, at 92.

104. A proponent of this view claimed the "[s]chools that could afford to advertise would get the good kids and others would become dumping grounds -- that's segregation.... If all were equal, vouchers would work. But all is not equal." *School Vouchers Alter the Landscape of Milwaukee*, ST. LOUIS POST-DISPATCH, Nov. 17 1996, at 13C.

105. Under the current system, a parent would have to spend \$2,500 to put their child in the private school, where under a voucher-based system they would only need to spend \$500. Undoubtedly, \$2,500 would be cost prohibitive, where \$500 would not be for some parents, but if "free" quality education exists, a sizable number of parents would continue to take it.

106. Milton Friedman claims that in districts employing vouchers, "a wide variety of schools would spring up to meet the demand." FRIEDMAN, *supra* note 45, at 91.

107. See *infra* Section III(B) (discussing state constitutional guarantees to educational quality).

“flea market-quality” schools many inner-city students are now compelled to attend.¹⁰⁸ Normal function of the free market, coupled with the benefits promised by this Comment’s innovative concept, “Education Enterprise Zones,”¹⁰⁹ will work to maximize educational quality.

B. State Constitutional Problems

Voucher programs are certain to be challenged on the grounds that they fail to deliver the requisite quality of education guaranteed by state constitutions.¹¹⁰ The market element voucher proponents tout as the source of the con-

108. Students already attending prestigious private schools will likely continue to be enrolled in “Armani-quality” schools. Most students will be enrolled in “Lord & Taylor-quality” schools. The wealthy will continue to receive the benefits of wealth, regardless of whether voucher programs are implemented. Accordingly, class envy, and stratification arguments, would be foolish reasons to not implement a voucher-based program.

109. See *infra* notes 174-84 and accompanying text (discussing packages of legislation intended to foster the expansion of quality private school into depressed areas).

110. Except for arguably Mississippi, every state’s constitution has “an ‘education clause’ that assigns to the state the responsibility for establishment of a public school system. A number of these education clauses obligate the state legislatures to provide for ‘a thorough and efficient system’ of public schools, while others use a broad variety of other formulations.” Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 105-06 (1995). The following is a comprehensive list of these clauses. ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; *Cal. Const.* art. IX, § 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. VII, §1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § V, ¶ 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VII, § 1; IOWA CONST. art. IX, 2d, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, Pt. 1, § 1; MD. CONST. art. VII, § 1; MASS. CONST. Pt. 2, C. 5, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. Pt. 2, art. 83; N.J. CONST. art. VIII, § IV, ¶ 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2(1); N.D. CONST. art. VIII, § 2; OHIO CONST. art. VI, § 2; OKLA. CONST. art. 1, § 5; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. II, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2; W.VA. CONST. art. XII, § 1; WIS. CONST. art. 10, § 3; WYO. CONST. art. VII, § 1. The text of the preceding clauses may be found in an appendix to Allen Hubsch, Note, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1343-48 (1992).

A favorite expression referred to by other state courts to emphasize the basic importance of education is found in *Brown v. Board of Education* ... “Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to

cept's ability to improve educational quality, may ironically cause voucher-based school systems to run counter to the state's constitution, when functioning on terms dictated by that constitution.¹¹¹

This potential "catch-22" is easily explained. Voucher programs are based on the free market model.¹¹² That inefficient and ineffective schools will be threatened with failure is axiomatic -- an inevitable result, viewed as the catalyst for producing innovation and increased quality.¹¹³ "Survival of the fittest" is positive in the general marketplace, but in the "education market," public school failure may contravene state constitutions.

Today, when market forces cause the failure of a private school, students are disrupted, but quickly enrolled in another private or public school. Such failures are positive because the average education quality available market-wide is increased, and the immediately effected students end up in superior schools.

cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

Washkie County Sch. Dist. v. Herschler, 606 P.2d 310, 333-34 (Wyo. 1980) (Chief Justice Raper of the Wyoming Supreme Court recalling the oft-quoted words of Chief Justice Warren in *Brown*, to explain the rationale behind Wyoming, and many other states, incorporating a guarantee of educational quality into their state constitution).

111. Note, *The Limits of Choice: School Choice Reform and State Constitutional Guarantees of Educational Quality*, 109 HARV. L. REV. 2002 (1996) (arguing that state constitutional guarantees of educational quality could be the Achilles heel of voucher programs based on the concept of pure free market competition).

112. See *supra* notes 39-46 and accompanying text (generally discussing the origins and market based theory underlying the concept of educational vouchers).

113. Summarizing how the free market would work to eliminate sub-standard schools, one commentator eloquently wrote,

schools that neglected to improve quality would fail in a competitive market, unlike in the present public school monopoly that shelters schools from market discipline and perpetuates the existence of failing schools. More importantly, a market dominated by private providers that are individually rewarded for outstanding performance would create an appropriate incentive system to improve the overall quality of lower-level education in America.

Cleveland, *supra* note 9, at 80.

114. "Every state constitution contains an education clause that generally requires the state legislature to establish some system of free public schools." Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 311 (1991). The United States Supreme Court held that the Federal Constitution does not consider education a fundamental right. *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1972). "Education, of course, is not among the rights afforded explicit protection under our Federal

However, state constitution education clauses,¹¹⁴ combined with the current centralized, monopolistic,¹¹⁵ school systems, work to ensure that public schools cannot fail.

Implementation of a voucher program would decentralize a district's educational paradigm; nonetheless, a public school "safety net" would still be mandated by their state constitution's education clause, effectively prohibiting a pure free market educational system.¹¹⁶ Reformed educational paradigms, resulting from the implementation of voucher programs, will be analogous to the United States economy -- Capitalistic, with a touch of Socialism.¹¹⁷

These "market-resistant" public schools, constitutionally forced into the otherwise free market education system, are voucher program's Achilles heel.

Constitution. Nor do we find any basis for saying it is implicitly so protected." *Id.* One commentator characterized the Federal Constitution as a "laissez faire document," and state constitutions as "communitarian ... even populist." Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 898 (1989). "Most state constitutions are acutely aware that it is the responsibility of the states to deal with education..." *Id.*

115. See *supra* notes 45-46 and accompanying text (economist Milton Friedman argues that government run elementary and secondary education system is a monopoly, causing it to be much less innovative and successful than our market based system of higher education). The current form of public education in the United States is similar to a "de facto monopolist because substantial state subsidies to the public school system allow public schools to predate the emergence of meaningful competition. Thus, students face a sole provider of education and generally cannot attend any school other than the school assigned to them based on their geographic location." Cleveland, *supra* note 9, at 108.

116. "Plan for healthy collaboration between choice, public and private schools, not ... free marketplace uncertainty.... Safety nets must exist for those who cannot get into their schools of choice." Peterkin, *supra* note 20, at 39. In addition to the state education clause rationale, voucher programs implemented on a full scale are likely to include public school participation to protect them from federal and state constitution Establishment Clause challenges. This broadens the class of institutions potentially receiving indirect benefits. See *supra* notes 73-96 and accompanying text (discussing the pattern that has developed for determining what constitutes admissible state aid); see also *infra* note 154 (The Cleveland plan, although limited, permits the vouchers to be used in surrounding public school districts, and private schools within the district. Further, the plan provided for tutorial assistance grants that could be used while remaining in the Cleveland Public School District, should a student choose not to leave. OHIO REV. CODE ANN. §§ 3313.975-976(A), (B) (Banks-Baldwin 1995 & Supp. 1997)). A "safety net" is necessitated by state constitutional guarantees to education to ensure that students who, for any reason, are not enrolled in a private school, receive an education. These contingencies could arise because of student choice, private school closure, student expulsion, or numerous other reasons.

117. The school system in its current form has been characterized as delivering "its product (i.e., education) to the market (i.e., students and parents) under the same principles that the former Soviet Union state enterprises implemented to manufacture and sell products to Soviet Citizens. Like the former Soviet system, consumer choice and competition do not exist..." Cleveland, *supra* note 9, at 80.

Some school failure is inevitable in districts employing vouchers.¹¹⁸ State education clauses will not be implicated when participating private schools fail.¹¹⁹ Conversely, participating public schools, being indestructible, will continue to exist in voucher-based systems, even when they would fail in a pure free market. Accordingly, if one becomes ineffective, it may contravene the state's constitutional guarantee of educational quality.¹²⁰ A vicious circle exists. The state's constitution forces a variable into the system that may cause the system to violate the constitution.

The viability of voucher programs as a tool for school reform, may ultimately be determined by the method of analysis applied in deciding challenges based on state constitution education clauses. Litigation based on these clauses has historically occurred in the context of school financing.¹²¹ Two variables fig-

118. Clarence Page, *Time for a Reality Check for Vouchers*, CHI. TRIB., Mar. 13, 1996, at 15 (reporting that two of the 17 private schools participating in Milwaukee's voucher program have failed, while two others grapple with serious financial difficulties).

119. As is true in the current dominant education paradigm, no violation occurs because the children are either shifted into a public school, or into another state approved school. *See supra* note 116. This Comment contends it is fundamental that every voucher program contain eligibility requirements that private schools must meet and maintain in order to participate. *See infra* notes 166-68. These requirements must be stringent enough to ensure that all schools participating in the program are of sufficient quality to withstand state constitutional challenge on the issue of educational quality. Both programs operating in the United States today, employ such eligibility requirements. *See infra* notes 140, 154 and accompanying text (Wis. Stat. Ann. §§ 119.23 (7)(a), & (b) (West 1991 & Supp. 1996); OHIO REV CODE ANN. § 3313.976 (A)(3), (B) (Banks-Baldwin 1995 & Supp. 1997)). Operation of these provisions dictates that the term "school failure" means not only *actual* inability of the institution to continue operating for financial reasons, but also failure to maintain eligibility requirements for participating in the state voucher program.

120. Note, *supra* note 111, at 2014-15.

121. Challenges of state school systems through the years have been characterized as having come in three "waves." Sayfie, *supra* note 25, at 927. The first wave of challenges were based on the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.* Second wave cases were based on state constitution equal protection and education clauses. *Id.* Challenges made today are classified as third wave cases, and they are based exclusively on state constitution education clauses. *Id.* Third wave cases consist of traditional challenges of finance plans. *Id.* More recently they have been based on the "claim that the state has failed to meet its duty, under the state constitution education provision, to provide a *minimum quality standard of education.*" *Id.* (emphasis added). Twelve states have found their method of financing education in violation of such provisions. *See* *Roosevelt Elementary Sch. Dist. v. Bishop*, 877 P.2d 806, 808 (Ariz. 1994) (plurality opinion); *Dupree v. Alma Sch. Dist.*, 651 S.W.2d 90, 91 (Ark. 1983); *Serrano v. Priest*, 557 P.2d 929, 958 (Cal. 1976), *cert. denied*, 432 U.S. 907 (1977); *Horton v. Meskill*, 376 A.2d 359, 374-75 (Conn. 1977); *Rose v. Council for Better Educ. Inc.*, 790 S.W.2d 186, 214 (Ky. 1989); *McDuffy v. Secretary of the Executive Office of Educ.*, 615 N.E.2d 516, 555 (Mass. 1993); *Helena Elementary Sch. Dist. v. State*, 769 P.2d 684, 690 (Mont. 1989); *Abbott v. Burke*, 643 A.2d 575, 576 (N.J. 1994) (*per curiam*); *Bismark Pub. Sch. Dist. v. State*, 511 N.W.2d 247, 263 (N.D. 1994) (plurality opinion); *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 141 (Tenn. 1993); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989); *Seattle Sch. Dist. v. State*, 585

ure prominently into the analysis employed in these cases: “inputs”¹²² and “outcomes.”¹²³ These variables will likely be important in the analysis of voucher-based school systems as well, however, this Comment contends the unique nature of the issue demands a new pattern of analysis be promulgated.

In challenges based on financing, courts scrutinize the discrepancies between schools in a particular district.¹²⁴ Application of this pattern to challenges of voucher-based systems would result in their being struck down, since natural operation of the free market dictates that some public schools may be sub-standard.¹²⁵ The quality of education provided by these systems can only be accurately determined if the “inputs”¹²⁶ and “outcomes”¹²⁷ are properly measured. This can only be accomplished by treating all of the participating schools in the district’s voucher-based system as a single unit.¹²⁸ Considering results from the participating private schools or the public schools in isolation, or contrasting the two, sacrifices substance for form, ignoring the larger picture.

Considering the dire condition of our current school system,¹²⁹ educators and reform advocate’s primary goal should be increasing the number of success-

P.2d 71, 100 (Wash. 1978); Washakie, 606 P.2d at 334 (Wyo. 1980).

122. Most courts examine the sufficiency of the ‘inputs,’ provided to a school, in addition to the usual consideration of the adequacy of financing, in educational quality challenges of school systems. Note, *supra* note 111, at 2011. ‘Inputs’ includes everything states provide for the schools, making the task of compiling an exclusive list nearly impossible. To illustrate the breadth of this category, see *Alabama Coalition for Equity, Inc., in Opinion of the Justices* No. 338, 624 So. 2d 107, 120-36 (Ala. 1993) (Appendix). A non-exclusive list includes “building and athletic facilities, libraries, class sizes, curricular and extracurricular offerings, special education and guidance programs, educational resources (such as audiovisual equipment and textbooks), and the quantity, salaries, and training of school staff.” Note, *supra* note 111, at 2011.

123. A smaller number of courts have considered “‘outcome’ measurements, such as test scores, public school accreditation rates, and drop-out rates....” *Id.*

124. See, e.g., *Dupree v. Alma Sch. Dist.*, 651 S.W.2d 90 (Ark. 1983).

125. See *supra* notes 110-20 and accompanying text (examining the conundrum created by the interaction between state constitutional education clauses and market forces operating in the educational system).

126. If “inputs” are considered alone, proper drafting of the plan could eliminate the possibility of it being deemed unconstitutional. Provisions could easily be made to maintain the required levels of funding and facilities.

127. One commentator argues that courts might attach the most importance to “outcome” measurements in challenges to voucher programs, since their stated purpose is increasing bottom line educational performance. Note, *supra* note 110 at 2014-15.

128. See *infra* notes 129-138. In the illustration justifying this position, it is argued that in reformed voucher-based school systems, the traditional public schools and the voluntarily participating private schools should be considered a single “state controlled” unit.

129. See *supra* notes 16-23 and accompanying text (chronicling the alarming failure of our public schools to provide adequate education or a safe environment).

ful students. Hence, in analyzing the efficacy of any educational reform, “outcome” measures should be of utmost importance.¹³⁰ Applying this premise to the analysis of voucher-based school systems, the “outcome” measures of all state controlled schools should be considered.

Prior to implementing voucher reforms, the state is only affirmatively responsible for ensuring the quality of public schools. By implementing voucher reforms, the state becomes affirmatively responsible for *both* public schools and participating private schools.¹³¹ Therefore, if in the voucher-based system an individual public school falls to a level of quality that would have been unconstitutional in the prior system,¹³² it will not invalidate the reformed system, if overall student “outcome” measures are higher.¹³³ In fact, this Comment argues invalidating a system in these circumstances would be contrary to state goals of educational quality. To demonstrate this position, see Illustration I and accompanying text.

130. Considering the sheer numbers of students failing to complete high school -- a failure that almost certainly dooms the effected individual to an unsuccessful life -- this Comment contends there is no other factor more important than increasing the actual number of graduates in a district. See *infra* note 134 (reciting the increasingly grim graduation rates for Ohio's three largest cities).

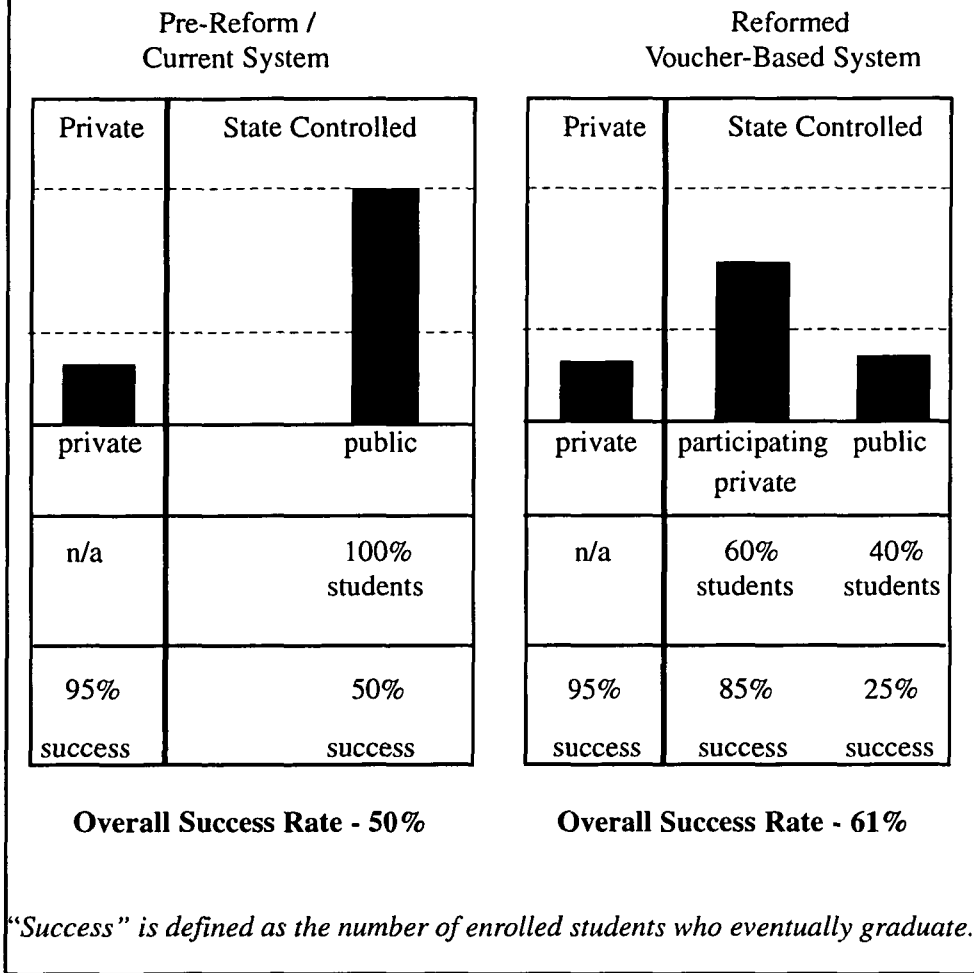
131. In both existing voucher plans, private schools that wish to accept using vouchers, must submit to a battery of eligibility requirements. See *infra* notes 164-68 and accompanying text. Participation in the voucher-based program effectively makes the private schools state actors. This classification, logically, makes the state responsible for their performance. See *infra* notes 140, 154 (WIS. STAT. ANN. § 119.23(7)(b) (West 1991 & Supp. 1996); OHIO REV. CODE ANN. § 3313.976(B) (Bank-Baldwin 1995 & Supp. 1997); giving the state the power to revoke a private school's eligibility to participate in the program for failure to meet and maintain standardized requirements). This is a stepped up measure of oversight, compared to that of non-participating schools. See *supra* notes 95-96 (reviewing oversight responsibilities of private schools by the state, generally).

132. See *supra* note 121 (discussing “third wave” state constitution clause challenges based on a school district's failure to provide a minimum level of educational quality).

133. Note that the issue of participating private schools meeting the objective “outcome” measures in the case of a constitutional challenge should be effectively taken care of by the eligibility requirements for participation in the program. See *supra* note 119.

134. Using a 50 percent “success” rate for current public school performance might initially appear to be an attempt to stack the numbers so the illustration ultimately arrives at a pre-determined, self-serving result. In reality, these hypothetical numbers are quite generous. A disturbing compilation of recent success rates for Ohio's public schools demonstrates the fairness of the illustration's numbers. In Cincinnati, Ohio, the “completion rate declined from 63 percent to 33 percent between 1984 and the 1995-96 academic year.” *School 'Wasteland' in Cities*, AKRON BEACON J., June 22, 1996, at E2. In Columbus, completion rates declined from 66 percent in 1984, to 45 percent in 1996, while during the same time period in Cleveland, completion rates fell from an already dismal 46 percent to 32 percent. *Id.*

ILLUSTRATION I



In the above illustration, under the “Current System,” the state is only responsible for the students enrolled in public schools. An average of 50 percent of these students graduate -- a measure labeled “success.”¹³⁴ In the “Reformed System,” where the state is deemed to control *both* the public schools and the participating private schools,¹³⁵ 60 percent of the students in the “state controlled” program chose to use their vouchers in participating private schools.¹³⁶

135. See *supra* note 131.

136. This Comment proposes that full scale voucher programs, such as the one depicted in this illustration, *must* give students as wide a variety of choices possible. See *supra* note 116 (reviewing federal and state constitutional reasons for drafting a broad voucher statute).

There, 85 percent of these students are deemed "successful." The remaining 40 percent of the students used their vouchers in the public schools, where 25 percent were "successful."¹³⁷

If the court judges the quality of education in our hypothetical district by solely examining the success rate of the public school -- 25 percent -- the program would likely be deemed unconstitutional. This Comment contends the only fair way to accurately gauge educational quality in such a voucher-based system is to consider the "outcomes" of all "state controlled" schools combined. In this illustration, the overall success rate under the voucher-based system would be 61 percent -- a marked improvement over the current 50 percent success rate. That a lesser quality of education may be provided in one or two isolated schools within the entire district, should be outweighed in the constitutional analysis, by the larger overall numbers of students receiving a quality education.¹³⁸

IV. STATE VOUCHER INITIATIVES

Only two voucher programs are currently operating in the United States,

137. The illustration's "Reformed Voucher-Based System" reflects hypothetical numbers from a school district where a voucher program has been fully implemented. In contrast to the generous numbers given for public school "success" in the "Current System," the illustration uses overly low numbers for public school "success" in the "Reformed System." These numbers are contrary to what voucher proponents believe will occur -- competition causing innovation, and subsequent improved "outcomes." These numbers, instead, reflect what voucher *opponents* claim will occur under such a program -- the "cream of the crop" being removed, resulting in lower school "outcomes." But, even using the opponent's numbers, the overall success rate district wide improves -- effectively saving a larger actual number of children from a lifetime of ignorance and failure. Note, however, because of limited numbers of existing private schools in all districts, it will likely take several years for a system to naturally develop to this degree. "Education Enterprise Zones" may be employed to speed the expansion of the private school market. These devices potentially may shave years off the time normally required for market expansion; *See infra* notes 174-84 (fully discussing the benefits of, and strategies for, implementation of these innovative market-based incentives). Even without "Education Enterprise Zones," in Cleveland, Industrialist, David Brennan, was personally responsible for the creation of two new schools. Scott Stephans, *Experiment Begins: Voucher Schools Open*, PLAIN DEALER (Cleveland), Aug. 29, 1996, at 1A. The Hope City Academy served 81 pupils, while its sister school, Hope Central Academy, boasted 236 students. *Id.* Mr. Brennan says that he plans to open more schools. *Id.*; *see infra* note 180. A third, new private school, the Ministerial Head Start, also opened in the Cleveland Plan's first year. Brief of the State Appellees at 10, *Gatton v. Goff*, Nos. 96APE08-991, 96AEP08-982 (Ohio Ct. App. 1996 10th Dist.).

138. This Comment contends if retaining the current system would result in a *larger* number of students not graduating, than would in the proposed voucher-based system, pursuant to the state constitutional guarantee to education, the court would effectively be compelled to permit the program *that fails the least* to go forward.

despite widespread talk of their implementation.¹³⁹ The first was the “Milwaukee Parental Choice Program [hereinafter “Milwaukee Plan”],¹⁴⁰ started in 1990 at the

139. On February 11, 1997, the trustees of Lincoln Park, New Jersey, voted to implement a tuition voucher program for their high school students. John Chadwick, *Summit Meeting on School Vouchers*, THE REC. (Northern New Jersey), Feb. 18, 1997, at L1. “There are at least 12 states that are going to be considering voucher legislation this year.” Tom Heinen, *School Choice Moving from State to National Forum*, MILWAUKEE J. SENTINEL, Jan. 19, 1997, at 21. Mary Jane Smetanka, *1997 Legislative Preview: Education; Tax Credits Rekindle Private School Debate*, STAR-TRIB. (Minneapolis-St. Paul), Jan. 5, 1997, at 1A (discussing new proposals for encouraging school choice, following the 1996 defeat of a school voucher bill). Despite past opposition, Florida’s Democratic Governor, Lawton Chiles, conceded he might sign an appropriately written voucher program in 1997. Diane Rado, *School Vouchers Gaining Favor*, ST. PETERSBURG TIMES, Jan. 8, 1997, at 1B. In addition to Ohio and Wisconsin, the following six states planned to actively debate implementing or expanding voucher programs in 1995: Illinois, Minnesota, New Jersey, Arizona, Pennsylvania and Connecticut. Cleveland, *supra* note 9, at 152. During 1991-92 legislative session, voucher proposals were “introduced in Alabama, Florida, Georgia, Idaho, Iowa, Louisiana, Maryland, South Carolina, and Tennessee.” AMY STUART WELLS, *TIME TO CHOOSE: AMERICA AT THE CROSSROADS OF SCHOOL CHOICE POLICY* 158 (1993).

140. WIS. STAT. ANN. § 119.23 (West 1991 & Supp. 1996) (amended 1993 & 1995). This section, entitled MILWAUKEE PARENTAL CHOICE PROGRAM, provides in relevant part:

(2)(a) Subject to par. (b), beginning in the 1990-91 school year, any pupil in grades kindergarten to 12 who resides within the city may attend, at no charge, any private school located in the city if all of the following apply:

1. The pupil is a member of a family that has a total family income that does not exceed an amount equal to 1.75 times the poverty level determined in accordance with criteria established by the director of the federal office of management and budget.
2. In the previous school year the pupil was enrolled in the school district operating under this chapter, was attending a private school under this section, was enrolled in grades kindergarten to 3 in a private school located in the city other than under this section or was not enrolled in school.

4. The private school complies with 42 USC 2000d.
 5. The private school meets all health and safety laws or codes that apply to public schools.
- (b) In the 1995-96 school year, no more than 7% of the school district’s membership may attend private schools under this section. Beginning in the 1996-97 school year, no more than 15% of the school district’s membership may attend private schools under this section.

(3)(a) The pupil or the pupil’s parent or guardian shall submit an application to the participating private school that the pupil wishes to attend.... [T]he private school shall notify the applicant, in writing, whether the application has been

accepted. The department shall ensure that the private school determines which pupils to accept on a random basis, except that the private school may give preference in accepting applications to siblings of pupils accepted on a random basis.

(4) Upon receipt from the pupil's parent or guardian of proof of the pupil's enrollment in the private school, the department shall pay to the private school parent or guardian ... an amount equal to the total amount to which the school district is entitled ... divided by the school district membership, or an amount equal to the private school's operating and debt service cost per pupil that is related to educational programming, as determined by the department, whichever is less.... The department shall send the check to the private school. The parent or guardian shall restrictively endorse the check for the use of the private school.

(6) The board shall provide transportation to pupils attending a private school under this section if required under § 121.54 and may claim transportation aid ... for pupils so transported.

(7)(a) Each private school participating in the program under this section shall meet at least one to the following standards:

1. At least 70% of the pupils in the program advance one grade level each year.
2. The private school's average attendance rate for the pupils in the program is at least 90%.
3. At least 80% of the pupils in the program demonstrate significant academic progress.
4. At least 70% of the families of pupils in the program meet parent involvement criteria established by the private school.

(b) The department shall monitor the performance of the pupils attending private schools under this section. If the department determines in any school year that the private school is not meeting at least one of the standards under par. (a), that private school may not participate in the program under this section in the following school year.

(c) A private school may not require a pupil attending the private school under this section to participate in any religious activity if the pupil's parent or guardian submits to the pupil's teacher or the private school's principal a written request that the pupil be exempt from such activities.

Id. The above quotation reflects the changes made between the second and third versions of the statute. Underlined words represent the additions made by the latest amendment.

behest of Wisconsin Governor, Tommy Thompson.¹⁴¹

When the Milwaukee Plan was initiated, few students, and fewer schools, were allowed to participate. It provided for the creation of a variable number of vouchers, equal to one percent of the Milwaukee School District's total enrollment.¹⁴² Only students from families with an income 175 percent below the poverty level were eligible.¹⁴³ Still, the program was unable to keep up with demand.¹⁴⁴ The private system encountered difficulties in accommodating every

141. James B. Egle, Comment, *The Constitutional Implications of School Choice*, 1992 WIS. L. REV. 459, 461-62 (1992). Governor Thompson first proposed a voucher program in 1988. Timothy T. Blank, Comment, *The Milwaukee Parental Choice Program, Its Policies, and Its Legal Implications*, 1 REGENT U. L. REV. 107, 111 n.26 (1991). This plan, which allowed Wisconsin students "attend, at no charge, any public school located in the county in which the city is located, or any private school located in the county in which the city is located that complies with 42 USC 2000d , if space is available and the pupil meets all applicable eligibility requirements," died in the Joint Committee on Finance. *Id.* at nn.26-27. Although Thompson settled for a much smaller program, he argues that vouchers are the future of education. Cal Thomas, *The NEA Leaves Us No Choice*, CIN. ENQUIRER, Aug. 20, 1995, at D2. An ardent support of voucher programs, Governor Thompson said, "Public schools must no longer be government-run schools. They will be schools that serve the public. School choice is more than a program. It is a philosophy. It is the belief that parents know best when it comes to their children." *Id.*

142. WIS. STAT. ANN. § 119.23(2)(b) (West 1991 & Supp. 1996) (this section was amended to increase the percentage of eligible students in 1993 and 1995).

143. *See supra* note 140 (Wis. Stat. Ann. § 119.23(2)(a)(1) (West 1991 & Supp. 1996)).

144. "Due to limited participation in the program on the part of the 18 eligible private schools, the number of student applicants exceeded the number of students enrolled by 236 in 1990, 168 in 1991, and 357 in 1992." WELLS, *supra* note 139, at 161. The following table compiles several elements giving insight into the performance of the Milwaukee Plan, during its first four years.

	1990-91	1991-92	1992-93	1993-94
Eligible Students	931	946	950	968
Applicants	577	689	998	1,049
Available seats	406	546	691	811
Participating students	341	521	620	742
Participating schools	7	6	11	23
Private, nonsectarian schools in Milwaukee	22	22	23	23

Michael E. Hartmann, *Cleaning Up With Banquo's Ghost in the Dairyland?, Analysis of the Milwaukee Parental Choice Program's Unconstitutional Conditioning Of Its Aid On An Effective Waiver of a Recipient's Free Exercise of Religion: Professor Richard A. Epstein's Bargaining With the State and Miller v. Benson*, 27 AKRON L. REV. 445, 456 tbl.3 (1994) (reprinting a table, originally compiled by John F. Witte et al., *Third-Year Report, Milwaukee Parental Choice Program*, Department of Political Science and The Robert La Follette Institute of Public Affairs, University of Wisconsin-Madison 33 (1993)). Although the sources give slightly different numbers for the third year, the trend they relate is clear. Increasing numbers of students chose to participate each year. Perhaps more enlightening is the increasing percentage of eligible students who applied to the program. In 1991, 68 percent of eligible students applied. This number increased to 73 percent in 1992, 105 percent in 1993, and 108 percent in 1994. *Id.*

student who wished to escape public education because religious schools were not permitted to participate.¹⁴⁵ Nonetheless, increasing numbers of students exited the public schools each year as non-religious private schools expanded or chose to participate in the program.¹⁴⁶

The Milwaukee Plan was amended in 1993 and 1995, increasing the percentage of Milwaukee School District students eligible to participate.¹⁴⁷ Largely as a result of Governor Thompson's influence, the 1995 amendments also authorized religious private school participation.¹⁴⁸ Predictably, these changes were immediately challenged,¹⁴⁹ and an injunction preventing their implementation was granted.¹⁵⁰ On January 15, 1997, Dane County Circuit Court Judge Higginbotham struck down the 1995 amendments increasing the program's size, and authorizing religious school participation.¹⁵¹ This decision is being appealed.¹⁵²

145. "[O]f Milwaukee's 107 private schools, 84 are parochial." Joe Price, Note, *Educational Reform: Making the Case for Choice*, 3 VA. J. SOC. POL'Y & L. 435, 464 (1996). Limiting participation in voucher programs to non-religious private schools, limits their effectiveness. *Id.* "[Ninety] percent of the private schools in the United States are religious." Steven K. Green, *The Legal Argument Against Private School Choice*, 62 U. CIN. L. REV. 37, 41 n.15 (1993) (quoting Lynn Olson, *New Approaches Blurring the Line Between Public and Private Schools*, EDUC. WK., Oct. 7, 1992, at 18) (alteration in original).

146. See *supra* note 144 (note the yearly increase in the number of applications filled out for participation in the program); See also *infra* note 180.

147. WIS. STAT. ANN. § 119.23(2)(b) (West 1991 & Supp. 1996) (the historical and statutory notes indicate the formula for determining the number of vouchers to create was amended in 1993 and 1995). The 1993 amendment increased the number of vouchers to 1.5 percent of the Milwaukee School District's total enrollment. Hartmann, *supra* note 144, at 456 n.53. The 1995 amendment further increased the number to 7 percent for the 1995-96 school year, and 15 percent for the 1996-97 school year. Heinen & Lawrence, *supra* note 5.

148. Will, *supra* note 5 (summarizing the legal maneuvering resulting from the amendment). Permitting religious school participation was always an objective for Governor Thompson. Blank, *supra* note 141, at 112 n.32. Explaining why, unlike in his failed 1987 voucher proposal, Governor Thompson did not propose religious school participation, it was reported that this "decision to back down on his plan to include religious schools in the choice initiative did not indicate a philosophical shift or any concern with the first amendment but rather his recognition of political reality. When asked why he did so, he responded, 'I want to win.'" *Id.*

149. See *supra* note 5 (discussing the continuing legal challenges to the Milwaukee Plan).

150. *Id.* The Wisconsin Supreme Court upheld the injunction, pending the Dane County Circuit Court's decision. *Wisconsin v. Jackson*, 456 N.W.2d 140, 142 (Wis. 1996).

151. Catherine Candisky, *Appeals Court Will Hear Suit on School Vouchers Feb. 13*, COLUMBUS DISPATCH, Jan. 21, 1997, at 1C; Heinen & Lawrence, *supra* note 5. This decision, which overturns the 1995 amendments to the Milwaukee Plan, does not take effect until after the current school year has ended. Candisky, *supra*; Heinen & Lawrence, *supra*, note 5. It will have the effect of sending between 100 to 150 children who chose to leave the public school system back to it. Candisky, *supra*; Heinen & Lawrence, *supra*, note 5.

152. The state's attorney, Edwin Marion, is hopeful the state Court of Appeals will rule on the case by the end of the 1996-97 school year. *Id.* However, regardless of the outcome of that decision, the case is expected to be appealed to the Wisconsin Supreme Court. *Id.* That decision, too, is likely to be appealed to the United States Supreme Court. See *infra* note 158 and accompanying text.

In 1995, the Ohio Legislature implemented the nation's second school voucher program.¹⁵³ The "Pilot Project Scholarship Program," [hereinafter "Cleveland Plan"],¹⁵⁴ like the amended Milwaukee Plan, allowed private religious

153. Carol Innerst, *Ohio Court Upholds Constitutionality of Vouchers*, WASH. TIMES, Aug. 2, 1996, at A7.

154. The Cleveland Plan is found in OHIO REV. CODE ANN., §§ 3313.974-979 (Banks-Baldwin 1995 & Supp. 1997), under the caption, "ALTERNATIVE SCHOOLS." These sections say, in relevant part:

3313.974 Definitions

- (B) "Mainstreamed handicapped student" means a handicapped child who has an individualized education program providing for the student to spend more than half of each school day in a regular school setting with nonhandicapped students.
- (C) "Separately educated handicapped student" means a handicapped child who has an individualized education program providing for the student to spend at least half of each school day in a class or setting separated from nonhandicapped students.

- (G) "Alternative school" means a registered private school located in a school district or a public school located in an adjacent school district.

3313.975 Pilot project scholarship program

- (A) ... The program shall provide for a number of students ... to receive scholarships to attend alternative schools...
- (B) ... In each year the program students may only use a scholarship to attend school in grades kindergarten through third.

The state superintendent shall award as many scholarships ... as can be funded given the amount appropriated for the program.

- (C)(1) ... In each year the program continues, no new students may receive scholarships unless they are enrolled in grade kindergarten, one, two, or three. However, any student who has received a scholarship in the preceding year may continue to receive one until he has completed grade eight.

- (E) The state superintendent shall make a grant to the pilot project school district sufficient to defray one hundred percent of the additional costs to the district of providing transportation to and from the alternative school for all students utilizing a scholarship to attend a public school.

3313.976 Registration of schools

- (A) No private school may receive scholarship payments from parents ... until the chief administrator of the private school registers the school with the superintendent of public instruction. The state superintendent shall register any school that meets the following requirements:
- (1) The school is located within the boundaries of the pilot project school district;
 - (2) The school indicates in writing its commitment to follow all requirements for a state-sponsored scholarship program under ... the Revised Code...;
 - (3) The school meets all state minimum standards for chartered non-public schools in effect on July 1, 1992, except that the state superintendent at the superintendent's discretion may register non-chartered nonpublic schools meeting the other requirements of the division;
 - (4) The school does not discriminate on the basis of race, religion, or background;
 - (5) The school enrolls a minimum of ten students per class or a sum of at least twenty-five students in all the classes offered;
 - (6) The school does not advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion;
 - (7) The school does not provide false or misleading information about the school to parents, students, or the general public;
 - (8) The school agrees not to charge any tuition to low-income families participating in the scholarship program in excess of ten per cent of the scholarship amount The school shall permit any such tuition, at the discretion of the parent, to be satisfied by the low-income family's provision of in-kind contributions or services.
- (B) The state superintendent shall revoke the registration of any school if, after a hearing, the superintendent determines that the school is in violation of any of the provisions of divisions (A) of this section.
- (C) Any public school located in a school district adjacent to the pilot program district may receive scholarship payments on behalf of parents ... if the superintendent of the district ... notifies the state superintendent ... that the district intends to admit students from the pilot project district for the ensuing school year...

3313.977 Priorities for admission of students

- (A)(1) Each registered private school shall admit students to kindergarten and first, second, and third grades in accordance with the following priorities:

-
- (a) Students who were enrolled in the school during the preceding year;
 - (b) Siblings of students enrolled in the school during the preceding year, at the discretion of the school;
 - (c) Children from low-income families attending school or residing in the school district in which the school is located until the number of such students in each grade equals the number that constituted twenty per cent of the total number of students enrolled in the school during the preceding year in such grade. Admission of such twenty per cent shall be by lot from among all low-income family applicants who apply....
 - (d) Children residing anywhere whose parents are affiliated with any organization that provides financial support to the school, at the discretion of the school;
 - (e) All other applicants residing anywhere, provided that all remaining available spaces shall be filled from among such applicants by lot.
- (2) Each registered private school shall first admit to grades four through eight students who were enrolled in the school during the preceding year. Any remaining spaces for students in these grades may be filled as determined by the school.
- (B) Notwithstanding division (A) of this section, except where otherwise prohibited by federal law, a registered private school may elect to admit students of only one gender and may deny admission to any separately educated handicapped student.

3313.978 Award of scholarships

- (A) ... The state superintendent shall provide information about the scholarship program to all students residing in the district, shall accept application from any such students ... and shall establish criteria for the selection of students ... which criteria shall give preference to students from low-income families. For each student selected, the state superintendent shall also determine whether the student qualifies for seventy-five or ninety per cent of the scholarship amount. Students whose family income is at or above two hundred per cent of the maximum income level established by the state superintendent for low-income families shall qualify for seventy-five per cent of the scholarship amount and students whose family income is below two hundred per cent of that maximum income level shall qualify for ninety per cent of the scholarship amount.
- (1) A student receiving a pilot project scholarship may utilize it at an alternative public school
 - (2) A student may decide to utilize a pilot project scholarship at a registered private school in the district if all of the following conditions are met:
 - (a) [T]he parent makes an application on behalf of the student to a registered private school.

school participation.¹⁵⁵ On July 31, 1996, it survived its first legal challenge,¹⁵⁶

- (b) The registered private school notifies the parent and the state superintendent ... that the student has been admitted.
- (C)(1) In the case of basic scholarships, the scholarship amount shall not exceed the lesser of the tuition charges of the alternative school the scholarship recipient attends or an amount established by the state superintendent not in excess of twenty-five hundred dollars.
- (2) The state superintendent shall provide for an increase in the basic scholarship amount in the case of any student who is a mainstreamed handicapped student and shall further increase such amount in the case of any separately educated handicapped child. Such increases shall take into account the instruction, related services, and transportation costs of educating such students.
- ***
- (4) No scholarship ... shall be awarded unless the state superintendent determines that twenty-five or ten per cent, as applicable, of the amount specified for such scholarship ... will be furnished by a political subdivision, a private nonprofit or for profit entity, or another person. Only seventy-five or ninety per cent of such amounts, as applicable, shall be paid from state funds.
- (D)(2) Annually ... the chief administrator of each registered private school located in the pilot project district and the principal of each public school in such district shall complete a parental information form and forward it to the president of the board of education. The parental information form shall be prescribed by the department of education and shall provide information about the grade levels offered, the number of students, tuition amounts, proficiency examination results, and any sectarian or other organizational affiliations.

3313.979 Payments to parents and to schools

Each scholarship ... to be used for payments to a registered private school ... is payable to the parents of the student entitled to the scholarship Each scholarship to be used for payments to a public school in an adjacent school district is payable to the school district of attendance by the superintendent of public instruction.

OHIO REV. CODE ANN. §§ 3313.974-.979 (Banks-Baldwin 1995 & Supp. 1997).

155. The Cleveland Plan is the first in the country that allows the use of state money to send children to religious private schools. David S. Cloud, *Ohio School Provides Lesson for a Nation: Vouchers Working on a Small Scale*, CHI. TRIB., Oct. 22, 1996, at 1.

156. *Gatton v. Goff*, Nos. 96CVH-01-193, 96CVH-01-721, 1996 WL 466499 (Ohio C.P. Franklin 1996) *rev'd sub nom.* *Simmons-Harris v. Goff*, 1997 WL 217583 (Ohio Ct. App. 10th Dist., May 1, 1997). Plaintiffs, concerned taxpayers and the Ohio Federation of Teachers, claimed the Cleveland Plan violated the Establishment Clause of the United States Constitution, and an equivalent section of the Ohio Constitution. *Id.* at *2-*3. This section provides, "[n]o person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law,

however, the Tenth District Court of Appeals reversed the decision.¹⁵⁷ This ruling is certain to be appealed, and a voucher program, be it the Cleveland Plan, Milwaukee Plan, or another, will eventually be heard by the United States Supreme Court.¹⁵⁸

The Cleveland and Milwaukee plans contain several similar provisions that effectively address numerous legitimate concerns of those who truly wish to improve American education.¹⁵⁹ This Comment strongly advises legislators from other states to incorporate similar provisions when drafting their own plans.

Voucher programs permitting religious school participation, *must* incorporate a provision directing the disbursement of state funds to the parents, *not to the schools*.¹⁶⁰ This route provides the greatest conceivable protection against Establishment Clause challenges.¹⁶¹ Should the Supreme Court uphold so written plans, as expected,¹⁶² such language will insulate future programs against success-

to any religious society[.]” Ohio Const. art. I, § 7. Judge Sadler granted summary judgment, upholding the constitutionality of the Cleveland Plan. *Gatton*, at *1.

157. *Simmons-Harris v. Goff*, 1997 WL 217583 at *9, *10 (Ohio Ct. App. 10th Dist., May 1, 1997).

158. Joyce Evans, *School Choice is a Lose-Lose Political Battle*, MILWAUKEE J. SENTINEL, Jan. 18, 1997, at 1 (noting the resolve of the Milwaukee Plan’s proponents in light of the legal setback dealt to them by Dane County Judge Higginbotham, Evans warned, “Expect the fight to wind up at the Supreme Court’s doorstep.”). Chip Mellor, the president of the Institute for Justice, a Washington D.C. based public-interest law firm, said the state voucher programs were in a “horse race” to the Supreme Court. Heinen, *supra* note 139; *see supra* notes 58-96 (discussing the constitutional issues implicated by permitting religious private school participation in voucher programs).

159. This Comment contends it is parents, and their representatives in the state and federal legislatures, who have a true interest in improving American education. If members of the education establishment have any interest in improving education, it extends only to the point that proposed reforms do not act contrary to their interest in maintaining the status quo. “The most obvious reason for (teachers unions and school district administrators) resistance to actually implementing parental choice is that they 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.” James A. Peyser, *School Choice: When, Not If*, 35 B.C. L. REV. 619, 622 (1994); *see also supra* notes 31, 38, 55.

160. *See supra* notes 140, 154 (Wis. Stat. Ann. § 119.23(4) (West 1991 & Supp. 1996); OHIO REV. CODE ANN. § 3313.979) (Banks-Baldwin 1995 & Supp. 1997).

161. *See supra* notes 58-96 (amassing the relevant issues that trigger Establishment Clause challenges and violations, and advancing a pattern voucher programs should follow to avoid such difficulties).

162. Concluding a properly written school voucher program would likely withstand Establishment Clause challenge, Constitutional scholar, Laurence Tribe, wrote:

Where aid has been available to public and non-public students alike, as would be the case under some voucher programs, the Court has been more favorable. This element is central to the Court’s holding in *Mueller* -- even though the public school students who paid tuition (and thus who would benefit from the deduction), those who attended a school outside their district, constituted a

ful Federal Constitutional challenge, although they will continue to be vulnerable to similar state constitutional suits.¹⁶³

Eligibility requirements that compel private schools to adhere to state and federal laws prohibiting discrimination, similarly must be incorporated for legal and political reasons.¹⁶⁴ Such measures eliminate serious Federal Constitution Equal Protection challenges,¹⁶⁵ while making proposed plans less vulnerable to the inevitable negative campaign that will be waged against them by the education establishment.¹⁶⁶

Provisions dictating state oversight of all participating schools should be incorporated to ensure an education of sufficient quality is provided for every student.¹⁶⁷ The state must possess the power to revoke any school's right to partici-

small proportion of total beneficiaries. *Witters*, although dealing with higher education, is also relevant, particularly because five Justices agreed that individuals' private choice eliminate any impermissible effects. These decisions suggest that the Court would uphold an educational voucher scheme that would permit parents to decide which schools, public or private, their children should attend. The establishment clause probably would not stand as an obstacle to a purely neutral program, at least one with a broad enough class of beneficiary schools and one that channeled aid through parents and children rather than directly to schools.

TRIBE, *supra* note 72, at § 14-10, at 1223; *see also supra* note 10 (reviewing several voucher program opponent's pained admissions that a properly drafted plan would likely withstand Constitutional scrutiny). Further proof the Court is likely to uphold the concept of vouchers permitting religious private school participation was given on January 16, 1997. Pursuant to an unusual procedural move, the Court decided to rehear *Aguilar v. Felton*, 473 U.S. 402 (1985). Melanie Kirkpatrick, *Toward a Better Definition of Religious Liberty*, WALL ST. J., Feb. 19, 1997, at A17. *Aguilar* dictated that government-funded remedial programs for disabled children who were enrolled in religious private schools, while permissible, could not take place in the religious school. 473 U.S. at 430-31. Professor Charles Haynes, an expert in the area of religion in public education at Vanderbilt University, stated that "The handwriting is on the wall," by deciding to rehear the case, the Court "is going down the road toward declaring voucher programs constitutional..." Edward Felsenthal, *Insider Trading and School Issue to be Considered by High Court*, WALL ST. J., Jan. 20, 1997, at B5.

163. *But see* Heinen, *supra* note 139. University of Wisconsin-Madison law professor, Gordon Baldwin, argues that a United States Supreme Court decision upholding a voucher program with religious private school participation "could allow Congress and the president to circumvent more restrictive state constitutions by creating voucher programs with federal funds...." *Id.*

164. *See supra* notes 140, 154 (Wis. Stat. Ann. §§ 119.23(2)(a)(4), (3)(a) (West 1991 & Supp. 1996); OHIO REV. CODE ANN. § 3313.976(A)(4), (B) (Banks-Baldwin 1995 & Supp. 1997)).

165. *See supra* notes 58-96 (examining Federal Constitution challenges based on violations of the Equal Protection Clause of the Fourteenth Amendment).

166. *See supra* notes 100-01, 104 and accompanying text (reviewing voucher opponent's racially charged rhetoric, intended to discredit the concept).

167. *See supra* notes 140, 154 (WIS. STAT. ANN. §§ 119.23(7)(a), (b) (West 1991 & Supp. 1996); OHIO REV. CODE ANN. §§ 3313.976(A)(3), (B) (Banks-Baldwin 1995 & Supp. 1997)).

pate,¹⁶⁸ should they fall below a specified level of quality. Such provisions will ensure the state constitution's guarantee of educational quality is met.¹⁶⁹

Disadvantaged children should be the primary beneficiaries of pilot plans for economic and political reasons.¹⁷⁰ Linking student eligibility to the child's family income level is also an objective way to determine who may participate while the private school market expands.¹⁷¹ Transportation costs should be covered by the vouchers, since many students may live far from participating private schools.¹⁷² Targeting inner cities, the areas with the worst schools, makes passage of these innovative measures more saleable to the public, while forging a coalition with a traditionally overwhelmingly Democratic group -- offsetting strong Democratic opposition, arising from their close ties with teachers unions.¹⁷³

168. The state does not have the power to eliminate public schools from participating, however, because of the state constitutional guarantees to education. See *supra* notes 110-20 and accompanying text.

169. See *supra* note 119 (directing how eligibility requirements should be drafted, so as to compel participating private schools to maintain a level of quality safely above the minimum standard guaranteed by state constitutions).

170. One critic of voucher proposals claims they would operate to make inner-city schools worse than what they already are, because "those schools would have only -- and not, as now, merely high proportions of -- parents and students lacking the resources, the ability, the desire, and the political clout to improve their schools or go elsewhere." James S. Liebman, *Voice, Not Choice*, 101 YALE L.J. 259, 298 (1991) (reviewing JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* (1990)). This eloquent burst of rhetoric concludes with the dire warning, "If the plight of urban children looks bad now, then heaven protect them from what any choice-driven future holds in store." *Id.* This type of "Government-knows-best" argument not only runs counter to the parental right to direct the education of their children, recognized in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), but it also vividly demonstrates why it is necessary to adopt provisions guaranteeing that disadvantaged children are able to avail themselves to such a program's benefits, and it argues for the implementation "Education Enterprise Zones." See *infra* notes 174-84 and accompanying text. Legislators should note that both existing plans linked student participation to income level. See *supra* notes 143, 154 and accompanying text (Ohio Rev. Code Ann. § 313.978(A) (Banks-Baldwin 1995 & Supp. 1997)); see also *infra* note 172 (discussing political reasons for initially targeting the disadvantaged).

171. See *supra* note 137; see also *infra* note 180.

172. See *supra* notes 140, 154 (WIS. STAT. ANN. § 119.23(6) (West 1991 & Supp. 1996); OHIO REV. CODE ANN. § 3313.975(E) (Banks-Baldwin 1995 & Supp. 1997)). "Education Enterprise Zones," incorporating incentives for opening new private schools in inner cities, may be used to remedy this problem. See *infra* notes 174-84 and accompanying text (considering how "Education Enterprise Zones" could eliminate this, and several other troublesome issues).

173. Considering the strong ties between the NEA and the Democratic party, Republicans must assemble coalitions to pass voucher programs. The disadvantaged residents of the inner cities are traditionally one of the strongest Democratic bases. By making them the primary beneficiaries of voucher-based systems, Republicans simultaneously shore up needed community support, weaken the opposition, and make a humanitarian gesture. "The NEA is among the Democratic Party's most ardent supporters. In 1993 and 1994, it gave \$2.2 million to Democratic congressional candidates, compared with a mere \$25,800 to Republicans." Rene

V. EXPANDING THE PRIVATE SCHOOL MARKET WITH "EDUCATION ENTERPRISE ZONES"

This Comment suggests legislators implement packages of statutes, in conjunction with voucher programs, designed to foster growth in the private school market, further bolstering them against legal¹⁷⁴ and political challenge.¹⁷⁵ These packages, called "Education Enterprise Zones,"¹⁷⁶ will stimulate market activity,¹⁷⁷ leading to an increased number of private schools -- effectively nullifying contentious problems in two key areas.

Sanchez, *Teachers Union on Defensive in School Reform Struggle*, WASH. POST, June 3, 1996, at A1. Republican Presidential nominee, Robert Dole, drew attention to the NEA's overwhelming support for the Democratic Party in the first *Presidential Debate in Hartford, Connecticut*, on October 6, 1996, when he, inartfully, but truthfully stated, "You can't be for school choice, because (you accept the NEA's money)... [Y]ou get 99.5 percent of the money, we don't know what happened to the other 0.5 percent But it all went to Democrats." 1996 *Presidential Debate in Hartford, Connecticut*, NBC Prof. Transcripts, Oct. 7, 1996, available in WL 10/7/96NBCPROT. Despite the natural tendency of Democratic politicians to reject anything the NEA rejects, because the existing pilot programs have legitimately attempted to help the disadvantaged, the cliché, "politics makes strange bedfellows," has been proven true.

Wisconsin exemplifies the unusual political coalition favoring school choice. The bill was sponsored by State Rep. Annette "Polly" Williams (D. - Milwaukee), the chairperson for Jesse Jackson's presidential campaign in the state of Wisconsin in 1988. Williams also has served as "General of Education" in Milwaukee alderman Michael McGee's Black Panther militia. McGee once advocated the overthrow of the U.S. government if socioeconomic conditions do not change by 1995. By contrast, Gov. Thompson, a white Republican, has supported Wisconsin's Learnfare program, under which the state may reduce welfare payments if a family's children are not attending school regularly.

Egle, *supra* note 141, at 462 n.15 (citation omitted).

174. See *supra* Section II(A), (B).

175. See *supra* notes 4-5, 31, 57.

176. "Enterprise Zones," which were conceived in Great Britain twenty years ago, are based on "the notion that free-market principles such as deregulation and tax breaks could help revive urban economies...." Jeffrey M. Euston, *Clinton's Empowerment Zones: Hope for the Cities or a Failing Enterprise?*, 3 KAN. J.L. & PUB. POL'Y, 140, 141 (1994). Thirty-eight states have implemented variations of enterprise zones. *Id.* at 142. Many of these include capital incentives such as "property tax credits, franchise tax credits, sales tax credits, investment tax credits, and other significant employer tax credits." *Id.* Economic development of blighted areas has been the primary goal with enterprise zones. *Id.* This Comment contends these effective tools can and should be adapted to serve the goal of improving education, by increasing the number of quality schools in inner-cities.

177. This invitation for government involvement through incentives could be characterized as being contrary to the free market theory on which the voucher concept is founded. Although the suggested statutes would benefit those choosing to take advantage of them, this Comment argues they are properly viewed as freeing investors from government imposed burdens. Voucher proponents neither expect, nor demand a pure free market in education. See *supra* notes 61-63 and accompanying text. Accordingly, their objective is properly characterized as creating a "freer" market.

1. Government Support of Religion

Those opposed to vouchers based solely on their connection to religion will only be satisfied if *no* religious schools are involved.¹⁷⁸ Less ideologically-driven individuals, mildly troubled by the much complained about connection, may be mollified by increasing the number of non-religious private schools in the religious / non-religious ratio.

2. Disregard of Inner City Areas

Opponents frequently argue voucher programs will fail to sufficiently serve disadvantaged children, since so few private schools are located in inner cities. Existing programs address this problem by transporting participating students to the private schools on district busses.¹⁷⁹ Program growth, however, may render this solution ineffective.

Both problems may be solved by offering incentives to spur expansion of the private school market. Implementation of a voucher program, alone, will encourage creation of competitive private schools.¹⁸⁰ Manipulation of the tax code, however, will encourage accelerated investment and program efficacy. Such innovations will primarily encourage non-religious school creation, since

178. The topic of separation of church and state invariably comes up in discussion of voucher programs that propose permitting religious private schools participation. Despite its effect of compelling over 100 students to return to the private school system they chose to leave, Barry Lyon, executive director of the Americans United for the Separation of Church and State, called the decision that prevented the Milwaukee Plan from including religious schools, "a tremendous victory for individual freedom." Matt Pommer, *Appeal of Choice Decision Planned*, CAPITAL TIMES (Madison, Wis.), Jan. 16, 1997, at 1A; see also *supra* note 151.

179. See *supra* notes 140, 154 (Wis. Stat. Ann. § 119.23(2)(a)(6) (West 1991 & Supp. 1996); OHIO REV. CODE ANN. § 3313.975(E) (Banks-Baldwin 1995 & Supp. 1997)).

180. See *supra* note 137 (citing the two "Hope Schools" started in Cleveland for the first year of their voucher program by Akron, Ohio businessman, David Brennan). The dual motivations of profit and community service, will insure that individuals like Brennan, will open new schools nationwide. Brennan, a Republican industrialist / attorney, is a "Milton Friedman voucher purist who believes that the education consumer (the parent) is entitled to any curriculum they desire for their children and that the voucher program is the best means to achieve that objective." Dominick Cirelli, Jr., Comment, *Utilizing School Voucher Plans to Remedy School Financing Problems*, 30 AKRON L. REV. ____ (forthcoming 1997) (manuscript at 30 n.125, on file with the author). But see *supra* note 144. Only one new non-religious private school opened during the first four years of the Milwaukee Plan. *Id.* However, during the same time period, the percentage of existing private schools in the district choosing to participate in the program increased from 35 percent to 52 percent. *Id.* Lack of growth in the private school market is certainly in large part a product of the program being limited to no more than 1.5 percent of the Milwaukee School District's total enrollment, and the daunting possibility the embattled program will be overturned by the courts -- two major disincentives for business investment.

business ventures are based on the profit motive.¹⁸¹ Motive notwithstanding, if for-profit schools do not deliver a quality product, they will fail. Hence, profit seeking encourages innovation and quality.

Amnesty from state income taxes, or permanent rate reductions, would greatly encourage the creation of participating private schools for investment purposes.¹⁸² Similarly, gift and estate taxes could be manipulated to encourage foundations¹⁸³ to support individuals who open and operate not-for-profit private

181. Profit is not a new or insidious motive for operating a school. For-profit private schools exist nationwide, generally delivering a higher quality education at a lower per pupil cost. "In 1993-94, the average base salary for public school teachers was \$34,153, compared with \$21,968 for private school teachers." DIGEST OF EDUCATION STATISTICS 1995, *supra* note 18, at 44. In 1994-95 an average of \$6,084 was spent per pupil in the public schools, compared to the average tuition of \$4,266 in 1993-94 for private schools. *Id.* at 45, 72 tbl.60.

182. Manipulation of the tax code is frequently used by third-world countries to attract foreign investment. This technique is used by underdeveloped countries use to counterbalance the risk business people from developed countries are asked take in investing there. The remote country of Ghana seeks to attract foreign investment by offering:

- (d) a corporate income tax rate of forty-five per cent with the allowances and deductions herein below provided:
 - (i) depreciation or capital allowance on plant, machinery, equipment and accessories to the extent of 100 per cent in the year of investment;
 - (ii) investment allowance of 10 *per centum*;
 - (iii) in the case of tree crops and livestock, excluding poultry, an income tax rebate over a three-year period to be specified by the Centre at the following rates: --
 - 75% in the first year;
 - 50% in the second year; and
 - 25% in the third year.
 - (iv) exemption of staff from payment of income tax relating to furnished accommodation on the farm.

INVESTMENT CODE § 12(1)(B)(d) (Ghana 1985). Provisions similar to these could be used to encourage investment in the similarly risky, depressed inner-city areas.

183. Private foundations are religious or charitable, domestic or foreign organizations that are not public charities. Victoria Bjorklund, *Charitable Giving to a Private Foundation, a Supporting Organization, or a Donor-Advised Fund*, SA87 ALI-ABA 143, 149 (May 2, 1996). Foundations typically have three features:

- (1) a single major source of funding -- usually gifts from one family or corporation, rather than funding from the general public,
- (2) a grant making program instead of direct operation of charitable programs, and

schools. Benefits could be contingent upon the school participating in the program, and vary in amount, depending on the performance of their students compared to those of other schools. Linking the benefit amount to objective performance, for not-for-profit schools, would serve the same purpose profit does in the for-profit context -- encouraging innovation and high student performance.

Incentives may be tailored to achieve the specific needs of each district. If school creation in blighted areas is a legislative goal, creating tax breaks for individuals doing so will spur such investment. The possibility of wholly segregated schools developing in inner cities may be eliminated by linking substantial benefits to maintaining a specific level of integration -- increasing the closer the school comes to the goal.¹⁸⁴ Incentives could be used to achieve any goal legislators and their constituents deem worthy, limited only by their imaginations.

VI. CONCLUSION

Declining performance, and increasing parental dissatisfaction with public education, have brought school reform issues to the forefront of the legislative agenda.¹⁸⁵ As with all issues political, changes result in one group gaining at another's expense. Societal gains in the school reform arena will come at the education establishment's expense. This truth makes selling reforms difficult. Teachers are generally held in high esteem by the public -- politicians are not. Consequently, when teacher's unions claim politicians have ulterior motives for proposing educational reforms, the admittedly disenchanted public, is reluctantly inclined to believe them.

Despite the conceptual popularity of voucher programs,¹⁸⁶ implementing them is difficult. Legislators must draft plans capable of garnering the support of an uncertain public, and their fellow law makers. Further, the plan must adhere to an exacting pattern, to enable it to withstand legal challenge.

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- (3) payment of grants and administrative expenses from the endowment rather than from the proceeds of a fundraising program.

Id. at 149-50. Although Foundations are primarily concerned with federal taxation issues, making this idea more viable for federal legislators, state legislators, too, may craft creative incentive packages to encourage their involvement in school creation. *See supra* note 4 (discussing recent Federal voucher proposals).

184. This is legislating to take advantage of human nature. The schools are not coerced by governmental dictate to meet a goal, however, because the powerful incentive of profit making is involved, large numbers of them will integrate with fervor. The concept of magnet schools could be employed in voucher-based systems with equal or greater efficacy than in the dominant education paradigm. *See supra* note 32 (explaining magnet schools and covering several of the specialized programs that have been successfully employed).

185. *See supra* notes 4-5, 138.

186. *See supra* notes 24-30 and accompanying text.

Legislators may now look to Cleveland and Milwaukee for insight on drafting their plan and for positive feedback to allay constituent fears.¹⁸⁷ The novel idea of "Education Enterprise Zones" should be experimented with to increase plan efficacy, and to undermine the criticisms forwarded by opponents.¹⁸⁸

The United States Supreme Court will likely uphold programs permitting religious private schools participation. This decision, coupled with increasing positive feedback from Cleveland and Milwaukee's "successes on the lakes" will bolster proponents arguments for implementation. Voucher programs will inevitably spread nationwide. Teachers who are more interested in students, than in the personal benefits secured for them by the NEA, *should* welcome, and participate in this development. Competition will eventually lead to higher compensation for quality teachers, and a more pleasant workplace -- free from the disruptions inherent in the current education paradigm.¹⁸⁹

Under voucher-based systems, the "pedantic heap[s] of sophistry and nonsense,"¹⁹⁰ that clutter the curriculum will disappear, helping to elevate our elementary and secondary educational system to the level of our Universities and Colleges -- an example "for people from around the world."¹⁹¹ The dominant educational paradigm, no longer holding a monopoly on school expenditures, will rightly be transformed into "one among many competing experiments, carried on for the purpose of example and stimulus, to keep the others up to a certain standard of excellence."¹⁹²

DOUGLAS A. EDWARDS

187. In a recent study measuring the effectiveness of the Milwaukee Plan, it was determined that the participating students, "97 percent of whom are black or Hispanic, are scoring 5 points higher on their reading tests and 11 points higher on math tests than their public school friends who applied for vouchers but were turned down for lack of space." Charles Osgood, *Commentary: Studies show low-income students given tax-free tuition vouchers to go to private school achieve higher test scores than their counterparts in public school*, OSGOOD FILE, Aug. 13, 1996.

188. *See supra* notes 174-84 and accompanying text.

189. One private school teacher in Milwaukee, where robust free market forces have yet to materialize because of the plans limited size and because of the numerous legal challenges, said that the lower pay she still receives is a trade off for the lack of bureaucratic red tape she must contend with. Kathy Walt, *Milwaukee Offers Learning Window on Voucher Plan*, HOUSTON CHRON., Apr. 30, 1995, at 1. The teacher also trumpeted her freedom to discipline students and flexibility to abandon the rigid curriculum, enabling her to meet her specialized student needs. *Id.*

190. SMITH, *supra* note 1, at 733.

191. *See supra*, note 45 (Friedman's comparison of how free market competition has cause a discrepancy in the quality of American education at the different levels, and how it is perceived worldwide).

192. Mill, *supra* note 2, at 98-99.