

MAKING THE GRADE: SCHOOL CHOICE COMES TO NEW JERSEY

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I. Introduction

After nearly two decades of conflict between the state's legislative and judicial branches over the specific requirements of the New Jersey Constitution's thorough and efficient clause,¹ in 1994, the New Jersey Supreme Court gave the Legislature until the 1997-98 academic year to bring the state's education policy into con-

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¹ See N.J. CONST. art. VIII, § 4, cl. 1. The "thorough and efficient" clause states that: "[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the state between the ages of five and eighteen years." N.J. CONST. art. VIII, § 4, cl. 1. See also *infra* notes 59-66 (explaining the evolution of judicial interpretation of the "thorough and efficient" clause).

formity with the standards set forth in the state constitution.² The most recent legislative initiative addressing this issue has been a proposal for school choice.³ The proposal is perhaps the most unconventional reform ever examined by this state.⁴

² See *Abbott v. Burke*, 136 N.J. 444, 447, 643 A.2d 575 (1994) (hereinafter *Abbott III*). The court ordered the Legislature to achieve equivalence in per pupil expenditures on education between special needs districts and wealthier districts for the 1997-98 school year. See *id.*; see also *infra* notes 64-66 (explaining the holdings in the various *Abbott* cases). The court found that children in poor, urban school districts have special educational needs which are not being met by the current system of school funding. See *Abbott III*, 136 N.J. at 452-53, 643 A.2d at 579-80. The court concluded that students in those special needs districts are entitled to an education that is the substantial equivalent of that afforded in wealthier districts. See *Abbott III*, 136 N.J. at 454, 643 A.2d at 580. In addition, the court called on the Legislature to provide for the special educational needs of students in those Special Needs Districts. See *Abbott III*, 136 N.J. at 447, 643 A.2d at 576. The mandate by the court in *Abbott III* conformed with the plaintiff's suggestion that legislative compliance with the "thorough and efficient" clause be achieved by 1997-98. See *id.*

The court's decision was based on the state's failure to assure equalization of school funding between special needs districts and wealthier districts. See *id.* The court found the relative disparity in average per pupil funding between those districts to be at 16% and held that if this disparity was not addressed in 1995-96 and 1996-97, it would entertain further applications for relief from any party to the lawsuit. See *id.* at 447, 643 A.2d at 577.

³ See Jo Ann Bodemer, *School Choice Through Vouchers: Drawing Constitutional Lemon-Aid From the Lemon Test*, 70 ST. JOHN'S L. REV. 273, n.1 (1996). The terms "school vouchers" and "school choice" have become interchangeable in the past decade and describe a system where parents are provided with the opportunity to send their children to out-of-district schools or private schools without paying double tuition. See *id.*

⁴ See A. 2443, 207th Leg., 1st Sess. (N.J. 1996). To this point, legislative attempts to reform education in New Jersey have centered around the issue of funding. See generally N.J. STAT. ANN. § 18A:58-1 (West 1968) (repealed 1975); N.J. STA ANN. § 18A:7D-1 (West 1994) (repealed 1996). The Quality Education Act of 1990 is representative of New Jersey's attempts to resolve the inadequacies in urban education. See Quality Education Act of 1990, ch. 52, 1990 N.J. Laws 587 (hereinafter QEA), amended by Act of March 14, 1991, ch. 62, 1991 N.J. Laws 200 (hereinafter QEA II) (codified as amended at N.J. STAT. ANN. §§ 18A:7D-1 -37 (West 1994) (repealed)). The law capped state spending in suburban school districts and redistributed the unused funds to urban districts. See N.J. STAT. ANN. § 18A:7D-1, Senate Education Committee Statement, Senate, No. 2721-L.1990, c. 52. Redistribution was accompanied by a \$1.3 billion state income tax increase, and local property tax increases from suburban districts which were reluctant to cut their education budgets in the face of the new cap on state aid. See Mark Jaffe & Kenneth Kersch, *Guaranteeing a State Right to a Quality Education: The Judicial-Political Dialogue in New Jersey*, 20 J.L. & EDUC. 271, 294 (1991); Chris Mondics, *Assembly OK's School-Aid Cut for Tax Relief*, THE RECORD (Northern N.J.), Mar. 12, 1991, at A5; Chris Mondics, *Democrats Short on Votes for Tax Relief Bill*, THE RECORD (Northern N.J.), Jan. 30, 1991, at A3; Joe Donnelly, *State May Ease Towns' Tax Levy*, THE RECORD (Northern N.J.), Dec. 12, 1990, at A3.

On October 21, 1996, Assemblyman E. Scott Garrett introduced bill A. 2443 in the New Jersey State Assembly proposing to establish a school tuition voucher pilot program.⁵ While the idea of school vouchers and the debate over their proposed efficacy has existed since the 1950s,⁶ only two cities, Milwaukee and Cleveland, currently employ school voucher programs.⁷ Although these programs are cautiously implemented through phase-in provisions and regulatory oversight,⁸ the public demand for school choice is at an all time high in the United States, and the legal community is currently giving school voucher proposals more attention than

Public hostility toward these increased tax rates prompted the Legislature to revise the QEA in 1991, but the political repercussions of the original law were inescapable. See Jerry Gray, *Florio Agrees to Revisions in School Act*, N.Y. TIMES, Dec. 14, 1992, at B1 (discussing changes made to the QEA). In 1991, the Republicans won a majority in both houses of the state legislature, signaling the end of massive wealth transfer as a remedy for educational inadequacy. See *id.*

⁵ See A. 2443. The bill establishes a five-year tuition voucher pilot program allowing eligible students to attend a participating public or private school and have the tuition paid by a voucher. See *id.*; see also *infra* Part III(B), and accompanying text (explaining specific provisions of A. 2443).

Assemblyman Garrett represents New Jersey's 24th Legislative District which encompasses all of Sussex County and parts of Hunterdon and Morris Counties. See MANUAL OF THE LEGISLATURE OF NEW JERSEY: TWO HUNDRED AND SEVENTH LEGISLATURE (SECOND SESSION) 1997, at 264, (Skinder-Strauss Associates 1997).

⁶ See MILTON FRIEDMAN, CAPITALISM AND FREEDOM, 85-107 (Univ. of Chicago Press 1962). While Friedman's tome was published in 1962, the ideas expressed therein were taken from a series of lectures delivered at Wabash College in 1956. See *id.*; see also *infra* Part II(A) (explaining Friedman's proposals for school choice).

⁷ See Tamar Lewin, *School Voucher Study Finds Satisfaction*, N.Y. TIMES, Sept. 18, 1997, at A16. While other municipalities have enacted similar school choice initiatives only Cleveland and Milwaukee have adopted large-scale programs that have been evaluated by extensive studies. See *id.*; see also *infra* Part II(C) (discussing school choice programs in Cleveland and Milwaukee).

⁸ See Lewin, *supra* note 7, at A16. Ohio brought the Cleveland school system under state control in 1995 when it ran out of sufficient funds to operate. See *id.* A voucher program was subsequently instituted and provided 1,996 vouchers to students from low income households. See *id.* The Cleveland program is slated to expand coverage to 3,000 students in 1997-98. See *id.*

In Wisconsin, the state superintendent of schools is authorized to monitor the performance of schools and students participating in the voucher program. See WIS. STAT. ANN. § 119.23(7)(a)(4) (West 1990). Additionally, participating private schools must submit to an audit upon the request of the state. See *id.* § 119.23(9)(a). Finally, a pupil assignment council is created to insure a balanced representation of pupils in the program. See *id.* § 119.23(8); see also *infra* Part V(A) and accompanying text (discussing state regulation of schools participating in the Milwaukee Parental Choice Program).

ever before.⁹ Therefore, A. 2443 comes at a time when many groups are evaluating the impact of school vouchers on their particular special interest agendas.¹⁰

Parts II and III of this note examine the history of school voucher programs in other jurisdictions to determine the impact such a proposal may have on New Jersey.¹¹ In Part IV, this note will discuss the constitutionality of school choice programs.¹² In addition, Part V will analyze the arguments in support and in opposition to school vouchers.¹³ This note will conclude by suggesting that, while much is at stake, school choice is an initiative New Jersey should further examine as an alternative to traditional education reform.¹⁴

⁹ See Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 360-61 (1997). O'Brien points out that legal discourse on school choice initiatives has been extensive and polyphonous. *See id.* The emergence of a Republican majority in the United States Congress has helped to move the debate over school vouchers to center stage. *See id.* at 361 n.6 (citing PAUL C. BAUMAN, GOVERNING EDUCATION: PUBLIC SECTOR REFORM OR PRIVATIZATION, at vii (1996)). Moreover, in his recent bid for the Presidency, Bob Dole announced his support for a school choice program at the national level. *See* O'Brien, *supra*, at 361 n.6.

¹⁰ *See* Ana M. Alaya, *Divided Lincoln Park Is Bringing School Voucher Issue to a Head*, THE STAR LEDGER (Newark), Feb. 2, 1997, at 32. The debate over school vouchers carries with it a strong ideological component as proponents tend to be skeptical of the government's role in education and put more stock in the remedial abilities of the free market. *See* Bodemer, *supra* note 3, at 301-03. Arguably, if public schools operated as businesses, the existence of competition would cause education providers to fine tune their work product. *See id.* at 303. Similarly, if American businesses were guaranteed a substantial customer base, they would be less inclined to operate efficiently and ultimately the quality of their product would suffer. *See id.* Opponents, on the other hand, are wary of removing something as essential to ordered society as education from the watchful eye of government. *See* O'Brien, *supra* note 9, at 404-05. Opponents claim that the ultimate goal of education is to improve citizenship, and therefore should be a collective responsibility, shared by all, and not just a "parental responsibility." *See id.* Since the state acts as a collective decision-maker for a body of individuals, opponents feel that school policy is appropriately left to the state. *See id.* Furthermore, the opposition argues that the state has an interest in producing productive citizens and removing state controls from education seriously undermines that interest. *See id.*

¹¹ *See infra* Parts II, III.

¹² *See infra* Part IV.

¹³ *See infra* Part V.

¹⁴ *See* Greg D. Andres, Comment, *Private School Voucher Remedies in Education Cases*, 62 U. CHI. L. REV. 795, 823 (1995). School vouchers are the only education reform proposals that offer a quick fix. *See id.* Therefore, as public officials engage in a prolonged debate over the proposed efficacy of various other schemes, students

II. Legislative History

A. The Friedman Model

Noted economist, Milton Friedman, first gave school vouchers scholarly attention in 1955 when he questioned the proper role of government in education.¹⁵ The development of the modern notion of school vouchers is attributed to Friedman because he was the first to challenge governmental dominance over education and to suggest that traditional market forces and increased autonomy might serve public schools more effectively.¹⁶ Most modern day proposals are very similar to Friedman's model.¹⁷

Friedman observed that governmental intervention in education results in a system where the state exercises primary control over the administration of education, thereby significantly diminishing parental influence.¹⁸ While Friedman failed to address the

in neglected schools suffer. *See id.*

¹⁵ *See* FRIEDMAN, *supra* note 6, at 85-86. Friedman begins his dissertation alleging that governmental dominance in the arena of education is so enmeshed that it is taken for granted. *See id.* at 85. He asserts further that while some government involvement in education is justified, state participation in the day to day operation of schools is unnecessary. *See id.* at 89. According to Friedman, the proper way to limit the government's involvement in education is to separate educational funding from educational administration. *See id.*; *see also infra* notes 17 to 22 (explaining Friedman's assertion that governmental administration of education should be separated from governmental financing of education).

¹⁶ *See* O'Brien, *supra* note 9, at 374-75. "Although the early intellectual history of the voucher concept can be traced to Adam Smith, John Stuart Mill, and Thomas Paine, the most frequently acknowledged founder of the modern private school tuition voucher concept is Milton Friedman." *Id.*

While O'Brien concedes that the concept of modern school tuition vouchers is almost universally attributed to Friedman, the author claims that this history is propagandized. *See id.* at 363. O'Brien asserts that the early school voucher movement was actually influenced by race-baiting politics of the deep South, and not by the "erudite musings" of Milton Friedman. *See id.* at 375. O'Brien proffers that the Georgia Legislature proposed a program similar to school vouchers in 1953. *See id.* at 364. According to O'Brien, the Georgia initiative was sponsored in an effort to maintain segregation in Georgia schools and not to increase access to educational alternatives. *See id.*

¹⁷ *Compare* FRIEDMAN, *supra* note 6, at 85-107, with WIS. STAT. ANN. § 119.23; A. 2443. While Friedman does not refer explicitly to vouchers, he proposes a system of choice for parents, and raises many of the same concerns that modern voucher proponents do. *See* FRIEDMAN, *supra* note 6, at 85-107.

¹⁸ *See* FRIEDMAN, *supra* note 6, at 90-91. Parents should have a wider range of choice in the education of their children. *See id.* If parental involvement in education is minimized and the state exercises increasing control, a risk of indoctrination

historical circumstances that led to this structure, he did provide a framework by which education reformers could reverse this trend.¹⁹

The Friedman framework's central component is the denationalization of America's public school systems.²⁰ Denationalization consists of scaling back government participation in education to the point where its only involvement is the legal mandate of compulsory school attendance and curriculum requirements.²¹

In the Friedman model, parents and communities fill the void left by the government's reduced involvement in decision-making.²² Providing parents with a choice of schools in which to

emerges. *See id.* at 91. School choice safeguards against this because "parents could express their views about schools directly by withdrawing their children from one school and sending them to another, to a much greater extent than is now possible." *Id.* at 91.

¹⁹ *See* FRIEDMAN, *supra* note 6, at 85-107. Friedman introduced the notion of competition to the administration of education. *See id.* at 96; *see also infra* Part V and accompanying text (discussing the proposed efficacy of school voucher programs).

²⁰ *See* FRIEDMAN, *supra* note 6, at 89. According to Friedman, "nationalization" is the governmental administration of educational institutions. *See id.* Nationalization is usually defended on the grounds that the stability of a society depends upon the education of its citizenry. *See id.* at 86. Further, education instills a common set of values in the individuals of a given society, and it is these values that lead to a unified, stable community. *See id.* Therefore, the education of one child contributes to the welfare of others (what Friedman calls "the neighborhood effect") by promoting a secure and democratic society. *See id.*

Friedman asserts that the only kind of governmental action justified by the neighborhood effect is the requirement that every child receive a minimum amount of education of a specified kind. *See id.* Therefore, public schools could be denationalized, thereby stripping the state of its administrative duties and leaving only its financing capacities in tact. *See id.* at 89. Thus, the neighborhood effect would still be achieved, but parents would be able to choose which schools to send their children to and competition would be introduced into the education system. *See id.* at 89, 96.

²¹ *See* FRIEDMAN, *supra* note 6, at 89. "The role of government would be limited to insuring that the schools met certain minimum standards, such as the inclusion of a minimum common content in their programs, much as it now inspects restaurants to insure that they maintain minimum sanitary standards." *Id.* at 89.

School choice programs that have been implemented in this country are generally accompanied by heavy state regulation, including curriculum requirements, and health and safety standards. *See* WIS. STAT. ANN. § 119.23(2)(a)(5); *see also infra* Part V(A) (discussing various regulations by the government placed on voucher programs).

²² *See* FRIEDMAN, *supra* note 6, at 94. Friedman asserts that under a voucher system, parents are permitted to satisfy their own views on the best way to educate their children. *See id.* For instance, the parent who would prefer to see his tuition dollars spent on "teachers and texts rather than coaches and corridors" can choose a school

enroll their children would foster competition among school systems and ultimately lead to improvement of the overall quality of education.²³ Theoretically, this new system would be more cost efficient and quality-based than a system run by government bureaucracy.²⁴

While Friedman's model proved to be influential to policy-makers and education reformers, his proposals were not widely accepted.²⁵ However, Friedman did provide a useful framework for contemporary proponents of school choice.²⁶ In fact, many reformers point to Friedman's theory as a justification in defense of school vouchers.²⁷

B. *The Road to the Legislature*

The debate over school choice was revisited in the late 1970's and early 1980's when an increasing number of Americans began to believe that American public school systems were in a collective state of decline.²⁸ A 1983 report by the National Commission on

which comports with his notions. *See id.* Similarly, a parent who prefers that his child's education stress the arts can satisfy these needs. *See id.*

²³ *See* FRIEDMAN, *supra* note 6, at 91. Friedman asserts that competitive enterprises are more likely to meet consumer demand than are nationalized enterprises. *See id.* The governmental administration of education shelters students from competition by making it difficult for private schools to gain access to most students. *See id.* at 107. Shifting away from this control makes incentives for all schools more effective. *See id.*

²⁴ *See* FRIEDMAN, *supra* note 6, at 91.

²⁵ *See* Lewin, *supra* note 7, at A16. Despite Friedman's dissertation, the first large-scale voucher programs to appear on the American educational landscape did not come until the 1990's in Milwaukee and Cleveland. *See id.*

²⁶ *See* FRIEDMAN, *supra* note 6, at 89. The voucher program suggested by Friedman provides parents with a specified maximum amount of money per child, per year to be spent on "approved" educational services. *See id.* Under the Friedman framework, parents are free to spend this sum, and any additional sum, on educational services from an institution of their choice. *See id.* Friedman added that the administration of the education could be rendered by private for-profit enterprises or by non-profit institutions. *See id.* Thus, the government's role in education would be limited to the imposition of a minimum level of required schooling and the subsidization of educational services. *See id.*

²⁷ *See* O'Brien, *supra* note 9, at 363.

²⁸ *See* PETER J. FERRARA, ISSUES '94, at 165-68 (Heritage Found. 1994) (asserting that American education is in crisis). The last three decades have produced dismal school performance and student achievement. *See id.* For example, in 1986, almost 94% of high school seniors were unable to solve multi-step mathematical problems or use basic algebra; over one-fourth of all seventeen year olds were unable to add, subtract, multiply, and divide using whole numbers; and SAT scores have dropped

Excellence in Education (Commission) fueled the criticism of public schools by announcing that American educational performance was substandard in relation to that of other industrialized nations.²⁹ More importantly, the Commission's factual findings demonstrated that much of the criticism directed at public schools was warranted.³⁰

Once again, many policy-makers turned to school choice to seek a remedy for the shortcomings of public education.³¹ Thus,

nearly 80 points in the last three decades. *See id.* at 167-68.

²⁹ *See id.* at 170-71 (citing former Education Secretary William Bennett discussing a report by the National Commission on Excellence in Education). Upon taking office, President Ronald Reagan called for the establishment of a commission to investigate public education in America. *See* Bodemer, *supra* note 3, at n.2. In 1981, former Education Secretary Terrel H. Bell established the eighteen member National Commission on Excellence in Education. *See id.* After almost two years of research on educational statistics, the Committee's findings prompted one member to say, "[i]f an unfriendly foreign power had attempted to impose on America the mediocre educational performance that exists today, we might well have viewed it as an act of war." *Id.* at 273.

³⁰ *See* FERRARA, *supra* note 28, at 171. Ten years after the report by the National Commission on Excellence in Education was released, Secretary Bennett reported that despite the government spending two trillion dollars on primary and secondary education between 1983 and 1993, there has been little improvement in educational achievement and some scores have actually dropped. *See id.*

³¹ *See* FERRARA, *supra* note 28, at 179-83. Other reform measures that were considered in this era included charter schools, open enrollment, and magnet schools. *See id.* Charter schools are public schools that are freed from state control. *See id.* As such, these schools can redesign and experiment with other, non-establishment educational techniques such as selecting their own curriculum, textbooks, staff, and teachers. *See id.* Open enrollment allows students to attend any public school in their district. *See id.* at 181. Finally, magnet schools essentially act as charter schools, but they organize around a specialized educational discipline. *See id.* at 182. In 1974, Manhattan's School District No. 4 in East Harlem adopted a magnet school program. *See id.* at 181. A year earlier, District No. 4 ranked last among all of New York's school districts in reading and mathematics. *See id.* The district covered a community riddled with high poverty where more than half of the families were headed by single mothers. *See id.* Under the 1974 reform plan, the district adopted parental choice and school autonomy. *See id.* School administrators were allowed to determine the curriculum, materials, and teaching methods that would apply in their school while parents were permitted to send their children to the district school of their choice. *See id.* Consequently, schools organized particular themes to appeal to students' particular interests. *See id.* For instance, among the junior high schools were: The Academy of Environmental Science; Isaac Newton School for Math and Science; Jose Feliciano Performing Arts School; and East Harlem Career Academy. *See id.* at 181. Under the new system, test scores have climbed from the bottom to the middle of all city school districts. *See id.* Furthermore, by 1987, 62.6% of the students were reading at or above their grade level, as opposed to 15.9% in 1973. *See id.* Lastly, the graduation rate increased from less than 50% in 1973 to

by the late 1980s, many reformers supported school choice programs based on the proposed benefits of a voucher system.³² During this time period, voucher proponents argued that the political institutions stifled student achievement by encumbering school districts with excessive bureaucracy.³³ Voucher proponents proposed shifting to a system which relied on parental choice and the free market.³⁴ They argued that school vouchers are the most effective tool to remedy the educational problems which plague the nation.³⁵

By 1990, reform measures were adopted in most states, but few gambled on school vouchers, focusing instead on public funding and state control.³⁶ The general consensus was that by investing in public education, tax dollars would find their way into the

over 90% in 1992. *See id.*

³² *See* FERRARA, *supra* note 28, at 182-83. By 1992, school choice legislation had been introduced in thirty states. *See id.* Similarly, 35 states had major citizen coalitions lobbying for school choice reform. *See id.*

³³ *See* JOHN E. CHUBB AND TERRY M. MOE, *POLITICS, MARKETS AND AMERICA'S SCHOOLS*, at ix (Brookings Inst. 1990). The nation's educational problem is an institutional one in that:

Bureaucracy vitiates the most basic requirements of effective organization. It imposes goals, structures, and requirements that tell principals and teachers what to do and how to do it denying them the discretion they need to exercise their expertise and professional judgment, and denying them the flexibility they need to develop and operate as teams. The key to effective education rests with unleashing the productive potential that is already present in the schools and their personnel. It rests with granting them the autonomy to do what they do best. As our study of American high schools documents, the freer schools are from external control - the more autonomous, the less subject to bureaucratic constraint, the more likely they are to have effective organizations.

Id. at 187. True educational progress will only come when reform is accompanied by a shift away from governmental control. *See id.*

³⁴ *See id.* at 189. For instance, a new educational institution should be built around decentralization, competition, and choice. *See id.* When a school is free from governmental constraints, bureaucratization is an ineffective way to organize. *See id.* Standardized categories of measurement imposed by bureaucracy merely interfere with the administration of education. *See id.*

³⁵ *See id.* at 199. "As the 1980's wore on, reformers increasingly called for bolder, more innovative actions that could strike at the heart of the schools' problems." *Id.* Many reformers at this time called for teacher empowerment, reduced bureaucracy, and a shift away from the traditional path of regulatory control. *See id.*

³⁶ *See id.* at 192-93. Traditional reforms included increased spending and state control. *See id.* While some states had adopted quasi-choice initiatives, large scale voucher-based reform was overlooked. *See id.*

classroom, thereby increasing the overall quality of education.³⁷

However, by the early 1990s it became evident that school funding reform was not the panacea that policy-makers had anticipated.³⁸ Clearly, if there was a link between school funding and school performance, it was very difficult to discern from the available statistics.³⁹ Thus, as education spending increased and student performance continued to decline, the debate over education reform again took center stage.⁴⁰

C. School Vouchers in Action

Wisconsin, the first state to implement a large-scale school voucher program, enacted the Milwaukee Parental Choice Program in 1990.⁴¹ Upon its inception, the plan was closely scruti-

³⁷ See *id.* at 193. The educational establishment directly benefits from increased school budgets, and therefore will lobby vigorously for a reform that includes increased monetary allocation. See *id.*

³⁸ See FERRARA, *supra* note 28, at 165. "American education is in crisis. Government spending on education has grown rapidly, even during the 1980's, yet school performance and student achievement have fallen, leaving young American's ill-equipped to compete in today's increasingly competitive world." *Id.*

³⁹ See FERRARA, *supra* note 28, at 171-72. Various studies show that there is no statistically significant correlation between spending and school performance. See *id.* In 1992, for example, New Jersey the nation in average per pupil expenditures, but ranked only 39th in average SAT scores and 14th in National Assessment of Educational Progress (NAEP) scores. See *id.* More strikingly, New York and the District of Columbia ranked 2nd and 3rd in per pupil expenditures, but achieved SAT ranks of only 42 and 49 respectively. See *id.* In contrast, Iowa spent nearly half of the average per pupil expenditures of what New Jersey spent, but ranked first in both SAT scores and NAEP scores. See *id.* at 165.

The five states with the highest SAT scores in 1993 were Iowa, North Dakota, South Dakota, Utah and Minnesota. These states also ranked at or near the top on every other indicator of educational performance. In terms of per pupil spending, they ranked, respectively, 27th, 49th, 42nd, 51st, and 25th.

Id. at 171-72. Furthermore, nine of the top ten states in student achievement were in the bottom half in spending, and all nine spent at least 40% less than New Jersey. See *id.*

⁴⁰ See CHUBB, *supra* note 33, at 192. Educators generally distinguish between two waves of education reform. See *id.* The first wave began in the early 1980s and focused largely on imposing new regulations on schools and providing them with additional financial resources. See *id.* As these reforms proved ineffective, educators began to examine more innovative solutions in a second wave of reform which would reduce unnecessary bureaucracy and decentralize important decision-making powers to the local level. See *id.*

⁴¹ See Bodemer, *supra* note 3, at 281-82. While similar reform initiatives have

nized.⁴² However, the maelstrom of disasters predicted by the program's opponents never materialized and many Milwaukee inner-city schools exhibited strong signs of improvement.⁴³ For example, early reports indicated an increase in standardized test scores among participating students and high levels of parental satisfaction with the program.⁴⁴ In fact, even groups initially opposed to the program now urge its continuation and expansion.⁴⁵

Under the Milwaukee plan, only students from families with a combined income not exceeding 1.75 times the poverty level are eligible to participate.⁴⁶ Eligible students are free to attend any private school within Milwaukee.⁴⁷ Once the student selects a school, an appropriation is made to the parent which equals the tuition of the chosen school under a stipulation that the money is explicitly restricted for use at the private institution.⁴⁸ In addition,

cropped up in some form in other states since the 1970s, The Milwaukee Parental Choice Program was the first to allow students to cross district lines and attend any participating public or non-sectarian private school of their choice. *See id.*

⁴² *See* Bodemer, *supra* note 3, at 282. The original enabling statute for the Milwaukee program survived challenges under both the Wisconsin Constitution and the United States Constitution. *See id.*

⁴³ *See* FERRARA, *supra* note 28, at 182. According to Professor Paul Peterson, Director of the Center for American Political Studies at Harvard University, students enrolled in the Milwaukee Parental Choice Program scored better on standardized reading tests than their public school counterparts. *See id.* Furthermore, a report by the Robert LaFollette Institute of Public Affairs in Wisconsin found high levels of student and parent satisfaction with the program as well as improved discipline and attendance. *See id.*

⁴⁴ *See* FERRARA, *supra* note 28, at 182. The evaluation by the Center for American Political Studies at Harvard University shows that students participating in the program achieve at a higher rate than students in public schools. *See id.*

⁴⁵ *See* FERRARA, *supra* note 28, at 182. Supporters of the Milwaukee Parental Choice Program come from both sides of the political spectrum and include such ideologically diverse parties as Polly Williams, the Wisconsin coordinator for the 1988 Jesse Jackson for President campaign, and Republican Governor Tommy Thompson. *See id.*

⁴⁶ *See* WIS. STAT. ANN. § 119.23(2)(a)(1). The statutory language states that beginning in the 1990-91 school year, any pupil who resides within the city may attend, at no charge, any non-sectarian private school located in the city if 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." *Id.*

⁴⁷ *See id.* § 119.23(2)(a). Under the original statute, there was a requirement that the chosen school had to be non-sectarian. *See id.* However, revisions to the law in 1995 permitted private sectarian schools to participate as well. *See infra* text accompanying note 88.

⁴⁸ *See id.* § 119.23(4). The state superintendent makes quarterly payments: 25%

only private schools that meet all health and safety codes may participate.⁴⁹ Finally, the Wisconsin Department of Education monitors the performance of participating students to ensure that they are not receiving a substandard education.⁵⁰

In 1995, Cleveland, Ohio, joined Milwaukee in implementing a school choice program.⁵¹ In 1996, the Ohio Department of Education issued almost 2,000 vouchers to students from low income families.⁵² The majority of participating families chose to send their children to Catholic schools, with the balance of students attending other religiously affiliated or non-secular schools.⁵³

A recent Harvard University study indicated that the Cleveland program has demonstrated improvement in the academic performance of participating students.⁵⁴ The study indicated progress on both math and reading tests.⁵⁵ More importantly, the

in September; 25% in November; 25% in February; and 25% in May to the participating private school. *See id.*

⁴⁹ *See id.* § 119.23(2)(a)(5).

⁵⁰ *See id.* § 119.23(7)(a). The Wisconsin statute requires that participating private schools meet at least one of the following standards: 1) at least 70% of the pupils in the program advance one grade level each year; 2) the schools average attendance rate for enrolled students is at least 90%; 3) at least 80% of the students in the program demonstrate significant academic progress; and 4) at least 70% of families of pupils in the program meet parental involvement criteria established by the private school. *See id.* Other state regulations of participating private schools include a requirement that the private school comply with Wisconsin Department of Education accounting standards and submit to an annual audit, surveillance of participating students by the Department, and that private schools not require students to engage in religious observance. *See id.*

⁵¹ *See Lewin, supra note 7, at A16.*

⁵² *See Lewin, supra note 7, at A16.* The Cleveland voucher program pays for up to 90% of private or parochial school tuition, with a maximum of \$2250. *See id.*

⁵³ *See Lewin, supra note 7, at A16.* In Cleveland, advocates of the voucher system have organized two new independent schools known as Hope Schools. *See id.* Hope schools mainly serve voucher participants who cannot find suitable, alternative education in the market. *See id.* Pupils who applied for school vouchers in Cleveland but ultimately remained in the public school system cited a number of reasons for not taking advantage of the new program, including transportation concerns, financial considerations, and failure to be admitted to the private school of their choice. *See id.*

⁵⁴ *See Lewin, supra note 7, at A16.*

⁵⁵ *See Lewin, supra note 7, at A16.* The Harvard study found that participating students gained fifteen percentage points on math tests, and five percentage points on reading tests. *See id.* However, the study also shows a drop of five percent in language scores. *See id.*

program has parents' support, many of whom feel that private schools focus more on academics and individual attention than public schools.⁵⁶

While it is still too early to make any conclusory judgments about the voucher programs in Milwaukee and Cleveland, preliminary reports seem to indicate that school choice has a positive effect on school performance.⁵⁷ In light of these findings, many other states, including New Jersey, are now examining the introduction of vouchers into their own school systems.⁵⁸

III. NEW JERSEY TUITION VOUCHER PROGRAM

A. Tracking Education Reform in New Jersey

Traditionally, education reform in New Jersey focused primarily on school funding.⁵⁹ In the case of *Robinson v. Cahill*, the New Jersey Supreme Court announced that the financing of the state's education system⁶⁰ failed to comply with the its constitutional guarantee of a "thorough and efficient" education for all children.⁶¹ In *Robinson*, there was a challenge to the relative ex-

⁵⁶ See Lewin, *supra* note 7, at A16. Two-thirds of parents whose children received vouchers were very satisfied with the academic quality of their chosen school. See *id.* Parents using vouchers were more than twice as likely to be happy with the school's discipline, class size, and teaching of moral values than those remaining in public schools. See *id.*

⁵⁷ See Lewin, *supra* note 7, at A16.

⁵⁸ See Lewin, *supra* note 7, at A16. In Washington D.C., Congressional Republicans have proposed a voucher program similar to that of Cleveland for the District of Columbia. See *id.*

⁵⁹ See Ronald T. Hyman, *School Finance Litigation in New Jersey*, 66 EDUC. L. REP. 531, 531 (1991).

⁶⁰ *Robinson v. Cahill*, 62 N.J. 473, 480, 303 A.2d 273, 276 (1973). In *Robinson*, the court noted that since the adoption of the "thorough and efficient" clause, the burden of funding the state's education system fell primarily on the shoulders of local municipalities. See *id.* Typically, these municipalities fund their respective schools primarily through the use of *ad valorem* property taxation schemes. See *id.* Under such a system, the tax base is taxable real property. See *id.* at 481, 303 A.2d at 276-77. Thus, districts with high ratables (valuable property) have more money to spend on education than districts with low ratables. See *id.* The result is a substantial disparity in sums available per pupil among various school districts. See *id.*

⁶¹ *Id.* Specifically, the court found that the state was only meeting 28% of the current operating expenses of public schools. See *id.* As a result, districts with high property values were funding their school systems at a much higher rate than districts with lower property values. See *id.* The court analyzed whether this system met

penditure disparities that existed between poor urban districts and wealthy suburban districts.⁶² The court ordered the legislature to remedy the deteriorating conditions in the state's schools through appropriate legislation.⁶³

Two decades of legislative action on school funding reform followed the decision in *Robinson*.⁶⁴ However, by 1993, the state was still in non-compliance with the "thorough and efficient" clause.⁶⁵ In 1994, the New Jersey Supreme Court declared in *Ab-*

the requirements of a "thorough and efficient" education. *See id.* at 509-10, 303 A.2d at 292-93.

The court defined a "thorough and efficient" education as that which prepares a child for citizenship and competition in the labor market. *See id.* at 515, 303 A.2d at 295. Next, the court declared that the only accurate measure of compliance with this constitutional mandate is dollar input. *See id.* at 515-16, 303 A.2d at 295-96. The court held further that given the very low ratables of some municipalities in New Jersey, reliance on local taxation for public school funding cannot satisfy the "thorough and efficient" mandate. *See id.* at 520, 303 A.2d at 297-98.

The plaintiffs in *Robinson* asserted that the responsibility of a "thorough and efficient" system of education was imposed upon the state. *See id.* at 509-10, 303 A.2d at 291-92. They argued that given this imposition, any educational funding system which relied upon local taxation rather than state taxation was *per se* unconstitutional. *See id.* at 509-10, 303 A.2d at 291-92. The plaintiffs urged the court to adopt the holding that the fiscal responsibility of maintaining a "thorough and efficient" system of education may not be delegated by the state. *See id.* at 509, 303 A.2d at 292.

The court accepted the plaintiffs' contention that it is the state's obligation to satisfy the "thorough and efficient" clause, but held that this mandate did not bar the delegation of the funding responsibility to the local government. *See id.* at 510, 303 A.2d at 292. The state can assign its obligation as long as it notifies the local government of what its educational obligation is and compels the local school district to raise sufficient funds to fulfill that obligation. *See id.* at 519, 303 A.2d at 297. Since the funding system challenged in *Robinson* did not comport with these requirements, the court struck it down as unconstitutional. *See id.* at 520, 303 A.2d at 297.

⁶² *See id.* at 480, 303 A.2d at 276. The plaintiffs were officials, residents, and taxpayers of five New Jersey municipalities who alleged that the state's school funding system violated the state education clause. *See id.* at 473, 303 A.2d at 273.

⁶³ *See id.* at 513, 303 A.2d at 294. The court in *Robinson* required the state to remedy public school expenditure disparities by either making an appropriation at the state level to underfunded districts, or passing legislation compelling municipalities to spend an appropriate amount on education. *See id.*

⁶⁴ *See Abbott III*, 136 N.J. at 454, 643 A.2d at 580.

⁶⁵ *See id.* at 446-47, 643 A.2d at 576. The New Jersey Supreme Court affirmed the judgment of the Chancery Division and declared the QEA unconstitutional. *See id.* The court based its decision on the law's failure to assure funding equality between Special Needs Districts and wealthy districts. *See id.*; *see also infra* notes 66-68 (discussing the line of *Abbott* cases).

bott v. Burke (Abbott III), that under the current funding system, there is no specific assurance that parity in school funding will be achieved between urban districts and suburban districts.⁶⁶ The

⁶⁶ See *Abbott III*, 136 N.J. at 450-51, 643 A.2d at 578. The *Abbott* line of cases began in 1985 when a group of students from Camden, East Orange, Irvington, and Jersey City challenged the Public School Act of 1975 as being violative of the New Jersey Constitution. See *Abbott v. Burke*, 100 N.J. 269, 277, 495 A.2d 376, 380 (1985) (hereinafter *Abbott I*). The plaintiffs were certified as a class to include all children residing and attending public schools in those cities. See *id.* at n.1, 495 A.2d at 380. The court in *Abbott I* proffered that the "thorough and efficient" clause requires state education law to afford a substantially equal level of schooling to children in special needs districts and wealthy districts. See *id.* at 296, 495 A.2d at 390. The court ultimately passed on adjudicating the merits of the case and remanded in order for the trial court to expand on the factual record. See *id.* at 301, 495 A.2d at 393.

The court revisited the challenge to the Public School Act of 1975 in 1990. See *Abbott v. Burke*, 119 N.J. 287, 294-95, 575 A.2d 359, 362-63 (1990) (hereinafter *Abbott II*). The court found the act unconstitutional as applied to poorer school districts. See *id.* at 295, 575 A.2d at 363. Consequently, the court ordered the Legislature to amend the act to address the extreme disadvantages of students in Special Needs Districts. See *id.*

The court began its analysis in *Abbott II* by expanding on the *Robinson* court's interpretation of the "thorough and efficient" clause. See *id.* at 306, 363-64, 575 A.2d at 368-69, 397-98. The court defined the meaning of thorough and efficient in the context of education as:

[B]eing able to fulfill one's role as a citizen, a role that encompasses far more than merely registering to vote. It means the ability to participate fully in society, in the life of one's community, the ability to appreciate music, art, and literature, and the ability to share all of that with friends.

Id. at 363-64, 575 A.2d at 397.

Next, the *Abbott II* court noted that the disparity in funding between wealthy and poor districts under the Public School Act of 1975 was dramatic. See *id.* at 364, 575 A.2d at 397. Under that act, the Legislature attempted to induce school districts to spend money on education by offering increased state aid with every increase in local aid. See Public School Act of 1975, N.J. STAT. ANN. § 18A7A-1 to -52 (West 1982). The result was that municipalities which could afford to spend more on education were given a large percentage of state aid while poorer districts which could not afford to contribute much to their educational system were all but cut off from state funds. See *Abbott II*, 119 N.J. at 382, 575 A.2d at 406-07.

Further, the court found that because of this gross disparity in funding between districts, students in special needs districts did not receive a "thorough and efficient" education as required by the state constitution. See *id.* at 368, 575 A.2d at 400. Again, the court called upon the Legislature to amend the state school funding law and equalize the funding for education between poor and wealthy school districts. See *id.* at 385, 575 A.2d at 408.

By 1993, a challenge to the constitutionality of the QEA, which was enacted to comply with the court's mandate in *Abbott II*, had come before the state supreme court. See *Abbott III*, 136 N.J. at 444, 643 A.2d at 575. In *Abbott III*, the court noted that to reduce the funding disparity between wealthy districts and poor districts, the legislature had put a cap on spending in suburban districts in an effort to allow spe-

Court posited that such a system was neither thorough nor efficient.⁶⁷

B. *Alternatives to School Funding Reform*

While the vast majority of past educational policy initiatives in New Jersey revolved around the issue of funding, there have been exceptions to that tradition.⁶⁸ For instance, in 1976, Montclair Township launched a school choice program in which the town council granted autonomy to all of its public schools, thereby allowing parents and students to choose from a list of city-wide public schools.⁶⁹

Other municipalities in New Jersey have expressed an interest in adopting school voucher programs.⁷⁰ Officials in Jersey City and Lincoln Park have proposed school choice to remedy their cities' education problems.⁷¹ However, these schemes have met with great resistance from other governmental entities and inter-

cial needs districts to achieve an equal level of funding. *See id.* at 448-49, 643 A.2d at 577-78. However, the court found that the law failed to create a state funding mechanism that would effectively assist poorer school districts in achieving quality education. *See id.* at 450-51, 643 A.2d at 578-79. Rather, the QEA's design for achieving equality relied on the discretionary action of the governor and Legislature to increase school funding in the future. *See id.*

Furthermore, the court in *Abbott III* found that since the QEA did not establish a system whereby students from poor, urban districts could function as citizens and competitors with students from wealthy, suburban districts, the law was unconstitutional. *See id.* at 454, 643 A.2d at 580. The court then mandated legislative compliance with the "thorough and efficient" clause by the 1997-98 school year. *See id.* at 447, 643 A.2d at 576.

⁶⁷ *See Abbott III*, 136 N.J. at 454, 643 A.2d at 580.

⁶⁸ *See Abbott II*, 119 N.J. at 300-16, 575 A.2d at 365-73 (discussing the New Jersey Legislature's attempts over the past twenty years to reform education through state funding); *see also* FERRARA, *supra* note 28, at 183 (explaining the magnet school plan adopted by Montclair Township in 1976); Alaya, *supra* note 10, at 32 (discussing a voucher proposal in Lincoln Park).

⁶⁹ *See* FERRARA, *supra* note 28, at 183.

⁷⁰ *See* Alaya, *supra* note 10, at 32. In Lincoln Park, the Board of Education is pushing for a voucher program to replace the current arrangement which sends Lincoln Park's 360 students to Boonton High School. *See id.* Declining test scores and unsatisfactory achievement rates at the Boonton school is the driving force behind the town's efforts to institute school choice. *See id.* As one parent put it, "I feel my taxes are going to a school that has less than stellar performance." *Id.* Similarly, in Jersey City, Mayor Bret Schundler is awaiting sponsorship of his voucher proposal to remedy the city's educational problems. *See id.*

⁷¹ *See* Alaya, *supra* note 10, at 32.

est groups.⁷² Regardless, parents in these municipalities exhibit overwhelming support for school choice proposals.⁷³

On a state level, A. 2443, the Tuition Voucher Pilot Program was the first legislative initiative to propose school choice as a remedy for New Jersey's continuing educational crisis.⁷⁴ Introduced in 1996, the bill attempts to establish a five-year pilot program whereby eligible students would be able to attend the participating public or non-public school of their choice.⁷⁵ In order to participate, the Department of Education must deem both the schools and the students eligible, utilizing criteria established by the state Commissioner of Education.⁷⁶

In most instances, parents would receive vouchers directly and would redeem them in exchange for the enrollment of their child in the school of their choice.⁷⁷ The program would establish

⁷² See Alaya, *supra* note 10, at 32. The New Jersey Education Association contends that vouchers are not supported by any state legislation and are unconstitutional. See *id.* However, the biggest barrier to implementation of the program has been the Education Commission which, in April, barred the town from using tax money for vouchers in April. See Lewin, *supra* note 7, at A16.

⁷³ See Alaya, *supra* note 10, at 32.

⁷⁴ See Alaya, *supra* note 10, at 32. Assemblyman Garrett's bill sets forth that: School tuition vouchers may serve as a vehicle for education reform by providing all parents with the ability to select the school and education program which best suits their children's individual needs. Increasing parental involvement and satisfaction with their children's educational program and environment will have a positive effect on the education of those children. In addition, school choice will provide an incentive to all schools, both public and private, to improve their educational programs and services and become more efficient and innovative.

A. 2443(1)(a). The bill currently remains in legislative committee. See Alaya, *supra* note 10, at 32.

⁷⁵ See A. 2443(5)(a). Assemblyman Garrett's bill calls for an appropriation of \$5.5 million to the Department of Education to effectuate the voucher program. See A. 2443(11). The bill also requires the Department of Education to seek other sources of public funding and to accept private contributions. See *id.*

⁷⁶ See A. 2443(4)(a). The Education Commissioner will appoint an eligibility review panel which will consider applications from schools wishing to participate in the program. See A. 2443(4)(b). The panel will base its recommendations for eligibility on, among others: 1) merit as a pilot site; 2) net cost to the district or state; 3) establishment of a representative sample of districts; and 4) practical capacity of the participating schools. See *id.* Furthermore, the Commissioner, at the recommendation of the panel, may terminate the voucher system in any eligible school district at the end of any school year. See *id.*

⁷⁷ See A. 2443(5)(b). Under A. 2443, the amount of the tuition voucher in each eligible school district will be no more than \$2500 for children in kindergarten

Parental Information Centers in each eligible school district to act as a liaison between the parent and the out-of-district school.⁷⁸ Furthermore, the process would facilitate the flow of vouchers to school boards.⁷⁹

In addition, the program includes a number of provisions designed to safeguard the quality of education of participating students.⁸⁰ For instance, the bill requires the Commissioner of Education and an advisory committee to measure the program's relative success and overall effectiveness.⁸¹ To that end, the

through eighth grade and \$3500 for children in grades nine through twelve. *See id.* In no case shall a tuition voucher given to a parent or guardian of a participating student exceed the tuition rate of the chosen school for the applicable year. *See id.* Furthermore, if a voucher is redeemed for enrollment at a non-public school or an out-of-district public school, the Commissioner of Education is required to adjust the resident enrollment and State aid entitlement of the eligible school district in order to account for the students attending under the program. *See A. 2443(5)(f).* For example, if a voucher is redeemed in order to attend a public school within the eligible school district, the department will not issue a check to the parent or guardian and no further tuition will be required for attendance. *See id.* Whereas, if a voucher is redeemed in order to attend a participating public school outside of the district, the department will not issue a check to the parent or guardian, but will credit the voucher amount to the participating school on behalf of the pupil and the parent or guardian will be responsible for the difference in tuition. *See id.*

⁷⁸ *See A. 2443(5)(c).*

⁷⁹ *See id.* As established by the statute, a Parental Information Center is an office which disseminates and receives tuition vouchers, and provides parents with information about participating schools and available options for their children. *See A. 2443(2).* In addition, the bill requires each Parental Information Center to make reasonable efforts to notify the public of all requirements necessary for participation in the tuition voucher pilot program. *See id.*

⁸⁰ *See A. 2443(10)(a).* The bill sets forth that: "In order to responsibly assess the merits of tuition vouchers, a limited pilot program should be established which incorporates adequate controls and is subject to meaningful evaluation." A. 2443(1)(b). The bill requires that any educational institution that wishes to participate in the voucher program comply with all state and federal standards applicable to non-public schools. *See A. 2443(2)(f).* Furthermore, the eligibility of a school to participate in the program is conditioned upon its satisfying the requirements of the Commissioner of Education which are set forth in the statute. *See text accompanying supra* note 77. Finally, under the bill, the Commissioner is authorized to recover any funds provided by a voucher which are not used to pay tuition at a participating school. *See A. 2443(7).* The violating parent or guardian is also liable to pay a penalty equal to two times the amount of the misapplied funds to the commissioner. *See id.*

⁸¹ *See A. 2443(10)(a).* The bill calls for an evaluation of the tuition voucher pilot program by the Commissioner with the assistance of an appointed research advisory committee. *See id.* The Commissioner's evaluation will consist of a review of relative attendance rates, dropout rates, graduation rates, parent and student satisfaction, parental involvement, and student academic achievement. *See id.*

Commissioner and committee would be required to make reports and recommendations regarding the voucher program to the Governor and Legislature each year.⁸² Additionally, the A. 2443 calls for a recommendation by the Commissioner, upon the program's conclusion as to whether the state should continue, expand, modify, or terminate the initiative.⁸³

IV. *Judicial Responses to School Vouchers*

A. *Challenging Vouchers in the Courts*

While there are a number of interest groups offering objections to school vouchers on many different grounds, the most significant obstacles to a large-scale implementation of school choice programs are the administrative and judicial tribunals.⁸⁴ For instance, both the Cleveland and Milwaukee voucher programs are currently the subjects of litigation⁸⁵ and run the risk of being struck down on various grounds.⁸⁶

An Ohio appellate court recently ruled that vouchers amount to an unconstitutional intermingling of church and state because of their availability for use at religious schools.⁸⁷ The state supreme court temporarily sustained the program, but subjected it

⁸² See A. 2443(10)(b). The Commissioner is to make a status report on the evaluation of the voucher program on or before January first of each year. See A. 2443(10)(c).

⁸³ See A. 2443(10)(b). Bill A. 2443 expires on June 30th of the fifth full school year following enactment. See A. 2443(12). The bill requires the Commissioner to make a formal recommendation concerning the future of the program to the governor and legislature by January 1st of the program's last school year. See A. 2443(10)(c).

⁸⁴ See *infra* Part IV for a discussion of the legal issues presented by school vouchers.

⁸⁵ See Lewin, *supra* note 7, at A16. Challenges to both the Cleveland and Milwaukee programs are based mainly on Establishment Clause grounds. See *id.*

⁸⁶ See text accompanying *infra* notes 86-90 (discussing the current challenges to the voucher programs in Cleveland and Milwaukee).

⁸⁷ See Lewin, *supra* note 7, at A16. "Cleveland's voucher program . . . remains under the cloud of a continuing court challenge. In May, an Ohio appeals court ruled that because the vouchers could be used at religious schools, the program was an unconstitutional mingling of church and state." *Id.* See also *infra* Part IV(B) (discussing judicial review of school voucher legislation under the Establishment Clause).

to judicial review at the end of 1997.⁸⁸ Similarly, in Wisconsin, the state supreme court entertained a challenge to the Milwaukee Parental Choice Program on the basis that it violated the Establishment Clause of the First Amendment.⁸⁹ The court issued a tem-

⁸⁸ See Lewin, *supra* note 7, at A16. While the court struck down the Cleveland voucher program as a violation of the Establishment Clause, the Ohio Supreme Court did not go so far. See *id.* Rather, the court allowed the program to exist until the end of the year with an extensive judicial review to be administered at that time. See *id.*

⁸⁹ See Bodemer, *supra* note 3, at 283-84. Under the original Wisconsin legislation, religious schools were not eligible to participate in the voucher program. See WIS. STAT. ANN. § 119.23(2)(a) (limiting participating private schools to non-sectarian schools). Consequently, the first challenge to the Milwaukee Parental Choice Program was not based on the Establishment Clause. See *Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992). In *Davis*, various school administration organizations and the National Association for the Advancement of Colored People (NAACP) challenged the Milwaukee Parental Choice Program on state constitutional grounds. See *id.* at 465. The plaintiffs advanced three arguments: 1) that the program violated art. IV, § 18 of the Wisconsin Constitution which states that the legislature may not pass a bill which is private or local in nature; 2) that the program violated art. X, § 3 of the Wisconsin Constitution which requires the establishment of uniform school districts; and 3) that the program violated the public purpose doctrine which requires that public funds be spent exclusively for public purposes. See *id.* at 462-63. The Wisconsin Supreme Court found in favor of the defendants on all three issues. See *id.* at 477.

First, the court found that the statute did not violate the constitutional provision that the legislature is prohibited from passing laws which expressly benefit only one locality and not the state as a whole. See *id.* at 473. The court noted that the Milwaukee Public School District has significantly greater education and poverty problems than other school districts in the state. See *id.* at 469. The court pointed out that these problems have external effects on the rest of the state and, therefore, improving the quality of education in Wisconsin is of statewide importance. See *id.* at 470.

Second, the court ruled that the Milwaukee Parental Choice Program did not violate the constitutional requirement that the state establish uniform school districts. See *id.* at 474. The court reasoned that the participating private schools did not constitute public school districts simply because they received some public money as a result of vouchers. See *id.* at 463. Therefore, these schools need not be uniform. See *id.* The court held further that the Milwaukee Parental Choice Program did not deprive students of a uniform education because participation in the voucher program was optional. See *id.* at 474.

Third, the court held that the program did not violate the public purpose doctrine. See *id.* at 477. The court found that the purpose of the voucher program was to improve education in Wisconsin which comports with the state's public policy. See *id.* at 463. In addition, the statute called for adequate governmental supervision of the program such that public funds were being used for a state purpose, namely to monitor education. See *id.*

In May of 1995, the Wisconsin Legislature amended the Milwaukee Parental

porary injunction preventing the state from funding sectarian schools⁹⁰ and a final decision is currently pending.⁹¹

As both decisions are expected to reach the United States Supreme Court, some observers are predicting the fate of school choice.⁹² Precedent on this issue tends to be fragmented.⁹³ However, as the debate over school vouchers continues to grow at a feverish pace, with school voucher cases on court dockets, jurisprudence on the issue is likely to evolve.⁹⁴

B. *The Establishment Clause as a Possible Barrier*

The most common ground for challenging the constitutionality of school choice is the Establishment Clause of the United States Constitution.⁹⁵ Past litigants have argued that because vouchers are available for use in sectarian schools, the state is supporting religion by supplying these schools with public funds.⁹⁶ Others contend that school vouchers constitute an excessive en-

Choice Program to extend participation to sectarian schools. See 1995 Wis. Legis. Serv. 27 § 4002 (West). Shortly thereafter, the statute was challenged on Establishment Clause grounds. See *Thompson v. Jackson*, 546 N.W.2d 140 (Wis. 1996). In *Thompson*, a *per curiam* opinion stated that it was unable to reach a verdict due to irreconcilable differences of opinion among the justices. See *id.* at 142. Three justices did not reach the Establishment Clause issue because they asserted that the amendments to the Milwaukee Parental Choice Program were in violation of art. I § 18, and art. X § 3 of the Wisconsin State Constitution. See *id.* Alternatively, three justices found that the plaintiffs had not met their burden of proof that the amendments to the program violated the Establishment Clause. See *id.* Since there was no opinion of the court, the court ordered a preliminary injunction which prevented private sectarian schools from participating in the program. See *id.* at 142. The court then dismissed the case without prejudice. See *id.*

⁹⁰ See *Thompson*, 546 N.W.2d at 142.

⁹¹ See *id.*

⁹² See Lewin, *supra* note 7, at A16. Legal analysts expect the Supreme Court of the United States to grant certiorari to the Wisconsin case. See *id.*

⁹³ See *infra* Part IV(B) and Part IV(C) (discussing the various and incongruous ways courts across the nation have dealt with school vouchers).

⁹⁴ See Lewin, *supra* note 7. With a number of voucher cases pending before various state and federal tribunals, a more tangible legal analysis is sure to emerge. See *id.*

⁹⁵ See David Futterman, Note, *School Choice and the Religion Clauses: The Law and Politics of Public Aid to Private Parochial Schools*, 81 GEO. L. J. 711, 714 (1993) (asserting that the primary criticism of school choice is that it violates the Establishment Clause).

⁹⁶ See *supra* Part IV(A) (discussing Establishment Clause challenges to the voucher programs in Cleveland and Milwaukee).

tanglement between religion and the state because students who use vouchers for religious schools will have to be monitored by the state.⁹⁷

While the First Amendment of the United States Constitution prohibits Congress from making any law which establishes religion or prohibits the exercise of religion,⁹⁸ it is not an absolute mandate requiring the total separation of church and state.⁹⁹ Indeed, the Supreme Court has recognized that some interaction between religion and the state is constitutionally permissible.¹⁰⁰ Therefore, pro-voucher litigants claim that the use of public vouchers in religious schools comports neatly with the Supreme Court's current Establishment Clause jurisprudence.¹⁰¹

⁹⁷ See *supra* Part IV(A) (referring specifically to the challenge facing the Cleveland voucher program).

⁹⁸ See U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." *Id.*

⁹⁹ See *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). In *Lemon*, the Supreme Court held that total separation of church and state is not possible or practicable. See *id.* In that case, the Court heard challenges to Rhode Island and Pennsylvania statutes which used public funds to supplement the salaries of some non-public school teachers. See *id.* at 607-09. The Court found that while some entanglement and involvement between church and state is inevitable, the statutory schemes in question were constitutionally impermissible. See *id.* at 625.

In fact, the Court found that some relationship between government and religious organizations is necessary. See *id.* The Justices referred to fire inspections, building and zoning regulations, and state requirements under compulsory school attendance laws as examples. See *Lemon*, 403 U.S. at 614. The Court held that only excessive entanglements will violate the Establishment Clause. See *id.* at 615; see also *infra* text accompanying note 100.

In a later case, the Court again held that the goal of the Establishment Clause is not the total separation of church and state. See *Lynch v. Donnelly*, 465 U.S. 668, 672 (1984). In *Lynch*, the Court found that a nativity scene erected by the city of Pawtucket, Rhode Island did not violate the Establishment Clause. See *id.* at 668.

¹⁰⁰ See e.g. *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993). In *Zobrest*, a municipality provided an interpreter to accompany a deaf student to his Catholic high school. See *id.* at 3-5. The Court held that this action did not violate the Establishment Clause because generally applicable statutes that have some ancillary impact on religion are not *per se* unconstitutional. See *id.* at 7-9. The Court explained that the establishment Clause does not bar a religious institution from receiving general government benefits such as protection by the police and fire departments, and maintenance of its public sidewalk. See *id.*

¹⁰¹ See Bodemer, *supra* note 3, at 311. A well constructed voucher program will probably survive scrutiny under the Establishment Clause. See *id.* "Based on the recent trend in Supreme Court decisions, it seems that school voucher programs will be evaluated under a more modern doctrine. The new doctrine appears to provide school voucher programs with a roadway through the Establishment Clause." *Id.* at

When evaluating Establishment Clause cases, the Court currently uses both the *Lemon Test*¹⁰² and the *Endorsement Test*.¹⁰³ Under either standard, the elements which are commonly implicated in school voucher cases are: 1) that the government aid to religious institutions does not create an excessive entanglement between church and state; and 2) that the government does not endorse a particular religion.¹⁰⁴

Generally, those who challenge vouchers as creating excessive entanglements argue that school choice is likely to embroil the state in the administrative matters of a religious education.¹⁰⁵ Indeed, in *Lemon v. Kurtzman*, the Court warned against statutes that require the state to monitor the practices of sectarian schools.¹⁰⁶

300-01; see also *infra* text accompanying notes 100-108.

¹⁰² See *Lemon*, 403 U.S. at 602. In *Lemon*, the Supreme Court established a three prong test that a statute must meet before it will be deemed constitutional under the establishment Clause. See *id.* at 612-13. The *Lemon Test* requires that: 1) the legislation must have a secular purpose; 2) the statute's principle or primary effect must not be to advance or inhibit religion; and 3) the statute must avoid excessive governmental entanglement with religion. See *id.* In its evaluation, the Court held that both the Rhode Island and Pennsylvania statutes satisfied the first prong of the test. See *id.* at 613. The Court found that the state always has a legitimate interest in maintaining minimum standards in schools. See *id.* at 613. However, since the Court found the statute involved created excessive entanglement between church and state, an evaluation of the second prong was unnecessary. See *id.*

Specifically, the Court examined "the character and purposes of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority," and determined that the state's entanglement with religion was excessive. *Id.* at 613.

¹⁰³ See, e.g., *Lynch*, 465 U.S. at 668. As an alternative to the *Lemon Test*, the Supreme Court also considers the endorsement test articulated by Justice O'Connor in *Lynch*. See *id.* at 687-88. Under this test, a statute comports with the Establishment Clause if the government does not become excessively entangled with religion. See *id.* Excessive entanglement occurs when the state interferes with the independence of a religious institution, when a religious organization is given access to government that non-adherents to the religion do not have, and when the relationship between the religious organization and the state fosters the creation of political alliances along religious lines. See *id.*

Furthermore, the endorsement test assures that the government does not endorse or disapprove of any particular religion. See *id.* This second prong is scrutinized closely by the Court. See *id.* Justice O'Connor states that "endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.*

¹⁰⁴ See Bodemer, *supra* note 3, at 292-301 (analyzing school vouchers under the Supreme Court's current Establishment Clause jurisprudence).

¹⁰⁵ See Bodemer, *supra* note 3, at 292-301.

¹⁰⁶ *Lemon*, 403 U.S. at 616-20. In *Lemon*, the Court found that the Rhode Island

On the other hand, voucher proponents argue that school choice will not require any more governmental oversight of religious schools than is already constitutionally permissible.¹⁰⁷ Furthermore, they argue that recent litigation has substantially weakened the guidelines promulgated in *Lemon*.¹⁰⁸

With regards to the Endorsement Test, the Supreme Court's greatest concern was the possibility that certain government aid to religious institutions might have the effect of advancing a particular religion.¹⁰⁹ Opponents claim that the government's practice of encouraging students to attend private religious schools might constitute state endorsement of religion.¹¹⁰ Conversely, the proponents of vouchers argue that the state is merely making funds available and it is the individual parent or family that is making the decision to support a sectarian school.¹¹¹

statute, which appropriated public funds to supplement the salaries of non-public teachers, included a provision for government controls and surveillance to insure that the state aid only supported secular education. *See id.* at 616. Although intending to maintain compliance with the Establishment Clause, the Court found that the statute required too much state supervision of a religious institution to be constitutional under the First Amendment. *See id.* The Court also found that the statute required the government to examine the religious school's records in order to determine the appropriate expenditure under the law. *See id.* at 620. The majority noted that this sort of state inspection of a religious institution is fraught with the entanglement of church and state that the Constitution forbids. *See id.*

¹⁰⁷ *See* Bodemer, *supra* note 3, at 298. State laws mandating that all schools train students on fire drill procedures, and the promulgation of laws regulating the education of handicapped children are examples of governmental regulation of schools. *See id.* at n.124.

¹⁰⁸ *See Lynch*, 465 U.S. at 679. In *Lynch*, the Court made reference to the *Lemon Test* but voiced its unwillingness to be confined to one test or criterion when reviewing Establishment Clause cases. *See id.* The Court noted further that in some recent cases, the *Lemon* analysis was not relevant. *See id.*

Perhaps the most scathing attack on the *Lemon Test* came from Justice Scalia when he criticized the Court's less than consistent reliance on the three-prong analysis. *See Lamb's Chapel v. Center Moriches Union Free School District*, ___ U.S. ___, 113 S. Ct. 2141, 2149 (1993) (Scalia, J., concurring).

As to the Court's invocation of the *Lemon Test*: Like some ghoul in a late night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.

Id.

¹⁰⁹ *See Lynch*, 465 U.S. at 688.

¹¹⁰ *See* Bodemer, *supra* note 3, at 299-300.

¹¹¹ *See* Bodemer, *supra* note 3, at 297-301. The Court's decision in *Zobrest* protects statutes which are applicable to the general public but benefits a religious organiza-

It is likely that the Court will eventually agree to hear one of the Establishment Clause challenges to the Cleveland and Milwaukee school choice programs in the near future.¹¹² The eventual outcome is a matter of much speculation.¹¹³

C. *Voucher Litigants as Plaintiffs*

Traditionally, voucher proponents have been the defendants in school choice litigation.¹¹⁴ However, there is an increasing number of plaintiffs who are challenging their state's school funding policies and asking for remedies in the form of vouchers.¹¹⁵ While students have been seeking judicial relief for substandard educational conditions since the 1970s, the practice of requesting school vouchers as a remedy is a relatively new phenomenon.¹¹⁶

In 1973, the Supreme Court held that education is not a fundamental liberty or right guaranteed by the United States Constitution.¹¹⁷ Since this decision, students seeking to challenge the

tion indirectly. *See id.* at 297. A voucher program should be a neutral state benefit because it enables parents to select the school of their choice. *See id.* Thus, a voucher program simply allows a parent to make a private choice about where to spend their education dollars and government endorsement of a specific religion is not a factor. *See id.*

¹¹² *See Lewin, supra* note 7, at A16.

¹¹³ *See Lewin, supra* note 7, at A16.

¹¹⁴ *See supra* Part IV(A) (discussing current challenges to school voucher programs in other jurisdictions).

¹¹⁵ *See Andres, supra* note 14, at 795. Most state constitutions guarantee the right to some minimum level of education. *See id.* However, while many courts nationwide are beginning to recognize affirmative education rights under their state constitutions, few have called for remedial measures. *See id.* at 800. As noted earlier, New Jersey is the exception to this trend. *See Abbott III*, 136 N.J. at 447, 454.

¹¹⁶ *See Andres, supra* note 14, at 796 (referring to cases where vouchers are sought as remedies as "the next phase of education litigation").

¹¹⁷ *See San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35-38 (1973). In *San Antonio*, Mexican-American parents whose children attended elementary and secondary schools in an urban school district in San Antonio, Texas, attacked the public education financing system used in that state. *See id.* at 45. Under the Texas scheme of school funding, the majority of funds for a particular district came from that district's ability to raise money through property taxation. *See id.* at 15-16. The plaintiffs claimed that this system discriminated against poor children residing in urban neighborhoods with low property tax bases, thereby violating the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 1. At trial, the district court found wealth to be a suspect classification and concluded that education is a fundamental right under the Constitution. *See id.*

On review, the United States Supreme Court found that Texas had not violated the Equal Protection Clause because wealth is not a suspect classification. *See*

educational policies for their state must rely on the education clause of their state constitution.¹¹⁸ In many cases, this has proven to be an effective course of action.¹¹⁹

Recently, in *Jenkins v. Leininger* and *Arviso v. Dawson*, plaintiffs claimed that their state constitutions gave them an affirmative right to an adequate education and that the current state of education in their respective school districts denied them that right.¹²⁰ In both cases, the plaintiffs argued that they were entitled to immediate relief which could come in the form of enrollment at a competent private school.¹²¹ Finally, they claimed that although funding reform might rectify educational conditions in the future, the likelihood that they will reap those benefits is slim.¹²²

id. at 18. First, the Court held that there was no evidence in the record that the poorest families in Texas lived in the poorest school districts. *See id.* at 22-23. Further, the Court found that where wealth is involved, "the Equal Protection Clause does not require absolute equality or precisely equal advantages." *Id.* at 23-24. Finally, the Court refused to depart from its well established standard that strict scrutiny is not applicable in cases of perceived wealth discrimination. *See id.* at 28-29.

Furthermore, in *San Antonio*, the Court held that education is not a fundamental right afforded explicit protection under the Constitution. *See id.* at 35. Again, the Court refused to stretch established constitutional standards. *See id.* at 31. The key in determining whether education is fundamental lies in the Constitution, and not in "comparisons of the relative societal significance of education as opposed to subsistence or housing." *See id.* at 33-34. Resorting to the rational basis test, the Court upheld the Texas funding system as constitutional under the Fourteenth Amendment and refused to subject the state's fiscal policy to strict scrutiny. *See id.* at 40-41.

¹¹⁸ *See Andres, supra* note 14, at 797.

¹¹⁹ *See Andres, supra* note 14, at 798 (referring specifically to the New Jersey case of *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973)). Andres asserts that *Robinson* generated lawsuits in over 25 states in the 1970s and 1980s. *See id.* Generally, plaintiffs in these cases relied on equal protection guarantees and education clauses in their state constitutions to claim that they were wrongfully deprived of adequate educations. *See id.*

¹²⁰ 659 N.E.2d 1366, 1377 (Ill. App. Ct. 1995); *Arviso v. Dawson*, No.BC 057321, slip op. at 2 (Ca.), cited in Andres, *supra* note 14, at 803. *See also* Andres, *supra* note 14, at 795-96. Both cases are currently awaiting review by state appellate courts. *See id.* The plaintiffs in these cases have claimed that their right to an adequate education is being denied due to pervasive crime in the schools, high dropout rates, and low test scores. *See id.* at 803.

¹²¹ *See Andres, supra* note 14, at 803. The parents of the plaintiffs claim that they should be allowed to send their children to neighborhood private schools where better educational opportunities exist. *See id.*

¹²² *See Andres, supra* note 14, at 802-03. For instance, the original plaintiff in *Robinson* is now in his thirties, and New Jersey has yet to provide the children in his district with a constitutionally acceptable education. *See id.* at 801.

The suit proved unsuccessful at the trial court level and was appealed.¹²³ In *Jenkins*, an Illinois court found that school vouchers present a political question that the Legislature must decide.¹²⁴ The court held that it was exercising judicial restraint in refusing to allow plaintiffs to attend private schools at public expense.¹²⁵ Similarly, in *Arviso*, the court deemed vouchers to be a political question and held that the separation of powers doctrine prevented a judicial resolution of the matter.¹²⁶

Although these decisions are setbacks, litigants seeking vouchers remain optimistic about possibilities for future success¹²⁷ because there is precedent for the judicial action they seek.¹²⁸ For

¹²³ See Andres, *supra* note 14, at 803.

¹²⁴ See *Jenkins*, 659 N.E.2d at 1377. In *Jenkins*, one hundred low income children attending public schools in Chicago sued the State Superintendent of Education, the State Board of Education, and the Chicago Board of Education. See *id.* at 1368. The plaintiffs alleged that the defendants failed to provide them with an efficient and high-quality education, thereby violating the Illinois State Constitution. See *id.* at 1368-1371.

The court found that the plaintiffs failed to state a cause of action because they did not identify any conduct by the named defendants that was arbitrary, unreasonable or capricious. See *id.* at 1372. Further, the court held that the plaintiffs' complaint was based on mere generalities about the quality of educational services provided by state and local school officials. See *id.* at 1371. Finally, the court noted that the fact that the schools where the plaintiffs were enrolled are in need of improvement does not establish a constitutional deprivation of the student's right to an education. See *id.* at 1372.

The court in *Jenkins* warned against the judiciary ordering a voucher system to resolve problems in public education. See *id.* at 1376-77. The court recognized the complexities involved in school funding and cited possible problems with court ordered vouchers, which included separation of church and state issues and substantial loss of public funds to the public school system. See *id.*

Lastly, the court noted that "the creation of school systems and the matter of their financing and administration is clearly a legislative prerogative that requires specialized knowledge." *Id.* at 1377. The court added that the judiciary should refrain from the matters because it lacks the knowledge and expertise to deal effectively with them. See *id.*

¹²⁵ See *id.*

¹²⁶ See *Arviso*, No.BC 057321, slip op. at 2 (Ca.), cited in Andres, *supra* note 14, at 803. In addition to holding that the separation of powers and political question doctrines precluded judgment for the plaintiff, the court in *Aviso* declared the claim "uncertain." See *id.*

¹²⁷ See Andres, *supra* note 14, at 823.

¹²⁸ See *Jenkins*, 659 N.E.2d at 1376. The plaintiffs in *Jenkins* asserted that due to their economic status, they lacked the ability to remove their children to private schools that provided adequate educational services. See *id.* at 1375. Furthermore, they argued that due to these circumstances they were being denied the right to ex-

instance, the United States Supreme Court has held that handicapped students have a right to be educated in a private school at the public's expense if their local school district cannot accommodate their educational needs.¹²⁹ The Court reasoned that these students were denied their right to an adequate education as guaranteed by the Individuals with Disabilities Education Act.¹³⁰ Consequently, the Court found that private school enrollment at the public's expense was an appropriate remedy.¹³¹

Similarly, courts have held that when states cannot provide a proper education for blind students, non-English speaking students, and dyslexic students, then these students are also entitled to public funding for private school tuition.¹³² These remedies are

ercise influence over their children's education. *See id.* at 1375-76.

¹²⁹ *See* Florence County School District Four v. Carter, __ U.S. __, 114 S. Ct. 361, 363 (1993). In *Florence*, the plaintiff was diagnosed with a learning disability and was placed in an individualized education program in her public school. *See id.* at 363. The plaintiff's parents were dissatisfied with this arrangement and enrolled their daughter in a private school which specialized in educating children with learning disabilities. *See id.* at 363-64. Later, the parents filed a lawsuit in federal district court alleging that the school district violated the Individuals with Disabilities Education Act (IDEA) by not providing their daughter with a free, adequate education at public expense as required by law. *See id.* 363-64. The parents claimed that since the public school system could not accommodate their daughter's educational needs, it was required to pay for her private school education. *See id.* They sought reimbursement for tuition and other costs incurred while their daughter was enrolled at the private school. *See id.* at 364.

The Court found that Congress, in enacting IDEA, intended to ensure that disabled children receive an appropriate and free education. *See id.* at 365. The Court held further that the defendant school district had violated the statute by failing to provide such an education to the plaintiff. *See id.* at 366. In light of the circumstances, the Court found that it was authorized to order reimbursement to the parents. *See id.*

¹³⁰ *See id.* at 366.

¹³¹ *See id.* In *Florence*, the statute authorized the Court to "grant such relief as the court determines is appropriate." *Id.* The Court noted that in exercising remedial discretion it must consider all of the factors that are relevant, including a determination of what level of reimbursement is appropriate and reasonable. *See id.* The Court concluded that if the cost of the private education incurred under IDEA was unreasonable, total reimbursement by the local school district could be warranted. *See id.*

¹³² *See, e.g.,* Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481 (1986) (holding that the use of public education funds for a blind student at a private Bible College is constitutionally permissible); *Castaneda v. Pickard*, 648 F.2d 989 (5th. Cir. 1981) (authorizing the use of broad remedial powers to secure the education rights of a Spanish-speaking student by mandating greater teacher training and improved measures for monitoring student progress); *Straube v. Florida Union Free Sch. Dist.*, 801 F. Supp. 1164 (S.D.N.Y. 1992) (holding that the state must

exceedingly voucher-oriented and provide proponents of school vouchers with ammunition for litigation.¹³³ These litigants are likely to argue that court ordered vouchers are actually a way of remedying substandard education while avoiding judicial management of education policy.¹³⁴ Presumably, the student chosen school is already adjudged to be satisfactory, and therefore requires no further supervision by the court.¹³⁵

V. *The Debate*

Perhaps the most severe criticism of school vouchers is that such programs allegedly result in segregated school districts.¹³⁶ Opponents claim that because private schools can accept students on almost any basis minority groups will be denied enrollment.¹³⁷ Opponents also advance the theory that ethnic groups will flock together, which would undermine diversity in the classroom and result in separate educational enclaves.¹³⁸

improve the educational opportunities available to a dyslexic student).

¹³³ See Andres, *supra* note 14, at 810.

¹³⁴ See Andres, *supra* note 14, at 812. Andres argues that "court ordered vouchers would avoid intrusive judicial action in state education systems." *Id.* The author points out that vouchers would not require the court to take over schools or recommend legislative initiatives. *See id.*

¹³⁵ See Andres, *supra* note 14, at 810.

¹³⁶ See O'Brien, *supra* note 9, at 401-02. In a recent study, academic achievement was not one of the major factors cited by parents when deciding to send their children to private school. *See id.* (citing Kevin B. Smith & Kenneth J. Meier, *School Choice, Panacea or Pandora's Box*, 77 PHI DELTA KAPPAN 312-16 (1995)). Additionally, the court found that Caucasian families are the most likely to seek transfers to private schools with low proportions of minority students. *See id.* (citing Jeffrey Henig, *The Local Dynamics of Choice: Ethnic Preferences and Institutional Responses, in WHO CHOOSES? WHO LOSES? CULTURE, INSTITUTIONS, AND THE UNEQUAL EFFECTS OF SCHOOL CHOICE* (Bruce Fuller & Richard F. Elmore eds., 1996)). It is also reported that parents searching for private schools generally desire to place their children with the right kind of classmates, not the right kind of program. *See id.* (citing Carol Ascher, *Retravelling the Choice Road*, 64 HARV. EDUC. REV. 209, 216 (1994)). Conversely, other reports indicate that improving education is the most important factor in a parent's decision to enroll their child in a voucher program. *See Lewin, supra* note 7, at A16.

¹³⁷ See COMMUNITY ADVOCATES FOR PUBLIC EDUCATION, NINE FACTS ABOUT PRIVATE SCHOOL VOUCHERS, #3 (citizen action pamphlet, on file with the Seton Hall Legislative Journal) [hereinafter NINE FACTS]. "In a private school voucher system, it is the private schools who do the choosing, not the parents. It is the private schools that can reject any potential student based on gender, race, religion, ethnicity, class, previous academic record, behavior or even physical or mental limitations." *Id.*

¹³⁸ See FRIEDMAN, *supra* note 6, at 91-92. Friedman acknowledges the commonly advanced argument that private schools exacerbate class distinctions and undermine

However, the argument that private schools will choose applicants on the basis of race is unpersuasive.¹³⁹ First, most private schools are already subject to varying degrees of state control.¹⁴⁰ Under a voucher program, a state can require participating schools to meet certain guidelines, such as adopting a policy of race-neutrality.¹⁴¹ In fact, the Milwaukee Parental Choice Program mandates that private schools meet certain state and federal education statutes that are normally binding on public education before they are granted participation in the program.¹⁴²

It is also unlikely that, if given a choice, parents will choose to send their children to a private school based solely on the racial composition of that school.¹⁴³ It is more likely that parents will consider educational quality as the major factor in the decision of where to send their child.¹⁴⁴ In fact, in a recent study of the Cleveland voucher program, eighty-five percent of school choice participants cited improvement in education, and not the demographic makeup of a participating school as their main reason for applying to the program.¹⁴⁵

the unifying force of public education. *See id.* He states that opponents of school choice advance the argument that "given greater freedom about where to send their children, parents of a kind would flock together and so prevent a healthy intermingling of children from decidedly different backgrounds." *Id.*

¹³⁹ *See infra* text accompanying notes 138-45, and accompanying text, rebutting the argument that school choice will result in racial discrimination.

¹⁴⁰ *See FERRARA, supra* note 28, at 184 (countering that under school choice, private schools would still have to meet state certification requirements).

¹⁴¹ *See CHUBB, supra* note 33, at 221. Private schools participating in voucher programs should be given great discretion with regard to their admissions policies. *See id.* However, all admissions decisions should be subject to non-discrimination requirements. *See id.* In fact, in certain jurisdictions, desegregation plans may call for racial quotas. *See id.* at 309. Besides non-discrimination policies, schools should be given great autonomy to define their own missions and construct their own programs. *See id.* at 221. The authors assert that innovation is limited when a school's student population is thrust upon it. *See Chubb, supra* note 33, at 221.

¹⁴² *See* WIS. STAT. ANN. § 119.23(2)(a)(4). For instance, the Milwaukee Parental Choice Program mandates that all participating private schools meet all health and safety codes that apply to public schools. *See id.*

¹⁴³ *See Lewin, supra* note 7, at A16. It is reported that the top reasons parents send their children to private schools are improvements in education, greater safety, location, religion and friends. *See id.*

¹⁴⁴ *See Lewin, supra* note 7, at A16. Furthermore, the implementation of school choice will benefit all students, not just those who enroll in the program. *See id.* As competition forces all schools to perform better, non-participating students will reap the benefits as well as voucher participants. *See id.*

¹⁴⁵ *See Lewin, supra* note 7, at A16.

Furthermore, the claim that non-minorities will flee urban areas under a voucher program, resulting in segregation, is misleading.¹⁴⁶ There would be less of a need for any student to relocate if the overall quality of education improves.¹⁴⁷ Additionally, it is the current system that allows some to escape mediocre public schools in favor of quality private schools.¹⁴⁸ Currently, it is the privileged that can afford to attend private school, but under a voucher program, everyone has the opportunity to participate.¹⁴⁹

Critics of the voucher system argue that school choice will drain resources from already underfunded urban school districts, causing their continued decline.¹⁵⁰ As a result, students who choose not to participate or are unable to participate in the program will be left without adequate educational support.¹⁵¹

First, this argument incorrectly assumes that when faced with vigorous competition from private schools, public schools will make no attempts to improve their academic performance.¹⁵² In a voucher system, public schools have an incentive to improve that

¹⁴⁶ See FERRARA, *supra* note 28, at 184.

¹⁴⁷ See FERRARA, *supra* note 28, at 184. Additionally, there is no reason to believe that minority students cannot perform as well academically when surrounded by members of their own race as opposed to an integrated environment. See Robin D. Barnes, *Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375, 2385 (1997).

¹⁴⁸ See FERRARA, *supra* note 28, at 184.

¹⁴⁹ See FERRARA, *supra* note 28, at 184; see also Friedman, *supra* note 6, at 92. "Under present arrangements, stratification of residential areas effectively restricts the intermingling of children from decidedly different backgrounds. In addition, parents are not now prevented from sending their children to private schools. Only a highly limited class can or does do so, parochial schools aside, thus producing further stratification." *Id.*

¹⁵⁰ See *Jenkins*, 659 N.E.2d at 1377. In *Jenkins*, the court noted that court ordered vouchers would require a re-allocation of funds already earmarked for public education. See *id.* The court found that this could result in a substantial loss of funding for the public school system. See *id.* The court recognized that the Chicago Public School system would most definitely suffer from such circumstances. See *id.* The court argued further that under a voucher system, children who are the most expensive to educate, such as children with learning disabilities, would not be able to meet the minimum standards of private schools and would remain in the now underfunded and overburdened public school system. See *id.*

¹⁵¹ See *id.*

¹⁵² See Bodemer, *supra* note 3, at 310. When faced with vigorous competition from competent private schools, public schools will respond by reducing waste, and increasing productivity, thereby providing educational services comparable to private schools. See *id.*

never before existed.¹⁵³ As a result, these school systems are likely to respond by reducing waste and improving productivity, which will have positive effects on the overall quality of education.¹⁵⁴

Second, the assumption that vouchers will drain public school funds is not entirely valid.¹⁵⁵ In most cases, educating students in private schools is much less expensive than the cost of a public school education.¹⁵⁶ Since the vast majority of school choice proposals will not provide vouchers in an amount that exceeds the tuition for the chosen school, the dollar amount above the private school cost will remain in the public school system.¹⁵⁷ As a result of vouchers, some public school districts will actually realize an increase in their per pupil expenditure.¹⁵⁸

Finally, it is arguably beneficial if some public schools are forced to close as a result of being out-performed by other area schools.¹⁵⁹ The rationale for allocating tax dollars into a failing public school is untenable¹⁶⁰ and forcing students out of substandard schools is beneficial to all parties concerned.¹⁶¹

VI. Conclusion

School voucher opponents are skeptical that these proposals

¹⁵³ See Bodemer, *supra* note 3, at 303. The incentive to achieve is that without improvement, public schools will be out of business. See *id.* Under a voucher system, public schools must constantly refine their product in order to remain viable. See *id.*

¹⁵⁴ See Bodemer, *supra* note 3, at 310.

¹⁵⁵ See Andres, *supra* note 14, at 814.

¹⁵⁶ See Andres, *supra* note 14, at 814. For instance, in Chicago, public schools spend approximately \$5,600 per pupil, while private school tuition can reach as low as \$2,500. See *id.*

¹⁵⁷ See Andres, *supra* note 14, at 814. In fact, A. 2443 provides that in no case will a voucher exceed the tuition rate of the participating school. See A. 2443. This is of particular importance in New Jersey since the state spends more dollars per pupil on public education than any other state. See *supra* text accompanying note 36. As such, the difference in tuition rates, which will be quite significant given the high rate of state education expenditures will be credited back to the public school, resulting in increased aid with relation to pupil enrollment. See Andres, *supra* note 14, at 814.

¹⁵⁸ See Andres, *supra* note 14, at 814.

¹⁵⁹ See Andres, *supra* note 14, at 814.

¹⁶⁰ See Andres, *supra* note 14, at 814.

¹⁶¹ See Andres, *supra* note 14, at 814. Furthermore, as in New Jersey, most states recognize efficient education as a constitutional right. See *id.* Therefore, the fundamental rights of the student trumps the rights of the failing school. See *id.*

will substantially improve a student's achievement.¹⁶² In the absence of any long-term data proving the efficacy of school vouchers, critics are wary of removing the education of children from the watchful eye of government.¹⁶³ Opponents claim that education is too critical to justify such a risky overhaul.¹⁶⁴

It is a widely held notion that the American public school system is failing to adequately educate the country's children.¹⁶⁵ Over the last forty years, this trend has been attributed to public schools being institutionalized under a heavy blanket of bureaucracy.¹⁶⁶ The administration of education has become detached from serving its primary purpose which is to educate children.¹⁶⁷

The problem is that local public school systems have a virtual monopoly over students.¹⁶⁸ Essentially, the public schools are guaranteed to have enough students each year to fill each classroom.¹⁶⁹ To wit, school officials have no market incentive to im-

¹⁶² See NINE FACTS, *supra* note 135, at fact #7. "A private school voucher system does not improve student performance." *Id.*

¹⁶³ See O'Brien, *supra* note 9, at 405 (arguing that as the responsibility for educating our children shifts from the state to the parents, the rationale for government funding of education is undermined).

¹⁶⁴ See O'Brien, *supra* note 9, at 405.

¹⁶⁵ See *supra* Part II(B) (asserting that for the past three decades, Americans have been dissatisfied with the state of public education in this country); see also CHUBB, *supra* note 33, at ix (stating that by most accounts the public education system in America is failing).

¹⁶⁶ See FERRARA, *supra* note 28, at 175-76 (arguing that increased spending fails to transform into improved student performance because much is lost in bureaucratic waste). For instance, a 1990 Fordham University study discovered that only 32.3% of funding for high schools in New York City reached the classroom. See *id.* On the other hand, nearly half of that funding was absorbed by the Board of Education and its staff which filled eight city buildings. See *id.* Similarly, while public school enrollment in America has declined by 7% over the last 20 years, the number of administrators and other non-teaching staff has increased by 40%. See *id.*

¹⁶⁷ See CHUBB, *supra* note 33, at 1. Public schools in America are not preparing students to compete in an international market. See *id.* "America's children are not learning enough, they are not learning the right things, and most debilitating of all, they are not learning how to learn." *Id.* Furthermore, society's children are falling behind students of foreign nations in areas of study such as math, science, and foreign languages. See *id.*

¹⁶⁸ See Bodemer, *supra* note 3, at 301-303. Under the current system of education, school administrators know that they are nearly guaranteed the attendance of children in the community, regardless of the quality of education that is provided. See *id.*

¹⁶⁹ See Bodemer, *supra* note 3, at 301.

prove the quality of education in their districts.¹⁷⁰ In other words, regardless of the school's achievement rates, enrollment will always be relatively static.¹⁷¹ Furthermore, public schools are awarded per pupil state funding which does not fluctuate with performance.¹⁷²

Alternatively, competition between districts eliminates elements which may stifle output.¹⁷³ For instance, if a public school system were required to compete with other schools in the area, it would be forced to manage its budget more efficiently, improve on the overall quality of its product, and be attractive to prospective students.¹⁷⁴ Failure to achieve these goals would result in the school no longer being viable and attractive to students and their parents. On the other hand, adherence to these standards would likely result in higher achievement for students.¹⁷⁵

Aside from the advantages of market competition, school choice has few tangible benefits.¹⁷⁶ Choice provides a sense of community involvement and ownership for parents, teachers, and students.¹⁷⁷ It is this involvement that leads to a greater commitment to success.¹⁷⁸ In addition, parental involvement in the education of their children has beneficial effects which transcend the

¹⁷⁰ See Bodemer, *supra* note 3, at 301.

¹⁷¹ See Bodemer, *supra* note 3, at 301-03. "The administrators know that regardless of the test scores or graduation rates the student body achieves, local children will have no option but to enroll." *Id.* at 302.

¹⁷² See Bodemer, *supra* note 3, at 301-03.

¹⁷³ See *supra* text accompanying notes 169-70 (discussing the proposed effects that competition would have on public education).

¹⁷⁴ See Bodemer, *supra* note 3, at 301. The author compares school systems to businesses. See *id.* If corporations could rely on a guaranteed customer base and a guaranteed cash flow, they would not have to produce a desirable product. See *id.* at 301-03. Similarly, if competition were introduced into educational systems and schools had to compete for enrollees and tuition, administrators would be forced to provide quality education. See *id.*

¹⁷⁵ See Bodemer, *supra* note 3, at 301-03. "A public school system required to compete with other education providers in the community would be forced to become more efficient, provide a better product, and improve services in order to remain viable." *Id.* at 303.

¹⁷⁶ See Barnes, *supra* note 147, at 2408-09. Barnes argues that school choice is not only a way to increase educational achievement, but it also operates as a method of reinforcing the parent's role in their child's upbringing. See *id.*

¹⁷⁷ See Barnes, *supra* note 144, at 2408 (citing Kevin Banasik, *Book Review*, 31 HARV. J. LEGIS. 519, 523 (1993)).

¹⁷⁸ See Barnes, *supra* note 144, at 2408.

boundaries of the classroom.¹⁷⁹ For example, it is argued that these effects lead not only to academic achievement, but to more energetic citizenship.¹⁸⁰

While the grim reports of America's educational malaise continue to grow, New Jersey residents can take solace in the fact that the debate over how to remedy the problem has begun to shift away from traditional reforms to more creative market-based solutions. Only when we accept the fact that attempts to ameliorate public education through increased funding have been futile can we truly understand what is at the heart of the problem. While school tuition vouchers will not solve all of the dilemmas that face our schools, voucher programs offer a common sense solution that should be examined further. Indeed, by introducing a school choice proposal in New Jersey, the state may finally meet its deadline at last.

¹⁷⁹ See Barnes, *supra* note 144, at 2408.

¹⁸⁰ See CHUBB, *supra* note 33, at 3. Moe argues that in the first few decades of the 1900s, schooling was a local affair and the bureaucratic institutionalization that exists today was largely non-existent. *See id.* The authors assert that education was bound up with family, neighborhood, and community. *See id.* *See also* O'Brien, *supra* note 9, at 399. According to O'Brien, voucher proponents argue that school choice fosters responsible citizenship through greater individual responsibility. *See id.* Thus, a parent who exercises control over his child's education is not only improving the potential for his child's academic success, but is also participating in the political process. *See id.*