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School Choice: American Elementary and Secondary Education Enter the Adapt or Die Environment of Competitive Marketplace, 29 J. Marshall L. Rev. 75 (1995)

Jonathan B. Cleveland

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SCHOOL CHOICE: AMERICAN ELEMENTARY AND SECONDARY EDUCATION ENTER THE “ADAPT OR DIE” ENVIRONMENT OF A COMPETITIVE MARKETPLACE

JONATHAN B. CLEVELAND

TABLE OF CONTENTS

INTRODUCTION	77
I. EDUCATING AMERICA’S YOUTH	82
<i>A. Central Planning and Monopolization</i>	85
<i>B. The Unavoidable Bureaucracy in Public Institutions: Money Lost and an Inability to Adapt</i>	88
<i>C. Protecting the Franchise at the Expense of the Consumer</i>	91
II. SCHOOL CHOICE	95
<i>A. A Short Primer on Various School Choice Proposals</i>	96
<i>B. Responding to the Public School Monopoly Argument</i>	99
1. <i>The Valuable Social Tool Argument</i>	100
2. <i>The Public Good Argument</i>	104
<i>C. The School Choice Proposal</i>	106
1. <i>Eliminating Producer Subsidies Leads to Competing Private Sector Producers</i>	108
2. <i>The Case for a Competitive Marketplace in Lower Education</i> ..	114
3. <i>Liberty and Individual Responsibility</i>	126
III. PROBLEMS AND CONSIDERATIONS IN IMPLEMENTING THE SCHOOL CHOICE PROPOSAL	128
<i>A. Economic</i>	128
1. <i>Supply / Demand</i>	128
2. <i>Price Floors and Price Caps — Vouchers and Price Inflation</i> ..	130

3. <i>Information Costs — The Risk of “Evil Choices”</i>	132
<i>B. Legal</i>	135
1. <i>Establishment Clause</i>	135
2. <i>Equal Protection</i>	139
3. <i>State Law Issues</i>	143
a. <i>Educational Equity</i>	143
b. <i>Davis v. Grover: State Constitutional Attacks Against School Choice</i>	147
c. <i>Epilogue: A Preliminary Review of the Milwaukee School Choice Plan</i>	149
IV. <i>OUTLOOK — WHERE IS SCHOOL CHOICE TODAY?</i>	150

SCHOOL CHOICE: AMERICAN ELEMENTARY AND SECONDARY EDUCATION ENTER THE "ADAPT OR DIE" ENVIRONMENT OF A COMPETITIVE MARKETPLACE

JONATHAN B. CLEVELAND*

*"[O]ne of the first rules of government is when you know you are doing something stupid, stop doing it."*¹

*"The definition of insanity is doing the same thing day after day, while each day expecting different results."*²

INTRODUCTION

The performance of American elementary and secondary students has declined rapidly over the last thirty years, while the cost of educating those students has risen dramatically.³ Setting aside whether or not standardized tests appropriately measure academic performance, American students compare miserably against international students on tests of math and science proficiency.⁴ No one can ignore the implications that arise from an education system that has made us a *Nation at Risk*.⁵ The competitiveness of an industrial economy depends on the education level of its labor. American business suffers unnecessary costs by providing its labor with basic education that secondary schools should have provided, and incurs the unknown cost from Ameri-

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1. Pierre S. duPont IV, *A "GI Bill" for Educating All Children*, reprinted in *PRIVATIZING EDUCATION AND EDUCATIONAL CHOICE: CONCEPTS, PLANS, AND EXPERIENCES* 134 (Simon Hakim et al. eds., 1994).

2. James A. Peysner, *School Choice: When, Not If*, 35 B.C. L. REV. 619, 627 (1994).

3. *Id.* at 626.

4. See *infra* notes 31-37 and accompanying text for a discussion of the decline of the academic performance of American students compared to students in other countries

5. See generally THE NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983).

can labor's relatively lesser ability to think on the job.⁶ The deterioration of the American elementary and secondary education system thus foreshadows future declines in American industrial competitiveness. America can expect industries to relocate certain labor intensive manufacturing processes to locations such as Poland or Southeast Asia, that offer low cost and better educated labor.⁷

The deterioration in American education has disproportionately occurred in the inner-city.⁸ In fact, inner-city public schools serving the poor more closely resemble prisons rather than places of learning. Because education is directly linked to economic prosperity, the failure to adequately educate children of the inner-city perpetuates a cycle of poverty in America.⁹ Despite dedicating substantial resources to inner-city public schools, these declines continue.¹⁰

Education reform is a critical issue facing state and federal level policy-makers. Ignoring the reality that public funds are a scarce resource, the education establishment, generally teacher unions, administrators and their organized groups and other education bureaucrats and their organized groups, advocate that government has underfunded education, and that the public school system needs more money to solve the problem. On the contrary, the government has not underfunded lower-level education. In fact, inflation-adjusted expenditures per pupil have increased more than 400% over the past forty years.¹¹ Moreover, America spends more per student on education than virtually all other industrial countries.¹² Yet, our students consistently

6. See *infra* notes 44-50 and accompanying text for a discussion of the effect of an uneducated labor force on American businesses.

7. Peter Gumbel, *Exporting Labor: Western Europe Finds That It's Pricing Itself Out of the Job Market*, WALL ST. J., Dec. 9, 1993, at A1 (discussing the migration of Western European labor-intensive manufacturing to low cost manufacturing facilities in Poland and other Eastern European countries); Steven E. Levingston, *Manufacturing Surge Shifts to the Southeast*, WALL ST. J., June 14, 1991, at A1 (discussing the shifting of low-cost, labor-intensive manufacturing from Hong Kong, Singapore, Taiwan and South Korea to Southeast Asia).

8. See Amy J. Schmitz, *Providing an Escape for Inner-City Children: Creating a Federal Remedy for Educational Ills of Poor Urban Schools*, 78 MINN. L. REV. 1639, 1641-47 (1994).

9. See generally Susan P. Leviton & Matthew H. Joseph, *An Adequate Education for All Maryland's Children: Morally Right, Economically Necessary, and Constitutionally Required*, 52 MD. L. REV. 1137 (1993).

10. See *infra* notes 97-114, 590-603 and accompanying text discussing how substantial amounts of increased education funds are allocated to bureaucracy and administration and not to the education of children.

11. JAMES R. RINEHART & JACKSON F. LEE, JR., *AMERICAN EDUCATION AND THE DYNAMICS OF CHOICE* 7 (1991).

12. See *infra* note 59 and accompanying text for figures on United States spending on education.

underperform students of those countries.¹³

Cynically, the education establishment of course wants more money because they would benefit most from increased expenditures. For example, at least thirty-three cents, and in some cases fifty cents, of every additional educational dollar funds non-educational activities such as administration.¹⁴ Of the money directed toward "instructional expenditures," evidence suggests that the system directs resources in areas that have no positive relationship to improving academic performance.¹⁵ Furthermore, merely focusing on funding ignores the systemic problems that exist in American education. The system today stifles innovation and individual effort, is subject to political constraints that dictate "milquetoast" curricula and is plagued with the complacency that inherently exists whenever institutions are not subject to competition.¹⁶

This Article challenges the present system of delivering education in grades K-12. It concludes that the present educational system is primarily responsible for the deterioration in the academic performance of American students and leads to a tremendous waste of social resources. In the present framework, America educates approximately ninety percent of its children in a public school monopoly.¹⁷ The public school monopoly exists as a result of producer subsidies that allow the predation of competing private schools.¹⁸ This government operated monopoly has become a bureaucratic, hierarchical, rule-bound provider that wastes social resources. In addition, this system directly contravenes numerous studies that indicate that education provided through a decentralized system, with parents, teachers and principals operating autonomously to determine curriculum, personnel and other matters, leads to substantially better performance by students.¹⁹

The American public school system delivers its product (*i.e.*, education) to the market (*i.e.*, students and parents) under the same principles that the former Soviet Union state enterprises

13. See *infra* note 430 and accompanying text comparing the performance of American students against students from other countries that spend less per student on education.

14. See *infra* notes 588-601 and accompanying text discussing increased educational costs related to implementation of tasks and policies externally imposed on public educators.

15. *Id.*

16. Peyser, *supra* note 2, at 624.

17. *Id.* at 622 n.13.

18. Philip K. Porter & Michael L. Davis, *The Value of Private Property in Education: Innovation, Production, and Employment*, 14 HARV. J.L. & PUB. POL'Y 397, 412-13 (1991).

19. See *infra* notes 115-23 and accompanying text discussing autonomous and decentralized school systems and the success of the New York charter school program.

implemented to manufacture and sell products to Soviet Citizens.²⁰ Like the former Soviet system, consumer choice and competition do not exist in the current American public school system. Therefore, schools have few incentives to provide a quality product to captive customers. Thus, no public school is rewarded for demonstrating outstanding performance or fails for exhibiting substandard performance.

This Article contends that attempts to effectuate "reform" within the current paradigm of providing education are misguided. It further argues for replacing producer subsidies that allow predation of private schools with demand subsidies to parents who could then select one of several schools for their child to attend (*i.e.*, the School Choice Proposal). Accordingly, a substantial number of new privately-owned schools would enter the lower-level education market to meet the increased demand. As such, the School Choice Proposal would dismantle the public school monopoly and lead to a marketplace of multiple private providers. Thus, those schools that neglected to improve quality would fail in a competitive market, unlike in the present public school monopoly that shelters schools from market discipline and perpetuates the existence of failing schools. More importantly, a market dominated by private providers that are individually rewarded for outstanding performance would create an appropriate incentive system to improve the overall quality of lower-level education in America.

This Article advocates that introducing school choice should be the first step in educational reform. A parent in each school district would have three alternatives. The parent could:²¹

1. Allow the school district to assign their child to a school;
2. Send their child to *any* public school that accepts the child, either inside or outside the child's school district; or
3. Accept a state funded scholarship voucher, in an amount at least equal to the average private school tuition or at most equal to the state expenditure per pupil in the public school system. The voucher would serve to fund the child's attendance at either religious or secular private schools.

Education is an economic good. In other words, more education is better than less education. Beginning with the normative premise that allocating economic goods should maximize consumer welfare rather than producer welfare,²² the education market-

20. See *infra* notes 87-93 and accompanying text for a discussion of central planning in the former Soviet Union of all commercial activity according to the a five-year projection developed by *Gosplan*.

21. This plan resembles the plan proposed by Delaware Governor Pierre duPont. See duPont, *supra* note 1, at 132.

22. See generally EDGAR K. BROWNING & JACQUELINE M. BROWNING, MICROECO-

place should reflect a competitive market²³ not a monopoly.²⁴ Following with a subsidiary normative premise that private actors, subject to market determination of success or failure, more efficiently accomplish tasks than public actors, private enterprises, rather than public institutions, should, therefore, provide education to avoid wasting social resources.

The nature of any monopoly dictates that the monopolist will expend resources to preserve its franchise. The benefactors of the present system, the education establishment, are well-organized in powerful labor unions that actively lobby legislatures and successfully preserve the status quo.²⁵ Achieving school choice in the political arena will be an arduous task. This Article attempts to generate ideological support for the school choice concept, especially from those inclined to viscerally reject the proposition based on the rhetoric advanced by the education establishment or from a mistaken notion that if government does not operate schools, children will not receive an education.

The education establishment attempts to perpetuate the present system by aligning itself with a sympathetic constituent, the poor, and portraying itself as the guardian of the poor. Yet, the class welfare approach is particularly egregious because the public school monopoly has condemned the inner-city poor to failing institutions and has done more to make their low-income status permanent by denying them effective educational opportunities.²⁶ The education establishment claims that school choice will benefit the rich at the expense of the poor.²⁷ This assertion is patently false. Students who attend wealthy suburban schools are not the primary beneficiaries of school choice. Rather, students in the inner-city are the primary beneficiaries of school choice. Polly Williams, an ardent inner-city activist for school choice for low-income students in Milwaukee, Wisconsin appropriately condemns the paternalism of the public school system.²⁸

NOMIC THEORY AND APPLICATIONS 568-94 (1986) (discussing welfare economics theory).

23. A competitive market is composed of many different firms producing a similar product. *Id.* at 251. Factors used to determine the competitiveness of a market include: 1) the number of buyers and sellers; 2) the mobility of resources; 3) the homogeneity of the product; and 4) the amount of relevant information possessed by the buyers and sellers. *Id.* at 251-53.

24. A monopoly exists when only one firm sells in a given market *Id.* at 329. See *id.* at 329-31 (discussing the characteristics of monopolies). See generally *id.* at 549-57, 364-66 (comparing monopolistic markets and competitive markets).

25. Peyser, *supra* note 2, at 622-23 (discussing the strength and organization of teachers and administrators as lobbyists against education reform).

26. Schmitz, *supra* note 8, at 1641-47.

27. Amy Christine Hevly, Note, *Nothing Simple or Certain: Establishment Clause Barriers to Choice in American Education*, 35 ARIZ. L. REV. 467, 470-71 (1993).

28. Thomas Hetland, *The Milwaukee Choice Program*, in PRIVATIZING EDUCA-

She states, "if liberals are so good for black people, why are we in such bad shape."²⁹ Therefore, the inner-city poor are the foremost beneficiaries of an educational voucher that would allow them to escape to better schools, and have an opportunity to improve their standard of living.

Few should disagree with the goal of better educating American children. Many, however, disagree on the means of achieving that goal. In selecting the appropriate means, education reform must confront a simple threshold issue which is often ignored: whether production should occur through a government-operated monopoly, or whether America should open its market to competition.³⁰ The education establishment's rhetoric suggests that the goal of education reform is merely government provision, rather than improving the quality of education. Conversely, school choice is not proposed as the end to be achieved. Instead, school choice is proposed as a means toward creating a system that achieves the goal of providing American children with a better education without wasting social resources. For that reason, the time to implement school choice is now.

I. EDUCATING AMERICA'S YOUTH

Far too many studies paint a bleak picture of the academic performance of American elementary and secondary students. High school graduation rates have plummeted.³¹ Absenteeism has dramatically increased.³² Only half of all high school seniors can locate France on a map.³³ Thirteen percent of seventeen-year-old students are illiterate, and that number rises to forty percent when surveying minorities.³⁴ Additionally, less than twenty percent can solve a math problem involving fractions.³⁵

TION AND EDUCATIONAL CHOICE: CONCEPTS, PLANS, AND EXPERIENCES 184 (Simon Hakin et al. eds., 1994)

29. *Id.*

30. See generally Philip T.K. Daniel, *A Comprehensive Analysis of Education Choice: Can the Polemic of Legal Problems be Overcome?*, 43 DEPAUL L. REV. 1 (1993).

31. JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 9 (1990) (stating that approximately 25% of the nation's high school students failed to graduate).

32. This includes absenteeism among teachers. Robert A. Frahm and Brant Houston, *Chalk Up Teacher Absenteeism as One More Woe of Big-City Schools*, HARTFORD COURANT, July 7, 1993, at A1; Leroy Williams Jr., *Denver Teacher Absenteeism Four Times Rate Among 79 Employers*, ROCKY MOUNTAIN NEWS, Oct. 14, 1993, at 17A.

33. Caspar W. Weinberger, *When Our Schools Do Badly - So Does America*, FORBES, Oct. 21, 1991, at 31.

34. See Lewis D. Solomon, *The Role of For-Profit Corporations in Revitalizing Public Education: A Legal and Policy Analysis*, 24 U. TOL. L. REV. 883, 887 (1993).

35. See duPont, *supra* note 1, at 121.

In 1983, the National Commission on Educational Excellence reported that the "average achievement of high school students on most standardized tests is now lower than . . . when Sputnik was launched in 1957."³⁶ The combined math and verbal scores on the Scholastic Aptitude Test (S.A.T.) have dropped from 978 in 1963 to 902 in 1993, and the absolute number of "outstanding" scores on the verbal portion, a score of 600 or more, have declined by more than thirty percent since 1972.³⁷

American students compare miserably to foreign students on international standardized tests, particularly in the areas of math and science.³⁸ Knowledge in these academic subjects is critical to technological advancements in industry.³⁹ According to former U.S. Secretary of Education, Lauro Cavazos, "the top five percent of our high school students know less about math than the average high school student in Japan."⁴⁰ Moreover, powerful anecdotal evidence of business executives supports the statistics depicting the dramatic decline in the quality of American education.⁴¹ For example, in 1989, Allstate Insurance Company sponsored a survey in which business leaders gave American public education a "C-."⁴² Thus, the deterioration in education directly impacts the competitiveness of American industry.⁴³

As a result, America's "human capital"⁴⁴ has become comparatively less valuable than that of our foreign competitors. In the modern and complex global economy, productivity gains heavily depend on "brain power," instead of rote rule-following.⁴⁵ Yet, American labor does not effectively think or learn on the job.⁴⁶ Thus, American manufacturers desperately seek, but nonetheless suffer, a severe shortage of skilled labor.⁴⁷ Moreover, the Ameri-

36. Peysner, *supra* note 2, at 627.

37. *Id.*; duPont, *supra* note 1, at 122. In 1995, S.A.T. scores increased. Many experts, however, attribute the increase to a "radical" change in the test format rather than an improvement in education. See Steven Stecklow, *S.A.T. Scores Rise Strongly After Test is Overhauled*, WALL ST. J., Aug. 22, 1995, at B1. For example, average scores on the American College Test (A.C.T.) did not improve. *Id.*

38. CHUBB & MOE, *supra* note 31, at 8.

39. *Id.*

40. RINEHART & LEE, *supra* note 11, at 4.

41. Tom Feeney, *Why Educational Choice: The Florida Experience*, in *PRIVATIZING EDUCATION AND EDUCATIONAL CHOICE: CONCEPTS, PLANS, AND EXPERIENCES* 52 (Simon Hakim et al. eds., 1994).

42. *Id.*

43. *Id.*

44. "Human capital" is an individual's ability to perform useful services. BROWNING & BROWNING, *supra* note 22, at 484. See also Paul B. Stephan III, *Federal Income Taxation and Human Capital*, 70 VA. L. REV. 1357, 1358-66 (1984) (discussing generally the "human capital" concept).

45. *Id.*

46. CHUBB & MOE, *supra* note 31, at 9.

47. Raju Narisetti, *Job Paradox: Manufacturers Decry A Shortage of Workers*

can economy has lost an estimated twenty-five to thirty billion dollars due to reduced productivity, errors and accidents *solely* attributable to illiteracy.⁴⁸ In addition, the cost of 700,000 high school dropouts each year amounts to \$240 billion in lost wages and foregone taxes over their lifetime.⁴⁹ Thus, the deterioration of America's educational system partially explains the decline in American competitiveness against Asian and European economies.⁵⁰

The quality of education not only impacts the overall economic health of a country, but dictates the welfare of the citizens within that country. Education is a crucial means of improving the standard of living of persons and communities because employers generally place a higher value on prospective *educated* employees.⁵¹ Concentrations of better educated persons (*i.e.*, a relatively more educated labor pool) attracts industry into communities.⁵² The inability to attract businesses into the inner-city results from failing to provide educational opportunities to those living in the urban core.⁵³ Unfortunately, crime and social decay are the attendant consequences of the failure to appropriately educate inner-city residents.⁵⁴

Although the official mantra of public education is its claim that "the poor and the oppressed [are its] greatest beneficiaries,"⁵⁵ the American education system has particularly stifled the opportunity for economic advancement of those students in the lowest economic stratum.⁵⁶ The performance statistics of inner-city school systems reflect grave disparities when compared to

While Rejecting Many, WALL ST. J., Sept. 9, 1995, at A1.

48. Simon Hakim et al., *Introduction*, in *PRIVATIZING EDUCATION AND EDUCATIONAL CHOICE: CONCEPTS, PLANS, AND EXPERIENCES 1* (Simon Hakim et al. eds., 1994).

49. See Solomon, *supra* note 34, at 888.

50. See Hakim et al., *supra* note 48, at 1. See also Solomon, *supra* note 34, at 885-87.

51. Hakim et al., *supra* note 48, at 1; Lynn A. Stout, *Some Thoughts on Poverty and Failure in the Market for Children's Human Capital*, 81 GEO. L.J. 1945, 1947 (1993). See also *The Nature of Poverty*, WALL ST. J., Mar. 30, 1995, at A16 (citing a Census Bureau study that stated, "[a]nyone who possesses a high school diploma . . . is highly unlikely to be poor long.").

52. See Selwin Price, *Location Matters to Manufacturers*, INDUS. WK., Oct. 2, 1989, at 50. A skilled workforce ranked as the second most important criteria for manufacturers when selecting a location. *Id.* Moreover, "the skill level of the local workforce . . . is likely to become increasingly [important] in the future." *Id.*

53. See generally Peter Dreier, *America's Urban Crisis: Symptoms, Causes, Solutions*, 71 N.C. L. REV. 1351 (1993).

54. *Id.* at 1362-69

55. MILTON FRIEDMAN & ROSE D. FRIEDMAN, *FREE TO CHOOSE* 151 (1980) (quoting Leonard Billet, *The Free Market Approach to Educational Reform*, Rand Paper P-6141, at 27-28 (1978)).

56. Schmitz, *supra* note 8, at 1657.

national averages, or to the performance of neighboring wealthier suburbs.⁵⁷ Decaying urban school systems dictate a bifurcation of society based on education, which leads to social conflict.

Many offer explanations for the decline in the quality of American education. Some proffer that the breakdown in family values, has created the problem when in fact, this is merely the consequence of the decline. Others claim that the public schools function adequately. Additionally, several in the education establishment contend that more money will solve the problem.⁵⁸ Ironically, however, America spends more on elementary and secondary education than most other industrial countries. In recent years, the United States has spent \$213 billion, or 4.1% of Gross National Product (GNP), on lower level education.⁵⁹ Clearly, underspending is not the problem and reform within the system is not the solution. Instead, this Article posits that the decline in academic achievement is the direct result of the established system used to deliver education to elementary and secondary students, and that education reform must envision transforming the provider of education from a public sector monopoly to a panoply of private sector providers.

A. Central Planning and Monopolization

At the beginning of the twentieth century, schooling was a local affair.⁶⁰ Local schools catered to and reflected the values of the local community.⁶¹ The families, neighborhoods and community directly influenced the curriculum, budget and personnel decisions.⁶² Principals and teachers were therefore directly accountable to their consumers, (*e.g.*, students and parents).⁶³ Although attendance did not become mandatory in all fifty states until 1918, schooling was nearly universal despite the absence of mandatory attendance laws.⁶⁴

During the Progressive Era, a reform movement expanded the government's role in providing lower-level education and consolidated authority over individual schools in distant governmental institutions.⁶⁵ The reform movement criticized the then-exist-

57. *Id.* at 1642.

58. *See* duPont, *supra* note 1, at 122-23.

59. Solomon, *supra* note 34, at 887 & n.15.

60. CHUBB & MOE, *supra* note 31, at 3.

61. *Id.*

62. *Id.*

63. *Id.*

64. FRIEDMAN & FRIEDMAN, *supra* note 55, at 150-62. *See also* David Beers & Jerry Ellig, *An Economic View of the Effectiveness of Public and Private Schools*, reprinted in *PRIVATIZING EDUCATION AND EDUCATIONAL CHOICE: CONCEPTS, PLANS, AND EXPERIENCES* 25-27 (Simon Hakim et al. eds., 1994)

65. CHUBB & MOE, *supra* note 31, at 4; FRIEDMAN & FRIEDMAN, *supra* note 55,

ing fragmented and parochial system of education.⁶⁶ Reformers replaced the decentralized system with centralized governing institutions staffed by "impartial education experts" who were devoted to the *public interest*.⁶⁷ Centralization reduced the number of school districts from 100,000 in 1945 to 16,000 today. Because centralization diminished the control of an individual over the distant political body,⁶⁸ as professional educators at the district, state and federal level took control of the public school system, parents correspondingly lost influence over the education that local schools provided.⁶⁹ Most major policy decisions regarding curriculum, course content and textbooks became, and still are, made at the state level.⁷⁰ District level officials were relegated to implementing directives and roles with little influence.⁷¹ Individual schools, the bottom rung of the hierarchy, had little discretion in determining the manner in which its students received an education.⁷² This system arose under the premise that distant bureaucrats "knew best what kind of education people needed and how it could be provided most effectively."⁷³

Presently, the system educates American students almost exclusively through this nearly universally followed public school system format.⁷⁴ States compel attendance in accredited institutions and communities make public schools available throughout school districts.⁷⁵ Originally, cities exclusively financed school systems by assessing local property taxes.⁷⁶ Now, however, most public school systems receive at least half of their funding from state governments.⁷⁷ Moreover, the federal government has expanded its role in funding public school systems.⁷⁸ Thus, private schools are not an economically feasible alternative for most families because parents pay taxes to support the public school system and would need to pay an additional tuition to enroll their child in a private school.⁷⁹ As a result, nearly ninety percent of all ele-

at 150.

66. CHUBB & MOE, *supra* note 31, at 4.

67. *Id.*

68. FRIEDMAN & FRIEDMAN, *supra* note 55, at 155.

69. *Id.*

70. *Id.*

71. *Id.*

72. Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423, 433 (1991).

73. CHUBB & MOE, *supra* note 31, at 4.

74. Nearly 87% of all students attend public schools. Peysner, *supra* note 2, at 622 n.13.

75. *Id.*

76. Hanushek, *supra* note 72, at 433.

77. FRIEDMAN & FRIEDMAN, *supra* note 55, at 155; RINEHART & LEE, *supra* note 11, at 89.

78. FRIEDMAN & FRIEDMAN, *supra* note 55, at 155.

79. Andrei A. Baev, *Civil Law and the Transformation of Property in Post-So-*

mentary and secondary students attend public schools.⁸⁰ Thus, the existence of "free" neighborhood public schools creates a virtual monopoly in the public school system.⁸¹

Centralization of decision-making in the public school system eliminates direct accountability of the decision-maker at the top of the hierarchy to the students and parents at the bottom of the hierarchy.⁸² The decision-maker does not personally confront or assess the impact of the thousands of decisions necessary to operate a school system.⁸³ Most important, the decision-maker is never disciplined for making erroneous decisions because consumer autonomy does not exist.⁸⁴ The education reformers developed a uniform curriculum and institutional setting that parents often viewed as inappropriately servicing the diverse talents, interests, desires and needs of their children.⁸⁵ Teachers genuinely sympathize with the plight of parents, but, despite their efforts, a centralized, monopolized, uniform system cannot address or respond to the parent's unique demands.⁸⁶

Essentially, the public school system delivers education to American students under the same central planning principles that factories in the former Soviet Union applied to the manufacture and delivery of products.⁸⁷ For example, in the former Soviet Union, all commercial activity was centrally planned according to a five-year projection developed by *Gosplan*.⁸⁸ Each state-owned enterprise (SOE) produced according to *Gosplan*, regardless of changes in economic circumstances.⁸⁹ This approach resembles developing curriculum plans at the state or district level, and American public school teachers rigidly following such plans.⁹⁰ Continuing the analogy, Soviet markets only sold Soviet products, and Soviet citizens therefore could not choose between competing products.⁹¹ Similarly, American parents cannot send their children to alternative schools because they cannot afford to pay the double tax.⁹² Thus, public schools enjoy a *de facto* monopoly

cialist Economies: Alternatives to Privatization, 12 U.C.L.A. PAC. BASIN L.J. 131, 135 (1993).

80. Peyser, *supra* note 2, at 620; RINEHART & LEE, *supra* note 11, at 1.

81. Peyser, *supra* note 2, at 622.

82. FRIEDMAN & FRIEDMAN, *supra* note 55, at 155.

83. SEYMORE FLIEGEL & JAMES MACGUIRE, *MIRACLE IN EAST HARLEM: THE FIGHT FOR CHOICE IN PUBLIC EDUCATION* 26 (1993).

84. *Id.*

85. *Id.*

86. *Id.* at 26.

87. Beers & Ellig, *supra* note 64, at 24. See generally Baev, *supra* note 79, at 135 (describing *Gosplan* practices).

88. Baev, *supra* note 79, at 135.

89. *Id.* at 136-37.

90. *Id.*

91. *Id.*

92. The "double tax" refers to the burden on parents who send their children to

nearly identical in design and effect as the former Soviet SOE's.⁹³

The Soviet economy collapsed and the American education system is declining because two systemic problems are inherent in a centrally planned system. First, central planning cannot anticipate spontaneous events or accommodate the individual needs of consumers.⁹⁴ A one-size-fits-all formula simply does not work. Second, central planning operates with a flawed incentive system because it fails to reward outstanding performance, innovation or production.⁹⁵ As such, dismal performance is pre-determined.

B. The Unavoidable Bureaucracy in Public Institutions: Money Lost and an Inability to Adapt

Bureaucratic control, rather than competition and consumer choice, are the norm in the public school system.⁹⁶ Illustrative of the expansive bureaucracy, school administrative staff increased 500% between 1960 and 1984, though student enrollment increased only nine percent.⁹⁷ Presently, non-teaching staff outnumber teachers.⁹⁸ The New York public school system illustrates the absurd "model of bureaucratic pathology" common to public school systems.⁹⁹ John Chubb compared the staffing of the central offices of the New York City public school system and the Catholic school system.¹⁰⁰ The public school system employed 6,000 administrators, whereas the Catholic school system's administrative office employed only twenty-five people to manage a school system.¹⁰¹ Thus, the Catholic school employed one-fifth the size of the public system.¹⁰² Professor Nathan Glazer of the

private school. These parents pay taxes to support the public school system as well as private tuition. The economic cost of private tuition includes the foregone benefit of the state expenditure per pupil available from attending the public system. See *supra* notes 77-79 and accompanying text for a discussion of the predation of private schools by public schools to establish market monopoly that results from the double tax.

93. Baev, *supra* note 79, at 136-37.

94. *Id.*

95. *Id.*

96. See Beers & Ellig, *supra* note 64, at 20-21.

97. Peyser, *supra* note 2, at 622.

98. *Id.*

99. FLIEGEL & MACGUIRE, *supra* note 83, at 26 (quoting DAVID ROGERS & NORMAN H. CHUNG, LIVINGSTON STREET REVISITED 110 (1983)).

100. *Id.* at 26-27.

101. *Id.*

102. *Id.* (discussing John Chubb's study of the New York City Public School System). A similar comparison was made in Washington, D.C. where the Catholic school system services 50,000 students with 17 administrators, and the public school system supports 81,000 students with 1,500 administrative workers. See Hakim et al., *supra* note 48, at 4.

Harvard Graduate School of Education commented that:

[in the public school system, there are] so many rules and regulations and levels of control that it's impossible to do anything. It is literally impossible to build a new school within the New York City school system in less than eight years, which was why a law had to be passed creating an independent school construction authority that promises completion in two years.¹⁰³

Bureaucracy inherently permeates government monopolies. The absence of external competition allows those operating in a government-operated monopoly to meet their own needs first, and the customer's needs second.¹⁰⁴ Public employees can exploit the built-in conflict of interest between their personal welfare and that of taxpayers because the mechanism to check these agency costs (*i.e.*, a competitive market), is non-existent.¹⁰⁵ Agency costs, or the incentive of managers to act in their own self-interest rather than on behalf of the producer, result from the separation of ownership and control.¹⁰⁶ For example, in many corporations no single shareholder owns a sufficient portion of stock necessary to justify the cost of monitoring corporate management. As such, executives have an incentive to "pad" expense accounts, travel first class and create various other unnecessary costs for the corporation. Shareholders, however, can at least indirectly monitor agency costs by comparing the financial performance of other comparable companies.

In a relatively competitive market, managers subject to such market discipline cannot extort unreasonable agency costs. On the other hand, with respect to the public school monopoly or other monopolies, agency costs are exorbitant. In the public school system, agency costs are reflected in the needless layers of bureaucracy. However, taxpayers as a group are more dispersed than shareholders in a corporation, and are exposed, individually, to less of a financial stake. Therefore, taxpayers have little incentive to discover and correct such abuses.

Not surprisingly, a substantial body of evidence ineluctably leads to the conclusion that private sector providers are more efficient than public sector providers.¹⁰⁷ Unlike private sector providers, bureaucrats in the public school system do not spend their own money, they do not become directly accountable for the return on money spent, and therefore, they become insensitive to

103. FLIEGEL & MACGUIRE, *supra* note 83, at 27-28.

104. RINEHART & LEE, *supra* note 11, at 93.

105. *Id.*

106. See generally George J. Stigler & Claire Friedland, *The Literature of Economics: The Case of Berle and Means*, 26 J.L. & ECON. 237 (1983).

107. See Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878, 883 & n.13 (1990).

costs imposed on taxpayers as a result of their decisions. The self-aggrandizing behavior by bureaucrats leads to expansion in budgets, programmatic authority and other administrative controls.¹⁰⁸ The utopian ideal of public officials expending extraordinary effort, with little personal gain, simply does not jibe with the fundamentals of human nature (*i.e.*, the pursuit of our own self-interest, as we perceive that to be).¹⁰⁹ In the end, expenditures on unnecessary bureaucracy waste the resources that should be used to educate children.¹¹⁰

The bureaucratic structure of the public school system, however, not only wastes resources, but directly impedes improving the quality of education. Bureaucrats acting in their self-interest, (*e.g.*, job preservation or advancement), often reject meritorious proposals due to tangential factors that require the official to favor a particular special interest group.¹¹¹ Officials with the motivation to make positive changes have little incentive to pursue these changes because they receive no additional remuneration, yet, incur direct non-monetary costs from the work they create.¹¹² Moreover, the hierarchical structure tends to perpetuate a school-wide and system-wide inertia which affects students, parents, teachers and principals.¹¹³ The smothering bureaucracy produces a "psychic estrangement" from the school, and general disaffection from the agents of the public school system.¹¹⁴ Of greatest concern, therefore, is not the wasted resources, but the effect of the overly hierarchical, rule-bound, formalistic approach present in the public school system on innovation and efforts to improve education.

Numerous experiments with education indicate that an autonomous and decentralized structure leads to dramatic improvement in the academic performance of students.¹¹⁵ John Chubb and Terry Moe concluded in their heralded 1990 study of public schools that "the more extensive this control by external authorities, the less likely schools are to be organized effectively. . . . High levels of autonomy from external authority tend to be associated with high levels of organizational effectiveness, and vice versa."¹¹⁶ Specifically, principals in schools that produce the

108. CHUBB & MOE, *supra* note 31, at 46.

109. RINEHART & LEE, *supra* note 11, at 40.

110. *Id.*

111. CHUBB & MOE, *supra* note 31, at 46.

112. *Id.*

113. *Id.*

114. FLIEGEL & MACGUIRE, *supra* note 83, at 192.

115. *See generally id.*

116. CHUBB & MOE, *supra* note 31, at 150-52. Chubb and Moe analyzed more than 20,000 students in a nationwide sample of 500 schools. *Id.* at 9. Their analysis of school organization divided those schools in the top quartile of a distribution

highest achievement score gains experience substantially lower interference from superintendents and central office administrators, particularly in areas of curriculum content, instructional methods and the autonomy to hire and fire teachers.¹¹⁷

The notion that school autonomy leads to improved student performance underlies charter school programs.¹¹⁸ In District Four of East Harlem, New York, a group of education pioneers developed a group of alternative public schools, operating away from the restrictions of the public school system.¹¹⁹ Teachers became rejuvenated when the school system removed the bureaucratic rules and regulations, thus, allowing them to freely develop curricula.¹²⁰ Eventually, that system permitted parents to send their children to any school in the district.¹²¹ The improvement in student performance was staggering. From 1974, when the school system established the inter-district school choice and alternative schools program, to the present, District Four improved its rank among the thirty-two districts in the New York public school system from thirty-two to twenty-two.¹²² Additionally, the percentage of students reading at or above their grade level more than doubled and more students were admitted to selective high schools.¹²³

C. Protecting the Franchise at the Expense of the Consumer

The bureaucratic structure of the public school system is incompatible with improving academic performance. Allocating resources through the public sector unavoidably leads to an overly bureaucratic structure, especially when that institution enjoys a monopoly position.¹²⁴ Efforts to alter the bureaucratic scheme, however, are destined to meet substantial resistance from those with a vested interest in the status quo.¹²⁵ The beneficiary of a legislated monopoly expends resources to maintain the franchise

of achievement gain scores are classified as "effectively organized" and those in the bottom quartile as "ineffectively organized." *Id.* at 143.

117. *Id.* Autonomy to hire and fire teachers was particularly more prevalent in effective schools than ineffective schools, yet this remains one area where teacher unions typically constrain principals. *Id.* at 154. The strict seniority systems and impediments on a principal's ability to select personnel according to his best professional judgment perpetuates mediocrity among teachers. *Id.* at 154-55.

118. See *infra* notes 175-90 and accompanying text for a description of charter schools.

119. See FLIEGEL & MACGUIRE, *supra* note 83, at 3-15.

120. *Id.* at 5-6.

121. *Id.* at 6.

122. *Id.* at 231.

123. *Id.* at 225-31.

124. CHUBB & MOE, *supra* note 31, at 46.

125. *Id.*; FLIEGEL & MACGUIRE, *supra* note 83, at 192.

(e.g. vote-gathering, lobbying and campaigning).¹²⁶ Not surprisingly, the education establishment, like any monopolist, has a vested interest in protecting its franchise and actively opposes efforts to introduce competition among schools for students.¹²⁷

Joseph Alibrandi, an advocate of school choice reform in California, describes the reaction of the education establishment to an innovative charter school established in Corona, California.¹²⁸ According to Alibrandi, the school revised its curriculum, established a car pool network to attract students from outside the community and required a commitment from parents to work toward the academic success of their children.¹²⁹ The school was tremendously successful, and parents went so far as to sleep overnight in the playground to ensure a priority position for their child's enrollment application.¹³⁰ Yet:

How did the public schools react? Its constituents wrote letters complaining about the competing school's car pool system, how traffic is blocked, and the various rules the alternative school was violating. . . . Instead of reacting the way any business or institution should react [when faced with competition], that is, look at what their competition is doing and come up with something better, they argue[d] and battle[d] [in the political arena to shut down their competition].¹³¹

The public school monopoly negates consumer choice and operates to maximize producer welfare rather than consumer welfare.¹³² Simple intuition suggests that, when a legislated arrangement establishes that a producer cannot lose its customers, the producer need not strive to serve those customers effectively. Moreover, a monopolist can "pass on" its costs to the customer, because the customer has no alternate provider.¹³³ Predictably, providers (teachers and administrators) have flourished in the public school system regime, while consumers (students and parents) have perished. Inflation-adjusted expenditure in the public school system has increased 400% since 1950.¹³⁴ Teacher salaries have increased an inflation-adjusted fifty percent since 1960,

126. Porter & Davis, *supra* note 18, at 423.

127. Peyser, *supra* note 2, at 622.

128. Joseph F. Alibrandi, *A Business Person's Perspective: Pro-Choice*, in PROCEEDINGS: THE FOURTEENTH CONFERENCE OF THE UNIVERSITY/URBAN SCHOOLS NATIONAL TASK FORCE: SCHOOL CHOICE 53-55 (Richard M. Bossone and Irwin H. Polishook eds., 1992).

129. *Id.* at 54.

130. *Id.*

131. *Id.* at 55.

132. BROWNING & BROWNING, *supra* note 22, at 351-57 (discussing the welfare cost of monopolies).

133. *Id.*

134. RINEHART & LEE, *supra* note 11, at 7.

while class sizes have declined by one-third and teachers have been relieved of many administrative duties they previously performed.¹³⁵ Notably, private schools, on average, spend fifty percent of the amount per student that public schools spend.¹³⁶ Yet, student performance in those private schools generally exceeds student performance in the public schools.¹³⁷

The decided advantages to producers from a system insulated from competition indicates that legislative changes to the public education system will be difficult to achieve. According to the economic theory of legislation, "legislative protection flows to those groups that derive the greatest value from it, *regardless of overall social welfare.*"¹³⁸ Educators benefitting from the current system enjoy efficient organization through powerful unions that ardently strive to perpetuate the existing system.¹³⁹ Consumers and taxpayers harmed by the current system face much higher organizational costs because they are dispersed throughout a community with a more attenuated connection to one another than educators (*i.e.*, who at least share a common avocation).¹⁴⁰ Thus, consumer groups form relatively less effective political coalitions to legislate change.¹⁴¹

Although some consumer groups can be tenacious, teacher and administrator groups are relentless because their jobs are at stake.¹⁴² For this reason, even when school choice enjoys widespread support,¹⁴³ voucher proposals often meet defeat in the political arena.¹⁴⁴ Even when states cautiously experiment with school choice, the education establishment exercises its political clout to dilute the scope of the program,¹⁴⁵ increase its control

135. Beers & Ellig, *supra* note 64, at 19.

136. Hakim et al., *supra* note 48, at 4. The lower cost is attributed to teachers performing administrative duties, lower teacher salaries and substantially less administrative staff. *Id.*

137. *See id.* Private schools place 10% to 15% more students at the appropriate grade level than public schools; the dropout rate in private schools is half the public school rate; twice as many students take the S.A.T. in private schools, and the overall score was 36 points higher. *Id.*

138. Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 (1982).

139. *See* Peyser, *supra* note 2, at 622 (noting that the National Education Association, the largest teachers' union, has a political action fund of \$22.5 million and an annual budget of \$750 million).

140. *Id.*

141. *Id.*

142. RINEHART & LEE, *supra* note 11, at 101.

143. *Id.* at 144 (1989 Gallup Poll indicating 67% of nonwhites and 59% of whites favor school choice).

144. *Id.*

145. The Milwaukee Parental Choice Program initially was made available only to 1,000 students. *See infra* notes 602-17 and accompanying text for a discussion of Wisconsin Constitution-based attacks on the Milwaukee Parental Choice Program.

over the program¹⁴⁶ and pre-ordain lackluster results.¹⁴⁷ Thus, the public school system not only exacts deadweight loss from its monopoly market structure, but also creates deadweight loss from the resources expended to obtain "rent-seeking" legislation that perpetuates the monopoly.¹⁴⁸

Education leaders advocate reform within the context of the existing system.¹⁴⁹ Yet, a politically motivated institution acting as market monopolists cannot maximize societal welfare.¹⁵⁰ That framework will maximize producer, rather than consumer, welfare.¹⁵¹ Until individual schools become subject to competition, and face the prospect of losing their livelihood if unable to meet the needs of their consumers, those public schools will remain complacent. Educational quality will stagnate. Bureaucracy will perpetuate, and expenditure in that system will continue to waste resources.¹⁵²

Education has suffered from the same mistaken premise that has befallen the modern welfare state. The premise is that centralized rule by command more effectively achieves the desired end than voluntary action.¹⁵³ Command systems eventually serve the needs of those in command at the expense of those it designed the system to benefit.¹⁵⁴ Vast bureaucracies emerge that devote resources to shifting paperwork rather than serving the intended beneficiaries.¹⁵⁵ Despite noble objectives of welfare

146. New Hampshire introduced a school voucher, but the education establishment transformed the program into "an administrative nightmare." See John Menge, *The Evaluation of the New Hampshire Plan: An Early Voucher System*, reprinted in *PRIVATIZING EDUCATION AND EDUCATIONAL CHOICE: CONCEPTS, PLANS, AND EXPERIENCES* 163 (Simon Hakim et al. eds., 1994).

147. Professor John Coons, a staunch supporter of the voucher system, refused to support the Colorado voucher initiative because of dilution. See John E. Coons, *An Educator's Perspective: Pro-Choice*, in *PROCEEDINGS: THE FOURTEENTH CONFERENCE OF THE UNIVERSITY/URBAN SCHOOLS NATIONAL TASK FORCE: SCHOOL CHOICE* 42 (Richard M. Bossone & Irwin H. Polishook eds., 1992).

148. Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 *VA. L. REV.* 471, 478-79 (1988).

149. CHUBB & MOE, *supra* note 31, at 12.

150. BROWNING & BROWNING, *supra* note 22, at 351-52.

151. *Id.*

152. The Theory of Bureaucratic Displacement dictates that in a "bureaucratic system . . . increase in expenditure will be matched by fall in production. . . . Such systems will act rather like 'black holes' in the economic universe, simultaneously sucking in resources and shrinking in terms of 'emitted' production." See FRIEDMAN & FRIEDMAN, *supra* note 55, at 155 (quoting Max Gammon who studied the British National Health Service). The Theory thus describes the public school system — a lower output (falling S.A.T. scores) for increasing amounts of input (expenditures increasing 400%). *Id.*

153. See *id.* at 187-88.

154. *Id.*

155. FLIEGEL & MACGUIRE, *supra* note 83, at 192.

programs, the results remain disappointing and will never improve as long as a system of government provision continues. America is in the midst of unshackling Progressive-Era policies that imposed substantial governmental intervention on the actions of private market participants, recognizing that goods and social resources are more efficiently allocated by voluntary exchange than by command. Recognizing this simple proposition, now is the time for school choice.

II. SCHOOL CHOICE

School reform re-emerged during the 1980s as an issue demanding national attention.¹⁵⁶ The widely publicized decline in academic performance corresponded with a perceived decline in the industrial competitiveness of the United States, especially with Japan.¹⁵⁷ To many, the superior academic performance of Japanese high school students correlated with the strength of the Japanese economy.¹⁵⁸ The decline in the American education system threatened America's position as a world leader, and in particular, the standard of living of all Americans.¹⁵⁹

Responding to the crisis in American education, states undertook reform efforts, appointing nearly 300 different task forces to study the education system and make recommendations.¹⁶⁰ Probably the most controversial reform proposal was the concept of school choice.¹⁶¹ According to the School Choice Proposal, each student would receive a state voucher to buy private education.¹⁶² As a result, neighborhood public schools would lose their geographic monopoly because parents, under the proposal, would be able to afford private school tuition.¹⁶³

Introducing meaningful consumer choice among public and private schools would force *all* schools to compete for students based on the quality of education provided. Schools would finally become accountable to their customers. If a school failed to provide a quality product, according to that customer's definition of "quality education," then that school would not survive. Since free enterprise and competition has led to the most successful product innovations, why not apply those principles to education?

156. RINEHART & LEE, *supra* note 11, at 20-21.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 21.

161. *Id.* at 20-21.

162. *Id.*

163. *Id.*

A. *A Short Primer on Various School Choice Proposals*

Developing a common vocabulary will probably minimize ambiguity among reform proposals and avoid a knee-jerk rejection toward any reform blanketed with the "school choice" label. The broadest definition of "school choice" includes any effort to make schools compete for students. The degree of competition, however, varies tremendously among school choice proposals. Presently, of course, all parents have the choice to send their child to any private school. Unfortunately, very few families have the economic means to afford private tuition, especially when public schools are "free." The producer subsidies to public schools allows effective predation of private schools, thereby leading to a market structure that educates ninety percent of all students in the public school system.¹⁶⁴

The first category of school choice proposals involves choice only among public schools.¹⁶⁵ The National Education Association equivocally supports "choice plans at the local level."¹⁶⁶ According to this category, the public school monopoly would continue under such a system, and the effects of the monopoly on cost and quality seemingly would remain.¹⁶⁷ Public school choice proposals offer two variations. The first variation is the intra-district public school choice proposal.¹⁶⁸ Intra-district public school choice allows students to attend any public school within their school district and comprises the most limited introduction of competition among schools.¹⁶⁹ Under this scheme, each school would offer the same curriculum developed by the school board.¹⁷⁰ Because all the schools would basically offer the same curriculum, most parents would likely select a school based on proximity, resulting in a student landscape nearly identical to the present system.¹⁷¹ The inter-district public school choice proposal is the other variation.¹⁷² According to that variation, students may enroll in schools outside their school district.¹⁷³ This option

164. Peyser, *supra* note 2, at 622.

165. W.W. Herenton, *A Legislator's Perspective: Anti-Choice*, in PROCEEDINGS: THE FOURTEENTH CONFERENCE OF THE UNIVERSITY/URBAN SCHOOLS NATIONAL TASK FORCE: SCHOOL CHOICE 75 (Richard M. Bossone & Irwin H. Polishook eds., 1992).

166. *Id.*

167. *Id.*

168. Hakim et al., *supra* note 48, at 1.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

is sometimes referred to as open public school enrollment.¹⁷⁴

The next step on the choice spectrum entails developing charter schools.¹⁷⁵ Charter schools are an attempt to re-establish local control over the curriculum, including the selection of teachers and principals, and the overall management of the operations of a public school.¹⁷⁶ The school would continue to receive state funding and thus, would not require tuition.¹⁷⁷ However, the school would operate essentially free of state-imposed education regulations.¹⁷⁸

Typically, state teacher unions strenuously oppose charter school programs, and legislatures, succumbing to pressure from these unions, often limit the number of charters permitted.¹⁷⁹ Moreover, before chartering a school, parents and other interested parties must receive approval from their local school board.¹⁸⁰ School boards, however, predictably fail to authorize charters because permitting charters would create competition for students.¹⁸¹ Competition for students would lead to a loss of public funds from the district to the charter school.¹⁸²

The second category of school choice proposals entails offering students a state voucher to pay private school tuition.¹⁸³ The voucher serves to eliminate some, if not all, of the "double tax" parents incur by sending their children to private schools.¹⁸⁴ The voucher stimulates consumer demand for private education.¹⁸⁵ This demand would lead to an increase in the supply of private schools.¹⁸⁶ Many voucher proposals would apply only to non-sectarian schools to avoid the inevitable constitutional controversy that would arise if the voucher could be used at religious schools.¹⁸⁷ Because most non-public schools have a religious affiliation, limiting the voucher system to non-sectarian schools only

174. *Id.*

175. FLIEGEL & MACGUIRE, *supra* note 83, at 192.

176. *Id.* at 193.

177. *Id.*

178. *Id.*

179. Tom Triplett, *Choice Through Charter Schools*, in PROCEEDINGS: THE FOURTEENTH CONFERENCE OF THE UNIVERSITY/URBAN SCHOOLS NATIONAL TASK FORCE: SCHOOL CHOICE 21 (Richard M. Bossone and Irwin H. Polishook eds., 1992).

180. *Id.*

181. *Id.*

182. *Id.*

183. See generally Michael J. Stick, *Educational Vouchers: A Constitutional Analysis*, 28 COLUM. J.L. & SOC. PROB. 423 (1995) (discussing the economic theory behind offering vouchers for private school education and constitutional issues related to the use of state-funded vouchers for private education).

184. Peyser, *supra* note 2, at 621-22.

185. Stick, *supra* note 183, at 427-32.

186. *Id.*

187. *Id.* at 432-60.

nominally increases competition for students.¹⁸⁸ Even if the U.S. Supreme Court upheld using state vouchers at sectarian schools, some would probably remain viscerally opposed to “public dollars” supporting religious schools.¹⁸⁹ Moreover, some state constitutions require a stricter separation of church and state than the federal constitution.¹⁹⁰

More radical proposals of completely privatizing the provision of higher education have not been advanced for elementary and secondary education.¹⁹¹ Apparently, a stronger notion of the public good aspect of lower-level education, or lingering agreement with Thomas Mann’s assertion that government has an affirmative duty to provide education, preempts discussion on such reforms.¹⁹² The merits of a completely privatized higher education system with public finance to those individuals who meet the subsidization criteria should seemingly apply to lower-level education as well.¹⁹³ Private institutions tend to educate more effectively at a lower cost.¹⁹⁴ As such, although privatization has not been prominent in the education reform debate,¹⁹⁵ several entrepreneurs have established operational plans to enter the market for lower-level education on a grand scale thereby increasing the presence of private sector producers.¹⁹⁶

Other school reform proposals, although literally unrelated to “school choice,” attempt to instill market principles to remedy systemic problems that currently exist in the delivery of education. Education Alternatives Inc. (EAI) contracts with school boards to privately operate public schools.¹⁹⁷ EAI’s focus is to improve educational quality by introducing new pedagogical methods and replacing existing methods of school management.¹⁹⁸ Again, the prevailing thought is that production is better left to

188. *Id.* at 430.

189. *Id.* at 469.

190. See *infra* note 536 and accompanying text for a discussion of cases interpreting separation of church and state clauses from state constitutions.

191. See Kevin C. Sontheimer, *Privatizing Higher Education*, in *PRIVATIZING EDUCATION AND EDUCATIONAL CHOICE: CONCEPTS, PLANS, AND EXPERIENCES* 145 (Simon Hakim et al. eds., 1994).

192. See FRIEDMAN & FRIEDMAN, *supra* note 55, at 184.

193. See Sontheimer, *supra* note 191, at 146.

194. Julie Huston Vallarelli, *State Constitutional Restraints on the Privatization of Education*, 72 B.U. L. REV. 381, 386-87 (1992).

195. See *infra* notes 576-603 and accompanying text for a discussion of litigation over state constitutional rights of students in poor school districts to an education equal to that of students in rich school districts.

196. Whittle Communications plans to establish a network of 2,000 private schools nationwide by the year 2012. See Hakim et al., *supra* note 48, at 7.

197. *Id.*

198. *Id.*

the private sector than the public sector.¹⁹⁹ Although EAI has only operated for less than three years and no conclusive evidence can confirm objective improvement in educational quality, preliminary evaluations of the schools in which EAI has operated indicates that “[t]hey appear to be practicing the best principles of learning available today, implementing sound governance techniques . . . , and empowering parents to [become] part of their children’s education.”²⁰⁰

Importantly, the voucher system is not mutually exclusive of any of the previously mentioned alternatives. For example, the proposal in this Article advocates combining open public school enrollment with a voucher redeemable at any private school.²⁰¹ School districts, within this framework, could decide to contract with EAI to manage their schools. In the alternative, the state could determine, if the voucher plan led to large scale defections from public schools, that it should play no role in providing education. Instead, it would merely accredit private schools and provide students with the financial support. On the other hand, state schools could become so desirable that no one avails themselves to the voucher. Regardless of the outcome, the principle behind school choice is simple: any and all parents, not a state bureaucrat in a distant locale, should and will decide where their child will attend school.

B. Responding to the Public School Monopoly Argument

Those who support the present system bear the burden of establishing why parents should not freely choose where their children will attend school. Free choice is so ingrained in the North American culture that many “don’t know how we ever got into a situation of telling parents where they have to send their kids to school. In China, I can see, but not here.”²⁰² No bureaucrat controls the groceries we buy, or even where we buy the groceries. Consumers have the freedom to decide whether to shop at an up-scale market that offers specialty items and bags groceries, or a warehouse store that offers discounts and requires shoppers to bag their own groceries. Thus, consumers are free to

199. *Id.*

200. Thomas H. Peeler & Patricia A. Parham, *A Public-Private Partnership: South Pointe Elementary School of Dade County, Florida*, in *PRIVATIZING EDUCATION AND EDUCATIONAL CHOICE: CONCEPTS, PLANS, AND EXPERIENCES* 203 (Simon Hakim et al. eds., 1994).

201. See *infra* notes 271-79 and accompanying text for a discussion of the details of the School Choice Proposal.

202. Beers & Ellig, *supra* note 64, at 21 (quoting Lamar Alexander, former Secretary of Education).

choose.²⁰³

Moreover, the federal government has historically relied on the principles underlying a voucher system to more efficiently accomplish welfare objectives. For example, when a segment of our society cannot afford to eat, the government intervenes to provide demand-side assistance (e.g., the federal food stamp program). The government does not, however, totally usurp control of food distribution merely because the market fails to provide for a small segment of society. Another well-established voucher program is the federal government's voucher program for low-income housing.²⁰⁴ Most agree that the housing voucher is, by far, a better means of providing shelter to the less fortunate than housing projects owned and operated by the federal government.²⁰⁵

Accordingly, private enterprise and consumer choice should displace the public school monopoly in providing elementary and secondary education. Generally, this system exists in the delivery of higher education.²⁰⁶ No bureaucrat dictates if, or where, students will receive a college education. Although each state owns and operates several outstanding universities, consumer choice ensures that colleges compete for students on the quality of education delivered.²⁰⁷ Why, then, do we continue to provide something so important in a system that has proven to be a failure? Moreover, why is there so much opposition to providing lower-level education in a system that has proven to be a success?

1. The Valuable Social Tool Argument

According to the education establishment, the public school system "is the most valuable social tool [available] to provide a common vision and shared experience."²⁰⁸ Combining students from different socio-economic, racial and ethnic backgrounds creates a melting pot reflective of our greater society.²⁰⁹ Accord-

203. FRIEDMAN & FRIEDMAN, *supra* note 55, at ix-xii.

204. Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633, 664 (current version at 42 U.S.C. § 1437f(d)(1) (1988 & Supp. V 1993)).

205. See Schill, *supra* note 107, at 878. See *infra* notes 371-81 and accompanying text for a discussion of housing vouchers and the resulting benefits of higher quality available housing, lower cost program management and better racial integration.

206. Douglas R. Richmond, *Private Colleges and Tuition Price-Fixing: An Antitrust Primer*, 17 J.C. & U.L. 271, 296-99 (1991).

207. For a discussion of the proposition that educational quality is reflected by the economic concept of utility, see *infra* notes 331-32 and accompanying text.

208. Ralph J. Flynn, *An Educator's Perspective: Anti-Choice*, in PROCEEDINGS: THE FOURTEENTH CONFERENCE OF THE UNIVERSITY/URBAN SCHOOLS NATIONAL TASK FORCE: SCHOOL CHOICE 50 (Richard M. Bossone and Irwin H. Polishook eds., 1992).

209. *Id.*

ingly, the public school system melds different backgrounds and serves to foster social harmony, while private schools threaten this goal by fostering economic elitism and fracturing the social fabric.²¹⁰ Yet, although the goal of a heterogeneous student population may be laudable, the public school system fails to achieve this aspiration. Because the public school system requires students to attend a school based on geographic boundaries, the demographics of school populations fail to reflect the general population.²¹¹ Particularly in large metropolitan areas, suburban schools tend to be white and wealthy, while inner-city schools primarily serve people of color.²¹² Moreover, efforts to integrate generally result in people of money leaving the system.²¹³ Thus, in many cases, private schools may be a better means for achieving racial and economic class integration than public schools.²¹⁴

Related to the goal of attracting a diverse student body, many also argue that the public school system is necessary in order to unify American society around a common set of civic virtues and moral values.²¹⁵ A common school system would therefore lead to an "enlightened and *uniform* civic culture."²¹⁶ Uniformity, however, is inimical to the tradition of our Republic and the nature of American society.²¹⁷ Not surprisingly, the public school system's efforts to achieve that goal generate considerable controversy.²¹⁸ The tradition of America is based on the principle of diversity—whether diversity of opinion, religion or racial and ethnic background.²¹⁹ Attempts to impose a single set of values and beliefs throughout the public school curriculum has therefore led to sharp political conflicts.²²⁰ Many communities have realized that creating a common curriculum cannot serve all interests and have avoided these contentious battles by creating "milquetoast curricula."²²¹

The Clinton Administration's efforts to establish "national standards" in history further illustrates the problem of political

210. *Id.*

211. Peyser, *supra* note 2, at 625.

212. *Id.* at 625-27. See also JONATHAN KOZOL, *Savage Inequalities: Children in America's Schools* 55-56 (1991).

213. Peyser, *supra* note 2, at 624-26 (describing Boston public schools).

214. See Suzanna Sherry, *Responsible Republicanism: Educating For Citizenship*, 62 U. CHI. L. REV. 131, 202-03 (1995); Deborah E. Beck, Note, *Jenkins v. Missouri: School Choice as a Method for Desegregating an Inner-City School District*, 81 CAL. L. REV. 1029, 1047-57 (1993).

215. Peyser, *supra* note 2, at 623.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 624.

institutions attempting to instill uniform values on the entire body politic.²²² The American History Standards project became a "jungle of runaway inclusiveness" and imposed on teachers and textbook publishers a politically correct anti-Western revisionist perspective of U.S. and World History.²²³ The project reflected the current trend in curriculum manipulation that attempts to substitute an alternative culture, adverse to the mainstream culture, under the guise of multiculturalism.²²⁴ Political opposition to the project ran deep, and the standards were scuttled.²²⁵ Although instilling values in the curriculum is appropriate, attempting to establish uniform values among ninety percent of the student population, especially when those values and opinions only reflect those of a fringe "educational elite,"²²⁶ blindly ignores the diversity of Americans.

School choice would lead to a school system conducive to a pluralist American society while achieving the goals of injecting values and character into students. A pluralist system of schools would more accurately reflect the diversity within our society rather than the public school system's effort to impose a "common understanding of the public good, based on a common curriculum and a common education."²²⁷ For example, although a voucher would enable certain students to select schools on criteria other than that traditionally included in the curriculum, a majority of students would select schools based on majoritarian beliefs of what the curriculum should include. Because majoritarian beliefs on curriculum probably transcend socio-economic class, school choice, by eliminating geographical boundaries, would also more effectively lead to a student population which would consist of students from diverse economic backgrounds unlike the current system.²²⁸

Furthermore, students could have the flexibility to emphasize fields of study such as math, science, literature or the arts that

222. *McCarthy, Seneca Falls and History*, WALL ST. J., Dec. 30, 1994, at A6.

223. *Id.* The standards made "clear in remarkable degree to which the achievements of the West are minimized, in the politically loaded leading questions asked of students, in the insistent emphasis on gender, race, and class oppression." *Id.* For example, George Washington is not mentioned once as President, but Senator McCarthy appears 19 times. *Id.*

224. Michael W. McConnell, *Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?*, 1991 U. CHI. LEGIS. F. 123, 124.

225. *Senate Rescues History*, WALL ST. J., Jan. 19, 1995, at A18 (describing Senate Resolution, passed by a vote of 99 to 1, condemning the standards).

226. McConnell, *supra* note 224, at 125.

227. *Id.* at 134.

228. See William Mullen, *Faith, Hope, and Scholarship*, CHI. TRIB., Mar. 12, 1995, Magazine, at 12 (describing inner-city college preparatory school that attracts students from inner-city as well as wealthy Chicago suburbs).

the common school system currently denies with its "one size fits all curriculum."²²⁹ To ensure quality, however, schools must continue to meet accreditation standards.²³⁰ Meeting these standards would diminish the fears that students will not learn important substantive subject areas.²³¹ Moreover, parents envisioning a standard college preparatory curriculum will refrain from selecting schools that neglect to educate their child effectively in all areas, regardless of a special expertise in one particular subject.²³²

Advocates of the existing system argue that niche schools develop values contrary to the public good and will eventually disunify American society.²³³ The school choice proposal may lead to a diverse array of religious schools that would instill the principles of those particular sects (*e.g.*, Islam, Judaism, Mormon or Catholicism).²³⁴ Other niche schools may also emerge and instill values along ethnic, racial or cultural lines, such as the emergence of Afrocentric schools.²³⁵

Michael McConnell persuasively rebuts the concern that those types of schools will disunify American society by analogizing similar arguments made concerning the religion clauses in the First Amendment of the U.S. Constitution.²³⁶ By preventing the government from establishing a common religion, the founders embarked on a radical experiment never undertaken by any other nation—"we would *not* have a common civic culture at the most fundamental level."²³⁷ America was rewarded for the risk of leaving the propagation of moral values to private institutions.²³⁸ Thus, America is not marked by serious religious divisiveness and religion is apparently more influential in America than nations of Western Europe.²³⁹ More important, the failure to establish one common religion has not yet disunified American society.²⁴⁰

229. Peggy S. Bittick, *Equality and Excellence: Equal Education Opportunity for Gifted and Talented Children*, 36 S. TEX. L. REV. 119, 127 (1995) (commenting that the "one size fits all curriculum" is usually tailored for students who achieve at the middle of the class or at the lowest level).

230. Greg D. Andres, *Private School Voucher Remedies in Education Cases*, 62 U. CHI. L. REV. 795, 812 (1995).

231. *Id.*

232. Daniel, *supra* note 30, at 34.

233. McConnell, *supra* note 224, at 128.

234. *Id.* at 127.

235. *See id.*

236. *Id.* at 133.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

2. *The Public Good Argument*

According to the principles of a free market, if sufficient demand exists for a product or service, then profit-seeking entrepreneurs will provide that product or service at an efficient price.²⁴¹ A purist would further argue that if a product or service is unavailable in the marketplace through voluntary action, then external forces should not compel its provision involuntarily.²⁴² Compelling involuntary provision reduces aggregate social wealth.²⁴³ Competing rationales, nonetheless, claim that instances exist where a product or service should exist, but the market, when undisturbed, fails to make it exist or continue to exist.²⁴⁴ These instances of "market failure" caused by excessive competition, natural monopoly, scarcity of resources or problems of collective action explain government intervention in several areas of commerce including electric utilities, railroads and broadcast communications to name a few.²⁴⁵

No one seriously questions that schools would exist absent government intervention.²⁴⁶ Parents would dedicate at least some portion of the taxes currently collected by the government to educate their children.²⁴⁷ For instance, prior to establishing the federally subsidized student loan program, parents sacrificed current consumption expenditures to send their children to college.²⁴⁸ Moreover, historical evidence indicates that a vibrant lower-level education marketplace existed for more than 200 years before the large-scale government intervention.²⁴⁹ Instead, the education establishment argues that the private market will provide an insufficient amount of "quality" education.²⁵⁰ This proposition is dubious at best.

Education constitutes a classic example of a good that provides external benefits. Benefits inure to the public-at-large, not merely the individual consumer, when an individual consumes education.²⁵¹ Therefore, education is a common example of a

241. See generally Paula M. Taffe, *Imputing the Wealth Maximization Principle to State Legislators*, 63 CHI.-KENT L. REV. 311, 312-14 (1987) (discussing Judge Posner's economic analysis of wealth maximization as a concept of efficiency).

242. *Id.* at 314.

243. *Id.*

244. *Id.*

245. *Id.*

246. See Beers & Ellig, *supra* note 64, at 25-27.

247. *Id.*

248. *Id.*

249. *Id.*

250. But see *supra* notes 31-43 and accompanying text describing the deterioration in the quality of lower level education.

251. BROWNING & BROWNING, *supra* note 22, at 595-608.

“public good.”²⁵² Examples of external benefits that the public derives from educated persons include more productive employees, informed voters, and lower crime due to the increased opportunity cost of committing a crime.²⁵³

When the public-at-large receives external benefits from another person’s education, they become “free riders.”²⁵⁴ Because free riders benefit from the education of others, they, theoretically, should, as a class, voluntarily cooperate to bear the cost of educating others.²⁵⁵ Yet, individual free riders have a natural incentive to understate the benefit they receive, and attempt to minimize their share of the burden.²⁵⁶ Collectively, providing that good will become difficult as each free rider attempts to make others subsidize the cost of education, while continuing to enjoy the benefits.²⁵⁷ Without government intervention, free riders would contribute nothing and each student would have to pay the full cost of his or her education.²⁵⁸ This situation results in an inefficiently low level of output.²⁵⁹ Education would be under-produced because additional education that would yield marginal benefits to the public would exceed the individual’s marginal cost and therefore would not be consumed.²⁶⁰ Accordingly, the public school system was established to capture these purported additional benefits.²⁶¹

The existence of external benefits in education may justify subsidization, but not government provision. When government provision results in inefficient expenditure, the marginal cost of providing education likely exceeds the inherently non-quantifiable external benefits of education.²⁶² In addition, and contrary to the intention of obtaining an efficient consumption of education, government provision of education through a monopolistic structure actually results in less education consumed than in a private system with subsidized demand.²⁶³ If few alternatives exist to supplement public school education other than an alternative private school, a child may consume less education than the

252. *Id.* at 595-97.

253. Porter & Davis, *supra* note 18, at 400-01.

254. BROWNING & BROWNING, *supra* note 22, at 608.

255. *Id.*

256. *Id.* at 595-608.

257. See Beers & Ellig, *supra* note 64, at 22. See also BROWNING & BROWNING, *supra* note 22, at 595-608.

258. BROWNING & BROWNING, *supra* note 22, at 595-608.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 608.

263. BROWNING & BROWNING, *supra* note 22, at 595-608.

amount a parent otherwise would be willing to purchase.²⁶⁴ For example, if parents desire \$1,200 worth of education for their child, but the public school only provides \$1,000 worth of education (*i.e.*, for "free"), the parent must then pay \$1,200 at a private school to obtain the incremental amount desired (*i.e.*, \$200 worth).²⁶⁵ It is unlikely, however, that parents will obtain the additional \$200 worth of education they desire and would otherwise purchase.

Moreover, voluntary exchange would more efficiently capture the purported external benefits that education provides.²⁶⁶ Presumably, parents would prioritize education expenditures for their children and at least dedicate the amount they currently pay in taxes toward education.²⁶⁷ In addition, private schools educate children at a substantially lower cost than public schools, which indicates that a large number of parents could afford to educate their children if relieved of the lifetime tax burden of supporting public education.²⁶⁸ In fact, despite the double tax, low-income parents in Chicago, a city with notoriously poor inner-city schools, manage to send their children to private schools charging tuition from \$870 to \$3,000 per year.²⁶⁹ In addition, private schools, charities and religious organizations have traditionally offered scholarships to low-income students based on academic merit.²⁷⁰ That a substantial number of children would continue to receive an education, and that those with academic merit lacking economic means would be subsidized by private organizations (*i.e.*, themselves subsidized by the government through non-payment of taxes), suggests that voluntary action closely achieves an optimal societal output of education.

C. *The School Choice Proposal*

A completely privatized system, absent any public assistance,

264. *Id.* at 111.

265. *Id.*

266. Historical evidence indicates widespread schooling in the 19th century prior to the monopolization of lower level education by public schools. *See* Beers & Ellig, *supra* note 64, at 27.

267. Annual per pupil expenditures are substantially higher than each parent's annual individual contribution because a large number of taxpayers do not presently use the public school system. A better proxy to calculate the amount that each parent would spend per year to be indifferent between a taxpayer financed system and a private system would calculate the present value of all taxes that a parent will not pay before and after their children have attended and completed school, and allocate this additional amount to each year that the parents pay for their child's tuition without government subsidization.

268. Beers & Ellig, *supra* note 64, at 30.

269. *Id.*

270. *See* Mullen, *supra* note 228, at 14-16.

would exclude certain members of society from receiving an education. That prospect offends an important egalitarian notion in America that each person should at least have the opportunity to succeed.²⁷¹ Thus, denying education would relegate children to a low-income status because education generally dictates a person's standard of living.²⁷² Moreover, external benefits derived from education, although difficult to quantify, arguably exist.²⁷³ For example, public investment in education indirectly results in reduced welfare support and fewer criminal trials.²⁷⁴ As such, the School Choice Proposal does not challenge the notion that public investment in education should continue.

Instead, the School Choice Proposal merely contends that the recipient of public investment should change from the producer (*i.e.*, the public school system) to the consumer (*i.e.*, parents with school-age children). In that regard, the School Choice Proposal seeks to establish a voucher system. Several states have already considered or adopted, although in limited fashion, a voucher system which offers scholarships to low-income students.²⁷⁵ This Article, however, advocates that states should establish a voucher that would be available to all students and redeemable at any private school.

Various considerations would impact determining the amount of the voucher. At a minimum, however, the amount of the voucher must allow parents to select from a variety of private schools. Initially, the state would maintain its present level of expenditure on education.²⁷⁶ The recipient of those funds, however, would change. Instead of blindly giving the money to state-owned schools (producer subsidies), parents with school-age children would receive it (consumer subsidies). Consequently, the money would go to those schools that the parents deem would best educate their child. Importantly, and contrary to the rhetoric against school choice, the voucher plan does not foretell whether some members of society will not receive an education. School choice simply rationalizes the market landscape in which education is provided.

The School Choice Proposal includes religious schools, assuming the proposal passes constitutional muster, as an important mechanism to ensure an immediate critical mass of competition in

271. Kenneth L. Karst, *Essay, Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 371 (1986).

272. David M. Nelson & Robert T. Patton, *Measuring Earnings Growth in the U.S.*, 3-DEC J. LEGAL ECON. 11, 13-17 (1993).

273. Porter & Davis, *supra* note 18, at 400-01.

274. *Id.*

275. See *infra* notes 627-33 and accompanying text for a discussion of the prevalence of school choice programs today.

276. Real expenditures, however, could decline in the future as a competitive market eliminates the substantial waste in resources that presently exists.

the education market. Religious schools should not be excluded due to a fear of public money supporting religion. That statement, often made by members of the education establishment with a vested interest in the status quo,²⁷⁷ mistakenly perceives the purpose of the voucher. The purpose of the voucher plan is not to support or advocate religion, but to improve education. Moreover, taxpayers presently support a public school system that imparts values contrary, sometimes offensive, to their own beliefs.²⁷⁸ Furthermore, in certain instances, the public school even indoctrinates children into a way of thinking, differing only in name from religion.²⁷⁹

1. *Eliminating Producer Subsidies Leads to Competing Private Sector Producers*

The debate concerning school reform must resolve the fundamental question of whether production will occur through the present public sector monopoly or through competing private sector suppliers.²⁸⁰ Microeconomic theory can explain the consequences of adopting either system, but is unable to decide which is the "better" system.²⁸¹ So far, this Article has used the term "monopoly" to describe the present system, and has alluded to the competitive market that the School Choice Proposal would create. Unquestionably, however, the School Choice Proposal will not result in meeting the strict parameters of a "perfectly competitive" market, in the same way that the current system is not a pure monopoly.²⁸² These general descriptive terms, nonetheless, appropriately characterize the market structure of each alternative.

The public school system operates as a *de facto* monopolist because substantial state subsidies to the public school system allow public schools to predate the emergence of meaningful competition.²⁸³ Thus, students face a sole provider of education and generally cannot attend any school other than the school assigned to them based on their geographical location.²⁸⁴ Although the School Choice Proposal would not lead to a "perfectly competitive"

277. FLIEGEL & MACGUIRE, *supra* note 83, at 192 (discussing bureaucrat's interest in preserving the bureaucracy).

278. See generally Terri Jane Lavi, *Free Exercise Challenges to Public School Curricula: Are States Creating 'Enclaves of Totalitarianism' Through Compulsory Reading Requirements?*, 57 GEO. WASH. L. REV. 301 (1988).

279. *Id.*

280. See generally Solomon, *supra* note 34, at 883.

281. BROWNING & BROWNING, *supra* note 22, at 349-57, 364-66 (comparing conditions in a perfectly competitive market to conditions in a monopolistic market).

282. See *supra* notes 48-50 and accompanying text for a discussion of the characteristics of perfectly competitive markets and monopolistic markets.

283. Porter & Davis, *supra* note 18, at 412-13.

284. BROWNING & BROWNING, *supra* note 22, at 251-53.

market, few industries operate under such restriction. Instead, the competitive model simply explains the market consequences of multiple suppliers who provide a similar good to many customers with adequate information.²⁸⁵

Perhaps the best-known conclusion of microeconomic theory is that, for the same level of demand and cost conditions, the prevailing price will be higher and prevailing output lower in a monopolistic market than in a competitive market.²⁸⁶ Providing lower-level education through a monopoly structure leads to paying more for less education.²⁸⁷ Substantially lower private school tuition compared to the public cost per student, and the correspondingly higher scores on standardized tests of private school students, illustrates that phenomenon.²⁸⁸ Moreover, the output level in a monopoly is "allocatively inefficient" because consumers value additional units of education more than the cost to produce those units in a competitive market.²⁸⁹ This inefficiency leads to the "deadweight" societal loss resulting from monopolization of a market.²⁹⁰

Monopoly further leads to a redistribution of income from consumers (*i.e.*, parents, students and taxpayers) to producers (*i.e.*, the education establishment).²⁹¹ Higher teacher salaries and a bloated bureaucracy in the public school system reflect this redistribution.²⁹² These descriptions are hardly debatable. To justify the present market framework, policy-makers must therefore determine that other benefits, derived only when a government monopoly provides education, exceed these welfare losses.

In instances of natural monopoly, one producer may meet the entire demand of the market most efficiently because of a declining marginal cost over the relevant range of production.²⁹³ In such cases, for example, electrical power production under certain market conditions, governmental intervention occurs to regulate prices and avoid the deadweight societal loss that results from monopoly pricing.²⁹⁴ Once concluding that a market lends itself to natural monopoly, regulators will prevent further entry by com-

285. *See generally id.* at 595-608.

286. *Id.* at 349-50.

287. *Id.* at 350.

288. *See* Hakim et al., *supra* note 48, at 4.

289. *See supra* notes 264-65 and accompanying text discussing that the lack of available supplements to public education results in less education consumed than otherwise in a competitive market.

290. BROWNING & BROWNING, *supra* note 22, at 350.

291. *Id.* at 351-53.

292. Solomon, *supra* note 34, at 895-96.

293. BROWNING & BROWNING, *supra* note 22, at 369-71.

294. *Id.* at 371-74.

peting firms to avoid excessive, or "wasteful," competition.²⁹⁵ Regulators and the producer thus enter a "regulatory bargain" providing an exclusive operating license to the producer in exchange for regulated pricing.²⁹⁶

Although the market cost structure may initially have created the natural monopoly and prevented entry by competitors, eventually the exclusive operating license may constitute the greatest barrier to entry.²⁹⁷ A "scheme of comprehensive non-regulation" would be preferable because no artificial barriers to entry would be created to perpetuate monopoly after the market ceased to be monopolistic.²⁹⁸ Under such a scheme, natural monopolies would emerge and extract rents, but new entrants or the threat of prospective entrants would "check" monopoly pricing.²⁹⁹ Innovation, substitute goods and the natural life cycle of the market, however, eventually will lead to competitive pricing.³⁰⁰

The market for lower-level education does not exhibit natural monopoly characteristics.³⁰¹ A legislative scheme designed to result in production dominated by a single producer through exclusive subsidies to public schools is therefore unjustified by market conditions. Size may offer economies of scale and scope, as in any industry, but production costs do not decline over all ranges of production for the provision of education.³⁰² Multiple suppliers would exist but for the state's decision to subsidize all the production costs of one producer.³⁰³ Presently, the state's *de facto* exclusive operating license to the public school system has created an artificial barrier to entry that perpetuates a monopoly when the market is inefficiently structured as such.³⁰⁴

The education system allows public schools to engage in predatory pricing to maintain their monopoly position.³⁰⁵ Although a private school may offer a superior product, parents/children derive greater overall utility from receiving a sub-standard education for free. The legislative scheme thereby artificially denies

295. *Id.*

296. *Id.*

297. See Richard A. Posner, *Natural Monopoly and its Regulation*, 21 STAN. L. REV. 548, 611-15 (1969).

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. Porter & Davis, *supra* note 18, at 412-13.

304. *Id.*

305. BROWNING & BROWNING, *supra* note 22, at 205-07. Predatory pricing is selling goods or services at low prices for the purpose of eliminating competition. *Id.* at 205.

welfare maximization and public schools survive only as a result of the legal framework allowing predatory pricing.³⁰⁶ If public schools competed on terms of product quality, but producer subsidies provided only modest price advantages, these schools presumably would lose a substantial number of students to private schools and probably reflect the market landscape of higher education. If the schools competed on terms of price and quality, (*i.e.*, charging consumers the full cost of the bloated bureaucracy by eliminating all producer subsidies), these schools almost assuredly would fail. Yet, this failing system is the system that the education establishment fights to preserve.

The poor quality of public schools inevitably results in people of money electing to "bypass" the system. Those who bypass the public school system in favor of private education obviously perceive that a private school offers a superior education opportunity.³⁰⁷ Bypass typically is a function of the availability of product substitutes.³⁰⁸ Private schools obviously present a substitute to public schools, but those substitutes are only available to moderately high income families with the means to afford private tuition.³⁰⁹ As such, people of money bypass the public school system. Unfortunately, people lacking the economic means cannot bypass.

The School Choice Proposal provides the economic means of bypass to everyone. As such, academic aptitude or field of study can determine where a child attends school. That aspect of the School Choice Proposal sparks considerable controversy from the education establishment, which claims that academic talent will flee and leave the "dregs" behind in one school.³¹⁰ In other words, private schools will "cream skim" the academic talent currently attending public schools.³¹¹ In the context of students, the "cream" is not merely those with high test scores. Instead, it is any student who bears an intangible cost to receive an education in the public school that would be missing at an alternative school. Or, in other words, any student who, for whatever reason, perceives a superior opportunity for education at an alternative school, but is unable to attend that school due to the tuition. This abstract concept of intangible cost may result from a number of factors such as the uniform curriculum that neglects to serve a student's particular field of interest, or the prospect that a private school will offer a safer environment.

306. Porter & Davis, *supra* note 18, at 412-13.

307. Vallarelli, *supra* note 194, at 386-87.

308. BROWNING & BROWNING, *supra* note 22, at 88.

309. Vallarelli, *supra* note 194, at 382-83.

310. FLEIGEL & MACGUIRE, *supra* note 83, at 193.

311. Vallarelli, *supra* note 194, at 386-87.

The education establishment's arguments against "cream-skimming" are no different than those of other legislated monopolists who attempt to preserve their franchise. "Cream-skimming" often results in regulated markets where a monopolist with a universal access mandate cross-subsidizes customers who cannot afford to pay the marginal cost of service by charging higher rates to a "creamy" (*i.e.*, high revenue and low cost) customer class.³¹² When a competitor enters to target the "cream," as would a substantial number of private schools as a result of the School Choice Proposal, the monopolist will attempt to restrict entry into the market.³¹³

AT&T, for example, attempted to stop MCI from offering long-distance telephone service at rates twenty to fifty percent below those of AT&T,³¹⁴ arguing that higher long-distance rates subsidized local service rates below the cost of service. Although the Federal Communications Commission (FCC) originally barred MCI from the long-distance market to preserve AT&T's monopoly, later, after the D.C. Circuit determined that the FCC exceeded its authority, the FCC permitted MCI's entry on the ground that the overall benefits of competition exceed the subjective benefit from an "equitable" rate to low volume, high cost, users.³¹⁵ Moreover, the FCC correctly held that such cross-subsidization is inconsistent with the public interest.³¹⁶ In similar fashion, the education establishment fears school vouchers for the same self-interested reason that AT&T feared MCI — competition will result in a loss of market share and the advantages inuring from a monopoly position.

When regulated monopolists fail in barring the entry of competition, such as AT&T in the MCI case, the next strategy is to bar customers from opting out of the common system. For example, electric utilities customarily subsidize residential users by charging lower costing industrial customers rates higher than their marginal cost.³¹⁷ In New York City, several industrial customers responded by constructing their own electric generators to supply energy at a lower cost than the common system charged.³¹⁸ To prevent exit (*i.e.*, opting out of the common sys-

312. BROWNING & BROWNING, *supra* note 22, at 387-88.

313. *Id.*

314. *See, e.g.*, MCI Telecommunications Corp. v. FCC, 561 F.2d 365, 372 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978).

315. *Id.*

316. *Id.*

317. Kenneth W. Costello, *Electing Regulators: The Case of Public Utility Commissioners*, 2 YALE J. ON REG. 83, 95-98 (1984).

318. Bernard S. Black & Richard J. Pierce, Jr., *The Choice Between Markets and Central Planning in Regulating the U.S. Electricity Industry*, 93 COLUM. L. REV. 1339, 1352-53, 1376 (1993).

tem), a monopolist will argue that the customer has an affirmative duty to subsidize other customers as well as the monopolist, and cannot leave the common system.³¹⁹ In 1988, for example, National Steel, similar to the industrial customers in New York City, bypassed the inflated rates charged by a monopolistic local natural gas distribution company, and built its own connection to an interstate gas pipeline.³²⁰ The Michigan Public Utility Commission sought, unsuccessfully, to bar National Steel from exiting.³²¹ Likewise, the education establishment, if vouchers are adopted, seeks to limit the number of vouchers available to restrict customer bypass.³²² Although the rhetoric is phrased to suggest a concern for students, the actions are designed merely to protect the franchise.

The question therefore becomes whether unrestricted "cream-skimming" is desirable, or whether our policy should confine those who wish to exit with a social obligation to cross-subsidize others. The economic analysis favors unfettered "cream-skimming" under the same principles that indicate the superiority of a competitive market to allocate resources.³²³ Yet, for policy-makers, non-economic considerations of "fairness" may outweigh the greater aggregate benefits society derives from competition.

The School Choice Proposal, (*i.e.*, unrestricted "cream-skimming"), will not increase the number of students denied a meaningful education. The education establishment's fear that school choice will leave students behind sounds hollow in light of the failure of the present system. This system cannot get much worse.

For example, sixty percent of public high school students failed a high school proficiency test in Jersey City, New Jersey, despite spending \$9,000 per student in the public school system.³²⁴ Additionally, twenty-five percent of the nation's high school students quit school before graduating with that percentage approaching fifty percent in large cities.³²⁵ Moreover, the current system suffers from severe truancy and absenteeism, and the

319. *Id.*

320. See Note, *Preemption and Regulatory Efficiency in Federal Energy Statutes*, 103 HARV. L. REV. 1306, 1314-17 (1990).

321. See *Michigan Consol. Gas Co. v. Panhandle E. Pipeline Co.*, 887 F.2d 1295, 1298 (6th Cir. 1989), *cert. denied*, 494 U.S. 1079 (1990).

322. Cynthia Bright, *The Establishment Clause and School Vouchers: Private Choice and Proposition 174*, 31 CAL. W. L. REV. 193, 196 n.22 (1995) (comparing the Milwaukee Parental Choice Program which limits student participation in the voucher program with California Proposition 174 which proposed to allow unlimited participation in the voucher program).

323. BROWNING & BROWNING, *supra* note 22, at 578-87.

324. *Whitman's Choice*, WALL ST. J., Jan. 10, 1995, at A20.

325. CHUBB & MOE, *supra* note 31, at ix.

performance of the inner-city poor is substantially lower than the neighboring suburban and national averages.³²⁶ There is no system that will produce perfect results. America can strive only for a system that, after close scrutiny, works better than any other alternative. More money placed into the current system will not work to improve the education that "marginalized" students receive because the current system does not work.³²⁷ Even if the School Choice Proposal leads to schools of "dregs" that could not or did not try to gain admittance to other schools, those schools will be no worse off than many schools in the present system. Moreover, concentrating on underachieving and unmotivated students in one location may be desirable to openly direct attention to those most in need.

More likely, the School Choice Proposal will improve the overall quality of education that schools provide, and reduce the number of students that the present system is guilty of leaving behind. The current system must accept responsibility for creating a present class of "dregs" by imposing a common curriculum on all students, notwithstanding special talents or interests. School choice will lead to a pluralist school system,³²⁸ creating opportunities for these students to enroll in special schools and develop those traits. Moreover, when a parent and child choose their school, instead of a bureaucrat dictating which school that child will attend, they create a vested interest in that school which instills in the student a purpose for attending that school.³²⁹ This intangible quality produces an observable improvement in the overall school climate, a critical indicator of school quality.³³⁰

2. *The Case for a Competitive Marketplace in Lower Education*

The School Choice Proposal will convert the market structure from a monopoly to a competitive market by eliminating exclusive subsidies to single producers. Instead, each consumer will receive the subsidy, and independently select their school of choice. Schools will therefore compete for students on terms of quality and, depending on the voucher amount, price. A competitive market will lead to a greater amount of education³³¹ at a lower cost,

326. *Id.*

327. Solomon, *supra* note 34, at 887 n.16 (noting that up to 50% of public school education expenditures goes toward non-education related administrative costs).

328. CHARLES L. GLENN, CHOICE OF SCHOOLS IN SIX NATIONS ix (1989).

329. *Id.*

330. *Id.*

331. Quantity of education refers to the utility derived from receiving education. Utility is a subjective measure of usefulness that results from consuming education. See BROWNING & BROWNING, *supra* note 22, at 58. For purposes of this Arti-

thereby eliminating the deadweight societal loss³³² that results from the public school monopoly. Furthermore, because a monopolist can pass on increased costs to the consumer while competitive firms must bear these costs, consumers bear the risk of mistake by monopolists whereas the producer bears such a risk in a competitive market.

To illustrate, when the school board decides the curriculum for all schools in the district, consumers bear the risk that the curriculum inadequately educates children in particular areas. If a school in a competitive market establishes an inappropriate education plan, parents will remove their children and send them to other schools. The risk of mistake falls on the producer. A competitive industry thus creates appropriate incentives (*i.e.*, the loss of economic livelihood or the potential for extraordinary gain) to avoid making mistakes, or immediately correcting these once they become apparent.

Superficially, one could conclude that schools in a competitive market will fail to take beneficial risks. On the contrary, however, a shocking disparity exists between the rate that private actors in the "adapt or die" environment of a competitive market innovate and incorporate technological change, and the rate of politically or ideologically influenced actors operating in an "if adapt, then die" environment. Political institutions stifle the rate of innovation by imposing multiple layers of review and approval before implementation, and not offering, individual rewards for innovating.³³³ In addition, factionalism among competing interest groups, as a result of the nuisance democratic decision-making imposes, inevitably results in diluting new proposals.³³⁴ Yet, even more disturbing, administrators and unions seek to dilute new proposals, or hinder their implementation, often as a means to ensure the failure of new proposals disadvantageous to their constituents, such as increasing class sizes, hiring teachers with less credentials, or providing teachers greater autonomy.³³⁵

Conversely, competing private-sector firms must attract consumers according to the merits that their products offer. Consumers will not choose product A, when product B is better at a lower cost.³³⁶ A marketplace with competing private firms therefore creates tremendous pressure on these producers to offer features

cle, we can assume utility encompasses an objective notion of quantity and a subjective notion of quality.

332. *Id.* at 351.

333. Porter & Davis, *supra* note 18, at 416.

334. *Id.*

335. *Id.*

336. BROWNING & BROWNING, *supra* note 22, at 9-11.

that other products fail to offer.³³⁷ Human nature, combined with the opportunity to keep the profit from your efforts, acts as an extraordinary stimulant in a competitive marketplace. The communications industry aptly illustrates the public sector's inability to match the rapid pace of innovation that occurs among private firms.³³⁸ Congress and the FCC have attempted to regulate mass communications, beginning with the rationale that scarcity of the electromagnetic spectrum would unduly impair access to broadcasting media.³³⁹ Thus, radio and television licenses came with the heavy price of regulation probably not tolerated by other industries.³⁴⁰

Technology arising in the private sector arose to circumvent burdensome broadcast regulations beginning in the 1960s with community antenna television (CATV).³⁴¹ In 1984 and 1992, Congress, in its continuing effort to maintain federal oversight over all mass media communications, even those that no longer involved the electromagnetic spectrum, imposed substantial barriers on the convergence of broadcast, cable and telephonic technologies.³⁴² Yet, while Congress and the FCC were thinking in cable, the private sector had already "eclipsed the fixed star of federal communications law" and dove into satellite and telephonic services that avoid the consequences of onerous regulation.³⁴³ The rate of innovation and the ability to adapt to new market conditions of private actors consistently exceeds the rate that politically influenced actors respond.³⁴⁴ This phenomenon would exist in lower-level education but for the present market structure, the public school monopoly.

337. *Id.* at 400-01 (discussing the concept of product differentiation).

338. Jim Chen & Daniel J. Gifford, *Law as Industrial Policy: Economic Analysis of Law in a New Key* 17 (Apr. 15, 1995) (unpublished manuscript, on file with the author and with *The John Marshall Law Review*).

339. *See id.*

340. *See id.* For example, unlike newspapers, broadcasters were required to allow access to speakers with alternative viewpoints. *Id.* (comparing FCC fairness doctrine with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), that struck down a comparable requirement for newspapers). In addition, race-based preferences upheld in awarding broadcast licenses are unconstitutional in other contexts. *Id.* The FCC has "erected a gargantuan body of laws that restricts entry at every level of the radio and television industries." *Id.*

341. *Id.* at 17-18. The Supreme Court nonetheless extended FCC jurisdiction to CATV. *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 163 (1968).

342. Chen & Gifford, *supra* note 338, at 18. *See also* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of the Communications Act of 1934, 47 U.S.C. §§ 151-757 (1988)); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of the Communications Act of 1934, 47 U.S.C. §§ 151-757 (Supp. IV 1992)).

343. *See* Chen & Gifford, *supra* note 338, at 18.

344. *Id.*

For the benefits attributable to a competitive market to materialize, the School Choice Proposal cannot be diluted by barriers that inhibit competition. Two critical aspects will be a large number of suppliers (*e.g.*, critical mass) and mobility of resources. The education establishment has strategically targeted these two aspects to dilute the efficacy of school choice proposals. For example, the argument to exclude religious schools from a voucher plan is really an effort to diminish the supply of competing institutions, thus making school choice exist only in theory and not in practice.³⁴⁵ Moreover, the education establishment may attempt to prevent resources from entering the education market by creating unnecessarily stringent accreditation standards in order to participate in a voucher program. A critical mass of suppliers, however, is critical to establish the competitive trait of price-taking.³⁴⁶ Price-taking is where the price of a good or service becomes market determined because an individual school cannot affect the overall price.³⁴⁷ To illustrate, if school A decides to increase its tuition, a sufficient number of alternative schools (*i.e.*, schools B through Z) exist to absorb market demands such that school A cannot increase its price without losing all of its students.³⁴⁸ Price-taking does not suggest, however, that all schools will charge the same tuition because education is not a fungible good. Schools will compete on non-price terms, (*e.g.*, athletic programs, math proficiency and theater departments) that consumers will individually value in their selection decision. Yet, no school can obtain an excess profit in the long run because consumers could choose an alternative school willing to provide the same curriculum for less tuition, or substitute an aspect of the school's curriculum (*e.g.*, an intramural athletic program rather than inter-varsity competition) for less tuition. Because of the importance of a critical mass of supply, the School Choice Proposal includes religious schools and requires open public school enrollment.

Mobility of resources is another critical aspect of establishing a competitive market in education. This concept primarily applies to eliminating artificial impediments that prevent competitors from entering a market.³⁴⁹ Substantial barriers to entry is a critical aspect of maintaining a monopoly.³⁵⁰ Unnecessarily stringent school accreditation standards would constitute an arti-

345. Stick, *supra* note 183, at 430-31.

346. BROWNING & BROWNING, *supra* note 22, at 153.

347. *Id.*

348. *Id.*

349. Sally C. Pipes, *Choice Through Vouchers*, in PROCEEDINGS: THE FOURTEENTH CONFERENCE OF THE UNIVERSITY/URBAN SCHOOLS NATIONAL TASK FORCE: SCHOOL CHOICE 27 (Richard M. Bossone & Irwin H. Polishook eds., 1992).

350. BROWNING & BROWNING, *supra* note 22, at 331-34.

ficial barrier for new supply to enter the market.³⁵¹ Most would agree that some minimum level of standards should exist to ensure that schools are bona fide educational institutions.³⁵² Yet, using standards to frustrate the creation of new supply would impede establishing a competitive market.³⁵³ Accreditation should therefore depend on broader performance criteria (*e.g.*, scores on standardized tests) rather than on adhering to a strict set of conditions.³⁵⁴ Moreover, express limitations on the creation of new supply, such as the limits placed on the number of charter schools in California,³⁵⁵ must not occur either.

Competition and consumer choice has produced a "first class" university system in America that exports a substantial number of degrees to foreign students.³⁵⁶ The federal student loan program for higher education operates under principles similar to the voucher proposal.³⁵⁷ Without demand subsidized by the federal government, many students arguably could only choose state institutions offering reduced tuition through production subsidies.³⁵⁸ Consumer choice, made possible by demand subsidies, has powerfully affected the curriculum of universities, and led to a diverse array of schools.³⁵⁹ David Riesman's work for the Carnegie Council on Policy Studies in Higher Education notes that:

American post-secondary education is extraordinarily diverse in terms of institutions [(*e.g.*, two year, four year, community colleges and religious colleges)] and even more so in terms of programs and enclaves within institutions [observing emergence of women's studies, Third World studies, and other curriculum changes resulting from consumer, (*e.g.*, student, pressure)].³⁶⁰

Colleges develop "marketing strategies" that identify the distinctive segment of students currently served by the college, whether the college is adequately serving these students and whether that segment presents a viable long term program.³⁶¹ These desirable aspects of the market for higher education would emerge in the market for lower education as a result of competition and consumer choice.

Although public universities compete with private institu-

351. Pipes, *supra* note 349, at 27-28.

352. See McConnell, *supra* note 224, at 126 n.3.

353. Pipes, *supra* note 349, at 27-28.

354. *Id.*

355. *Id.*

356. *Id.* at 30 (quoting Nobel laureate economist Milton Friedman).

357. DAVID RIESMAN, ON HIGHER EDUCATION: THE ACADEMIC ENTERPRISE IN AN ERA OF RISING STUDENT CONSUMERISM 351-56 (1980).

358. *Id.*

359. *Id.* at 106.

360. *Id.*

361. *Id.*

tions for students, public universities, in most instances, provide a less desirable product.³⁶² Without subsidized tuition, public institutions seemingly would not appeal to prospective students. Private colleges consistently dominate the top positions in academic rankings.³⁶³ In addition, public universities are far less responsive to consumer demands for curriculum content.³⁶⁴ Public universities do not engage in the marketing plans to attract students that Riesman described because, as of 1980, no public institution had been closed (although some had been consolidated).³⁶⁵ Even in a case where the president of a state university concluded that the school was so ill-equipped to serve the wants and needs of its students and, therefore, called on the legislature to close the school, local legislators, at the behest of faculty and local business interests, managed to keep the school open.³⁶⁶

The vast inefficiencies resulting from public provision of higher education has led one commentator to conclude that "no strong philosophical or economic arguments . . . favor . . . publicly provided higher education."³⁶⁷ Instead, higher education should be privately provided, with public finance to individuals meeting subsidization criteria.³⁶⁸ The same problems with public provision that these commentators document with public universities will arise in lower-level public schools even with school choice. Directly subsidizing a producer eliminates market constraints to control costs, thereby leading to inefficient expenditure.³⁶⁹ Moreover, production subsidies that allow lower tuition create artificial demand for the sub-standard education offered by public schools.³⁷⁰ For that reason, lower level, as well as higher level, education reform must envision a long-term strategy of transforming provision from the public sector to the private sector.

The advantages of accomplishing desirable social objectives through the private sector, instead of the public sector, is aptly illustrated by the federal government's experience in low-income housing.³⁷¹ The New Deal-era witnessed the entrance of the fed-

362. RIESMAN, *supra* note 357, at 106 (noting more stringent regulations concerning curriculum and admissions standards, a greater prevalence of collective bargaining and fewer incentives to develop innovative learning methods at public universities).

363. See, e.g., *America's Best Graduate Schools*, U.S. NEWS & WORLD REP., Mar. 20, 1995, at 77 [hereinafter *America's Best Graduate Schools*].

364. RIESMAN, *supra* note 357, at 106.

365. *Id.*

366. *Id.*

367. See Sontheimer, *supra* note 191, at 146.

368. *Id.*

369. Porter & Davis, *supra* note 18, at 412-13.

370. Charlotte Crane, *Scholarships and the Federal Income Tax Base*, 28 HARV. J. ON LEGIS. 63, 71-73 (1991).

371. See Schill, *supra* note 107, at 910-15.

eral government into providing low-income housing.³⁷² Presently, the government owns and operates 1.3 million units of public housing.³⁷³ Beginning in the 1970s, however, the government began to rely on the private sector to deliver housing assistance, offering supply-side incentives³⁷⁴ and demand-side assistance with housing vouchers.³⁷⁵ Numerous studies indicate substantial cost savings, up to 112%, from using vouchers rather than government provision of housing.³⁷⁶ The cost savings result from subjecting private actors to market discipline, which lowers both the cost of construction and administration.³⁷⁷ For example, illustrative of the interest group politics that inevitably affect political decision-making, the enabling legislation for public housing construction became captured by powerful labor unions that prohibited competitive pricing for construction labor.³⁷⁸ Housing vouchers, in addition to offering substantial savings, are also heralded for offering tenants a choice in the type of housing and geographical location, as well as encouraging landlords to maintain more desirable living conditions.³⁷⁹

While traditionally "liberal" groups advocate housing vouchers as a more effective means of providing low-income housing, the same groups proclaim that education vouchers cannot work. On the contrary, the same observed benefits of the housing voucher scheme will result with school vouchers. Similar to public education, public housing has been criticized for creating and perpetuating racial segregation, while the housing voucher, as will the education voucher, has had an integrating effect.³⁸⁰ Moreover, substantial cost savings from efficient expenditure will allow children to receive more education at present expenditure levels.³⁸¹

Efficient expenditure is fundamentally important because education is an economic good. In other words, more education is better than less because education is a desirable commodity in the

372. *Id.* at 894.

373. *Id.* at 897.

374. See Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633, 662 (current version at 42 U.S.C. § 1437f(b)(2) (1988 & Supp. V 1993)).

375. See Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633, 664 (current version at 42 U.S.C. § 1437f(d)(1) (1988 & Supp. V 1993)).

376. Schill, *supra* note 107, at 901.

377. *Id.* at 902-03.

378. *Id.* at 903-04.

379. See Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633, 664 (current version at 42 U.S.C. § 1437f(d)(1)).

380. Schill, *supra* note 107, at 911 & n.134.

381. See *supra* note 331 and accompanying text for a discussion of the concept of utility.

view of consumers.³⁸² Economic goods are scarce.³⁸³ Every society must determine how limited resources will be allocated among the unlimited demand for them. The education establishment, and the rhetoric concerning reform, often ignore that education confronts a scarcity of funding no different from other activities.³⁸⁴ An additional one million dollars of public funds dedicated to education requires that one million dollars will not be spent on roads, police, or other government functions.³⁸⁵ Should the government ignore the constraint and obtain the funding through taxation, then taxpayers, as a class, will have one million dollars less to spend on food, clothing or other goods.³⁸⁶ The notion of scarcity indicates the problem with inefficient expenditure. If increased educational expenditures fail to yield increased academic performance, but instead expand bureaucracy, taxpayers would prefer to retain their money. Education reform must begin with the understanding that every dollar spent on education is a dollar not spent on something else. Those that seek to maintain the existing system must justify that, as a society, we place a higher value on the unnecessary expenditures that fund a bloated bureaucracy than alternative uses.

Economic models explain that a competitive market structure will allocate economic goods to result in more goods at a lower price than a market dominated by a monopolist.³⁸⁷ The School Choice Proposal implicitly adopts allocative efficiency as a societal goal, rather than the goal of distributional equity sought by the present system. To crudely illustrate the difference, in a society of ten persons, allocative efficiency seeks societal output of twelve units, with each person receiving a varying amount, whereas distributive equity favors ten units equally distributed. Controversial to those favoring distributional equity is the prospect of those in the lowest stratum of an allocatively efficient system receiving less than one unit of output; controversial to those favoring allocative efficiency is the prospect of taking from those in the high end of the spectrum to bolster those at the low end (*i.e.*, redistribution) because this inevitably leads to lower overall production.³⁸⁸ Advocates typically assert either that a distributional

382. BROWNING & BROWNING, *supra* note 22, at 36.

383. *Telecommunications Research & Action Ctr. v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986) (footnote omitted), *cert. denied*, 482 U.S. 919 (1987).

384. RINEHART & LEE, *supra* note 11, at 30-32.

385. BROWNING & BROWNING, *supra* note 22, at 9-11.

386. *Id.*

387. *Id.* at 349-57, 364-66.

388. See David W. Barnes, *Nonefficiency Goals in the Antitrust Law of Mergers*, 30 WM. & MARY L. REV. 787, 854-61 (1989); A. Dan Tarlock, *Environmental Protection: The Potential Misfit Between Equity and Efficiency*, 63 U. COLO. L. REV. 871, 881-83 (1992).

equity system can achieve the same level of production as an allocative efficiency system; or conversely, that an allocative efficiency system will outproduce a distributional equity system to such an extent that the person receiving the least will, nonetheless, receive more than the *pro rata* portion received under a distributive equity system (*i.e.*, the trickle down theory, or "the rising tide will raise all boats" metaphor).³⁸⁹

Such arguments generally remain confined to theory and rhetoric, and a perfect system of either does not exist for comparison. Yet, the seventy-two year experiment of the Soviet Union and Eastern European economies premised on principles of distributional equity generally provides powerful evidence of the long term failure of such a system for allocating resources.³⁹⁰ Moreover, the United States has embraced, for more than 200 years, the concepts of free enterprise and competition, precepts of allocative efficiency. The legal framework of the United States is designed to advance allocative efficiency through antitrust laws, the Dormant Commerce Clause and various other sources of law that embrace and advance the principles of free trade and competition.³⁹¹ Deviations from such a system thus must overcome a strong presumption against their efficacy.

The experiment in distributional equity of lower level education began in the 1930s, a period heavily influenced by worldwide tendencies toward socialism and centralization of authority.³⁹² Ultimately, these systems failed.³⁹³ Many supporters of the present system, however, recognize the economic efficiency of a competitive market for lower level education, but justify maintaining the present system on the ground that a universal education system, provided through a public school monopoly, is necessary to "realize the promise of democracy and our commitment to justice and equity."³⁹⁴ This response reflects a common mistake of assuming the necessity of the present system, rather than the necessity of education itself, in forging the success of America. The universal access goal of public education promoted by local governments may have, at first, effectively organized an *ad hoc* rural education system.³⁹⁵

389. Barnes, *supra* note 388, at 854-61.

390. *Economies in Transition Around the World*, BUS. AM., Mar. 11, 1991, at 2 [hereinafter *Economies in Transition*].

391. See Chen & Gifford, *supra* note 338, at 11 n.80 (describing a cohesive and distinct legal analysis by members of the University of Minnesota Law School faculty, constituting the "Minnesota School" on economic regulation within federal systems).

392. FRIEDMAN & FRIEDMAN, *supra* note 55, at 155.

393. *Economies in Transition*, *supra* note 390, at 2.

394. See Herenton, *supra* note 165, at 73.

395. See Porter & Davis, *supra* note 18, at 397.

Today, however, America prospers despite the established system. Tomorrow, however, is uncertain. When displacing public provision is proposed, the education establishment strikes back with the rallying call of "democracy."³⁹⁶ The democracy label is effective rhetoric, because Americans comfortably take the existing system for granted.³⁹⁷ If the proper descriptive term of "socialist" was used to characterize the public education system for allocating education,³⁹⁸ then perhaps the rhetoric of the education establishment would be less effective.³⁹⁹ The debate could then proceed, as it should, according to whether the present system more effectively accomplishes the goal of educating children. Those arguments would need to justify an "island of socialism in [the] free market sea" of America due to a mistrust of voluntary exchange to best allocate education.⁴⁰⁰ In that regard, Anders Aslund, a leading advocate of swift privatization schemes in formerly communist countries, catalogued five principle reasons to privatize socialist economies that apply, in startling similarity, to America's public education system.⁴⁰¹

First, privatization creates a boundary between economics and politics.⁴⁰² Industrial firms should be judged by economic performance, not political considerations.⁴⁰³ Similarly, schools should survive or fail according to their academic performance. Accordingly, a school should expire if its students score lower on standardized tests or are not admitted to desirable colleges.

Second, privatization is necessary to make firms economically independent and exposed to financial discipline.⁴⁰⁴ Economic independence creates an appropriate incentive system.⁴⁰⁵ State owned firms do not bear the consequences of money-losing investments, and therefore unduly undertake projects or activities that do not enhance wealth or profitability.⁴⁰⁶ Public schools also do not adequately bear the risk of their decisions. Public schools do not lose students when curriculum decisions fail to enhance aca-

396. CHUBB & MOE, *supra* note 31, at 5.

397. *Id.*; see also FRIEDMAN & FRIEDMAN, *supra* note 55, at 154.

398. FRIEDMAN & FRIEDMAN, *supra* note 55, at 154.

399. See Chen & Gifford, *supra* note 338, at 5 n.27. See, e.g., JOHN KENNETH GALBRAITH, *ECONOMICS AND THE ART OF CONTROVERSY* 35 (1955) (stating that American culture has a disdain for socialism so intense as to be "remarkable").

400. FRIEDMAN & FRIEDMAN, *supra* note 55, at 154.

401. Anders Aslund, *Principles of Privatisation for Formerly Socialist Countries* 3-5 (Jan. 14, 1991) (Preliminary Working Paper No. 18 for Stockholm Institute of Soviet and East European Economies, on file with author).

402. *Id.* at 3.

403. *Id.*

404. *Id.* at 4.

405. *Id.*

406. *Id.*

demic performance.⁴⁰⁷ For public schools, revenue is obtained in the competitive enterprise of extracting from the public fisc.⁴⁰⁸ As the state funds public education, or any activity, the state creates a class of persons dependent on future funding. Therefore, these persons become highly involved in the political decision-making that appropriates funding.⁴⁰⁹ In other words, the public officials can buy political patronage by funding the state education system.

Third, privatization ensures a competitive market.⁴¹⁰ Markets without competition are subject to complacency, and maintain the status quo.⁴¹¹ Competition leads to economic growth, innovation, and product quality improvements to attract consumers. The absence of competition in the public school system, similarly, is responsible for the declines in student achievement.

Fourth, a subsidiary of the third rationale, private ownership leads to "creative destruction" through entrepreneurship and innovation.⁴¹² In the United States's manufacturing sector, 11% of manufacturing jobs are lost and replaced each year, compared to .5% in the former USSR.⁴¹³ Centralized management in the public school system has similarly deterred developing innovative pedagogical methods or experimental programs that lead to improved student performance.⁴¹⁴ The decision to innovate in public schools is made at the state or federal level, not at the school level. Because individual teachers or principals receive little, or no, direct reward from innovation, few experiments are developed to target specific students or classroom situations. Moreover, the bureaucratic structure establishes a burdensome process of submitting proposals, seeking various approvals, and then alteration to reflect the political reaction of community groups, teacher's groups and civil rights groups.⁴¹⁵

Fifth, a socialist economy does not invest capital on a rational basis.⁴¹⁶ Instead, political factors dictate the beneficiaries of investment.⁴¹⁷ As such, the formerly communist economies had obsolete fixed assets despite high rates of investment.⁴¹⁸ Investment in public education has doubled, while academic perfor-

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.*

415. See Porter & Davis, *supra* note 18, at 397.

416. Aslund, *supra* note 401, at 4.

417. *Id.* at 4-5.

418. *Id.* at 5.

mance has declined.⁴¹⁹ Certainly academic performance and investment should be positively correlated.⁴²⁰ Yet, an inverse relationship between educational expenditures and academic performance reflects that the public school system similarly misapplies investment capital.⁴²¹

Aslund concludes that privatization should proceed swiftly, rather than gradually, to eliminate the stifling effect of monopolization on the emergence of private sector suppliers, the continued waste of social resources in obsolete enterprises, and to ensure a critical mass of competing firms.⁴²² The gradual privatization approach of Hungary (unsuccessful) compared to the swift approach of the Czech Republic (successful) supports Aslund's thesis.⁴²³ In that regard, privatization of the lower-level education marketplace, accomplished via the voucher, should occur swiftly — the race to transform the lower level education market to private sector production “belongs to the hare and *not* to the tortoise.”⁴²⁴ As such, efforts to limit vouchers by means-testing or excluding religious schools from the voucher program represent an overly cautious transition and will detrimentally affect the success of the School Choice Proposal.⁴²⁵

The United States seemingly taught the world the value of free enterprise and competition, leading to the collapse of the formerly communist economies. Ironically, America remains committed to a socialist model, and is the only major industrialized country that does not widely embrace competition in its school system.⁴²⁶ The teacher now must become the student. The Dutch Constitution, for example, expressly guarantees citizens the freedom to use public funds to establish any school, independently select a curriculum and appoint teachers with government oversight extending only to assure a minimum standard of quality.⁴²⁷ German private schools receive public subsidies to make private education available to all children regardless of economic means.⁴²⁸ Japan instills competition by ranking schools according to the performance of their students on university entrance exams.⁴²⁹ Even more ironic, while these countries consistently

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.* at 9-11.

423. *Czech's Show the Way*, WALL ST. J., Apr. 20, 1995, at A12.

424. *Id.* (emphasis in the original).

425. See *infra* notes 449-66 and accompanying text for a discussion of the problems of supply and demand.

426. PETER DRUCKER, *THE NEW REALITIES* 235 (1988).

427. See GLENN, *supra* note 328, at 47-81.

428. *Id.* at 189-207.

429. DRUCKER, *supra* note 426, at 235.

outperform American students in international comparisons, each spends less per pupil.⁴³⁰

Wholesale comparisons to the practices of the former Soviet Union and other socialist countries as a paradigm of the public school system, although analytically analogous and powerfully prescriptive, fail to persuade the establishment of the need for change because, according to the public school mantra, the system must be "equitable."⁴³¹ Equity seemingly would require that every child have an equal opportunity to receive a quality education.⁴³² The government monopoly, however, has fostered "savage inequalities" in the delivery of education to the urban poor.⁴³³ This fostering leads the establishment to demand substantial amounts of money, poured into the existing system, to remedy that inequality.⁴³⁴ That claim ignores substantial empirical evidence reflecting little, or no, correlation between educational expenditures in the present public education system and academic performance.⁴³⁵ Of every dollar given to the present system, at least thirty-three, and possibly fifty cents will be spent on the administrative bureaucracy.⁴³⁶ Little wonder that education bureaucrats seek more money. Moreover, the present system misallocates its resources, directing funds to areas that do not result in improved student performance.⁴³⁷ More important, even if superficial "equity," reflected by the amount of money spent in school districts, could be achieved, the present system would continue to forsake other fundamental interests.

3. Liberty and Individual Responsibility

Professor John Coons has long advocated school choice with no reference to the efficiency of establishing a competitive market for education.⁴³⁸ To Coons, "the fundamental argument[s] for school choice . . . are social."⁴³⁹ The public school system that seeks to remedy the "savage inequalities" is itself inimical to social justice.⁴⁴⁰ All members of society should be equally free to

430. RINEHART & LEE, *supra* note 11, at 7. In 1985, the United States spent an overall average of \$3,310 per pupil, West Germany \$2,253 and Japan \$1,805. *Id.*

431. Porter & Davis, *supra* note 18, at 401-03.

432. *Id.*

433. See KOZOL, *supra* note 212, at 50-60.

434. *Id.*

435. CHUBB & MOE, *supra* note 31, at 102-04, 125-26.

436. See *infra* notes 594-600 and accompanying text describing the bureaucratic structure of the public education system.

437. See Hakim et al., *supra* note 48, at 3-5 (noting that the United States spends more on buildings and administration compared to Germany and Japan).

438. Coons, *supra* note 147, at 39.

439. *Id.*

440. Coons suggests that the present system of conscripting students to schools

decide their destiny. The public school monopoly forsakes liberty, for an illusory equity.⁴⁴¹ Yet, only a select few are vested with the liberty of choice. The select few consists of those wealthy enough to afford the double tax of private education or to establish richly endowed suburban schools.⁴⁴² Nevertheless, denying liberty of choice to others by conscripting children of the urban poor does not create equity. This "equity" of the public school system engenders hostility toward the political system that dictates to lower income families that they are incapable of determining the fate of their children.⁴⁴³ Equity only will exist if a system grants all parents and children the liberty of choice. Thus, society must respect the dignity and the responsibility of parents and children to choose.

Professor Suzanna Sherry contends that society not only must respect the responsibility of parents to choose, but presume that parents will behave responsibly.⁴⁴⁴ According to Professor Sherry, an essential goal of education is to inculcate specific values of cultural literacy, critical thinking and moral character.⁴⁴⁵ The failure of the present education system in accomplishing this objective risks losing America's heritage of responsible republican citizenship.⁴⁴⁶ A voucher system is therefore desirable, notwithstanding the other arguments based on economic efficiency or liberty, but instead because it will instill "responsible citizenship and reinvigorat[e] the lost assumption of individual responsibility."⁴⁴⁷

The education establishment claims that, with increased funding, they can provide better education. Who do parents trust with the money? Do they trust the education bureaucrats who

leads to the following eight maladies: 1) blacks are assigned to all-black schools; 2) the poor go to school with the poor, thereby reinforcing the cycle of poverty; 3) teachers can never become true professionals because their clients have no option of exit; 4) teachers are discouraged from exercising creative judgment and become self-despising time servers; 5) the parents lose control over the fate of their child's education and accept the status of non-responsible observer; 6) children experience vulnerability upon perceiving the impotence of their parents; 7) group conflict and simple apathy result from the disenfranchising of parents and children; and 8) ordinary and low-income families recognize that the same government that fosters this system takes care to preserve the natural authority of wealthy parents, thereby devastating civic morale. *Id.* at 39-40.

441. Peter W. Cookson, *Redesigning the Financing of American Education to Raise Productivity: The Case for a Just Voucher*, in *PRIVATIZING EDUCATION AND EDUCATIONAL CHOICE: CONCEPTS, PLANS, AND EXPERIENCES* 107 (Simon Hakim et al. eds., 1994).

442. Vallarelli, *supra* note 194, at 382.

443. *Id.* at 385-86.

444. Sherry, *supra* note 214, at 131.

445. *Id.*

446. *Id.*

447. *Id.* at 179 & n.200.

have controlled the system for more than sixty years, or do parents think that they, given every cent of that money, can better decide how and where their child will receive an education? Curiously, if the education establishment believes they can do a better job, they should have no worry because, under those circumstances, every parent currently serviced by the public school system will redeem their voucher with their neighborhood public school and the school will receive every penny of the funding it would receive without the School Choice Proposal. No one fears a battle they believe they can win. Instead, the education bureaucrats fear that if the system adapts, their positions will die.⁴⁴⁸ The change to a competitive market, via the School Choice Proposal, will not dictate the end of education, but the end to wasteful practices in public education. Monopoly power has granted the public school system a captive customer, and the education establishment seems intent on keeping that customer imprisoned.

III. PROBLEMS AND CONSIDERATIONS IN IMPLEMENTING THE SCHOOL CHOICE PROPOSAL

A. *Economic*

1. *Supply / Demand*

A voucher will create consumer demand, but the supply of schools initially will remain the same. Choice means little if each consumer is practically required to make the same decision. For example, choice exists in the current system if a parent forgoes the state expenditure per pupil and pays a private school tuition. In theory, choice exists, but in practice, choice is unrealistic. As such, a change in the demand side, without addressing the supply side will produce little benefit.⁴⁴⁹ Presently, only a small portion of private schools are non-sectarian, especially in the inner-city.⁴⁵⁰ Providing choice through a voucher, but eliminating the vast majority of schools from consideration will negate any meaningful impact that would arise from school choice, especially for the inner-city poor which is the class that stands to benefit most from a voucher.⁴⁵¹ For this reason, religious schools should be included in any school choice plan.

Merely providing open public school enrollment, an approach

448. FLIEGEL & MACGUIRE, *supra* note 83, at 192.

449. Hakim et al., *supra* note 48, at 173; Pipes, *supra* note 349, at 27.

450. See generally Hakim et al., *supra* note 48, at 6. Of the approximately three million students that receive private education, 2.5 million attend Catholic parochial schools. *Id.* Moreover, the Catholic school system is virtually the only private school alternative in the inner-city. See Beers & Ellig, *supra* note 64, at 29 (noting emergence of Catholic schools in Chicago, Illinois at the "turn-of-the-century").

451. FRIEDMAN & FRIEDMAN, *supra* note 55, at 151.

equivocally supported by the education establishment in the face of widespread public demands for school choice, is also a solution of limited potential.⁴⁵² Open public schools, without an option to attend private schools, fail to meaningfully expand consumer alternatives. Public school choice provides a choice among homogeneous providers. With public school choice, the curriculum, teaching methods and educational practices, nonetheless, generally remain uniform.⁴⁵³ Moreover, without the voucher, the public school system will maintain its monopoly position, perpetuating the corresponding "deadweight" loss.⁴⁵⁴

Even with vouchers, parents will face barriers that limit the supply of schools from which to choose. Geographical barriers create a practical obstacle, leading parents to generally favor schools proximate to their home.⁴⁵⁵ Transportation costs, as well as the cost of acquiring information, probably will eliminate distant schools from consideration.⁴⁵⁶ An increase in the number of schools providing education likely will occur to meet increased demand where that increased demand exists — *i.e.*, mostly in the inner-city. Unnecessary constraints, or a failure to make a long-term commitment to school choice, however, will dampen interest in establishing private schools to meet the increased demand. For example, the New Hampshire school choice experiment fixed a five-year limit on the availability of vouchers.⁴⁵⁷ Accordingly, the finite period increased the enterprise risk associated with building a school, eliminated investment returns from becoming a private provider of education, and precluded the entry of entrepreneurs into the market.⁴⁵⁸

Means testing vouchers (*i.e.*, only providing to low-income students) also severely limits the potential of school choice to improve the overall quality of education.⁴⁵⁹ Middle income families would continue to face the double tax burden if they desire to send their children to private schools. Most would opt for the default provider (*i.e.*, the state) and to a large degree, the public school monopoly would continue. Because only a limited segment of the population would receive vouchers, the increase in private sector supply would be curtailed as well. Moreover, providing

452. RINEHART & LEE, *supra* note 11, at 115.

453. In fact, the Wisconsin Constitution requires uniformity among public schools in a district. See *Davis v. Grover*, 480 N.W.2d 460, 473-74 (Wis. 1992).

454. See *supra* notes 286-90 and accompanying text discussing the "deadweight" societal loss of the public school system.

455. Daniel, *supra* note 30, at 15-16.

456. *Id.*

457. Menge, *supra* note 146, at 174.

458. See *id.* (discussing the New Hampshire Voucher Program).

459. Bright, *supra* note 322, at 197 (discussing the Wisconsin school choice plan which is limited to students from low-income families).

vouchers to some, but not all, will foster resentment from those denied state welfare.

Charter schools represent a supply-side stimulus to foster the development of disparate schools.⁴⁶⁰ Charter schools offer promising results because these operate outside the realm of the public school system's centralized bureaucracy.⁴⁶¹ Charter schools are therefore directly accountable to consumers, leading to improved educational quality, innovative curricula and pedagogical methods, involved parents and appropriate incentive systems for teachers and principals.⁴⁶² Although charter schools provide a short-term solution to avoiding the public school monopoly, maintaining a public sector provider retains direct economic dependence on the state, making charter schools inefficient producers in the long run. Moreover, to be effective, the centralized bureaucracy cannot smother the establishment or operation of charter schools, which it often tends to do.⁴⁶³ Otherwise, parents and teachers will lose control, and the charter school will be no different from other public schools.⁴⁶⁴

Although unleashing demand will lead to the creation of new supply, indirect supply-side subsidies to encourage the entry of private sector producers may also be considered. A change in the conditions of production inputs will lead to a change in the amount supplied.⁴⁶⁵ Unquestionably, capital costs constitute a substantial production input of operating a school. Subsidizing the capital costs of establishing a private school would expand supply. Subsidizing capital investment could occur through tax free "Educational Development Bonds" or a capital gains tax exemption on equity investments into accredited providers of lower-level education. The federal government similarly encourages the construction of housing available to low-income families by subsidizing the interest contractors pay on construction loans.⁴⁶⁶

2. *Price Floors and Price Caps — Vouchers and Price Inflation*

The School Choice Proposal resembles other state voucher plans.⁴⁶⁷ The scholarship is redeemable at any public or private

460. FLIEGEL & MACGUIRE, *supra* note 83, at 193.

461. *Id.*

462. *Id.*

463. See Chester E. Finn, Jr. & Diane Ravitch, *Charter Schools — Beware Limitations*, WALL ST. J., Sept. 7, 1995, at C14.

464. See Pipes, *supra* note 349, at 28.

465. BROWNING & BROWNING, *supra* note 22, at 14.

466. See *supra* notes 371-81 and accompanying text discussing the Low Income Housing Program.

467. See *supra* note 1 and accompanying text for a discussion of the school choice plan proposed by Delaware Governor Pierre duPont.

school, thereby forcing all schools to compete for students. The amount of the voucher is left to the state to determine. The Milwaukee Plan offered \$2,500 vouchers, half the amount spent per pupil in the public school system.⁴⁶⁸ Indiana proposed providing parents with a voucher equal in amount to state and local funding allocated per student in the child's school district, thereby eliminating any funding advantage of public schools.⁴⁶⁹ In 1990, then governor of Delaware Pierre duPont proposed a \$2,150 scholarship, approximately one-third of the \$6,650 cost per student in the public school system, basing the voucher amount on a review of private school tuition in the state.⁴⁷⁰

The voucher amount must be sufficient to make a meaningful supply of private schools available. Moreover, setting an amount substantially higher than the prevailing market rate for private tuition will encourage new private schools to enter the market and transform the market into one dominated by private sector providers more quickly.⁴⁷¹ The voucher amount will initially operate as a price floor, and then, after competitors emerge, as a price ceiling.⁴⁷² Presuming a limited number of competitors in the market, lower cost schools will tend to raise tuition to the amount of the voucher, causing price inflation. For example, if the voucher amount is set at \$2,150, a school previously charging tuition of \$2,000 likely will raise tuition to \$2,150. That school will realize "excess returns" as a result of the voucher establishing a higher price than the school otherwise would charge. Normally, competition enters a market where excess returns are generated and will "compete away" those rents and establish a competitive price.⁴⁷³ One consequence of setting a high voucher amount, then, will be to create excess returns in the short term, and attract additional suppliers.⁴⁷⁴

Because most voucher plans require the full use of the voucher, an artificial price floor will emerge at the voucher amount because a parent incurs no benefit from selecting a school that offers a tuition lower than the voucher amount. Schools will not charge below the voucher amount, and excess returns may remain for low cost schools. Schools, instead, would compete on non-price terms, similar in principle to commercial banks giving toasters to depositors when the federal government set maximum interest rates lower than the market price for deposits.⁴⁷⁵ With schools

468. *Davis v. Grover*, 480 N.W.2d 460, 477 (Wis. 1992) (Cecil, J., concurring).

469. *See duPont*, *supra* note 1, at 132-40.

470. *Id.*

471. BROWNING & BROWNING, *supra* note 22, at 257-58.

472. *Id.* at 23-24.

473. *Id.* at 257-58.

474. *Id.*

475. Prior to 1980, Regulation Q of the Federal Reserve Board restricted the

supported by public funds, such a result would lead to subsidization of activities that do not result in marginal benefits that taxpayers generally want to finance (e.g., free letter jackets to all graduates).

To address the potential for creating an inflexible price floor for lower level education, a voucher plan should rebate to parents the amount of the voucher that exceeds private tuition. Parents could keep the difference and spend it however they choose. As a result, the voucher amount would operate similarly to a price ceiling in the market for a minimum amount of lower level education.⁴⁷⁶ Private schools would charge less than the voucher amount and compete away any excess rents that the voucher amount may allow. Again, setting a voucher price higher than the average tuition will stimulate entry.

Some concern may exist that parents will simply choose the "cheapest" school and pocket the excess. Although similar concerns could be levied against the federal food stamp program, such fears are misplaced with school choice. Low cost schools would provide adequate education because these schools would need to meet state accreditation standards.⁴⁷⁷ Moreover, those parents undertaking the effort to make a choice of schools certainly can be expected to favor the long term interests of their children rather than short term consumption.⁴⁷⁸ Nonetheless, to resolve the tension between an inflexible price floor and direct cash rebates, Indiana proposed placing the excess of the voucher in a lifetime account of the student that could be used for educational purposes, such as college or vocational education.⁴⁷⁹ Although the Indiana plan introduces additional administrative costs, it creates an economic incentive for students to graduate and seek additional education. In addition, the permissible uses of the Indiana account could be expanded to finance other activities such as job training by employers.

3. Information Costs — The Risk of "Evil Choices"

The education establishment advances three discernible arguments related to information costs as a market imperfection that makes school choice unfavorable. First, parents are incapable of making the "correct" choice of schools for their children and, therefore, better educated professional bureaucrats must be en-

amount of interest a commercial bank could offer to attract deposits. See TIM S. CAMPBELL, MONEY AND CAPITAL MARKETS 426 (1988).

476. BROWNING & BROWNING, *supra* note 22, at 257-58.

477. FLIEGEL & MACGUIRE, *supra* note 83, at 193.

478. *Id.* at 190-92.

479. See *supra* note 21 and accompanying text for a discussion of the school choice plan proposed by Delaware Governor Pierre duPont.

trusted with the power to assign children to schools.⁴⁸⁰ Second, parents will blindly favor schools in higher socio-economic areas, unfairly impairing schools in lower income areas.⁴⁸¹ Third, as a result of the bias toward higher income area schools, school choice will require lower income students to undertake the burden of travelling to high-income area schools, but children in high-income areas will not need to suffer that burden.⁴⁸²

The first assertion, that parents are incapable of making a "good" choice, reflects the sickening paternalism of the present system.⁴⁸³ The education system should reflect the model of free choice and self-determination that underlies American society.⁴⁸⁴ Even after implementing school choice, bureaucratic self-preservation will further the notion that the state must intimately involve itself in parental choice.⁴⁸⁵ New Hampshire's experiment with a voucher plan included a 228 page manual to describe the "simple" school choice plan.⁴⁸⁶ Moreover, the education establishment in New Hampshire compelled the creation of an Information Agency, a multi-layered bureaucracy designed to provide information on education choices.⁴⁸⁷ The New Hampshire approach indicates that as the state unduly complicates selecting a school, choice becomes more costly, and thus, fewer choices are made.

Parents are not only capable of making "good" choices without stringent government oversight, but parents, rather than bureaucrats, *should* decide where their child will attend school. The Economics of Information (EOI) ensures that a market of information concerning product attributes will emerge.⁴⁸⁸ Schools will advertise their curriculums, test scores, college placement and specialized programs.⁴⁸⁹ Typically, third parties provide independent evaluations of academic programs.⁴⁹⁰ Moreover, schools will develop reputations, both good and bad, which will assist parents in making their choice. The premise that poor

480. RINEHART & LEE, *supra* note 11, at 146.

481. *Id.* at 145.

482. Patricia L. Willis, *A Business Person's Perspective: Anti-Choice*, in PROCEEDINGS: THE FOURTEENTH CONFERENCE OF THE UNIVERSITY/URBAN SCHOOLS NATIONAL TASK FORCE: SCHOOL CHOICE 58 (Richard M. Bossone and Irwin H. Polishook eds., 1992).

483. FLIEGEL & MACGUIRE, *supra* note 83, at 186-87.

484. *Id.*

485. *Id.* at 192.

486. Menge, *supra* note 146, at 174.

487. *Id.*

488. See generally John M. Church, *A Market Solution to Green Marketing: Some Lessons from the Economics of Information*, 79 MINN. L. REV. 245 (1994); George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961).

489. *Id.*

490. See, e.g., *America's Best Graduate Schools*, *supra* note 363, at 84 (describing the annual rankings of graduate schools in U.S. News & World Report).

parents cannot effectively choose a school after evaluating available information is patronizing and contradicts the experience with school choice in East Harlem, New York.⁴⁹¹ According to the leaders of the charter school initiative in East Harlem, "when poor parents were provided with information, they fought as hard, if not harder, to educate themselves and their children as to their options and how to realize them within a choice system."⁴⁹²

School choice opponents nonetheless worry that children will be harmed by making a "bad" choice, or harmed when denied the school of their first choice.⁴⁹³ For this reason, school choice is to be forsaken. Inevitably, parents may choose a school that, after enrolling, the child realizes is inappropriate for him or her. The child, however, can transfer schools the following year. Concededly, transferring may cause some disruption, but arguably is no more injurious than the experiences of children in assigned schools who have *no* escape. For children who are denied their first school of choice, the option of transferring will be a desirable means to attend a "better" school after proving themselves at another school.⁴⁹⁴

The second argument, that parents will blindly favor schools in high income areas thus leading to the demise of schools in low income areas, is demonstrably false.⁴⁹⁵ Parents will naturally tend to favor neighborhood schools due to the inconveniences of transportation.⁴⁹⁶ Competition for inner-city students will improve the quality of all inner-city schools.⁴⁹⁷ A choice system is not designed, nor will it lead to, a strict stratification of quality. Instead, choice will lead to a wide array of high quality schools. An example of a high quality inner-city school that attracts wealthy suburban children exists in Chicago with St. Ignatius College Preparatory.⁴⁹⁸ Moreover, Chicago aptly illustrates a vibrant market of affordable private education in the inner-city.⁴⁹⁹

The third argument against school choice follows the same paternalistic pattern of the first. This argument says that even if you want to do it, we must save you from yourself.⁵⁰⁰ Polly Williams, a leading advocate of the school choice plan in Milwaukee,

491. FLIEGEL & MACGUIRE, *supra* note 83, at 189-90.

492. *See id.*

493. *Id.*

494. *Id.*

495. *See supra* note 483 and accompanying text for a discussion of parents' preference for sending their children to school in higher socio-economic areas.

496. FLIEGEL & MACGUIRE, *supra* note 83, at 189.

497. *Id.*

498. *See Mullen, supra* note 228, at 12 (discussing the college preparatory program at St. Ignatius High School in Chicago, Illinois).

499. *See Beers & Ellig, supra* note 64, at 29-35.

500. Hetland, *supra* note 28, at 184.

reflects her sentiment toward such paternalism by haranguing the establishment with, "if liberals in the [Democratic] party are so good for black people, why are we in such bad shape?"⁵⁰¹ The underlying premise of school choice is that the parent and child, not the state, will decide which school to attend.⁵⁰² If the child values the incremental benefit of a better education more than the incremental cost of inconvenience arising from travelling to another school, then the child will choose the distant school.⁵⁰³ The question with school choice ultimately becomes who decides, the parent or the state. For a bureaucrat to usurp that choice emasculates any notion of liberty that underlies our society. Furthermore, to mask such an argument under the guise of "equity" is the "last refuge of the scoundrel."⁵⁰⁴ According to the innovators of the East Harlem choice plan, "equity is a great idea, and we are all in favor of it, but let's concentrate less on equities that level down and more on equities that level up."⁵⁰⁵

The education establishment attempts to clothe their opposition to school choice as coming from the guardians of the poor.⁵⁰⁶ The class warfare tactic is sadly more concerned with the "haves" not having rather than the "have nots" having. The education establishment has dictated the operation of a public education monopoly that has decimated the opportunities for the class of people they see themselves as protecting. Whether merely good-intentioned but wrong, or disingenuous and self-interested is irrelevant. The contention that parents cannot choose, or if they do choose it will be inequitable, really boils down to education bureaucrats self-interestedly preserving their jobs.

B. Legal

1. Establishment Clause

Including religious schools in the School Choice Proposal raises an obvious Establishment Clause issue.⁵⁰⁷ School choice proposals have a tendency to exclude religious schools to avoid the inevitable constitutional challenge.⁵⁰⁸ Timid political pragma-

501. *Id.*

502. Daniel, *supra* note 30, at 8.

503. FLIEGEL & MACGUIRE, *supra* note 83, at 190-91.

504. *Id.* at 188.

505. *Id.*

506. *Id.* at 186-88.

507. The Establishment Clause in the First Amendment states that "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I.

508. See generally Mark J. Beutler, *Public Funding of Sectarian Education: Establishment and Free Exercise Clause Implications*, 2 GEO. MASON INDEP. L. REV. 7 (1993).

tism may prove unwise, however. Excluding religious schools eliminates the vast majority of private schools from consideration.⁵⁰⁹ The full benefits of a competitive market will not materialize, and the education establishment will soon proclaim, "we tried school choice and it did not work," when, in actuality, true school choice was never "tried" at all. So far, stalling the inevitable constitutional question has allowed law reviews to fill their pages with the on-going debate of whether the Establishment Clause precludes enacting a voucher system that includes parochial schools.⁵¹⁰ As with many constitutional issues, the conclusion on the constitutional question generally coincides with the conclusion on the underlying policy. As such, those favoring school choice fail to identify an Establishment Clause problem, whereas those who oppose school choice find that the Constitution provides a convenient backstop to prevent such a plan. This Article concededly follows that pattern.

The three-prong test of *Lemon v. Kurtzman*⁵¹¹ provides the point of departure to determine whether the School Choice Proposal would violate the Establishment Clause. Under *Lemon*, a statute must have a secular purpose; the principal or primary effect of the statute must neither inhibit nor advance religion; and the statute must not foster excessive government entanglement with religion.⁵¹² The secular purpose prong generally has little relevance in an Establishment Clause inquiry into aid to parochial schools.⁵¹³

The inquiry concerning the primary effect of a legislative scheme tends to distinguish between whether state aid travels directly from the state to the school,⁵¹⁴ or takes an indirect route from the state to the individual to the school.⁵¹⁵ In *Committee for Public Education & Religious Liberty v. Nyquist*,⁵¹⁶ the Court invalidated a New York law that, in part, provided direct mone-

509. Stick, *supra* note 183, at 430.

510. See e.g., Bright, *supra* note 322, at 193; David Futterman, *School Choice and the Religion Clauses: The Law and Politics of Public Aid to Private Parochial Schools*, 81 GEO. L.J. 711 (1993); Steven K. Green, *The Legal Argument Against Private School Choice*, 62 U. CIN. L. REV. 37 (1993); Note, *The Establishment Clause, Secondary Religious Effects, and Humanistic Education*, 91 YALE L.J. 1196 (1982).

511. 403 U.S. 602, *reh'g denied*, 404 U.S. 876 (1971).

512. *Id.* at 612-13.

513. *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983).

514. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 764 (1973). *But see* *Roemer v. Board of Pub. Works of Md.*, 426 U.S. 736 (1976) (permitting direct state aid to religious colleges if the institution is not pervasively sectarian and secular activities can be separated).

515. *Mueller*, 463 U.S. at 388; *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 485 (1986).

516. 413 U.S. 756 (1973).

tary grants to particular religious schools for maintenance. Yet, in *Mueller v. Allen*,⁵¹⁷ the Court upheld Minnesota's state tax deduction for education expenses incurred by parents providing tuition, textbooks and transportation for their children to attend elementary or secondary school, either public or private. Although the deduction overwhelmingly benefitted parents who sent their children to religious schools, the Court stated that, contrary to *Nyquist* where the state provided tuition grants only to parents who sent children to private schools, the state aid was "made available generally [to all parents of the State] without regard to sectarian-nonsectarian, or public-nonpublic nature."⁵¹⁸ As such, similar to Equal Protection analysis, a mere discriminatory effect does not *per se* violate the Establishment Clause.⁵¹⁹

The Court reinforced its position toward permitting indirect assistance (*i.e.*, aid that first goes to a citizen before going to a religious institution) in *Witters v. Washington Department of Services for the Blind*.⁵²⁰ In *Witters*, the Court upheld that a state could extend assistance to blind persons who intended to become ministers or study at Christian colleges.⁵²¹ Accordingly, when "aid goes to individuals, [that] means that [the] decision to support religious education is made by the individual, not by the State."⁵²² Most recently, the Court held in *Zobrest v. Catalina Foothills School District*⁵²³ that the Establishment Clause does not prevent a public school district from providing a sign-language interpreter to a hearing-impaired child who chose to attend a sectarian school.

The standard voucher redeemable at a religious school withstands scrutiny under *Lemon's* second prong. As with the aid in *Witters*, a voucher provides indirect aid to religious schools only after a parent chooses to enroll their child in a religious school.⁵²⁴ When aid is indirect, the primary effect is to advance the direct activity, which is education in the case of vouchers. Although the School Choice Proposal affects a broader class of persons and may differ in scope than the aid in *Witters*, the scope does not differ in degree, or principle, from the tax deductions in

517. 463 U.S. 388 (1983).

518. *Id.* at 398.

519. *Id.* at 400-01; *see also* *Washington v. Davis*, 426 U.S. 229, 235 (1976).

520. 474 U.S. 481 (1986). *But see* *Witters v. Washington Comm'n for the Blind*, 771 P.2d 1119 (Wash. 1989) (en banc) (stating that financial aid for religious education is unconstitutional under the Washington state constitution), *cert. denied*, 493 U.S. 850 (1989).

521. *Witters*, 474 U.S. at 489.

522. *Id.* at 488.

523. 113 S. Ct. 2462 (1993).

524. *Witters*, 474 U.S. at 486-87.

Mueller.⁵²⁵ A tax deduction and voucher have equivalent economic effects because both rebate to the taxpayer funds to which the state otherwise would be entitled. Of course, instead of a voucher, school choice could be achieved by raising the deduction to a level that eliminates the "double tax."⁵²⁶ That alternative, however, ignores that inner-city families do not have the income to shield with a tax deduction.⁵²⁷ The voucher merely provides the same economic benefit to poor families that the Establishment Clause permits with tax deductions for rich families.

Other religious schools benefit from large-scale indirect state assistance programs, yet survive *Lemon's* second prong. The federal student loan program, essentially a form of demand-side subsidy for college education, places no restriction on students attending religious schools.⁵²⁸ Moreover, the G.I. Bill operates similarly by financing the education, even at religious colleges, of eligible persons.⁵²⁹ Although the Court may more strictly review programs that affect children due to a fear of "indoctrination," that distinction generally applies when religious symbols are involuntarily thrust on students in a public school.⁵³⁰ Here, the parent breaks the indoctrination causal chain by making a voluntary choice of schools.

Next, for the School Choice Proposal to run afoul of *Lemon's* excessive entanglement prong, the voucher must lead to "comprehensive, discriminating, and continuing state surveillance" of religious schools.⁵³¹ Opponents of the voucher pretend that the state has no present involvement with religious schools, and that the voucher will suddenly lead to substantial state oversight. Thus, the School Choice Proposal presumably fails *Lemon's* third prong. Yet, states already heavily involve themselves with accreditation, reviewing textbooks, monitoring attendance and scoring state required tests taken by students of religious schools.⁵³² Therefore, a challenge under this prong must show that the *incremental involvement* of the state will amount to "comprehen-

525. *Mueller*, 463 U.S. at 390-93.

526. See *supra* note 93 and accompanying text for a discussion of the "double tax" incurred by parents with children in private schools who must pay tuition for the school in addition to the portion of their taxes that goes to funding public education.

527. Daniel, *supra* note 30, at 23-24.

528. See, e.g., 20 U.S.C.A. § 1085(b) (West 1990) (defining eligible institutions).

529. See 38 U.S.C.A. § 3451 et seq. (West 1990); *Witters*, 474 U.S. at 388 n.3.

530. See, e.g., *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (prohibiting school prayer during high school graduation ceremony).

531. *Lemon*, 403 U.S. at 619.

532. See *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 650 (1980).

sive . . . surveillance.”⁵³³ As currently structured, the School Choice Proposal will not meaningfully alter a state’s involvement with religious schools. The third prong represents a mere red-herring raised by school choice opponents.

The concern of legislators regarding the constitutionality of including religious schools appears to be misplaced. Vouchers advance education, not religion. The Court’s modern approach to Establishment Clause jurisprudence recognizes that

At this point in the 20th century, we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. [citations omitted]. The risk of significant religious or denominational control over our democratic processes — or even of deep political division along religious lines — is remote when viewed against the positive contributions of sectarian schools, and such risk seems entirely tolerable in light of the continuing oversight of this Court.⁵³⁴

A wholesale assertion that any voucher plan including religious schools violates the Establishment Clause is clearly wrong. A school choice plan, properly crafted, can include religious schools and pass federal constitutional muster.⁵³⁵ Most important, the School Choice Proposal should be made available to all parents, and envision no greater oversight of religious schools. As such, state legislators grappling with school choice should proceed to include religious schools in that plan. However, one *caveat* exists. State constitutions may require a stricter separation of church and state than the federal standard under the Establishment Clause.⁵³⁶ If so, those states may need to amend their state constitutions to include religious schools.

2. Equal Protection

Prior to the 1954 Supreme Court decision in *Brown v. Board of Education*,⁵³⁷ many school districts provided public education in segregated schools. In *Brown*, a unanimous Court held that a legal scheme mandating segregating schools violated the Equal Protection Clause of the Fourteenth Amendment.⁵³⁸ In the follow-up case to determine the appropriate remedy, the Court or-

533. *Lemon*, 403 U.S. at 619.

534. *Mueller*, 463 U.S. at 400.

535. *Green v. County Sch. Bd.*, 391 U.S. 430, 440-41 (1968).

536. *See, e.g.*, Opinion of the Justices (Choice in Education), 616 A.2d 478, 480 (N.H. 1992) (stating direct payment to sectarian schools chosen by students in school choice proposal determined to be unconstitutional under New Hampshire state constitution); *Witters*, 771 P.2d at 1119 (holding that indirect aid used to attend religious school is unconstitutional under Washington state constitution).

537. 347 U.S. 483 (1954).

538. *Id.*

dered that the school district abandon a scheme of segregation and proceed with "all deliberate speed" to desegregate its schools.⁵³⁹ The Court authorized district courts to oversee school desegregation orders that local school boards would need to devise in order to comply with *Brown*.⁵⁴⁰ Forty years later, after intense federal supervision of local school systems, large numbers of inner-city children nonetheless attend one-race schools.⁵⁴¹

A literal reading of *Brown* suggests that the Supreme Court merely decided that *de jure* segregation in public education violates Equal Protection.⁵⁴² A literal reading ignores the progeny of school desegregation cases that indicate a federal mandate to end desegregation and the vestiges of racial discrimination.⁵⁴³ The cases immediately following *Brown* focused on the conversion from a dual system, one for blacks and one for whites, to a unitary system. In *Green v. County School Board*,⁵⁴⁴ the Court invalidated a freedom-of-choice plan that a school board proffered to remedy its separate system. Such a plan, however, would be constitutional if the plan offered a "real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, non-racial system."⁵⁴⁵

In *Swann v. Charlotte-Mecklenburg Board of Education*,⁵⁴⁶ the Court provided greater flexibility to school boards in devising alternative schemes to comply with *Brown*. Student assignments were acceptable so long as the school district did not exclude students, directly or indirectly, on account of race.⁵⁴⁷ The Court further recognized that one-race schools within a school district were inevitable due to large concentrations of blacks in inner-cities, and thus not *per se* unconstitutional.⁵⁴⁸ The judicial oversight that *Brown II* required was intended to be temporary.⁵⁴⁹ Once a school district has complied with a desegregation order and at one time achieved "unitary status," judicial intervention under *Brown II* is inappropriate.⁵⁵⁰ Instead, intervention should occur only according to the more general standards of Equal Protection.⁵⁵¹

539. *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

540. *Id.*

541. Beck, *supra* note 214, at 1029-30.

542. See Daniel, *supra* note 30, at 39.

543. See generally *Freeman v. Pitts*, 503 U.S. 467 (1992); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

544. 391 U.S. 430 (1968).

545. *Id.* at 440-41.

546. 402 U.S. 1 (1971).

547. *Id.* at 23-24.

548. *Id.* at 25-26.

549. *Board of Educ. of Oklahoma City v. Dowell*, 498 U.S. 237 (1991).

550. *Id.* at 247.

551. *Freeman*, 503 U.S. at 489.

The Court affirmed this principle in *Freeman v. Pitts* by denying an Equal Protection claim when resegregation of a school district resulted from private choices, rather than state action.⁵⁵²

Despite *Green*, a school choice plan seemingly would survive an Equal Protection challenge. If the school district implementing the School Choice Proposal had achieved "unitary status," *Dowell* suggests that further judicial intervention and desegregation orders cannot proceed unless the Proposal has the actual intent to discriminate according to race.⁵⁵³ Furthermore, *Freeman* would immunize the School Choice Proposal from attack even if such a plan resulted in a greater number of one-race public schools.⁵⁵⁴ For school districts still subject to a desegregation order, *Green* expressly recognizes that a school choice plan may be utilized.⁵⁵⁵ Although the freedom of choice plan in *Green* did not pass the Court's scrutiny, the school district had not attempted to use other methods to achieve desegregation.⁵⁵⁶ Conversely, the School Choice Proposal would constitute an alternative means to accomplish desegregation only after other methods had failed. Recent cases explicitly suggest the Court's willingness to defer to "experimentation" by local school boards in their efforts to achieve desegregation.⁵⁵⁷ So long as opportunities exist for desegregated education, the School Choice plan will be permissible.

Merely because the School Choice Proposal and *Brown* can constitutionally coexist does not address the normative concern underlying the policy of desegregation. Yet, the School Choice Proposal offers a realistic mechanism to desegregate education on a broader scale. Blacks and minorities constitute a disproportionate segment of the poor. Thus, they will disproportionately benefit from a scheme that enables them to bypass the public school system that created, and continues to foster, segregation.⁵⁵⁸ Concededly, the underlying goal of the School Choice Proposal does not directly target eradicating desegregation. In fact, in present choice systems, a niche of Afro-centric schools have emerged to appeal exclusively to black children (*i.e.*, presumably adopting the premise of "separate, but better").⁵⁵⁹ The School Choice Proposal, however, will more effectively and efficiently create meaningful

552. *Id.*

553. *Dowell*, 498 U.S. at 237.

554. *Freeman*, 503 U.S. at 467.

555. *Green*, 391 U.S. at 440-41.

556. *Id.*

557. *Dowell*, 498 U.S. at 237; *Miliken v. Bradley*, 418 U.S. 717 (1974); Daniel, *supra* note 30, at 49 n.327.

558. K.G. Jan Pillai, *Affirmative Action: In Search of a National Policy*, 2 TEMP. POL. & CIV. RTS. L. REV. 1, 17 (1992).

559. Christopher Steskal, *Creating Space for Racial Difference: The Case for African-American Schools*, 27 HARV. C.R.-C.L. L. REV. 187, 187 (1992).

opportunities for desegregated education than federal court monitoring.

Accomplishing desegregation by school choice was attempted by an offspring plaintiff class from the *Jenkins v. Missouri*⁵⁶⁰ desegregation case. In that case, the class sought a judicial remedy of tuition vouchers to attend any of fifty private schools within the Kansas City School District.⁵⁶¹ That remedy would assist the district in meeting numerical targets for racial balance by allowing black children to leave the public school system, thereby increasing the proportion of whites in the district.⁵⁶² The School Choice Proposal more broadly would allow all children to leave the system, expanding the universe of schools offering desegregated education. Although the initial effects on desegregation would be marginal, the long-term prospect for desegregating not merely the public schools, but all schools within a community, seems bright.

Desegregation efforts under the *Brown* mandate have provided perverse results, analogous to attempting to make water flow uphill. The Boston public school system reflects the problem of "white flight" when students, through busing and conscripted attendance, are coerced into a school system to meet a numerical racial mix.⁵⁶³ The Kansas City school system, the subject of the *Jenkins* litigation, attempted to draw whites into a predominantly black school district by spending \$500 million on new magnet schools.⁵⁶⁴ For their money, Kansas City "bought" 750 white students into the district, less than three percent of the student population.⁵⁶⁵ Tragically, 3,000 black students remained on a waiting list to attend the lavish, albeit half-empty, schools until more whites could be lured into the district.⁵⁶⁶ Contrast a school choice plan in East Harlem that began in 1974.⁵⁶⁷ The district allowed the development of alternative schools (similar to charter schools) that could independently develop curriculums outside the influence of the school board.⁵⁶⁸ Parents could send their child to any school in the district.⁵⁶⁹ In seven years, East Harlem raised its district rating from thirty-two to eighteen.⁵⁷⁰ Additionally,

560. 639 F. Supp. 19 (W.D. Mo. 1985), *aff'd as modified*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987).

561. Beck, *supra* note 214, at 1030.

562. *Id.*

563. Peyser, *supra* note 2, at 626-30.

564. See Beck, *supra* note 214, at 1035.

565. *Id.*

566. *Id.* at 1036.

567. FLIEGEL & MACGUIRE, *supra* note 83, at 5-15.

568. *Id.*

569. *Id.*

570. *Id.* at 231.

twenty-five times the number of students were admitted to selective high schools than when the program began.⁵⁷¹ With respect to desegregation, the student population continues to mostly represent the predominantly black and hispanic racial mix of the district.⁵⁷² However, the district did attract several hundred white students from *outside* the school district.⁵⁷³

3. State Law Issues

a. Educational Equity

The latest fad in education litigation has been challenging the public education system under state constitutional provisions that typically provide a right to education.⁵⁷⁴ Plaintiffs, students and taxpayers in poor school districts, generally contend that the public education system discriminates against them and provides an unconstitutionally unequal education relative to rich school districts.⁵⁷⁵ Plaintiffs seek to declare the public education system unconstitutional, and issue a mandate to the legislature to remedy the funding disparities among school districts.⁵⁷⁶ Initially, plaintiffs availed themselves of the federal Equal Protection Clause to challenge their state public education systems.⁵⁷⁷ Yet, in *San Antonio Independent School District v. Rodriguez*,⁵⁷⁸ the Supreme Court held that education is not a fundamental right, wealth is not a suspect class and, thus, as so often the case under "rational basis" review, the plaintiff lost.

Denied a federal remedy, plaintiffs then asserted claims under their respective state constitutions. In *Robinson v. Cahill*,⁵⁷⁹ the New Jersey Supreme Court resuscitated the "educational equity" claim brought under a state constitutional right to education. *Robinson* established the norm for educational equity claims, and from the time of its decision in 1973, sixteen state supreme courts have intervened and held their public education systems unconstitutional.⁵⁸⁰

The merits of activist judicial intervention in an area historically belonging to state legislatures presents its own set of problems. Judicial solutions to policy matters are less "democratic,"

571. Beck, *supra* note 214, at 1050.

572. FLIEGEL & MACGUIRE, *supra* note 83, at 225.

573. Beck, *supra* note 214, at 1050-51.

574. See generally, Alexandra Natapoff, 1993: *The Year of Living Dangerously: State Courts Expand the Right to Education*, 92 EDUC. L. REP. 755 (1994).

575. *Id.*

576. *Id.*

577. *Id.*

578. 411 U.S. 1, *reh'g denied*, 411 U.S. 959 (1973).

579. 303 A.2d 273 (N.J.), *cert. denied*, 414 U.S. 976 (1973).

580. Natapoff, *supra* note 574, at 755.

especially in states that do not elect their judges.⁵⁸¹ Judges not accountable to voters have deeply entangled themselves with the "nuts and bolts of education policy"⁵⁸² mandated compliance with unpopular solutions. Conversely, judicial action is attractive for its efficiency, and overreaching courts have been, to some extent, brushed back by ballot initiatives.⁵⁸³

Educational equity litigation raises a more troubling question, however, concerning its effectiveness in improving education quality. The litigation is expensive, diverts funds from schools to lawyers and victory in the courts seldom lead to substantive changes in the legislative scheme.⁵⁸⁴ For example, the New Jersey litigation continues, while rich school districts spend \$1,700 more per pupil than poor districts.⁵⁸⁵ California solved its funding disparities by spending less on overall education.⁵⁸⁶ Yet, probably most disturbing is the underlying premise of the educational equity claim that: increased expenditure in the current public education system will lead to improved academic performance.⁵⁸⁷

In the present system, no systematic relationship exists between school expenditures and student performance.⁵⁸⁸ Aggregate school expenditures per pupil have doubled from 1966 to 1989, while average S.A.T. scores have declined by more than sixty points.⁵⁸⁹ Although some question the merits of measuring performance with S.A.T. scores, similar declines are reflected in other standardized tests and in comparative tests with students of other countries.⁵⁹⁰ Some argue that the increase in expenditure relates to increased tasks externally imposed on public educators, *i.e.*, educating handicapped students, immigrants and other disadvantaged students.⁵⁹¹ Yet, the bulk of the increase is attributable to implementing policies independently established by the public education system purportedly designed to improve student performance.⁵⁹² For example, increasing salaries for teachers holding master's or other higher level degrees, rewarding teacher

581. *Id.* at 783-84.

582. *Id.* at 783 n.100.

583. *Id.*

584. *Id.* at 765 n.35.

585. *Id.* at 765.

586. *Id.*

587. See *supra* note 152 and accompanying text discussing the Theory of Bureaucratic Displacement.

588. Hanushek, *supra* note 72, at 423.

589. *Id.*

590. See *supra* notes 31-43 and accompanying text for a discussion of declining scores by American students on standardized tests both in general and as compared to students from other countries.

591. Hanushek, *supra* note 72, at 423.

592. *Id.*

seniority without accounting for teacher performance and reducing student/teacher ratios.⁵⁹³

Increased expenditure has not enhanced student performance. The bureaucratic structure of the public education system readily explains such a result. For every U.S. dollar the school system receives, only sixty-six cents is applied to "instructional expenditures."⁵⁹⁴ The remainder is directed toward bureaucracy.⁵⁹⁵ Further analysis indicates that a substantial portion of "instructional expenditures" provide no countervailing benefit in terms of student performance.⁵⁹⁶ Instructional expenditures are mostly determined by teacher salaries and class size.⁵⁹⁷ Teacher salaries are determined according to seniority and education received, rather than merit.⁵⁹⁸ Professor Hanushek accumulated the results of more than 187 studies that sought to determine if any relationship existed between class size, teacher experience, and teacher education.⁵⁹⁹ Hanushek concluded that, "[o]verall, the results are startlingly consistent. No compelling evidence emerges that teacher/student ratios, teacher education or teacher experience have the expected positive effects on student performance."⁶⁰⁰

593. *Id.*

594. *Id.*

595. *Id.* at 433.

596. Hanushek, *supra* note 72, at 433.

597. *Id.*

598. *Id.*

599. *Id.*

600. *Id.* at 437-38. The chart on the next page is a reproduction of Professor Hanushek's summary of the studies analyzing the effect of expenditure in specific areas, and the relationship to student performance. *Id.* at 455.

The conclusions require appropriate caution. These studies do not refute the intuitive notion that increased spending should lead to increased performance. Instead, these studies indicate that increased expenditure *in the present system* does not lead to increased student performance because the present system inefficiently employs its resources.⁶⁰¹ The studies reflect that the present system's investment in teacher experience, smaller class size and teacher education do not provide a return on investment in student performance. The results perfectly illustrate producer advantage in a monopoly market. As a result, the premise of the educational equity claim, to improve education in poor school districts by increasing expenditure, dictates that this policy approach will fail if the goal is to improve student performance. If the goal is to maximize producer welfare, or merely government provision regardless of social cost, then the educational equity claim succeeds.

STUDIES	STATISTICALLY SIGNIFICANT STUDIES			STATISTICALLY INSIGNIFICANT STUDIES		
	No. of Studies	Pos +	Neg -	Pos +	Neg -	Unknown
Teacher/Student Ratio	152	14	13	34	46	45
Teacher Education	113	8	5	31	32	37
Teacher Experience	140	40	10	44	31	15
Teacher Salary	69	11	4	16	14	24
Expenditures per Student	65	13	3	25	13	11
Administration	61	7	1	14	15	24
Facilities	74	7	5	17	14	31

The chart divides the studies into those producing statistically significant results and those that did not. The chart then classifies studies according to the number that reflected a positive relationship between the variable and student performance, those that exhibited a negative relationship and those in statistically insignificant studies where the relationship was unknown.

601. Hanushek, *supra* note 72, at 433.

b. *Davis v. Grover*:⁶⁰² State Constitutional Attacks Against School Choice

The Milwaukee Parental Choice Program (MPCP) established a landmark foray into the realm of widespread school choice.⁶⁰³ The MPCP is an experiment that tests the underlying premise that parental choice leads to an improvement in education for children of low-income families. Wisconsin enacted the MPCP to provide that certain low-income students in Milwaukee may attend, at no charge, any nonsectarian private school located in the Milwaukee School District.⁶⁰⁴ No more than one percent, or 1,000, of the students in the district may participate per school year.⁶⁰⁵ Approximately \$2,500 of state educational funding is diverted to the private school attended by each participating student.⁶⁰⁶ In 1990, the first year of implementation, 341 students participated. Presently, approximately 830 students participate.⁶⁰⁷

Acting predictably, like any state-sanctioned monopolist faced with competition, State Superintendent Herbert Grover set forth to create impenetrable barriers to entry for private schools seeking to participate.⁶⁰⁸ Grover attempted to require private schools to execute "complex forms certifying that they [the private schools] met numerous requirements in excess of those specified [by the statute]."⁶⁰⁹ Lonzetta Davis, the parent of a six-year-old student seeking to participate in the program, initiated an action asserting that the Superintendent exceeded his authority and acted to frustrate the MPCP.⁶¹⁰ Various school administration organizations and the NAACP intervened ("Intervenors") to challenge the MPCP under the Wisconsin Constitution. The Intervenors alleged that the MPCP was unconstitutionally "logrolled" through the legislature as part of a budget bill, that the MPCP violated the uniform district schools clause and that the MPCP impermissibly dedicated public funds to a private purpose.⁶¹¹ A Wisconsin circuit court upheld the constitutionality of the MPCP and determined that Superintendent Grover exceeded his authori-

602. 480 N.W.2d 460 (Wis. 1992).

603. *Id.*

604. *Id.* at 463.

605. *Id.*

606. *Id.*

607. Maribeth Vander Weele, *State School Voucher Fight Heating Up*, CHI. SUN TIMES, Feb. 8, 1995, at 17.

608. *See Davis*, 480 N.W.2d at 464-65.

609. *Id.*

610. *Id.*

611. *Id.*

ty.⁶¹² A court of appeals reversed, finding that the MPCP was unconstitutional on the "logrolling" allegation, but did not enjoin the MPCP. The Wisconsin Supreme Court upheld the MPCP, dismissing the Intervenor's three allegations.⁶¹³ The procedural claim of logrolling, although the principal issue dividing the Wisconsin Supreme Court, probably does not universally threaten state school choice plans properly enacted. The two other substantive claims, however, may potentially impact other state school choice plans.

The Wisconsin Constitution provides that "the legislature shall provide by law for the establishment of district schools which shall be as nearly uniform as possible."⁶¹⁴ The Intervenor argued that participating private schools became district schools by accepting public money. Accordingly, these private schools, by offering a different (read: better)⁶¹⁵ "character of instruction" from the public schools in the district, allegedly violated the Uniformity Clause. The court determined that participating private schools do not constitute district schools, reasoning that the Uniformity Clause requires the legislature to provide the *opportunity* for children to receive a free uniform basic education, but does not require the legislature to ensure that all children must receive a uniform education.⁶¹⁶ The court's reasoning makes sense, otherwise construing the Uniformity Clause to require that children must receive a uniform education would preclude the mere existence of non-public schools. Moreover, a committed textualist certainly would not construe a private school to be "established" by the MPCP.

The Intervenor made a "woefully" ironic third claim: that the MPCP directs public money to private schools that are "woefully inadequate" due to lack of governmental supervision.⁶¹⁷ The court first noted that the participating private schools must meet state accreditation and licensing requirements.⁶¹⁸ The second contention of the Intervenor, however, reflects a tension particularly germane to other states that adopt school choice plans. The Intervenor argued that participating private schools have no duty to demonstrate institutional quality. The absence of state controls over private schools, therefore, would make diverting state funds inappropriate. However, the underlying

612. *Id.*

613. *Davis*, 480 N.W.2d at 462-63.

614. *Id.* at 472 (citing article X, section 3 of the Wisconsin Constitution).

615. *See generally* Hetland, *supra* note 28, at 184 (describing the deplorable conditions of the Milwaukee Public School System).

616. *Davis*, 480 N.W.2d at 473-74.

617. *Id.* at 475.

618. *Id.*

premise of the MPCP and school choice is that "less bureaucracy coupled with parental choice [rather than bureaucratic, therefore would] improve educational quality."⁶¹⁹

The Wisconsin court appropriately resolved the tension by noting that the MPCP provided for state supervision without unduly bureaucratizing the process. Rather than placing direct controls on the participating schools in the form of curriculum content or pedagogical methods, the MPCP adopted an outcome based review of the overall performance of the schools. As such, the state can restrict participation to only schools that to meet minimum performance levels, but the state cannot invidiously undermine school choice programs by smothering schools and parents with excessive regulation.

c. Epilogue: A Preliminary Review of the Milwaukee School Choice Plan

The MPCP enabling legislation instructed the State Superintendent of Schools to monitor the performance of the participating students and to oversee that the participating private schools met the performance criteria that the legislation specifically described.⁶²⁰ Pursuant to that statutory responsibility, the State Department of Public Instruction appointed Professor John Witte of the University of Wisconsin at Madison to independently evaluate the program.⁶²¹

Witte's conclusions largely were equivocal, and particularly emphasized that:

[I]t is not only too soon to make any definite judgments about achievement, but that making any judgment at all would be difficult [because] [a]lmost all students in the program are elementary or middle school students. It is extremely difficult to measure outcomes or achievement for children at those ages.⁶²²

In general, Witte reported that compared to Milwaukee public school students, choice students' achievement test scores were slightly higher on reading, and slightly lower on math.⁶²³ Harvard University Professor Paul E. Peterson sharply criticized Witte's comparison methodology, claiming that the choice students were compared to a control group with higher initial test scores, higher incomes and more intact families.⁶²⁴ To that end, Witte's report does concede that the choice students were not succeeding

619. *Id.* at 475-76.

620. Hetland, *supra* note 28, at 183-85.

621. *Id.*

622. *Id.* at 185.

623. *Id.* at 186.

624. *Id.*

in the public schools, that they probably had higher-than-average behavioral problems and that seventy-six percent came from single-parent homes.⁶²⁵

Witte's report concluded that parental satisfaction with the schools of choice was significantly higher than that with the public schools in all categories surveyed (e.g., teachers, principal, instruction and discipline).⁶²⁶ High parental satisfaction led to higher involvement in the school and its various parental organizations. Similarly, student satisfaction was positive. Although a student attrition rate of thirty-five percent occurred between the first and second year, that was mostly attributed to a thirty-three percent mobility rate of students in the Milwaukee public schools and the closing of a private academy in the district. In addition, uncertainty that the school choice program would survive the numerous lawsuits filed by various education organizations also led to attrition.

Most important, school choice brought promise to low-income youths that the public schools could not deliver. Doris Pinkney, a parent of a participating child, described her situation as follows:

'[T]he Milwaukee Public Schools just lost interest in [my child]. With the help of the Milwaukee School Choice Plan, she was able to place Tanika [her child] in the fourth grade class at Harambe School, 'where she's having the best education experience of her life. She loves school, is learning a lot, and is on the honor roll. Moving her to a private school may be the best decision we ever made.'⁶²⁷

Opinion polls of Wisconsin residents reflect greater support for a voucher system now, than at the inception of the MPCP.⁶²⁸ Moreover, a new superintendent, Howard Fuller, replaced Herbert Grover, the official who attempted to derail school choice at every point. Superintendent Fuller addressed the Milwaukee School Board in an eight-page memo that, *inter alia*, recommended increasing parental involvement in choice programs, informing parents of their opportunity to select a private school of choice and allowing dollars to follow the student instead of the institution.

IV. OUTLOOK — WHERE IS SCHOOL CHOICE TODAY?

School choice exists in varying degrees in several states. Minnesota enacted open public school enrollment in 1987, and today, twenty-one states have adopted some form of public school choice.⁶²⁹ Likewise, twenty-seven states have adopted the char-

625. Hetland, *supra* note 28, at 184.

626. *Id.*

627. *Id.*

628. *Id.*

629. Marjorie Lambert, *School Voucher Idea Heads to Front Burner*, FT. LAUDER-

ter school movement in one form or another.⁶³⁰ Yet, the first state to adopt a voucher plan, and the state that appears to lead the rest in establishing meaningful school choice is Wisconsin. Governor Tommy Thompson, quickly becoming a national political leader as a result of his progressive views on school choice, has proposed expanding the coverage of the Milwaukee voucher program to a greater number of students, and to include religious schools as eligible institutions.⁶³¹ The plan has received bi-partisan support, notably the advocacy of Democrat state legislator Polly Williams and Milwaukee Mayor John Norquist.⁶³² Other states, namely Ohio, are also forging aggressive voucher plans as well.⁶³³

Although education organizations in 1993 successfully defeated several state-wide referenda on school choice, the 1994 elections brought pro-choice majorities to several state legislatures and governor's mansions despite the opposition from education groups.⁶³⁴ Eight states will actively consider establishing, or expanding, voucher programs in 1995.⁶³⁵ Wisconsin and Ohio plan to include religious schools in their programs, presenting the Establishment Clause issue for the first time.

Each program presently under consideration, however, is limited in scope, and designed more as an "experiment" than a true commitment to school choice. For example, no state plans to consider a universal voucher program available to all students in the state. Instead, all target their programs to low-income students, and typically only to those in the school districts of large metropolitan areas. Programs of limited reach unfortunately will yield only limited benefits. No measurable expansion in the supply of schools will occur without greater certainty of long-term demand, via the voucher. Moreover, uncertainty concerning the longevity of the voucher program may inhibit parents from participating. Unfortunately, such timidity may be politically necessary in light of the education establishment's stranglehold on main-

DALE SENTINEL, Feb. 5, 1995, at 1A.

630. *Id.*

631. Karen J. Cohen, *Thompson School Choice Program Could Resonate Nationwide*, STATES NEWS SERV., Feb. 23, 1995, at 1.

632. John Norquist, 'Choice' About Parental Power, WIS. ST. J., Feb. 26, 1995, at 2B.

633. Carol Innerst, *New School-Choice Strategy Eyes Low Income Demonstration Project*, WASH. TIMES, Mar. 24, 1995, at A12. Senator Daniel R. Coats (R-Ind.) and Joseph I. Lieberman (D-Conn.) plan to introduce federal legislation making \$30 million available in 10 to 20 demonstration projects. *Id.*

634. See generally Nina Shokraii, *School Choice Picks Up Steam*, WASH. TIMES, Jan. 17, 1995, at A17.

635. *Id.* Illinois, Minnesota, Wisconsin, Ohio, New Jersey, Arizona, Pennsylvania and Connecticut.

taining its monopoly. Sometimes, to get from A to C, you need to stop at B. Eventually, the impact of school choice on low-income students will resonate, and middle-income families will likely organize and demand inclusion in the voucher program as well.