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A COMPREHENSIVE ANALYSIS OF EDUCATIONAL CHOICE: CAN THE POLEMIC OF LEGAL PROBLEMS BE OVERCOME?

Philip T.K. Daniel*

INTRODUCTION

In 1989, the Ohio legislature passed the “Omnibus Education Reform Act,” which called for local school districts to adopt a policy of educating the state’s kindergarten through twelfth-grade students in accordance with the concept of parental choice. The original legislation, implemented in July of 1993, entailed two corresponding plans. First, an “intradistrict choice” plan allows children to apply for acceptance at any public school located within the school district of their residence. Second, all school boards are required to adopt a policy of acceptance or rejection of an “interdistrict choice” plan allowing students to attend a public school in the district from an adjacent district without paying tuition. A third plan, introduced in three 1992 legislative bills, suggests a program whereby certain students may seek admission to a public or private school in the state with support from state “vouchers” in the amount of the per-pupil cost of that school.

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1. See Ohio Rev. Code Ann. §§ 3313.97, 3313.98, 3313.981, 3317.022, 3327.05 (Anderson 1990). Please note that the “choice” concept is variously labeled as “choice,” “parental choice,” “school choice,” and “educational choice.” All of these terms are used interchangeably throughout this article.
2. Id. § 3313.97.
3. Id. § 3313.98.
4. See 1992 Ohio H.B. 635, 119th Ohio Gen. Assembly, Reg. Sess. (Jan. 28, 1992); 1992 Ohio H.B. 825, 119th Ohio Gen. Assembly, Reg. Sess. (July 15, 1992); 1992 Ohio H.B. 851, 119th Ohio Gen. Assembly, Reg. Sess. (Aug. 28, 1992). These bills, which have not yet been voted on, are intended to create a five-year pilot voucher program. The bills would permit schoolchildren to attend private and sectarian schools, supported by state funds, as long as the institution does not require students to participate in any religious activity. One of the bills states: “The Department shall distribute . . . a voucher in the amount of the per pupil cost to educate a child in the district
School choice has emerged as one of the major reform movements in education in the past five years, and Ohio has joined several states and many individual school districts that have created or are considering programs in this area. Some reformers view school choice as the vehicle for restructuring and improving the nation's schools. Even though these reformers have referred to it as the "panacea" for educational reform, educational choice can have several definitions, as seen by the descriptions listed above. An examination of the states' individual choice plans indicates there is little uniformity and some confusion. State legislation has taken many different forms and has resulted in unanticipated problems and other less-than-positive effects on program participants. Quickly enacted legislation resulting from public pressure to "cure" the nation's education woes has not proven to be effective. This article will give a short history of school choice, present an overview of school choice options, and examine the various positions of supporters and detractors of this reform movement. The article will also outline the legal issues created by choice legislation and discuss the implications of the analysis for policy makers. To give a more concrete picture of how choice is to be implemented, this article will refer to the proposed Ohio plan as well as other private and government-sponsored reports.


7. Id. at 217.
8. See supra notes 2-4 and accompanying text; see also infra Appendix A (explaining the choice options available in each state).
I. HISTORY OF PARENTAL CHOICE

Parents choosing an education for their children is hardly a novel idea, having been a goal of reformers since at least the eighteenth century. How choice evolved — if at all — from these ideas, however, is not a matter of early historical record. What we do know is that choice has not always involved the public schools.

The concept of an overall educational system featuring parental choice actually arose as early as 1776 in Adam Smith's book, *An Inquiry Into the Nature and Causes of the Wealth of Nations.* Applying his capitalist philosophy to an educational sphere, he reasoned that if the state paid all of the costs of a child's education, the teacher "would soon learn to neglect his business." Also in the eighteenth century, Thomas Paine proposed a deregulated educational plan where education would be compulsory and in which every family would receive a specified amount of money for each of their children to attend school up to the age of fourteen. In the nineteenth century, John Stuart Mill advocated the use of tuition vouchers, indicating that choices in education must apply to both public and private institutions.

The modern scheme for parental choice in education itself is almost forty years old. In 1955, Milton Friedman argued from an economic perspective that such plans were feasible if market forces were permitted to reign. Specifically, Friedman theorized that if parents could choose any school, public or private, with state support through vouchers, this would break the monopoly of the public schools and increase educational competition. In other words, if free market forces were let loose, the American education system would be more effective and efficient. Friedman coined the term

9. See infra notes 10-13 and accompanying text (discussing the early evolution of the theory of educational choice).
11. Id. at 737.
13. Id. at 379 (citing JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY (Ashley ed., 1915) (London n.d.)).
15. FRIEDMAN, CAPITALISM AND FREEDOM, supra note 14, at 89, 99.
16. Id. at 91, 99.
"educational voucher" and determined that vouchers would increase the access of families, especially poor ones, to quality education.  

Resistance to the notion of parental choice began shortly after the proposal of the Friedman theory. This was due to the fear that such actions might undermine the Supreme Court's ruling in *Brown v. Board of Education*, which sought to end state-mandated segregation. After the unanimous decision in *Brown*, many southern states attempted to create state-supported voucher systems for white families who sent their children to segregated private schools. In addition, they created parental choice programs for public schools which technically permitted African-Americans and whites to transfer out of segregated school systems but which provided neither incentives nor the legal apparatus to dismantle centuries of state-supported discrimination. Hostile white administrators, teachers, and students who sought to dissuade African-American enrollment at the all-white public schools confronted those who desired to transfer. Parental choice in the 1950s and 1960s, therefore, came to be linked to the perpetuation of segregation.

The symbiosis of parental choice and unconstitutional school segregation was demonstrated in a major Supreme Court decision in 1968. The Court struck down a school choice plan in *Green v. County School Board of New Kent County*, indicating that it was an insufficient and unacceptable desegregation tool and that school officials, not black children, have an "affirmative obligation" to dis-

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17. *Id.* at 99.
19. *See id.* at 492 (noting that segregation had long been a nationwide problem).
22. *Id.* Intolerance for integrated education was by no means limited to the South. White groups in Chicago, Illinois, for example, monitored the influx of African-Americans into the public schools and set up numerous barriers to desegregation that were supported by municipal authorities. Examples of activity designed to prevent integration included residential segregation, discriminatory employment practices, the creation of vice houses, and the outward hostility of school officials, teachers, and students. In Chicago, black students found it almost impossible to transfer to schools with white students, as official school board policy was to divide attendance along racial lines. When black students did get transfers, officials frequently revoked them after the students showed up for school. Students who escaped detection from school officials often went back to the black schools to escape the wrath of white students. *See generally* Philip T.K. Daniel, *A History of Discrimination Against Black Students in Chicago Secondary Schools*, 20 Hist. Educ. Q. 147 (1980) (examining the integration/segregation dilemma in Illinois from a historical perspective).
mantle racially identifiable schools. In *Green*, the Court noted that there were "practical conditions" in the southern states, especially black economic dependency on whites and threats of white reprisals, that prevented the exercise of free parental choice. This had a tremendous negative effect on the choice movement, not only in the courts, but also in the United States Congress. Between 1967 and 1977, the House of Representatives introduced six bills which emphasized some element of parental choice, but none of them passed.

Criticism of American public schools ran unabated despite desegregation efforts, with some reformers going so far as to describe the system as a "wasteland." Among other reforms of public schooling, some were still proposing a parental choice plan using vouchers as a solution, particularly for the problems faced by minority children in the cities. Many educators promoted a voucher system for poor and minority students and, in 1969, the United States Office of Equal Opportunity provided funding for proposals in voucher experiments. What was proposed was a highly regulated voucher plan designed specifically for poor children of public school age, featuring both eligibility criteria for the participating schools and particularized admissions standards.

In the 1970s, authors John Coons and Stephen Sugarman emerged as the leading proponents of parental choice through the use of educational vouchers, which they dubbed "scholarship certificates." The thrust of their arguments centered around the need for family participation in school decision-making. They advocated

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24. *Id.* at 440-41.
25. *Id.* at 440 n.5.
28. In 1966, for example, Christopher Jencks proposed that universities take over some public schools, that business take over the management of some schools, that teachers have independent charters to manage schools, and that students receive tuition grants to attend any school, whether public or private. See Christopher Jencks, *Is the Public School Obsolete?*, THE PUB. INTEREST, Winter 1966, at 18, 26-27.
29. Levin, *Vouchers and School Choice, supra* note 20, at 280 (citing CENTER FOR THE STUDY OF PUB. POLICY, EDUCATION VOUCHERS, A REPORT ON FINANCING ELEMENTARY EDUCATION BY GRANTS TO PARENTS (1970)).
30. *Id.*
soliciting the participation of parochial schools in order to have the space available exceed the number of students. As the number of spaces increased, schools would have to improve the quality of education in order to attract students. This approach illustrates the departure of the Coons/Sugarman theory from that of Friedman's strict economic focus with its emphasis on an equilibrium between supply and demand. The Coons/Sugarman approach concentrates on the objective of improving education; "[serving] the best interest of the individual child; [fostering] consensus on the constitutional order; and [achieving] racial integration." The work of Coons and Sugarman served as the backdrop for a campaign in the 1970s to place a voucher system before California voters. The authors themselves were very active in this initiative. But although the proponents of the legislation created a re-awakening and awareness of parental choice, they failed to receive enough signatures to attach the issue to a state ballot.

The 1980s began a period of protracted efforts to address perceived shortcomings in American education. Numerous national reports indicated that the American public education system had fallen into a malaise. For example, a report sponsored by the United States Department of Education, entitled *A Nation at Risk: The Imperative for Educational Reform*, issued a scathing indictment of public education and indicated that if something wasn’t immediately done, the schools faced a "rising tide of mediocrity." Paul Copperman, an analyst quoted in the report, proclaimed that, "For the first time in the history of our country, the educational skills of one generation will not surpass, will not equal, will not even approach, those of their parents." The general report continued by stating that "[o]ur once unchallenged preeminence in commerce, industry, science and technological innovation is being overtaken by competitors throughout the world." This problem confronting American public schoolchildren has resulted in lower test scores compared with those

32. Id. at 153-54.
33. Id. at 17.
34. Levin, Vouchers and School Choice, supra note 20, at 280.
35. Id.
37. Id. at 11.
38. Id. at 5.
of students from other industrialized countries, with especially weak performance among children from poor, minority, and single-parent families.  

In the years that followed this 1983 study, implementation of programs aggressively aimed at improving schools answered this call for reform. Included among these reform activities were: increased state allocations for local school system budgets; tighter state controls over curriculum, personnel training, textbook selection, instructional methods, and discipline; the creation of school-based management plans; and a greater voice in school decisions for teachers. These attempts at providing public education with an elixir, however, seemed to have little impact on the public's perception of education. For example, a Gallup poll conducted in 1988 showed that 64 percent of this country's population would give the public schools a grade of "C" or below when evaluating the effectiveness of American schools in educating their children.

One of the reforms fostered by national reports such as *A Nation at Risk* involved the resurrected plan of school choice. Indeed, school choice "emerged as the single most rousing idea in the current school reform effort." Numerous states and several individual school districts adopted choice plans, and for many this was their only in-place reform strategy.

The idea of school choice received new impetus as the result of a symbiosis of traditional conservative support and a new found liberal constituency. In 1990, the Brookings Institute, a liberal think tank, published a book by John E. Chubb and Terry Moe, entitled *Politics, Markets and America's Schools*, supporting school choice plans. They proposed a radical reform plan on the theory that

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39. Id. at 8.
43. Id.; see generally Legislation Review, supra note 5.
44. See Chubb & Moe, supra note 6, at 1.
schools should be based on the competitive market model, should be open equally to public, private, and parochial schools, and should be financed through tax-subsidized vouchers. In their book, the authors demonstrated just how sanguine they were about the postulated ideas, stating, "Without being too literal about it, we think reformers would do well to entertain the notion that choice is a 'panacea.' " They went on to write:

Choice is a self-contained reform with its own rationale and justification. It has the capacity all by itself to bring about the kind of transformation that, for years, reformers have been seeking to engineer in myriad other ways. Indeed, if choice is to work to greatest advantage, it must be adopted without these other reforms, since the latter are predicated on democratic control and are implemented by bureaucratic means.

Thus, Chubb and Moe stood convinced that a free-market system was the only way to reform American education. A corollary position was that market-driven schools are educationally more effective than those that are democratically controlled. According to the authors, democracy leads to bureaucracy, thus placing heavy, unwieldy demands on schools and making them inefficient and unresponsive to the educational needs of students. They postulated that only by relieving schools of this bureaucracy caused by democracy could students ever become competitive again.

On the political right, conservative leadership under former President George Bush embraced the ideas of Chubb and Moe in the education reform package known as America 2000. In describing this plan at a campaign fundraiser, President Bush said:

Our future depends on education reform, on our ability to revolutionize, literally reinvent our schools, to take that revolution beyond the four walls of the classroom, transform our attitudes and ideas, the way we think about education.

[W]e must create an incentive to improve education by promoting school choice. For far too long, we've shielded our schools from competition, allowed the system a damaging monopoly power over students. Well, just as monopolies are bad for the economy, they're bad for our kids. Every parent should have the power to choose which school is best for his child, public,

45. Id. at 215-26.
46. Id. at 217 (emphasis in original).
47. Id. (emphasis in original).
48. Id. at 216-17.
private or religious. 

Bush attempted to put teeth into this reform agenda by calling for a parental choice bill that would have authorized federal scholarships in amounts up to $1,000 for children of middle and low-income families to attend any school, whether public, private, or religious. 

Following this initiative, Wisconsin became the first state to enact legislation providing for a limited school choice plan involving private schools. The Wisconsin legislature passed the Milwaukee Parental Choice Program as part of the state’s 1990-1991 budget bill. In March, 1992, the Wisconsin Supreme Court upheld the plan as valid under the Wisconsin constitution. In the three years leading up to that decision, Ohio and four other states passed choice legislation. The Ohio legislation, implemented in July of 1993, followed in the wake of the conflict in Wisconsin. The next section more fully describes the Ohio legislation.

II. SCHOOL CHOICE OPTIONS

School choice, in general terms, is the privilege of parents to select schools for their children, either inside or outside their district of residence, with enabling support provided by their local, state, or national government. The idea of choice rests upon the twin principles of increased competition and the alignment of students with the best possible schools for their needs. The privilege of choice may extend to a public or private school, with parents being subsidized by the government in the form of a voucher or income tax credit.

51. Levin, Vouchers and School Choice, supra note 20, at 281.
54. The four states besides Ohio are Arkansas, Iowa, Minnesota, and Nebraska. See infra Appendix A (surveying the choice legislation currently available throughout the country).
55. Local school districts such as East Harlem in New York City have established choice programs. See, e.g., David L. Kirp, What School Choice Really Means, ATLANTIC MONTHLY, Nov. 1992, at 119 (analyzing the reasons behind the achievements of the East Harlem program). Numerous states have passed legislation supporting state-based educational choice. See also infra Appendix A for a delineation of the choice programs available in each state. The former Bush administration not only expressed support for these programs, but attempted to allocate federal tax dollars for their promotion. Augustus F. Hawkins, Becoming Preeminent in Education: America’s Greatest Challenge, 14 HARV. J. L. & PUB. POL’Y 367, 381 (1991).
56. Vouchers refer to government tax dollars given to parents to fully fund or supplement a student’s attendance at a public or private school. Tuition tax credits refer to a kind of reimbursement that parents receive in the form of an income tax credit, particularly if their children attend
There are a wide range of possible structures for these plans, but "they share the common element of agreement that greater choice is desirable in the US [sic] system of education." The following sections describe the choice options in order to acquaint the reader with the most frequently used terminology and the most common meanings assigned to that terminology. To give some embodiment to the choice enterprise, specific reference will be made to Ohio legislation that took effect in July of 1993, proposed legislation currently before the Ohio legislature, and a current plan on the part of the Governor to restructure education based on choice in that state. This section will also comment on school choice in the state of Minnesota and private school choice in Milwaukee, Wisconsin.

A. Public School Choice

1. Intradistrict Choice Plans

Americans are most familiar with the idea of intradistrict choice. Typically, the local boards of education determine school attendance areas and grant parents discretion to select schools anywhere in the school district. While most districts do not adhere to absolute rigid- ity in establishing attendance boundaries, policies often vary among districts within a state.

The Ohio Revised Code, indicative of such state legislation, requires the board of education of each city, locality, and exempted village school district to adopt an enrollment policy entitling resident students to attend an "alternative school" in the district. An "alternative school" is defined as a school building other than the one to which the district superintendent assigns the student. The statute leaves the development of specific policies up to each individual school district, subject to a myriad of requirements and limitations, especially in regard to student application and admission procedures. The statute does not require a student to specifically make a choice with regard to the school of attendance. Instead, "the policy . . . require[s] a student to apply only if he wishes to attend

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a private school.


59. Id. para. (A)(2).

60. Id. paras. (B)-(F).
an alternative school.” Each district’s policy must include information about school capacity limits — guaranteeing that students enrolled or living in the attendance area of a school will be given preference over applicants — and procedures to ensure an appropriate racial balance in the district’s schools.

The Ohio State Board of Education monitors the school districts and their programs to ensure that policies are not discriminatory. In selecting students for admission, the statute strictly forbids the use of criteria such as proficiency in the English language; academic, athletic, artistic, or other extracurricular ability; or former disciplinary records. Moreover, a district board cannot place limitations on the admission of applicants with disabilities. The board can, however, require a student receiving special education services to attend a school where the services specified in the student’s Individualized Education Program are available.

In addition to the above, intradistrict choice options also encompass magnet schools and alternative schools. These options, of course, have been in existence much longer than the current choice legislation. They are included in this section, however, because student choices are limited to the school district of residence.

a. Magnet Schools

Magnet schools were originally designed to fill the academic needs of students whom school officials thought were especially well-qualified in certain subjects, particularly math and science. Since the desegregation activity of the 1960s, one of the major goals of magnet schools has been to attract a racially diverse student body, especially if such schools are located in urban areas. Indeed, research supports the notion that the creation of magnet schools was meant to foster desegregation in the schools so as to forestall white

61. Id. para. (B)(1).
62. Id. para. (B)(2).
63. Id. paras. (C)(1), (3)-(4).
64. Id. para. (C)(2).
65. Id. The term “Individualized Education Program” (“IEP”) is derived from the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1485 (Supp. 1991). An IEP is jointly developed by school personnel and parents to describe the needs of a student with disabilities and to prescribe appropriate placement and services to meet those needs.
flight to the suburbs.\textsuperscript{68} School administrators hence transferred massive amounts of funds into these projects to support extra programs not found in other schools in the district in order to provide places for white staff members. They also placed limits on minority student enrollment so they would be able to attract enough white students.\textsuperscript{69} Magnet schools offer alternatives to the traditional curriculum and usually share three primary characteristics: (1) a curriculum designed around a specific theme or method of instruction; (2) a select student population and teaching staff; and (3) a student body drawn from a variety of attendance areas.\textsuperscript{70}

Although proof of the educational effectiveness of such schools is limited,\textsuperscript{71} many magnet schools have achieved a goal of racial balance through voluntary integration.\textsuperscript{72} However, researchers fault the validity of the reported academic achievement gains in these schools because magnet schools typically serve a small percentage of the student population and often leave the traditional educational system intact for the vast majority of students.\textsuperscript{73} One report concluded that achievement gains of magnet school students have often been made at the expense of students in non-magnet schools.\textsuperscript{74} The study noted that magnet schools have typically pulled the best and the brightest from school districts and that this has had a negative im-

\textsuperscript{68} See, e.g., Hawkins, supra note 55, at 380; see generally Christine H. Rosell, The Carrot or the Stick for School Desegregation Policy: Magnet Schools or Forced Busing (1990) (focusing on the potential dangers of magnet school systems through an examination of the failure of one set of New York magnet schools to achieve its goals).

\textsuperscript{69} Hawkins, supra note 55, at 380.

\textsuperscript{70} Id.

\textsuperscript{71} One study has indicated that magnet schools have been quite successful in improving the achievement of students able to take advantage of this educational option. Rolf K. Blank, Educational Effects of Magnet High Schools, in 2 Choice and Control in American Education 77, 93-97, 99-100 (William H. Clune et al. eds., 1990) [hereinafter Blank, Educational Effects]. In his article, Blank discusses the results of the 1983 national study that he helped conduct. See Rolf K. Blank et al., U.S. Dep't of Educ., Survey of Magnet Schools: Analyzing a Model for Quality Integrated Education (1983) [hereinafter Blank et al., Survey of Magnet Schools].

\textsuperscript{72} Blank, Educational Effects, supra note 71, at 80 (noting that desegregation plans using mandatory assignment help to desegregate schools but that voluntary plans maintain higher rates of integration over time). A national study sponsored by the United States Department of Education examined more than 45 magnet schools in fifteen school districts and revealed that 40 percent of the districts were effective in achieving voluntary desegregation. Blank et al., Survey of Magnet Schools, supra note 71, at 32. Blank and his colleagues also found that large urban school districts that were gaining in population and were multi-racial and multi-ethnic were most successful in achieving desegregation. Id. at 86-87.

\textsuperscript{73} Chubb & Moe, supra note 6, at 209.

pact on non-magnet schools. Moreover, minority children from low-income backgrounds who may not have scored as high as other students on standardized tests are often unable to enroll in such schools. Even if they can gain admission, they are sometimes segregated within the magnet school itself.

b. Alternative Schools

Alternative schools originated by and large in the 1960s as a way of promoting independent decision-making in public school students and to “increase the participation of minorit[y persons] in all phases of public school life.” The phrase “alternative schools” is a broad term and is generally perceived to define any school offering experiences different from those of conventional public schools. However, such institutions are known particularly for educating students “who have attendance or disciplinary problems, who are potential or actual dropouts, or who have severe difficulty in mastering basic skills.”

Such schools provide positive evidence of decreasing drop-out rates, truancy, and class attendance problems. Evidence of student participation in such schools also demonstrates the development of greater positive self concepts and the learning of basic and vocational skills. There is also evidence, though, of the segregation of students and the fact that there may be very little difference between the teaching methods and techniques used in alternative schools and those used in more conventional schools.

2. Interdistrict Choice Plans

Interdistrict choice generally offers parents the opportunity to send their children to another school district in the resident state subject to the following restrictions: (1) the transfer does not adversely affect desegregation mandates; (2) the receiving district agrees to accept nonresident students; and (3) the receiving district

75. Id.
76. Hawkins, supra note 55, at 381.
78. Id.
79. Id. at 66.
80. Id.
81. Id.
82. Id. at 67.
has available space within its schools. For example, Ohio law requires the board of education of each city, locality, and exempted village school district to adopt a resolution pertaining to enrollment of students from "adjacent" school districts. An "adjacent" school district is one that "abuts the territory of [the] district adopting [the] resolution." The statute also states, however, that a school district in the state must choose to "either entirely prohibit the enrollment of students from all adjacent districts or permit enrollment of students from all adjacent districts in accordance with a policy contained in the resolution." This latter statement gives the individual school district the discretion to choose whether or not to participate in the interdistrict choice program.

Minnesota's interdistrict program is one of "open enrollment," meaning that all students may attend any public school in the state (subject to certain specified restrictions) and that state funding will follow the student to any school he or she chooses to attend. Minnesota was the first state in the country to legislatively mandate a statewide open enrollment program. The juxtaposition of the Ohio and Minnesota statutes demonstrates the variations on the theme of interdistrict choice. Such choice in Ohio is "cluster choice" involving only contiguous school districts, while in Minnesota the entire state is one school district. Moreover, in Ohio, participation in interdistrict choice is optional at the district level, whereas in Minnesota all school districts must develop such a program, although they may choose not to admit any transfer students.

Ohio's procedural requirements for interdistrict admission parallel

83. OHIO REV. CODE ANN. § 3313.98 (Anderson 1990).
84. Id. para. (A)(3). There are categorical differences between interdistrict choice programs in Ohio and that of other interdistrict choice states such as Minnesota and Nebraska. In Ohio, this choice option can be described best as "cluster choice," in that the student may only seek application to a public school district within a certain coterminous geographic boundary. Interdistrict choice in the other states mentioned is best defined as "open enrollment," where students may attend any school within the state. See MINN. STAT. § 120.062 (1993); NEB. REV. STAT. § 79-1435.02 (1992).
85. OHIO REV. CODE ANN. § 3313.98(B) (Anderson 1990).
86. MINN. STAT. § 120.062 subd. 7 (1993). A student wishing to attend a school located outside their resident district must apply to that nonresident district. Each district's board must adopt, by resolution, specific standards for acceptance and rejection of these applications. These standards may include the capacity of the program, class, grade, level, or school building. Id.; see also id. subd. 5(f) (allowing a district to reject applications in order to comply with a district's desegregation plan).
87. Id. § 120.062. Open enrollment is not necessarily limited to interdistrict choice, as it also contains intradistrict options.
88. Cf. Id. subd. 7 (1993); OHIO REV. CODE ANN. § 3313 (Anderson 1990).
the language of Ohio's intradistrict choice legislation; students living in the district receive preference over those outsiders seeking enrollment, and outsiders already matriculating receive preference over first-time applicants. Choice is further limited by the fact that school districts cannot have a policy discouraging or prohibiting its resident students from applying to an adjacent school district with an interdistrict policy unless such transfers would negatively affect the racial balance in the resident district. Ohio does not, however, set guidelines for maintaining the racial balance required in the legislation governing the intradistrict or interdistrict choice programs.

A school district enrolling nonresident students under interdistrict choice in Ohio receives additional funds in an amount equal to the state minimum expenditure formula. In Minnesota, as in Ohio, choice aid to students comes mainly from the state. Both states set a dollar amount which moves with the student to the nonresident district. Given the wide disparity in expenditure patterns of districts in both states, interdistrict choice could be a boon for rich districts and a bust for poor ones.

Prior to the enactment of choice legislation, Ohio law required school districts to provide transportation to resident pupils enrolled in kindergarten through eighth grade living more than two miles from school. The school board could provide transportation to high school students at any distance, but was not required to do so. The current choice legislation mandates transportation for those accepted students who are living outside the district. This transportation provision is similar to Minnesota's, which only requires the receiving district to provide transportation to such transferees within the receiving district's boundaries. This means students living outside the district must find some alternative method of transportation.

91. Ohio Rev. Code Ann. § 3313.981 (Anderson 1990). This amount was roughly $2,800 during the 1992-93 school year. State tax dollars that would have normally gone to the sending district and local property taxes from that sending district supply the funds for such a formula. Id. § 3317.021 (Anderson Supp. 1992).
95. Id.
tion to get to the borders of the receiving district. Both states perceived the potential for an equal protection argument brought by low-income students and added a provision reimbursing below-poverty-level parents for transportation between home and the nonresident school. 98

Even though many states have enacted this form of choice legislation, 99 most reports indicate that only a minimal number of students are actually changing districts. 100 Drawbacks to this type of legislation include funding and transportation problems. State funding for schools is determined by the number of students in a district, as well as by the cost of schooling in that district. Thus, school board officials are less inclined to promote interdistrict choice for fear of losing students and needed state funding. 101 Many states are similar to Minnesota in that they place the cost and responsibility of transporting students from outside the school district on the parents. 102 This financial burden may well discourage many parents from taking advantage of this option.

3. Postsecondary Enrollment Options

Ohio, like other states, has a postsecondary enrollment options plan which gives high school juniors and seniors the opportunity to take nonsectarian courses for credit at any state-assisted college or university authorized to award degrees under the aegis of the state. 103 The program creates more options for students who wish either to accelerate their high school program or expand the program to include course work not available in the high school curriculum. Students may enroll in such courses as long as the number of classes does not exceed the equivalent of a high school course load. 104 Each high school determines how much credit each course is worth, and students must declare whether the courses are being taken for high school or college credit. 105

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99. See infra Appendix A (detailing the choice legislation available in each state).
102. See supra notes 86-87 and accompanying text (detailing the scheme set forth under the Minnesota statute); see also infra Appendix A (summarizing school choice legislation throughout the country).
103. OHIO REV. CODE ANN. §§ 3365.01-.10 (Anderson 1990).
104. Id.
105. Id.
4. **Charter Schools**

Most charter school plans allow teachers or other interested citizens to apply for a state charter to establish a public school. Ohio has no such legislation. Minnesota, however, was the first state to pioneer this idea with its "Outcome-Based School Act" of 1991. The charter schools in Minnesota ostensibly provide opportunities for classroom teachers to engage in innovative techniques and curriculum development. In addition, local school boards can propose charter schools that must, in turn, be approved by the state board of education. Only licensed teachers may form or operate such schools, and teachers must constitute a majority of the charter school's board of directors. Finally, charter schools may not charge tuition and cannot be affiliated with religious or nonpublic sectarian institutions.

**B. Private School Choice**

Private choice is the promotion of market forces within the educational enterprise providing public tax dollars to pay for private education. Typically, the funding for such plans comes either in the form of vouchers or tuition tax credits.

1. **Voucher Systems**

Educational vouchers are based on economic theories of marketplace supply and demand. Milton Friedman, an economist and the modern architect of vouchers, proposed an unregulated voucher model in the mid 1950s. Under his plan, all parents would receive vouchers equal to the cost of educating a child in the public school system, but schools — both public and private — could charge whatever tuition the market would bear. Parents who desired more expensive schools could supplement the value of the voucher. Under Friedman's plan, education would become a consumer item similar to any other commodity.
Under a modern voucher plan, all parents would receive a voucher for a designated amount per school-age dependent. Parents could apply these vouchers to the cost of education at any approved public or private educational facility.\textsuperscript{114} The amount of the voucher would be based on the total amount of public funds available for education divided by the number of school age children. Private schools, however, could set tuition costs higher than the amount provided by the state vouchers, meaning that parents selecting the private schools would have to cover the extra costs.\textsuperscript{115} Both public and private schools, therefore, would compete in the marketplace for students.

a. Ohio

Ohio has no current legislation involving publicly-funded vouchers for private schools. There are, however, three new bills before the legislature that have vouchers as their base.\textsuperscript{116} House Bill 635 would create a five-year pilot program permitting “at-risk” students to attend private and sectarian schools.\textsuperscript{117} House Bill 825 is duplicative of House Bill 635, except that it would require a participating sectarian school to issue a statement that students are not compelled to adhere to any specific religion.\textsuperscript{118} House Bill 851 would submit the question of overall private and sectarian school participation in the voucher program to the electorate for an upcoming referendum.\textsuperscript{119}

House Bills 635 and 825 delineate the state program for distribution of the vouchers. They provide direct allocation of tuition to parents in an amount equal to the per-pupil cost to educate a student in the district where he or she is domiciled.\textsuperscript{120} Parents would be able to use the vouchers at a public, private, or sectarian school.\textsuperscript{121}

In late 1992, a commission organized by the Governor of Ohio prepared a report calling for a voucher system that would give stu-
dents the ability to choose freely among public and private schools. This school deregulation plan proposes education vouchers of between $1,600 and $3,000 depending on grade level, with the greatest amount of funds at the highest grades. Under the plan, any public or accredited private school would be eligible for the voucher program. The voucher plan is consistent with either an open admissions or restricted admissions policy.

Under the proposed open admissions policy, a public school must prioritize admissions based on: (1) students returning from the preceding year; (2) a requirement whereby up to 20 percent of the student body must be from low-income groups; and (3) all other students once the first two categories are satisfied. The proposal also stipulates that there can not be discrimination based on race, gender, or creed, a statement which seems rather obvious when one talks of public schools. The proposal would permit discrimination against learning-disabled students, however, in that school districts would not be "required to [admit such students] unless . . . [there are] facilities sufficient to deal with the learning disabled child that is applying." Like public schools, participating private sectarian schools that opted for open admissions under the Ohio proposal would also be required to use the low-income requirement of 20 percent of the student body as a priority for student enrollment. This is somewhat muted, however, by the fact that first priority may go to members of the religious sect or church organization sponsoring the school. The document contains no language pertaining to race, gender, creed, or disability with regard to private, sectarian schools and open admissions. This presumably means such schools would be free to discriminate against such persons in their admissions policies.

In addition to the open admissions policy, the Ohio Scholarship Plan would also allow a restricted admissions policy. However, even under a restricted admissions policy, private schools would not

122. Ohio Scholarship Plan, supra note 4.
123. Id. at 6.
124. Id.
125. Id.
126. Id.
127. Id.
128. Id. at 6-7.
129. Id. at 5, 7.
be able to discriminate based on a student's race. The plan does, however, specifically permit gender discrimination. Also, one may assume it permits disability discrimination from its lack of mention. The language of the proposed restricted admissions policy also denotes that a qualifying private school could "require attendance at, but not participation in, religious activities of a school." Public school districts would also be able to establish a restricted admissions program for magnet schools located within their geographic boundaries.

The proposed Ohio plan goes a step further than most states in reference to the regulation of private schools by state-based educational governing boards. Specifically, if a private school chose to participate in this voucher program, student achievement would be determined through the use of a uniform test administered to all public schools and based on a national standard. Until the development of such a uniform exam, all participating schools would measure student progress using the Ohio Proficiency Test.

Whether the Ohio Legislature enacts either the aforementioned House Bills, the Ohio Scholarship Plan, or a combination of the two, profound legal implications with respect to discrimination based on race and disability will follow. In particular, if provisions regarding student attendance at religious functions of the participating private schools and government regulations based on proficiency test mandates are enacted, they may violate the Establishment Clause. The Legal Issues section of this article will address these topics.

b. Wisconsin

Wisconsin became the only state in the nation with a private school choice program when its legislature passed the Milwaukee Parental Choice Program in 1990. This pilot program enables up to one percent of a school district's low-income students to attend private, nonsectarian schools while the state pays participating schools approximately $2,500 for each student enrolled under the

130. Id. at 7.
131. Id.
132. Id.
133. Id.
134. Id. at 10.
EDUCATIONAL CHOICE program. General school allocations that would otherwise be paid to Milwaukee public schools provide the funds for the program.

To remain eligible for the program, participating private schools must meet at least one of the following standards established for program accountability: (1) at least 70 percent of the pupils in the program must advance one grade level each year; (2) the private school's average attendance rate for the students in the program must be at least 90 percent; (3) at least 80 percent of the students in the program must demonstrate significant academic progress; or (4) at least 70 percent of the families in the program must meet parental involvement criteria established by the private school. These minimal criteria have been the source of great criticism from authors who suggest that these criteria possess the potential for great abuse. For example, during 1990 many of the participating schools used student attendance as the quality control mechanism while only one used the element of academic progress. Moreover, the state board of education has no evaluation procedure for determining if any of the schools are actually meeting the minimum standards listed above.

In March of 1992, the Wisconsin Supreme Court held that the process which lead to the passage of the voucher program was constitutional. The state superintendent of public instruction as well as numerous amici had challenged the process. The court reversed the appellate court, ruling that the legislation creating the voucher program did not violate the doctrine of spending state money for the public good. In its opinion, the court noted that "[s]ufficient safeguards are included in the program to ensure that participating private schools are under adequate governmental supervision reasona-

136. Id. para. (2)(b).
137. Id. para. (5)(a).
138. Id. para. (7)(a).
139. See, e.g., Julie K. Underwood, Choice is Not a Panacea, 71 W. EDUC. L. REP. 599, 602-605 (1992) (analyzing whether "the [l]egislature can spend funds for a public purpose without assurances that the public purpose will be served.").
140. Id. at 604-605.
142. Amici joining in the case were the Wisconsin Association of School District Administrators, Inc., the Wisconsin Education Association Council, the National Association for the Advancement of Colored People, the Association of Wisconsin School Administrators, the Milwaukee Teachers Education Association, the Wisconsin Congress of Parents and Teachers, Inc., the Milwaukee Administrators and Supervisors Council, and the Wisconsin Federation of Teachers. See Davis v. Grover, 464 N.W.2d 220, 222 (Wis. Ct. App. 1990).
143. Davis v. Grover, 480 N.W.2d at 472-73.
bly necessary under the circumstances to attain the public purpose of improving educational quality.” 144 Additionally, the court ruled that the program met the state's uniformity requirement because it “in no way deprives any student the opportunity to attend a public school with a uniform character of education. Even those students participating in the program may withdraw at any time and return to a public school.” 146 The court's ruling proved to be negatively prophetic, as the Milwaukee program encountered problems when introducing private school choice absent public accountability: one of the pilot schools was forced to shut down in the first year of the plan's operation. 148 This had a devastating effect on the children in that school. 147

2. Tax Credits and Deductions

Another strategy designed to increase parental choice in educational decisions affecting children is to provide income tax relief for the costs associated with private schooling. Under a tax credit plan, parents whose children attend private schools take all or part of the educational expenses as a tax credit.

In 1973, the Supreme Court struck down a New York statute that, in part, permitted parents to deduct from their adjusted gross incomes (for state income tax purposes) a designated amount for each dependent for whom they paid at least fifty dollars in nonpublic school tuition. 148 Concluding that the law rewarded parents for sending children to private, primarily parochial schools, the Court held the law advanced religion in violation of the Establishment Clause. 149 The statute provided aid to parents who sent their children to private schools, and there was no mechanism in place to guarantee that state money would not be used for religious purposes. 150

In 1983, however, the Supreme Court in Mueller v. Allen 151 upheld a Minnesota tax benefit program entitling parents of public or private school students to claim state income tax deductions up to a

144. Id. at 463.
145. Id. at 474.
146. CARNEGIE REPORT, supra note 42, at 18.
147. Id.
149. Id. at 798.
150. Id. at 780.
designated ceiling for educational expenses. Distinguishing the Minnesota program from the New York provision that bestowed benefits only on parents of private school students, the Court declared that "[a] State's decision to defray the cost of educational expenses incurred by parents — regardless of the type of school their children attend — evidences a purpose that is both secular and understandable." The Court reasoned that such aid does not have the primary effect of advancing religion, and noted that most decisions where the Court struck down state aid to parochial schools involved the direct transmission of public funds to private schools. The Court found the Minnesota scheme to be facially neutral because it was a deduction permitted for all parents whether their children were in public or private school. The Court further noted that the assistance went directly to the parents and only indirectly to the school.

Although the holding in Mueller supports school choice, some have used the decision to promote a voucher system rather than tax credits. Mueller stands for the principle that direct payments to parents rather than to schools may prevent a violation of the Establishment Clause, because the payments can be used to pay for education in a secular school. Another potential problem facing a tax credit scheme, however, is one of equal protection; tax benefits may only aid those parents who have a sufficiently high tax liability. Low-income families would be less likely to profit from such a program and might even be constructively ineligible for the credit. This makes education vouchers the more popular of the two private choice plans because vouchers provide all parents with a "scholar-

152. Id. at 404.
153. Id. at 395.
154. Id. at 398.
155. Id. at 396-99.
156. Id. See also Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993). In that case, the Court held that the Establishment Clause was not violated where a public employee was placed in a sectarian school to serve as an interpreter for a deaf student pursuant to the regulations contained in the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-85 (1993). Zobrest, 113 S. Ct. at 2469. However, the Court then noted in a footnote that there would have been no issue at all had the IDEA funds been disbursed directly to the student's parents, who then could have used the funds to pay the interpreter themselves. Id. n.11. This footnote has obvious implications for any choice-based voucher plan which includes private, sectarian schools.
157. Possible reasons include the fact that low-income families might not have enough income to make use of the deduction, or that the tax scheme might involve an itemized deduction, and low-income families typically do not itemize their deductions.
ship" that travels with the student regardless of the family’s socio-economic background.

Tuition vouchers and tax credits, apparently intended to create a marketplace of choice, have been faulted as jeopardizing the overall welfare of the American public school system because they transfer funds out of an enterprise already in serious financial trouble. This line of reasoning leads to the obvious conclusion that a choice plan could perpetuate a class strata by keeping low-income students in low-income schools. In addition, vouchers and tax credits permit, to a degree, private schools to receive more of the public dollar without having to submit to public regulation or having to accept many of the students that public schools must educate. A lack of accountability may cause problems for low-income students even when they are the target of these forms of choice legislation. The next section of this article addresses these criticisms as well as others.

III. ARGUMENTS FOR AND AGAINST SCHOOL CHOICE PLANS

Parental choice, especially when it involves private schools, serves as one of the more hotly debated issues in education today. Until recently, the debate has been highly theoretical due to the absence of empirical studies evaluating both theories and programs. This section of the article will continue some of that theoretical discussion, but it will also note the work of empirical studies conducted to date. Much of the empirical information emanates from analysis of pro-choice reports such as the Chubb and Moe study. To delineate the colloquy, this section will examine parental choice under topics that are prominent among the theorists: school competition, student achievement, equitable concerns regarding low income students, and the right of parents to choose the schools their children attend.158

A. Competition

The values embodied in economic competition underlie most school choice legislation. As early as 1974, Peter Drucker argued

158. Commentators have evaluated parental choice statutes under the rubrics of “competition” and “student achievement” in other state-based studies. See, e.g., C. Lee Cusenbary, Jr., Educational Choice Legislation After Edgewood v. Kirby: A Proposal for Clearing the Sectarian Hurdle, 23 ST. MARY’S L.J. 269 (1991) (analyzing the conflict raised by free choice between the Establishment and Free Exercise Clauses of the First Amendment); Allan E. Parker, Jr., Public Free Schools: A Constitutional Right to Educational Choice in Texas, 45 Sw. L.J. 825 (1991) (analyzing the constitutionality of Texas’s educational choice plan).
that educational institutions, like other government service institutions, are ineffective due to the way they are funded.\textsuperscript{159} According to Drucker, leaders in business recognize that satisfying the customer is the only way to guarantee continued existence and growth of the company.\textsuperscript{160} However, others point out that involuntary taxes consistently fund public schools. Regardless of whether they satisfy student needs or perform effectively in the process, public schools still collect a major share of tax dollars to stay in "business."\textsuperscript{161} As the argument goes, this type of funding situation, absent choice legislation, results in a "captive audience" regardless of the school's performance or its responsiveness to children and parents.\textsuperscript{162}

This latter set of comments also forms the basis of the most widely-quoted work on school choice, \textit{Politics, Markets and America's Schools}, by John Chubb and Terry Moe.\textsuperscript{163} These authors believe that schools driven by the market place are more effective than those under public control.\textsuperscript{164} They argue that deregulating the public school system will create a highly differentiated set of offerings for students and will lead to greater efficiency, thereby offering a better educational product.\textsuperscript{165} They accuse public school systems of being complacent, lethargic, inefficient, and unresponsive to the needs of most students. They argue that only by providing greater choice to parents in a pure market situation involving public and private schools can the quality of education in the United States ever improve.\textsuperscript{166}

Using the Chubb and Moe thesis, many state legislatures have enacted educational choice legislation.\textsuperscript{167} As a general rule, such states have left intact the ability of educational organizations to use tax dollars to support education. Furthermore, local school authori-

\textsuperscript{159} Peter F. Drucker, \textit{Management} 131-33 (1974).
\textsuperscript{160} Id.
\textsuperscript{161} See generally Philip K. Porter & Michael L. Davis, \textit{The Value of Private Property in Education: Innovation, Production and Employment}, 14 Harv. J.L. & Pub. Pol'y 397, 413-16 (1991) (arguing that the American educational system would be greatly improved if the government was removed from the supply side of the education market and all schools were privately owned and operated).
\textsuperscript{162} Remarks of President Bush to the Lehigh Valley 2000 Community, \textit{Pub. Papers} 609, 612 (Apr. 16, 1992) ("When our students are a captive audience, our schools have no incentive to improve.").
\textsuperscript{163} Chubb & Moe, supra note 6.
\textsuperscript{164} Id. at 206-18.
\textsuperscript{165} Id. at 216-17.
\textsuperscript{166} Id.
\textsuperscript{167} See infra Appendix A (surveying the choice legislation available in each state).
ties have been able to maintain authority to seek additional local tax dollars through referenda. Choice advocates seek a variation of this arrangement by supporting the right of parents to choose a school, inside or outside the district, with public funds supporting the student. The economic theory of supply and demand, therefore, suggests that state funds would continue to enable these school districts to meet consumers’ demands. If the state were to adopt a completely free-market approach to educational choice, this theory says, it would force public schools to be more responsive to the needs of parents and students. As a result, schools would provide more desirable educational services. Conversely, schools that did not meet these demands would either have to improve educational programs or go out of business. 168

Detractors of this competition theory indicate that the experience of business can hardly serve as a model for the public school system to do its job. 169 They state that the work of Chubb and Moe, as well as that of other researchers, provides little in the way of evidence that marketplace justice will improve school processes or increase efficiency. In fact, such detractors indicate that the marketplace is often indifferent to the needs of certain people, particularly low-income groups, because they can be “manipulated through fraud and false advertising.” 170 Stated another way, educational choice can never operate as a pure market because the seller of the service gets to choose the students and may charge different prices for services to discriminate on the basis of religion, race, disability, or any other arbitrarily chosen reason. 171

Detractors of the competition theory also state that markets do not operate naturally, but rather are socially constructed. Moreover, gambling in free markets for profit is one thing, but playing stocks with a child’s education is quite another. Hence, the business model is not one for the education of the general public, as its private structures are incongruent with the public challenges. 172

168. Chubb & Moe, supra note 6, at 216-17; see also Friedman, Capitalism and Freedom, supra note 14, at 93 (stating that the injection of competition into the education marketplace will stimulate the development and improvement of all schools).
169. Cookson, supra note 27, at 158.
170. Id.
172. Id.; see also Wells, supra note 21, at 137 (noting that political institutions actively promote and protect over-bureaucratization).
Indeed, the notion of a pure competitive model in education ignores the fact that it is practically obligatory for every state and local government to provide a system of public education. There will always be students for whom public, non-magnet education is the only alternative. Hence, as a matter of public policy, it would be difficult to create a constitutionally supportable option of closing schools when the government’s obligation is to ensure a viable, free educational program to which all students have access. Where inadequate education exists, the state’s duty is to improve rather than abandon.

B. Student Achievement

At the center of the school choice revolution is the position that competition among schools will not only promote efficiency, but will have the corollary effect of vastly improving student academic achievement. Chubb and Moe, for example, argue that student achievement can be enhanced by the injection of market competition. Market theory drives this attitude, since its basis is the view that public schools have a monopoly on education, and that monopolies are devoid of pressure to operate efficiently. Specifically, Chubb and Moe state that parents should be further empowered, with the help of the state, to choose schools for their children; thus, parents will choose schools of higher academic quality, and this will in turn coerce schools of inferior quality to either provide better service or cease to exist.

Chubb and Moe condemn the current public school enterprise, claiming that current student achievement is a function of school organization and the structure of the school. The public school system has as its foundation the notion of shared governance between the state, the school board, parents, teachers, and other school personnel. Therefore, public schools suffer from bureaucratic control, and this in and of itself inhibits student achievement. Chubb and Moe state that the current system also diminishes school achievement because a democratic system of politics promotes cen-
tralized bureaucratic control and inhibits the autonomy of front-line administrators.\textsuperscript{178} Market choice, by contrast, is by nature decen-
tralized, and this independence from democratic politics and bu-
reaucracy fosters the development of organizational characteristics 
necessary for greater student achievement. Such organizational 
characteristics include varied and up to date academic programs, 
teacher creativity, high levels of teacher and administrative profes-
sionalism, increased discipline, and greater independent thinking on 
the part of students.\textsuperscript{179}

Anyone concerned about the welfare of public education in the 
United States can not overlook Chubb and Moe's arguments. 
Whether or not their arguments have merit or persuade legislators, 
public education is in great peril. If it is true that student achieve-
ment is a function of school organization and such public school or-
ganization is incapable of promoting this achievement, the door will 
open for pundits to openly call for the absence of shared governance 
in schooling and to collapse the boundary between public and pri-
ivate schooling.

Chubb and Moe based their viewpoint on data gathered from two 
surveys.\textsuperscript{180} Using this information, Chubb and Moe determined that 
school organization is one of four significant variables affecting stu-
dent achievement, as measured by increases in standardized test 
scores from the sophomore to the senior year in high school.\textsuperscript{181} The 
other three significant variables were: (1) the student's ability at the 
sophomore year; (2) the socioeconomic status of the student's fam-
ily; and (3) the socioeconomic status of the student body.\textsuperscript{182} They 
surmised from this data that well-organized schools with clear aca-
demic goals, strong educational leadership, and ambitious programs 
can make a meaningful difference in student achievement, and that 
this is comparable in importance to a student's background.\textsuperscript{183}

\textsuperscript{178} Id.
\textsuperscript{179} Id. at 215-18.
\textsuperscript{180} Id. at 22. Chubb and Moe combined data from The High School and Beyond Survey 
("HS&B") and the Administrator and Teacher Survey ("A&TS"). \textsc{Chubb \& Moe}, supra note 6, 
at 22. \textit{See National Ctr. for Educ. Statistics, The High School and Beyond Survey} 
(1980) [hereinafter \textsc{High School and Beyond Survey}]; \textit{National Ctr. for Educ. Statistics, 
The High School and Beyond 1980 Sophomore Cohort First Follow-up Survey} 
(1982); \textit{National Ctr. for Educ. Statistics, Office of Educational Research and 
\textsuperscript{181} \textsc{Chubb \& Moe}, supra note 6, at 116-18.
\textsuperscript{182} Id. at 118-23.
\textsuperscript{183} Id. at 123.
Curiously, the authors did not discuss the correlation between the other variables, such as the student's sophomore year ability, family socioeconomic status, and the socioeconomic status of the student body. Because of this and other inconsistencies, critical analyses of their work began to appear. Early on, John Witte examined the data in *The High School and Beyond Survey* ("HS&B"), 184 one of the surveys relied on by Chubb and Moe. 185 Witte surveyed the statistical models, findings, and interpretations as well as the insights derived from that data set. He concluded that studies from it provide no useful information for the debate on school choice because reported differences in achievement between the schools in the set are de minimis, and that even these differences could be accounted for by measurement errors. 186

Henry Levin also examined Chubb and Moe's statistical analysis of the HS&B study. 187 He found that although the Chubb and Moe study was "arcane and incomprehensible to the vast public audience," it nevertheless "succeeded in creating the perception that their conclusions were based on scientific findings." 188 Levin instead postulated that the authors' findings were based on "tendentious reasoning and personal opinion that passed for analysis." 189 Another author, David Hogan, joined Levin in questioning the integrity of the Chubb and Moe research. 190 Hogan stood incredulous that the variables of student ability at the sophomore year, socioeconomic status of the family, and the socioeconomic status of the student body were left out of the analysis relative to student achievement. 191 Hogan saw this as "academic alchemy," since such variables figure so prominently in the work of the authors who created the data set in the first place. 192 Hogan viewed this as a serious conceptual and methodological flaw which undermines the credibility of the position.

184. *High School and Beyond Survey*, *supra* note 180.
185. See John F. Witte, *Private School Versus Public School Achievement: Are There Findings That Should Affect the Education Choice Debate?*, 11 *ECON. OF EDUC. REV.* 371 (1992) (concluding that there is little evidence in HS&B that has any policy relevance for educational choice).
186. Id. at 387-91.
188. Id. at 283.
189. Id. at 281.
191. Id. at 100.
192. Id. at 100-101.
that student achievement is a function of school organization.\textsuperscript{198}

Anthony Bryk and Valerie Lee, who used the same HS&B data, concluded that Chubb and Moe took unwarranted liberties in defining key concepts and in creating analytical models that the data did not justify.\textsuperscript{194} They postulated that the effect of this activity was to skew the results of the data to a particular outcome. They concluded that this kind of work is intellectually irresponsible, as it supplants a critical, disinterested analysis with a position nurtured by partisan politics.\textsuperscript{196}

Finally, the Carnegie Foundation for the Advancement of Teaching completed a 118-page report which surveyed school districts and parents concerning the issue of school choice.\textsuperscript{198} Pointing to student achievement, the study demonstrated that the impact of choice programs is ambiguous at best.\textsuperscript{197} While there was some small evidence of a correlation in district-wide programs, there was no such connection at the statewide level. Furthermore, although the essence of school choice for most proponents is that competition will stimulate academic programs, the survey offered little evidence of this notion. Of the states with competitive open enrollment legislation, no educational gains were attributable to parental choice.\textsuperscript{198}

\section*{C. Race, Class, and Choice}

Supporters of educational choice also argue that it enables children of low-income and minority families to achieve educational equity and opportunities previously denied them because of their economic status. The rationale is that such students are victims of neighborhood schools because they must deal with an intellectually starved curriculum, a disproportionate track, and the stigma of being less-capable learners. Choice proponents suggest that if given innovative choices, parents will elect to leave these neighborhood schools for more effective options. Consequently, the neighborhood schools will be held more accountable.

Chubb and Moe are once again the progenitors of this idea.

\begin{flushright}
\textsuperscript{193} Id.
\textsuperscript{195} Id. at 448-49.
\textsuperscript{196} See \textit{Carnegie Report}. supra note 42.
\textsuperscript{197} Id. at 16, 20, 22.
\textsuperscript{198} Id.
\end{flushright}
Through parent choice, low-income parents would have the alternatives wealthy parents have always enjoyed: public, private, secular, or sectarian schools. They propose a voucher system, keyed to parental income, that would prohibit parents from subsidizing the vouchers with "add-on" dollars but enable the state government to uniformly supplement the vouchers through the raising of taxes. These measures answer the concern of those who advocate equalizing the financial footing of all children regardless of socioeconomic status. Far from dispossessing economically disadvantaged families, supporters argue that choice programs would empower these families as never before.

One can hardly deny that the criticism of the public schools in connection with minority and low-income children is absolutely true. Public schools discriminate. In fact, the Supreme Court had to arrest state policies authorizing the separation of black and white children. School administrators and teachers have actually stifled the efforts of poor and minority students to achieve academic parity with other students. Even now the disciplinary procedures in public schools appear to be differentially applied between poor minority and more wealthy white students. The question is whether educational choice has demonstrated any amelioration of this and whether poor families who do not do well in the job and housing markets will become winners in a deregulated education market.

The research of equity advocates, however, seems devoid of any specific evidence that choice will better the situation of minority and low-income students. In fact, the empirical evidence indicates just the opposite. There is little proof that private schools and suburban public schools readily accept minority children from the city even when choice is an option. There is greater evidence that white students are better able to use choice to transfer from integrated

199. CHUBB & MOE, supra note 6, at 219-20.
200. Id.
201. Id.
203. See generally Daniel, supra note 22 (providing a history of discrimination against black students in Chicago schools).
urban schools to all-white suburban schools. Moreover, urban choice appears to exacerbate social divisions because middle class students have disproportionate access to the best public schools. In the San Francisco magnet school program, for example, schools recruit students from the highest socioeconomic level, ultimately resulting in an "unintentional two-tiered school system." Finally, choice legislation is unlikely to give a student enough money to attend a private school of his or her choice. In contrast to the Chubb and Moe proposal, suggested choice programs do not contemplate a voucher for the full cost of private tuition. This would do little to help poor parents because they would be forced to make up the difference out of family funds. Such a proposal seems rather naive, if not disingenuous.

Choice supporters tout the experience of the East Harlem schools in New York City as a successful example of school choice. This is because it was the first such program in the country and because, over the past twenty years, the area has raised itself from being dead last on proficiency tests (compared to the rest of the city) to a level approximating the city-wide average. An understanding of the demographics of the area is important to fully comprehend the magnitude of the accomplishment. There are approximately 14,000 students in the district, 80 percent of whom are eligible for free or reduced lunch programs. Ninety-five percent of the children are either African-American or Hispanic. Before reform came to the district, there was a tremendous gang problem, a malaise among the teachers and administrators, and children existed in an atmosphere

206. Id. at 284-85, 297.
210. CARNEGIE REPORT, supra note 42, at 44.
211. Kirp, supra note 55, at 120.
212. Id.
void of learning. This changed radically with the influx of generous amounts of state and federal money and new administrative leadership. The change, however, may not have helped those students most in need; instead, it put them in a position of competing for the good schools in East Harlem under the rubric of choice. Choice, therefore, became a gate-keeper for school administrators, not parents. School officials used choice to select and admit the most academically gifted of the students. In fact, until recently, these schools had hidden admissions criteria enabling them to choose students long before parents had a chance to apply. This was school choice in Harlem, and using the same criteria as other selective institutions, good students were already in the better schools.

Activities of school personnel notwithstanding, there is some research that suggests a difference in the way parents of varied socioeconomic backgrounds make decisions relative to choice. One study of a choice program in Alum Rock, California, involved tuition vouchers given to parents over a five-year period between 1972 and 1977. The study found that information levels regarding the voucher program were much higher among white parents with higher incomes, and the parents' educational backgrounds proved to be an especially important factor. To wit, these parents were much more likely to use the vouchers and to choose schools that offered the best possible education.

The Alum Rock study highlights the role of information acquisition in educational choice, as well as education and experience in choosing among alternatives. Henry Levin also concludes that in all these respects, low-income minority parents are simply ill-equipped to make the informed decisions that other parents can. Part of the reason is the lack of access to information, and even if information is readily available, the fact remains that these parents suffer the inability to decipher the argot of legislative and administrative

214. Kirp, supra note 55, at 120.
215. Id. at 127.
216. Id.
217. Id.
218. Wells, supra note 21, at 142.
219. Id. at 147-50.
220. Id.
221. Levin, Theory of Choice, supra note 57, at 269.
Levin notes that in a different California choice experiment, even with a substantial effort to inform parents through various media, there was considerably less awareness of choice options among low-income minority parents. A similar pattern was found in the choice program in Milwaukee, where many low-income minority parents had little idea of the names or descriptions of available schools.

Levin raises a further related difficulty concerning choice among low-income minority parents. Choices are made on the basis of the context of one's own experience, and studies have shown that blue-collar parents tend to emphasize obedience to authority in the choice of schools while white-collar families tend to emphasize critical and independent thinking. Extending these findings, this would mean that low-income parents would tend to emphasize highly structured schools stressing discipline and basic skills as opposed to middle and upper class parents, who would push the development of greater freedom in the curriculum based on good communication skills and conceptual learning. The latter type of emphasis coincides with the college preparatory strand of schools. Such an inbred problem, therefore, would likely perpetuate rather than ameliorate class status under choice.

The Carnegie study confirmed this problem, indicating that choice programs work better for the better-educated. Those with the sophistication, the knowledge, and the income were better able to choose the best academic programs in Minnesota and Milwaukee. Low-income students, including those who may be homeless, in the care of under-educated grandparents, in group homes, or have drug problems stand little chance if the choice is left to any but very knowledgeable, culturally sensitive, and committed school personnel.

222. In the East Harlem choice program, some poor families were disadvantaged by the complicated and stilted admissions processes, and this had the effect of turning some families away from the program. See Donald R. Moore & Suzanne Davenport, High School Choice and Students at Risk, 5 Equity and Choice 5, 7 (1989) [hereinafter Moore & Davenport, High School Choice] (noting that students in New York City were confronted with a catalog over 300 pages long, listing 261 different schools and programs to which they, in theory, could apply).
223. Levin, Theory of Choice, supra note 57, at 269.
224. Id.
225. Id. at 270.
226. Id.
227. Id.
229. Id.
Furthermore, unless regulation of choice programs addresses the needs of the least economically able, such persons will have no real choice.

D. Parental Rights

In the choice debate, one of the major points of contention relates to parental rights in influencing a child’s education. In fact, this argument has served as one of the foundations for choice programs from the beginning. Choice advocates claim that parents should have the right to choose not only the type of school, but the type of education they want for their children. The most strident proponents of increased family control are usually fundamentalist/evangelical sects and other religious groups. These groups advocate including private schools in the educational choice programs. They promote the idea that parents should have a greater role in selecting the educational programs that serve to shape the values of their children. The notion is that just as parents themselves influence the values and traditions of their children, they should be able to select schools that reinforce these mores. A choice of schools, therefore, is necessary to exercise such a right.

Proponents of this idea include Ruth Randall, former Commissioner of Public Education in Minnesota, who stated that “choice is for everyone.” She also stated that although Americans have many choices with regard to most of the fundamentals of life, “The one place . . . where [they] have not been able to choose is education for children from the time they start kindergarten through grade 12 unless . . . [they] have money to pay for private school or for tuition to a different public school.”

The Carnegie report notes that the United States Office of Education under the Bush administration espoused this idea of a “fundamental right” of choice, claiming that assignment to a school based on residence was undemocratic and that choice as a program would improve schools for all strata of society.

230. James S. Coleman, Schools and the Communities They Serve, 66 PHI DELTA KAPPAN 527, 532 (1985).
231. Id.
233. Id.
234. Carnegie Report, supra note 42, at 6. The concept of a fundamental right of parents to participate in the decision-making process with respect to the education of their children has its origin in two early Supreme Court cases. See Pierce v. Society of Sisters, 268 U.S. 510 (1925)
the federal government, therefore, followed that of the choice proponents, maintaining that the state had gradually and unjustifiably supplanted parents in shaping the education, beliefs, and values of children.\textsuperscript{235}

Contrary to the above positions, the right of parents to influence or effect changes in the education their children receive has never been held to be absolute.\textsuperscript{236} States have assumed the responsibility for the education of children by enacting, for example, compulsory attendance laws. Children, however, are not required to attend a public school.\textsuperscript{237}

Federal\textsuperscript{238} and state\textsuperscript{239} courts have consistently upheld the right of

(holding unconstitutional a statute that required children to attend public schools and stating that parents have the liberty to direct the upbringing and education of their children); Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down a law prohibiting the teaching of foreign languages to young children and holding that the 14th Amendment's incorporation of the term "liberty" includes non-academic rights such as the right to teach and the right to acquire knowledge). In Pierce, the Court stated that a state may not "standardize its children by forcing them to accept instruction from public teachers only." Pierce, 268 U.S. at 535. Hence, if they choose, parents can send their children to private schools, whether they be religious or secular. Language in Justice William Douglas's concurrence in Roe v. Wade also supports the view that parents may participate in the decisions regarding their children's education:

[American citizens are entitled to] freedom of choice in the basic decisions of . . . life respecting marriage, divorce, procreation, contraception and the education and upbringing of children.

These rights, unlike those protected by the First Amendment, are subject to some control by the police power. . . . These rights are "fundamental" and we have held that in order to support legislative action the statute must be narrowly and precisely drawn and that a "compelling state interest" must be shown in support of the limitation.

Roe v. Wade, 410 U.S. 179, 211 (1973) (Douglas, J., concurring) (emphasis in original). Nevertheless, the Court has held that education per se is not a fundamental right under the Constitution. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 29-39 (1973). In that case, the plaintiffs claimed that Texas's method of financing education violated the Equal Protection Clause. The Supreme Court responded by declaring that education was not a right to be protected under the Fourteenth Amendment. Id.

235. See Carnegie Report, supra note 42, at 6 (stating the position of the Bush administration with regard to school choice).

236. See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972). In Yoder, the Supreme Court indicated that the primary role of parents in the upbringing of their children is now established beyond debate as an enduring American tradition. Yoder concerned the question of whether parents have the right to determine the patterns of their children's education. The evidence showed that Amish children, educated on Amish farms and in Amish shops under the supervision of adults, made adequate gains in basic skills and citizenship. Id. at 212-13. If the evidence had been to the contrary, the Court would probably have required that the Amish children attend either a public school or an equivalent facility. Consequently, the state's power to determine what education should be circumscribed the rights of the parents. Id. at 229-36.

237. Pierce, 268 U.S. at 535.

238. Id. at 534. In this case, the Court stated:

No question is raised concerning the power of the State reasonably to regulate all
the state to regulate education within its borders. In *People v. Turner*, the court rejected a claim that a California statute, which required parents to place their children in either a public school or a private school meeting certain prescribed conditions, deprived parents of their constitutional right to determine how their children should be educated. Similarly, the Supreme Court of Maine upheld the state’s compulsory attendance laws and the right of the state to control and regulate education, declaring that “where the state has provided a reasonable procedure whereby [parents] may vindicate their asserted right to educate their children[,] . . . they may not ignore the procedure and then appeal to this court claiming that their right has been denied.” Also, a New York court upheld the legal authority of the state to impose reasonable educational guidelines requiring parents to educate their children. The court noted that parents have no absolute right to educate their children free from state regulation and that they must observe the reasonable requirements imposed by the state.

The above short legal review exemplifies the rights of parents and the state to make decisions regarding the education of children. Proponents of choice would take this issue further, asking that parents receive special benefits for choosing to place their children in either private or secular schools. Clearly, private and secular schools are an important option for many citizens. Attendance at these institutions is a choice made for various reasons, including religious ones. As a matter of public policy, though, the state’s taxpayers should have no obligation to pay for this decision. The state’s job is to regulate the nonpublic schools, not to ensure their survival.

In its report, the Governor’s Commission on Educational Choice for the State of Ohio stated that “the choice issue is grounded on

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schools, to inspect, supervise and examine them, their teachers and pupils, to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught and that nothing be taught, which is manifestly inimical to the public welfare.

*Id.*

239. See *infra* notes 240-44 (discussing several cases that upheld state laws regulating education).


241. *Id.* at 687.


244. *Id.*
the basic premise that the child's parents or guardians are best suited to choose the school which will develop the highest potential of the individual child."

Furthermore, the report states, "We will leave it to others to debate the merits or disadvantages of choice." This section of the article has delineated some of that debate.

IV. LEGAL ISSUES

Much has been written in journals and the media about the topic of choice. It is imperative that in addition to assessing the educational merits of these programs, educators, attorneys, and legislators consider the legal ramifications of such legislation. This section will provide an overview of legal challenges, examine the potential legal implications of choice options, and point out areas where legislators have exposed themselves to legal vulnerability. At this point in time there is minimal case law on point. As a result, much of what is contained herein is based on analogy to other areas of constitutional and educational law.

A. Desegregation

Historically, legal challenges to choice plans have focused on school desegregation efforts. But given recent desegregation cases, there is some question as to whether open enrollment plans will be

245. Ohio Scholarship Plan, supra note 4, at 1.
246. Id.
248. Green v. County Sch. Bd., 391 U.S. 430 (1968) (striking down school choice plan that had the effect of creating severe segregation in a community's schools where segregation had not existed prior to enactment of the plan).
found to violate the Fourteenth Amendment's Equal Protection Clause if they result in racial resegregation. However, school districts currently operating under desegregation mandates are particularly vulnerable to legal challenges because they have an affirmative duty to eliminate the effects of prior racial discrimination. Open enrollment plans can be used to satisfy this affirmative duty whether or not they actually result in desegregated schools.  

National school desegregation by court order began with *Brown v. Board of Education*, which held that de jure segregation in public education was unconstitutional. The Supreme Court intended that *Brown'*s mandate eliminate single-race schools and lead to integration, but *Brown* can be read in more than one way. Did the *Brown* Court demand racial balance in schools, or did it simply require relative equality of educational opportunity? Under the former reading, mostly one-race schools are not permissible; under the latter, they are.

This controversy has led to a search for student assignment plans that incorporate parental choice, but prevent racial and economic isolation. A federal court has not yet decided a case in which the constitutionality of a controlled choice plan is at issue. In addition, there has been little litigation in the lower courts concerning choice. The following subsections evaluate the development of Equal Protection analysis, as applied in school desegregation cases by the United States Supreme Court since *Brown*, and apply that analysis in the context of school choice plans.

1. Brown's Progeny

The *Brown* decision consisted of two opinions: the first ("*Brown I"*) provided the legal underpinnings for desegregation, while the second ("*Brown II"*) implemented the tenets of the first. In *Brown I*, a unanimous Court held that school segregation denied plaintiffs equal protection of the law as mandated by the Fourteenth

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249. Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969) (per curiam) (striking down a lower court's mandate delaying the desegregation of Mississippi schools and holding that the continued operation of racially segregated schools under the "all deliberate speed" standard was no longer constitutionally permissible).


251. Id.


The Court first noted that cases construing the Fourteenth Amendment precluded all state-imposed discrimination against African-Americans. Writing for the Court, Chief Justice Earl Warren chronicled the erosion of Plessy v. Ferguson, then rebutted its central tenets by citing modern psychological studies that demonstrated the detrimental effect segregation had on black schoolchildren. The Court stated, "To separate [African-American schoolchildren] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community . . . unlikely ever to be undone."

The Court then agreed to hear reargument on the issue of appropriate relief. Unfortunately, Brown II failed to provide much direction to the lower courts. Although the Court held that the school district involved in the litigation had to proceed with "all deliberate speed" in desegregating their schools, the pace of desegregation remained slow fifteen years after Brown I. Many judges, interpreting the phrase "all deliberate speed," emphasized the efforts of blacks who transferred into mostly white schools. A school district's compliance with Brown often merely meant offering "freedom-of-choice" plans which allowed courageous blacks to enter white schools. Few whites entered the previously all-black schools.

In Green v. County School Board, the Court examined a "free-
dom-of-choice” plan. The Court found such plans unacceptable as a sufficient step in the transition to a racially unitary school system.\textsuperscript{266} Even though earlier Supreme Court decisions focused on providing black students the opportunity to attend all-white schools, the Court held that these goals were only a first step.\textsuperscript{266} New Kent County had not acted with deliberate speed in desegregating its schools; it adopted its freedom-of-choice plan eleven years after \textit{Brown I}.\textsuperscript{267} In its examination of the freedom-of-choice plans, the Court stated that such plans are not automatically unconstitutional\textsuperscript{268} and that:

Where it offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, nonracial system there might be no objection to allowing such a device to prove itself in operation. On the other hand, if there are reasonably available other ways, such for illustration [sic] as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, “freedom of choice” must be held unacceptable.\textsuperscript{269}

The Court further determined that school systems must satisfy seven factors in order to comply with a desegregation order. Known to later courts as the “\textit{Green factors},” they require that: (1) students of all races receive the same quality education; (2) administrator and teacher assignments be race neutral; (3) student assignments be race neutral; (4) all students be given equal access to the school transportation system; (5) all schools receive equitable allocations of resources; (6) school buildings and facilities be of equal quality; and (7) all students be given equal access to extracurricular activities.\textsuperscript{270} The Court also concluded that the school district had not satisfied these factors except where, as with school facilities, there was an attempt to keep black and white children segregated. The Court then required New Kent County to formulate a new plan for desegregation which would result in the elimination of racially identifiable schools.\textsuperscript{271}

Until 1971, Supreme Court desegregation decisions failed to de-

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\textsuperscript{266} Id.
\textsuperscript{266} Id. at 436.
\textsuperscript{267} Id. at 438.
\textsuperscript{268} Id. at 439.
\textsuperscript{269} Id. at 440-41.
\textsuperscript{270} Id.
\textsuperscript{271} Id. at 442.
lineate which equitable remedies lower courts could use in issuing
desegregation orders. In Swann v. Charlotte-Mecklenburg Board of
Education,272 the Court filled that void. In affirming a district
court's adoption of a desegregation plan drafted by a court-ap-
pointed expert, the Court broke down the central issue of school as-
ignment into four questions.273 Two of the issues are relevant to the
school choice inquiry: whether a court may consider racial quotas in
issuing orders, and whether one-race schools must be eliminated
under a desegregation plan.274

The Court's objective in dealing with desegregation issues was to
ensure that school districts did not exclude pupils from any school,
directly or indirectly, on account of race.275 In its opinion, the Court
noted that the district judge had found that variation from its racial
balance requirement of 71 percent white students to 29 percent
black students might be unavoidable, suggesting that the norm was
a fixed mathematical proportion.276 But the Court found that the
lower court had used the ratios as no more than a starting point in
the process of shaping a remedy. The limited use of mathematical
ratios was, hence, within the equitable remedial discretion of the
courts.277

On the issue of one-race schools, the Court noted that African-
Americans often live in centralized groups in cities.278 Under some
circumstances, certain schools consisted of students of only one race
until the district provided new schools or neighborhood patterns
changed. The Court held that the existence of such schools under
these circumstances was not in and of itself discriminatory.279

Milliken v. Bradley,280 however, placed limitations on the reach of
the remedial powers explicitly available to lower courts after

273. Id. at 22.
274. Id. In answering the other questions, the Supreme Court clarified that lower courts may
engage in remedial altering of school zones and that transportation of students is permissible
under a desegregation plan. Id. at 27-29.
275. Id. at 23.
276. Id. at 23-24.
277. Id. at 25.
278. Id. at 25-26.
279. Id. The Court placed the burden of proving those circumstances on the school board,
presuming that such schools did not meet the mandate of Brown. The Court required that a school
board provide for the optional transfer of students attending one-race schools to other schools
where they would be in the minority, and that the board assure free transportation and available
space at other schools in the district. Id. at 26-27.
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Swann. The Michigan law at issue in Milliken required suburban school districts surrounding the City of Detroit to participate in a massive integration plan with the city, even though the City of Detroit, its suburbs, or the State of Michigan had never had a statutory or constitutional provision which legislated segregation in schools. The district court upheld the legislation, finding that the only feasible desegregation plan for the city of Detroit involved the crossing of boundary lines for the limited purpose of desegregation. Nevertheless, the Supreme Court held that absent a showing of a constitutional violation within a suburban district that produced a segregative effect in another district, such a plan was impermissible. The Milliken Court stressed the importance of local control in education, a notion which it had articulated two years earlier in San Antonio Independent School District v. Rodriguez. The legislation at issue in Milliken was found by the Court to abolish local control. The Court remanded the case to allow the plaintiffs the opportunity to demonstrate constitutional violations within the suburban districts that produced a segregative effect in the City of Detroit.

A 1990 decision, Missouri v. Jenkins, reaffirmed the vast reach of federal courts when formulating desegregation orders. In Jenkins, the Western District Court of Missouri issued a writ of mandamus requiring the imposition of increased property taxes for the Kansas City, Missouri, School District ("KCMSD"). The monies were to fund an elaborate "magnet school" program designed to attract students of all races to the Kansas City schools. Missouri law, however, prevented the school district from raising property taxes without the

281. Id. at 722-23.
283. Milliken, 418 U.S. at 744-45. The Milliken Court was split, with Justices William Brennan, Byron White, William Douglas, and Thurgood Marshall dissenting, and Justice Potter Stewart writing a concurring opinion limiting the decision to the particular facts at issue in the case.
284. 411 U.S. 1 (1973). In Rodriguez, the plaintiffs attacked the State of Texas's method of financing education as violating the Equal Protection Clause of the Fourteenth Amendment. The Court, however, held that education was not a fundamental right under the Constitution and thus was not subject to the Fourteenth Amendment. But see Plyler v. Doe, 457 U.S. 202, 221 (1982) (stating that although education is not a fundamental right, "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation.").
286. Id. at 753.
288. Id. at 38-39.
consent of voters, who had refused to do so. The State of Missouri challenged the writ on grounds that the district court lacked the power to impose the tax increase. Although the Supreme Court found the imposition of a tax increase to be an abuse of discretion, it upheld the court of appeals' modification authorizing KCMSD to submit a levy to the state revenue department sufficient to fund the court's required budget and to enjoin the operation of state laws limiting or reducing the levy below that limit. In other words, the court could order a tax increase to fund a high-priced desegregation plan, although the executive and legislative branches would actually have to impose the tax.

The most recent cases in this area heard by the Supreme Court have involved districts attempting to extricate themselves from federal court supervision of desegregation efforts. In *Board of Education v. Dowell*, the Court expressed its willingness to grant school districts more discretion in administering desegregation plans where the district at one time had achieved unitary status but had since reverted to a system permitting segregated schools to exist. The district court in *Dowell* imposed a desegregation plan on Oklahoma City in 1972 after finding that previous efforts by the city's school board were ineffective in eliminating the effects of de jure segregation. In 1977, the same court held that the school district had achieved "unitary" status and lifted its order. In 1984, the school district adopted a School Reassignment Plan ("SRP"), under which a number of previously desegregated schools would again become

289. *Id.* The total cost of the desegregation remedy was estimated at $88 million for three years. The Missouri Constitution, however, limited property taxes to $1.25 per $100 of assessed value unless a majority of voters approved a greater levy, and to $3.25 per $100 unless two-thirds of the voters approved the levy. Also, the district could not just raise assessed values, since the state's Hancock Amendment required corresponding decreases in the property tax levy when assessed values rose. *Id.*

To illustrate the expansiveness of the district judge's ruling, property taxes in Kansas City doubled after the decision was handed down. Per-pupil spending in the KCMSD increased to $6,783, compared to a statewide average of $3,786. Although not exhaustive, this list typifies the benefits conferred as a result of the court's order: Olympic-sized swimming pools, a model ancient Greek village, a 25-acre farm, and a scale model of the U.N. General Assembly. ArLynn Leiber Presser, *Broken Dreams*, A.B.A. J., May 1991, at 60, 63.

290. *Jenkins*, 495 U.S. at 37.
291. *Id.* at 52.
293. *Id.* at 248-49.
294. *Id.* at 241-42.
295. *Id.*
predominantly one-race schools. In 1985, the respondents in Dowell moved to reopen the desegregation case, contending that the district had not achieved unitary status and that the SRP marked a return to segregation.

While the primary issue in Dowell concerned the conditions under which an injunctive order could be lifted, an undercurrent of desegregation policy was evident, especially in Justice Marshall's dissenting opinion. Notwithstanding this fact, the Dowell Court held that federal supervision of local school systems was intended to be a temporary measure to remedy past discrimination. It repeated the Milliken Court's emphasis on local control of education: if a school district has complied with court conditions for a "reasonable" period, dissolution of the decree recognizes the importance of local control. According to the Court, if a school board has discriminated in the past, a district court need not accept the board's professions of future good faith at face value. At the same time, compliance with previous orders must be considered relevant. The Court remanded the case to the district court to allow it to determine whether the Oklahoma City school board had made a sufficient showing of constitutional compliance as of 1985, when the SRP was adopted, to enable the court to dissolve the injunction. The lower court was directed to determine whether the board had complied with the decree and whether the vestiges of past discrimination were virtually eliminated. Furthermore, it is clear that the school dis-

296. Id. at 242.
297. Id. The district court denied the motion, but the court of appeals reversed and remanded, finding that the 1972 order had never been lifted. On remand, the district court again found that demographic changes had rendered the 1972 plan unworkable and that the school district had made a good-faith attempt to comply with the court's orders. The court held that residential segregation in Oklahoma City was the result of private decision-making and economics and could not be linked to previous school segregation. It concluded that the previous injunctive decree should be vacated, returning the school district to local control. The court of appeals again reversed, holding that an injunction could be lifted only if it inflicted a "grievous wrong" on a party resulting from unforeseen, drastic changes. Id. at 242-44.
298. Id. at 251 (Marshall, J., dissenting). Justice Marshall noted that Oklahoma City had resisted litigation for eleven years before the 1972 order. He feared that the majority's standard for dissolving a desegregation order was too mild. Justice Marshall's test for deciding whether the desegregation order should be dissolved was to determine whether any vestiges of discrimination still existed. Id. at 256 (Marshall, J., dissenting).
299. Id. at 248.
300. Id.
301. Id. at 249.
302. Id.
303. Id. at 249-50.
strict remained subject to the mandate of the Equal Protection Clause.304

Finally, the Supreme Court held in Freeman v. Pitts305 that resegregation does not have constitutional implications if the resegregation results from private choices rather than state action.306 In Freeman, the DeKalb County (Georgia) School System sought to be released from federal court supervision of its efforts to eliminate the effects of past de jure segregation. The school system claimed that residential factors caused resegregation in the school district. Concomitantly, it claimed that it set a plan in motion which satisfied most of the factors necessary for achieving desegregation and attempted to extricate itself from court jurisdiction.307 The district court agreed with one part of the school board’s argument in that unitariness was found in the Green factors of transportation, school assignments, extracurricular activities, and physical facilities between those schools containing predominantly one-race schools.308 Nonetheless, the court found vestiges of a dual system in quality of education and in teacher and administrative assignments.309 The case was brought up on appeal where the Eleventh Circuit ruled that court jurisdiction would continue until all of the Green factors were met.310

The Supreme Court granted certiorari and later held that federal courts may relinquish supervision of suspect schools even when only some of the Green factors have been accomplished; specifically, courts can order that school districts are free of judicial control when they can demonstrate desegregation in “incremental stages.”311 The Court seemed to further its position of moving away from the dictates of Brown and Green by stating that:

[U]pon a finding that a school system subject to a court-supervised desegregation plan is in compliance in some but not all areas, the court in appropriate cases may return control to the school system in those areas where compliance has been achieved, limiting further judicial supervision to operations

304. The 14th Amendment provides: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.
306. Id. at 1448.
307. Id. at 1433.
308. Id.
309. Id. at 1441-42.
310. Id. at 1442.
311. Id. at 1445.
that are not yet in full compliance with the court decree.  

2. School Choice Under Equal Protection Analysis

Controlled parental choice is distinct from the freedom of choice plans of the 1960s, which the Court held unconstitutional, because controlled choice uses quotas to ensure racial balance in schools. Thus, a court would not strike down a controlled choice plan on the same grounds used to invalidate freedom of choice plans.

*Green v. County School Board* suggests that the Supreme Court will use a comparative approach to determine whether school choice plans in previously segregated districts survive scrutiny under the Equal Protection Clause. If a choice plan "offers real promise . . . to effectuate conversion . . . to a unitary, non-racial system," it may be upheld under *Green.* At the same time, the *Green* Court emphasized that if other available means of achieving a unitary, non-racial school system will result in effectuating conversion more quickly than a choice plan, the alternate means should be chosen.

A controlled choice plan's use of racial quotas may, however, be constitutionally problematic. If a court finds past intentional discrimination in a school system, the court will uphold the use of quotas. In a system that has achieved unitary status, however, it is questionable whether a court would rely on past discrimination to justify such racial classification. Because a constitutional right to racial balance in public schools does not exist, a controlled choice

312. *Id.* at 1445-46 (emphasis added).
314. *Id.* at 440-41.
315. *See* Coalition to Save Our Children v. State Bd. of Educ., 757 F. Supp. 328, 351 (D. Del. 1991) (holding that voluntary techniques, such as magnet schools, have a place in desegregation plans where they offer promise of aiding a school district in moving toward full compliance with the Equal Protection Clause of the Fourteenth Amendment).
316. *See* Diaz v. San Jose Unified Sch. Dist., 633 F. Supp. 808 (N.D. Cal. 1985), *aff'd,* 861 F.2d 591 (9th Cir. 1985) (demonstrating that choice in education is not per se unconstitutional). In *Diaz,* the court distinguished controlled choice plans from freedom of choice plans that had previously been held unconstitutional. In order to remedy segregative intent, the court fashioned a plan similar to controlled choice to achieve desegregation. *Id.* at 812. Under the court's plan, students could rank school preferences. The plan also featured district-wide magnet schools and schools with specialty enrichment programs, designed to encourage students to attend schools outside the neighborhood in an attempt to achieve voluntary desegregation. If voluntary choices did not lead to sufficient desegregation, however, the plan allowed a school board to impose ethnic caps to achieve the desired racial and ethnic balance. *Id.* at 815-16. The Ninth Circuit upheld the freedom of choice plan at issue, stating that the plan "reflects *Green's* admonition that 'freedom of choice is not an end in itself,' but that it may have a proper place in a desegregation plan." *Diaz,* 861 F.2d at 596 (citation omitted).
plan’s use of, racial quotas may lead to its downfall. If a controlled choice plan accomplishes its stated purpose of providing students with quality desegregated educational opportunities, students may have no cause to challenge the plan.

In *Swann*, the Court explicitly disavowed the use of fixed mathematical ratios in fashioning desegregation remedies, endorsing them only as a starting point. Such ratios are useless even as a starting point, however, in the wake of *Milliken*. Parents with the means to do so can avoid desegregation by either moving to a suburban district or by sending their children to private schools.

The Court’s willingness to uphold the Kansas City tax increase in *Jenkins* might implicitly suggest that the Court is moving toward endorsing schemes that encourage integration rather than mandate it. The Kansas City magnet schools were designed to make the city’s schools so attractive that white suburban pupils would want to

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317. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (holding that one-race schools are not per se discriminatory); see also *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977) (holding that a school desegregation plan that required each school in a district to be brought within 15 percent of the black-white ratio of the city was unjustified); *Harris v. Crenshaw County Bd. of Educ.*, 968 F.2d 1090 (11th Cir. 1992) (holding that when a school board proposes to close a school facility with a predominantly minority student body, it must adduce evidence sufficient to support the conclusion that its actions were not in fact motivated by racial reasons). The court stated that until a school system achieves unitary status, it has an affirmative duty to eliminate the effects of prior unconstitutional conduct. *Id.* at 1094-95. In order to fulfill that duty, “school officials are obligated not only to avoid any official action that has the effect of perpetuating or reestablishing a dual school system, but also to render decisions that further desegregation and help to eliminate the effects of the previous dual school system.” *Id.* at 1095.

318. 418 U.S. 717 (1974); see also supra notes 280-86 and accompanying text (discussing the holding in *Milliken*).

319. See *Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976) (holding that a school district which had implemented a racially neutral attendance pattern in order to remedy perceived constitutional violations on the part of schools officials need no longer be subject to court supervision). In *Spangler*, the court had fully performed its function of providing an appropriate remedy for previous racially discriminatory attendance patterns. The court determined that the subsequent failure of a racially neutral student assignment system, resulting from changes in the demographics of residential patterns caused by families moving in and out of the school district, does not require annual readjustment of attendance zones. *Id.* at 436-37; see also *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979) (holding that disparate impact and foreseeable consequences, without more, do not establish a constitutional violation, and that where it is foreseeable that a demographic shift may result in resegregation following a declaration of unitary status, this factor by itself will not result in a finding that the district is in violation of the previous desegregation mandate).

320. 495 U.S. 33 (1990); see also supra notes 287-91 and accompanying text (discussing the holding in *Jenkins*).

321. See also *Willan v. Menomonee Falls Sch. Bd.*, 658 F. Supp. 1416 (E.D. Wis. 1987) (holding that Wisconsin’s plan for school integration, authorizing the school district to enter into voluntary agreements providing for the interdistrict transfers of pupils in order to promote racial integration, was valid and constitutionally viable).
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attend them, effectively integrating the schools.\textsuperscript{322} Similarly, even if a court decides Brown requires racial integration of all public school classrooms, school choice proponents might be able to demonstrate that a school choice plan would result in ratios of white to minority students closer to the state or area averages than would occur under traditional, post-Milliken desegregation plans.\textsuperscript{323}

\textit{Dowell}\textsuperscript{324} and \textit{Freeman},\textsuperscript{325} however, might offer the most persuasive arguments that the Court, in the school choice context, will interpret Brown as standing for equality of educational opportunity, and not necessarily for racial integration. The \textit{Dowell} Court indicated a willingness to defer to local and state school authorities.\textsuperscript{326} The school board’s Student Reassignment Plan involved a return to some predominantly one-race schools, yet the Court refused to find the plan to be a per se violation of Brown.\textsuperscript{327} Thus, if one consequence of a school choice plan would be the re-creation of several mostly one-race schools, the Court may likely find no per se violation of the Equal Protection Clause.

Based on the above rendition of case law, it would appear that a thumb has been placed on the scales of justice, weighted in favor of school choice, even at the cost of resegregation. This interpretation overlooks the sociological and psychological principles that the Brown ruling was based on:

\begin{quote}
To separate \{African-American schoolchildren\} from others of similar age and qualifications . . . generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely
\end{quote}

\textsuperscript{322} See also Coalition to Save Our Children v. State Bd. of Educ., 757 F. Supp. 328 (D. Del. 1991) (holding that voluntary techniques such as magnet schools have a place in desegregation plans where they offer the promise of helping a school district comply with the Equal Protection Clause of the Fourteenth Amendment).

\textsuperscript{323} Price v. Austin Indep. Sch. Dist., 945 F.2d 1307 (5th Cir. 1991). This case involved a new student assignment plan that was implemented after a finding of unitary status. The court held that in “unitary” school systems only intentional discrimination on the part of school officials violates the Constitution. \textit{Id.} at 1315. Evidence of a possible segregative impact of the new student assignment plan was not determinative of unconstitutionality absent a showing that the school board acted with discriminatory intent. \textit{Id.} at 1318. Foreseeability of the discriminatory impact of a school district’s student assignment plan, without more, is not proof of forbidden discriminatory purposes. \textit{Id.} at 1319.

\textsuperscript{324} 498 U.S. 237 (1991); see also supra notes 292-304 and accompanying text (discussing the decision in Dowell and its effect on the Court’s analysis of school plans aimed at ending segregation).

\textsuperscript{325} 112 S. Ct. 1430 (1992); see also supra notes 305-12 and accompanying text (detailing the Freeman holding and its impact on the Court’s analysis of school plans).

\textsuperscript{326} Dowell, 498 U.S. at 248.

\textsuperscript{327} \textit{Id.} at 242-43, 249.
ever to be undone... "Segregation of white and [African-American] children in public schools has a detrimental effect upon the [African-American] children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the [African American] group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of [African-American] children and to deprive them of some of the benefits they would receive in a racially[ly] integrated school system."\textsuperscript{8}

This reasoning from \textit{Brown I} was reiterated in \textit{Freeman} with the Court's position that school districts must eliminate a segregated system, because leaving it intact would ensure that racial stigma would remain.\textsuperscript{29} The Court in \textit{Freeman} went on to emphasize that the \textit{Green} factors and the precepts of \textit{Brown} work in tandem, and that if racial identifiability of schools is a result of the assessment, courts must fashion remedies to correct the relevant components of the school system.\textsuperscript{30}

Ergo, opponents of school choice could argue that such a program stigmatizes some minority students by branding the public schools they attend as inferior. This is similar to the demoralization and stigma that the Supreme Court observed in \textit{Brown} and recounted in \textit{Freeman}. The dual system created before 1954 branded minority students as different and of lesser intellect than white students. Some of the evidence from school choice programs denotes a similar stigmatizing effect on minority children — such programs delegate them to inferior schools lacking the infrastructural support given to other schools, sometimes even those in the same district.

A study of magnet programs in four large cities found that magnet schools designed to attract large numbers of white students receive much larger allocations of school district and state dollars than other schools in the district.\textsuperscript{31} In addition, school personnel evaluated as the best were systematically assigned to those schools. Equipment and supplies, hard to obtain in the regular institutions, were readily available in the magnet schools. The study found that the presence of this kind of "choice" produced a constant feeling of inferiority and disconcertion among students, staff, and parents in

\begin{footnotesize}
\textsuperscript{8} Brown v. Board of Educ., 347 U.S. 483, 494 (1953) (citation omitted) (alterations in original).
\textsuperscript{29} Freeman v. Pitts, 112 S. Ct. 1430, 1443 (1992).
\textsuperscript{30} Id. at 1445 (holding that federal courts have authority to relinquish supervision and control of school districts in incremental stages).
\textsuperscript{31} Moore & Davenport, \textit{High School Choice}, supra note 222, at 9.
\end{footnotesize}
the non-magnet schools. Choice sent a message in these cities that it was the exclusive province of an established elite, precisely the message that the Brown and Freeman Courts found unconstitutional.

Choice proponents point to the fact that all existing legislation in this area carries a caveat against discrimination, and that a market approach will in fact encourage desegregation. Their contention is that anti-discrimination laws will guarantee equal opportunity for all students. This may be faulty reasoning because, as noted before, competition for "choice" spaces is by no means based on an even playing field, and civil rights laws do not encompass all kinds of discrimination with which school officials should be concerned. Moreover, even when certain practices are prohibited by law, the existence of those laws will not necessarily prevent discrimination. For example, the proposed voucher plan in Pennsylvania included a nondiscrimination provision; however, testimony from members of religious schools indicated that certain kinds of students would have a difficult time gaining admission because they were not affiliated with a particular church. The Ohio Scholarship Plan addresses this issue as well, as it has a nondiscrimination provision based on race. However, a major part of the document indicates that first priority for admission to religiously affiliated schools goes to members of the sponsoring church. This means that despite the existence of protective laws, choice may remain elusive for some students unless a complaint is brought.

Such a complaint involving private schools in the choice confines may occur for a variety of reasons. One part of the Ohio Scholarship Plan, for example, contains no language referring to race, gender, or creed. In another part of the document, racial discrimination is expressly forbidden. Notwithstanding this apparent conflict, private schools are not protected under the constitution if they exhibit racial prejudice. In Runyon v. McCrary, the Supreme Court

332. Id.
334. PENNSYLVANIA REPORT, supra note 171, at 16.
335. OHIO SCHOLARSHIP PLAN, supra note 4.
336. Id. at 6-7.
337. Id. at 6.
ruled that federal law[^339] protects a citizen's right to enter into contracts and that it prohibits private, nonsectarian schools from denying admission solely on the basis of race.[^340]

This study already spoke to the fact that the proposed Ohio choice plan involves private religious schools. Such schools may lose their tax exempt status if they engage in racial discrimination. This was determined in *Bob Jones University v. United States*,[^341] where the facts demonstrated that African-Americans were only admitted under a very restrictive policy.[^342] The Supreme Court found such actions to be inconsistent with the public interest.[^343]

The above analysis featuring civil rights laws and accompanying case law only serves to provide the reader with some understanding of the problems that may be engendered by choice legislation. The legality of the issues should certainly influence, but should not drive, the concerns of either promoters or detractors of school choice. Instead, the focus should be on the choice models themselves which, in their current state, separate students in ways that may or may not be legally prohibited but which, regardless, ought to be troubling to educators and attorneys alike.

### B. Students With Disabilities

School choice relates not only to able-bodied students, but to ones with disabilities as well. A number of legal issues arise in this area that legislators and school personnel must be cognizant of, since there is the potential for dispute based on both federal and state law. What follows is an explanation of the national disability statutes, executive interpretations of those statutes relating to school choice, and a rendering of state law as regards school choice and disability. The analysis is limited to public schools; a statement about private schools and disabled populations is made in the next section on the Establishment Clause. Once again, Ohio legislation will be featured in this section.

The educational rights of students with disabilities are created and protected by three federal statutes. They include the individuals

[^341]: 461 U.S. 574 (1983) (holding that the government's interest in preventing racial discrimination is compelling enough to override a school's Free Exercise contention that its racially discriminatory admissions policy was compelled by tenets of the religion with which it is affiliated).
[^342]: *Id.* at 575.
[^343]: *Id.*
with Disabilities Education Act ("IDEA"),\textsuperscript{344} Section 504 of the Rehabilitation Act of 1973 ("Section 504"),\textsuperscript{348} and Title II of The Americans with Disabilities Act ("ADA").\textsuperscript{346} All three of these statutes must be considered by those involved with students with disabilities and "choice" because they serve as the legal structures for determining the most appropriate education for children with disabilities.

The fundamental premise of the IDEA is that all children with disabilities are entitled to a free appropriate public education ("FAPE").\textsuperscript{347} A FAPE encompasses special education and related services provided in the least restrictive environment. The provisions of the IDEA set out extensive procedural requirements which center around the development by the school or school system of an individualized education program ("IEP") for each child with a disability.\textsuperscript{348} The IEP must state the child’s present level of educational functioning and contain both long- and short-term educational goals and objectives.\textsuperscript{349}

Section 504 covers all programs receiving federal assistance and, unlike the IDEA, is not limited to discrimination in educational institutions. However, United States Department of Education regulations implementing Section 504 contain procedural and substantive obligations which are binding on education agencies.\textsuperscript{350}

The ADA is a very broad statute as well, covering not only the issue of education, but also the issues of employment and transportation.\textsuperscript{351} Like the other statutes, the ADA mandates that schools must provide and administer programs for disabled populations in an appropriate and integrated environment.\textsuperscript{352}

\textsuperscript{352} The Code of Federal Regulations provides that a government agency "shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. § 39.130(d) (1992). Section 794 of The Rehabilitation Act authorizes the head of each government agency to "promulgate such regulations as may be necessary" to carry out the purpose of the Act. 29 U.S.C.A. § 794(a) (West Supp. 1993). Section 12133 of the ADA then states, "The remedies, procedures, and rights set forth in section 794a of Title 29 [Rehabilitation Act of 1973] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132
Executive interpretations of the scope of these statutes correlative to the concept of choice may run counter to the interests of most students with disabilities. As noted in Part II of this study, many state statutes feature various forms of intradistrict and interdistrict choice. This gives parents the opportunity to send their child to a school either within or outside the school district. Once again, however, there appears to be the possibility of discriminatory activity as parents of children with disabilities may not have this option. In an executive opinion, the Director of the Office of Special Education Programs ("OSEP") reiterated the policy that all education placement decisions for special education students must be made by an IEP team. This means that the parents of such children must meet with school personnel and make out a year-long written plan before any transfer to another school can take place. This ruling, in a sense, takes the education decision away from parents and places it in the hands of others. In another part of this report, this author argues that if choice is to remain an option, having school personnel make some of these decisions may be useful for low-income children whose parents are alienated by school bureaucracy or who simply do not have the requisite knowledge to make informed choices. This executive ruling may discriminate against children with disabilities and their parents on the basis of one quality alone — whether or not such parents are knowledgeable about available educational choices.

Sensitive to the impact of its ruling, OSEP issued another statement in support of choice for the disabled population. According to another executive opinion, "Federal law does not prohibit states from requiring that responsibility for providing a free appropriate public education . . . to children with handicaps be transferred from the school district of the child's residence (resident district) to the non-resident school district of parental choice (choice district) . . . ." 

353. See supra notes 55-157 and accompanying text (discussing both intradistrict and interdistrict plans and comparing plans currently in effect in Ohio, Minnesota, and Wisconsin); see also infra Appendix A (surveying the choice legislation currently available in or under consideration by each state).
If a student with disabilities was permitted to invoke choice and subsequently transfer, the nonresident school district would become responsible under the aforementioned federal statutes for his or her education. This would include making decisions about placement and bearing the cost of any essential services or equipment needed to assist in learning activities. Needless to say, educating a disabled student can sometimes be quite expensive, and states may be motivated to give narrow interpretations to the executive rulings stated herein so as to circumvent choice privileges. The rulings essentially say that such a decision is the prerogative of the state. This broad mandate, however, leads to the determination that a right to a FAPE in the least restrictive environment depends on the state of domicile. For example, Utah and Idaho permit parents of children with disabilities to “not only . . . select school districts outside of their residential district but . . . actually choose a particular educational program or school within the choice district.”

On the other hand, six states — Utah, Colorado, Washington, Iowa, Nebraska, and Ohio — have promulgated statutes establishing limitations on choice transfers due to disabilities and permit receiving boards of education to require such students to “attend school where the services described in the student’s IEP are available.” This raises a legal problem in that Section 504 prohibits the denial of benefits of services offered to “qualified” disabled persons by a school district. Moreover, there are numerous elements of the IDEA that prohibit discrimination against students with disabilities that could be applied to choice legislation.

Ohio’s statutes dealing with choice, as noted, permit school districts to place limitations on the admission of students with disabilities. These limitations are dictated by the mandated creation of an IEP team which must give its imprimatur for a change of placement. The receiving district also has veto power if it does not have the services needed to accommodate the student’s disability.

356. Id. at 670.
361. Id.
These are not admission criteria that parents of able-bodied students face; clearly, the choices for parents of children with disabilities are much more limited. Still, legislative sections and case law may be used to challenge this differential.

The platform for such a challenge begins with Section 504, which prohibits the denial of benefits to qualified students with disabilities. However, we proceed with the determination that choice is a benefit available to all students, including those “qualified” ones with disabilities. This means that all school districts are obligated first to make a determination as to whether a child can be educated with requisite aids and services before making a decision not to educate or not to admit, if read in concert with Section 504. The “choice” statutes of Ohio and five other states would permit school district decisions without such a determination.

In fact, school districts cannot institute eligibility criteria for students with disabilities (once again, read in concert with Section 504) with regard to a responsibility for education. In *Timothy W. v. Rochester School District*, for example, the issue was whether school districts have an obligation toward students despite the severity of their disability. The First Circuit Court of Appeals ruled that the IDEA contains no requirement that a child with a disability first demonstrate that he or she could benefit from an education in order to be eligible to attend school. The ruling firmly established the IDEA’s “no reject provision” by emphatically stating that school districts cannot impose eligibility requirements for disabled children seeking an education. Under both Section 504 and the IDEA, if choice is a benefit available to all students in a state, children with disabilities cannot be refused admission because of their disability alone.

The claims of parents of children with disabilities desiring placement in a nonresidential school district might also be buttressed by

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364. McKinney, *Parental Choice*, supra note 355, at 370-71. The other five states are Colorado, Iowa, Nebraska, Utah, and Washington. *Id.* See *supra* note 357 and accompanying text (listing the choice statutes of the states that permit school district decisions without such a determination).
366. *Id.* at 962.
367. *Id.* at 960.
the decision in *Roncker v. Walter*, a “least restrictive environment” case decided by the Sixth Circuit Court of Appeals. *Roncker* held that the Education for All Handicapped Children Act required mainstreaming to be provided to the maximum extent appropriate. The court here was concerned with whether a student would be better suited for a private or public facility. The parents desired the public school so that their son would be associated with other nondisabled children. The court held that the proper determination for the Sixth Circuit was whether services offered by a separate facility for children with disabilities could be offered by a regular school. The court said that school systems could consider concerns such as educational benefit to the student, whether the child would be a “disruptive force” in the classroom, and the cost of educating the child. If choice is an educational benefit under Section 504, to be made available to all students, and if school districts must consider the above criteria before refusing a student, the statutes of Ohio and other states unlawfully discriminate against some students with disabilities.

Choice has both its proponents and detractors. Proponents postulate that it creates greater options which in turn foster achievement and the integration of students. Unless and until attention is paid to admissions criteria for students with disabilities in the choice legislation of states like Ohio, neither achievement nor integration will be assured. This represents an argument in favor of the detractors.

C. Private School Choice Plans: State Aid to Sectarian Schools

As discussed, several states currently have or will soon enact school choice programs. In analyzing these programs, one issue that must be broached is the possibility that educational choice will lower the wall between church and state when sectarian schools take the state’s educational dollar. Choice plans stipulating the distribution of public funds to private schools have been challenged as infringing upon the Establishment Clause of the First Amendment. The Establishment Clause prohibits governmental action that ad-

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369. Id. at 1063.
370. Id. at 1061.
371. Id.
372. Id. at 1063.
373. Id.
vances or impedes religion or excessively entangles church and state. The reader will note that the issue of private schools has been broadened to include religiously affiliated schools. This is necessary because only one case, Davis v. Grover, has arisen relating to choice and private nonsectarian schools. It is therefore difficult to discuss choice and private schools without including sectarian facilities. Indeed, in 1989, 20,682 of the 25,616 private schools in the United States were religiously affiliated. Because of this large number of sectarian schools and the possible shift of state funds to these institutions under a broad-based choice plan, constitutional challenges may arise. As with other sections of this study, proposed legislation and executive action from the state of Ohio will be featured.

Three new voucher-oriented bills were introduced into the state of Ohio during 1992 that have not yet been called to a vote. House Bill 635 would create a voucher program, House Bill 825 would require private, sectarian schools to issue a statement that participating students are not compelled to adhere to any specific religion, and House Bill 851 would submit the issue of private sectarian school participation in choice programs to the electorate for an upcoming referendum. The Governor of Ohio's office began internal action on the bills and produced a document known as the Ohio Scholarship Plan. The plan promotes deregulation of the state's school system, and one of its major tenets is the involvement of private sectarian schools in the school choice program. The plan pro-

374. U.S. CONST. amend. 1 ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").
375. 480 N.W.2d 460 (Wis. 1992). In Davis, an action was brought to compel the State Superintendent of Public Instruction to comply with the statute creating the Milwaukee Parental Choice Program. The program is designed to aid low-income children in attending nonsectarian private schools. Id. at 462. Teachers' unions, administrators' organizations, and civil rights groups intervened to challenge the constitutionality of the statute. Id. at 465. The Wisconsin Supreme Court held that: (1) the choice program complied with the uniformity clause requiring the legislature to provide for establishment of district schools as nearly uniform as practicable; and (2) the choice program complied with the public purpose doctrine. Id. at 473, 477. See also supra notes 141-47 and accompanying text (discussing the Davis decision).
377. See supra notes 4, 116-21 and accompanying text (detailing the provisions of the three Ohio House Bills).
381. See OHIO SCHOLARSHIP PLAN, supra note 4.
vides for tuition vouchers worth between $1,600 and $3,000, depending on the student's grade in school, with increases provided for subsequent years. There is no provision preventing the use of the vouchers for purely religious reasons.

The United States Supreme Court, in *Everson v. Board of Education*, applied the Establishment Clause to the states through the doctrine of "selective incorporation" under the Fourteenth Amendment and set boundaries restricting the scope of permissible reimbursement. In *Everson*, the Court upheld a New Jersey statute authorizing reimbursement to parents for expenses incurred in the transportation of children to sectarian and secular schools. The Court placed significant limits on such aid, however, stating:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion . . . . In the words of Jefferson, the clause against establishment of religion . . . was intended to erect "a wall of separation between church and State."

1. The Lemon Test

For more than 20 years, *Lemon v. Kurtzman* has provided the framework for evaluating the constitutionality of statutes under the Establishment Clause. *Lemon* concerned efforts by Pennsylvania and Rhode Island to reimburse private sectarian schools for teacher salaries and secular educational services. While holding that the laws violated the Establishment Clause, the *Lemon* Court fashioned a three-pronged test to determine whether such statutes were in accordance with the Constitution. First, the Court held that a statute must have some secular legislative purpose. Second, the principal or primary effect of the statute must be one that neither advances

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382. *Id.* at 4.
383. *Id.* at 4.
384. *Id.* at 15-16.
385. *Id.* at 18.
386. *Id.* at 15-16.
387. 403 U.S. 602 (1971).
388. *Id.* at 609-10.
389. *Id.* at 612.
nor inhibits religion. The Court found that although the legislative intent of the reimbursement plans at issue was not to advance religion, the plans entailed excessive governmental entanglement with religion and thus failed to pass constitutional muster.

Two years later, the Pennsylvania legislature enacted another statute to reimburse parents for tuition in sectarian schools without restricting parents or schools with respect to the use of the money. In Sloan v. Lemon, the Supreme Court applied the three-pronged Lemon test and held that the statute had the primary effect of advancing religion. Rejecting the state's argument that parents were "mere conduits" for public aid to sectarian schools, the Court stated:

We think it plain that this is quite unlike the sort of "indirect" and "incidental" benefits that flowed to sectarian schools from programs aiding all parents by supplying bus transportation and secular textbooks for their children. Such benefits were carefully restricted to the purely secular side of church-affiliated institutions and provided no special aid for those who had chosen to support religious schools. Yet such aid approached the "verge" of the constitutionally impermissible. . . . In Lemon v. Kurtzman, we declined to allow Everson to be used as the "platform for yet further steps" in granting assistance to "institutions whose legitimate needs are growing and whose interests have substantial political support." . . . Again today we decline to approach or overstep the "precipice" against which the Establishment Clause protects.

Ohio's proposed voucher program, as listed in the Ohio Scholarship Plan, makes no mention of how the money will be delivered over to the private sectarian schools or just what the vouchers will be used for. Presumably, they may go toward those "purposes" ruled unconstitutional in Lemon.

The second prong of the Lemon test is embodied in the Court's decision in Committee for Public Education v. Nyquist. In that case, the Supreme Court struck down a New York law that aided parochial schools, holding that it violated the Establishment Clause
and was thus unconstitutional. The law provided direct monetary grants for the maintenance and repair of the facilities of nonpublic schools serving a high concentration of pupils from low-income families, tuition reimbursement to parents of students attending such schools, and income tax benefits to those parents who did not qualify for tuition reimbursements.

The New York law satisfied the first prong of the Lemon test. The Court found a secular legislative purpose for the statute: preserving a healthy and safe environment for schoolchildren and promoting pluralism and diversity among public and nonpublic schools. But the maintenance and repair provisions, tuition reimbursements, and tax deductions all failed under the second prong; the Court found that the legislation had the primary effect of advancing religion. Part of the Court’s opinion seems particularly devastating to the contentions of school choice proponents that such plans will benefit educational choices of the poor. The opinion of the Court stated that:

In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one “advancing” religion. However great our sympathy . . . for the burdens experienced by those who must pay public school taxes at the same time that they support other schools because of the constraints of “conscience and discipline,” . . . [our sympathy] may [not] . . . justify an eroding of the limitations of the Establishment Clause now firmly

397. Id. at 798.
398. Id. at 762-65. According to N.Y. Laws 1972, c. 414 § 1 (amending N.Y. Educ. Law, art. 12 §§ 549-553 (Supp. 1972-1973)), schools received grants of $30 per student (or $40 per student if the school’s facilities were more than 5 years old). Nyquist, 413 U.S. at 762-65. To qualify for the reimbursement plan, parents had to have an annual taxable income of less than $5,000, and the amount of reimbursement was limited to $50 for grade school students and $100 for each high school student. The deduction available to parents not qualifying for the reimbursement ranged from $1,000 per dependent for families with an adjusted income of less than $9,000 to zero for families with an adjusted income of $25,000 or more. Id. at 764-66.

Chief Justice Warren Burger and Justices Byron White and William Rehnquist dissented in part. They argued that while the repair and maintenance provisions were unconstitutional, the tuition reimbursement and tax deductions plans should have been upheld. Id. at 798 (Burger, C.J., dissenting in part).
399. Id. at 773.
400. Id. at 774. The Court reasoned that the entire repair budget of the sectarian schools could have been funded by the program, not just that portion attributable to nonsectarian education. Thus, some of the leftover funds could have financed religious education. Id. at 774, 779-80. The Court also held that the effect of the tuition reimbursements was to provide financial support for private sectarian schools, and thus its primary effect was to advance religion. Id. at 783, 785-89. The tax deduction plan was found to have an effect similar to that of the tuition reimbursement plan. Id. at 794. Whether or not any of the three provisions resulted in excessive state entanglement with religion was not considered by the Court.
implanted.\textsuperscript{401}

Based on the above statement by the Court, the Ohio voucher plan’s emphasis on low-income students would not be enough to save the plan.\textsuperscript{402} Further, it could be reasoned that since, in most instances, members of religious organizations would have first priority under the plan, the Ohio plan advances religion. Inasmuch as there is no designation in the plan as to where the money would go or what it would be used for, the \textit{Lemon} test’s “effects” prong would also be breached.

The concept of “entanglement” has also been central to several of the Court’s decisions in this area. In \textit{Meek v. Pittenger},\textsuperscript{403} the state of Pennsylvania, party to the original case of \textit{Lemon v. Kurtzman}, passed statutes which provided for the lending of instructional materials and equipment to sectarian elementary and secondary schools.\textsuperscript{404} The statutes also provided children at those schools with auxiliary services including counseling, testing, and psychological service.\textsuperscript{405} The Supreme Court ruled that both statutes violated the Establishment Clause.\textsuperscript{406} Although the statutes were said to be based on secular purposes, the Court held that the lending of materials and equipment “has the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefiting from the Act.”\textsuperscript{407} Regarding the auxiliary services given directly to children at the sectarian schools, the Court also stated that excessive entanglement was certainly present if the state was to be certain that its publicly employed personnel did not advance the religious mission of the schools.\textsuperscript{408} “Entanglement” was also found by the Court in \textit{Nyquist}\textsuperscript{409} in that the statute at issue required a further taxing of the state budget and the need for continuing appropriations to provide necessary funds to what was clearly a sectarian enterprise.\textsuperscript{410}

The Ohio plan clearly presents similar entanglement problems.

\textsuperscript{401} \textit{Id.} at 788-89 (citation omitted).
\textsuperscript{402} \textit{Ohio Scholarship Plan}, \textit{supra} note 4, at 6.
\textsuperscript{403} 421 U.S. 349 (1975).
\textsuperscript{404} \textit{Id.} at 352-53.
\textsuperscript{405} \textit{Id.}.
\textsuperscript{406} \textit{Id.} at 367-72.
\textsuperscript{407} \textit{Id.} at 363.
\textsuperscript{408} \textit{Id.} at 370.
\textsuperscript{409} 413 U.S. 756 (1973).
\textsuperscript{410} \textit{Id.} at 796-97.
Under the plan, students across the entire state would be eligible for vouchers between $1,600 and $3,000, meaning that millions of dollars from the state budget would be allocated for this purpose. Since these figures are designed to increase, new allocations would have to be made each year by the legislature, clearly violating the Nyquist holding. Furthermore, because the overwhelming majority of private schools are also religiously affiliated, fully 80 percent of the dollars would be sent to sectarian institutions.

Entanglement could also be found in the “Accountability” section of the plan. Student achievement in all schools participating in Ohio’s choice program will be “determined on a yearly basis by utilizing a uniform testing program for public and private schools applied on a national standard base.” Until such a base is established, the Ohio proficiency exam will be used. If such a standard is followed, it will require a massive amount of hours from state personnel to monitor the requisite procedures in private schools. This involvement would also run afoul of Lemon and render the state plan unconstitutional.

Court decisions concerning state aid to private sectarian schools are far from consistent. But the Lemon test has remained as the Supreme Court’s standard throughout. There are variations of the

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411. Ohio Scholarship Plan, supra note 4, at 4.
412. Id. at 10.
413. Id.
414. Although textbook loans to sectarian schools have been upheld, Wolman v. Walter, 433 U.S. 229, 255 (1977), loans for instructional materials and equipment were not, Meek v. Pittenger, 421 U.S. 349, 373 (1975). The supplying of state-prepared standardized tests, scoring services, and state reimbursement for costs arising from the administration of the state-prepared test were upheld, Committee for Pub. Educ. v. Regan, 444 U.S. 646,662 (1980), but a state law providing for reimbursement to private schools for costs associated with state-mandated record-keeping and testing of subjects was struck down, Levitt v. Committee for Pub. Educ. and Religious Liberty, 413 U.S. 472, 482 (1973). The Court has sanctioned property tax exemptions, Walz v. Tax Comm., 397 U.S. 664 (1970), and upheld tax deductions for tuition expenses, transportation, and taxes, when the deductions were available to parents of students attending private schools, Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973). Transportation costs have been upheld, Everson v. Board of Educ., 330 U.S. 1, 18 (1947), but reimbursements of tuition payments to low-income parents have been struck down, Sloan v. Lemon, 413 U.S. 825, 835 (1973). Annual state subsidies to sectarian higher educational institutions for nonsectarian purposes are permissible, Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672, 689 (1971), but state subsidies to private, sectarian primary and secondary schools for building maintenance and repair is not, Nyquist, 413 U.S. at 798. A program for speech, hearing, and remedial services to private school students on private school grounds was held unconstitutional, Meek v. Pittenger, 421 U.S. 349 (1975), although diagnostic speech, hearing, and psychological services on the premises of private schools passed constitutional muster, Wolman, 433 U.S. at 244.
Lemon test, though, that could influence the "choice" enterprise relative to private sectarian schools.

2. The "Endorsement Test"

A case suggesting that the Court might consider modifying the stance it took in Lemon is Lynch v. Donnelly. Justice Sandra Day O'Connor, in her concurring opinion in Lynch, maintained that the Establishment Clause is violated in two situations. The first occurs when government becomes excessively entangled with a religious institution, resulting in some religious groups gaining access to governmental powers not shared by all and possibly leading to a political constituency defined along religious lines. The second, more direct infringement occurs when government endorses or disapproves of a certain religion. One of the purposes of the Establishment Clause, according to Justice O'Connor, is to avoid political divisions. Her concurring opinion focused on institutional entanglement and endorsement or disapproval of religion in an attempt to clarify the Lemon test.

The endorsement test suggested by Justice O'Connor was grafted onto the primary or principal effects prong of Lemon, which she contended asks whether the government's actual purpose is to endorse or disapprove of religion. She reasoned that the strength of this application was that it avoided invalidation of some of the laws that the Court has upheld even though they may advance or inhibit religion, such as tax exemptions for religious organizations. Applying the endorsement test to the facts of Lynch, she held that the purpose of including a nativity scene in a holiday display was not promotion of the religious content of the scene, but rather the celebration of a traditional holiday. She then concluded that the na-

416. Id. at 687-88 (O'Connor, J., concurring).
417. Id.
418. Id.
419. Id. at 689 (O'Connor, J., concurring).
420. Id. at 690 (O'Connor, J., concurring).
421. Id. at 691 (O'Connor, J., concurring).
422. Id. at 691-92 (O'Connor, J., concurring).
423. Id. at 692 (O'Connor, J., concurring). Lynch involved an action challenging the inclusion of a nativity scene in a Christmas display maintained by the city of Pawtucket, Rhode Island. Id. at 671. O'Connor argued that a government celebration of Christmas is so common that it is generally not understood to be an endorsement of religion. O'Connor went on to explain that the nativity scene, a traditional symbol of the holiday, is commonly displayed with purely secular
tivity scene merely acknowledged religion and did not endorse it; thus, it passed her modified "endorsement" test. It is important to note that the endorsement test was adopted in *County of Allegheny v. American Civil Liberties Union*, another religious symbol case. In the majority opinion, Justice Harry Blackmun held that Justice O'Connor's concurrence in *Lynch* provided a more sound analytical framework for evaluating religious symbols than did the *Lynch* majority opinion.

In *School District of the City of Grand Rapids v. Ball*, Justice O'Connor again applied her endorsement analysis in another concurring opinion. At issue in *Grand Rapids* were programs offered by the school district in which parochial school students could attend religious symbols. *Id.* at 692 (O'Connor, J., concurring).

424. *Id.* at 692-93 (O'Connor, J., concurring).
426. *Id.* at 595. Whether or not Justice Blackmun would apply the use of the endorsement test to cases not involving religious symbols is questionable, given his emphasis on cases involving religious symbols.

In a separate opinion in *County of Allegheny*, Justice Anthony Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, concurred in part and dissented in part. *Id.* at 655 (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy set forth a new analytical model, the "coercion" approach, for analyzing this type of case. *Id.* at 659-63 (Kennedy, J., concurring in part and dissenting in part). He noted that *Lemon* provided the applicable framework for analyzing a petitioner's claims, but at the same time, he questioned the wisdom of retaining the *Lemon* test. *Id.* Justice Kennedy suggested that several earlier opinions of the Court would require eliminating all contact between government and religion if they were to be strictly applied. *Id.* at 657 (Kennedy, J., concurring in part and dissenting in part). The Establishment Clause, however, granted the government some latitude in recognizing and accommodating religion. *Id.* To not do so would result in a latent hostility toward religion, to the detriment of religion. *Id.*

According to Justice Kennedy, the case law on the Establishment Clause reveals two limiting principles. *Id.* at 659 (Kennedy, J., concurring in part and dissenting in part). First, government may not coerce anyone to support or participate in religion. *Id.* Second, government may not give direct benefits to religion in such a degree that it establishes a de facto state religion. *Id.* He acknowledged that the Court's earliest decisions had rejected coercion as a test for Establishment Clause violations. *Id.* at 660 (Kennedy, J., concurring in part and dissenting in part). He noted, however, that those previous decisions discussed direct coercion only, and not acts of indirect coercion. *Id.* at 660-61 (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy proposed that the proper analysis would be to apply Chief Justice Burger's opinion in *Walz* to determine whether a governmental act recognizing religion is more than just passive and symbolic. *Id.* at 661-62 (Kennedy, J., concurring in part and dissenting in part). Where the act is passive and does not amount to sponsorship, any benefit to religion is unlikely to present a risk of establishment as long as the act is not inherently coercive. *Id.* Because the city sought only to celebrate the Christmas season, the displays fell within the tradition of government accommodation. *Id.* at 663 (Kennedy, J., concurring in part and dissenting in part). Minus a coercive element, Justice Kennedy would have found the religious displays to be constitutional. *Id.* at 664-67 (Kennedy, J., concurring in part and dissenting in part).

427. 473 U.S. 373 (1985); see infra notes 458-59 and accompanying text (likening the tax scheme in *Ball* to the proposed Ohio plan).
public school classes during the regular school day ("Shared Time") or shortly after school ("Community Education"). Justice William Brennan, writing for the Court, applied the Lemon test and held that the program had the primary or principal effect of advancing religion. Justice O'Connor concurred in part, distinguishing between a parochial school teacher paid by the state, which would violate the Establishment Clause, and a public school teacher who taught parochial school students, which would not run as foul of the Establishment Clause. The former situation is analogous to broad-based school choice plans like those found in Ohio, Minnesota, and Nebraska, because funds to pay parochial school teachers under such schemes come indirectly from the state. Applying Justice O'Connor's endorsement analysis to school choice, therefore, would result in a finding that such a plan violates the Establishment Clause.

3. The "Coercion" Test

Another case possibly modifying the Lemon test is Lee v. Weisman. In that case, the Supreme Court was asked whether a benediction or invocation invoking a deity and delivered by clergy at a public school ceremony had the principal effect of advancing religion in violation the Establishment Clause. Justice Anthony Kennedy delivered the majority opinion in Weisman, and naturally based it on his concurring opinion in County of Allegheny, where

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428. Id. at 375-77. On the same day that Grand Rapids was decided, the Court held in Aguilar v. Felton, 473 U.S. 402 (1985), that New York City's use of public funds to pay public school employees to teach in parochial schools violated the Establishment Clause. Justice O'Connor dissented in Aguilar and concurred and dissented in part in Grand Rapids.

429. Grand Rapids, 473 U.S. at 383, 397. Justice Brennan cited three reasons for his holding: (1) teachers might have been involved in religious instruction; (2) the programs might have provided a symbolic link between religion and education; and (3) the programs might have indirectly subsidized religious functions. Id. at 397.

430. Id. at 398-99 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor wrote:

When full-time parochial school teachers receive public funds to teach secular courses to their parochial school students under parochial school supervision, I agree that the program has the perceived and actual effect of advancing the religious aims of the church-related schools. This is particularly the case where, as here, religion pervades the curriculum and the teachers are accustomed to bring religion to play in everything they teach.

Id. at 399-400 (O'Connor, J., concurring in part and dissenting in part).


432. Id. at 2652.

433. 492 U.S. 573, 655 (1989) (Kennedy, J. concurring); see also supra note 426 and accom-
he first announced his "coercion" analysis. The "coercion" test holds that it is unconstitutional for public officials to be involved in religious activity that induces students to participate through public or peer pressure.\footnote{434} This includes a prohibition against direct pressure as well as indirect or subtle coercion which is psychological or social in origin.\footnote{435} The majority in Weisman held that inasmuch as graduation is a ceremony which students are subtly obligated to attend, state authorized prayer at graduation coerces some students to compromise their beliefs.\footnote{436} Although Justice Kennedy went to great lengths in his opinion in Weisman to limit the holding to the facts of the case,\footnote{437} the decision could have implications for state aid to education relating to "choice" in that the standard used to determine constitutionality is one of coercion.

The inclusion of private sectarian schools in a choice program has the potential for ensnaring Justice Kennedy's "coercion" test. Private schools, both secular and sectarian, provide primarily academic programs and, in contrast to public schools, rarely offer generalized or vocational courses of study.\footnote{438} The students who attend such schools tend to score better on achievement tests than their public school counterparts,\footnote{439} have higher attendance rates,\footnote{440} and have fewer behavioral problems.\footnote{441}

The state of Ohio's proposed choice voucher plan serves as an example of when the "coercion" test might be applied. Proposed house bills already before the legislature\footnote{442} and the Governor's Ohio Scholarship Plan\footnote{443} work in concert to effectuate this possibility. Ohio House Bills 635\footnote{444} and 825\footnote{445} both announce the participation of private sectarian schools in the state's choice program. Ohio

panying text (discussing Justice Kennedy's coercion analysis in County of Allegheny).

\footnote{434}{Id. at 659-62.}
\footnote{435}{Weisman, 112 S. Ct. 2658-59.}
\footnote{436}{Id. at 2661.}
\footnote{437}{Id. at 2655.}
\footnote{438}{JAMES S. COLEMAN ET AL., NATIONAL CENTER FOR EDUC. STATISTICS, CONTRACTOR REPORT: PUBLIC AND PRIVATE SCHOOLS 282 (1981).}
\footnote{439}{Id. at 172.}
\footnote{440}{Id. at 102.}
\footnote{441}{Id. at 102-03.}
\footnote{443}{OHIO SCHOLARSHIP PLAN, supra note 4.}
\footnote{444}{1992 Ohio H.B. 635.}
\footnote{445}{1992 Ohio H.B. 825.}
House Bill 635 also stipulates that a sectarian school that accepts a student under the plan must adopt a statement that "the school shall not require any voucher student to participate in any religious activity."\(^{446}\) The Ohio plan takes this issue a step further under its guidelines on admissions to such schools, permitting the private sectarian schools to "require attendance at, but not require participation in, religious activities of the school."\(^{447}\) The activity that can be derived from such a statement is similar to that declared unconstitutional under *Weisman*. There, students were said to be subject to the "coercion" of officials by being forced to listen to a school prayer at graduation ceremonies.\(^{448}\) While school officials defended the action by stating that students did not have to listen to the prayer or, in the alternative, could have decided not to attend the ceremonies,\(^{449}\) the Court's response was telling. To wit, the Court noted that attendance at graduation is important to students.\(^{450}\) It is the culmination exercise of several years of school activity and hence is "one of life's most significant occasions."\(^{451}\) While attendance may not be required, a student cannot just willy nilly decide to be absent, for being absent would mean "forfeiture of those tangible benefits which have motivated the student through youth and all her high school years."\(^{452}\)

By analogy, students under the Ohio choice plan, who carry the state's dollar, may feel that they would forfeit the chance of a "better" education by not going to a private sectarian school. Should they go to such schools, they cannot just decide not to participate in any religious activity, for the trappings of such religious activity will be replete within the institution. Hence, as in *Weisman*, there would be the subtle pressure of conformity induced by the non-verbal messages that ring out of a sectarian institution. There would also be present the direct coercion held unconstitutional by *Weisman*. Students under the Ohio plan are compelled to attend religious activities of the sectarian schools involved in the choice program.\(^{453}\)

\(^{446}\) 1992 Ohio H.B. 635, at 5; see also 1992 Ohio H.B. 825, at 6 ("[T]he school shall not require any voucher student to profess any religious tenet or adhere to any article of faith or religious doctrine as a condition of admission").

\(^{447}\) *Ohio Scholarship Plan*, supra note 4, at 7.


\(^{449}\) *Id.* at 2659.

\(^{450}\) *Id.*

\(^{451}\) *Id.*

\(^{452}\) *Id.*

\(^{453}\) *Ohio Scholarship Plan*, supra note 4, at 7. However, the students are not required to
This may signal to students that the state is pushing them to adhere to a particular way of thinking inconsistent with their values and background. This is similar to the kind of pressure that Justice Kennedy found wanting under his "coercion" test. As a result, Ohio's proposed legislation on choice appears to be unconstitutional under this test.

4. Can Judicial Support of Sectarian Schools Save Choice?

Proponents of choice often cite two cases to support their position: *Mueller v. Allen*[^454] and *Witters v. Washington Department of Services for the Blind.*[^455] In *Mueller*, the Supreme Court, by a 5-4 vote, upheld a Minnesota law which permitted residents to deduct expenses for tuition, textbooks, and transportation for students at both public and private schools.[^456] In validating the law, the majority reaffirmed both *Lemon* and *Nyquist*, but indicated that states have discretion in tax statutes, especially when they benefit all students, whether or not the students attend a public or private school.[^457]

It is doubtful that the Ohio plan could gain strong support from the *Mueller* decision because the plan is not based on a tax statute and it in no way parallels the Minnesota law. In fact, Ohio's proposed plan is more like that found in *School District of the City of Grand Rapids v. Ball*,[^458] where the Court saw no "meaningful distinction . . . between aid to the student and aid to the [sectarian] school."[^459] To wit, there is no language in the Ohio plan that determines how funds will imbue to the private schools complying with the statute.

In the other case relied on by choice supporters, a unanimous Court in *Witters* ruled that a state payment for vocational education to a blind student did not upset the three prongs of *Lemon* simply...
because the student chose to use the money to attend bible school.\textsuperscript{460} In its decision, the Court emphasized the minimal amount of funds going toward the religious program and the likelihood that only one person would get religious training with public funds.\textsuperscript{461} As noted, the Ohio plan is apposite; unlike the plan in \textit{Witters}, large numbers of students and a large amount of funds are likely to end up supporting sectarian schools.

Even if \textit{Witters} could be interpreted to validate the awarding of grants to the parents of sectarian school students, there is some question as to whether it would apply to elementary and secondary students. The Court has, in the past, subjected public funding of higher education to considerably less Establishment Clause scrutiny than public funding of elementary and secondary education. In \textit{Tilton v. Richardson}\textsuperscript{462} the Court stated, "There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools. . . . There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination."\textsuperscript{463}

Research has also shown that the Court has found Justice O'Connor's endorsement analysis particularly useful in cases involving the education of children between kindergarten and the twelfth grade.\textsuperscript{464} The impressionability of young children has led the Court to follow the general rule that the wall of separation between church and state must be higher in elementary and secondary education.\textsuperscript{465}

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\textsuperscript{461} \textit{Id.} at 488.
\textsuperscript{462} 403 U.S. 672 (1971) (upholding the constitutionality of the Higher Education Facilities Act of 1963, which provided federal construction grants to colleges and universities, and finding that providing such grants to church-related schools did not have the effect or purpose of promoting religion).
\textsuperscript{463} \textit{Id.} at 685-86.
\textsuperscript{465} Underwood, \textit{Establishment Analysis}, supra note 464, at 56. The Court explained this protectiveness of students in secondary and elementary education settings in \textit{Edwards v. Aguillard}, 482 U.S. 578 (1987). The court in \textit{Edwards} struck down a Louisiana statute that prohibited the teaching of evolution in public schools unless it was accompanied by instruction in "creation science." \textit{Id.} at 578-79. In holding that the statute was motivated solely by a religious purpose, the Court stated:

The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools
This is a consistent theme, for in *Weisman*, the majority, using the "coercion" test, indicated that its decision was being made precisely because the audience in question consisted of schoolchildren.\(^{466}\) Such students are susceptible to peer pressure as well as the presence of authority relative to the development of religious values.\(^{467}\) The voucher plan in Ohio obviously relates to students in primary and secondary schools and is therefore not buoyed by the decision in *Witters*.

The *Ohio Scholarship Plan*’s use of choice vouchers must be scrutinized for additional reasons. It carries an anti-discrimination clause, but permits students belonging to the various religious sects to have priority for admission to religious schools.\(^{468}\) This could mean that some students will never have the opportunity to attend these religious schools. While the private schools are forbidden to consider race in their policies, they can consider gender and disability.\(^{469}\) In the latter area this is an important issue, especially for Ohio and states with similar choice legislation. In 1990, the United States Department of Education issued an executive opinion indicating that private schools did not have to accept handicapped children.\(^{470}\) This has far reaching implications inasmuch as the writer of that opinion is today Ohio’s Superintendent of Public Instruction.\(^{471}\)

The tuition voucher program in Ohio poses a number of concerns of which educators, legislators, and attorneys in that state — and others like it — must be conscious. The legal problems notwithstanding, there is the issue of a mass desertion by the best and brightest students. Non-magnet public schools could again become

\begin{itemize}
  \item with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. \ldots The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students’ emulation of teachers as role models and the children’s susceptibility to peer pressure. \ldots Furthermore, “[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the state is it more vital to keep out divisive forces than in its schools \ldots.”
\end{itemize}


\(^{467}\) *Id.* at 2659.

\(^{468}\) *Ohio Scholarship Plan*, *supra* note 4, at 6-7.

\(^{469}\) *Id.*

\(^{470}\) *Carnegie Report*, *supra* note 42, at 68.

\(^{471}\) Dr. Ted Sanders, State Superintendent of Public Instruction for Ohio.
warehouses for only the poor with legislative allocation at a trickle. The public schools are clearly ill. The question is whether choice in general and choice vouchers in particular are the right medicine to ensure survival.

VI. CONCLUSION

This study has attempted to inform the reader of the complexities of the school "choice" enterprise. The enactment of choice legislation has implications for legislators, attorneys, school personnel, and students who are either beneficiaries or victims of these programs.

Choice programs entail significant hurdles for desegregation, disability, and the Establishment Clause. The progression of case law from Brown to Freeman suggests that choice may contribute to the re-creation of predominantly one-race schools. However, the precepts of Brown, as supported by Freeman, may serve as important indicators that the judiciary will not support a return to segregation. The challenge for legislators and school districts, like those in Ohio and other "choice" states, is to create operating policies that maximize opportunities for students while minimizing segregative results. The danger that must be guarded against is a sophisticated return to segregation under the guise of a desperate attempt to attack the decline of quality education.

School choice programs also affect disabled students. The rights of these students are created and protected by federal statutes and corresponding state laws. Nevertheless, interpretation of these legal protections, while ostensibly designed to help disabled children, may actually serve as a hindrance to decision-making on the part of parents. Research in this area points to the fact that parents of disabled children may not have the "choices" that accrue to the parents of able-bodied students. This may be a violation of the aforementioned federal statutes, of which school personnel must be cognizant before fully implementing a choice program.

Choice involving private, sectarian schools may run into difficulty with the three prongs of the Lemon test. Any choice program must have a predominantly secular purpose, must neither advance nor inhibit religion, and must not foster government entanglement with religion. One key to a viable choice program involving private schools, then, is the formation of a plan that keeps government involvement to a minimum. This, however, raises other issues such as those found in the Milwaukee experiment, where limited govern-
ment oversight created student victims of choice programs through schools that were forced to shut down.

Of equal importance with regard to private sectarian schools is the definition of "establishment." Under the Lemon test, the Supreme Court has wavered back and forth between broad and narrow interpretations of the First Amendment of the Constitution. More significantly, however, the Court has fashioned other tests involving the Establishment Clause that may ultimately decide the fate of school choice plans.

But there are additional concerns that those involved in school reform must face in this era of academic uncertainty. While the purpose of reform must certainly be to improve schools and thereby increase student achievement, there must also be other reasons for reform. Reform must do more than teach more math, science, English, and basic skills. It must be more than lengthening the school day, rewarding teachers, and placing a heavy focus on learning computer skills. Reform must aid students in developing skills and attitudes that are necessary to function in a democratic society and in developing a commitment to justice, equality, and good citizenship. These latter issues were noticeably missing from A Nation at Risk, and this serves as a basic criticism of that report and others like it. The report was a rallying cry for a very complicated set of problems, not an analysis of those problems. Hence, the reaction around the country was to try to find quick fixes for complex problems without surveying the causes or victims. School choice may be one of those quick fixes.

This study has attempted to demonstrate that choice has gone through little analysis before being implemented by school systems. Detractors of choice have charged that this is an elitist approach for dealing with students and does more harm than good for many of the persons such programs are designed to aid. Hence, choice may not improve achievement for those who need it most; choice is more of a selection process designed to give those students already in the circle of success a boost of performance.

These statements can now be made because there has been some assessment of choice. The Carnegie Foundation, for example, has determined that legislatures have initiated most public school choice programs without addressing school funding disparities and without

472. See supra note 36 and accompanying text (discussing the conclusions of the report).
fully informing parents and other citizens about the programs. As for choice involving private schools, promises in those schools that are participating are “outdistancing reality.” And the reality is that most private schools will not accept students most in need because this would relieve those schools of their competitive edge in recruiting the “better” students.

What is called for then is a reform movement which authors like Henry Levin call a “restructuring” or “drastic revamping of public schools in terms of their . . . effectiveness.” Many researchers in the choice area have come to the same conclusion. Most students will continue to be taught in the district of residence. The appropriate public policy, therefore, is to increase efforts to improve the quality of those schools whenever they are deemed to be inadequate. What is needed under “restructuring” is a guarantee of accountability from schools and their staffs. The Carnegie Report cites, among other things, the demonstrable effectiveness of school programs that include information on student academic progress, attendance, graduation rates, curriculum standards, and parental participation. Such a program would be evaluated by a state appointed team of education experts, similar to accreditation teams for colleges. The team would have the power to sanction schools and to even replace leadership if sufficient evidence of a positive change was not provided. However, even this is not enough if true reform is desired. Sufficient funds to educate students must be provided to all school districts. This, too, poses several legal issues. States are now posturing through concerns of finance equity; Kentucky, Texas, and Montana have already brought forth significant case law, and the battle is ongoing in Ohio. While no one has the formula to aid school systems in better educating their students, we do know from the experience in East Harlem, New York, that student achievement increased with the infusion of good and committed teachers, good and committed administrators, planning on the part of those personnel, the absence of per-pupil funding disparities, and adequate funding from government sources. While it was not present in East Harlem, added to this list should be a desire to educate all students regardless of background. This is the needed “restructuring” of American

473. Levin, Vouchers and School Choice, supra note 20, at 279.
474. CARNEGIE REPORT, supra note 42, at 80.
475. Id.
476. Id.
education, and it can be done in any school system with or without the inclusion of “choice.”
APPENDIX A

Summary of Existing Choice Programs

1. Alabama

Under its "Schools of Choice" plan, Alabama's school districts may, at their option, participate in either intradistrict or interdistrict choice programs. To date, however, no school system has chosen to participate in either of these programs. Alabama's legislation includes provisions for both magnet and alternative schools. Such programs already exist in major cities such as Huntsville, Montgomery, and Mobile.

2. Alaska

As of yet, no choice legislation has been introduced in Alaska. The Governor of Alaska did establish a task force on choice, which recommended the creation of charter schools and interdistrict transfers, but the state Commission declined to support a voucher program.

3. Arizona

Arizona is currently examining a comprehensive school choice bill. The bill, which was introduced in the Arizona House, calls for statewide open enrollment within public schools. The bill allows all children between the ages of six and twenty-one to attend any school located within their attendance area if they meet the requirements of that school. The governing board will establish the pupil enrollment for the school and each grade. Schools are required to consider disabled students for acceptance under the same provisions used for nondisabled students, so long as the school is able to meet the disabled student's individualized education program.

Beginning in 1995, parents may request enrollment in a nonresi-
dent school by submitting an application before February 1 of the
previous school year.\textsuperscript{488} School districts are not compelled to provide
transportation for the transferring students.\textsuperscript{489} In addition, the Gov-
ernor's Education Reform Task Force, in 1991, considered a propos-
al to grant a voucher for students currently enrolled in private ele-
mentary and secondary schools in the state, with the intent of ex-
panding it in the future.\textsuperscript{480}

4. Arkansas

A comprehensive open enrollment plan, patterned after the Min-
nesota law,\textsuperscript{491} was passed in March of 1989.\textsuperscript{492} This legislation
openly promotes competition for students between school districts as
a means of improving the responsiveness and effectiveness of Arkan-
sas's schools.\textsuperscript{493} The law includes limitations on transfers —
designed to protect court-ordered desegregation plans and racial
balances in school districts — and measures to prevent the recruit-
ment of gifted students and student athletes.\textsuperscript{494} Students trans-
ferring to a nonresident school district are ineligible for interscholastic
athletic competition during the first year of the transfer.\textsuperscript{495} Under
the law, parents bear the costs of transportation; no exceptions or
special provisions are made for economically disadvantaged stu-
dents.\textsuperscript{496} State per-pupil aid follows a transferring student to the re-
ceiving school district.\textsuperscript{497}

5. California

A California statute gives local school districts the authority to
grant students permission to enroll in schools outside their resident
district boundaries. Additionally, the governing board of any school
district may establish one or more alternative schools within a dis-

\textsuperscript{488} Id. at 7.
\textsuperscript{489} Id. at 8.
\textsuperscript{490} Education Reform the Money Myth, ARIZ. REPUBLIC/PHOENIX GAZETTE, Nov. 21, 1991, at A14.
\textsuperscript{491} See infra notes 570-80 and accompanying text (discussing the Minnesota choice
legislation).
\textsuperscript{492} Arkansas Public School Choice Act of 1989, ARK. CODE ANN. §§ 6-18-206 to -223
\textsuperscript{493} Id. § 6-18-206(a)(2).
\textsuperscript{494} Id. paras. (a)(3), (g)(1)-(7).
\textsuperscript{495} Id. para. (e).
\textsuperscript{496} Id. para. (c).
\textsuperscript{497} LEGISLATION REVIEW, supra note 5, at 6 (1992 Update).
\textsuperscript{498} CAL. EDUC. CODE § 58500 (West 1989).
the county board of education adopt a plan to conduct an outreach program to inform every parent of the opportunity to choose a school for their child.500

In addition to the enacted legislation, a California-based organization, the Excellence through Choice in Education League ("Ex-CEL"), conducted a campaign to place an initiative on the 1992 state ballot that would have provided a voucher to students wanting to attend public or private schools in the state.501 The scholarship value for each child would have provided at least 50 percent of the average amount of state and local government spending per public school student in grades kindergarten through twelve.502 In essence, this initiative would have allowed any school to become a charter school.503 However, the California Supreme Court ruled that the initiative lacked the requisite validated signatures, and it was subsequently removed from the ballot.504

Early in 1992, several Democratic state legislators proposed charter school legislation505 which would substantially deregulate charter schools but would still require charter schools to meet specific educational standards.506 In July of 1993, the Governor of California signed a bill allowing every school to receive monies from the State School Fund if it establishes a policy of open enrollment within its district for residents of the district.507 Also in July of that year, the Governor signed a bill authorizing the governing board of any school district to admit pupils residing in another school district to attend any school in the nonresident district.508

6. Colorado

The Colorado "Public Schools of Choice" plan was passed in 1990 as part of the state's Education Appropriation Act.509 It man-

499. Id. § 58512.
500. Id. § 58501.
502. Id.
503. Id.
504. CARNEGIE REPORT, supra note 42, at 100.
506. Id.
dates that every school district adopt policies and procedures for enrollment in particular programs or schools within each school district. Limitations on enrollment in such intradistrict programs are permitted only if there is a lack of space within a program or school or if there is a need to maintain compliance with a desegregation plan. Transportation funds are not provided.

The plan also establishes a pilot interdistrict choice program, intended to be in place until July 1, 1997, in which the state department of education can select no more than three participating school districts from representative geographical areas of the state. Additionally, the plan includes a grant awards program to school districts participating in the pilot program. It also creates a "Schools of Choice" fund, whereby funds set aside for the interdistrict program are to be utilized for the direct and indirect costs of implementing and administering the pilot program.

7. Connecticut

A Task Force to Study the Feasibility of Establishing and Maintaining Charter Schools was created by the Connecticut Legislature in 1991. In 1992, the Education Committee of the Connecticut General Assembly held hearings on a bill designed to implement the Task Force's findings. However, the bill never made it out of committee because a prescribed, legislatively-imposed deadline was not met. The education committee report became Legislative Bill 323 in 1993, but failed to pass the Assembly because legislators felt it was politically unfeasible to put state funds into charter schools when the public schools were desperately in need of funds.

8. Delaware

Delaware presently does not have a choice program in place, and

510. Id. § 22-36-101(1).
511. Id. paras. (3)(a), (d). See id. for additional bases for limitations on enrollment under the plan. The city of Denver is excluded from the plan because a court-ordered desegregation plan is in place. Katie Kerwin, Schools Open Boundaries, Cross Fingers, ROCKY MOUNTAIN NEWS. Aug. 25, 1991, at 6.
514. Id. § 22-36-104(1).
515. Id. § 22-36-105.
516. LEGISLATION REVIEW, supra note 5, at 3 (1992 Update).
517. Id.
518. Id.
there is no choice legislation currently before the state legislature.\textsuperscript{520}

9. \textit{Florida}

During 1991, two choice proposals were introduced in the Florida House. One would have created a statewide voucher choice program, issuing certificates for students to attend public or private schools.\textsuperscript{521} This plan, however, was rejected by the legislature.\textsuperscript{522} The second choice proposal, which was enacted in 1992, calls for vouchers for "at-risk" ninth grade students who are enrolled in dropout prevention programs.\textsuperscript{523} Known as the Dropout Prevention Act, the bill is a comprehensive dropout prevention program with provisions for dropout retrieval activities\textsuperscript{524} and educational alternative programs.\textsuperscript{525}

10. \textit{Georgia}

A postsecondary options bill passed the Georgia General Assembly in 1992.\textsuperscript{526} The bill stipulates that pupils may enroll in public or private postsecondary institutions and receive dual credit towards earning a high school diploma and a college degree.\textsuperscript{527}

11. \textit{Hawaii}

Hawaii does not have a statewide choice program but permits limited intradistrict and interdistrict transfers with the agreement of both the sending and receiving schools.\textsuperscript{528}

12. \textit{Idaho}

The Idaho "Enrollment Options Program" passed the legislature in 1990 and was implemented during the 1991-92 school year.\textsuperscript{529} Under the plan, parents or guardians must submit applications by February 1 for enrollment in a new district the following school year.

\textsuperscript{520} \textsc{Carnegie Report}, \textit{supra} note 42, at 101.
\textsuperscript{521} Id. at 102.
\textsuperscript{522} Id.
\textsuperscript{524} "Dropout retrieval activities" are defined by the statute as "educational programs and activities which identify and motivate students who have dropped out of school to reenter school in order to obtain a high school diploma or its equivalent." \textit{Id.} para. (3)(a).
\textsuperscript{525} "Educational alternatives programs" are educational programs "designed to offer variations of traditional instructional programs and strategies for the purpose of increasing the likelihood that grade 4 through grade 12 students who are unmotivated or unsuccessful in traditional programs remain in school and obtain a high school diploma or its equivalent." \textit{Id.} para. (3)(b).
\textsuperscript{526} \textsc{Ga. Code Ann.} \S 32-615a.1(b) (Harrison Supp. 1992).
\textsuperscript{527} Id.
\textsuperscript{528} \textsc{Carnegie Report}, \textit{supra} note 42, at 102.
\textsuperscript{529} \textsc{Idaho Code} \S 33-1402 (Supp. 1993).
Parents are responsible for transportation to and from the school or to a bus stop within the receiving district. The law restricts a student's participation in extracurricular activities after transfer to another district. Under the plan, no districts can prevent students from leaving a school district, but any district may opt not to receive pupils under the enrollment options program.

13. Illinois

In 1992, Illinois enacted an intradistrict open enrollment plan which is subject to the space available in each school district. Resident students are given priority status and all other applicants must participate in a lottery for the remaining spaces.

14. Indiana

Senate Bill 393 was first introduced into the Education Committee of the Indiana General Assembly in 1991, and was introduced again in 1992. Both versions of the legislation "provide[d] scholarships for all children in the state to use at any school of their choice, reduce[d] regulation of scholarship-redeeming schools and g[ave] teachers and schools more autonomy, provide[d] for state-wide testing, and add[ed] new measures to help preschool children." However, the bill never made it out of the Education Committee during the 1993 legislative session.

15. Iowa

In 1989, the Iowa legislature passed a comprehensive open enrollment program patterned upon the Minnesota plan. The goals of the legislation included the elimination of the monopoly of the district of residency and the promotion of competition between the districts in order to motivate school improvement. Unfortunately, the legislation contains no safeguard provisions to help schools that lose

530. Id.
531. Id.
532. Id.
533. Id.
536. Id.
537. Telephone interview with Charles Myers, Legislative Assistant, Legislative Information Service, Indiana General Assembly (Sept. 1, 1993).
539. See infra notes 570-80 and accompanying text (examining the Minnesota choice legislation).
students as a result of transfers.\footnote{541}

In the initial transfer application, parents must state the reasons for requesting the transfer from one school district to another.\footnote{542} In addition, during the first year of enactment, the legislation afforded resident districts the option of limiting student transfers to no more than five percent of the district's total enrollment.\footnote{543} Athletic recruitment is also prohibited by the legislation.\footnote{544} Transportation costs are paid by parents except where the student is eligible for free or reduced-price school lunches.\footnote{545} In general, transferring students must remain in the new district of choice for four years unless their family moves or their parents petition the district for a change.\footnote{546}

16. Kansas

Numerous choice proposals have been introduced in the Kansas legislature, but none have made it out of committee to date.\footnote{547}

17. Kentucky

In 1989, Kentucky undertook a statewide educational restructuring plan. The resulting legislation gives parents, whose children are enrolled in schools determined to be in academic crisis, the option to select enrollment in another public school.\footnote{548} During the 1991 session, choice legislation was examined in the House Education Committee but no action was taken.\footnote{549}

18. Louisiana

During the 1990 and 1991 legislative sessions, the Louisiana legislature examined a voucher system which would have given parents subsidies to choose a public, private, or parochial institution, with funding following the student to the new school.\footnote{550} No legislation resulted from this action.\footnote{551}
19. Maine

In 1991, 1992, and 1993, an education choice bill, "An Act to Establish a Choice Program," was introduced to the legislature but later died.552

20. Maryland

During the 1991 legislative session, a pilot voucher program for low-income students enrolled in the Baltimore City elementary schools was proposed.553 The bill would have allowed up to 100 such students to attend any school in the state of Maryland.554 The bill received literally no support in the House Ways and Means Committee and was reported out of committee unfavorably.555

Early in 1992, another version of the Baltimore voucher pilot program was introduced in the House Ways and Means Committee.556 This version extended the parameters of the 1991 proposal to Prince George's County students as well.557 In 1993, Governor William Donald Schaefer publicly endorsed a bill which would have allowed 200 low-income Baltimore children to attend private schools at the taxpayers' expense.558 The proposal was defeated in March of 1993 by a narrow margin.559

21. Massachusetts

An interdistrict choice bill was enacted in Massachusetts during the 1991 legislative session.560 The bill included language that made it obligatory for the state to fund the program;561 however, the legislature did not appropriate funds, nor did it include language necessary to implement the bill.562 Amendments passed during 1991 gave the state the right to take money from a city or town's local aid program to help pay the tuition of a student transferring out of the

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554. Id.
555. Id.
557. Id.
561. Id.
562. Id.
school district in that city or town.\textsuperscript{563} This particular facet of the legislation has caused some districts to lose hundreds of thousands of dollars in local aid to other districts. One low-income city lost \$300,000 in local aid to a more affluent city through the transfer program.\textsuperscript{564}

The interdistrict open enrollment system, as it stands following the 1991 amendments, states that any child may transfer from the school district or residence to a public school in another school district as long as the transfer is approved by the receiving district’s school committee.\textsuperscript{565} The state pays the school committee a tuition rate which cannot exceed the average expense per student.\textsuperscript{566} In addition, the law includes language prohibiting discriminatory admission policies based on the race, color, religion, creed, national origin, sex, age, ancestry, athletic performance, physical handicap, special need, academic performance, or English proficiency of a child.\textsuperscript{567} Currently, the issue of transportation expenses is unsettled.\textsuperscript{568}

22. \textit{Michigan}

Michigan presently has legislation pending that would create a mandatory statewide choice program applicable to all school districts.\textsuperscript{569}

23. \textit{Minnesota}

In 1987, Minnesota passed a comprehensive interdistrict open enrollment program whereby students residing in all districts may transfer across district lines as long as the receiving district has space available.\textsuperscript{570} The legislation went into effect in the September of 1990,\textsuperscript{571} and it “allows taxpayers to deduct from state taxable income amounts paid for tuition, textbooks, and transportation of dependents attending an elementary or secondary school of whatever


\textsuperscript{564} Id.


\textsuperscript{566} Id.

\textsuperscript{567} Id.


\textsuperscript{570} \textit{Minn. Stat. § 120.062(1), (2)} (1993).

\textsuperscript{571} Id. § 123.
Parents can deduct up to $650 per dependent for grades kindergarten through six and up to $1,000 per dependent for grades seven through twelve. State per-pupil funding follows each student to the receiving district under the Minnesota legislation. Under the open enrollment plan, transportation costs are generally borne by the parents, except for students who are eligible for the school lunch program; the state reimburses the receiving districts for transportation of these students. The open enrollment plan does not include provisions to aid schools which may lose students through the transfer program.

In 1991, the Minnesota Legislature expanded the choice program. Passage of a bill creating charter schools (also referred to as outcome-based education) permitted the development of up to eight such schools in the state, with no more than two per district. A local school board and the state board of education must approve such schools, and the schools can be established only by licensed teachers practicing outcome-based education. Charters may be granted to private schools, though not to those affiliated with sectarian institutions.

24. Mississippi

The state’s governor has “campaigned in favor of school choice and has created a task force looking at school reform, but no choice proposals have emerged as yet. In addition, Senator Mike Gunn introduced legislation, S 2590, that would ask the State Board to study the possibility of offering post-secondary [sic] options to 11th and 12th graders.” The legislature has taken no further action concerning school choice.
25. Missouri

The latest data from the United States Department of Education concerning school choice in Missouri shows that in 1992, three bills involving vouchers or tuition tax credits were introduced into the legislature.\(^{583}\) However, there was no official action on any of the proposed legislation.\(^{584}\) In 1993, however, the state legislature approved Senate Bill 380, "The Outstanding Schools Act," to comply with state standards for equalizing academic standards and meeting equity funding goals for public education in the state.\(^{586}\) There is a "choice" provision in the bill whereby a student attending those school districts deemed "unaccredited" by the state board of education may enroll in an accredited school in another district. The student's resident school district pays the necessary tuition and transportation costs."\(^{586}\)

26. Montana

Currently, Montana is not considering any school choice legislation.\(^{587}\)

27. Nebraska

Nebraska's open enrollment law\(^{588}\) is modeled after the Minnesota open enrollment program.\(^{589}\) The state began phasing in the program during the 1990-91 school year, and it was fully implemented by the start of the 1993-94 school year.\(^{580}\) One of the main goals of the legislation is to induce competitiveness between school districts as a means to promote improved instruction, although no specific language promoting improvements for all schools was attached to the open enrollment plan.\(^{591}\) Transporting students to the new school district is the parents' responsibility, although receiving districts have the option to provide transportation.\(^{592}\) Students re-

\(^{583}\) Legislative Review. supra note 5, at 9.

\(^{584}\) Id.


\(^{587}\) Carnegie Report. supra note 42, at 106.


\(^{589}\) See supra notes 570-80 and accompanying text (examining the Minnesota choice legislation).


\(^{591}\) Id.

\(^{592}\) Id. § 79-3410.
questing transfers in the state may do so only once unless their family relocates, and the student must remain in the new school district for at least one year. The legislation requires parents to describe a "substantial educational opportunity available" in the receiving district that is not available in the student's district of residence.

Until the 1993-94 school year, participation in the open enrollment program was voluntary. During the 1991-92 and 1992-93 school years, transfers were limited to five and ten percent, respectively, of the districts' total enrollment. Such restrictions on transfers no longer apply after the 1993-94 school year.

28. Nevada

The legislature may consider choice legislation during the 1993 session, and "[s]tate education officials predict 'a hard-fought battle,' particularly if the plan includes private schools."

29. New Hampshire

In 1992, the New Hampshire Supreme Court decided two cases that threatened the school choice programs in the state. The first concerned Epsom, New Hampshire, a small town without a public high school. In 1990, Epsom selectmen passed a tax abatement program whereby residents would receive up to $1,000 in tuition reimbursement for sending their children to high schools in other public school districts. Thirty-five local residents sued, arguing that such local legislative action was in violation of the state constitution. The New Hampshire Supreme Court ruled that the local government was "less than boundless" in its authority to interpret the state constitution regarding tax abatements and that the Epsom selectmen had failed to meet the "good cause" requirement to qualify under the state statute; hence, the tax abatement plan was overturned. The court did not address the issue of students attending private or sectarian schools or the effect of state action on tax

593. Id. § 79-3403, -3406.
594. Id. § 79-3406.
596. Id. § 79-3405(3).
597. CARNEGIE REPORT. supra note 42, at 107.
599. Id. at 815.
600. Id.
601. Id. at 817.
602. Id. at 816.
abatements.

In the second action, the state supreme court was asked by the legislature to render an advisory opinion on whether a proposed state voucher program that allowed parents to send their children to any approved school — public, private, or sectarian — and which required the sending district to pay up to 75 percent of the tuition of the new school would pass state constitutional muster. The court ruled that the voucher legislation would violate the state's constitutional prohibition against compelling any person "to pay towards the support of the schools of any sect or denomination." The court also noted that sectarian schools "predominate among the non-public schools."

30. New Jersey

The Governor and two legislators proposed an amendment to the state's Quality Education Act in 1992. The bill authorizes the creation of two charter schools in each county of the state. The schools would be created and run by teachers and parents and could be limited by age group, grade level, teaching method, or subject matter. Limits on achievement, aptitude, or intellectual or athletic prowess are prohibited, but there is nothing in the language of the bill prohibiting discrimination based on race, gender, or disability. The bill has not yet received a recommendation from the legislature's education committee.

In 1993, two legislators introduced a public school choice program. This program would allow pupils in certain public school special needs districts to attend a school in another public school district starting in the 1994-95 school year. The board of education in each district that decides to participate in the program would determine the number of nonresident pupils which could attend its schools. Any pupil suffering from a severe disability would not be
allowed to participate in this program, and transportation costs would be provided by the school district of residence. If the school district of residence fails to provide transportation, the school district of attendance would receive aid and provide transportation. If neither district provides transportation, the parents of the pupil would receive $675 or the per-pupil amount determined for non-public school transportation to assist with transportation costs.

31. New Mexico
Based on New Mexico’s open enrollment program, students may attend any public school in the state if space is available. State per-pupil funding follows the student to any school, but districts are only responsible for providing transportation for students attending a school in their district of residence. No new choice legislation had been introduced as of the end of the 1992 session. A voucher plan was listed as a bill in 1991, but was not carried over into the 1992 legislative session.

32. New York
Two choice proposals were introduced in the New York Assembly during the 1993 session. The first proposed the creation of a demonstration voucher program to enable four school districts around the state to establish demonstration voucher programs. The program was designed to allow students to attend public or private schools, and was aimed primarily at districts with high concentrations of poor students. The second proposal suggested an amendment to the tax law that would allow taxpayers with a net taxable income of $30,000 or below to deduct tuition, textbooks, and transportation expenses for dependents from their federal adjusted gross income. The proposal included a $650 credit for students in grades one through eight, and a $1,000 credit for students in grades nine through twelve. No tax credit was included for instructional

614. Id. at 3.
615. Id.
616. Id. at 3-4.
617. Id.
619. CARNEGIE REPORT, supra note 42, at 107.
620. LEGISLATION REVIEW, supra note 5, at 10.
622. Id.
624. Id.
books and materials used in the teaching of religious tenets, doctrines, or worship. Further, the credit would not be available to offset expenses incurred at a for-profit school.

The East Harlem School District, which established one of the first school choice programs in the country, is an anomaly in New York. The demographic student make-up in the East Harlem schools is 60 percent Hispanic, 35 percent African-American, four percent white, and one percent Asian. The program is celebrated by its supporters as being one of the most successful examples of choice, having raised the reading scores of its students by over 65 percent compared to other students within the city and state. As of late, however, researchers have criticized that achievement as being the result of a variety of factors, only one of which may be choice.

33. North Carolina

North Carolina recently considered two bills dealing with school choice. One would have authorized a program of choice in counties with a population exceeding 300,000 that have more than one local school administrative unit, but the bill was withdrawn from further consideration in 1992. Another, called “Project Genesis,” promotes the restructuring of the public schools in four school districts in the state.

Project Genesis was enacted in the summer of 1992. The legislation calls for the state board of education to create a four-year pilot program in up to two schools in each of four school districts. Restructuring under the plan includes flexibility and accountability, competitive bidding on the management of schools, and magnet schools.
Project Genesis also calls on local school boards to implement a program allowing teams of educators to open schools, and mandates private funding before a school is eligible to receive additional state or local funds. The proposal also demands that local school boards develop a process to maintain a racially balanced student population.

34. North Dakota

Discussions are under way for implementing a plan similar to Minnesota's, but no choice legislation is currently pending.

35. Ohio

Ohio's intradistrict choice plan, to which all of the state's public schools districts must adhere, took effect in the Fall of 1993. Additionally, legislation requires all local school boards to either accept or reject participation in an interdistrict transfer plan with adjoining districts. Within this program, limitations are placed on transfers that would negatively affect racial guidelines in each district.

In addition, three new voucher-oriented bills were introduced in the state legislature during the 1992 legislative session that have not been called to a vote. House Bill 635 would create a five-year pilot program permitting "at-risk" students to attend private and sectarian schools. House Bill 825 is similar, except it requires participating sectarian schools to issue a statement that students are not compelled to adhere to any specific religion. Finally, House Bill 851 would submit the question of overall private/sectarian school participation in a voucher program to the electorate for an upcoming referendum.

36. Oklahoma

Oklahoma introduced its interdistrict transfer program in 1991.
The enacted legislation formalized the process and required only the agreement of superintendents from both the sending and receiving districts.\textsuperscript{648}

37. \textit{Oregon}

The Oregon legislature is currently considering a proposed statute that would institute both intradistrict and interdistrict choice in public schools.\textsuperscript{649} The proposed law would require the State Board of Education to set guidelines and develop models for districts wishing to participate in choice programs.\textsuperscript{650}

38. \textit{Pennsylvania}

A 1991 voucher proposal, which would have amended the state Public School Code of 1949 and permitted the awarding of vouchers of up to $900 for students to attend any public, private, or parochial school in the state, was defeated.\textsuperscript{651} In deciding that tuition vouchers were unconstitutional, the Pennsylvania House relied on several sections of the Pennsylvania Constitution which prohibit the disbursement of state funds to sectarian institutions.\textsuperscript{652} The legislative deliberations over the bill resulted in heated battles between lawmakers, and at one point a racial argument ensued.\textsuperscript{653} In the Senate, one side had stipulated that minority students could only move to private/sectarian schools if "[those schools] have room for them."\textsuperscript{654} In the hearings surrounding the proposed legislation, one parochial representative stated that the parish residents had priority for slots in the schools. The representative testified that there was a six- or seven-year waiting list for one school he had recently visited.\textsuperscript{655}

\textsuperscript{648} \textit{Id.} § 8-102(A).
\textsuperscript{649} David Ammons, \textit{Education Legislation Falls Short of Gardner's Goals}, \textit{Oregonian}, Apr. 9, 1990, at D2. Oregon has enacted a "Learning By Choice" program. The legislation also includes a "Running Start" program which allows seventh and eighth grade students to enroll in high school courses early, and allows juniors and seniors to attend colleges under a postsecondary option. \textit{Id.}
\textsuperscript{650} \textit{Id.}
\textsuperscript{652} \textit{Pennsylvania Legislative Journal}, \textit{supra} note 333, at 1920. The applicable sections relied on by the Pennsylvania House included Article I, section 3 and Article III, sections 29-30 of the Pennsylvania Constitution, and Article I of the United States Constitution. \textit{Id.}
\textsuperscript{653} \textit{Id.}
\textsuperscript{654} Hearings of the Pennsylvania House of Representatives, House Bill 953, line 3141 (Dec. 11, 1991).
\textsuperscript{655} \textit{Pennsylvania Report}, \textit{supra} note 171, at 16.
39. Rhode Island
Rhode Island has no choice legislation and is not considering any at the present time.656

40. South Carolina
Two bills were introduced into the legislature in 1991 and were carried over into the 1992 session. The bills dealt, respectively, with open enrollment and with a voucher system involving both public and private schools.657 At the time of this writing, no official action had been taken on either bill.658

41. South Dakota
Due to the rural nature of the state, school choice is not an issue in South Dakota.659

42. Tennessee
House Bill 2662, a choice-related proposal, was presented to the Tennessee House Education Committee in March of 1992.660 The bill included provisions for intradistrict and interdistrict open enrollment programs, for scholarships which could be used for attending private schools, and for postsecondary enrollment options for high school students.661

43. Texas
Two voucher bills have been introduced in the Texas Legislature, one of which specifically targets educationally-disadvantaged students.662 Several of the school districts in some of the state's larger cities have operated magnet schools for years.663

44. Utah
Utah first passed open enrollment legislation in 1990. The Utah "Student Enrollment Options Bill," amended in 1991, is designed so that local school boards may participate in an open enrollment pro-

656. See Legislation Review, supra note 5, at 11 (stating that a proposal for vouchers was introduced but did not make it out of the committee).
657. Id.
658. Id.
660. Legislation Review, supra note 5, at 12.
661. Id.
gram. The program promotes both intradistrict and interdistrict transfers. Under the 1991 amendment, the resident district pays one-half of the resident district's per-student expenditure above the value of the state contribution to the nonresident district for each resident student properly registered in the nonresident district. The law also provides that the State Board of Education shall establish policies regarding nonresident student participation in interscholastic competition.

45. Vermont
Vermont has one of the oldest systems of limited choice in the United States. If a community is too small to support a public school beyond the elementary grades, the town will send a child to the school of his/her choice and fund the tuition in a public or nonsectarian private school. Since many smaller communities offer public school only through the elementary grades, this provision ensures access to education through high school.

46. Virginia
Two school choice measures were introduced during the 1993 legislative session in Virginia. The first, which became law, allows parents to choose a school within the resident school district or in another district participating in the alternative attendance program. The second choice measure, which failed to pass out of the legislature, would have given students residing in economically-deficient areas a certificate for educational services at a participating school selected by the child's parent or guardian. Any public or private, nonsectarian school could be selected under the proposed plan.

47. Washington
During the 1990 session of the Washington Legislature, two versions of school choice legislation were enacted. One proposes the funding of pilot projects followed by a study to determine if the pro-

665. Id.
666. Id. § 53A-2-210(2).
667. Id. § 53A-2-208(4).
669. Id.
672. Id.
gram positively affects student achievement. The second mandates a statewide interdistrict school choice system. This legislation strongly encourages interdistrict transfers for those students whose financial, educational, safety, or health situations would reasonably be improved or in situations where the student's school would be more accessible to parental worksites or a childcare facility. Transfers are considered illegitimate if they negatively affect existing desegregation plans. Districts may establish fees for non-resident transfer students.

The bill also created the "Running Start Program," which allows high school juniors and seniors to attend vocational technical institutes or community colleges on a full- or part-time basis while concurrently enrolled in high school. The school district is required to transmit funds for the higher education classes on a proportional basis. No money is provided for transportation.

48. West Virginia

During 1992, proposals were made for a $500 tax credit for private education and a voucher program of up to $2,500 per student for low-income children. Later, a second tax credit bill was introduced. However, the legislature failed to take action on any of these initiatives.

49. Wisconsin

Choice in Wisconsin is limited to a pilot voucher program in Milwaukee. Based on legislation passed in 1990, up to 1,000 low-income children may attend private, nonsectarian schools. In the second year of the program, approximately 600 students transferred out of the public schools. In the program's first year, a number of the students had to transfer back into public schools mid-year when

674. Id. § 28A.225.220.
675. Id. paras. (3)(a), (b).
676. Id. para. (4).
677. Id. para. (6).
678. Id. § 28A.600.310.
679. Id. para. (2).
680. Id. § 28A.600.380.
681. LEGISLATION REVIEW, supra note 5, at 13.
682. Id.
683. Id.
685. Id.
686. CARNEGIE REPORT, supra note 42, at 18.
one of the schools participating in the program was forced to shut down.687

In March of 1992, the Wisconsin State Supreme Court upheld passage of the program as constitutional.688 The process through which the program had been passed by the legislature had been challenged by the state superintendent of public instruction as well as by numerous amici, including the Wisconsin Education Associate Council.689 The state supreme court reversed the lower court and held that the legislation creating the voucher program did not violate the doctrine of spending state money for the public good.690 The Court noted that sufficient safeguards were included in the program to make sure that participating private schools were adequately supervised by the government, thus ensuring that they would accomplish the public purpose of improving educational quality.691 The court also ruled that the program met the state's uniformity requirement because it did not deprive students of the opportunity to attend a public school with a uniform character of education.692

50. Wyoming

This state has initiated no choice legislation due to its rural nature and its sparse population.693

687. Id.
689. Id. at 462, 465.
690. Id. at 477.
691. Id.
692. Id. at 474.
693. CARNEGIE REPORT, supra note 42, at 112.