1-1-1998

Next Frontier in Public School Finance Reform: A Policy and Constituional Analysis of School Choice Legislation, The;Issues in School Choice

Christopher D. Pixley

Follow this and additional works at: http://scholarship.law.nd.edu/jleg

Recommended Citation
Available at: http://scholarship.law.nd.edu/jleg/vol24/iss1/3

This Article is brought to you for free and open access by the Journal of Legislation at NDLScholarship. It has been accepted for inclusion in Journal of Legislation by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
The Next Frontier in Public School Finance Reform:  
A Policy and Constitutional Analysis of  
School Choice Legislation

Christopher D. Pixley*

I. INTRODUCTION

As long as local school systems can be assured of state aid and increasing federal aid without the accountability which inevitably comes with aggressive competition, it would be sentimental, wishful thinking to expect any significant increase in the efficiency of our public schools. If there are no alternatives to the present system . . . then the possibilities of improvement in public education are limited.¹

Although debate over the quality of public schools has raged since the dawn of compulsory education in the United States, the call for widespread remedial action has only recently occupied the public’s attention.² In particular, the past quarter-century has

* Dennis, Corry & Porter, Atlanta, Georgia. J.D. Vanderbilt University School of Law. Special thanks to Alex Hurder, Professor of Law, Vanderbilt University, for his review of drafts of this article. A strong supporter of the public education system, Professor Hurder’s thoughtful analysis and well-reasoned inquiry shed light on the range of issues facing any system of compulsory education.

1. Kenneth B. Clark, Alternative Public School Systems, 38 Harv. Educ. Rev. 100, 111 (1968); see also Robert Lutz & Clark Durant, The Key to Better Schools, WALL ST. J., Sept. 20, 1996, at A14 (“Public schools too often fail because they are shielded from the very force that improves performance and sparks innovation in nearly every other human enterprise—competition.”).

2. See David C. Berliner & Bruce J. Biddle, The Manufactured Crisis: Myths, Fraud, and the Attack on America’s Public Schools (1995) (citing income inequality, urban decay, violence, drugs, an aging population and competing demands for funds as obstacles which education reformers are content to ignore); John E. Chubb & Terry M. Moe, Politics, Markets and America’s Schools (1990) (analyzing a comprehensive database on American schools and concluding that private schools achieve superior outcomes as a result of greater school and teacher autonomy); Peter W. Cookson, School Choice: The Struggle for the Soul of American Education (1994) (finding several potential disadvantages to school choice programs, including the long term impact of unequal access to schools); Chester E. Finn, Jr., We Must Take Charge: Our Schools and Our Future (1991) (suggesting detailed criteria for the development of institutional accountability among public schools); Louis Gerstner, Reinventing Education (1994) (recommending greater teacher autonomy and the creation of competitive markets for educational services); Robert Haggerty, The Crisis of Confidence in American Education: A Blueprint for Fixing What Is Wrong & Restoring America’s Confidence in the Public Schools (1995) (pointing to violence, instability of the American family unit, and the decline of business and institutional ethics as influences upon, rather than results of, the American system of public education); David Harger, School Choice: Why You Need It, How You Get It (1994) (describing the cost inefficiencies in the public school structure and the benefits of adopting a universal voucher system); Myron Lieberman, Public Education: An Autopsy (1993) (calling for the inclusion of for-profit schools in any market-based reform program, and explaining the limits of monopolies and the expansion of irrelevant educational offerings); National Comm’N on Excellence in Educ., U.S. Dep’t of Educ., A Nation at Risk: The Imperative for Educational Reform, A Report to the Nation and the Secretary of Education (1983) [hereinafter A Nation at Risk] (findings of a presidentially-appointed council that the educational skills of the current generation will not surpass, nor even approach those of their parents, leading to a concurrent decline in economic prosperity); James R. Rinehart &
seen an assault against funding disparities between individual school districts in a given state. Such disparities arise because local school districts are required by state laws to raise nearly half the money necessary for operation through local property taxes. Since “property-rich” districts generate more money for education than school districts in “property-poor” districts, students in the most impoverished areas attend the most poorly funded schools.

---

JACKSON F. LEE, JR., AMERICAN EDUCATION AND THE DYNAMICS OF CHOICE (1991) (noting that any meaningful gain in educational standards is impossible under the present system of public education and suggesting deregulation and privatization as structurally viable methods of reform); SANDRA A. WADDOCK, NOT BY SCHOOLS ALONE: SHARING RESPONSIBILITY FOR AMERICA’S EDUCATION REFORM (1995) (discussing the role of family, community and technology in the reform of American public education); KENNETH G. WILSON & BENNETT DAVISS, REDESIGNING EDUCATION (1994) (calling for systems management, greater teacher autonomy, application of cognitive learning models, cooperative as opposed to competitive learning and the use of computer-based learning technologies in the classroom); Lamar Alexander, What We Were Doing When We Were Interrupted, in NATIONAL ISSUES IN EDUCATION: THE PAST IS PROLOGUE 73 (John F. Jennings ed., 1993) (arguing for sweeping changes to the educational system he oversaw as Secretary of Education for the Bush administration); William J. Bennett, An Obligation to Educate, CAL. POL. REV., Summer 1992, at 20 (concluding from his experiences as Secretary of Education for the Reagan Administration that market-based reform is necessary); Edward M. Kennedy, The Nation Is at Even Greater Risk, in NATIONAL ISSUES IN EDUCATION: THE PAST IS PROLOGUE 19 (John F. Jennings ed., 1993) (suggesting an expansion of programs such as Head Start and increased training and professionalism among our educators).


4. A breakdown of the sources of public school funding shows variation from state to state. Compare Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 392 (Tex. 1989) (explaining in round numbers that the state provides forty-two percent of educational funding, local school districts provide fifty percent, and the remainder "comes from various other sources including federal funds") with DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 91 (Ark. 1983) (stating that "the funding for Arkansas schools comes from three sources: state revenues provide 51.6%, local revenues 38.1%, and federal revenues 10.3%.")

5. The term “property-rich” districts as used in this article refers to districts with a high property tax base per pupil relative to other communities throughout the state. The author nonetheless acknowledges the existence of districts whose high tax revenues are offset by unusually high municipal and educational expenses.

6. The term “property-poor” districts refers to districts with a relatively low tax base per pupil.

Despite attempts of state legislatures to correct school finance disparities through various equalization plans, the frequent failure of these plans to achieve their stated purpose has resulted in citizens across the country instituting lawsuits to achieve true equality of educational funding. Although a large number of these suits have fallen short of achieving a judicial mandate of educational equality, public discontent has nonetheless centered upon successful finance reform litigation. This discontent is related to the inability of lawmakers to fashion legislation in conformity with court orders. Increasingly, lawmakers, educators, and the courts are acknowledging both the structural impediments to true equality, as well as the tendency of the governmental branches to avoid responsibility for crafting solutions.

between districts leads both to disparities in available funding as well as disparities in the available tax burden levied upon district residents. Id. Poorer districts are often forced to tax at a higher rate than wealthier districts merely to collect a fraction of the per pupil funding which the wealthier districts receive. This point is highlighted by the Texas Supreme Court in Edgewood Independent School District v. Kirby, 777 S.W.2d 391 (Tex. 1989):

Property-poor districts are trapped in a cycle of poverty from which there is no opportunity to free themselves. Because of their inadequate tax base, they must tax at significantly higher tax rates in order to meet minimum requirements for accreditation; yet their educational programs are typically inferior. The location of new industry and development is strongly influenced by tax rates and the quality of local schools. Thus, the property-poor districts with their high tax rates and inferior schools are unable to attract new industry or development and so have little opportunity to improve their tax base. Id. at 393.

8. States have enacted various equalization plans to correct funding disparities between districts. The most frequently employed methods are Flat Grants, Foundation Plans and Funding Equalization Plans. Under a system of Flat Grants, an absolute amount of state money is paid to each district on a per pupil or per teacher basis. Foundation Grants are a state-wide aid program which provides funds to wealthy and poor districts alike. As a consequence, although Flat Grants act as an aid to poor districts struggling to meet necessary operating expenses, they do not eliminate funding disparities between the property-rich and property-poor districts which receive them in equal measure.

In contrast, Foundation Plans affect only needy districts. These state-aid programs amount to a guarantee that a state will provide funds to any district which is unable to meet a specified minimum level of financing through local property taxes. While Foundation Plans provide aid exclusively to property-poor districts, they only provide funds to achieve a specified minimum level of operating expenditure. For this reason, they fail to equalize disparities in available funds between districts.

Finally, several states have enacted Funding Equalization Plans. Here, the state guarantees that any district which will tax itself at a specified minimum rate will receive the same amount of money per pupil as all districts which tax themselves at that rate. Thus, in theory, a poor district which taxes at the same rate as a wealthy district will receive the same funding per pupil as the wealthy district by way of a state subsidy to local property tax revenues. Unfortunately, the level of funding a state may offer to achieve equalization by way of this plan is generally capped by state budgets.

Although many states apply one or a combination of these programs, they have not achieved their stated purpose. See generally WALTER I. GARMS ET AL., SCHOOL FINANCE: THE ECONOMICS AND POLITICS OF PUBLIC EDUCATION (1978) (discussing the failure of equalization strategies).

9. See cases cited supra note 3.


11. The impediments referred to here are those resulting from cost differentials for everything from accommodations for students with special needs (frequently higher in urban districts) to the cost of school construction, security and teachers’ salaries (invariably higher in urban districts). These issues are treated at length in Eric A. Hanushek & John F. Kain, On the Value of Equality of Educational Opportunity as a Guide to Public Policy, in ON EQUALITY OF EDUCATIONAL OPPORTUNITY 116 (Frederick Mosteller & Daniel P. Moynihan eds., 1972).

12. Attempts to avoid responsibility for implementing the difficult decisions associated with finance reform efforts were starkly demonstrated by the New Jersey legislative, judicial and executive branches in the series of decisions in Robinson v. Cahill, 303 A.2d 273 (N.J. 1973), cert. denied, 414 U.S. 976 (1973); Robinson v. Cahill, 306 A.2d 65 (N.J. 1973); Robinson v. Cahill, 335 A.2d 6 (N.J.
In response to the relatively bleak prospects for existing finance reform measures, the battle lines over the improvement of public education have shifted. Although the focus of finance reform litigation has traditionally centered on the portion of school district revenues generated by local property taxes, the level of such revenues is most critical in a system where students are required to attend a designated school in their district. With the advent of state educational choice efforts, district boundaries are being removed. Moreover, in the case of privatization legislation, parents who previously could not afford to choose where their child matriculated would have personal access to a per pupil share of the state’s education budget, one of the major sources of funding for the operation of public schools. The new frontier in public school finance reform is shifting the focus of reform efforts from the redistribution of taxpayer wealth to an emphasis on the overall competitiveness of our public schools.

This article advocates the infusion of competition into the public school arena and surveys the various policy and constitutional challenges to privatization. Part II examines the growing need for reform of the public educational system as illustrated by the declining performance of American public school students. Part II also examines funding as a determinant of educational achievement and explores how the growth of the education bureaucracy over the past thirty years has shifted public education resources away from classrooms. Part II concludes with an examination of the challenges and opportunities which privatization efforts will face. Part III surveys the state and federal constitutional challenges to school choice legislation. The article concludes with a discussion of why well-crafted legislation offering school choice should withstand constitutional scrutiny.

13. States have enacted various school choice programs in an attempt to create a free market of educational alternatives. The four types of choice programs in use offer a range of alternatives to students attending a designated public school in their district. Intra-district Public Choice frees parents to choose among public schools in their district. Inter-district Public Choice expands this alternative by offering parents the option of transferring their children into school districts other than their own. Both of these systems condition the acceptance of students on the availability of space in the chosen school. The third approach adopted by a number of states is Market-Oriented Public Choice. This method of school choice focuses on the creation of self-managed public schools funded according to the level of enrollment but free of many of the state’s educational regulations. The final method applied today is Private Choice, a system which provides funds directly to parents in the form of vouchers or tax breaks which fund all or a portion of the cost of the public or private school chosen. The latter two methods of choice are the main focus of this article.

14. Funding for public schools is derived from three major sources: state tax revenues, local school district property tax revenues, and the federal government monies earmarked for education. Of these sources, state tax revenues and local property taxes account for more than ninety percent of the funding for a majority of school districts. It is precisely because local property taxes constitute such a large portion of public school revenues (with property taxes often accounting for more than fifty percent of the district’s funding) that disparities between school districts are frequently significant. See, e.g., DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 92 (Ark. 1983) (noting a nearly three to one disparity in the actual per pupil funding of Arkansas school districts); Helena Elem. Sch. Dist. No. 1 v. State, 769 P.2d 684, 686 (Mont. 1989) (finding spending disparities as high as eight to one between similarly sized school districts); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 392 (Tex. 1989) (finding that the wealthiest district in the state had over $14 million in property-wealth per student, while the poorest district had approximately $20,000—a 700 to one differential).
II. THE GROWING NEED FOR REFORM OF THE PUBLIC SCHOOL SYSTEM

The politics of the United States as of other countries is influenced, and influenced for the worse, by the fact that the use of markets are imperfectly understood by a majority of the citizens. No doubt this popular misunderstanding of economics does on occasion lead to the gratuitous or even harmful use of government to perform certain social functions for which the government does not have a comparative advantage. Though there are some valid arguments that point in the opposite direction, it is surely a reasonable hypothesis that the limited understanding of economics among the laity leads to a somewhat bigger public sector than would be optimal.15

A. What Is School Choice?

America's current public school system represents a virtual monopoly.16 Although private institutions resemble market competitors, no true market exists because public and private institutions are non-profit entities. As non-profit entities, they do not react to losses in market share the way a company selling a service for profit would. In a free market, competitors must monitor the innovations of other companies and the demands and preferences of consumers. Cost and the quality of service are factors, as is the availability of efficiencies in service and new product offerings. In contrast to the free market approach, education consumers rarely choose between public and private schools by reference to which system is most efficient or offers the latest innovations in educational techniques. Instead, general concepts of the effectiveness of public and private schools, in addition to the wherewithal of parents, dictate the choice between forums.17 Without the pressure to react to market share, non-profit schools—both public and private—lack the incentives to keep pace with the changing needs of the free market their graduates will enter. Moreover, because public and private schools cannot retain excess tuition as profits they lack the incentives to lower costs while increasing student achievement.18 The inclusion of for-profit schools is, therefore, essential to the creation of true competition. Choice plans which exclude for-profit schools from participation fail to create a competitive market system. Proposals such as the Milwaukee Parental Choice Program, which illustrate this deficiency, are herein discussed.

The most promising school choice initiatives operate on the premise that nothing short of a free market for schools will create the proper incentives for improvements in education.19 Proponents of school choice believe the availability of for-profit schools

---

16. HARMER, supra note 2, at 55-57.
19. Lewis D. Solomon, The Role of For-Profit Corporations in Revitalizing Public Education: A
will infuse competition into primary and secondary education, thereby fostering improvement. In practice, school choice would entail the distribution of a tax “voucher” to parents which would be redeemable as tuition dollars for a student’s enrollment in the public, private or for-profit school of the parents’ choice. Unlike the present system, in a competitive environment the cost of education should not be a barrier to a student’s attendance at the best regional school. In the absence of a true competitive system with for-profit participants, the effect of tuition vouchers could be negated by private schools increasing their tuition costs by the amount of the universally distributed voucher. Those wealthy enough to send their children to a private school would continue to do so, and the rest would be left to choose among various public school choices. By contrast, although any competitive voucher system will require parents to absorb the expense of tuition costs exceeding the value of the tax voucher, the inclusion of for-profit schools within the system will promote cost competition and efficiencies which have been lacking in our non-profit system. Ultimately, if the financial viability of every school depends on its cost efficiency and the achievement of its students, our educational system should become more affordable and more effective.

B. Why School Choice? — What Is Wrong With the Current System?

Since the publication of *A Nation at Risk* in 1983, the movement for educational reform has been heard throughout both the public and private sector, by authors, legislators, economists, businessmen, and notably by two former Secretaries of Education. Authored by the National Commission on Excellence in Education, *A Nation at Risk* in 1983, the movement for educational reform has been heard throughout both the public and private sector, by authors, legislators, economists, businessmen, and notably by two former Secretaries of Education.锅鳌* A Nation at Risk*, supra note 2.

One of the difficulties in discussing educational “choice” results from the various conceptions of the term. While one commentator may view “choice” as a concept involving universal access to a variety of education providers, others assign the term to any program which offers alternatives to enrollment in a district school, even if the alternatives are limited to a small group of students. Professor Sharon Keller’s article in this volume of the *Journal of Legislation* examines the latter concept of “choice.” In her article, Professor Keller reviews a program aimed at a group of African-American parents in Detroit seeking the establishment of charter Afrocentric male academies offering “educational programs that . . . focus on the special problems of an identified population of students.” Sharon Keller, *Something to Lose: The Black Community’s Hard Choices About Educational Choice*, 24 J. LEGIS. 67, 67 n.2 (1998) (quoting Detroit Public Schools, Male Academy Grades K-8 (Dec. 7, 1990) (draft on file with Professor Sharon Keller, University of Miami School of Law)). The program is deemed “Alternative Schools of Choice.” Keller, supra, at 67. Because the “alternative” schools scrutinized by Professor Keller offer choice to a small, segregated class of students, they fail to represent the type of universal “choice” analyzed in this article. Unfortunately, references to limited access programs—such as Detroit’s Afrocentric male academies—as “school choice” have a tendency to handicap public discussions of universal choice legislation by conjuring images of schools which limit access according to race, wealth, religious affiliation or scores on private entrance examinations. It is precisely these images which tend to undermine universal choice legislation by generating the unfounded fear among parents that their child may be relegated to a substandard school because of discriminatory admissions criteria.


22. See CHUBB & MOE, supra note 2; GERSTNER, supra note 2; HARMER, supra note 2; LIEBERMAN, supra note 2; RINEHART & LEE, JR., supra note 2; WILSON & DAVISS, supra note 2;
at Risk noted that "the educational foundations of our society are being threatened by a rising tide of mediocrity." The risk identified by the authors included low performance of American students on international comparisons of student achievement, a finding that twenty-three million American adults were functionally illiterate, evidence that functional illiteracy among minority youth was as high as forty percent and statistics demonstrating that average achievement of high school seniors on standardized tests was lower than in 1957, when Sputnik was launched. The Commission's members cited failures in the content of educational offerings and the quality of instruction, and concluded that the decline in educational performance results largely from the way education in the United States is conducted. Today the debate over the need for school reform continues to escalate, with statistics and studies being rapidly generated, cited, reexamined and disputed. Although debate is often limited to whether our educational system is failing, it has become clear that America is no longer a leader in educational achievement. Following more than a decade of marginal progress toward the improvement of our public schools, today's reformers are examining whether government is the most effective service provider available.

1. Declining Performance of American Students
a. The Purpose of Educational Comparisons

Many of the leading opponents of school choice argue that a major cause for concern about American schools is the perceived loss of economic competitiveness in international markets. According to Jeffrey Henig,

Alexander, supra note 2; Bennett, supra note 2; Kennedy, supra note 2. But see Arthur J. Newman, In Defense of the American Public School (1978) (illustrating two centuries of criticism and reform movements aimed at redefining our nation's educational goals and the method of delivering education); David Tyack & Larry Cuban, Tinkering Toward Utopia (1995) (arguing that a century of so-called school reforms has illustrated a great disparity between reform goals and the effect of implemented reforms).

23. A Nation at Risk, supra note 2, at 5. The Commission itself was appointed by the Secretary of Education, T.H. Bell. Members were selected according to the criteria set forth in the Commission's charter, which sought representatives with knowledge of educational programs at various levels and familiar with the views of the public, employers, educators and leaders in a range of professions. Id. at 40. Among the members chosen were four university and college presidents, two university professors, two high school principals, a former State Commissioner of Education, a former State Board of Education member, a former State Governor, a City School Board President, a Superintendent of Schools, a retired chairman of a multinational corporation, a founder of a small business, the Immediate Past-President of the Foundation for Teaching Economics, the Immediate Past-President of the National School Boards Association, and the National High School Teacher of the Year for 1981-82. Id. at iv. The Commission's report was the most prominent of a long series of officially commissioned studies on the government school system, the majority of which had been "scathingly critical." Chubb & Moe, supra note 2, at 9-10; see also Maurice R. Berube, Teacher Politics: The Influence of Unions 134-41 (1988) (offering an explanation of the Commission's findings and a critical evaluation of the recommendations for reform).

24. A Nation at Risk, supra note 2, at 8.

25. Id. at 18-23. The Commission's report represented more than a mere critique of American education. A Nation at Risk offered a detailed list of recommendations regarding changes in content, standards and expectations, time, teaching, leadership and fiscal support. Id. at 24-33. Specific recommendations included the increased use of standardized tests of achievement "not to be confused with aptitude tests" and "career ladders for teachers" which would include "professionally competitive, market sensitive, and performance-based" salaries. Id. at 28-31.

26. Thomas Toch, In the Name of Excellence: The Struggle to Reform the Nation's Schools, Why It's Failing, & What Should Be Done 17 (1991); see also Tyack & Cuban, supra note 22, at 140 ("In the last generation, discourse about public schooling has become radically narrowed. It has focused on international economic competition, test scores, and individual 'choice' of
The argument is based on a simple causal chain: poor education leads to less knowledge and innovation, less knowledge and innovation leads to faltering economic productivity, and faltering economic productivity leads directly to a decline in the quality of life. And this message is sharpened with direct references to the current and growing economic threat posed by Germany, Korea and Japan.  

Opponents of school choice argue that this theory misperceives the development of the world economy. Economist Lester Thurow explains that until recently, the world economy was capital intensive, favoring resource abundant nations such as the United States. Today, with advances in technology and the shift to an information economy, worldwide capital markets have developed which erase the advantage of resource abundance. Henig concludes,  

Even if the United States had maintained an educational edge over other nations . . . it is likely that its economic competitive advantage would have narrowed due to other forces. To acknowledge this is not to say that education is unimportant; to the contrary, a strong case can be made that changing world conditions make national differences in education more important. But suggesting that changing conditions impose new educational demands has quite different implications from suggesting that deteriorating education accounts for our current woes.  

Henig and Thurow’s observations accurately note that the redistribution of trained personnel throughout the globe did not occur overnight. They suggest that the evolution of international markets, not the educational achievement of America’s work force, has driven our loss of competitiveness. Henig goes so far as to suggest that there is no evidence of overall decline in educational performance, that the rate of decline in standardized test performance has decelerated and that claims of an educational crisis in America ignore improvements the nation has made in key areas such as narrowing the “racial gap.”  

Opponents of school choice initiatives have suggested that the risks associated with reform are not justified by the data on educational performance. Although both within-country comparisons of educational outcomes for American public and private schools and between-country comparisons of national educational achievement among industrialized countries consistently demonstrate poor performance by American public schools, opponents of reform eschew the data, suggesting that the risks of large scale
reform outweigh any possible benefits. Henig argues that if reform is at all necessary, America should employ the moderate combination of "proven techniques, calculated experimentation, monitoring of response, and readjustment based on feedback." He further cautions that applying the label "crisis" to current public school problems creates a sense of urgency which could promote one-shot cures. Opponents also argue that reforms such as school choice will change the way school decisions are made, thereby making the process of education less democratic without any guarantee that the substance of education will be improved.

One drawback of these claims is that they are non-quantifiable. Because reform opponents believe that Americans are overly dependent on standardized examinations as a measure of performance, they refocus the public school debate toward issues with less exacting standards. At present, student performance in core curriculum is the only quantifiable measure of school success. Over time, the development of proficiency in math, science and writing have also gained increasing importance to employers, most of whom have experienced sweeping technological change in recent years. As Joseph Murphy has noted, even factory employees with relatively "low-tech" jobs are failing to enter the workforce with a requisite mastery of math and reading. According to Murphy, "U.S. corporations spend $25 billion a year teaching employees skills they should have learned at school. Motorola spends $50 million a year teaching seventh-grade math and English to 12,500 factory workers—half its hourly employees. Kodak is teaching 2,500 how to read and write." This finding is further informed by

32. HARMER, supra note 2, at 15-17; see also AMERICAN ASS'N OF SCH. ADMN'RS, AMERICA 2000: WHERE SCHOOL LEADERS STAND 13 (1991) ("A scoreboard mentality has developed that undermines efforts aimed at enhancing student achievement. Any testing program must recognize the needs of students to do their own personal best and achieve their personal goals, not just enhance comparisons with other schools, school districts, groups, states, or nations.").
33. HENIG, supra note 27, at 51. See generally SEYMOUR B. SARASON, THE PREDICTABLE FAILURE OF EDUCATIONAL REFORM 117-34 (1990); TYACK & CUBAN, supra note 22.
34. HENIG, supra note 27, at 51.
35. Id.; see also TYACK & CUBAN, supra note 22.
36. TYACK & CUBAN, supra note 22, at 62. Tyack and Cuban suggest, "A problem with defining 'success' as meeting predetermined goals . . . is that some of the most significant dimensions of actual programs, both positive and negative, may not be captured by the measured outcomes." Id. The authors illustrate this conclusion by noting for example, that "minimum competency testing" resulted in classroom instruction aimed at the development of basic skills needed to pass the competency exam rather than "complex thinking skills." Id. Yet testing and the opportunity it provides for the comparison of alternative curricula is intended to identify and measure the development of higher level thinking. Our nation's most competitive and successful post-secondary institutions rely heavily upon standardized test results when assessing candidates for admission. It would seem reasonable, then, to rely on such tests when determining the general success of different curricula and different institutions.
37. JOSEPH MURPHY, The Educational Reform Movement of the 1980s: A Comprehensive Analysis, in THE EDUCATIONAL REFORM MOVEMENT OF THE 1980S 3 (1990); see also THE HARRIS EDUC. RESEARCH CTR. AND THE COMM. FOR ECON. DEV., AN ASSESSMENT OF AMERICAN EDUCATION: THE VIEW OF EMPLOYERS, HIGHER EDUCATORS, THE PUBLIC, RECENT STUDENTS, AND THEIR PARENTS 8-12 (1992) (noting that twenty-eight percent of the 402 executives from small, medium and large companies participating in the study have been forced to create or increase "remedial and training services in basic areas such as math, reading and writing" since 1987, and that sixty-nine percent report that for every one acceptable high school graduate applicant, they must reject five others).
38. MURPHY, supra note 37, at 15; see also Bernard Avishai, Companies Can't Make Up for Failing Schools, WALL ST. J., July 29, 1996, at A12. Avishai notes, Over the past five years Motorola has spent some $30 million to support public school reform. That's an admirable commitment, but one that underlines how futile it is to speak of improving basic education through "corporate responsibility." Even if every company in the Fortune 1000 spent twice as much as Motorola does on the schools, this
a 1993 report of the United States Department of Education noting that many large employers, including Bell Laboratories, Texas Instruments and IBM, are being forced to fill research jobs with people educated outside the United States. Ultimately, even if American economic prosperity could be said to be independent of the educational achievement of the nation's citizens, there is little doubt that our economic progress is, nonetheless, retarded by the cost of remedial schooling and employee screening.

In addition to measuring school success, comparisons of student achievement force proponents of America's education bureaucracy to demonstrate the success of "calculated experimentation, monitoring . . . and readjustment." For example, since the publication of A Nation at Risk in 1983, student performance has shown no significant improvement, despite repeated efforts at experimentation within the existing government structure. Additionally, while there is no guarantee that all districts will experience improvements in academic outcomes as a result of school choice, the process of true free market competition does make one guarantee: those schools that fail to perform in the educational marketplace will be eliminated or absorbed by the schools which do succeed. As such, the change of process which reform opponents bemoan as "antidemocratic" should provide faster and more effective response to the demands of citizens than our current educational bureaucracy.

Today, any crisis that has been attributed to the conduct of public education is premised on the competence and literacy of our students. Because few would argue that intellectual ability has been declining in recent generations, and because our public schools are the only American institutions charged solely with the responsibility of educating our society, lower academic achievement is attributed to less effective schools. If comprehension of essential concepts and the development of higher level reasoning can be measured by criteria other than student performance on standardized assessments, opponents of educational reform have declined to offer any suggestions. In the absence of any alternative method for assessment of public school achievement, educational comparisons continue to offer feedback on the development or stagnation of the public school system.

would amount to barely 0.5% of the nationwide education budget.

40. See HENIG, supra note 27, at 51.
41. See, e.g., OFFICE OF EDUC. RES. AND IMPROVEMENT, U.S. DEP'T OF EDUC., YOUTH INDICATORS, 1991: TRENDS IN THE WELL-BEING OF AMERICAN YOUTH (1991). The report found that "[a]mong students in groups of advanced and developing countries, U.S. students had a mediocre performance on an international test of science proficiency" despite the fact that "comparatively few [United States students] were in the advanced science classes that qualified them to participate in the examinations." Id. at 75. The study additionally found that fewer than half of our high school graduates could locate information in a news article, balance a checkbook or follow travel directions. Id.
42. See HENIG, supra note 27, at 51 ("The market-based reform plans that are my primary focus can be antidemocratic in substance, a fact that the current momentum of the 'do something' movement temporarily obscures.").
b. A Statistical Analysis of Student Achievement

Studies of the overall achievement of American students over time have suggested that America's global competitors are increasing their educational advantage over the United States. Opponents of educational reform often claim that international assessments make inappropriate comparisons, since other nations test only their college-bound students, while in the United States most American students are tested. The obvious conclusion is that if top American students were compared to their foreign counterparts, the United States would compare favorably. Unfortunately, this conclusion lacks empirical support. According to a 1993 study conducted by the United States Department of Education, tests of the brightest students from thirteen countries ranked Americans ninth in physics, eleventh in chemistry and thirteenth in biology. The American students chosen were high school seniors taking advanced placement courses. Author David Harmer commenting on this research noted, "In short, America's best science students are the industrialized world's worst." The same results have been found in math. In a 1986 report by the Carnegie Forum on Education and the Economy, American eighth-grade students ranked thirteenth out of fifteen countries on comprehensive international mathematics comparisons. Further, al-
though the most recent international comparison by the Organization for Economic Cooperation and Development (O.E.C.D.) showed the United States scoring high in reading and near average in science, the suggested improvement in American scores occurred only because the O.E.C.D. omitted five countries that had outscored the United States in previous O.E.C.D. studies. Finally, while there is ample evidence for the claim that American schools may be failing to properly educate the majority of their students, it is noteworthy that we have also neglected to challenge our most gifted children. According to a 1993 report by the Department of Education, gifted elementary school students are currently required to attend classes where they have mastered thirty-five to fifty percent of the curriculum before the school year starts. Further, in addition to impeding the educational development of both gifted and challenged students, poor methods of instruction may influence the choice to forgo the completion of a student's formal education. Indeed, students at every skill level have been found less likely to reach graduation in public schools as compared to their private school counterparts.

If the actual decline in academic performance of American students does not point to a decline in the quality of the education they are receiving, it is instructive to examine the quality of today's teaching materials. According to John Taylor Gatto, New York State's Teacher of the Year for 1991, "Pick up a fifth-grade math or rhetoric textbook from 1850 and you'll see that the texts were pitched then on what would today be considered college level." Moreover, empirical evidence supports Gatto's first-hand account. Donald Hayes of Cornell University took 766 elementary and secondary school texts published from 1860 to 1991, and designed a computerized scoring system to determine the comparative difficulty of reading them. He explained that "the texts for the fourth through eighth grade have been declining since 1965, and now are the simplest they've ever been." Hayes explained that it is not that students have

Fewer than 4 in 10 young adults can summarize in writing the main argument from a lengthy news column . . . . Only 25 out of 100 young adults can use a bus schedule to select the appropriate bus for a given departure or arrival . . . . Only 10 percent of the total group can select the least costly product from a list of grocery items on the basis of unit-pricing information . . . .

Id. at 67 (citing EDUCATIONAL TESTING SERV., THE WRITING REPORT CARD, 1984-1988 (1989)).

49. False Positive, WASH. POST, Jan. 23, 1994, at C6. The five nations omitted from the O.E.C.D. comparison included Korea, Taiwan, Hungary and the then-Soviet Union. The omission of these nations was noted by Brookings Institute scholar and former Education Under-Secretary Diane Ravitch.

50. NATIONAL EXCELLENCE, supra note 39, at 14.

51. See HARMER, supra note 2, at 71-73. Harmer cites a University of Maryland study showing that merely attending a Catholic rather than public school raises the disadvantaged student's probability of completing high school and entering a four-year college by twenty percent. Harmer also notes that the government school dropout rate is twice that of independent schools, and that six years after high school graduation, only thirteen percent of government school students have bachelors' degrees, compared with thirty-one percent of independent school graduates. See also Christine Bowditch, Getting Rid of Troublemakers: High School Disciplinary Procedures and the Production of Dropouts, 40 SOCIAL PROB. 493, 506-07 (1993) (examining the routine disciplinary procedures in inner-city public education and concluding that public schools help to perpetuate racial and class stratification by adding to the student dropout rate through the exercise of often unnecessary discipline against those students who are inherently at the greatest risk of dropping out).


53. Donald P. Hayes, Have Curriculum Changes Caused SAT Scores to Decline?, Address at the 88th meeting of the American Sociological Association (Aug. 13-17, 1993) (transcript available through Sociological Abstracts, Inc.).
Public School Finance Reform

less intellectual ability today, but that "they haven't gotten from the schools the depth of knowledge they used to get."  

2. Structural Impediments to Improving Student Performance
a. Bureaucracy and Focus of Attention away from Core Educational Concerns

The question of why we are losing ground or failing to improve in international educational assessments may best be explained by reference to how our public school system operates. Education, like other industries, involves producers and consumers whose interests are often in conflict. 55 Unlike other industries, however, the public education system is a monopoly, with exclusive access to public funds controlled by a government which provides the service. This characteristic acts as a disincentive to improvement. Because teachers and public school administrators act as both the service provider and the representative of the consumers receiving the service, they are free to place their interests before those of the consumer. In fact, these producers employ the largest union in the country to do so. 56 It has been noted that the basic function of the teachers unions is to increase benefits to the teachers while staving off criticism and competition—two necessary factors behind innovation in free markets. 57 Because many Americans lack the money necessary to take their business elsewhere and enroll their children in private institutions, there is little incentive for public schools to become more efficient, effective or responsive to their customers. 58

54. Id. This conclusion is further informed by the work of author Avis Carlson, who describes the rigors of obtaining an eighth-grade diploma in a small Kansas town in 1907. AVIS CARLSON, SMALL WORLD LONG GONE: A FAMILY RECORD OF AN ERA 83-84 (1975). The author recounts having to define panegyric, talisman, triton and misconception, calculate the interest on an eight percent note for $900 running two years, two months and six days, name countries producing large quantities of wheat, cotton, coal and tea, give an account of the "colleges, printing, and religion in the colonies prior to the American Revolution," and "name the principal political questions which have been advocated since the Civil War and the party which advocated each." Id.

55. LIEBERMAN, supra note 2, at 47; see also RINEHART & LEE, supra note 2, at 4-5. See generally SAMUEL L. BLUMENTHAL, NEA: TROJAN HORSE IN AMERICAN EDUCATION (1984) (examining the conflict between the union's promotion of public school teachers' interests and the larger need for more effective methods of transmitting education).

56. See BERUBE, supra note 23, at 3, 17, 47-48 (describing the 2.2 million member National Education Association as the "largest of unions" and the 600,000 member American Federation of Teachers as "the collective bargaining representative in such megacities as New York, Boston, Philadelphia, Chicago, Washington, D.C., Detroit, San Francisco and St. Louis"); see also Peyser, supra note 19, at 622 (noting the size of the National Education Association by reference to its annual budget of $750 million and annual political action fund of $22.5 million).

57. See LIEBERMAN, supra note 2, at 285-86. Lieberman illustrates this point by reference to a union proposal for the management of parental complaints against teachers, which required the parent to put the complaint in writing and confront the teacher and the teacher's union representative, and which held that the teacher could not be dismissed on the basis of a parental complaint. Lieberman contrasted this system with private sector management, which typically facilitates the expression of consumer complaints to avoid the loss of business. In this respect, Stephen Chapman has suggested that the National Education Association "has only one purpose: to further the interests of teachers. It has made clear that the interests of teachers and the interests of education don't necessarily coincide." BERUBE, supra note 23, at 8 (quoting Stephen Chapman).

58. See Carol Blue Muller, The Social and Political Consequences of Increased Public Support for Private Schools, in PUBLIC DOLLARS FOR PRIVATE SCHOOLS 39, 49 (Thomas James & Henry M. Levin eds., 1983) (observing that private school tuition acts as a "protective tariff that prevents private schools from competing with public schools"); see also HARMER, supra note 2, at 82. Harmer observes,

Since the government schools have a captive market, they don't need to improve to keep their customers; most customers have nowhere else to go. Occasionally a great success
One complement to the anti-competitive nature of the public school monopoly is the political process by which standard curriculum is developed. Because public schools function as part of a command economy, parents have very little influence over the development of curriculum. The mechanism for consumer influence over a command economy is legislation, and for the latter part of this century, the focus of legislative efforts with respect to education have centered on racial and social equality. According to advocates of school reform, the result has been a de-emphasis on core subjects and a politically unassailable growth of special programs. Examples of these educational objectives include widely offered courses in AIDS education, consumer education and sensitivity education, each of which takes valuable public school resources away from instruction of core offerings. One result, reported in Adult Literacy in America, a 1993 report from the National Center for Education Statistics, is that nearly half of adult Americans are barely literate, with such limited reading and writing skills that many of them cannot perform simple tasks such as writing a letter explaining a billing error. This finding is cause for even greater concern when compared to the educational development of the next generation of American adults. According to the 1992 International Assessment of Educational Progress scores, American thirteen-year-olds rank among the worst performers of students in fifteen industrialized nations on science and math achievement tests. One conclusion to be derived from these reports is that greater time and instruction must be returned to core curriculum if

---

story emerges from somewhere in the system or from the independent schools—and most government schools keep right on doing what they were already doing. Success is barely observed, when in a free market it would be assiduously imitated. 

Id. Moreover, the dearth of competition in the education marketplace attracts less qualified applicants to teaching. See CARNEGIE FORUM ON EDUC. AND THE ECON., supra note 48, at 29 (1986) (comparing the dramatic difference in mathematics and verbal SAT scores for all college-bound seniors and intended education majors and concluding "[t]hese rough measures of academic ability suggest that even with a modest improvement in performance during the past few years, those students contemplating teaching careers continue to lag behind the performance of the average college-bound student by a substantial margin"); see also ROBERT M. HARDAWAY, AMERICA GOES TO SCHOOL 163 (1995) ("The average [SAT] score for aspiring teachers is 389 out of a possible 800."). In MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962), Friedman notes, if one were to seek deliberately to devise a system of recruiting and paying teachers calculated to repel the imaginative and daring and self-confident and to attract the dull and mediocre and uninspiring, he could hardly do better than imitate the system of requiring teaching certificates and enforcing standard salary structures that has developed in the larger city and state-wide systems. It is perhaps surprising that the level of ability in elementary and secondary school teaching is as high as it is under these circumstances. The alternative system would resolve these problems and permit competition to be effective in rewarding merit and attracting ability to teaching. Id. at 96. With the growth in size of the education bureaucracy and the continued reliance on salary schedules influenced more by seniority and the possession of degrees and teaching certificates than by merit, Professor Friedman's comments have retained their validity more than a quarter-century after the publication of Capitalism and Freedom. 59. Economists distinguish command economies from market economies because the latter are influenced primarily by their customers while the former are controlled exclusively by the government. 60. See LIEBERMAN, supra note 2, at 165 ("As 'diversity' increases, the public school curriculum reflects more compromises between various interest groups. These compromises result in programs and courses that lack coherence or unity of purpose. Instead, they are a mishmash reflecting the politically feasible, no matter how pointless they may be educationally."). 61. NATIONAL CTR. FOR EDUC. STATISTICS, OFFICE OF EDUC. RES. AND IMPROVEMENT, U.S. DEP'T OF EDUC., ADULT LITERACY IN AMERICA (1993). 62. EDUC. TESTING SERV., SECOND INTERNATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS (1992).
we are to be educationally competitive with other nations.63

While reports of declining competitiveness in core curriculum fuel calls for educational reform, they also draw attention to the political debate over the various purposes of public education. One of the questions at the center of this debate asks how, in the absence of a system of public education, will the content of important non-core curricula be transmitted to young Americans. School choice opponents, many of whom have consistently championed the need for growth in non-core curricula, suggest that the education reform movement is grounded in America's reaction to the social problems of our young people—problems which are unrelated to core curricula but which are increasingly addressed by specialized non-core offerings.64 They maintain that

---

63. The argument that educational offerings in public schools should be streamlined is further informed by the fact that students in other nations typically have a longer school day and attend school for a greater portion of the year. See A NATION AT RISK, supra note 2, at 21; see also NATIONAL CTR. FOR EDUC. STATISTICS, OFFICE OF EDUC. RES. AND IMPROVEMENT, U.S. DEP'T OF EDUC., SUMMARY OF THE FIRST HEARING OF THE NATIONAL EDUCATION COMMISSION ON TIME AND LEARNING (1992); Ron Zambo, Elementary School Teachers' Instructional Behavior in Mathematics Problem Solving: A Comparative Study, Presentation at the Annual Meeting of the American Educational Research Association (Apr. 5-8, 1994) (transcript available through Office of Educational Research and Improvement, United States Department of Education, Educational Resources Information Center) (discussing IAEP-2 results, which placed American students near the bottom of the tested countries in mathematics achievement while South Korean students ranked near the top; offering comparative research on methods of instruction in the United States and Korea and noting that Korean students annually attend school an average of forty-four more days than students in the United States). Moreover, employers and college educators suggest that while recent high school graduates have sufficient interpersonal and group skills, they are uniformly lacking in those attributes essential to success in the workplace or in higher education.

It is not that they are lacking in eagerness and willingness to get along with those they work with. However, the devastating news is that employers are convinced that their new hires out of high schools are by and large borderline in terms of functional literacy, their capacity to express themselves, and their basic functional skills. Most of all, they have little in the way of capacity for high concentration or creative and skillful application of their minds to work challenges.


64. See, e.g., HENIG, supra note 27, at 46 (noting that public receptiveness to the concept of an educational crisis reflects concern over the decline of personal values among young Americans, not a decline in the quality of education itself); see also BERLINER & BIDDLE, supra note 2, at 215 (citing income inequality, urban decay, violence, drugs, an aging population and competing demands for funds as obstacles which education reformers are content to ignore); HAGGERTY, supra note 2, at 70 (pointing to violence, instability of the American family unit and the decline of business and institutional ethics as influences upon, rather than results of, the American system of public education); Bracey, supra note 44, at 114 (suggesting that public frustration over drug use, violence and teen pregnancy has been directed toward public schools in the absence of any accurate explanation for these social problems). Moreover, the general concern that schools are increasingly responsible for the moral development of children has been voiced for some time.

That we have compromised this commitment [to excellence in education] is, upon reflection, hardly surprising, given the multitude of often conflicting demands we have placed on our Nation's schools and colleges. They are routinely called on to provide solutions to personal, social and political problems that the home and other institutions either will not or cannot resolve. We must understand that these demands on our schools and colleges often exact an educational cost as well as a financial one.

A NATION AT RISK, supra note 2, at 6; see also Albert Einstein, On Education, Address at the Albany, New York Celebration of the Tercentenary of Higher Education in America (Oct. 15, 1936), in IDEAS AND OPINIONS 59 (1990). Einstein noted, The school has always been the most important means of transferring the wealth of tradition from one generation to the next. This applies today in an even higher degree than in former times, for through modern development of the economic life, the family
public receptiveness to the concept of an education crisis reflects concern over the decline of personal values among young Americans and a disillusionment with drug use, violence and teen pregnancy as opposed to declining literacy. Defenders of public education conclude that the need for non-core curricula is greater than ever, and that public schools offer the ideal forum for such programs. This theory implies that market-based choice proposals may thwart efforts to address social problems at the local school level by destroying one of the last open forums of debate and exchange regarding community and societal values. In this regard, the Carnegie Foundation for the Advancement of Teaching has cautioned that school choice and its emphasis on the empowerment of the individual parent should not ignore the role of the public school system as a conduit for the development of a sense of community and civic responsibility.

Of course, if it is assumed that the cultivation of civic virtues and democratic ideals is one of the main benefits of public education, an obvious mechanism for transmitting these qualities should exist. Unfortunately, however, the structure of the public education establishment has, by many accounts, contributed to the decline in morality and the ignorance of civic virtues among public school students. David Harmer, former president of ExCEL, an influential California organization which advocated California’s choice proposal—Proposition 174—stated,

Schools can and should reinforce the common values necessary to the perpetuation of a free republic. Among these are an understanding of the rule of law; an appreciation of liberty and the constitutional principles that preserve it; and respect for the life, liberty, property and opinions of others.

Do the government schools cultivate these qualities in their students? Not really. . . . The predominant trend in government schools is to maintain a posture of undiscriminating neutrality on any matter remotely moral; these things are said to be matters of opinion, personal, relative. Intellectual inquiry and reasoned debate are out; exploration of feelings is in. School personnel can safely promote such politically correct causes as environmentalism or such politically correct values as tolerance of the unusual . . . but the cultivation of any qualities of character beyond these is considered oppressive, improper and quaint.

One possible effect of this moral neutrality in American public education was the fact that “[a]s of 1993, the nation’s 85,000 government schools were experiencing more than 3 million crimes annually, or more than 35 crimes” per school per year. To be sure, “[t]he family, not the school, bears primary and ultimate responsibility for shaping the character of the child.” At the very least, however, such statistics indicate that the public schools may not be developing civic virtues as the Carnegie Foun-
Public School Finance Reform

dation suggested. One example of the difficulties public schools face in this area is the constitutional mandate of church-state separation. Today, most schools have taken this mandate further than the Supreme Court requires, by withdrawing almost entirely from the moral realm. Fearful of religion or the hint of religious dogma, public school discussions of ethics and values are rare. The attempt to address intensely value-laden issues in a neutral manner leads to programs such as the state-mandated family life program, which New Jersey high school senior E.V. Kontorovich noted “drifted from sex education toward sex preparation.” As Kontorovich explained,

Amid all this hands-on instruction, of course, abstinence, which requires neither a gadget nor training, gets short shrift: it is mentioned once in a video, but is not assigned further discussion or study.

My sex-ed experience is far from atypical. According to the Eagleton survey, virtually all high-school health teachers (in New Jersey) and more than half of middle-school health teachers instruct students in contraceptive methods... Students across the country are being exposed to contraceptive kits with mock phallices and cervixes. . . .

Obviously, this is an extremely mechanistic-and limited-view of sex. In my school, there is little difference in tone between our sex education classes and the defensive driving courses we took in the 10th grade. Both are seen as natural, even ubiquitous, activities that can be made safe with a few pointers.

But focusing on the physical details of sex is value-laden in itself and misleads students. It strips away the ethics that inform human sexuality. Schools should not preach values, but there is a difference between that and pointing out that they exist, and are inseparable from some aspects of life.

Such criticism demonstrates the antithesis of the democratic forum our public schools are said to provide. Moreover, the idea that public school instruction is shaped by local actors involved in democratic exchange misperceives the realities of today’s

70. Interestingly, the avoidance of moral topics within the public schools receives less attention than the treatment of morality in the private system. In fact, one of the more persuasive arguments against school choice proposals suggests that private schools promote undemocratic thinking by the nature of their instruction. HENRY M. LEVIN, EDUCATION AS A PUBLIC AND PRIVATE GOOD 220 (1987) (discussing the probability that “Catholic schools will not tolerate open discussion of abortion, military schools a candid discussion of disarmament, or evangelical schools a discussion of evolution”). Notwithstanding the fact that millions of Americans have been educated in private schools, with no detriment to democracy, this argument assumes that public schools themselves provide unbiased consideration of controversial topics. This assumption ignores the possibility that actors in the public education bureaucracy might use instructional materials to promote specific ideological viewpoints at the expense of balanced discussion or debate. See TOCH, supra note 26, at 153 (noting that an instructional unit on nuclear disarmament published by the National Education Association, the largest of the teachers unions, urged students to collect signatures on petitions calling for a nuclear freeze and that the unit was developed while the NEA’s executive director, Terry Herndon, was President of Citizens Against Nuclear War, an organization that operated out of National Education Association headquarters in Washington, D.C.). Lieberman similarly describes one unit from a union-published source book for classroom use.

In discussing “Why a Worker Joins a Union,” it relies on a biographical sketch. The sketch features an employer who explains why his employees are not working as follows: “Oh, I have plenty of work all right, but I thought it would be good psychology to let the boys walk the streets a few days. It will put the fear of God into their hearts.” Not surprisingly, the source book does not consider the possibility that workers might refuse to join unions for legitimate reasons.

LIEBERMAN, supra note 2, at 159.


72. Id.
public school system. Increasingly, the democratic forum of the public schools has become a myth given the centralization of the public education bureaucracy. Since 1945, the number of public school districts nationwide has fallen from over 100,000 to fewer than 15,000.73 In turn, the traditional practice of local school boards operating schools with direct accountability to parents has been replaced by a massive bureaucracy, where legislators and state educational administrators have the lion’s share of discretionary authority, where teachers have little autonomy and where parents must petition their state legislature for changes they once could have achieved by attendance at a local school board meeting.74 The result of this centralization is the further insulation of schools from the demands of their customers. David Harmer observed, “Protected from competition, government school personnel face no meaningful consequences for success or failure.”75 Furthermore, as long as parents lack meaningful and affordable alternatives to the public school system, there is no reason for public schools to change. Ultimately, whether it is the growth of non-core curricula or the ever-diminishing access to public school administrators, today’s American public education bureaucracy impedes the responsiveness of schools to their consumers, and perpetuates a curriculum shaped largely by special interests.

b. Politics and Public School Cost Efficiency

In response to criticism of the performance of American public schools, actors in the public system have maintained for years that American public schools are under-funded. Recently, this suggestion has been bolstered by the attention given to the decline in the infrastructure of American schools.76 Professor Myron Lieberman has discussed this development and concluded that funding is not the problem.77 School officials have strong incentives to spend revenues for immediate benefits.78 Public school administrators recognize that taxpayers will absorb the cost of future building repairs due to inadequate maintenance, and this frees administrators to under-invest in their physical plant. In short, preventive maintenance is not budgeted because spending tax revenues to avert costly repairs in the future requires a long-term outlook. By contrast, private institutions budget for continuing, sometimes costly maintenance, since “the owners [of the private property] not the public at large, would have to absorb the losses due to inadequate maintenance.”79

An additional inefficiency of public school expenditure is the method by which educational programs are financed and secured. Interest groups have always sought to implement special educational programs. Most recently, however, they have sought to

73. NATIONAL CTR. FOR EDUC. STATISTICS, OFF. OF EDUC. RES. AND IMPROVEMENT, U.S. DEPT OF EDUC., DIGEST OF EDUCATION STATISTICS tbl. 88 (1993) [hereinafter DIGEST OF EDUCATION STATISTICS].
74. DAVID BOAZ, The Public School Monopoly: America’s Berlin Wall, in LIBERATING SCHOOLS: EDUCATION IN THE INNER CITY 49 (1991); see also DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR 262 (1992) (discussing the volume of studies supporting the conclusion that greater teacher autonomy leads to increased student performance); Keller, supra note 19, at 72 (noting that even state sponsored charter programs do not create the level of teacher autonomy enjoyed by instructors at private schools).
75. HARMER, supra note 2, at 56.
76. See Bracey, supra note 44, at 120.
77. See LIEBERMAN, supra note 2, at 166.
78. See id.
79. Id.
secure their programs from the changing demands of modern education. To avoid the elimination of special programs due to obsolescence, interest groups seek to have them established by legislation. Once established in this way, public schools are restrained from terminating these programs even when they have outlived their usefulness. Exacerbating this inefficiency in course programming is the fact that public schools, like other government entities, are under pressure to avoid a budget surplus at the end of any fiscal year. Public school officials spend all available funds, often without regard to efficiency considerations, because budget surpluses can lead to a reduction in government revenues for future years as well as teacher and taxpayer demands for access to residual funds. These inefficiencies are passed on to taxpayers who underwrite the cost of public school education. According to United States Department of Education statistics from 1993, the average annual per pupil cost of public education is an estimated $5920. By contrast, the Department of Education reports that Catholic schools charge an average annual tuition of $1327, while other church-sponsored private schools charge an average of $1941 and non-sectarian private schools charge an average of $3839. Further, although parochial school tuition figures understate the actual cost per student due to church subsidies, once all other costs are factored in, the per pupil cost of parochial schools remains less than half that of government schools. The variance in the cost of educating public and private school students is explained by the fact that private schools spend the majority of their money on classroom instruction while public schools spend a majority of their funds on the maintenance of a bureaucracy. “For example, the Archdiocese of Washington, D.C., educates 50,000 students with a central administrative staff of 17. The government school system of Washington, D.C., with 81,000 students, has a central administrative staff of 1,500.”

Despite these findings, opponents of school choice such as Professor Sharon Keller have argued that the cost savings of private and for-profit schools rely upon the “loss of remuneration by teachers” in these systems. Keller, supra note 19, at 96. Notwithstanding Professor Keller’s assumption that teachers' salaries in a privatized system would be reduced to the current private school level, currently operating for-profit education providers such as Education Alternatives, Inc. are cooperatively revitalizing the administration, finances and facilities of public schools under contract, while paying teachers the same salary that they would have been paid under union negotiated contracts in their district. See Solomon, supra note 19, at 895-98. The savings achieved by for-profit providers such as Education Alternatives, Inc. largely result from significant reductions in the administrative expenses of public schools. Id.
courage the pursuit of efficiencies by placing the customer at the center of all decisions regarding educational expenditures. Moreover, even without any reform to the method of instruction currently employed by public and private schools, cost efficiency suggests that there are strong policy reasons for underwriting the cost of students who wish to attend private institutions. When coupled with research regarding the relationship of school spending to student performance on standardized tests, this conclusion gains merit. As Eric Hanushek observed after reviewing sixty studies attempting to link school expenditures to student achievement, there is no such relationship, and therefore no reason to pay for public school programs that do not work.7

C. Barriers to the Implementation of School Choice

1. Public Misconceptions Regarding the Function of Market-Based Education

In the recommendation of public policy, there is always a temptation to overstate benefits and ignore limitations. The temptation in the arena of public school finance debate cuts both ways. Reformers frequently downplay the government’s role in a system nonetheless dependent upon tax revenues, and opponents of reform mischaracterize choice proposals as a vehicle for redistributing tax dollars to private institutions and the wealthy. Given their tendency to mislead, these myths deserve

bureaucracies do not necessarily function more efficiently than their less specialized private school counterparts. See TYACK & CUBAN, supra note 22, at 78. Tyack and Cuban observed the problems of accountability in the recently “decentralized” public school bureaucracy of New York City. When a new chancellor, Joseph A. Fernandez, arrived in New York in 1990 to administer the school district, he found it was not clear who was in charge, if anyone. His office windows were dirty, so he called an engineer to clean them. Sorry, he learned, by contract the engineers cleaned windows only once a year. When he asked his secretary to order highlighting pens, he was informed that delivery would take four weeks. It was unclear just what were the prerogatives of the thirty-two decentralized school boards. Only by negotiating with the principal’s union could he change a policy that gave principals, in effect, a tenured fiefdom in a particular building.

86. See LIEBERMAN, supra note 2, at 169-70.

87. Hanushek, supra note 83, at 1167; see also JAMES S. COLEMAN ET AL., HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED (1982) (concluding that the superior academic performance of students in Catholic schools is due to effects of the schools themselves and not to selection bias).

88. Although a number of reformers recognize the pervasive government influence on private actors in a voucher system, others have viewed the challenges of implementation as merely peripheral. Compare Michael Heise, Public Funds, Private Schools and the Court: Legal Issues and Policy Consequences, 25 TEX. TECH. L. REV. 137, 149 (1993) (acknowledging that “private schools would have to relinquish some control over their core education decisions to judges and juries”) with Peyser, supra note 19, at 624 (suggesting that, given good schools to choose from, a voucher system would “liberate education from the clutches of politics by shifting power to parents and individual schools, at the expense of school committees and local school departments”).

89. One particularly misleading argument frequently leveled against private choice proposals maintains that parents with children currently attending private schools would receive an improper financial benefit from the receipt of a tuition voucher. See generally Steven K. Green, The Legal Argument Against Private School Choice, 62 U. CIN. L. REV. 37, 40 (suggesting that under a voucher system, “[u]pper income parents who can otherwise afford private education will be provided an extra bonus, while other parents will be forced to choose between sub-quality private education and the under-funded public schools”) (emphasis added).

Such arguments ignore the role of tax dollars as the very foundation of government revenues. It is not an “extra bonus” for a tax payer to be afforded a benefit in return for their payment of taxes. Currently, parents who choose to send their children to private school forfeit that portion of their tax dollars allocated to education. The failure of the taxpayer to receive a benefit in this situation represents a subsidy to other taxpayers. The removal of this subsidy does not result in a “bonus,” but
Although educational choice does reserve a role for government participation and even regulation, the responsibility of government necessarily would be limited to the distribution of tax revenues and regulation of only the most essential aspects of education.\textsuperscript{90} Despite these parameters, reform advocates often fail to acknowledge that implementation of new social programs rarely is successful without active involvement of federal officials, and specific and quantitative standards for compliance with regulatory schemes.\textsuperscript{91} Because the government's participation in implementing a new educational system cannot be overlooked, reformers must seek to persuade current producers of public education that the personal benefits of competition outweigh the challenges and increased demands of a market system. Examples of such benefits include merit-based pay and career tracks for education professionals, both of which offer monetary benefits to those educators willing to compete.

On the other side of the debate, myths regarding the purpose of educational choice frequently have gained acceptance as a result of poor research designs and flawed reporting. One example comes from the Carnegie Foundation for the Advancement of Teaching's 1992 report on school choice. The Foundation mischaracterized school choice proposals when it conducted a national survey regarding public opinion toward vouchers.\textsuperscript{92} One question asked, "Some people think that parents should be given a voucher which they could use to enroll their child in a private school at public expense. Do you support or oppose this idea?"\textsuperscript{93} The report implied that vouchers function exclusively as a method for funneling public monies to private institutions. In reality, the idea behind school choice is that tax vouchers distributed to parents would be redeemable as tuition for a student's enrollment in the public, private or for-profit school of the parent's choice. Nonetheless, the poll served to reinforce the perception that vouchers are a method for increasing private school enrollments.

instead, merely represents the proper allocation of tax revenues to all taxpayers. This equitable distribution of educational tax dollars removes public education from the realm of social programs and reinstates it in its intended form as a public service. As Professor McConnell has observed,

By taxing everyone, but subsidizing only those who use secular schools, the government creates a powerful disincentive for parents to exercise their constitutionally protected option to send their children to parochial schools. Nondiscriminatory allocation of educational resources would restore religious parents to the neutral set of incentives they faced before the government taxed them to support secular education.


Notwithstanding this distinction, the argument in favor of receiving a benefit from the payment of taxes does not support a conclusion that the government has committed an Establishment Clause violation by withholding education tax dollars from parents of children attending parochial schools. In \textit{Bowen v. Roy}, 476 U.S. 693 (1986), the Court stated that,

We conclude that government regulation that indirectly and incidentally calls for a choice between securing a government benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons.

\textit{Id.} at 706.

90. \textit{See} RINEHART \& LEE, \textit{supra} note 2, at 127-28; \textit{see also} LIEBERMAN, \textit{supra} note 2, at 279-80.
92. CARNEGIE SPECIAL REPORT, \textit{supra} note 66, at xv.
93. \textit{Id.} at 95; \textit{see also} HENIG, \textit{supra} note 27, at 189-90 (discussing how the wording and structure of polling questions influences analyses of the public will regarding privatization and school choice proposals).
The Foundation erred similarly when it sought to determine through opinion polls the trade-offs involved in supporting choice. The Foundation posed a question to American adults about "how, in their view, American public education would best be improved." The question asked:

Please imagine two people having a discussion on how to improve the public schools in this country. Mr. Smith says: The best way to improve education is to focus directly on supporting neighborhood schools, giving every school the resources needed to achieve excellence. Mr. Jones says: The best way to improve education is to let schools compete with each other for students. Quality schools would be further strengthened and weak schools would improve or close.

Who are you more likely to agree with, Mr. Smith, who would support every neighborhood school, or Mr. Jones, who would let schools compete for students?^94

Not surprisingly, more than eighty percent of respondents favored empowering neighborhood schools. Unfortunately, the question is misleading. To begin, it suggests that we currently possess the government resources necessary to bring every school to a level of academic excellence, notwithstanding the fact that this position has been disproven by over twenty years of school finance reform litigation and judicial mandates for finance equalization. Moreover, it perpetuates the myth that increased funding will inspire improvement in public education despite declining performance in the face of a federal education budget which, adjusted for inflation, has increased forty percent since 1982 and has tripled since 1960. While the avowed purpose of the question was to determine the trade-offs involved in supporting choice, the question compares resource expansion to competition. Such comparisons are confounded by human nature, which prefers concepts of abundance to programs involving the allocation of scarce resources. Because tax revenues for educational funding are limited, the suggestion that debate over education reform simply requires a choice between increased funding and market mechanisms is flawed. This flaw is exacerbated further by

94. CARNEGIE SPECIAL REPORT, supra note 66, at 11-12.
95. Id. at 13.
96. Id.
97. See generally GARMS ET AL., supra note 8 (examining school finance equalization strategies and the reasons for their failure); Note, supra note 10, at 1078-80 (noting barriers to the implementation of judicial mandates of reform include disproportionate influence of property-rich districts and collective action problems resulting from voter unwillingness to pay the higher taxes associated with school finance remedies); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 71 (1973) (Marshall, J., dissenting) (noting the inadequacy of existing political solutions to school finance equalization).
98. CHUBB & MOE, supra note 2, at 101 (citing U.S. Department of Education statistics); see also JAMES S. COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY 295-97 (1966) (maintaining that academic achievement is driven by family influences rather than educational offerings and school facilities); HARDWAY, supra note 58, at 15 (observing that teacher salaries increased by eighteen percent in real dollars between 1970 and 1995); RINEHART & LEE, supra note 2, at 6 (noting that budgetary expansion has led to a reduction in public school student-teacher ratios of almost one-third since 1960); Hanushek, supra note 83, at 1162 (finding no correlation between school expenditures and student achievement); John E. McDermott & Stephen P. Klein, The Cost-Quality Debate in School Finance Litigation: Do Dollars Make a Difference?, 38 LAW & CONTEMP. PROBS. 415 (1974) (finding insufficient evidence to identify a cost-quality correlation in education); Michael J. Churgin et al., Note, A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars, 81 YALE L.J. 1303 (1972) (concluding that no direct correlation exists between individual and district property wealth in Connecticut, and suggesting that public school finance equalization efforts intended to pool individual property tax revenues across districts are flawed).
the question's design, which pits Mr. Smith, who would support every neighborhood school against Mr. Jones, who would leave the schools' survival up to the market. This contrast implies that supporters of competition are signing a death warrant for public education. As David Harmer has commented, "concern over the fate of the public education system is widespread and almost irrational." Yet, Harmer notes,

Maintaining a system isn't our goal; teaching children is. The government school system is a means to that end, not an end in itself. Failure to make that distinction distorts most discussions of educational reform, which tend to center on how to shore up the present system rather than how to teach children.

Harmer's comments have direct application to the design of the Carnegie Foundation's questions. As long as research efforts continue to focus on the need for greater capital and greater public support, the goal of greater student achievement—its purpose of any education reform movement—will be overshadowed.

2. A Free Market Analysis of the Milwaukee Experiment: Is This What We Can Expect?

Much has been written about the Milwaukee Parental Choice Program, the nation's most comprehensive experiment with school choice to date. According to the 1992 special report on school choice by the Carnegie Foundation for the Advancement of Teaching, "Promises have outdistanced reality in Milwaukee." One of the main factors leading to the Foundation's conclusions was the small number of participants in the program. According to the Carnegie Foundation, "Thus far, only about six hundred of the 97,000 Milwaukee public school students have switched to a private school." The Foundation's report, however, brushed aside two highly relevant facts regarding the small number of choice participants. First, the report makes brief mention that the reason for participation of only 632 students in 1992 was the fact that there were only 936 seats originally available in the program. The remaining 304 seats in the program were filled when it began, but those students chose not to return to their alternative school the following year, and no effort was made to fill these vacated seats within the program. Moreover, the report also mischaracterized the Milwaukee plan as a private choice initiative, despite the fact that religious and for-profit schools were excluded from participation while all Milwaukee public schools were

99. CARNEGIE SPECIAL REPORT, supra note 66, at 13.
100. HARMER, supra note 2, at 7; see also Bennett, supra note 2, at 20, 36 (explaining his view that schools are a service provider that do not exist merely for their own benefit, but instead exist for the benefit of the student).
101. HARMER, supra note 2, at 7.
103. CARNEGIE SPECIAL REPORT, supra note 66, at 19.
104. Id. at 18.
105. LIEBERMAN, supra note 2, at 11.
 included. According to the Carnegie Foundation, "Simply put, while a handful of students may have benefitted, the Milwaukee plan appears, thus far, to have done little or nothing to help one of our most troubled school systems." \(^{107}\)

The Carnegie report's conclusion was largely inconsistent with the goals and expectations of the experiment. The Wisconsin Legislature presumably did not expect the Milwaukee Parental Choice Program to revitalize an educational system of 97,000 students by offering private choice to less than 1000 of them. Moreover, drawing conclusions about the value of school choice by reference to the Milwaukee voucher program is misguided. The problem lies in the fact that the Milwaukee plan did not create a competitive market system. Bureaucratic and structural limitations on the plan eliminated the possibility that schools could function as true market competitors. For example, participation was limited to one percent of enrollment in Milwaukee public schools, or 936 students. \(^{108}\) Also, no school could be made up of more than forty-nine percent voucher students, religious and for-profit schools were excluded, and the amount of the voucher was set at fifty-three percent of the average amount spent per pupil in the Milwaukee schools in 1990-91, approximately $2500. \(^{109}\) As a result, these legislative limits precluded the emergence of a competitive market. For example, the small scale of the program made it impossible to achieve economies of scale in employment, purchasing and other basic operations. \(^{110}\) Additionally, because for-profit schools were excluded, entrepreneurs had no entry into the marketplace, and because the number of voucher-redeeming pupils could not exceed one percent of public school enrollments, public schools had no need to fear competition from voucher-redeeming schools.\(^ {111}\)

Despite these limitations, few reformers oppose the Milwaukee plan. Instead, their concern is that it will be regarded as a true test of a market system of education. As Professor Myron Lieberman explains, "The Milwaukee plan is likely to turn out poorly precisely because it is not a competitive market system of education." \(^{112}\) Until a true competitive market experiment is implemented, conclusions regarding the efficacy of a market system of education are premature.

\(^{106}\) Id. at 12.  
\(^{107}\) CARNEGIE SPECIAL REPORT, supra note 66, at 19.  
\(^{108}\) LIEBERMAN, supra note 2, at 11.  
\(^{109}\) Id. at 12; see also Underwood, supra note 102, at 230 (pointing out several additional requirements imposed by the Wisconsin Legislature, including a required average attendance rate of ninety percent, the satisfaction of minimum parental involvement criteria and the mandate that qualifying families must not have income greater than 175% of the federal poverty level).  
\(^{110}\) LIEBERMAN, supra note 2, at 12.  
\(^{111}\) Id.  
\(^{112}\) Id. at 13. Moreover, general confusion regarding what a voucher system entails interferes with public acceptance of voucher proposals. Not only are vouchers frequently mischaracterized as methods of transmitting public funds to private schools, they have also been described as a method of channeling students to public schools offering specialized curricula, a concept similar to magnet schools. See Keller, supra note 19, at 72. ("Similarly, vouchers involve the incorporation of parental choice in the assignment of students to public schools with specialized offerings; in this way they are essentially similar to magnet schools."). Although this view of voucher plans may loosely fit the Milwaukee Parental Choice Program, it is inconsistent with any of the four current legislative models of choice: Intra-district Public Choice, Inter-district Public Choice, Market-Oriented Public Choice, and Private Choice. See generally supra note 13.
3. The Reality of Implementing Sweeping Reforms

Assuming public misconceptions of market-based choice proposals can be overcome, the true challenge will be the implementation of a voucher system. It has been suggested that a legislative or judicial victory for school choice supporters may not result in the alternatives they expect.111 Because school choice will have to be implemented by local school districts and school boards, the implementation of a market system is subject to reformation by recalcitrant bureaucrats. John Chubb and Terry Moe have commented that the administrative process affords educators and public school administrators the opportunity to impose rules or procedures limiting student access to private and for-profit schools.114 Administrative review procedures which could be employed to limit access to the market include regulations regarding: “1) compliance with zoning ordinances; 2) construction of facilities meeting state, county and local building codes and fire and safety regulations; 3) state or local regulation of a private [or for-profit] school; 4) teacher qualifications and pupil teacher ratios; and 5) curriculum requirements.”115 This list is expanded when one considers the social fallout associated with the elimination of a long-standing cultural and psychological investment in public education.116 Moreover, by merely expanding regulatory mandates, current administrators in the public school system could limit the flexibility of market entrants and increase their costs.117

Against this backdrop, attacks may be made against a choice system based on the claim that powerful for-profit and private schools will discriminate against students. The idea is that organized suburban constituencies or coalitions of private schools would force the gradual elimination of the equalizing elements of school choice.118 Such discriminatory practices might include, for example, restrictive admission based upon geographic location and transportation costs. Ultimately, attempts to benefit the advantaged while reversing the redistributive effects of school choice for the disadvantaged could do more harm to the political longevity of choice legislation than administrative resistance to market entrants.

The possibility, however, that opponents of school choice could erect administrative barriers to competition while also attempting to discredit competitive schools is unlikely. For example, the same school choice program which must ultimately be implemented by local school districts and education professionals with their own agendas is not likely to be co-opted by isolated communities interested in tuition add-ons and restrictive admissions. In short, a legislatively mandated system implemented by professionals in the existing school system is unlikely to revert to a standard which is

113. See Henig, supra note 27, at 183 (claiming that well-organized parent groups and coalitions of private schools could eventually force the erosion of the equalizing elements of vouchers through the institution of anti-competitive measures such as tuition add-ons); Lieberman, supra note 2, at 295 (arguing that uncritical support for voucher plans with anti-competitive provisions, such as those in the Milwaukee Parental Choice Program, could be as damaging to lower and secondary education as the current public school monopoly); Solomon, supra note 19, at 928 (observing that public school teachers, administrators and their unions could block the growth of for-profit schools through the use of restrictive regulations over zoning, facility construction, teacher qualifications and student-teacher ratios).
114. Chubb & Moe, supra note 2, at 309.
115. Solomon, supra note 19, at 928.
116. Lieberman, supra note 2, at 296; see also Bennett, supra note 2, at 20.
117. Solomon, supra note 19, at 930.
118. Henig, supra note 27, at 184; see also Berliner & Biddle, supra note 2, at 175-77.
socially and politically undesirable. Although the market will govern developments in school structure and techniques, legal and social barriers to the development of discriminatory practices will continue to exist in the education market as they do in other markets.

Finally, in addition to potential administrative barriers to the adoption of a free market for pre-collegiate education, the possibility that reform efforts could fail to meet public expectations or that perceived improvements could overshadow actual progress, deserves attention. The great educational reforms of this century ultimately adapted to fit within the existing system of education. Some reforms began with unrealistic expectations while others had modest initial goals that expanded after capturing the imagination of the public. In the end, the structure of public education changed far more than its substance.

While such observations carry historical importance they are not readily applicable to discussions of a competitive market for education because a competitive market naturally allows for competing views of the substance and structure of the ideal school. Under a free market system, some schools would undoubtedly resist change. Others however would embrace reform, allowing for the success or failure of individual reforms to be determined. Further, the related concern that a competitive market for education could place profit and perception of academic excellence ahead of actual improvements in academic achievement ignores the fact that the free market responds to public demand for information about the success or failure of educational programs. With independent organizations rendering opinions on the quality of individual institutions, and the corresponding possibility of losing students to more competitive schools, administrators would have the proper incentive to pursue better methods of education.

There is no doubt that implementing a reform as ambitious as school choice presents an array of difficulties. Logistics and transportation problems, inequality of opportunity between rural and urban citizens, the ambivalence of some parents toward the selection of a school and the possibility of inadvertent resegregation are among the chief concerns of choice opponents. Most of these problems, however, already exist within the current public school system. Moreover, these problems merely comple-

119. TYACK & CUBAN, supra note 22, at 64-84 (analyzing reforms such as the introduction of kindergartens and junior high schools and juxtaposing the ambitious goals of reformers against the homogenizing effects of the public school system); see also Michael W. Kirst, The State Role in School Restructuring, in EDUCATION REFORM IN THE 90's 31 (Chester E. Finn, Jr. & Theodore Rebarber eds., 1990) ("Schools may confuse restructuring with merely intensifying the existing school system, or see the state restructuring program as just another funding source."); HENIG, supra note 27. Henig has observed that,

Market-based choice reforms are intended to change the process by which school-related decisions are made. Advocates presume that such changes in process will translate into changes in what actually goes on inside the classroom—the substance of education—but the link between process and substance is at best indirect. Part of the popularity of the choice proposals depends on different groups projecting their own vision of what the substantive consequences will be. More of them than not are destined to be disappointed.

Id. at 51.

120. See generally TYACK & CUBAN, supra note 22, at 66-67 (examining how enthusiasm for kindergartens transformed the limited goal of softening a child's entry into the classroom into the unrealistic expectation that kindergartens could "rescue children and their parents from poverty and crime, turn immigrants into Americans, [and even] solve the race problem").

121. RINEHART & LEE, supra note 2, at 141-58.
ment the poor academic performance of our public school students on national and international assessments. After more than three decades of incremental reform, the very method of dispensing education in this country has now come under scrutiny.

While legislative alternatives to the current system exist, if they are to succeed they will have to garner both public support and judicial endorsement. Of these two, it is the latter which has the most exacting standards.

III. SCHOOL CHOICE AS THE NEXT ARENA IN FINANCE REFORM LITIGATION

A. Legal Challenges to School Choice

1. Federal Constitutional Constraints

Because the creation of a competitive market for educational services would employ the use of public, private and for-profit schools, the federal constitutional challenges to privatization aim at the elimination of both private and for-profit competitors. Legal assaults on the inclusion of private schools in choice proposals focus on concerns over the use of public funds for religious purposes. This approach has wide appeal for opponents of choice since private educational institutions are largely sectarian. Additionally, challenges to for-profit schools may attempt to eliminate cost-efficiencies in education by mandating strict adherence to cumbersome regulations currently imposed upon America's public schools. Although the full scope of federal constitutional challenges to the adoption of school choice legislation is not yet known, it is likely that the mechanism for these challenges will be found in the First and Fourteenth Amendments. Legislators interested in the implementation of choice proposals should recognize the implications of these federal constitutional arguments.

a. The Establishment Clause

[W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

The Establishment Clause of the First Amendment prohibits government from establishing a state religion or restraining the free exercise of any individual's religion. Not surprisingly, the distribution of public funds for use by religious institutions implicates the Establishment Clause. It has been suggested that the use of public tax dollars for private schooling is an issue implicating strict constitutional prohibitions. The theory notes that any public funds distributed to religious schools increase those schools' budgets, thereby aiding religion. Indeed, while the use of public

122. DIGEST OF EDUCATION STATISTICS, supra note 73, at 69; see also Heise, supra note 88, at 139 (noting that "approximately 81% of America's private schools are associated with religious institutions, and these religious schools educate 84% of private school students").
124. U.S. CONST. amend. I
125. See, e.g., Douglas Laycock, A Survey of Religious Liberty in the United States, 47 OHIO ST. L.J. 409, 443-51 (1986) (referring to the implication of strict constitutional prohibitions by the use of public tax dollars for private schooling as the "no-aid" theory); McConnell, supra note 89, at 127-34 (noting that the Court's decision in Board of Education v. Allen, 392 U.S. 236 (1968), "effectively required the parochial schools to secularize their curriculum if they wished to receive assistance").
funds may be restricted to non-sectarian courses, the public subsidy still bolsters the religious schools' resources, and schools with greater resources can invest more in their religious programs or expand the number of students to whom they teach religion by lowering tuition.\textsuperscript{126} Nevertheless this theory, the United States Supreme Court has pursued several methodological approaches which permit some degree of state assistance to religious schools.\textsuperscript{127}

One view adopted by the Court in \textit{Witters v. Washington Department of Services for the Blind}\textsuperscript{128} holds that the state's decision to provide educational funds to individuals, even where those individuals may apply the funds to a religious education, does not result in the establishment of religion.\textsuperscript{129} In \textit{Witters}, the State offered scholarships for the vocational training of the blind. Larry Witters was denied the use of his scholarship because he wished to use it for training as a church youth director or pastor. The Supreme Court held that because the program did not have the principal or primary effect of advancing religion,\textsuperscript{130} the availability of the scholarship for religious education did not violate the Establishment Clause.\textsuperscript{131}

The Court has come to a similar conclusion where states have chosen to provide special aid to students:\textsuperscript{132} the Constitution does not compel states to discriminate against individuals receiving education in religiously affiliated schools.\textsuperscript{133} The Court has not gone so far, however, to say that states are required to spend as much money on students in religious schools as they spend on students in public schools. In fact, the closest the Court has come to mandating equality of funding between public and private education can be found in the dissent of Chief Justice Burger in \textit{Meek v. Pittenger}.\textsuperscript{134} There, the Chief Justice argued that because parents have the constitutional right to send their child to a religious school, and because states refuse to fund sectarian institutions, the decision to attend a religious school requires a parent to forfeit the state educational subsidy which their child would receive in a public school.\textsuperscript{135} The Chief Justice considered this practice to be a violation of the Four-
tion for his child or to forgo the opportunity for his child to learn to cope with—or overcome—serious congenital learning handicaps, through remedial assistance financed by his taxes. Affluent parents, by employing private teaching specialists, will be able to cope with this denial of equal protection, which is, for me, a gross violation of Fourteenth Amendment rights, but all others will be forced to make a choice between their judgment as to their children’s spiritual needs and their temporal need for special remedial learning assistance.

Meek, 421 U.S. at 387.

136. Id.


138. See, e.g., Wolman v. Walter, 433 U.S. 229, 250 (1977) (“In view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools.”); Meek v. Pittenger, 421 U.S. 349, 350 (1975) (“The massive aid that nonpublic schools thus receive is neither indirect nor incidental, and even though such aid is ostensibly limited to secular instructional material and equipment the inescapable result is the direct and substantial advancement of religious activity.”).

139. See, e.g., Witters v. Washington Dep’t of Servs. for the Blind, 474 U.S. 481, 488 (1986) (describing the lack of state action in the application of program funds, Justice Marshall held, “Aid recipients’ choices are made among a huge variety of possible careers, of which only a small handful are sectarian. In this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State”); Mueller v. Allen, 463 U.S. 388, 400 (1983) (referring to an income tax deduction available to parents of students attending private or public schools, Justice Rehnquist writing for the Court noted, “[t]he historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case”); Everson v. Board of Educ., 330 U.S. 1, 18 (1947) (“The First Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary ...” [Cutting off church schools from these [social] services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment.”). But see Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 798 (1973); Sloan v. Lemon, 413 U.S. 825, 828 (1973). In Nyquist and Sloan aid which was formally given to parents, and not directly to religious schools, was nonetheless invalidated.

140. Cochran v. Louisiana Bd. of Educ., 281 U.S. 370 (1930) (stating that the State’s purchase of textbooks for public as well as private school students is constitutionally permissible, since “the legislation does not segregate private schools, or their pupils, as its beneficiaries... Individual interests are aided only as the common interest is safeguarded”).
which benefits all students neutrally, without reference to religion, is permissible. Consequently, benefits which are passed directly to the parent, who in turn chooses to apply them to religious or secular education, may be permissible. Directing the aid to the parent may be seen as an indication that those programs focus directly on the transmission of education, and only incidentally and occasionally accommodate religion. The decision to direct aid to the parent rather than the parochial school alone, however, is insufficient to overcome Establishment Clause scrutiny.

Finally, the Court has made various attempts to categorize the activities of religious schools, breaking them down into components which it could label as religious or secular. The Court then approves aid in only those situations where the money is applied to a wholly secular purpose. The application of this approach, frequently referred to as the “tracing theory,” has resulted in sometimes confusing, often indistinguishable conclusions by the Court.

(1) Lemon v. Kurtzman

Underlying the analysis of constitutionality in many of these cases is the threshold test created in the 1971 decision of Lemon v. Kurtzman. Despite significant modification, this position continues to influence the Court’s treatment of government aid to religious schools. Under the Lemon framework, the constitutionality of stat-

---

141. Id. at 374-75.
142. In Wolman v. Walter, 433 U.S. 229, 250 (1977), Justice Blackmun, writing for the Court, addressed the singular practice of directing aid to parents rather than parochial institutions. In Committee for Public Education v. Nyquist, the state attempted to justify the program, as Ohio does here, on the basis that the aid flowed to the parents rather than to the church-related schools. The Court observed, however, that unlike the bus program in Everson v. Board of Education, and the book program in Allen, there “has been no endeavor to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former.” The Court thus found that the grant program served to establish religion. If a grant in cash to parents is impermissible, we fail to see how a grant in kind of goods furthering the religious enterprise can fare any better. Id. at 250-51 (citations omitted) (footnotes omitted). Although the Court’s message focused on the establishment of religion, its language demonstrated skepticism toward the practice of offering public aid to parochial schools through a third party intermediary. Not until Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993), would the Court acknowledge that aid flowing to religiously affiliated schools is constitutional where the program is ideologically neutral and the recipients include students attending both public and private schools.

144. Compare Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (holding state low-income student scholarships and income tax credits for families sending children to sectarian schools to be unconstitutional aid to religion) with Mueller v. Allen, 463 U.S. 388 (1983) (upholding a tax deduction for transportation and tuition expenses of public and private school students, with the recognition that the deduction for tuition expenses affected only those families with children attending private schools). In addition to the confusion attending any application of the tracing theory, this approach potentially violates the ruling in Pierce v. Society of Sisters, 268 U.S. 510 (1925), that a state law that compelled students to attend only public schools was unconstitutional because it impermissibly interfered with the liberty of parents to decide on matters affecting the upbringing and education of their children. Id. at 534-35.
146. In this respect, the Court in Agostini v. Felton, 117 S.Ct. 1997, 2010 (1997), recently reaffirmed the general principles used to evaluate whether government aid violates the Establishment Clause.
utes under the Establishment Clause is analyzed using a three-part test: “First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’” In Lemon, Rhode Island and Pennsylvania attempted to supplement the salaries of teachers in private sectarian schools in order to bring the salaries of private school teachers in line with those of public school teachers. Noting that the benefits offered under the two legislative plans were more than indirect or incidental, the Court held that while the intent of the legislation was not to advance religion, the effect entailed excessive government entanglement with religion. As Chief Justice Burger explained,

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these [restrictions intended to avoid the use of public monies for the advancement of religion] are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

In application, each prong of the test has accounted for the invalidation of some form of state aid to religion. For example, the first prong of the test was applied by the Court just two years after Lemon in a case that resulted from the Pennsylvania Legislature’s effort to reimburse parents for the tuition expense of sectarian schools. The State claimed that the statute did not violate Lemon because the parents were not restricted in the use of the money. The Court did not accept this argument, noting that the legislation was clearly distinguishable from legislation crafted for the benefit of all parents, since the plan provided special aid to parents who had chosen to support religious schools.

---

147. Lemon, 403 U.S. at 612-13. Lemon, which represented the Court’s first attempt at a comprehensive constitutional test for reviewing government aid to religion, remains a viable basis for school finance decisions. The test, however, has received extensive criticism. See McConnell, supra note 89, at 127-34. According to Professor McConnell,

It is the parochial school aid cases that most starkly illustrate the perverse effects of the Lemon test. In these cases, the Court generally has prohibited government aid to schools that teach religion. But in Pierce v. Society of Sisters, a celebrated decision, the Court held that parents have a constitutional right to send their children to private, including religious, schools. The Court explained, “The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.” Without aid to private schools, however, the only way that parents can escape state “standardization” is by forfeiting their entitlement to a free education for their children—that is, by paying twice: once for everyone else’s schools (through property taxes) and once for their own.

Id. at 131-32. (citations omitted) (footnotes omitted).

148. Lemon, 403 U.S. at 602-03.

149. Id. at 616 (“The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid.”).

150. Id. at 620 (“It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches.”).

151. Id. at 619.

152. Sloan v. Lemon, 413 U.S. 825 (1973) (holding that the tuition reimbursement plan violated the second prong of the Lemon test because the statute, which afforded benefits solely to those who chose to receive religious schooling, increased access to religious schools and consequently had the primary effect of advancing religion).

153. Id. at 832 (“The State has singled out a class of its citizens for a special economic benefit.
The second prong of the *Lemon* test was applied in *Committee for Public Education and Religious Liberty v. Nyquist*. In that case, a New York state law provided funding for maintenance and repair of non-public schools serving low-income families, tuition reimbursements to families with students attending such schools and certain income tax benefits. According to the Court, each of these measures failed under the second prong of the *Lemon* test because each had the primary effect of advancing religion. For example, the Court held that the entire repair budget of the sectarian schools could have been funded by the program, as opposed to only that portion attributable to nonsectarian, core education. More significantly, the Court found the effect of the tuition reimbursements was to provide financial support for private sectarian schools, resulting in the inevitable conclusion that the statute's primary effect was to advance religion.

Finally, in *Meek v. Pittenger* the Court applied the "entanglement" prong to prohibit both the lending of instructional materials and the funding of counseling, testing and psychological services in sectarian schools. Excessive entanglement with religion was anticipated if the state was to properly monitor whether its materials or employees were being used to advance the religious mission of the schools.

While these decisions establish limits on the permissible relationship between government and religious organizations, they also suggest that a well-designed school voucher program could survive the *Lemon* test. First, the requirement of a secular purpose is consistent with the intent of most voucher programs, which seek to improve educational achievement, lower educational costs and provide alternatives to students whose designated public school is underperforming. Second, because tuition vouchers are redeemable at any school—public, private, religious or for-profit—their primary effect is to expand educational alternatives for all parents. Where benefits have been provided directly to families rather than religious schools, even if the benefits are in turn used for some aspect of religious education, the Court has found the effect of the legislation to be permissible.

Michael Heise noted, "Just as would occur when wel-
fare recipients give public funds (a portion of their welfare benefits) to religious institutions, any aid to religious schools through a voucher program would be indirect, would result from private choice, and would not depend on any financial incentive favoring religious schools.” Finally, it is unlikely that excessive government entanglement with religion could result from the type of formalistic oversight which a voucher system would entail. As the majority noted in Lemon,

Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. Zorach v. Clauson, 343 U.S. 306, 312 (1952). Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts. . . . Judicial caveats against entanglement must recognize that the line of separation, far from being a “wall,” is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship. 161

Notwithstanding the Court’s language in Lemon, it is important to note that the Court could potentially invalidate a voucher proposal if it chose to categorize all the activities of the religious schools receiving public funds. As with its recently overturned decision in Aguilar v. Felton, 162 the Court might choose to approve a voucher system only where the aid was used for entirely secular purposes. 163 Under this theory, aid found to support religious activities could be held to have the primary effect of advancing religion. Furthermore, although extensive regulation might eliminate the potential for public monies to be used for religious activities, such regulation would run the risk of causing entanglement between church and state, thereby violating the third prong of the Lemon test. It was precisely this catch-22 which the Court moved away from in Zobrest v. Catalina Foothills School District. 164

(2) Zobrest v. Catalina Foothills School District

A recent decision by the Supreme Court indicates its willingness to permit the use of public funds for religious instruction, as long as the funds are not distributed directly to the school. In Zobrest v. Catalina Foothills School District, the State refused to provide an interpreter for a deaf student attending a Catholic school, despite the availability of such interpreters in public and secular private schools. 165 The Court disagreed with the State and held that the availability of an interpreter was a neutral benefit provided without reference to religion. 166 The Court reasoned that the govern-

160. Heise, supra note 88, at 142.
161. Lemon, 403 U.S. at 614.
165. Id.
166. Id. at 10. (“The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as ‘disabled’ under the [Individuals with Disabilities Education Act], without regard to the ‘sectarian-nonsectarian, or public-nonpublic nature’ of the school the child attends.”).
ment program providing an interpreter applied neutrally to any qualifying child and that the child, not the sectarian school, primarily benefitted from the program.\textsuperscript{167} Thus, as with the Court's decisions in \textit{Mueller v. Allen}\textsuperscript{168} and \textit{Witters v. Washington Department of Services for the Blind},\textsuperscript{169} the aid here was not considered to be accruing to the religious school. Moreover, the Court went beyond \textit{Mueller} and \textit{Witters} by applying the child benefit theory without imposing upon it the constraints of the \textit{Lemon} test. The decision indicated a move away from the view that the Establishment Clause prohibits any portion of public funds to be used for religious instruction. Further, the holding suggested that the Court was taking a step away from the \textit{Lemon} test and the tracing theory, and moving toward a more accommodationist approach to Establishment Clause questions.

The most significant aspect of the \textit{Zobrest} decision may be found in footnote eleven, in which the Court suggested that families acting as intermediaries in the application of public funds to religious purposes might avoid Establishment Clause problems altogether. As the Court explained, there would be no problem under the Establishment Clause if the funds instead went directly to the student's parents, who could then hire the interpreter themselves.\textsuperscript{170} The Court went on to quote from the respondent's brief that the interpreter in such a situation would be the student's employee, not the school's, and "government involvement in the enterprise would [therefore] end with the disbursement of funds."\textsuperscript{171} The application of this line of reasoning to a school choice plan is obvious: legislation mandating the disbursement of public funds to parents in the form of government vouchers would make the chosen school the parent's employee, not the government's. Not only does this approach withstand First Amendment scrutiny, but it also comports with the concept of a free market for education.

\textit{Zobrest}, taken together with \textit{Mueller, Witters, Committee for Public Education and Religious Liberty v. Nyquist},\textsuperscript{172} and \textit{Sloan v. Lemon},\textsuperscript{173} makes the indirect flow of public aid to sectarian schools through a third party intermediary relatively unassailable, provided that the relevant aid program is ideologically neutral and the class of recipients includes students attending both public and private schools. Given the Court's long-standing rejection of the idea that aid flowing to religious institutions automatically violates the Establishment Clause by freeing funds for religious purpos-

\textsuperscript{167} Id. at 13. ("The [Individuals with Disabilities Education Act] creates a neutral government program dispensing aid not to schools but to individual handicapped children.").


\textsuperscript{169} Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986).

\textsuperscript{170} Id. at 13 n.11. Although \textit{Zobrest} acknowledged the necessity for the ideological neutrality of permissible aid programs, in footnote eleven the Court implied that a less exhaustive list of criteria are necessary to overcome Establishment Clause scrutiny than previously thought. See generally Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 781 (1973) ("[T]he fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered.") (emphasis added).

\textsuperscript{171} Zobrest, 509 U.S. at 13 n.11 (quoting Brief for Respondent at 11, \textit{Zobrest} (No. 92-94)). This line of reasoning was previously addressed in \textit{Mueller} and \textit{Witters}. In \textit{Mueller}, Justice Rehnquist noted that channeling assistance to sectarian schools through parents "reduced the Establishment Clause objections." \textit{Mueller}, 463 U.S. at 399. Similarly, in \textit{Witters} Justice Marshall wrote that state scholarship aid which ultimately flowed to sectarian institutions did so "only as a result of the genuinely independent and private choices of aid recipients." \textit{Witters}, 474 U.S. at 487.


es, the Zobrest decision obfuscates the primary arguments against aid that is equally redeemable at public and private institutions. While some opponents of choice proposals have confused the relevant constitutional questions by maintaining that "eligibility for participation in a voucher program is always contingent upon attendance at private schools," any legitimate voucher plan would avoid such patent invalidity through the choice of voucher redemption at public, private or for-profit schools.

By relying upon the child benefit theory, to the exclusion of the Lemon test, Zobrest suggested that the neutral application of benefits and the indirect flow of aid to sectarian and non-sectarian schools represent the necessary base-line criteria for a constitutionally sound voucher proposal.

(3) Agostini v. Felton

In the short period since Zobrest, its specific implications, as well as the general direction of Establishment Clause jurisprudence, have been fervently debated. Without acknowledging this debate, on June 23, 1997, the Court crafted the latest chapter in its developing application of the Establishment Clause to aid for education programs. Twelve years after its decisions in Aguilar v. Felton, and its companion case, School District v. Ball, the Court revisited both decisions in Agostini v. Felton by use of an otherwise obscure rule of procedure, concluding that Zobrest amounted to "fresh law" and contributed to a significant change in Establishment Clause jurisprudence.

In Agostini petitioners sought review of the Supreme Court's decision in Aguilar, alleging that subsequent changes in both the factual conditions underlying the decision and the decisional law of the Court rendered the ruling prospectively inequitable, and thereby reviewable under Federal Rule of Civil Procedure 60(b). In Aguilar, the

174. See Hunt v. McNair, 413 U.S. 734, 743 (1973) (rejecting "the recurrent argument that all aid [to parochial schools] is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends"); see also Widmar v. Vincent, 454 U.S. 263, 274-75 (1981) ("If the Establishment Clause barred the extension of general benefits to religious groups, 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'") (citations omitted).

175. Green, supra note 83, at 66-67.


177. Green, supra note 83; Peyser, supra note 19; Heise, supra note 88; Daniel, supra note 102; Hood, supra note 176.


181. FED. R. CIV. P. 60(b). The question presented in Agostini v. Felton was whether the petitioners—parents of private school children bound by Aguilar v. Felton's injunction against New York City's use of public employees to administer remedial education—were entitled to relief from the injunction under Federal Rule of Civil Procedure 60(b)(5). Agostini, 117 S. Ct. at 2006. Rule 60(b)(5) reads in pertinent part, "On motion and upon such terms as are just, the court may relieve a party ... from a final judgment [or] order ... [when] it is no longer equitable that the judgment should have prospective application." Id.

182. Agostini, 117 S. Ct. at 2011 ("Indeed, even the Zobrest dissenters acknowledged the shift Zobrest effected in our Establishment Clause law when they criticized the majority for 'stray[ing] ... from the course set by nearly five decades of Establishment Clause jurisprudence.' Thus, it was Zobrest—and not this case [Agostini]—that created 'fresh law.'" (emphasis added)).

183. Id. at 2006 (citing Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992)).

Court held that the Establishment Clause barred New York City from sending public school teachers into parochial schools to provide remedial education for disadvantaged children under a congressionally mandated program. The Court reasoned that the program necessitated an excessive entanglement of church and state in violation of the Establishment Clause. Accordingly, the city was enjoined from allowing secular instruction by public school teachers on the premises of parochial schools.

In seeking review of *Aguilar*, petitioners cited one factual and two legal developments warranting relief from the injunction. While dismissing two of petitioner's claimed developments, the Court agreed with the third: that *Aguilar* had been so undermined by the subsequent Establishment Clause decisions in *Witters* and *Zobrest* that it was no longer good law.

The *Agostini* Court's review of *Aguilar* and its companion, *Ball*, noted three mutual assumptions as well as a fourth precept unique to *Aguilar* which had been directly or implicitly rebutted in subsequent decisions of the Court. Explaining that it had abandoned the presumption of *Meek* and *Ball* that the presence of public employees on parochial school grounds invariably results in state-sponsored religious indoctrination and/or a "symbolic union" between government and religion, the

---


186. *Aguilar*, 473 U.S. at 409 ("[T]he supervisory system established by the City of New York inevitably results in the excessive entanglement of church and state, an Establishment Clause concern distinct from that addressed by the effects doctrine.").

187. Id. at 412-13.

188. Id. at 413.

189. *Agostini*, 117 S. Ct. at 2006. According to the petitioners, the primary developments warranting modification of the injunction were (1) the exorbitant cost of complying with the injunction while concurrently meeting the requirements of the Elementary and Secondary Education Act; (2) the fact that a majority of justices deciding *Board of Education v. Grumet*, 512 U.S. 687 (1994), had expressed the view that *Aguilar* should be reconsidered or overruled; and (3) the fact that *Aguilar* had been undermined by subsequent Establishment Clause decisions in *Witters*, *Zobrest* and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. at 819 (1995).


191. The premises underlying the Establishment Clause violations found in *Ball* and *Aguilar* are described in *Agostini* as the "assumption" that, (i) [A]ny public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decision-making. Additionally, in *Aguilar* there was a fourth assumption: that New York City's Title I program necessitated an excessive government entanglement with religion because public employees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion.

192. Id. at 2010. In her opinion on behalf of the majority, Justice O'Connor addressed each of the assumptions individually, explaining that the Court's understanding of the criteria used to evaluate whether a program has an "impermissible effect" had changed. Id.
The majority noted that it was *Zobrest* which had "expressly disavowed" these ideas. Further, by reference to *Witters* and *Zobrest* the Court expressed its abandonment of the assumption in *Ball* that all government aid directly benefitting the educational function of religious schools is invalid.\(^{193}\) This latter point is of particular significance to proponents of school choice. In *Agostini* the Court acknowledged that the Establishment Clause did not interfere in the issuance of a vocational tuition grant to a blind student attending a Christian college,\(^{194}\) or a deaf student using a publicly employed interpreter in a religious school.\(^{195}\) The rationale in both cases, identified and endorsed by the majority in *Agostini*, maintained that public funds went to the religious institutions "only as a result of the genuinely independent and private choices of individuals."\(^{196}\) Accordingly, the Court concluded that the aid at issue in *Agostini* was indistinguishable from the aid offered in *Zobrest*.\(^{197}\)

Finally, the majority signaled its intention to rein in the use of the entanglement prong of *Lemon*. While reaffirming that entanglement remains part of the Court's Establishment Clause analysis, the Court reasoned that entanglement was merely an "aspect of the inquiry into the statute's effect," i.e., *Lemon* 's second prong.\(^{198}\) Noting that entanglement does not necessarily have the effect of advancing or inhibiting religion, the Court retreated from the concept that all possible forms of entanglement violated the Establishment Clause.\(^{199}\) Here, the majority embraced a more accommodationist approach, confirming that it will no longer invalidate government programs on the mere possibility that they might advance religion. Moreover, the Court acknowledged the ripple effect of a much stricter view of entanglement; that is, to the extent the Court no longer presumes that public employees will inculcate religion simply by virtue of being placed in a sectarian environment, the administering government body is free to allow state-funded non-religious instruction without need for the kind of pervasive monitoring which would create excessive entanglement.\(^{200}\)

In both express and implicit terms, *Agostini* reflects the Court's elevation of *Lemon* 's second prong—asking whether the aid has the principle or primary effect of advancing religion—to a position as the preeminent inquiry in Establishment Clause jurisprudence.\(^{201}\) Consequently, the significance of *Agostini* has to do not only with

---

193. *Id.* Referring to *Witters*, the Court noted,

   The grants were disbursed directly to students, who then used the money to pay for tuition at the educational institution of their choice. In our view, this transaction was no different from a State's issuing a paycheck to one of its employees, knowing that the employee would donate part or all of the check to a religious institution.

\(^{194}\) *Id.* at 2011.

\(^{195}\) *Witters*, 474 U.S. at 481.

\(^{196}\) *Zobrest*, 509 U.S. at 1.

\(^{197}\) *Agostini*, 117 S.Ct. at 2012 (quoting Committee for Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 782-83 n.38 (1973)).

\(^{198}\) *Id.* at 2012.

\(^{199}\) *Id.* at 2015.

\(^{200}\) *Id.*

\(^{201}\) *Id.* at 2010. Significantly, the *Agostini* Court never mentions the *Lemon* test, opting instead to note those aspects of Establishment Clause analysis which continue to influence the Court.
its clarification of the status of cases such as Zobrest, Witters, Aguilar, Ball and Meek, but with its much broader conclusion that the Court’s Establishment Clause jurisprudence has significantly changed since it decided Aguilar.\textsuperscript{202} Although the Court was unwilling to express its abandonment of the Lemon test, both its reliance on Zobrest and its acknowledgment of a changing perception of the criteria used to determine whether aid has the effect of advancing religion promise to focus the attention of Establishment Clause jurisprudence away from symbolic or potential advancement of religion toward empirically demonstrable violations.\textsuperscript{203} In this manner, Agostini reflects the Court’s move away from the separationist standards of the Lemon test toward an analysis that accommodates the private choices of aid recipients.

Following Agostini, the most significant apparent hurdle for choice proponents under Establishment Clause jurisprudence may be the idea that public aid to parochial schools is appropriate only to the extent that it does not relieve the sectarian school of costs it otherwise would have borne.\textsuperscript{204} Although Agostini and Zobrest found refuge from these arguments by virtue of the fact that the subject programs were merely “supplemental” to the regular curricula,\textsuperscript{205} it is noteworthy that in Witters a student’s individual decision to use a state-funded scholarship for religious education did not mandate the conclusion that the programs principle or primary effect was to advance religion.\textsuperscript{206} Given Agostini’s elevation of the Court’s “effects” analysis, it would now appear that the decision to offer state aid to all students under an ideologically neutral program allowing the student to select the school of their choice among private and public providers will withstand Establishment Clause scrutiny.

\textsuperscript{202} Id. (citations omitted). Later in its opinion, the Court again signaled that programs containing a neutral purpose will be evaluated primarily with an eye toward determining whether they have the “effect” of advancing religion. \textit{Id.} at 2015-16. In arriving at this conclusion, the Court did not abandon the entanglement prong of Lemon so much as it collapsed this prong into the criteria used to determine a government program’s “effect.” Noting that entanglement should be treated “as an aspect of the inquiry into a statute’s effect,” the Court explained,

\textit{[The] three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion [are]: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement.}

\textit{Id.} at 2016.

\textsuperscript{203} In this respect the majority looked to Zobrest as evidence of its “refus[al] to presume that a [public employee] would be pressured by the pervasively sectarian surroundings to inculcate religion” by adding to or subtracting from the course work. \textit{Id.} at 2010-11. The Court also identified, as a weakness of the Ball holding, the lack of any evidence of actual religious indoctrination. \textit{Id.} at 2008-09. Moreover, with respect to Aguilar, the Court stated, “Certainly, no evidence has ever shown that any New York City Title I instructor teaching on parochial school premises attempted to inculcate religion in students.” \textit{Id.} at 2012 (citations omitted).

\textsuperscript{204} See Zobrest, 509 U.S. at 12. This idea dates back to Meek, 421 U.S. at 350 and Wolman, 433 U.S. at 248-51, both of which suggested that public funds distributed to religious schools aided religion by increasing the recipient school’s budgets.

\textsuperscript{205} Agostini, 117 S. Ct at 2013-14.

\textsuperscript{206} Witters, 474 U.S. at 488.
b. State Action Doctrine

Although First Amendment challenges regarding educational vouchers apply only to religious schools, the Fourteenth Amendment's state action doctrine poses a potential threat to the efficient and autonomous operation of both private and for-profit institutions. For example, private schools acting under the color of state law must adhere to due process requirements207 and observe student privacy rights,208 among other constitutional requirements.209

Although private schools are currently regulated by state and federal law, the application of statutes such as Title VI of the Civil Rights Act of 1964210 or section 504 of the Rehabilitation Act of 1973,211 both of which apply to recipients of federal funds, could potentially bankrupt participating private and for-profit schools. For example, Title VI would impose a duty on private schools receiving funds to provide English language instruction to non-English-speaking students.212 Also, if subject to section 504, private schools would be required to provide educational services to handicapped students which are not otherwise mandated.213

Ultimately, the question may be reduced to whether contracts with public agencies render private institutions state actors under the Fourteenth Amendment. It is significant that in Witters, the Court noted that the student's individual choice to use his scholarship at a religious institution demonstrated that the payment to the school did not amount to state action.214 Moreover, in Rendell-Baker v. Kohn,215 the Supreme Court did not find state action where a private school, funded largely by the

207. See, e.g., Goss v. Lopez, 419 U.S. 565, 568 (1975) (regarding the due process which must be afforded students before imposing suspension).
209. See generally PUBLIC DOLLARS FOR PRIVATE SCHOOLS 166-70 (Thomas James & Henry M. Levin eds., 1983) (discussing the myriad constitutional protections provided to public school students but not required of private institutions with private funding).
212. See, e.g., Lau v. Nichols, 414 U.S. 563, 567 (1974) (Relying solely on the Civil Rights Act of 1964, the Court held, "Basic English skills are at the very core of what the public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education.").
213. Although section 504 of the Rehabilitation Act of 1973 "by its terms does not compel educational institutions to . . . make substantial modifications in their programs to allow disabled persons to participate," nor does the failure to do so constitute discrimination, Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979), it has nonetheless been held that the Individuals with Disabilities Education Act (Education of the Handicapped Act), 20 U.S.C. §§ 1400-1491 (1994), which relies upon the Rehabilitation Act for enforcement by way of federal funding, mandates that the state provide "personalized instruction with sufficient support services to permit the [handicapped] child to benefit educationally from that instruction . . . [so as] to achieve passing marks and advance from grade to grade," Board of Educ. v. Rowley, 458 U.S. 176, 203-04 (1982). In Board of Education v. Rowley, the Court reversed the Second Circuit's order that a Westchester County school district provide a sign language interpreter for an eight-year-old deaf child pursuant to the Individuals with Disabilities Education Act, but noted, however, that the Act's mandate of a "free appropriate public education" required "instruction specially designed to meet the unique needs of the handicapped child." Rowley, 458 U.S. at 188-89. Moreover, the Court acknowledged that under the Act, educational services were to be provided "at public expense and under public supervision . . . ." Id. at 189 (emphasis added).
214. Witters, 474 U.S. at 488 ("On the facts we have set out, it does not seem appropriate to view any aid ultimately flowing to the Inland Empire School of the Bible as resulting from a state action sponsoring or subsidizing religion.").
state, dismissed teachers without the level of due process afforded to public school teachers. The Court's decision, however, focused on the fact that the school's contract centered on the education of the school's students, and not on personnel matters.

Weighing in favor of the autonomy of private and for-profit schools is the fact that such institutions rely heavily on non-governmental standards, which give the schools the appearance of anything but state actors. Furthermore, unlike the bureaucracies that govern public schools, private and for-profit institutions construct fewer barriers between schools and their consumers. Thus, it is less likely in a free market that education consumers will have to petition their legislators to get the special needs of their children met. At the same time, however, without standardized government mandates, private and for-profit schools will not be required to accommodate special needs that do not exist in their student body, as public schools are by federal and state statutes.

2. State Constitutional Restraints

Several characteristics of state constitutions indicate that they may pose the most serious threat to the successful implementation of school choice. Because all powers not conferred upon the federal government are reserved to the states, the various state constitutions give structure to the extremely broad powers of the states. Not surprisingly, these broad charters often protect individual rights which are not secured under the Federal Constitution, such as the right to an education.

The authority of the states on matters not subject to the federal charter is further expanded by the nonuniformity of state constitutional jurisprudence. Although most state constitutions contain similar provisions, many of which were originally borrowed from the charters of other states, there is no necessity for uniform interpretation. The method by which state constitutional jurisprudence develops is limited only by the

216. Id. at 841-42 ("The most intrusive personnel regulation promulgated by the various government agencies was the requirement that the Committee on Criminal Justice had the power to approve persons hired as vocational counselors. Such a regulation is not sufficient to make a decision to discharge, made by private management, state action.").

217. Id. at 838-39 n.6.

218. See Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 785 (Md. 1983) ("[S]tate constitutions, unlike the federal constitution, are not of limited or delegated powers and not restricted to provisions of fundamental import; consequently, whether a right is fundamental should not be predicated on its explicit or implicit inclusion in a state constitution.").


220. See A.E. Dick Howard, Introduction: A Frequent Recurrence to Fundamental Principles, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW xxi (Bradley D. McGraw ed., 1985) ("[S]tate courts act properly when they develop an independent body of constitutional law . . . "). Professor Howard notes, however, that state constitutional jurisprudence should consistently reflect the core values shared among states in the development of their independent charters. "[T]he notion of a 'common market' of constitutional rights has strong moral overtones. Any principled theory of state constitutional litigation that invites standards that may vary . . . from state to state certainly should take account of this issue." Id. at xviii. The problem of course with the idea of state courts referring to foreign interpretations of similar constitutional provisions, is that it assumes similarly worded provisions embody similar intentions. Justice Charles Douglas of New Hampshire comments on the undue deference to interpretations of the Federal Constitution by noting, "The federalization of all our rights has led to a rapid withering of the development of state decisions based upon state constitutional provisions." Douglas, supra note 219, at 1140.

221. Howard, supra note 220, at xiii.
perceived obligation of state courts to justify departures from federal precedents.222 Where rights protected by the states are not created or addressed by the Federal Constitution, this process is simple; the state merely cites the obligation created by the state charter. This is the case, for example, with state constitutional education guarantees.

a. State Constitutional Education Guarantees

In San Antonio School District v. Rodriguez,223 the United States Supreme Court concluded that education is not a fundamental right protected under the Federal Constitution.224 Noting that the Constitution does not expressly or implicitly mention the right to education, the Court left to the states the responsibility of guaranteeing education rights.225 Because all state constitutions place an obligation upon the legislature to provide free schools to their citizens, state courts have assumed responsibility for interpreting the constitutional right to education.226 Toward this end, the vast majority of state courts have recognized that their state charters refer to the creation of "public" or "common" schools.227 These references suggest that it would require judicial interpretation of state constitutions to determine what free market arrangements would fulfill the requirement of public education.

Since the Court's decision in Rodriguez, a number of state courts have reviewed whether the education articles of their state constitution offer a guarantee of equal or minimally adequate public or common schooling.228 These cases generally fall into two categories: school financing suits relying on due process and equal protection arguments, where state constitutional education guarantees are a preliminary matter, and education rights claims, where the central issue is the minimum level of educational opportunity required under the state charter.229 To the extent that most state consti-

222. See generally Hans A. Linde, E Pluribus—Constitutional Theory and State Courts, 18 GA. L. REV. 165, 176 (1984). Although state courts frequently avoid conflicts with federal precedents, Linde notes that concerns over departures from federal jurisprudence are irrational in light of the independent basis for state constitutional decisions and the broad powers of the state charter.

Why [do] state courts [not] always apply state law before reaching a federal question? In fact they routinely do so with state statutes or constitutional provisions that have no federal parallel. But when the Supreme Court has decided a point, many state courts take the decision as a kind of benchmark, presumptively correct also for state law. When they depart from federal decisions, state courts often begin by explaining that the Supreme Court permits them to interpret their state's law in their own way—a sign of how far we have lost sight of basic federalism.

Id.


224. Id. at 35 ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this court to depart from the usual standard for reviewing a State's social and economic legislation.").

225. Id. at 44 ("[I]t would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every state.").


227. Id. at 97.


229. See Allen W. Hubsch, The Emerging Right to Education Under State Constitutional Law, 65
tutions vest the legislature with exclusive responsibility for the establishment of public education, state court decisions regarding education guarantees generally offer little more than baseline criteria for complying with the constitutional command of public or common schooling. Thus, although the state courts have in some cases defined the meaning of the education guarantee, they have generally deferred to the state legislature's plan for conferring education. In doing so, state courts have ultimately mandated the establishment of financing equalization schemes and minimum educational standards, but have given broad deference to the resulting legislative programs. Ultimately, in light of the constraints placed on judicial activism by the language of most state constitutional education guarantees, it is unlikely that these provisions will invalidate the use of public funds for private and for-profit education.

b. Implicit Limitations on State Conferences of Power

Although state constitutions by their terms do not prohibit government grants of authority to private parties, several constitutional clauses require state control of public functions. For example, public purpose clauses either limit the use of public funds for non-public purposes or specify that no funds will be distributed to non-public uses. In cases dealing with the public purpose doctrine, courts place emphasis on whether the benefit is realized primarily by the public or by a private institution. Some state courts have consequently allowed the conferral of public benefits directly upon private institutions serving members of the public, while others have rejected them. Thus, although a school choice plan which calls for the distribution of funds directly to private and for-profit schools might be rejected under the public purpose doctrine.
doctrine, distribution of publicly funded vouchers directly to parents would not.

In addition to the public purpose doctrine, judicial constructions have been used by state courts to limit the power of private actors in the public arena. One such construction is the non-delegation doctrine. This doctrine potentially interferes with delegations of state authority to private parties. It does so, in many cases, by reference to state constitutional vesting clauses, which confer specific authority upon certain branches of government. Because these clauses are frequently interpreted as limits on which branches of government may exercise specific powers, the delegation of governmental authority to private actors could be prohibited by the doctrine. Moreover, some state constitutions contain provisions that specifically vest government agents with control over public schools. These clauses provide direct authority for the invalidation of delegations of government power.

The concern addressed by such clauses and by the non-delegation doctrine is that government authority will be used by private parties to further their own interests at the expense of the public interest. Although the courts have frequently been inclined to enforce private delegations of authority when the interests of the private actor are closely aligned with those of the conferring agency and/or the public, state courts have created no precise guidelines for this determination. In general, factors such as the availability of agency and judicial review and the creation of guidelines to govern private actors have persuaded state courts to uphold private delegations. With respect to the privatization of education, it is unclear whether state courts will find extensive educational regulations adequate to limit the pursuit of purely private benefits. Moreover, because educational instruction is far more discretionary in na-

239. See Lawrence, supra note 235, at 650.
240. Id.
241. Hubsch, supra note 226, at 134-40 (reviewing each state's constitutional provision for the operation of public education and the specific language regarding the role of the government).
242. Lawrence, supra note 235, at 659-61. Professor Lawrence notes that this concern has public policy as well as strict constitutional dimensions.

When a public official is permitted to exercise a public power, he is generally expected to do so in a basically disinterested way. The community expects him to act from some conception of what is good for the community or according to standards that seek to further community interests, as opposed to acting to further his narrow private interests . . . [Among other concerns, the prospect] that private interest will affect the content of actions has obvious due process connections. One settled element of procedural due process is that the decision-maker must not be personally biased, that he must make his decision according to established standards or a disinterested view of the public interest. If a delegation creates the opportunity for private interest to dominate the use of governmental power, then those against whom the power is used may well have suffered deprivations without due process.

243. Id. at 686-88.
244. See George W. Leibmann, Delegation to Private Parties in American Constitutional Law, 50 IND. L.J. 650, 697-701 (1975) (noting that many courts refuse to uphold delegations of government authority to private actors without provisions for agency and/or judicial review); see also Lawrence, supra note 235, at 692 (noting that the creation of guidelines that direct private actors increases the likelihood that delegations will be upheld).
245. This, of course, assumes that the benefit derived by the education provider in the form of
ture than government activities currently delegated to private service providers, it is unlikely that state courts will analogize ministerial activities such as private garbage collection services with more complex activities such as school instruction.

Because the landscape of current case law interpreting the non-delegation doctrine offers little indication as to how state courts may view the delegation of responsibility for public education, and because the vesting clauses themselves fail to provide any textual guidance, school choice proposals are vulnerable to arbitrary judicial invalidation based upon state vesting clauses and the non-delegation principle they are interpreted to support. Given that no market-based or private choice proposal has yet to be enacted, however, state courts that would employ the non-delegation doctrine to invalidate such legislation must do so without actual evidence of a conflict between public and private interests. Because few courts have adopted a rule prohibiting all private delegations, the practical necessity for evidence of improper effect should limit the use of the non-delegation doctrine against school choice plans.

B. Why Should School Choice Prevail?

Following the United States Supreme Court's decision in Zobrest v. Catalina Foothills School District, the major challenge facing proponents of educational choice shifted to the various state constitutions and certain limitations they embody. Among these, the public purpose and non-delegation doctrines pose the greatest threat to the privatization of education. Both doctrines address the fundamental problem posed by privatization: self-interested decision-makers could wrest control of public functions from government, only to degrade the quality of service by pursuit of private incentives such as profit. In contrast to these concerns, the benefits accruing from a market system, such as cost efficiency and competition over quantifiable performance standards, indicate the conformity of public and private interests. For example, cost efficiency, a major goal of every school in a market system, is consistent with the public and governmental interest in the efficient allocation of government resources. Although excessive cost-cutting motivated by profit rather than student enrichment may occur, this excess is controlled by the education consumer, who may choose to take their education dollar elsewhere if quality declines. Moreover, if the interests of the education consumer were to shift away from the quality of education itself toward an interest inconsistent with the state constitutional guarantee of a "thorough" or "efficient" system of education, an earlier judicial validation of the delegation may be reviewed. As such, a free market for educational services would exist subject to state constitutional guarantees regarding the quality of instruction and curriculum. Given

voucher redemptions is somehow separate from any benefit accruing to the public. Courts reviewing private delegations have rejected similar arguments, which ignore the relative advantage of some private service providers and the benefit to the public of more efficient service. See generally In re Hansen, 275 N.W.2d 790, 795 (Minn. 1978) (noting the state's inability to efficiently evaluate the quality of American law schools, and the wisdom of delegating this responsibility to the American Bar Association).

246. Lawrence, supra note 235, at 668 ("[T]he ultimate criticism of the vesting clause as a constitutional basis is that it has failed to inspire a body of principled case law.").


248. Gershon M. Ratner, A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills, 63 TEX. L. REV. 777, 815 (noting that every state except Alabama and Mississippi have constitutional provisions requiring a system of free public schools, most of which are required under the state charter to be "thorough" or "efficient").

249. Lawrence, supra note 235, at 687; see also Keller, supra note 19 (examining the serious
these continuing constitutional safeguards, it is difficult to justify the invalidation of school choice on state constitutional grounds.

IV. CONCLUSION

It is important to recognize that the current school system was designed over 150 years ago and supported this nation's extraordinarily successful industrial era very well. The problem is not the concept of mass public education, but the fact that in its current form mass public education no longer adequately prepares young people for a real world, one that has changed dramatically. What we teach, how we teach it, and what we expect from students must change if we are to succeed in the twenty-first century.

The next frontier in public school finance reform should shift the focus of reform efforts from the redistribution of taxpayer wealth to the competitiveness of our public schools. After a quarter-century of finance reform litigation, the nation is awakening to the fact that public education is failing not only our urban and rural poor, but students from our wealthiest districts as well. Moreover, public education is also failing our brightest students in every socioeconomic class.

Given this backdrop, there is a great deal of disagreement over why and how our system has fallen into disrepair. The causes of declining student performance, for example, have been variously attributed. Educators have long cited a lack of proper educational funding; nonetheless, with a dramatic infusion of capital over the past thirty years and with one of the highest per pupil spending averages of any industrialized nation, this defense has finally lost steam. Recently, economists, legislators and education experts alike have begun to reexamine the structural impediments posed by the government's monopoly over education. This examination has resulted in a call for market-based reform of national education.

The call for a free market in education faces political and legal challenges. As-
assuming that the nation’s psychological investment in government-operated public education can be overcome, and assuming a true free market could be implemented, federal and state constitutional challenges pose the final threat for derailing choice initiatives. Following the Supreme Court’s recent adoption of the child benefit theory in Establishment Clause cases, the likelihood that federal constitutional claims will invalidate school choice has greatly diminished. Further, although several state constitutional provisions limit the exercise of government authority by private parties, as long as the benefit of government funding is realized primarily by the public consumer rather than the private service provider, such provisions should not interfere with school choice legislation.

Today, carefully designed choice proposals are both feasible and worthy of serious review. Only time will tell whether the public’s growing impatience with the current educational system can instigate the shift to a free market.