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RENAISSANCE IN EDUCATION: THE CONSTITUTIONALITY AND VIABILITY OF AN EDUCATIONAL CHOICE OR VOUCHER SYSTEM

I. INTRODUCTION

Choice is an approach to education that is gaining momentum in the country today, but people have different images as to what defines choice. Choice is an end product and consists of various means to achieve that end. The voucher system is one method that is a popular choice means among parents and politicians alike. In fact, choice and voucher are sometimes mistakenly interchanged as meaning the same thing. This paper will deal with the choice system implemented through the means of the voucher system.

It is important to the future of this nation that children receive the best education available. This paper will discuss the advantages and pitfalls of the voucher system and educational choice, and will forecast where our education system is headed.

II. CHOICE DEFINED

Parents have a choice where to send their children to school. This choice comprises different approaches, each with its own advantages. These approaches consist of magnet schools, vouchers, tuition tax credits, open enrollment plans and controlled choice. Magnet schools are characterized by various types of academic programs, including science, math, performing arts, vocational, or learning methods, such as immersion. Tuition tax credits offer tax relief to parents who choose to send their children to private schools. Open enrollment plans give parents the right to enroll their children in any public school if classroom space is available. Controlled choice programs provide intra-district choice among schools. These approaches address choice, but not how to get that choice. Vouchers address more deeply how funding that choice will occur.

III. VOUCHER DEFINED

The voucher instrument gives the parents the option to choose where their child receives an education. Taxes for education are assessed in the usual manner, but designation of the school funds is not earmarked. A voucher from state or local government, which represents a fixed amount of money

for each child, is issued to the parent or to the parent's school of choice. After the parent chooses which school their child will attend, the funds are allocated to that school. The funds are thereby funneled to the schools which the parent chooses and not that which the government chooses for them. If a particular school does not receive enough voucher funding, then it suffers. The message will be clear to that school it does not meet parental choice, which in turn creates an educational marketplace.

The voucher idea has been around for many years. John Stuart Mill first proposed the original voucher idea in his book *On Liberty* in 1859.¹

Following up on Mill's idea, Adam Smith in *Wealth of Nations* introduced consumer sovereignty, where the desires and tastes of the consumer govern the products produced and services rendered. University of Chicago professor Milton Friedman would probably be called the Father of Modern Educational Vouchers. He expanded the consumer sovereignty idea by coupling it with the voucher idea in 1955.² He and his wife Rose restated the plan in 1980 in their book *Free to Choose* in which they examined ways to solve education woes through educational vouchers.

IV. CONSTITUTIONAL ISSUES

Education was important to the founding fathers of the constitution, but was not considered a constitutional right.³ The U.S. Constitution, as well as the Bill of Rights and the other amendments, do not specifically address nor provide for a right to education. Education was a privilege to be given or withheld. However, arguments in *Brown v. Board of Education*⁴ support the public education. But, does this right

1. "If the government would . . . require for every child a good education . . . it might leave to parents to obtain the education where and how they pleased, and content itself with helping to pay the school fees of the poorer classes of children, and defraying the entire school expenses of those who have no one else to pay for them." JOHN S. MILL, ON LIBERTY 106 (1859), reprinted in JOHN S. MILL, ON LIBERTY WITH THE SUBJECTION OF WOMEN AND CHAPTERS ON SOCIALISM (Stefan Collini ed., 1989).

2. Milton Friedman, *The Role of Government in Education*, in, ECONOMICS AND THE PUBLIC INTEREST 123 (Robert A. Solo ed., 1955).

3. Roe L. Johns, *Some Critical Issues in School Financing*, in CONSTITUTIONAL REFORM OF SCHOOL FINANCE 157, 158 (Kern Alexander and K. Forbis Jordan eds., 1973).

4. "Today, education is perhaps the most important function of state and local

to education extend itself to an education voucher and choice system? Parents have few legal rights to influence or control the educational practices within the public schools. Several parts of the Constitution have been used to challenge the education voucher where it has been used.

A. Thirteenth Amendment

The first Constitutional issue challenges the voucher system because the Thirteenth Amendment which prohibits slavery and the badges and incidents of that condition. The argument is that the voucher system would discriminate on the basis of race. In *Runyon v. McCrary*,⁵ two black children applied for admission to private, nonsectarian schools. Both children were denied admission solely on the basis of race and challenged the denial of admission. The Supreme Court held that private, nonsectarian schools which offer enrollment to qualified applicants from the public at large may not limit their offering to whites only and refuse admission to others solely on the basis of race. If an education voucher is used, racial discrimination cannot occur when admitting children to a school because it would be a constitutional infringement. Thirteenth amendment discrimination can be easily avoided by ensuring that admission is not based on race.

B. Fourteenth Amendment-Equal Protection Clause

The second Constitutional issue challenging the education voucher system is the Equal Protection Clause of the Fourteenth Amendment. It is argued that the voucher system will violate the Equal Protection Clause because poor school districts will not receive the necessary funds and that this will actually result in racial segregation. In *Serrano v. Priest*, (*Serrano I*)⁶, parents in a poor school district challenged California laws that financed schools from local property taxes.

government . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

5. 427 U.S. 160 (1976).

6. 487 P.2d 1241 (Cal. 1971).

Per pupil revenue disparities resulted from inadequate local property taxes. The California Supreme Court held in favor of the parents and said education was a fundamental interest which could not be conditioned on wealth. The school finance laws violated the Equal Protection Clause of the 14th Amendment. In *Serrano v. Priest*, (*Serrano II*)⁷, on appeal from proceedings on remand from *Serrano I*, the parents challenged the California constitution on the basis of the constitutionality of California's school finance laws. Again the California Supreme Court held for the parents, and ruled the quality of education could not be dependent upon levels of district spending. The court found the school finance laws violated the equal protection clause of the state constitution.

If the voucher system were to be used, *Serrano I* and *Serrano II* will buttress the argument for vouchers. In a voucher system, each child will be accorded the equal protection that each deserves by distributing vouchers across all economic and ethnic lines to serve the educational needs of the child.

However, a different result was reached in *San Antonio Indep. Sch. Dist. v. Rodriguez*.⁸ Parents of school children in poor districts claimed Texas' financing of schools was unfair. Texas had a foundation program and then allocated funds according to property taxes paid in each district. Contrary to *Serrano*, the United States Supreme Court ruled for the state and held that wealth was not a suspect class and education was not a fundamental right. The foundation program provided for the minimally required education and did not require equalization.

Racial equal protection is argued in *Hall v. St. Helena Parish Sch. Bd.*,⁹ and *Poindexter v. La. Fin. Assistance Comm'n.*¹⁰ In both cases, a state statute permitted counties to close, sell, or lease their public schools, and then provide tuition vouchers that could be cashed in by private schools. The Legislative rationale was the parents' right to decide on the type of education received by the child. Race was not mentioned in the legislation, but was an obvious motive. In holding the statutes unconstitutional, the federal courts noted Louisiana's resistance to desegregation and concluded the

7. 557 P.2d 929 (Cal. 1977).

8. 411 U.S. 1 (1973).

9. 197 F. Supp. 649 (E.D. La. 1961).

10. 275 F. Supp. 833 (E.D. La. 1967).

legislation had the effect of maintaining segregation. If an education voucher scheme increases racial segregation, either by means or ends, it will be vulnerable to equal protection attack.

C. Fourteenth Amendment-Due Process Clause

The leading case that supports the right for parents to choose where their child attends school is *Pierce v. Society of Sisters*.¹¹ An Oregon law required all children between eight and sixteen to attend public schools until the completion of the eighth grade. This impaired the operation of nonpublic schools, and its enforcement would have resulted in the destruction of private schools. The United States Supreme Court held that the state may reasonably regulate all schools and child attendance, but the state may not deny children the right to attend adequate private schools and force them to attend only public schools. This was based on the Fourteenth Amendment right which protects persons from arbitrary state action impairing life, liberty or property interest without due process of law.

There were three reasons for this holding. First, the act required children to attend only public primary schools, and it was not reasonably related to a legitimate state purpose because children could be adequately educated in private as well as public schools. Second, the act unreasonably interfered with the liberty of parents to direct the education of their children. Third, the act impaired and threatened the property interest of the private schools. Although this case is nearly seventy years old, it is a prime statement of the liberty parents have to direct the education of their children. This case clearly recognizes the right of choice implicit in the school vouchers system.

In *Everson v. Board of Education*,¹² a New Jersey statute allowed payment to parents for children's bus transportation, including to nonpublic schools. The taxpayer plaintiff claimed a violation of state and federal constitutions when parochial school students received payments. The Supreme Court ruled in favor of the school board and held that the child, not the school was the beneficiary. The taxes were satisfying a public

11. 268 U.S. 510 (1925).

12. 330 U.S. 1 (1947).

need and the statute did not violate the Due Process Clause of the Fourteenth Amendment.

This case seems to support school choice. Where education is concerned, the child should be the beneficiary, not the school. When due process is correctly applied to the choice and voucher system, it will directly affect a child and his education for the better. Due process will be an invaluable tool for those children who need assistance to ensure rights to the education that every child deserves.

D. First Amendment-Establishment Clause

The voucher and choice system will open the school marketplace in which public and private schools will be used. But, when vouchers go to the private school, it will pose a separation of church and state problem because ninety percent of American private schools are church related. Because of the Establishment clause of the first amendment,¹³ many cases have arisen which make a constitutional attack on the voucher scheme.

In *Zorach v. Clauson*,¹⁴ the Supreme Court recognized that government does not have to be hostile to religion. This message was reinforced in *Lynch v. Donnelly*,¹⁵ when the high court ruled the Constitution mandates accommodation of, not hostility, toward religion. These two cases imply a rejection of the Constitutional attack, the most prominent case under the Establishment Clause is *Lemon v. Kurtzman*¹⁶ which supports the attack. The case involved two state statutes: a Rhode Island statute allowed payment to nonpublic school teachers for teaching nonsecular subjects, and a Pennsylvania statute allowed reimbursement to nonpublic schools for teacher salaries, textbooks, and materials. The Supreme Court ruled that both statutes were unconstitutional.¹⁷ The three prong

13. The Establishment Clause of the First Amendment says: "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I.

14. 343 U.S. 306 (1952) (allowing release time for religious instruction).

15. 465 U.S. 668 (1984) (nativity scene allowed in city Christmas display).

16. 403 U.S. 602 (1971).

17. A three prong test was provided to establish criteria for Establishment Clause cases. 1) The statute must have a secular legislative purpose. 2) Its primary effect must be one that neither advances nor inhibits religion. 3) The state must not foster an excessive government entanglement with religion and it must avoid potential for political divisiveness. *Id.* at 612-13 (citing *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968) and *Waltz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

test of *Lemon* may create some opposition for the voucher scheme if vouchers are distributed to children who wish to attend secular, private schools.

In 1973, opponents of the voucher scheme hailed *Commission for Public Education and Religious Liberty v. Nyquist*¹⁸ as a victory. New York state established three financial aid programs for nonpublic elementary and secondary schools. One program was to supply funds to qualifying nonpublic schools for repair of equipment and facilities. Another provided tuition reimbursement, and the third program provided for a tax credit. A group of taxpayers challenged the statute because most of the schools that were to benefit from these programs were sectarian schools. The court held that a law providing for direct payment to sectarian schools for repair was unconstitutional. The court also found the second and third programs of tuition reimbursements and tax credit to be unconstitutional. The *Lemon* three prong test was applied to the statute. It was found the repair and maintenance provisions directly supported the religious as well as secular functions of the schools and therefore unconstitutionally advanced religion. The tax credits directly supported the enrollment of children in religious schools by unconstitutionally advancing religion, and the tuition reimbursement appeared to be aid to religion which was an excessive state entanglement with religion.

Nyquist clearly forbids the use of a voucher system if the vouchers are to be used and advanced to sectarian or parochial schools. The vouchers unconstitutionally advance religion and create an excessive government entanglement with religion, and perhaps even meet the first prong of the test through a non-secular legislative purpose.

New York state was again a testing ground in *Commission for Public Education and Religious Liberty v. Regan*¹⁹. The same plaintiff in *Nyquist* challenged a New York statute which allowed use of public funds to reimburse private schools for testing and reporting services mandated by the state. The committee challenged the statute as a violation of the Establishment Clause, but this time the statute passed the *Lemon* test and was held constitutional. The court ruled that the provision for testing services did not have the primary

18. 413 U.S. 756 (1973).

19. 444 U.S. 646 (1980).

effect of aiding religion.²⁰ The test was prepared by the state and the sectarian schools had no control over the content of the test. Each test covered a secular academic subject, not dealing with religious subject matter. The tasks performed were not part of the teaching process and could not be used to foster an ideological outlook, therefore they had a primarily secular purpose and effect.

More recent cases in 1985 and 1986 are divided on the Establishment Clause issue. In *Grand Rapids Sch. Dist. v. Ball*,²¹ the school district had shared time and community education programs which provided classes to nonpublic school students at public expense in nonpublic schools. The classes were to supplement the state core curriculum and were taught by public school teachers. This had the primary effect of advancing religion, so it failed the second prong of the *Lemon* test. In *Aguilar v. Felton*²² the state used federal funds to pay the salaries of public school teachers to teach remedial subjects in parochial schools. This resulted in excessive government entanglement in religion, failing the third prong of the *Lemon* test. Finally a case passed constitutional muster in *Witters v. Wash. Dep't of Serv. for the Blind*.²³ A blind student studying at a Christian college to become a minister was denied financial vocational assistance. The Supreme Court held for the student. A significant portion of aid would not go for religious education; thus it reasoned that state aid was neutral and did not indicate endorsement of religion.

Great care must be executed in fashioning a voucher statute or program that will meet the *Lemon* three prong test. It can be argued that state voucher aid is neutral and does not indicate endorsement of religion, that vouchers go to the child and parent and not to the school. This enforces the idea that vouchers have a secular legislative purpose, not focused on just sectarian schools. It can be said that the child is the one who benefits with good education, which has no connection to religion, thereby neither advancing nor inhibiting religion. Focusing on the child as the beneficiary, as mentioned earlier, may counter the excessive entanglement test. On the other

20. The wording of the legislation was: "to provide educational opportunities of a quality which will prepare citizens for the challenges of American life in the last decades of the twentieth century." *Id.*

21. 473 U.S. 373 (1985).

22. 473 U.S. 402 (1985).

23. 474 U.S. 481 (1986).

side, the argument can be framed effectively by saying that voucher aid is guaranteed to go directly to religious schools, schools which endorse and teach religion, and it violates the "neither advances nor inhibits religion" prong of the *Lemon* test. The excessive entanglement test will also be at issue, thus creating a tension between church and state. The state statute telling the voucher sectarian school that it may not advance nor inhibit religion, and the school not adhering to that statute. Careful planning and caution will have to be taken in designing a voucher plan to avoid this obstacle.

E. First Amendment-Free Exercise Clause

The Free Exercise Clause is an overlooked clause in defending religious educational equality. Few cases have been decided on this clause, but they cannot be ignored. Under the Free Exercise Clause, it should be a constitutional right to attend a religious school and be supported by the voucher fund.

In *Wisconsin v. Yoder*,²⁴ the state compulsory education law required school attendance until age sixteen, but Amish children did not observe the law and quit at eighth grade. The state challenged the Amish viewpoint, but the Supreme Court ruled for the Amish. It was held that the Wisconsin compulsory education law impinged on the rights of parents to raise children. Compulsory education in this case violated the fundamental right of parents to direct the upbringing of their children and Free Exercise Clause of the First Amendment. This case deals with compulsory education, however, it can be argued that any family may choose to enroll their child in a parochial school and have the fundamental free exercise right of parents to direct the funds for the upbringing of their children the way they wish, even in a religious school setting.

Grants to church colleges were considered in *Tilton v. Richardson*.²⁵ Unlike the coercive nature of compulsory education, this case focused on the non-coercive nature of grants and the rights insured under the Free Exercise Clause. Taxpayers challenged the Higher Education Facilities Act of 1963 that allowed grants to church colleges for construction of academic facilities. The law was ruled constitutional because all colleges were included under the act, and aid was non-

24. 406 U.S. 205 (1972).

25. 403 U.S. 672 (1971).

ideological. The act did not violate the Establishment clause or the Free Exercise Clause because there was no coercion identified. This case would be useful for either construction of nonpublic schools or for vouchers to nonpublic schools. Vouchers can be ruled as aid that is non-ideological and non-coercive.

Of course, if voucher programs are instituted by states across the country, constitutional challenges would be raised. There is no reason that aid to the parent cannot be applied both to a public and nonpublic setting, if the *Lemon* Establishment Clause 3-prong tests are met. The Fourteenth Amendment Due Process and Equal Protection Clauses must also be considered in statute construction.

A voucher system that meets constitutional scrutiny is one in which the child's educational welfare is the centerpiece of the legislation. This legislation can say, "an education system which will promote the welfare of the child's education and further the American ideal of great education for everyone."

V. PRO VOUCHER AND CHOICE SCHEME

The public school system, with few exceptions, is a monopoly. A monopoly occurs when a provider has exclusive ownership or control of a specific commodity or service. Schools are locally rather than nationally administered, which creates a variation of schools around the country. The variety of state and national schools is not important, it is the variety of choice on the local scene which is important. There is only one large provider within a local reference, and that large provider is the public school district which, in turn, supplies the local neighborhood public school. The local market is the market that is important. Parents do not have access to a variety of local educational choices, and consumer sovereignty is limited. (Parental consumer sovereignty is subject to the majority's taste, however.) Vouchers and choice schools will survive if a majority of the consumers want it to survive. Vouchers and the notion of choice should be given full educational standing in the local market so parents can at least have other options.

Without options and competition, the educational monopoly becomes insipid and stale. Americans have the right to choose what kind of an education they receive, just like any other personal right. This can be accomplished by the use of a voucher and choice system. One child may choose to go to an academic school, and another child may choose a vocational

education. The voucher method gives the child more freedom to pursue varied objectives. Without choice, the mediocre education available to all will not be tailored to the individual need. Freedom to choose and competition will be a means to a good education for each child and will be the end result if voucher or choice is facilitated. This freedom and competition is a persuasive argument for proponents of the 'pro-choice' movement.

Another reason people may choose the pro-voucher and choice system is the decided effect of student peers. In 1966, the U.S. Office of Education released the Coleman report. It indicated that how much students learned seemed to be associated almost entirely with their family backgrounds and the backgrounds of their peers. Parental influence of those peers also has an added effect. Parents who want their children to learn will place their children with other children whose parents want them to learn. If children have peers who care about learning, great academic success will occur. Every child still receives an education, but they receive the type of education they want.

It is a myth that more money brings better education. This is demonstrated by the national standardized achievement test (SAT) scores. In fact, students in many of the states that spend the most on education did the worst on the SAT.²⁶ If taxes were spent wisely on the voucher method, total expenditures for schooling would rise, but public taxes would not increase because a desired education by a parent would either be subsidized by that parent or wisely used to its full extent. More efficiency of the education tax dollar occurs, along with the added bonus that education would improve through a variety of choices.

Vouchers and choice can be a key to unlocking an education. They can resolve the issue between public interest and private interest. Because the educators and politician are fighting for more money, power and rights for themselves, education becomes another piece of public interest legislation bandied about. If instead the choice of schooling is handed to the parents, the private interest of the child will be recognized and the clout of the educators will be diminished. The public and private interest debate does not belong in a child's

26. Michael Morris, *Big Bucks and Bad Scores*, UT. CO. JOURNAL, Jan 26, 1992, at A-12.

education. A child cannot get the type of education he needs if he is constantly pulled apart by a special interest monopolistic school system.

Private interests are violated if a teacher in an assigned neighborhood monopoly school teaches ineffectively and the child does not learn. Multiply that ineffectiveness by three or four teachers and the effect can be devastating to the child. The parent and child have no right to transfer to another school, and no recourse but to be taught ineffectively. The education of many children in the public school system is damaged because the group is more important than the individual. To illustrate, the author's own child in previous years has been asked by his teachers to not answer any oral recitation math questions because he answers quicker than anyone else. Instead of encouraging him to advance, he is stifled by the group and his teacher. In a choice school where math is emphasized, his efforts would be rewarded instead of ignored. Parent and child are caught in a web of low achievement and low esteem. The more public schools are directed toward the public interest and not parental control, the more parents will be driven to vouchers or choice.

Diversity is another advantage of the voucher and choice system. This diversity could range from schools specializing in auto mechanics to zoology. Diversity in educational objectives creates more demand for some schools and less demand for other schools, thus creating a marketplace. A pluralistic school system would come into being; more private schools would probably emerge. Schools would change in order to attract a certain kind of parent. Mediocrity would be replaced by nonpareil schools.

Proponents of voucher and choice list parental regulation and control of schools as a plus. Right now, there is an imaginary battle of wills between educators and parents: "Educator knows best" versus "parent knows best." The voucher and choice system stands by the notion that parents know more about their children, and what their interests are; parents have more of a vested interest in what their children learn and retain than a teacher. Generally, who can deny that a parent's interest and love is stronger than a teacher's ?

Releasing an administrator from the responsibility of knowing what is best for the student gives the teacher the latitude to concentrate on the curriculum. This will in turn create a healthy teacher independence. In an experimental

voucher system in Alum Rock, California,²⁷ it was found that teachers relied less on the faculty and administrators and more on themselves. This might be due to the fact teachers feel they have more freedom of curriculum to satisfy the parents, and themselves.

In talking to a local teacher, she confided that she and other teachers suffered from job insecurity because of administrative pressure. When a teacher is more worried about the job than curriculum, the children will suffer because they will not receive the education they deserve. Granted, parents will have control in the voucher and choice method, but direct communication with a teacher is better than job-on-the-line pressure from an administrator.

Finally, vouchers would promote integration of the races. The people would be segregated by what type of education they want to receive, not by the neighborhoods they live in. If a young black wanted to receive an excellent education, he would not be obstructed in his pursuit by the neighborhood he lived in. The black and the white, parent and child alike, would be driven by the idea of receiving the best education rather than worrying about integration of races. What better way to link a good common goal together than finding those who want the same for their children and connect them together?

VI. ARGUMENTS FOR AND AGAINST VOUCHER/CHOICE

Opponents have defenses for most of the merits stated above. A balancing must occur between the two sides and an objective view reached.

Probably the main reason people oppose the voucher and choice system is the equalization of humanity that exists within the present public school system would be upset. People fear that the systems would not represent students of the whole community and that segregation would occur at a greater rate. These people are proponents of the best public good, not the best individual good. They argue that what is good for a single student is not necessarily the best for the public as a whole. They cling to the old fashioned idea of the public school system. They oppose vouchers because the system works well enough without complete reform. They argue that schools must be integrated socially and economically. There is

27. D.KIRP & M.YUDOF, EDUCATIONAL POLICY AND THE LAW, 318 (1982).

no representation of the whole community if vouchers are allowed to flourish.

The issue is maximizing opportunities versus equalizing opportunities. There is no reason to believe the equalizing effect and desegregation which anti-voucher people strive for cannot be achieved along with the maximizing of opportunity that the individual student needs. In a recent poll²⁸ the voucher plan finds its strongest support among blacks (57 percent), and inner-city dwellers (57 percent), those which would seem to be the most likely to oppose such a program.

Another objection is the fact that vouchers may go to private schools. It is a fact that ninety percent of American private schools are church related.²⁹ This poses constitutional problems addressed earlier in this paper. With a voucher system, this percentage is likely to change.

An advocate for vouchers, Laurence Tribe has stated his opinion that vouchers will pass constitutional hurdles.³⁰ Another advocate of tuition vouchers, John E. Coons, a law professor at the University of California at Berkeley, views *Witters v. Wash. Dep't of Serv. for the Blind*³¹ as strong support for vouchers. He believes that this case and others serve as a buttress against any constitutional challenges.

There is also a possible area of contention between government and religious schools in the *Lemon* test. If government gets too involved in church schools when administering vouchers or choice, a possible danger of excessive entanglement in the *Lemon* three prong test may occur.

However, legislation that gives individuals public money to spend in religious institutions already exists in the 1990 child care legislation and the forty five year old G.I. Bill. When GI's returned home from World War II and were given money for education, it was not questioned whether the money would be

28. 1991 GALLUP/PHI DELTA KAPPA POLL, OFFICE OF INTERGOVERNMENTAL AND INTERAGENCY AFFAIRS (conducted May 1991 and published September 1991).

29. Doerr, *Implications of Supreme Court Decisions for Public Aid to Parochial Schools*, in, CONSTITUTIONAL REFORM OF SCHOOL FINANCE 185, 189 (K. Alexander & K.F. Jordan ed. 1973).

30. "Any objection that anyone would have to a voucher program would have to be policy-based and could not rest on legal doctrine . . . One would have to be awfully clumsy to write voucher legislation that could not pass constitutional scrutiny . . . As long as it is a program of aid to parents and not aid as a way of funding parochial schools through the back door, then it would be constitutional." Susan Chira, *Can Vouchers Hurdle Church-State Wall?*, N.Y. TIMES, June 12, 1991 at B5 (quoting Laurence Tribe).

31. 474 U.S. 481 (1986); see *supra* note 23 and accompanying text.

used in private or public institutions.

A third concern is the administrative headaches that will occur. The task of grafting public and private school administrations together seems overwhelming. This specific headache occurred in Milwaukee, Wisconsin where the only experimental voucher system in the country exists. A disagreement occurred between the executive director of the voucher system in Milwaukee and the principal of Juanita Virgil private school, a school which participated in the program. The school abruptly shut down in the middle of the year because it was plagued by money troubles and personal feuds. The feuds consisted of everything from transportation, to lunch programs, to finding books for the students. One day the students in the program arrived at school and were told not to come back. A lot of those students were left in a bind and had no other school to attend.

A twinge of doubt exists whether the vouchers will be used to perpetrate fraud. However, these doubts are small and do not compose a major factor in the fight against vouchers. The voucher instrument may exist only "on paper" as the money may directly be paid to the desired school. However, the government must make sure that the money is being used for the right purpose. This may produce some of the administrative headaches mentioned earlier.

Educational standards or controls are another thing that anti-voucher people are battling. If schools are reformed, there will be no standard of accountability. There will no objective, outside standard. This is a troubling notion and one that cannot be ignored. Teachers and educators do not like the idea of a complete turnabout of the education system with no accountability. This accountability must be taken on by those who choose and those who teach the chosen. For the voucher system to work, parents and teachers must work together to establish the accountability needed. Teachers should be free to help choose the curriculum and decide what is right. However, parental input, previous teaching experience, and understanding administrators are all needed for an accountability system to work out.

Conversely, anti-voucher and choice people may say there is too much control. President Bush and his staff developed a program called *America 2000, An Education Strategy*.³² In this

32. U.S. DEPARTMENT OF EDUCATION, *AMERICA 2000, AN EDUCATION STRATEGY*

program it calls for certain goals to be reached in order to qualify for government education expenditures destined to go to voucher and choice schools. These voucher and choice opponents fear the government will literally take over and educators will fall by the wayside.

The *America 2000* program suggests that the President, Congress, the Governors, and the business community will jump-start the voucher program.³³ But most of all, it will take America's parents to help in the schools, the communities, and at home. The parents are to be examples, teachers, leaders, and demanding shareholders of the schools to make the *America 2000* education strategy work. That seems to say that the federal government may have a hand initially in getting the reform movement started, but they will hand it over to the state and local government to decide how to run their voucher or choice program.

In Michael A. Olivas, *Information Access Inequities: A Fatal Flaw in Educational Voucher Plans*,³⁴ an interesting voucher problem is posed. The problem is lack of information distribution to the parents of children involved in the voucher scheme. His article proposes the idea that people cannot be equitably serviced by making choice decisions because of the lack of information about the voucher system. He states that the poor implement a different information delivery system. This is particularly true in minority communities. The information is disseminated more by word of mouth. He believes that the complex nature of the education voucher means that the poor and underprivileged would not take proper advantage of it simply because they would not know about it.

His article does not take into account the 1990 Milwaukee experiment, however. In the program, only the poor and disadvantaged were invited to participate. Not only has the program been successful, but parents are pleased with it and seem to be involved. Information was distributed, and the program seems to be functioning well.

Educating the handicapped is another major concern for those who do not like the voucher or choice system. The handicapped are not readily taken into the private school and taught. Many private schools do not accept handicapped

(1991). This is the education program that supports choice and vouchers compiled by the Department of Education.

33. *Id.* at 5-6.

34. 10 J. LAW & EDUC. 441 (1981).

students on the premise they cannot equal the public schools with their federal programs to educate the handicapped. Private schools acknowledge the fact that they are not equipped to teach them. This will be a concern of all parents who have handicapped students.

Finally, voucher opponents use Alum Rock as their overall rebuttal to the voucher system. This voucher program, tried in 1973, was in Alum Rock School District, California. Results of this experiment are revealing; in the program's last year, only eleven percent of parents chose to transfer their child to another school and curriculum. Parents did not investigate their child's new school and most were content to hear about their schools from education professionals. Voucher opponents indicate this is a typical response of American people. A small percentage of parents are active in the education of their child, most are not. This Alum Rock experiment increased parents' power of choice, but most parents failed to use that empowerment.³⁵

Why was there partial parent apathy in the 1973-1975 Alum Rock experiment? Granted, there will always be parents who do not care about their child's education, but that is a small percentage. The real reason is past history. Parents were accustomed to being told by the educators what was best for their children. The school system had worked for them in the past, and they saw no reason to change. We can analogize to a small extent the countries of eastern Europe. They want democracy, but they need to be shown how to establish that freedom. If any parent were asked today if they could choose the best education for their child, they would choose it. Education is a freedom that was long ago taken away from the parents and given to the educators. Horace Mann was an advocate of common education which gives to all the freedom of education. Mann did not foresee that choice of education or voucher systems would be an issue. His idea was useful at the time, but times are changed and the name of common education should be changed to choice and voucher education.

VII. THE MODERN VOUCHER

The voucher idea rode waves of support and non-support in

35. Kirp, *supra* note 27, at 322 (1982).

the 1970s and early 1980s. Most were not in favor because of various problems mentioned earlier. The Reagan administration appointed the Presidential Advisory Panel on Financing Elementary and Secondary Education in May, 1982. The panel's mission was to provide the President, the Secretary of Education and the Congress with advice and counsel concerning public policies on raising and distributing money to support public and private schools. Among their findings, the fourteen member panel suggested vouchers and deregulation of public schools.

In 1983, President Reagan established the National Commission on Excellence in Education. The Commission published its findings in *A Nation at Risk*, which dramatized the need for reform of the nation's schools. The report called upon parents to demand the best of schools, participate actively in children's education and provide a living example of positive values.

President Bush, taking office in 1989 did little for education his first year. Generally, he looked further into America's habits for education. Total spending for elementary and secondary schools had doubled since 1980-while the number of students had remained about the same; education spending had increased approximately 33 percent per public school student but results had not improved and potential was being wasted.³⁶

But in 1990, President Bush acted upon President Reagan's and his own findings by establishing *America 2000*.³⁷ However, the Bush administration does not believe the *America 2000* goals could be achieved by the present education system. They believe substantial, even radical changes will have to be made.³⁸

Lauro F. Cavazos, former Secretary of Education, started

36. U.S. DEPARTMENT OF EDUCATION, *supra* note 32.

37. *Supra* note 32. This established the National Education Goals to be attained by the year 2000. These goals include:

1. All children in America will start school ready to learn.
2. The high school graduation rate will increase to at least 90%.
3. Competency tests will be given in grades four, eight and twelve. Every school will ensure that students learn to use their minds well.
4. U.S. students will be first in the world in science and mathematics achievement.
5. Adult Americans will be literate.
6. Drug and violence free schools.

38. In remarks in announcement of the Opportunity Action Plan to Civic and Charitable Organizations, February 27, 1991, President Bush said, "We need responsive schools, customer-driven ones, if you will."

the "education snowball" going under the Bush administration. In his remarks made at the Education Press Association³⁹ he said, "I consider choice the cornerstone to restructuring elementary and secondary education in this country."

The March 1991 appointment of the new Education Secretary, Lamar Alexander, a two term governor from Tennessee, is another driving force behind this educational reform. He predicts that choice "won't even be an issue in four or five years."⁴⁰ and believes the public's attitude toward voucher/choice is so positive it will be resolved soon.

Another force was the 1990 release of a book called *Politics, Markets and America's Schools*, by John E. Chubb and Terry M. Moe.⁴¹ Chubb and Moe do not actually call the system they propose a voucher system, rather a choice system, but the basic tenets of a parent voucher system are intact.

Chubb and Moe basically endorse the Coleman Report. This report, mentioned earlier, released by the U.S. Office of Education in 1966, stated that how much students learned seemed to be associated almost entirely with their family backgrounds and the backgrounds of their peers. Money did not have much effect on the output of the schools.

Chubb and Moe also incorporated a 1979 report by Michael Rutter, which included the same Coleman factors, along with two more intangible factors. Rutter's intangible factors are academic balance among students, and school organizational atmosphere. In simple terms, academic balance is the amount of gifted and not-so-gifted students in a school, and school organizational atmosphere consists of an effective pattern of discipline, praise, carefully planned class curriculum and regularly assigned homework.

Chubb and Moe bring together the Coleman factors and Rutter's intangibles and add their own idea of school organization. This school organization is a restructure of the Rutter atmosphere concept. Their school organization consists of school standards, leadership, teacher quality and educational practice which Chubb and Moe propose will be a panacea to the education system.

Their book proposes that anybody can create a school if

39. In remarks made at the Education Press association "Newsmaker" Luncheon at the National Press Club, Washington D.C. on May 19, 1989.

40. *National Journal*, September 7, 1991 at 2156, 2157.

41. Published by the Brookings Institute, a Washington D.C. think tank.

they meet minimum state criteria. In this setting, schools will have their own autonomy and public schools already in existence can qualify. Every student is free to attend any public school in the state, and free transportation will be supplied (to the extent practical). For each pupil enrolled, the school will receive a set fee from the state tax fund. Each school will have its own admission requirements, and will be free to expel students that it cannot handle. Statewide teacher tenure laws will be abolished, and unions will bargain with individual schools. The state will continue to set certification standards, but the standards will be minimal. Private schools can participate or remain private, whichever they prefer.

The significant change in Chubb and Moe's reform is the introduction of choice, which includes both suppliers and consumers of education.

VIII. EDUCATORS' RESPONSE

Educators' response to President Bush, Secretary Alexander and to the book *Politics, Markets and America's Schools* have generally been negative. California superintendent of public instruction Bill Honig⁴² blasted the choice and voucher program proposed by Chubb and Moe. In the article, he said that the ideas that Chubb and Moe proposed "so jeopardize this democracy that they should be dismissed as dangerous claptrap." He was also quoted as saying, "Their book is a profound example of the intellectual community's abandoning our most important democratic institution."⁴³ Mr. Honig favors incremental reform instead.

Incremental reform is also stressed by Deborah W. Meier,⁴⁴ principal of Central Park East Secondary School in New York City. She says, "we can have the virtues of the marketplace without some of its vices and we can have the virtues of the best private schools without undermining public education."

Albert Shanker, president of the American Federation of Teachers also discourages the voucher system.⁴⁵ He says "If

42. Bill Honig, *School Vouchers: Dangerous Claptrap*, N.Y. TIMES, June 29, 1990 at A25.

43. Walter Shapiro, *Pick a School, Any School*, TIME, Sep 3, 1990 at 70-72.

44. Deborah W. Meier, *Choice Can Save Public Education*, THE NATION, Mar. 4, 1991 at 271.

45. Shapiro, *supra* note 43, at 72.

your goal is merely to recruit students, you can do that by offering a trip to Disneyland or with a good football team." The following year Mr. Shanker posed a separation of church and state rhetorical question, "Do we really want tax dollars supporting Muslim schools that teach their students it is an obligation to assassinate Salman Rushdie?"⁴⁶

Other critics have criticized Chubb and Moe's statistical findings. They feel the statistics are inflated or misleading.⁴⁷ And Chubb and Moe have left open questions.⁴⁸

President Bush's choice plan has sparked confusion and skepticism among educators.⁴⁹ There is not even partisan support for Bush's idea of extending choice to both public and private schools.⁵⁰

Educators are split as to whether choice will improve the education received by children who do not have functioning families. Robert L. Crain, a professor of sociology of education at Columbia University Teachers College says "In any choice plan, the families who have the least resources in terms of information, energy and money will be left behind."⁵¹

IX. VOUCHER EXPERIMENTS IN THE NATION

There are two notable educational experiments that exist

46. Walter Shapiro, *Tough Choice*, TIME, Sep. 16, 1991 at 56.

47. Nicholas Lemann, Book Review, *A False Panacea*, ATLANTIC, Jan 1991 at 101, 102 (reviewing JOHN E. CHUBB AND TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS (1990)).

48. "It's not clear why they (Chubb and Moe) believe that schools will improve in a market system." Will these parents gravitate toward academically excellent schools and reject the rest? Those questions are left unanswered. Abigail Therstrom, *Is Choice a Necessity?*, PUB. INT., Fall 1990, at 124.

49. Mark Pitsch, *Bush Seeks to Reward District Plans that Include Private School Choice*, EDUC. WEEK, Feb. 13, 1991 at 29 (stating that officials of the National Association of Elementary School Principals remained convinced that the establishment of a voucher program will leave poorer schools with fewer resources and fewer students).

50. Representative Bill Goodling of Pennsylvania, ranking Republican on the Education and Labor Committee was quoted as saying "in that case [voucher system], we would be coercing the states to change their constitutions, and I don't think we should be in that kind of business." He went on to say he would support choice if they did not include private schools and if there were no strings attached. *Id.*

51. Susan Chira, *Faces of School Choice: The Rules of The Marketplace Are Applied to the Classroom*, N.Y. TIMES, June 12, 1991 at A1, B5. In the same article, Amy Stuart Wells, working on her doctoral dissertation at the same Columbia Teachers College, found through her research that choice did not 'empower' parents, rather it segregated their children in the worst schools.

in the nation right now. One is located in East Harlem, New York. This choice system is limited entirely to the public school system. The parents may choose where to send their children without using a voucher. The other is located in Milwaukee, Wisconsin. This is a purely private school voucher system.

East Harlem pioneered choice in 1974 and it has slowly been improving ever since. District Superintendent, Anthony Alvarado replaced the traditional urban public school by opening a few model schools that would attract a loyal following among parents. More schools were added, some as small as fifty to the largest being around three hundred students. These schools were small and cohesive groups, all working toward a common goal of good education for children. The main difference between the East Harlem and Milwaukee experiments is that East Harlem has worked within the confines of the public school system. It has used gradual change, with a lot of pushing from its backers to institute a choice for parents, with no help from legislative mandates. It took extraordinary men and women with vision to make this system work.

The second system, started in March 1990, was sponsored by Annette (Polly) Williams, a state representative from Wisconsin. It allows parents to use state money (\$2,586) to pay for private school tuition. These funds come from the general school aid that would otherwise be paid to the public schools. It does not include private religious schools and is limited to low income families, with about 1000 children participating. It was immediately challenged in court on May 30, 1990, and again on June 25, 1990. The two suits were consolidated and on August 6, 1990, Judge Steingass, the trial court judge ruled that the law was not unconstitutional on its face. It was held constitutional by the Wisconsin Supreme Court.⁵²

Public reaction to the program has been good,⁵³ but there is no evidence that choice was boosting student achievement. The evaluation confirmed parent satisfaction and recommended continuation of the program.⁵⁴ Although academic test scores

52. Davis v. Grover, 480 N.W.2d 460, (Wis. 1992).

53. Priscilla Ahlgren, *Why Poor Parents like the Program's Options*, MILWAUKEE JOURNAL, Nov. 24, 1991 (reporting on an independent evaluation of the program released on November 21, 1991).

54. Tanya Barrientos, *Parents Love 'Choice' as Milwaukee Does It*, THE PHILADELPHIA INQUIRER, Nov. 25, 1991. She says that the evaluation was done by John Witte, a University of Wisconsin professor. Professor Witte recommended continuing the program because "it offers the seeds of innovation, opportunities for

showed no dramatic improvement, parents loved the plan and have become more involved in their children's education.

X. CHANCES FOR VOUCHER SUCCESS

The 1991 Gallup/Phi Delta Kappa Poll⁵⁵ found that support for vouchers rose to 50 percent, 6 points since last time they asked a similar question. The voucher plan finds its strongest support among blacks (57 percent), inner-city dwellers (57 percent), people with children under 18 (58 percent), public school parents (56 percent), and nonpublic school parents (66 percent).

The National Association of Independent Schools (NAIS) survey⁵⁶, found that 57 percent of the public-71 percent of people aged 18 to 29 support vouchers that could be applied toward public, private or parochial schools.

In the NBC News/Wall Street Journal Survey⁵⁷ found that most registered voters (56 percent) support giving parents tax credits or vouchers for tuition at the public or private schools of their choice.

Other surveys not mentioned also back a voucher idea. Overall, the voucher system is gaining momentum. The numbers prove it, but the major obstacle in its course will be the teachers and administrators who do not feel radical reform or reform at all is necessary. They point to the East Harlem example, but the question posed here is how many educators have the kind of extraordinary vision needed to guide choice to every school in the United States? The answer is probably not many.

XI. CONCLUSION

In order to improve our educational system, reform with state and federal backing is needed. The voucher system as a major component of the education system is the key to making our educational system work again. However, it is a distant relief for a present problem.

Jill Jasperson

poor parents that are already available to most other parents in our state."

55. Conducted in May 1991 and published in September 1991.

56. Conducted January 23-February 11, 1991 and released July 23, 1991.

57. Conducted May 10-14, and released May 17, 1991.