The New Parental Rights Challenge to School Control: Has the Supreme Court Mandated School Choice?

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A revolution in the traditional mechanisms of school governance and control is occurring in the United States, a revolution that is expected to be energized by the decision of the United States Supreme Court in Zelman v. Simmons-Harris,¹ permitting voucher programs to include sectarian schools. What may not be expected is the effect of an earlier Supreme Court decision, the case of Troxel v. Granville.² Although Troxel directly addresses issues involving a parent's right to control visitation rights of her children's grandparents, seven justices in Zelman provided renewed vigor to the substantive due process rights of parents to control the upbringing of their children,³ a concept with potentially explosive ramifications for the current battles surrounding educational policy and parental rights. With the convergence of Troxel, the increasingly pervasive federal and state emphases upon standards, assessment, and the rating and reporting of individual school performance, and the removal by the Supreme Court of the constitutional barrier to the use of publicly funded vouchers at religious schools, the Court has opened a door that may permit parents to escape poorly performing and "failing" public schools.

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^{1. 536} U.S. 639 (2002) (Establishment Clause not a barrier to publicly funded voucher program permitting parents to choose sectarian schools as one among several options).

^{2. 530} U.S. 57 (2000) (State's authority to grant child visitation rights over the objection of a fit custodial parent limited by Due Process Clause of Fourteenth Amendment).

^{3.} *Id.* (Justice O'Connor's plurality opinion, joined by Chief Justice Rehnquist and Justices Ginsburg and Breyer; concurring opinions by Justices Souter and Thomas; and Justice Kennedy's dissenting opinion).

I. INTRODUCTION

Thirty years ago a bright-line distinction existed between the two dominant instrumentalities of school control: public schools and private schools. Although state compulsory education laws required student attendance in school for a fixed number of years, parents could satisfy the compulsory attendance requirement by sending their children either to public or private schools.⁴ For the public schools, which enrolled approximately 90% of the students,⁵ the government, predominantly the local school district through its board of education, was responsible for policymaking and administration. Virtually all of the remaining ten percent of the students were enrolled in private schools, which were controlled predominantly by sectarian bodies and not-for-profit corporations.⁶ The private schools were, and continue to be, subject to varying degrees of oversight by the states.⁷ Home schooling then accounted for a minuscule number of students.⁸

6. Catholic schools represented and continue to represent a significant, although declining, percentage of the private school enrollment. In 1969, Catholic school students represented almost 85% of the private school enrollment. By 1999, Catholic school enrollment had declined to 2,511,040 students, just under 50% of private school enrollment, with other religious school enrollment at 1,843,580. DIGEST OF EDUC. STAT., *supra* note 4, at 71. *See also* STEPHEN D. SUGARMAN & FRANK R. KEMERER, SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW 25 (1999) (Conservative Protestant schools are the fastest growing segment of the private school enrollment during the past three decades).

7. See, e.g., ARIZ. REV. STAT. ANN. § 15-828 (West 2001); GA. CODE ANN. § 20-2-690 (2001); COLO. REV. STAT. § 22-1-121 (2001); FLA. STAT. ANN. § 232.021 (West 2001); N.Y. EDUC. LAW § 803 (McKinney 2000); IND. CODE ANN. § 20-10.1-4-4 (Michie 2001). See also Pierce, 268 U.S. at 534 and Farrington v. Tokushige, 273 U.S. 284, 298 (1927) (holding that lower court properly enjoined enforcement of Hawaiian law regulating foreign language schools which goes "far beyond mere regulation of privately supported schools").

8. A 1988 estimate suggested that approximately 10,000-15,000 students were educated at home during the late 1970s. Patricia M. Lines, *Homeshoolers: Estimating Numbers and Growth*, U.S. Dep't of Educ. *at* http://www.ed.gov.offices/OERI/SAI/homeschool (Spring 1999).

^{4.} NAT'L CENT. FOR EDUC. STAT., 2001 DIGEST OF EDUCATION STATISTICS 168 [hereinafter DIGEST OF EDUC. STAT.] (2002) (ages of compulsory school attendance by state); *see also* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (state cannot compel attendance at only public schools).

^{5.} In 1970, elementary and secondary school enrollment totaled 51,257,000. Public school enrollment totaled 45,894,000 students; private schools enrolled 5,363,000 students, with Catholic schools enrolling 4,363,566 of the private school students. DIGEST OF EDUC. STAT., *supra* note 4, at 12, 73.

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As with banking, telecommunications, and electric power,9 however, the entire school world has changed within the last three decades. The wall of separation between public and private schooling, given constitutional stature by the Pierce decision, has faded, as aptly described in a related context, into "a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."¹⁰ A continuum of public schools-ranging from the traditional district-attendance schools, to magnet schools,¹¹ to charter schools,¹² to privately managed charter schools-is emerging. Now, private schools, too, are becoming part of the continuum, ranging from the traditional models, supported primarily by non-public funding, to private schools populated to a great extent by former public school students and supported substantially by publicly funded vouchers.¹³ The latter schools, in funding and student population, closely mimic the public schools, and they share many characteristics with the privately managed charter schools. Private schools continue to be subject to varying degrees of regulation by the states, but their regulation is becoming more intensive in some states.¹⁴ In addition, at the far end of the continuum, a rapidly increasing number of students are being educated outside of any formal school structure through home schooling,¹⁵ which is also subject to greatly varying degrees of regulation

14. See supra note 7 and accompanying text (regarding state oversight of private schools).

^{9.} See, e.g., Gramm-Leach-Bliley Financial Modernization Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (financial services reform); Lance Liebman, *Foreword: The New Estates*, 97 COLUM. L. REV. 819, 825 (1997) (telecommunications law struggling to keep up with technological advances); and Peter Coy, *Gridlock on the Power Grid*, BUS. WK., Aug. 28, 2000, at 48-49 (effect of electricity deregulation).

^{10.} Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (state programs providing direct aid to pervasively sectarian schools violate Establishment Clause).

^{11.} Magnet schools are schools with special themes, such as science, performing arts, and vocational education, designed to attract students from throughout a school district. They often have selective admissions criteria. Magnet schools became one of the major instruments for desegregation in large urban school districts. *See, e.g.*, Paul E. Peterson, *The New Politics of Choice, in* LEARNING FROM THE PAST 229 (Diane Ravitch & Maris A. Vinovskis eds., 1995).

^{12.} See infra notes 47-68 and accompanying text (regarding the development and characteristics of charter schools).

^{13.} Examples of such schools can be found in the cities of Milwaukee, Wisconsin, and Cleveland, Ohio. *See infra* notes 98-102 and accompanying text (regarding the Milwaukee and Cleveland voucher programs). In addition, a number of programs around the nation have raised private funds to provide "vouchers" to students. *See infra* notes 78-82 and accompanying text (regarding privately supported voucher programs).

^{15.} The precise number of home-schooled children is difficult to ascertain and subject to some controversy. See STACEY BIELICK, KATHRYN CHANDLER, & STEPHEN P. BROUGHMAN, U.S. DEP'T OF EDUC., HOMESCHOOLING IN THE UNITED STATES: 1999 4 (2001) (recent report estimates

and supervision by the states.¹⁶ The resurgence of cursorily regulated home schooling marks an ironic partial reversion to the pre-compulsory education era.¹⁷

This article will examine one aspect of the potential political and legal consequences of these changes upon parental rights in relation to the public schools. Moreover, the *Troxel* decision may provide parents with the opportunity to challenge long-accepted practices of public school districts and states that require students to attend poorly performing schools and that place limits upon home schooling. The Supreme Court's renewed emphasis upon parental rights to control the upbringing of their children suggests that parents can dispute the assignment of their children to individual schools, particularly if the state itself, as a consequence of standards-based reforms, classifies some of these schools as poorly performing or "failing" schools. As more of the states move toward grading individual schools,¹⁸ parents will increasingly wonder why their children should be compelled to attend schools the state itself has labeled poorly performing or "failing," and no doubt will press for better options for their children.

Changes often produce unintended consequences. The consequences here could undermine longstanding principles and practices of public educators. Whether these changes will lead to improvement in student academic performance is an open question.

18. See infra notes 193-196 and accompanying text (regarding state grading of schools).

that 850,000 students nationwide were being home-schooled in 1999) available at http://nces.ed.gov/pubsearch/pubsinfo.asp?Pubid=2001033. See also Lines, supra note 8 (earlier study estimated that in 1998 one and one-half to two percent of school age children—between 750,000 and 1,000,000—were being home schooled). As the statistics indicate, home-schooled children now make up a significant percentage—perhaps 20%—of the children educated outside of the public schools.

^{16.} See, e.g., 24 PA. CONS. STAT. ANN. § 13-1327.1 (West 1998); LA. REV. STAT. ANN. § 17:230 (West 2001); N.C. GEN. STAT. § 115C-564 (1999); OHIO REV. CODE ANN. § 2923.122 (West 1999); FLA. STAT. ANN. § 232.0201 (West 2001); KAN. STAT. ANN. § 72-1111 (2000) (as amended by the Juvenile Justice Reform Act of 1996, c. 229, § 121), 1996 KAN. SESS. LAWS 1272, 1404 (Kansas does not permit the typical home school, but it does allow private denominational and parochial instruction by "competent" instructors). See also Emily Buss, The Adolescent's Stake in the Allocation of Educational Control Between Parent and State, 67 U. CHI. L. REV. 1233, 1236 (2000) (noting that states are loosening restrictions upon home schooling: "Increasingly, states are abandoning educational requirements, such as certification, that made it difficult or impossible for parents to home school their children, and replacing such requirements with regulations designed to serve the limited purpose of ensuring that children acquire the basic knowledge and academic skills offered in school").

^{17.} See infra note 204 and accompanying text (illustrating the potential reach of idiosyncratic decisions by parents given greater control of curriculum decisions).

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Public schools, particularly the weaker schools, will face additional, related, and daunting challenges. The system of public school finance, for example, already the subject of criticism and legal challenges in many states, could be thrown into chaos as charter schools and vouchers siphon funds in a potentially arbitrary fashion from public school districts, with the greatest impact likely to be upon the most troubled urban schools.¹⁹ The consequent unplanned fragmentation of student assignment and funding within districts will make it even more difficult to resolve the school finance battles in a number of states.²⁰

Part II of the article will assess the changing framework of educational governance in the United States. It will examine the rapidly spreading charter school and voucher program initiatives, including their workings, justifications, and policy and constitutional issues, including those addressed in Zelman. Part III will consider the potential impact of *Troxel* upon parental rights to control the education of their children in the light of the new initiatives, education continuum, and the standards-based reforms considered in Part II. Part IV will offer concluding thoughts.

II. THE CHANGING FRAMEWORK OF EDUCATIONAL GOVERNANCE

In 1997, the then Chancellor of the New York City school system, Rudy Crew, declared: "We don't have a lot of time which is why I feel this incredible urgency. I think we have 10 years, tops, to turn the system around before the public gets fed up and begins to replace it with some-

^{19.} JOHN ERICKSON ET AL., U.S. DEP'T OF EDUC., CHALLENGE AND OPPORTUNITY: THE IMPACT OF CHARTER SCHOOLS ON SCHOOL DISTRICTS 21-31 (2001), available at http://www.ed.gov/ pubs/chartimpact. See, e.g., Darcia Harris Bowman, Mich. District Hires Edison to Manage Its Schools, EDUC. WK. Feb. 23, 2000, at 3 (The Inkster, Michigan, school district—small, urban, and predominantly minority—provides an instructive example. In part as a consequence of the establishment of eight charter schools, the troubled school district has suffered a significant loss of students and funding. It plans to turn over the running of its schools to Edison Schools Inc., a private, for-profit corporation, demonstrating the ripple repercussions of various reforms.). See also Caroline Hendrie, Indianapolis Charters Spur Budget Debate, EDUC. WK., Oct. 23, 2002, at 3 (four new charter schools in Indianapolis Public Schools District, drawing many students previously attending private schools, seen as siphoning funds from District schools).

^{20.} See Richard Rothstein, Equalizing Education Resources on Behalf of Disadvantaged Children, in A NOTION AT RISK: PRESERVING PUBLIC EDUCATION AS AN ENGINE FOR SOCIAL MOBILITY 31 (Richard D. Kahlenberg ed., 2000). The fiscal crises faced by many states for fiscal year 2003-04 are focusing attention in several states upon the costs of and impact upon school finance policies of charter schools. Caroline Hendrie, Charter Laws Are Targeted in Fiscal Tilts, EDUC. WK., Mar. 5, 2003, at 1.

thing else."²¹ The public school establishment nevertheless continues to demonstrate a remarkable ability to sidetrack systemic changes. Some of the reasons that urban school systems in particular deflect significant change are explained in a penetrating analysis by an astute scholar.²² Examples abound, and Dr. Crew himself was a casualty of one such attempt to introduce change into some of the New York City school system's worst performing schools.²³ Nevertheless, the increasing intensity, velocity, and scope of the debate over public education and the Supreme

22. FREDERICK M. HESS, SPINNING WHEELS: THE POLITICS OF URBAN SCHOOL REFORM (1999).

23. See David Herszenhorn, Crew Softens Threat to Quit Over Vouchers, N.Y. TIMES, Mar. 7, 1999, at 41, and Jacques Steinberg, Crew Reflects on the Job, and the Rift That Helped to End It, N.Y. TIMES, Jan. 6, 2000, at B1 (discussing a 1999 proposal by New York City Mayor Rudolph Giuliani to use public funds to finance private school vouchers which ignited a controversy between the Mayor and New York City Schools Chancellor Rudy Crew and ultimately led to a decision by the New York City Board of Education not to renew Dr. Crew's appointment as Chancellor); Thomas C. Lueck, Giuliani Suggests Privatizing Failing Schools, N.Y. TIMES, Jan. 12, 2000, at B7; Edward Wyatt, Taking a Corporate Approach to Remaking Education, N.Y. TIMES, Jan. 12, 2000, at A16; Edward Wyatt, New York to Seek Private Managers for Worst Schools, N.Y. TIMES, July 27, 2000, at A1 (reporting that Dr. Crew's successor, Schools Chancellor Harold O. Levy, after continual prodding by the Mayor, proposed to use the New York State charter school mechanism to give control of some of the City's worst performing schools to private companies or nonprofit agencies in the Fall of 2001); Alison Gendar, Four (of Five) Parent Voters Said No to Edison Takeover, N.Y. DAILY NEWS, Apr. 3, 2001, at 1 (the proposal was defeated by vote of the parents at each of the five schools after an aggressive, negative campaign by some politicians, community activists, and union members). In fact, the authority and much of the power of the New York City Board of Education itself and the 32 local community school boards within New York City also have become casualties of the new Mayor's initiative to reform education. See N.Y. EDUC. LAW § 2590 (2002), enacted as Chap. 91, Laws of 2002. See, e.g., Jennifer Steinhauer, Two Major Points of School Law Get Justice Dept. Approval, N.Y. TIMES, July 14, 2002, at B2 (Board of Education reformed by giving Mayor authority to appoint eight of 13 members, including Chancellor who now serves as Board Chairperson) and Anemona Hartocollis, Politics Absent as Mayor Picks School Panelists, N.Y. TIMES, July 19, 2002, at B1 (Mayor announces seven of his appointments to the reconstituted N.Y.C. Board of Education). In addition, the Mayor and Dr. Levy's successor as Schools Chancellor, Joel I. Klein, announced a reorganization of the system, stripping the Community School Boards of all of their remaining powers and naming ten regional superintendents to administer the system. Jennifer Medina, New Leaders of Schools Are Called Demanding, N.Y. TIMES, Jan. 28, 2003, at B3. Some members of the New York State Legislature, however, questioned whether the plan could be implemented without legislative approval. Jennifer Medina, 5 State Senators Question Plan By Mayor to Overhaul Schools, N.Y. TIMES, Jan. 29, 2003,

^{21.} Quoted in Sara Mosle, *The Stealth Chancellor*, N.Y. TIMES MAG., Aug. 31, 1997, at 33. *See also* EDWARD B. FISKE & HELEN F. LADD, WHEN SCHOOLS COMPETE: A CAUTIONARY TALE (2000) (New Zealand has taken the lead in replacing its public school system with "something else," a combination of decentralization, parental choice, and market competition); John H. Bishop, *Privatizing Education: Lessons from Canada, Europe, and Asia, in* VOUCHERS AND THE PROVISION OF PUBLIC SERVICES 292 (C. Eugene Steuerle et al. eds., 2000) (for a discussion of the experience in other countries).

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Court's recent decision in Zelman,²⁴ as well as the enacted and proposed reforms during the several years since Dr. Crew's statement, demonstrate that ten years may well be an overestimate.²⁵

Public education is a profound and complex government enterprise with a variety of sometimes conflicting political, social, and economic objectives. Justice William Brennan captured its significance in 1982 in one of the Supreme Court's most significant public education decisions: "In sum, education has a fundamental role in maintaining the fabric of our society."²⁶ But the fabric of our society also determines what we ask of our system of public education. Professor Ronald Manzer observed:

In any political community the collective philosophy of education and theory of learning must be vital subjects of public deliberation and argument that are grounded in the fundamental beliefs and commitments of a broader public philosophy and hence can provide warrants for collective judgments about the effectiveness, efficiency, legitimacy, and justice of educational policies.²⁷

Relatively few, however, have attempted to ground the hard educational policy decisions within a broader public philosophy.²⁸ In the United

25. See, e.g., Terry M. Moe, A Look at . . . School Vouchers; The Public Revolution Private Money Might Bring, WASH. POST, May 9, 1999, at B3 (arguing that publicly funded voucher programs, particularly in inner cities, will expand greatly because of increasing public pressure); Kerry A. White, Gathering of Mayors Focuses on Vouchers, Charter Schools, EDUC. WK., Nov. 3, 1999, at 5; Matther Miller, A Bold Experiment to Fix City Schools, ATLANTIC MONTHLY, July 1999, at 15-31 (proposing testing of consequences of vouchers by selecting several big cities with failing public schools, raising per pupil spending, and offering a system of universal vouchers); Eric W. Robelen, Federal File, Reich on Vouchers, EDUC. WK., Sept. 13, 2000, at 31 (former Secretary of Labor Robert B. Reich proposed providing vouchers of up to \$12,000 to families based on a sliding scale for use at public, charter, or private schools); Bill Swindell, GOP Majorities Could Make the Grade on School Choice This Year, CQ WKLY., Feb. 22, 2003, at 450 (Republicans in both chambers of Congress showing renewed interest in voucher proposals).

26. Plyler v. Doe, 457 U.S. 202, 221 (1982) (finding a Texas statute that denied a free public education to children of illegal immigrants unconstitutional under the Equal Protection Clause of the Fourteenth Amendment).

27. RONALD MANZER, PUBLIC SCHOOLS AND POLITICAL IDEAS: CANADIAN EDUCATIONAL POLICY IN HISTORICAL PERSPECTIVE (1994).

28. Professor Harry Brighouse is a noteworthy exception. HARRY BRIGHOUSE, SCHOOL CHOICE AND SOCIAL JUSTICE (2000).

at B2 and Jennifer Medina, Panel Says School Boards Should Stay Largely Intact, N.Y. TIMES, Feb. 20, 2003, at B2. The Chancellor and the Mayor placed a full-page advertisement in the New York Times to announce the changes, which include a uniform curriculum in reading, writing, and math for most of the City's schools. An Open Letter from Mayor Bloomberg and Chancellor Klein to the Parents and Families of New York City's School Children, N.Y. TIMES, Jan. 21, 2003, at B4.

^{24. 536} U.S. 639 (2002).

States the current public education debate is somewhat different, involving a broader debate about the role of the government and the increasing role of the market economy in our society.²⁹ In this context, the legitimacy of the "public school monopoly" is viewed by many as akin to the potentially dominant power of the Federal Government and consequently as a threat to be resisted mightily.³⁰ In regard to efficiency and effectiveness,³¹ the public schools increasingly are subject to the pressures of assessment and competition, including standardized tests measuring student performance, the market economy through school choice iniatives,³² and the privatization movement.³³ Justice, of course, is an abstruse and difficult question, and in the United States it is often measured by con-

30. As to the Federal Government, the point of view is perhaps best expressed in Justice Thomas's dissent, joined by Justices O'Connor and Scalia and Chief Justice Rehnquist, in U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 846 (1995): "Our system of government rests on one overriding principle: all power stems from the consent of the people... The ultimate source of the Constitution's authority is the consent of the people of each individual state, not the consent of the undifferentiated people of the Nation as a whole."

31. In regard to the push for efficiency and effectiveness, see *Quality Counts 2001: A Better Balance*, EDUC. WK, Jan. 11, 2001, at 8-193 (reporting the results of state efforts to raise standards and accountability in U.S. schools) and *Quality Counts 2002: Building Blocks for Success*, EDUC. WK., Jan. 10, 2002 at 68-80 (update). Contrary to the long accepted view in the U.S. that education is primarily a state responsibility, the Federal Government now has weighed into the assessment and accountability efforts in a very manifest way with the enactment of the No Child Left Behind Act of 2001, Pub. L. No. 107-110 (2002). The Act walks the tightrope of maintaining state responsibility and accountability for public education, while setting federal standards. *See* Anjetta McQueen, *Provisions of the Education Overhaul Law*, CQ WKLY., Jan. 26, 2002, at 262 (summarizing the principal provisions of the Act).

32. See FISKE & LADD, supra note 21 (in regard to the influence of the market economycompetition and choice—the New Zealand experience is instructive).

33. In regard to privatization, *see, e.g.*, MYRON LIEBERMAN, PRIVATIZATION AND EDUCATIONAL CHOICE (1989) (analyzing various approaches to privatization in education). *See also Reading, Writing and Enrichment*, ECONOMIST, Jan. 16, 1999, at 55 (discussing the increasing role of privatization and private corporate money in U.S. education); *but see* CAROL ASCHER ET AL., HARD LESSONS: PUBLIC SCHOOLS AND PRIVATIZATION (1996) (reviewing earlier experiences with school privatization and concluding that there are no empirical results that support the promise of privatization of public schools) *and* Mary Ann Zehr, *Studies Cite Segregation in Private Schools*, EDUC. WK., July 10, 2002, at 14 (studies indicate that students in private schools are more likely to attend racially segregated classrooms).

^{29.} The results of the debate are reflected in a number of arenas. See, e.g., CHARLES NOBLE, WELFARE AS WE KNEW IT: A POLITICAL HISTORY OF THE AMERICAN WELFARE STATE (1997) (analyzing the impact of the political structure of government in the United States upon attempts to create or continue national social service programs). See also JOEL D. ABERBACH & BERT A. ROCKMAN, IN THE WEB OF POLITICS: THREE DECADES OF THE U.S. FEDERAL EXECUTIVE 134-160 (2000) (describing the reinventing government phenomenon in regard to the market economy).

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stitutional considerations.³⁴ The consequences of the *Troxel* and *Zelman* decisions, therefore, will likely intensify the debate about justice and our educational system.

Since the publication of A Nation At Risk: The Imperative for Educational Reform in 1983,³⁵ the need for radical reform of public education in the United States has been accepted and advocated by most political and educational leaders.³⁶ As already noted, the reform movement is leading to the spread of standards-based reforms throughout the nation.³⁷ In addition, the two other paradigm reforms of the moment—charter schools and vouchers are based upon the concept of choice. Observers have noted that "[w]ith the increasing demand for better schools, states and communities are providing more options to families The most important options are full school choice programs, charter schools and private scholarships."³⁸

In 1859, John Stuart Mill succinctly and presciently articulated that the notion of choice in education has a foundation in political theory:

Is it not almost a self-evident axiom, that the State should require and compel the education . . . of every human being who is born its citizen? . . .

Were the duty of enforcing universal education once admitted, there would be an end to the difficulties about what the State should teach, and how it should teach, which now convert the subject into a mere battlefield for sects and parties, causing the time and labor which should have been spent in educating, to be wasted in quarrelling about education It might leave to parents to obtain the education

^{34.} See, e.g., William J. Brennan Jr., The Constitution of the United States: Contemporary Ratification, in JUDGES ON JUDGING: VIEWS FROM THE BENCH 200, 210 (David M. O'Brien ed., 1997); William K. Kelley, Inculcating Constitutional Values, 15 CONST. COMMENT 161, 178 (1998).

^{35.} NAT'L COMM. ON EXCELLENCE IN EDUC., U.S. DEP'T OF EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983) (the commission was directed by the Secretary of Education to examine the quality of education in the United States), available at http://www.ed.gov/pubs/NatatRisk/index.html (last modified Oct. 7,1999).

^{36.} But see RICHARD ROTHSTEIN, THE WAY WE WERE? THE MYTHS AND REALITIES OF AMERICA'S STUDENT ACHIEVEMENT (1998) (arguing that public schools are performing as well or better than ever).

^{37.} See supra note 31 (demonstrating the spread of standards-based reforms).

^{38.} Dave A. DeSchryver, School Choice TODAY, Center for Education Reform, at http://207.86.17.180/pubs/choice1.htm (last modified March 2000).

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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 them.³⁹

Mill's libertarian concept was first combined with that of the market economy by University of Chicago economist Milton Friedman, later and more elaborately by John E. Coons and Stephen Sugarman, and ultimately by John Chubb and Terry Moe in their seminal work, *Politics, Markets, and America's Schools.*⁴⁰ Professor Friedman put forth his proposal as follows:

Governments . . . could finance [education] by giving parents vouchers redeemable for a specified maximum sum per child per year if spent on "approved" educational services. Parents would then be free to spend this sum and any additional sum on purchasing educational services from an "approved" institution of their own choice. The educational services could then be rendered by private enterprises operated for profit, or by non-profit institutions of various kinds.⁴¹

In the 1970s, after languishing for two decades, the concept was advanced by Professors Coons and Sugarman. Their theme, however, somewhat echoed John Stuart Mill, and was told from the point of view of poor children and their families:

On the grounds of simple fairness children should be guaranteed reasonable access to education whatever their parents views The humane response is that the right to education should not be limited by parental resources; parental duty [regarding education] means nothing to the child if the family cannot afford to educate him. Therefore, additional collective action is necessary, and unless the child is to be taken from his parents, this requires a subsidy of

^{39.} JOHN STUART MILL, ON LIBERTY 107-108 (Alburey Castell ed., 1947).

^{40.} JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS (1990).

^{41.} Milton Friedman, *The Role of Government in Education, in* ECONOMICS AND THE PUBLIC INTEREST 127 (Robert Solo ed., 1955). Professor Friedman continues to advocate his position almost half a century later. Mark Walsh, *Friedman Disappointed That Voucher Plans Aren't Bolder*, EDUC. WK., Dec. 12, 2001, at 16.

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the parents by the state. Only in that way can the child's hope for education be delivered from the economic limitations of his family.⁴²

After another decade and with perhaps the greatest impact, Chubb and Moe completed the tapestry of school choice by weaving together the arguments that political pressures undermine public schools and that market forces strengthen private schools:

Schools, we believe, are products of their institutional settings. America's public schools are governed by institutions of direct democratic control, and their organizations should be expected to bear the indelible stamp of those institutions. They should tend to be highly bureaucratic and systematically lacking in the requisites of effective performance. Private schools, on the other hand, operate in a very different institutional setting distinguished by the basic features of markets—decentralization, competition, and choice—and their organizations should be expected to bear a very different stamp as a result. They should tend to possess the autonomy, clarity of mission, strong leadership, teaching professionalism, and team cooperation that public schools want but . . . are unlikely to have.⁴³

According to Chubb and Moe, therefore, choice is the school reform that addresses public school weaknesses:

[W]e think reformers would do well to entertain the notion that choice *is* a panacea . . . Choice is a self-contained reform with its own rationale and justification. It has the capacity *all by itself* to bring about the kind of transformation that, for years, reformers have been seeking to engineer in myriad other ways. Indeed, if choice is to work to greatest advantage, it must be adopted *without* these other

^{42.} JOHN E. COONS & STEPHEN SUGARMAN, EDUCATION BY CHOICE 11 (1978). The voucher programs of the cities of Milwaukee and Cleveland are need-based, thus following the notions of Coons and Sugarman. See Tax Supported K-12 Voucher Programs in Wisconsin, Ohio, and Florida, Center for Education Reform, at http://edreform.com/school_choice/legislation.htm (last visited Nov. 25, 2002).

^{43.} CHUBB & MOE, *supra* note 40, at 67. Support for Chubb and Moe's conclusion that political pressures undermine public schools received support from a perhaps unexpected source, another Brookings Institution publication: HESS, *supra* note 22. See also FISKE & LADD, *supra* note 21, at 255-74 (discussing New Zealand's radical reform which brought the approaches that Chubb and Moe advocate—decentralization, parental choice, and market competition—into the core of the public school system; the results were not all as anticipated).

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reforms, since the latter are predicated on democratic control and implemented by bureaucratic means. The whole point of a thoroughgoing system of choice is to free the schools from these disabling constraints by sweeping away the old institutions and replacing them with new ones. Taken seriously, choice is . . . a revolutionary reform that introduces a new system of public education.⁴⁴

Although Chubb and Moe reject top-down reforms,⁴⁵ top-down reforms will spur the demand for choice by highlighting public school failures through means such as standardized tests and school report cards. This is already the case in several states including Florida and New York.⁴⁶

A. Charter Schools

Charter schools are now the most widespread choice reform.⁴⁷ In a manner similar to that of term limits, the phenomenon of charter schools began sweeping the country early in the 1990s.⁴⁸ The first charter school law was enacted by Minnesota in 1991,⁴⁹ and the first charter school

48. The term limits sensation was curtailed, at least at the federal level, by the U.S. Supreme Court's decision in *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995) (holding unconstitutional state attempts to impose term limits upon service in the U.S. Congress). Perhaps both phenomena represent the search for a "silver bullet" to solve what are perceived to be almost intractable political problems.

49. UNIV. OF STATE OF N.Y., STATE EDUC. DEP'T, CHARTER SCHOOLS, A COMPREHENSIVE OVERVIEW 29 (1994).

^{44.} CHUBB & MOE, supra note 40, at 217 (emphasis in original); see also Daniel M. Fox & John M. Ludden, Living but Not Dying by the Market: Recent Changes in Health Care, 127 DAEDALUS 137 (1998) (an interesting comparison of the impact of increased competition in health care with education).

^{45.} CHUBB & MOE, supra note 40, at 194-198.

^{46.} See infra notes 120-125 and accompanying text (describing the Florida experience with rating schools) and note 196 and accompanying text (describing the New York State system for classifying low-performing schools).

^{47.} Reforms, however, often conflict. The simultaneous imposition of state-wide, standardsbased, "top-down" reforms upon charter and private schools, whose underlying premise is decentralization, creates a clash of goals. The Commissioner of Education in New York State and the State Board of Regents are engaged in a campaign to raise academic standards throughout the state and by implementing testing requirements in charter schools as well as "standard" public schools. *See* REGS. OF THE COMM'R OF EDUC., NEW YORK STATE, CHARTER SCHOOL REPORT CARD, Sec. 119.3, and NEW YORK CITY OFFICE OF CHARTER SCHOOLS, NYC PUBLIC CHARTER SCHOOLS: AN OVERVIEW (charter schools have autonomy to establish their own educational mission, curriculum, and administrative structure, but all are accountable for educational performance and fiscal management practices).

opened there in 1992.⁵⁰ Eleven years later, by late 2002, 39 states, the District of Columbia, and Puerto Rico had enacted charter laws.⁵¹ At the beginning of the 2002-2003 school year, a total of 2700 charter schools were operating in 36 states and the District of Columbia, serving approximately 575,000 students.⁵² Most of the operating charter schools, however, were only a few years old⁵³ and approximately 50% of the operating charter schools were located in only four states—Arizona, California, Florida, and Texas.⁵⁴

Charter schools are independent public schools, initiated and operated by entities and groups such as teachers, parents, community organizations, colleges, universities, and educational entrepreneurs. They are based upon a written document—a charter—granted by a chartering authority as authorized by the law of the state. Although they vary considerably from state to state, charter schools include all, most, or some of the following characteristics. Charter schools: 1) operate based upon a detailed written agreement—the charter—for a specified period; 2) exist as public legal entities, separate in some way from the local school district in which they are located; 3) operate free from many state and local regulations applicable to public schools; 4) receive operational funding from public funds, and make budget decisions at the school level; 5) are relatively free to adopt instructional and curriculum protocols; 6) are free to manage decisions, including hiring and budgeting, at the school level; and 7) give sponsors, including in many cases teachers

52. Charter School Highlights and Statistics, Center for Education Reform, at http://edreform.com/pubs/chglance.htm (last visited Nov. 7, 2002) [hereinafter Charter School Highlights]. The 575,000 students represent approximately 1.2% of the total public school enrollment, projected as 47,358,000. DIGEST OF EDUC. STAT., supra note 4, at 12.

53. U.S. Dep't of Educ., The State of Charter Schools 2000—Fourth Year Report, The Expanding Charter School Movement (January 2000), at http://www.ed.gov/pubs/charter4thyear/a.html (last visited Feb. 2, 2002) [hereinafter State of Charter Schools].

54. Charter School Highlights, supra note 52.

^{50.} BRYAN C. HASSEL, THE CHARTER SCHOOL CHALLENGE: AVOIDING THE PITFALLS, FULFILLING THE PROMISE 75 (1999).

^{51.} States with charter school laws include: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Wisconsin, and Wyoming. *Charter School Highlights and Statistics*, Center for Education Reform, *at* http://edreform.com/pubs/chglance.htm (last visited Nov. 7, 2002). For a summary of the provisions of the charter school laws, see *Charter School Basics*, Education Commission of the States (April 2001) *at* http://www.ecs.org/clearinghouse/24/12/2412.htm (last visited Feb. 2, 2002).

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and parents, the opportunity to participate in the design of schools.⁵⁵ As public institutions, charter schools are open to any student (in their catchment area) who applies.⁵⁶ Unlike private schools participating in a voucher system, an oversubscribed charter school must admit students by lottery.⁵⁷ And, unlike private schools, ability to pay is not a criterion for attendance.⁵⁸

Charter school advocates extol the influence of market forces upon the success of charter schools:

Charter schools are not just freer to be responsive and work hard, however. They also have incentives to do so. One incentive comes from the fact that charter schools are "schools of choice." No student is compelled to attend a charter school; parents may withdraw their children from charter schools at any time. Charter schools cannot take their "customers" for granted. Their very survival depends upon the degree to which families believe the schools are responding to family preferences and working hard to provide the education they demand.⁵⁹

Two of the more controversial aspects of the charter school phenomenon, however, are that in ten states, for-profit organizations can legally manage and operate charter school and in some states, church-related organizations are eligible to sponsor charter schools.⁶⁰ Given the diffi-

^{55.} HASSEL, *supra* note 50, at 5, *and* UNIV. OF STATE OF N.Y., *supra* note 49, at 4. Credit for introducing the concept of charters as a choice option for public schools in the United States is given both to Ray Budde, author of EDUCATION BY CHARTER: RESTRUCTURING SCHOOL DISTRICTS (1988), and to Ted Kolderie, author of BEYOND CHOICE TO NEW PUBLIC SCHOOLS: WITHDRAWING THE EXCLUSIVE FRANCHISE IN PUBLIC EDUCATION (1990). UNIV. OF STATE OF N.Y., *supra* note 49, at 4-5.

^{56.} Some civil rights advocates now see charter schools as a mechanism by which Black and Hispanic Americans can achieve greater benefits from school choice and provide a better education for their children. See Robin D. Barnes, Black America and School Choice: Charting a New Course, 106 YALE L.J. 2375, 2381 (1997); Jodi Wilgoren, Young Blacks Turn to School Vouchers as Civil Rights Issue, N.Y. TIMES, Oct. 9, 2000, at A1; Mary Ann Zehr, Hispanic Group Quietly Initiates Big Charter Push, EDUC. WK., Nov. 21, 2001, at 1.

^{57.} Bryan C. Hassel, *The Case for Charter Schools, in* LEARNING FROM SCHOOL CHOICE 35 (Paul E. Peterson & Bryan C. Hassel eds., 1998).

^{58.} Id.

^{59.} HASSEL, supra note 50, at 6.

^{60.} Twelve states prohibit direct management of charter schools by for-profit organizations, but 16 additional states allow indirect management or operation by for-profit organizations. *Charter Law Scorecard Ranks States*, Center for Education Reform, *at* http://edreform.com/charter_schools/ laws (last visited Nov. 10, 2002).

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culties of starting a charter school,⁶¹ which Hassel describes in gruesome detail,⁶² it is hardly surprising, although unanticipated by most charter advocates, that large enterprises, with considerable resources, are playing an increasing role as charter school sponsors. As the reported examples illustrate, funding adequate facilities is one of the major implementation problems for charter schools; the problem is exacerbated because charter schools usually pay for facilities out of operating funds or private contributions, rather than the dedicated funding sources for capital expenditures usually available to public schools.⁶³ Many states leave only the charter school corporation or board responsible for a charter school's debt,⁶⁴ making borrowing more difficult. Funding for start-up costs—textbooks, equipment, and computers—presents another challenge for charter school sponsors in many states.⁶⁵ Consequently, describing the role of for-profit entities in charter schools, Hassel states:

- 63. VENTURESOME CAPITAL, supra note 61, at 69.
- 64. VENTURESOME CAPITAL, supra note 61, at 66.
- 65. VENTURESOME CAPITAL, supra note 61, at 55-56.

^{61.} See, e.g., U.S. DEP'T OF EDUC., VENTURESOME CAPITAL: STATE CHARTER SCHOOL FINANCE SYSTEMS 69-75 (2000) [hereinafter VENTURESOME CAPITAL] (reviewing charter school facilities and capital outlay financing issues as one of biggest implementation problems for startup charter schools); Lynn Schnaiberg, An Apparent First: Colo. Charter School Gets S&P Rating, EDUC. WK., July 14, 1999, at 13 (describing the experience of one charter school, the Core Knowledge Charter School in Parker, Colorado, which illustrates the difficulties many start-up charter schools have in financing capital facilities, which are not generally financed by state funds); Darcia Harris Bowman, Charters Hit By Facilities Funding Woes, EDUC. WK., Nov. 8, 2000, at 1 (finding and financing facilities are on-going hurdles for charter schools); see also CALIFORNIA SECRETARY OF STATE, CALIFORNIA OFFICIAL VOTER INFORMATION GUIDE 39 (Aug. 14, 2000), and California Secretary of State, State Ballot Measures, at http://vote2000.ss.ca.gov/Returns/ prop/00.htm (last visited Jan. 11, 2001) (California Proposition 39, passed by the voters at the Nov. 7, 2000 election, however, among other provisions, requires each local school district to provide charter school facilities); Lynn Schnaiberg, Report Urges More Oversight of Mass. Charter Schools, EDUC. WK., Jan. 12, 2000, at 20 (Massachusetts Inspector General reported that loans taken out by charter schools to pay for facilities could become the responsibility of state taxpayers if the school shuts down or has its charter revoked); Jeff Archer, More Oversight Sought for Ohio School Choice, EDUC. WK., Jan. 19, 2000, at 5 (a variety of problems have afflicted charter school startups in Ohio); SEYMOUR B. SARASON, CHARTER SCHOOLS: ANOTHER FLAWED EDUCATIONAL REFORM? 35-38 (1998) (for an additional analysis of some of the problems involved in creating a charter school); State of Charter Schools, supra note 53 (as of September 1999, 59 charter schools, nearly four percent of all charter schools ever started, had already closed); Darcia Harris Bowman, Charter Closings Come Under Scrutiny, EDUC. WK., Feb. 28, 2001, at 1 (by early 2001, 27 additional charter schools had closed, bringing the total to 86, still constituting four percent of the total of 2150 operating charter schools); Caroline Hendrie, New Scrutiny For Sponsors of Charters, EDUC. WK., Nov. 20, 2002, at 1 (California, Texas, and Ohio debate additional steps to assure accountability of charter schools).

^{62.} HASSEL, supra note 50, at 104-27.

"More plausible is the scenario under which a handful of large organizations" whether for-profit outfits like the Edison Project or non-profit efforts like New American Schools—each sponsors a large number of charter schools nationwide."

The opportunities for large for-profit enterprises are demonstrated by the August 2, 1999 Edison Schools's filing with the Securities and Exchange Commission to offer \$172.5 million worth of stock in an initial public offering. "Edison has thrived recently with the emergence of charter schools in urban areas, run by community groups rather than school boards." Dow Jones, Edison Schools Seeks Public Offering, N.Y. TIMES, Aug. 3, 1999, at C6. See also, Philip Lentz, For-Profit Firms Eye NY to Run Charter Schools, CRAIN'S N.Y. BUS., Apr. 26, 1999, at 1 (describing the opportunities for for-profit education management companies, particularly in suburban upstate schools, following enactment of New York State's charter school law); William C. Symonds, For-Profit Schools, Bus. WK., Feb. 2, 2000, at 64-76 (describing the experiences of the several for-profit firms involved in the education business) and Mark Walsh, Businesses Flock to Charter Schools, EDUC. WK., May 22, 2002, at 1 (continued interest displayed by for-profit enterprises in charter school management). Edison managed more than 130 schools, in 22 states, with 75,000 students during the 2001-2002 school year, but had yet to show a profit. Jacques Steinberg, For-Profit Venture Has Yet to Turn a Profit, N.Y. TIMES, Apr. 8, 2002, at A17. Edison is also having "accounting problems." See Mark Walsh, Edison Reels Amid Flurry of Bad News, EDUC. WK., May 22, 2002, at 1 (S.E.C. announced that some Edison reported revenues had not been realized). The academic progress of students in Edison schools is a contentious issue. See, e.g., Jacques Steinberg & Diane B. Henriques, Complex Calculations on Academics: Edison Schools and Detractors Rely on Test Scores and Surveys, N.Y. TIMES, July 16, 2002, at A10 (reporting debate about Edison's assessment of its schools' accomplishments). Edison continues to press ahead aggressively by, for example, purchasing a full-page advertisement in the business section of The New York Times. Edison Schools: The First Decade, N.Y. TIMES, Nov. 7, 2002, at C7.

The philosophical debate about the propriety of inserting the profit motive of a corporation, with its primary loyalty to its shareholders, into public education is intensifying. Mark Walsh, *Report Card on For-Profit Industry Incomplete*, EDUC. WK. Dec. 15, 1999, at 1. Professor Brighouse, however, argues that the issue of the profit motive is a red herring. HARRY BRIGHOUSE, *supra* note 28, at 47-53. Privatization of "failing" urban schools is increasingly advocated. *See, e.g.*, Jacques Steinberg, *Edison Gets a Share of Philadelphia Contracts*, N.Y. TIMES, Mar. 27, 2002, at A14 (describing the resolution of a contentious debate about the participation of Edison and several other for-profit companies in overhauling Philadelphia's troubled public schools).

Even school districts are becoming charter school entrepreneurs. "[I]n a striking illustration of how charter schools can stir innovation in the most unexpected places, the Higley [Arizona] district has one small elementary school for its own students and two dozen charter schools scattered across Arizona." Tamar Lewin, Arizona District Profits From Charter Schools, N.Y. TIMES, June 13, 1999, at 33.

Perhaps even more striking and controversial is the appearance of cyber charter schools. Andrew Trotter, *Cyber Schools Carving Out Charter Niche*, EDUC. WK., Oct 24, 2001, at 1; Andrew Trotter, *Pennsylvania Report Examines the State's Online Charter Schools*, EDUC. WK., Nov. 7, 2001, at 30; Robert Tomsho, *Learning @ Home: Controversy Flares Over Public Funding* of 'Cyber Schools,' WALL ST. J., Apr. 5, 2002, at A1 (cyber-charter schools, some associated with for-profit ventures, drawing students and concomitant funding from traditional school districts); Caroline Hendrie, *Cyber Learning Complicates Charter Funding*, EDUC. WK., Jan. 15, 2003, at 19 (several states reexamining funding of cyber-charter schools).

^{66.} HASSEL, supra note 50, at 142.

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These predictions were borne out in New York State. The New York Charter School Law was enacted in December of 1998.⁶⁷ Four of the first eight proposals for charter schools approved in New York State were to be operated by for-profit companies. (Two other schools opened in 1999 were established New York City public schools converted to charter status.)⁶⁸ Local parent-teacher groups, with limited resources, would find it exceedingly difficult to find, alter, and finance a suitable building with-in nine months, particularly in high-cost areas of the state such as New York City.

B. School Choice and Vouchers

The education continuum becomes hazier as one moves along to choice programs built upon vouchers. In 1925, the Supreme Court decision in *Pierce*⁶⁹ gave parents the right to send their children to a private rather than a public school to satisfy compulsory education laws. During the 1990s, approximately ten percent of school-age children attended private schools,⁷⁰ but parents have had to pay tuition costs.

Now, private school choice through the initiation of voucher programs is gaining momentum. In the United States, the concept of choice is a cardinal canon of both our market economy and democratic society. The perceived failure of some traditional public schools,⁷¹ particularly many in urban school districts,⁷² is propelling the demand for a mechanism that

^{67.} N.Y. CLS. Educ. § 2850 (2002), enacted as Chap. 16, Laws of 1998.

^{68.} Caroline Hendrie, *First New York Charters Approved*, EDUC. WK., June 23, 1999, at 23; Lynette Holloway, *State Official Paves Way for 5 Charter Schools to Open in Fall*, N.Y. TIMES, Aug. 6, 1999, at B3. *See* Karen Nelis, *Impact Unknown*, EMPIRE ST. REP., Apr. 1999, at 25 (for a discussion regarding whether the New York State charter school law will lead to major changes in public education within the State).

^{69.} Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534-35 (1925) (state cannot compel attendance at only public schools).

^{70.} The Fall 1999 enrollment in private schools was 5,162,684. Total elementary and secondary enrollment was 52,875,000. DIGEST OF EDUC. STAT., *supra* note 4, at 71,12. *Cf*. Bishop, *supra* note 21, at 296-97 (in part because a number of countries pay for private—including religious—schooling, private schools account for a much higher percentage of enrollment in some European and Asian countries).

^{71.} See, e.g., NAT'L COMM. ON EXCELLENCE IN EDUC., *supra* note 35; the "perception" of failure is made quite real when states formally classify some schools as "failing." See infra, notes 120-125 and accompanying text regarding the Florida voucher program and notes 130, 193-195 and accompanying text regarding the grading of individual schools under various state programs.

^{72.} But see ROTHSTEIN, supra note 36 (presenting a differing and positive view about the effectiveness of the public school system in the United States).

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would give poor, urban, parents "trapped" in a dysfunctional public school system a choice⁷³—hence voucher programs. The Reverend Floyd Flake, for example, a well-known Black minister in Queens, New York City, and a former U.S. Congressman, is a strong advocate of vouchers:

I would argue that if we are not doing what we are mandated to do, then we have a responsibility to demand that our resources be spent in ways that guarantee that every child in America has an equal opportunity to compete Are vouchers the total answer? Absolutely not. America will always need a public education system If the system does not reform fast enough to create alternatives, it cannot continue to be the monolith that makes promises that it does not deliver.⁷⁴

Choice can also be provided through the tax system. In 1997, for example, Minnesota amended its existing program to provide a tax deduction to middle-income taxpayers and a tax credit of up to \$1,000 a year to low-income families, which may be used for educational expenses at either public or private schools.⁷⁵ Such programs are of limited value to very low-income parents, however, because their state tax payments may not even approach \$1,000, an amount which, in any event, would not cover private school tuition.⁷⁶ The earlier Minnesota program was found to be constitutional by the U.S. Supreme Court.⁷⁷

^{73.} See, e.g., Greg D. Andres, Private School Voucher Remedies in Education Cases, 62 U. CHI. L. REV. 795 (1995); Kerry A. White, NRC Report Calls for Voucher Experiment, EDUC. WK., Sept. 15, 1999, at 3; Karla Scoon Reid, Minority Parents Quietly Embrace School Choice, EDUC. WK., Dec. 5, 2001, at 1 (reporting a strong undercurrent of support from African-Americans and Latinos for school choice options ranging from charter schools to vouchers); Alexandra Starr, We Shall Overcome, Too, BUS. WK., July 15, 2002, at 86 (young African-American politicians amenable to vouchers to fix public education); and Kate Zernike, Vouchers: A Shift, But Just How Big?, N.Y. TIMES, June 30, 2002, at WK 3 (Black Alliance for Educational Options supports vouchers for poor students).

^{74.} The Reverend Dr. Floyd Flake, *Presentation, in* EDUCATION VOUCHERS ... CAN PUBLIC EDUCATION MEET THE CHALLENGE? 3-5 (Roscoe C. Brown, Jr. ed., 1998). *See supra* note 21 for references to alternatives adopted in other nations.

^{75.} MINN. STAT. ANN. § 290.0674 (West 2002).

^{76.} Average tuition in private schools in 1993-94 was \$3,116, with average tuition lowest in Catholic schools (\$2,178) and highest in non-sectarian schools (\$6,631). DIGEST OF EDUC. STAT., *supra* note 4, at 73.

^{77.} Mueller v. Allen, 463 U.S. 388, 400 (1983).

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Privately supported school scholarships (in effect privately funded voucher programs) are also mushrooming. Some, as in Arizona, receive state support through tax expenditures. The Arizona statute permits a state tax credit of up to \$500 for individuals who donate to "school tuition organizations," charitable organizations that fund educational scholarships or tuition grants to children to allow them to attend any qualified school, including a sectarian school, chosen by their parents.⁷⁸ The constitutionality of the statute was upheld by a three-to-two decision of the Arizona Supreme Court.⁷⁹ Not surprisingly, the Arizona program has been both praised and condemned.⁸⁰ Other school scholarship programs are privately financed,⁸¹ and it is estimated that 60,000 students received privately financed, voucher-style scholarships to attend private schools during the 2001-02 school year.⁸²

As with charter school laws, there are different types of publicly supported voucher programs; the programs benefitted an estimated 17,500 students during the 2001-02 school year.⁸³ The underlying similarity of voucher programs, however, is that the state provides eligible parents with a voucher, which can then be used to educate their children in a participating school of their choice. The state then reimburses either the school

81. See Richard A. Melcher & Aaron Bernstein, Itching to Get Out of Public School, Bus. WK., May 10, 1999, at 38-40 (discussing the impact of financier Theodore J. Forstmann's privately funded Children's Scholarship Fund, which raised \$160 million to fund vouchers for lowincome families); Jacques Steinberg, Nation's Wealthy, Seeing a Void, Take Steps to Aid Public Schools, N.Y. TIMES, Sept. 23, 1999, at A1 (reporting announcement by William Gates III, chairman of Microsoft, of a one billion dollar scholarship program for disadvantaged minority students). Full-page advertisements by the Catholic Archdiocese of New York seek additional sponsors for its Inner-City Scholarship Fund. See, e.g., How Do You Choose Between Them?, N.Y. TIMES, Sept. 8, 1999, at A19.

83. Id.

^{78.} ARIZ. REV. STAT. ANN. § 43-1089 (West 2001).

^{79.} Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999), cert. denied, 521 U.S. 921 (1999).

^{80.} Compare Carrie Lips & Jennifer Jacoby, The Arizona Scholarship Tax Credit: Giving Parents Choices, Saving Taxpayers Money, Cato Policy Analysis, at www.cato.org (Sept. 17, 2001) (arguing in support), and Ralph G. Neas, A Model to Avoid: Arizona's Tuition Tax Credit Law, People for the American Way Foundation, at http://www.pfaw.org (Sept. 2001) (a policy paper issued by the People for the American Way Foundation in opposition). See also Glen Y. Wilson, The Equity Impact of Arizona's Education Tax Credit Program: A Review of the First Three Years, Education Policy Studies Laboratory, Arizona State University, at http://www.asu.edu/educ/epsl/EPRU/documents (last visited Dec. 5, 2002) (finding that program is expensive, does relatively little to help poor students, and that primary recipients are families whose children are already enrolled in private schools).

^{82.} Karla Scoon Reid, Minority Parents Quietly Embrace School Choice, EDUC. WK., Dec. 5, 2001, at 20.

of choice or the parent for the value of the voucher. On the other hand, crucial differences in programs include the amount of the voucher, whether sectarian schools are eligible to participate in the program,⁸⁴ whether participating schools can charge tuition greater than the voucher, which parents are eligible to participate in the program, whether provisions are made for student transportation, and the degree to which participating private schools are regulated by the state (if at all). The different programs, of course, produce different consequences for parents and for the various public school systems.⁸⁵ The key question is whether vouchers improve student academic performance. At present, the answer is unclear.⁸⁶

The states of Maine and Vermont and the cities of Cleveland and Milwaukee offer publicly funded "full choice" programs, giving parents the opportunity to send their children to the public or private school of their choice.⁸⁷ The Maine and Vermont programs are longstanding.

The program in Maine, established in 1873, is designed to provide primary and secondary education. About one half of the school districts in Maine do not have their own secondary schools and therefore have voucher or "tuitioning" programs.⁸⁸ The program pays tuition for

87. School Choice Today, Center for Education Reform, at http://www.edreform.com/pubs/ sctoday.pdf (last modified June 2001).

^{84.} See Randy Kennedy, Educator Who Sees Both Sides of Vouchers, N.Y. TIMES, Mar. 10, 1999, at B2 (a discussion of the voucher issue from the point of view of the Superintendent of Schools for the Catholic Archdiocese of New York—the country's eleventh largest school system).

^{85.} See, e.g., Paul E. Peterson, Top Ten Questions Asked about School Choice, in BROOKINGS PAPERS ON EDUCATION POLICY 374 (Diane Ravitch ed., 1999) (table illustrating differing characteristics of big-city school choice programs for low-income families); Tamar Lewin, Few Clear Lessons From Nation's First School-Choice Program, N.Y. TIMES, Mar. 27, 1999, at A10 (reviewing impact of voucher program upon Milwaukee public schools).

^{86.} See William G. Howell ET AL., Effect of School Vouchers on Student Test Scores, in CHARTERS, VOUCHERS & PUBLIC EDUCATION 136 (Paul E. Peterson & David Campbell eds., 2001) (suggesting that school voucher programs may shrink the black-white test-score gap for participating students); Mark Walsh, RAND Study Balances the Debate on School Choice, EDUC. WK., Dec. 12, 2001, at 1 (reporting on a major review of scholarly research on private school vouchers and charter schools); Debra Viadero, Increased Choice Found to Have Modest Impact on School Improvement, EDUC. WK., Dec. 5, 2001, at 11 (reporting upon a study conducted by the National Center for the Study of Privatization in Education at Teachers College, Columbia University); Debra Viadero, Voucher Plans' Test Data Yield Puzzling Trends, EDUC. WK., Feb. 27, 2002, at 5 (reporting upon results from studies of privately financed voucher programs in New York City and the District of Columbia). See also Henry M. Levin, A Comprehensive Framework for Evaluating Educational Vouchers, 24 EDUC. EVALUATION & POL'Y ANALYSIS 159 (2002) (proposing a framework for evaluating educational vouchers based upon larger range of goals).

^{88.} Mark Walsh, Court Excludes Religious Schools From 'Tuitioning', EDUC. WK., May 5, 1999, at 3.

approximately 5600 children to attend only public or non-sectarian private schools.⁸⁹

Lawsuits by parents seeking to force Maine to fund tuition for children attending sectarian schools have thus far been unsuccessful. Both the First Circuit⁹⁰ and the supreme judicial court of Maine⁹¹ have held that the exclusion of sectarian schools from Maine's program did not violate either the U.S. or Maine constitutions.

In the case of Vermont, the program, established in 1869, funds high school educations for 6500 students in districts which do not have their own public schools. By local option, the Vermont program includes sectarian schools.⁹² The supreme court of Vermont, addressing an issue arguably distinct from that presented in the Maine cases, held that reimbursement of a parent for tuition expenses incurred educating his son at a sectarian high school did not violate the Establishment Clause of the U.S. Constitution.⁹³ A case presenting the same factual issues, however, was again decided by the Vermont Supreme Court in 1999.⁹⁴ The Chittenden School Board included religious schools among the approved voucher schools in 1995. One independent sectarian secondary school, a Catholic school, operated in the school district's county. When the Chittenden School District voted to allow reimbursement to the Catholic school, the Vermont Commissioner of Education terminated state aid to education in the school district. The District then sued the Commissioner and the Vermont Education Department claiming that tuition reimbursement was constitutional. The Vermont Supreme Court distinguished *Campbell* by noting that the issues involving the Vermont Constitution had been explicitly reserved in Campbell.⁹⁵ It held that Chittenden School District violated the Compelled Support Clause of

^{89.} Id. at 1-2 and A Long Road to Court, EDUC. WK., July 10, 2002, at 18. See also ME. REV. STAT. ANN. tit. 20-A, §§ 5204(4), 2951(2) (West 2001).

^{90.} Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999), cert. denied, 528 U.S. 931 (1999).

^{91.} Bagley v. Raymond Sch. Dep't, 728 A.2d 127 (Me. 1999). The legal battle in Maine, however, has been reignited following the U.S. Supreme Court's decision in Zelman v. Simmons Harris. John Gehring, Legal Battle Over School Vouchers Returns to Maine, EDUC. WK., Sept. 25, 2002, at 17 (Institute for Justice filed suit in Maine state court arguing that denying Maine parents right to select religious schools constitutes religious discrimination). See infra note 117.

^{92.} VT. STAT. ANN., tit. 16, §§ 822(a)(1), 1121. See also A Long Road to the Court, supra note 89.

^{93.} Campbell v. Manchester Bd. of Sch. Dirs., 641 A.2d 352 (Vt. 1994).

^{94.} Chittenden Town Sch. Dist. v. Vt. Dep't of Pub. Educ., 738 A.2d 539 (Vt. 1999), cert. denied sub nom., Andrews v. Vt. Dep't of Pub. Educ., 528 U.S. 1066 (1999).

^{95.} Chittenden Town Sch. Dist., 738 A.2d at 541-42.

the Vermont Constitution by reimbursing tuition for a sectarian school in the absence of adequate safeguards against the use of public funds for religious education.⁹⁶ Following the U.S. Supreme Court decision in *Zelman*, the Institute for Justice announced that it will challenge the provision of the Vermont Constitution, arguing that "state constitutions may not discriminate against religious options."⁹⁷

The Milwaukee voucher program, established in 1990,⁹⁸ issued vouchers worth up to \$5,553 to 10,739 students in grades K-12 attending private schools during the 2001-02 school year.⁹⁹ The Cleveland program, established in 1995, issued vouchers worth up to \$2,250, to 4,195 students in grades K-8 attending private schools during the 2001-02 school year.¹⁰⁰ Both programs permit attendance at sectarian schools, with both surviving constitutional challenges in their state supreme courts on this issue.¹⁰¹ The Cleveland program, however, was also challenged in the federal courts, leading to a landmark U.S. Supreme Court decision.

Following the reauthorization of the Cleveland program, the National Education Association, the American Federation of Teachers, People for the American Way, and other anti-voucher groups filed suit in Federal District Court, leading to the issuance of an injunction by U.S. District Judge Solomon Oliver, Jr., precluding 587 new voucher students from receiving vouchers pending further proceedings. The vast majority of the 56 private schools in the Cleveland program are religious schools. Judge Oliver found, in his preliminary injunction ruling, that the program "has the primary effect of advancing religion."¹⁰² The preliminary injunction was stayed "pending final disposition of the appeal by the United States

99. Tax Supported K-12, supra note 42.

^{96.} Id.

^{97.} Vanessa Blum, Both Sides Head for Next Battleground, LEGAL TIMES, July 1, 2002, at 8. See infra note 117.

^{98.} Jeff Archer, Obstacle Course, EDUC. WK., June 9, 1999, at 25.

^{100.} Tax Supported K-12, supra note 42. Another source reported that 4,456 Cleveland students were receiving vouchers during the 2001-02 school year. Jacques Steinberg, Cleveland Case Poses New Test for Vouchers, N.Y. TIMES, Feb. 10, 2002, at 30.

^{101.} See Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998); Simmons-Harris v. Goff, 711 N.E.2d 203, 215-216 (Ohio 1999) (The supreme court of Ohio decided in Simmons-Harris, however, that the bill creating the Cleveland voucher program violated the one-subject rule of the Ohio Constitution because it included the creation of a substantive program in a general appropriations bill). But see Jessica L. Sandham, Ohio Lawmakers Reinstate Voucher Program, EDUC. WK., July 14, 1999, at 17 (reporting that the Ohio Legislature and Governor subsequently reenacted the program).

^{102.} Simmons-Harris v. Zelman, 54 F. Supp. 2d 725 (N.D. Ohio 1999).

Court of Appeals for the Sixth Circuit" by a 5-4 vote of the U.S. Supreme Court on November 5, 1999.¹⁰³

On December 20, 1999, Judge Oliver issued a decision finding that taxpayer-financed vouchers used by children to attend parochial schools violate the Establishment Clause of the First Amendment.¹⁰⁴ The decision was appealed to the Sixth Circuit Court of Appeals, and the parties agreed to permit children to continue to attend parochial schools under the program until a decision by the Sixth Circuit.¹⁰⁵ Almost one year later, on December 11, 2000, a divided three-judge panel of the Sixth Circuit ruled that the Cleveland voucher program violated the Establishment Clause of the First Amendment.¹⁰⁶ The two-judge majority relied heavily upon the U.S. Supreme Court's decision in *Committee for Public Education v. Nyquist*¹⁰⁷ in reaching its conclusion that the Ohio Scholarship program is designed to attract religious institutions.¹⁰⁸ Voucher supporters vowed to continue the legal battle,¹⁰⁹ and on September 25, 2001, the U.S. Supreme Court granted cert.¹¹⁰ The case was argued before the Court on February 20, 2001.¹¹¹

On June 27, 2002, the Supreme Court issued its long-awaited decision. Chief Justice Rehnquist delivered the opinion of the court on behalf of a five-justice majority. Relying primarily upon three recent Establishment Clause precedents, *Mueller v. Allen*,¹¹² Witters v. Washington Department

103. Zelman v. Simmons-Harris, 528 U.S. 983 (1999). See also Mark Walsh, Court Blocks Injunction, Allows Voucher Program To Continue Temporarily, EDUC. WK. Nov. 17, 1999, at 23. 104. Simmons-Harris v. Zelman, 72 F. Supp. 2d 834 (N.D. Ohio 1999).

105. Jodi Wilgoren, School Vouchers for Cleveland are Declared Unconstitutional, N.Y. TIMES, Dec. 21, 1999, at A1; Jeff Archer, Cleveland's Voucher Supporters to Appeal Latest Legal Setback, EDUC. WK., Jan. 12, 2000, at 9.

106. Simmons-Harris v. Zelman, 234 F.3d 945, 948 (6th Cir. 2000).

107. 413 U.S. 756 (1973).

108. Simmons-Harris, 234 F.3d, at 958-62.

109. Judi Wilgoren, A Ruling Voids Use of Vouchers in Ohio Schools, N.Y. TIMES, Dec. 12, 2000, at A1.

110. 533 U.S. 976 (2001).

111. Linda Greenhouse, *Cleveland's School Vouchers Weighed by Supreme Court*, N.Y. TIMES, Feb. 21, 2002, at A1['] (reporting about the oral argument); Jacques Steinberg, *Cleveland Case Poses New Test for Vouchers*, N.Y. TIMES, Feb. 10, 2002, at 1 (discussing potential impact of the Court's decision and reporting that many Cleveland families receiving vouchers had children who had already been attending private schools).

112. 463 U.S. 388 (1983) (upholding Minnesota program authorizing tax deductions for educational expenses).

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of Services for Blind,¹¹³ and Zobrest v. Catalina Foothills School District,¹¹⁴ the majority opined as follows:

[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens, who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission . . . is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.¹¹⁵

In order to find the Cleveland program neutral toward religion and parry the argument of the dissenters that over 96% of all voucher recipients go to religious schools,¹¹⁶ the majority relied upon the continuum of educational choices available to the parents of the children attending the troubled Cleveland public schools:

Cleveland schoolchildren enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community [charter] school, or enroll in a magnet school.¹¹⁷

^{113. 474} U.S. 481 (1986) (unanimous holding rejecting challenge to vocational scholarship program that provided tuition aid for student studying at religious institution to become pastor).

^{114. 509} U.S. 1 (1993) (rejecting challenge to program permitting sign language interpreter to assist deaf child enrolled in religious school).

^{115.} Zelman, 536 U.S. at ____, 122 S. Ct. at 2467.

^{116.} Id. at ____, 122 S. Ct. at 2494 (Souter J. dissenting).

^{117.} Id. at ______, 122 S. Ct. at 2496. Interest in the program skyrocketed after the Supreme Court decision, with the Ohio Department of Education receiving almost 500 more applications in July of 2002 than in July of 2001. The number of slots in the program was increased to 5,523 for the 2002-03 school year. Caroline Hendrie, *Applications for Cleveland Vouchers Soar After High Court Ruling*, EDUC. WK., Sept. 4, 2002, at 34. In addition, the *Zelman* decision is spurring a new round of challenges to state constitutional provisions prohibiting use of government funding for parochial schools. Tony Mauro, *The 'Blaine' Game*, LEGAL TIMES, Aug. 5, 2002, at 1, *and* Mark Walsh, *Voucher Advocates Plan a Multistate Legal Battle*, EDUC. WK., Oct. 16, 2002, at 17.

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In 1999, Florida enacted the first state-wide, publicly funded school voucher program in the United States.¹¹⁸ (Puerto Rico had adopted a Commonwealth-wide voucher program earlier, and California had attempted to do so.¹¹⁹) Under the law, each Florida public school is assigned a letter grade (A-F) every year, based upon test scores, attendance, and graduation rates.¹²⁰ Students in schools receiving failing grades for two of every four years will be able to use state opportunity scholarships (vouchers) of approximately \$4,000 to attend a different, qualified public school (graded "C" or better) or to pay for tuition at a private school, including a sectarian school.¹²¹ In 1999, the Florida Department of Education estimated that approximately 156,000 students at up to 169 public schools could qualify for vouchers at the beginning of the 2000-01 school year.¹²² Two schools were affected during the 1999-2000 school year, with about 58 students receiving vouchers worth a maximum of \$3400 (excluding special needs students).¹²³ Remarkably, however, the

On November 2, 1993, California voters rejected Proposition 174, which would have established a comprehensive state-wide voucher program in California. Jack Cheevers, *Valley Voters Solidly Reject Voucher Iniative*, L.A. TIMES, Nov. 4, 1993, at B8. A more far-reaching proposal, Proposition 38, appeared on the November 7, 2000 California ballot. California Secretary of State, *California Official Voter Information Guide*, Aug. 14, 2000, at 32-37. It, too, was overwhelmingly rejected. Mark Walsh, *Voucher Initiatives Defeated in Calif., Mich.*, EDUC. WK., Nov. 15, 2000, at 14.

120. Florida Oks 1st Statewide Voucher Plan for Schools, supra note 118, at A10.

^{118.} Opportunity Scholarship Program, FLA. STAT. ANN. § 229.0537 (West 2002): see also Florida OKs 1st Statewide Voucher Plan for Schools, CHIC. TRIB., May 1, 1999, at A10 (The voucher program was a top priority of Governor Jeb Bush and passed both houses of the Florida Legislature by wide margins, 25-14 in the Senate and 70-48 in the House).

^{119.} Puerto Rico adopted a Commonwealth-wide voucher program in 1993. Pub. L. No. 71, the Special Scholarship Program and the Free Selection of Schools Act, 18 L.P.R.A. § 911 (1999). It provided for "special scholarships" [vouchers] for economically qualified public school students transferring to private schools. Clint Bolick, *Puerto Rico: Leading the Way in School Choice*, WALL ST. J., Jan. 14, 1994, at A11; Larry Rohter, *Puerto Rico Takes Lead With School Vouchers and Feels the Arrows*, N.Y. TIMES, Oct. 27, 1993, at B8. In late 1994, however, the supreme court of Puerto Rico held that the Act violated Article II, Section 5 of the Puerto Rico Constitution, which provides: "No public property or public funds shall be used for the support of schools or educational institutions other than those of the state." Asociación de Maestros de P.R. v. Torres, 137 D.P.R. 528 (P.R. 1994) *available at* www.westlaw.com (English version available by searching case names).

^{121.} Mike Clary, Florida to be First to Launch Statewide School Vouchers, L.A. TIMES, Apr. 29, 1999, at 1.

^{122.} Jessica L. Sandham, Florida OKs 1st Statewide Voucher Plan, EDUC. WK., May 5, 1999, at 1, 21. See also Center for Education Reform, supra note 42.

^{123.} Jessica L. Sandham, Schools Hit By Vouchers Fight Back, EDUC. WK. Sept. 15, 1999, at 1.

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Florida Commissioner of Education announced early in the summer of 2000 that the Florida accountability program had been so successful in raising test scores that vouchers would not be offered to any new students for the fall 2000 school term.¹²⁴ The program's success, however, did not continue unabated. In June of 2002, the Florida Commissioner announced that ten schools had received a second "F" during the 2001-02 school year, making approximately 8900 students eligible for vouchers.¹²⁵

There is, of course, a powerful anti-private-school choice movement.¹²⁶ With relatively few requirements placed upon private schools accepting vouchers, there is also concern on the part of some about a potential proliferation of private schools set up for the sole purpose of receiving voucher students:

In Cleveland, "fly-by-night private schools opened up just to take the voucher students," said Sandra Feldman, the president of the American Federation of Teachers and a forceful opponent of voucher programs. "What are they thinking? They're washing their hands of the majority of children by not putting money into what works."¹²⁷

The Florida program, on the other hand, is politically very attractive because it provides a publicly funded exit for children from public schools that are acknowledged by the state to be failing to educate their children. The program served as a model for President George W. Bush's

^{124.} Jessica L. Sandham, Vouchers Stall as Fla. Schools Up Their Scores, EDUC. WK., July 12, 2000, at 1.

^{125.} Press Release, Fla. Dep't of Educ, 2002 School Grades Released (June 12, 2002), available at http://www.firn.edu/doe/schoolgrades/pdf/pressrelease.pdf; John Gehring, Voucher Battles Head to State Capitals, EDUC. WK., July 10, 2002, at 1, 25.

^{126.} See R. Kenneth Godwin, Frank R. Kemerer, & Valerie J. Martinez, Comparing Public Choice and Private Voucher Programs in San Antonio, in LEARNING FROM SCHOOL CHOICE 305, n.40 (Paul E. Peterson & Bryan C. Hassel eds., 1998) and Levin, supra note 86, at 160 (presenting a brief summary of the opposition position).

^{127.} Sandham, *supra* note 123, at 21. See infra notes 136-138 and accompanying text (describing the Cleveland experience with the Hope Academies, which appear to have changed their sponsorship and structure primarily to enhance their level of public financing). See also Jeff Archer, Voucher Programs Pose Unique Set of Challenges, EDUC. WK., May 17, 2000, at 19 (some of the private schools participating in voucher programs have experienced difficulties, which has led to the question of whether governmental oversight should be increased); Evaluation of the Cleveland Scholarship Program, 1998-2000, Summary Report, Indiana Center for Evaluation, at http://www.indiana.edu/~iuice/ (evaluation of the academic performance of students participating in the Cleveland Scholarship Program is still inconclusive).

initial education legislation presented to Congress in January of 2001¹²⁸ and subsequently enacted as the No Child Left Behind Act.¹²⁹ It is also serving as a model for other states.¹³⁰ Attacking it may come with a political price, as one of its sponsors, Florida Republican House Representative Alex Diaz de la Portilla, noted: "People bringing legal challenges need to be careful because we're dealing with children and ' their futures It would be irresponsible of them to keep children from learning how to read and write because of their own special interests."¹³¹

Nevertheless, a coalition of teacher organizations and advocacy groups soon filed a lawsuit in Florida state court. The lawsuit led to a March 14, 2000, decision by a Florida circuit court judge that Article IX, Section 1 of the Florida Constitution prohibited the use of taxpayer funds for private school tuition.¹³² In a potentially significant decision, however, a Florida District Court of Appeal reversed the circuit court, ruling that the Florida Constitution "does not unalterably hitch the requirement to make adequate provision for education to a single, specified engine, that being the public school system."¹³³ The Florida litigation was expected to recommence following the U.S. Supreme Court

130. See Quality Counts 2002, Recent Trends in State Accountability Systems, EDUC. WK., Jan. 10, 2002 (since 1999, ten more states and D.C. have school accountability systems; and seven other states plan to implement school ratings by fall 2004); see also Ulrich Boser, Pressure Without Support, EDUC. WK., Jan. 11, 2001 (27 states rate schools primarily on test scores; some states judge schools by test scores over time; others examine achievement gaps between sub-groups within a school and penalize schools that register large disparities).

131. Sandham, supra note 124. See also Mark Walsh, Private School Choice Target in New Round of Court Challenges, EDUC. WK., Aug. 4, 1999, at 11.

132. Holmes v. Bush, 2000 WL 526364 (Fla. Cir. Ct. 2000). Holmes v. Bush, 2000 WL 527694 (Fla. Cir. Ct. 2000) (Order denying motion to vacate the automatic stay, but imposing conditions). See also Jodi Wilgoren, School Vouchers are Ruled Unconstitutional in Florida, N.Y. TIMES, Mar. 15, 2000, at A20; Jessica L. Sandham, Voucher Plan Struck Down in Fla. Court, EDUC. WK., Mar. 22, 2000, at 1.

133. Bush v. Holmes, 767 So. 2d 668, 675 (Fla. Dist. Ct. App. 2000) *Petition for review* denied 2001 (2001 Fla. LEXIS 952). Interestingly, the decision is consistent, as Professor Brighouse notes, with one of Milton Friedman's key insights—government's obligation to finance education does not require that government run the schools. BRIGHOUSE, *supra* note 28, at 26. It is also consistent with John Stuart Mill's philosophy. MILL, *supra* note 39 and accompanying text.

^{128.} See Anjetta McQueen, States, Schools Looking Ahead to How Overhaul Will Work, CQ WKLY., Dec. 15, 2001, at 2972 (describing the progress of HR 1, the No Child Left Behind Act, through Congress).

^{129.} Pub. L. No. 107-110 (2002). The No Child Left Behind Act is providing another opportunity for for-profit enterprises. Mark Walsh, *Struggling Edison 'Reversioning' Its School Expertise*, EDUC. WK., Nov. 13, 2002, at 8 (Edison offering new services in student assessment and "achievement management systems").

decision in Zelman.¹³⁴ In the meantime, the Florida program provides considerable leverage to parents seeking to use the *Troxel* decision to move their children to "better" public schools or to private schools accepting vouchers.¹³⁵

The increasing murkiness of the distinctions within the school control continuum was demonstrated by a development in Cleveland. The Hope Academies, two private schools with more than 400 students established in 1996 to serve students in Cleveland's voucher program, closed in June of 1999. A few months later, in September, two charter schools were to open on the same sites, sponsored by new non-profit organizations. The non-profit entities, however, were contracting with the former private school owner's for-profit education management firm to manage the schools, and it was anticipated that personnel from the defunct voucher schools would then work in the new charter schools.¹³⁶ "Some school choice experts say changes between voucher and charter status are inevitable as long as those different types of schools receive different levels of public funding."¹³⁷ The Cleveland conversions, likely the result of the higher level of funding provided to charter schools in Ohio,¹³⁸ presage potential difficulties in differentiating charter and voucher

135. See infra Section III.

137. Archer, *supra* note 136. During 2001-02, the Hope Academies received \$4900 per charter school student, more than twice the \$2,250 Ohio voucher. Reid, *supra* note 136.

138. Why the Hope Schools in Cleveland Had to Change, Ohio Roundtable & Ohio Freedom Forum, at http://www.ohioroundtable.org/presskit/newsrel/hopechange.htm (July 9, 1999). In Ohio, charter schools are known as "community schools." OHIO REV. CODE ANN. § 3314 (West Supp. 2002).

^{134.} Blum, *supra* note 97. On August 5, 2002, Judge Kevin P. Davey of the Florida Circuit Court issued a final summary judgment, finding the Florida Opportunity Scholarship provision violated Art. I, § 3 of the Florida Constitution, which prohibits use of public revenue, directly or indirectly, in aid of any sectarian institution. Bush v. Holmes, 2002 WL 1809079 (Fla. Cir. Ct. 2002). The State of Florida appealed, and the program has been permitted to continue until the case is resolved. Alan Richard, *Florida Sees Surge in Use of Vouchers*, EDUC. WK., Sept. 4, 2002, at 1.

^{136.} Jeff Archer, *Two Cleveland Voucher Schools Plan Rebirth With Charter Status*, EDUC. WK., July 14, 1999, at 20. *See* Zelman v. Simmons-Harris, 536 U.S. 639, _____, 122 S. Ct. 2460, 2477 (2002) (O'Connor J. concurring) (citing transfer of voucher students to new community schools as evidence that parents view these two options "as reasonable alternatives"). The Hope Academies are operated by White Hat Ventures LLC, Ohio's largest for-profit education management company, which spends about \$30 million in state funds annually. The owner of White Hat Ventures LLC contributed substantially to Republican candidates in the Republican-dominated Ohio legislature. Karla Scoon Reid, *Millionaire Industrialist Touts 'White Hat' Firm to Build Charter Model*, EDUC. WK., May 22, 2002, at 13.

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schools, and raise the question as to whether some voucher schools should be considered state actors.¹³⁹

C. Home Schooling

The other endpoint of the education continuum—home schooling may also be affected by the *Troxel* decision and by public-private voucher programs. It is estimated that home schooling may now represent up to 20% of privately schooled children.¹⁴⁰ All states permit home schooling, with great variance in the degree of regulation.¹⁴¹ In some states the extent of regulation does not differ markedly from the regulation of certain private schools. In California, for example, some parents in their filings with the state are reporting their home schooling as private schools with fewer than five children.¹⁴²

The potential interconnections are further demonstrated by some California charter schools, which have been enrolling home-schooled students through programs of distance learning, with their sponsoring districts perhaps benefitting financially from the home-school-oriented charter schools. A law, which took effect in January, 2002, is affecting a number of California's charter schools, as well as angering home schooling parents, by tightening regulations regarding distance-learning students.¹⁴³

^{139.} Voucher schools, primarily dependent upon public funding and the enrollment of former public school voucher students, might be vulnerable to being declared state actors, which could profoundly impact their autonomy. The issue should be of particular concern to sectarian voucher schools. Concommitantly, the Ohio voucher program places a number of restrictions upon religious schools, some of which may infringe upon church autonomy. *See* Zelman v. Simmons-Harris, 536 U.S. at ______, 122 S. Ct. at 2499-2501, (Souter J. dissenting). In addition, "more widespread use of vouchers will likely mean an increase in [governmental] scrutiny. Civil rights advocates will press for restrictions on the employment practices of service providers, targeting those who discriminate in favor of co-religionists and against gay and lesbians." Ira C. Lupu & Robert W. Tuttle, *In Vouchers They Trust*, LEGAL TIMES, July 8, 2002, at 34, 35. *Contra* Logiodice v. Trustees of Me. Cent. Inst., 296 F.3d 22 (1st Cir. 2002) (private school in Maine, with 80 percent of students sponsored by local school district and about 50 percent of its budget funded by local school district, not state actor subject to Fourteenth Amendment due process requirements).

^{140.} See supra note 15 (regarding the difficulties of determining the number of home-schooled children).

^{141.} See supra note 16 (regarding state regulation of home schooling) and Ralph D. Mawdsley, Home Schools and the Law, 137 ED. L. REP. 1 (1999) (reviewing state regulations).

^{142.} Lines, supra note 8.

^{143.} Jessica L. Sandham, *Calif. Rules Hitting Home for Charter Schools*, EDUC. WK, Sept. 8, 1999, at 16; *and* Caroline Hendrie, *Calif. Charter-Funding Fight Hits Home*, EDUC. WK., Jan. 15, 2003, at 1.

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In a jurisdiction with a voucher program including private and sectarian schools, parents who withdraw their children from public schools and opt to home-school their children and who meet the eligibility criteria for vouchers may seek to claim voucher funds. These parents could assert an entitlement to vouchers if a state which is providing vouchers for non-public education denies the voucher to parents who opt to home school their children, relying, in part, upon the *Troxel* decision.¹⁴⁴

D. New Directions?

The impact of current charter school and voucher choice programs remains fairly limited. Cumulatively, they educate a little over one percent of the public school population,¹⁴⁵ with home schooling accounting for approximately two percent additional.¹⁴⁶ The reasons for the limited scope of charter school and voucher programs are largely political, related in significant part to the dominance of suburban representatives in the state legislatures.¹⁴⁷ Suburban parents strongly support their public school systems, and they resist and oppose programs that would intrude upon the autonomy of their local school districts.¹⁴⁸ That viewpoint is

^{144.} See infra Section III. A particularly strong claim could be made by home-schooling parents in Kansas. See supra note 16 (noting the peculiarities of the applicable Kansas statutes); In Interest of Sawyer, 672 P.2d 1093 (Kan. 1983) (home instruction with an uncertified teacher does not satisfy compulsory school attendance law). Cf. Hooks v. Clark County Sch. Dist., 228 F. 3d 1036 (9th Cir. 2000), cert. denied 532 U.S. 971 (2001) (the Ninth Circuit, however, upheld the denial of Individuals with Disabilities Education Act (IDEA) funding to children educated at home). Cf. Samuel Ashby, Finding the Way Back Home: Funding for Home School Children Under the Individuals with Disabilities Education Act, 101 COLUM. L. REV. 1709 (2001) (at least one commentator has criticized the decision as frustrating the purpose of the IDEA and oversimplifying state categorization of types of schooling).

^{145.} See supra note 52 (for numbers of students attending charter schools) and note 83 and accompanying text (for numbers of students served by publicly supported voucher programs).

^{146.} See supra note 15 (estimating the number of home-schooled children).

^{147.} See William Schneider, The Suburban Century Begins, ATLANTIC MONTHLY, July 1992, at 33 (positing that the U.S. demographically has become a suburban nation and that national politics is now driven by the concerns of suburban voters) and Rhodes Cook, Suburbia: Land of Varied Faces And a Growing Political Force, CQ WKLX., May 24, 1997, at 1209 (analyzing increasing dominance of the suburbs as demographic and political entities).

^{148.} See, e.g., Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996) (finding *de facto* segregation within Hartford school district creating extreme racial isolation violates Conn. Constitution and ordering State Legislature to fashion a remedy, which likely would impact the 20 surrounding suburban school districts) and Sheff v. O'Neill, 733 A.2d 99 (Conn. Super. Ct. 1999) (trial judge, after reviewing state efforts to comply with the *Sheff* decision, concludes that plaintiffs failed to wait reasonable time and their return to court was premature). Six years later, plaintiffs returned to court again, arguing that the legislature has taken very limited action to implement the decision. See

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expressed by their representatives in the state legislatures.¹⁴⁹ It may be necessary to turn to the judiciary to force change,¹⁵⁰ and the U.S. Supreme Court may have opened the door, even before its decision in *Zelman*.

III. THE IMPACT OF *TROXEL* UPON THE RELATION-SHIP BETWEEN PARENTS AND PUBLIC EDUCATION

The *Troxel*¹⁵¹ decision may upset the existing balance of power between the state and parents in regard to state compulsory education policies by strengthening the constitutionally based authority of parents to resist some state and school district mandates. In particular, by breathing new life into *Pierce*,¹⁵² *Troxel* offers constitutional support to parents challenging the state's authority to assign students to poorly performing schools within the public education system and perhaps to parents claiming government support for home schooling and private school attendance.

Pierce set forth the constitutional principles under which the states compel school attendance and regulate public and private schools. Compulsory education laws, the first of which was adopted by Massachusetts in 1852,¹⁵³ shifted much control over a child's education from the presumably incompetent parents to the local school district acting under state authority.

School Racial Balance Stifled: Expert: Little Change Since Sheff Ruling, CONN. L. TRIB., May 6, 2002, at 6, and Associated Press, State Wants More Time to File Sheff v. O'Neill Briefs, July 12, 2002 (lawyers for both sides ask judge to extend deadline for final briefs to permit negotiation of possible settlement). A settlement, relying heavily upon building eight new magnet schools in Hartford, was announced in early 2003. Paul von Zielbauer, Hartford Integration Plan to Add 8 Magnet Schools, N.Y. TIMES, Jan. 23, 2003, at B5; Paul von Zielbauer, Both Hope and Doubt Greet School Desegregation Plan, N.Y. TIMES, Jan. 23, 2003, at 30; Jane Gordon, Sheff Is Just the First Step, N.Y. TIMES, Feb. 2, 2003, at 1CT.

^{149.} See James E. Ryan & Michael Hesse, The Political Economy of School Choice, 111 YALE L.J. 2043 (2002) (discerning analysis of the scope and limitations of school choice programs).

^{150.} As was the case with *de jure* segregation and *Brown v. Board of Education*, 347 U.S. 483 (1954) and its progeny, *infra* note 203, and Justice Thomas's concurring opinion in Zelman, *infra* note 201.

^{151.} Troxel v. Granville, 530 U.S. 57 (2000).

^{152.} Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

^{153.} AARON BENAVOT, THOMAS JAMES, & DAVID TYACK, LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785-1954 75 (1987).

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Over the long perspective of the last century and a half, both phases of compulsory school attendance may be seen as part of significant shifts in the functions of families and the status of children and youth . . . Advocates of compulsory schooling often argued that families—or at least families, like those of the poor and foreignborn—were failing to carry out their traditional functions of moral and vocational training. Immigrant children in crowded cities, reformers complained, were leading disorderly lives, schooled by the streets and their peers more than by Christian nurture in the home. Much of the drive for compulsory schooling reflected animus against parents considered incompetent to train their children. Often combining fears of social unrest with humanitarian zeal, reformers used the powers of the state to intervene in families and to create alternative institutions of socialization.¹⁵⁴

Shortly after the first world war, Oregon was the first state to seek to require, by referendum, that all children attend public schools.¹⁵⁵ The challenge to the referendum,¹⁵⁶ passed by the voters of Oregon on November 7,1922, led to the Supreme Court's decision in *Pierce*. In its opinion, the Court ruled that the Oregon law was an unconstitutional violation of the substantive due process rights of the parents:

[W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control The funda-

^{154.} David Tyack, Ways of Seeing: An Essay on the History of Compulsory Schooling, 46 HARV. EDUC. REV. 355, 363 (1976). See Michael W. Sedlak, Attitudes, Choices, and Behavior: School Delivery of Health and Social Services, in LEARNING FROM THE PAST 57 (Diane Ravitch & Maris A. Vinovskis eds., 1995) (In addition to education, the schools were used as vehicles to achieve other goals of reformers). Now it is these same groups of parents described by Professor Tyack who are often receiving the worst the public schools have to offer and are therefore, through their advocates, seeking a way out.

^{155.} The fascinating story of the adoption of the referendum in Oregon is described in LAW AND THE SHAPING OF PUBLIC EDUCATION, *supra* note 153, at 177-190.

^{156.} Referenda, not mediated by the give and take of the state legislative process, now play an increasing and controversial role in the attempt to direct educational policy. Drew Lindsay, *Ballot Busters*, EDUC. WK, Nov. 1, 2000, at 37 (reporting about the various education referenda on the ballots in a number of states for the November 2000 election). The lack of legislative process can result in consequences not contemplated by the sponsors of the referendum. *See, e.g.*, Alan Richard, *Florida Debates How to Shrink Class Sizes*, EDUC. WK., Feb. 5. 2003, at 15 (Governor Bush proposes using vouchers to satisfy requirements of class size constitutional amendment passed by voters in the November, 2002 election, a plan criticized by sponsors of the amendment).

mental 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. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.¹⁵⁷

The Court did, however, preserve the authority of the state to mandate compulsory education and to regulate the private schools, to which parents now had constitutional blessing to send their children:

No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers be of good moral character and patriotic disposition, that certain certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.¹⁵⁸

Pierce lay virtually dormant for many decades, however, with the shift toward reliance upon the First Amendment Free Exercise Clause as a limitation upon state mandates curtailing parental rights regarding the education of their children.¹⁵⁹ *Pierce*'s impact upon education battles was

Note: the First Amendment Free Exercise Clause, not considered applicable to the states at the time of *Pierce*, was first held to be applicable to the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (state statute which required obtaining a license to solicit for religious cause, from official who had to determine whether the cause was religious, violated free exercise of religion as incorporated in Due Process Clause of Fourteenth Amendment).

^{157.} Pierce, 268 U.S. at 534-35.

^{158.} Id. at 534.

^{159.} Wisconsin v. Yoder, 406 U.S. 205 (1972) (State of Wisconsin compulsory education law violates the Free Exercise Clause when applied to parents of Old Order Amish children over the age of 14). In his opinion for the Court, Chief Justice Burger circumscribed *Pierce*: "However read, the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the *religious* upbringing of their children." Id. at 233 (emphasis added). This religious limitation, however, ignores both the language of *Pierce* and the fact that one of the plaintiffs was a secular military academy. Compare the plurality opinion in *Troxel*, which, relying upon a broader reading of *Yoder* (and by implication *Pierce*), omits the religious element: "The history and culture of Western civilization reflect a strong tradition of parental concern for nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." Troxel v. Granville, 530 U.S. 57, 66 (2002) quoting Quillioin v. Walcott, 434 U.S. 246, 255 (1978).

seen as limited. One commentator during this period described *Pierce* as follows:

Pierce is problematic if approached entirely in terms of individual entitlements . . . Compulsory attendance laws interfere more significantly with parental autonomy than the law in *Pierce*, the decision that children must attend *some* school for eight or more years of their lives appears more consequential than the secondary decision that they must attend *public* school Thus *Pierce* becomes intelligible only against the background of a structure limiting the power of government to indoctrinate the young. Although the Justices probably did not intend this construction, *Pierce* may be understood as telling governments that they are free to establish public schools and to make education compulsory for certain age groups, but they are not free to eliminate competing private sector institutions that promote heterogeneity in education.¹⁶⁰

Yet the six prevailing justices in *Troxel*, as well as at least one of the dissenting justices, rely heavily upon *Pierce* to underscore parents rights to control the education of their children. They do this by analyzing *Pierce* as creating an individual entitlement for parents to direct their children's education. They appear to emphasize a point unnecessary to the resolution of the child-visitation dispute before the Court. For example, Justice O'Connor's plurality opinion, joined in by the Chief Justice and Justices Ginsburg and Breyer, reads in part as follows:

The Fourteenth Amendment . . . includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago . . . we held that the "liberty" protected by the Due Process Clause includes the right of parents to establish a home and bring up their children and to control the education of their children. Two years later, in *Pierce v. Society of Sisters*, we again held that the

^{160.} Mark G. Yudof, When Governments Speak: Toward a Theory of Government Expression and the First Amendment, 57 Tex. L. Rev. 863, 888-890 (1979) (emphasis in original).

liberty of parents and guardians includes the right to direct the upbringing and education of children under their control. We explained in *Pierce* that the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.¹⁶¹

The opinion later speaks of "a presumption that fit parents act in the best interests of their children."¹⁶² It goes on to state: "The decisional framework employed by the Superior Court directly contravened the *traditional presumption* that a fit parent will act in the best interest of his or her child."¹⁶³

Justice Souter in his concurring opinion notes: "[T]he right of parents 'to bring up children' and to 'control the education of their own' is protected by the Constitution."¹⁶⁴ Later in his opinion, speaking of parental rights to control a child's associates,¹⁶⁵ he writes:

The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character. Whether for good or ill, adults not only influence but may indoctrinate children, and a choice about a child's social companions is *not essentially different from the designation of the adults who will influence the child in school.*¹⁶⁶

165. In the education setting the question of peer influences upon children and the wishes of the children themselves have not often been considered by the Supreme Court. See Wisconsin v. Yoder, 406 U.S. 205, 242 (1972) (Douglas, J. dissenting in part) ("Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views."). See also Emily Buss, The Adolescent's Stake in the Allocation of Educational Control Between Parent and State, 67 U. CHI. L. REV. 1233 (2000) (On the other hand, among the issues that also largely have been overlooked is the state's interest in encouraging interaction among ideologically diverse older adolescents and the benefits of such interaction for older adolescents themselves.) and Note, Children as Believers: Minors' Free Exercise Rights and the Psychology of Religious Development, 115 HARV. L. REV. 2205 (2002) (examining the issue of children's independent exercise of their free exercise rights).

166. Troxel, 530 U.S. at 78 (Souter, J. concurring) (emphasis added). The school setting often provides most of the child's social companions. Within the public school system it has almost always been the school district that, without parental consent, has assigned "the adults who will influence the child in school."

^{161.} Troxel, 530 U.S. at 65 (internal citations omitted).

^{162.} Id. at 68.

^{163.} Id. at 69 (emphasis added).

^{164.} Id. at 77, quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (Souter, J. concurring).

Justice Thomas takes the most far-reaching position—that strict scrutiny, the most stringent level of review, should be applied:

Our decision in *Pierce v. Society of Sisters* holds that parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them. The opinions of the plurality, Justice Kennedy, and Justice Souter recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights.¹⁶⁷

In his dissenting opinion, Justice Kennedy also endorses the concept of parental rights:

[T]here is a beginning point that commands general, perhaps unanimous, agreement in our separate opinions: . . . the custodial parent has a constitutional right to determine, *without undue interference by the state*, how best to raise, nurture, and educate the child. The parental right stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment. *Pierce* and *Meyer*,¹⁶⁸ had they been decided in recent times, may well have been grounded upon First Amendment principles protecting freedom of speech, belief, and religion. Their formulation and subsequent interpretation have been quite different, of course; and they have long been interpreted to have found in Fourteenth Amendment concepts of liberty an independent right of the parent in the custody, care and nurture of the child, free from state intervention.¹⁶⁹

At least seven justices thus appear to have given new life to the *Pierce* concept of substantive due process creating a fundamental liberty interest of parents to control the education of their children. The standard of review of state action impairing this parental interest may range from the plurality opinion's presumption in favor of a parental decision, to Justice Thomas's desire to apply strict scrutiny to any governmental infringement

^{167.} Id. at 80 (Thomas, J. concurring).

^{168.} Meyer v. Nebraska, 262 U.S. 390 (1923) (finding unconstitutional on substantive due process grounds a Nebraska criminal statute that forbid public or private school teachers to teach in any language except English and to teach foreign languages below high school level).

^{169.} Troxel, 530 U.S. at 95 (Kennedy, J. dissenting) (internal citations omitted) (emphasis added).

of the fundamental rights of the parents to decide who shall educate their children. Significantly, unlike *Yoder*, the *Troxel* right does not rest upon the presence of a religious element in the parental decision making.¹⁷⁰

Within the public schools, the accommodations between governmental mandates and parental autonomy and authority in matters of educational decisions, until now, have been left primarily to the states to resolve through state legislative action, state coordinating bodies, and local boards of education. In today's world, acknowledging an individual entitlement—a constitutional right of parental control as a fundamental liberty interest—could shift much decision making from the educational establishment to the parents and, concomitantly, to the Federal courts, leaving public educational agencies with less discretion to implement educational policy.

The question then arises as to how this new fundamental liberty interest can be invoked in practice. More than three decades ago, in *Stanley v. Illinois*,¹⁷¹ the Supreme Court held that parental custodial rights are entitled to procedural due process protection as a liberty interest protected by the Fourteenth Amendment. As the Court stated: "[T]he interest of a parent in the companionship, care, custody, and *management* of his or her children 'comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."¹⁷² Likewise, as this article posits, *Troxel* suggests a parallel substantive due process liberty interest in directing a child's education. Consequently, parents whose children—against the parents' wishes—are assigned to poorly performing or "failing" public schools for the convenience of the local school district should be entitled to challenge the school district's decision in a due process hearing.¹⁷³ Similarly, the Court in *Stanley* stated:

171. 405 U.S. 645 (1972) (unmarried father entitled to a hearing before changes in custody rights are made in a state proceeding).

172. Id. at 651 (internal citations omitted) (emphasis added).

173. This concept parallels the statutorily created rights to a hearing for children covered by the IDEA. *See* Ashby, *supra* note 144 *and infra* note 188 and accompanying text (discussing the IDEA). Statutory rights in the school choice context may also be in the offing. The consequences and impact of the No Child Left Behind Act, Pub. L. No. 107-110 (2002), however, are still unclear.

^{170.} For a related and controversial *pre-Troxel* decision, which appears consistent with *Troxel, see*, Peterson v. Minidoka County Sch. Dist. No. 331, 118 F.3d 1351 (9th Cir. 1997) (finding unconstitutional under the Free Exercise Clause the demotion of a public school principal who had decided to home school his children). *Cf.* Mozert v. Hawkins County, 827 F.2d 1058 (6th Cir. 1987, *cert. denied*, 484 U.S. 1066 (1988) (requirement that public school students study basic reader series chosen by school authorities found not to create unconstitutional burden under free exercise clause).

Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praisewor-thy government officials, no less, and perhaps more, than mediocre ones . . . But when, as here, the procedure forecloses the determinative issues of *competence and care*, when it explicitly *disdains present realities in deference to past formalities*, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.¹⁷⁴

Prior to *Troxel*, at least one commentator suggested that "[i]nvoluntary placement of students by the state in a program not designed to provide the skills that the state has articulated as the purpose of compulsory education could be viewed as a deprivation of liberty without due process of law"¹⁷⁵ When a local school district involuntarily places a student in a school that the state has declared is performing poorly, or, indeed, is failing, it is clearly disdainful of present realities in deference to past formalities (i.e. assumption) that all public schools provide an acceptable education.¹⁷⁶ The parent's liberty interest in seeking to have one's children escape from such a school is persuasive.¹⁷⁷ The applicable standard

174. Stanley v. Illinois, 405 U.S. 645, 656-57 (1972) (internal footnotes omitted) (emphasis added).

175. Paul Weckstein, School Reform and Enforceable Rights to Quality Education, in LAW AND SCHOOL REFORM: SIX STRATEGIES OF PROMOTING EDUCATIONAL EQUITY 345 (Jay R. Heubert ed., 1999).

176. This is evidently the assumption behind Oregon's statute in Pierce.

177. School district officials have a vested interest in maintaining enrollments, which directly affect state aid, local budgetary support, and, perhaps less directly, their own jobs and salaries. Their decisions that seek to keep children within a district, even in a poorly performing school, are likely affected by self interest challengeable under *Tumey v. Ohio*, 273 U.S. 510 (1927).

See, e.g., Erik W. Robelen, Dept. Seeks to Clarify ESEA School Choice Mandates, EDUC. Wk., July 10, 2002, at 40; Diana Jean Schemo, New Federal Rule Tightens Demands on Failing Schools, N.Y. TIMES, Nov. 27, 2002, at A1; Diana Jean Schemo, Rule on Failing Schools Draws Criticism, N.Y. TIMES, Nov. 28, 2002, at A25 (newly issued U.S. Dep't of Educ. regulations requiring failing public schools to offer transfers to students regardless of space availability in other schools met with dismay by state and local education officials); Mark Walsh & Joetta L. Sack, Suits Contend Officials Fail to Obey ESEA, EDUC. WK., Feb. 5, 2003, at 1 (parents of children assigned to failing schools in New York City and Albany, New York, suing school districts in New York State courts, claiming they had denied students opportunity to transfer or receive supplemental services, but whether the No Child Left Behind Act authorizes a private right of action is unclear) and Brandon Bain, 'No Child Left Behind' Failure Draws Lawsuit, LEGISLATIVE GAZETTE, Feb. 18, 2003, at 6 (also reporting that Brighter Choice, a charter organization in Albany, N.Y., has been airing commercials, supported by a \$4 million Federal grant, aimed at parents in the area's three "failing schools").

of review—ranging from the plurality's presumption in favor of the parent to the requirements of strict scrutiny urged by Justice Thomas would require the local school district to justify its action and would subject its justification to judicial review.¹⁷⁸

The parental liberty interest is not answered satisfactorily by a state response that *Pierce* entitles parents to remove their children from the public schools and enroll them in a private school. In 1999, 75.9% of students in grades 1-12 attended an assigned public school, while only 14.5% attended a public school of their choice.¹⁷⁹ The remainder attended private schools or were home schooled.¹⁸⁰ Setting aside the economic costs entailed in private school education and the potential equal protection issues that may ensue,¹⁸¹ every state, by constitution, statute, or by both,¹⁸² mandates the availability of free, compulsory public elementary and secondary education for all children within its boundaries.

The current revival of parental rights is occurring in an educational era vastly different from the *Pierce*-era of the mid-1920's, and therefore may have very different consequences from those that resulted from *Pierce*—the protection of the right to satisfy compulsory education laws by attending private schools. As already described, the bright-line distinc-

One scholar has found that personal and political self interest often severely limit educational reform. HESS, *supra* note 22.

^{178.} In other contexts, not based upon constitutional substantive due process rights, the Supreme Court has described the minimal requirements of due process. *See, e.g.*, Tumey v. Ohio, 273 U.S. 510, 522 (1927) (reviewing historical development, from the common law, of the principle "[t]hat officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided."); Goldberg v. Kelly, 397 U.S. 254 (1970) (hearing that is required prior to termination of welfare benefits must provide timely and adequate notice detailing reasons for proposed action and an effective opportunity to defend by confronting adverse witnesses and presenting arguments and evidence orally); Mathews v. Eldridge, 424 U.S. 319 (1976) (finding that predetermination evidentiary hearing not required in disability benefits proceedings and opining that due process is flexible and requires analysis of governmental and private interests involved, as well as risk of erroneous deprivation of private interest and probable value of alternate procedural safeguards).

^{179.} U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2002 177 (2002). Tellingly, parental satisfaction was significantly greater, most emphatically among black parents, when their children were attending schools of choice. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2001 165 (2001).

^{180.} DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2002 177 (2002).

^{181.} Cf. Yick Wo v. Hopkins, 118 U.S. 356 (1886) (finding state may not selectively apply seemingly impartial law without violating Equal Protection Clause) and Stanley v. Illinois, 405 U.S. 645, 658 n.10 (1972).

^{182.} See DIGEST OF EDUC. STAT., supra note 4.

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tion between public and private schools is evolving into a continuum of schooling ranging from the traditional public school to home schooling.¹⁸³ Concomitantly, the importance of education and the scope of public and private education have grown enormously. Total elementary and secondary school enrollment at the time of *Pierce* was approximately one half what it is today.¹⁸⁴ Significantly, in 1919-20, fewer than a third of the population 14-17 years of age was enrolled in high school. By 1929-30, which marked the onset of the great depression, the percentage enrolled had grown to just over one half.¹⁸⁵ In 2000, 94.1% of the 14-17 year old population was enrolled in high school¹⁸⁶ and 95.7% was enrolled in school.¹⁸⁷ Furthermore, special education did not exist in the 1920s, and therefore little or no education was provided to students with serious disabilities.¹⁸⁸ In 1920, only 16.4% of the population 25 years of age and over had completed high school, and the percentage had risen only to 19.1 by 1930. In 2000, however, 88.1% of 25-29 year olds had completed high school.¹⁸⁹ In 1920, only 3.3% of the population 25 and over had completed four or more years of college, rising only to 3.9% by 1930.¹⁹⁰ By 2000, however, 29.1% of 25-29 year olds had completed a bachelor's degree or higher.¹⁹¹ Most significantly, the ability of people to achieve successful careers 75 years ago was much less dependent upon successful completion of high school and entry into college.¹⁹² Consequently, the effects of decisions made by public educational authorities were considerably less significant for most people.

^{183.} See supra Sections I and II.

^{184.} During 1919-20, total elementary and secondary enrollment was 23,278,000. It grew to 28,329,000 by 1929-30, the onset of the great depression, DIGEST OF EDUC. STAT., *supra* note 4, at 12.

^{185.} DIGEST OF EDUC. STAT., supra note 4, at 69.

^{186.} DIGEST OF EDUC. STAT., supra note 4, at 69.

^{187.} DIGEST OF EDUC. STAT., supra note 4, at 15.

^{188.} The Individuals with Disabilities Education Act (IDEA) was enacted in 1975. The rights it created have been explicated and enforced by several Supreme Court decisions. States now have the obligation to provide a "free appropriate public education" for students with special needs. *See* Ashby, *supra* note 144. There are interesting parallels between IDEA and its statutory parental rights procedures with those emanating from *Troxel. See supra* note 173. *See, e.g.*, Caitlin v. Sobol, 93 F.3d 1112 (2d Cir. 1996) (parents asserting both statutory and constitutional rights in dispute about school district payment for special education services).

^{189.} DIGEST OF EDUC. STAT., supra note 4, at 17.

^{190.} DIGEST OF EDUC. STAT., supra note 4, at 17.

^{191.} DIGEST OF EDUC. STAT., supra note 4, at 17.

^{192.} In addition, at least one well-published observer argues that the quality of public education provided during the Pierce era was considerably less rigorous than today's much criticized product. ROTHSTEIN, *supra* note 36, at 15.

Therefore, the concept of parental rights to educational control described in *Pierce* was largely confined to the choice between public and private schools, a choice with relatively limited impact.

Scenarios in which parents would want to assert such a constitutional right are mushrooming as state educational policies evolve. Twenty-nine states and the District of Columbia have adopted accountability plans that provide in different ways for publicly grading individual public schools or school districts, with seven additional states planning to implement ratings by the Fall of 2004.¹⁹³ The No Child Left Behind Act of 2001 requires schools to meet "adequate yearly progress" targets.¹⁹⁴ Under current policies some schools are being graded by a state as "failing."195 New York State, for example, currently classifies schools with very poor student results on standardized tests as SURR schools, "Schools Under Registration Review." The New York City School District has 58 of the 83 SURR schools under its jurisdiction, and these schools have had a substantial number of uncertified teachers.¹⁹⁶ Yet thousands of New York students face mandatory de jure or de facto assignment to these schools.¹⁹⁷ Parents, asserting a right to control the education of their children, could for very sound reasons refuse to allow their children to attend a poorly performing school.¹⁹⁸ Today, the consequences of decisions by public education authorities that affect children are far more consequential, and

^{193.} Quality Counts 2002: Building Blocks for Success, EDUC. WK., Jan. 10, 2002, at 69, 76.

There is opposition to grading schools. See Rick Green, List to Identify Lagging Schools State Hopes to Inspire Reform, HARTFORD COURANT, Aug. 1, 1999, at A1 (a Connecticut plan to designate elementary and middle schools "in need of improvement" based upon student performance on Connecticut Mastery Tests was opposed by some because, they asserted, it would stigmatize poor children who have started further behind.) See also Quality Counts 2002, at 76. (Connecticut is now, nevertheless, rating its schools).

^{194.} Pub. L. No. 107-110 (2002).

^{195.} Quality Counts 2002, supra note 193.

^{196.} Press Release, New York City Educ. Dep't, 18 New York City Public Schools Removed From State SURR List, 6 Are Placed On (Feb. 3, 2003), *available at* http://www.nycnet.edu/ press/02-03/n54_03.htm (last visited Feb. 6, 2003) and New YORK STATE EDUC. DEP'T, SCHOOLS UNDER REGISTRATION REVIEW (SURR) LIST (Jan. 13, 2003), *available at* http://www.emsc.nysed.gov/nyc/SURR/SURRJan2003.html (last visited Feb. 6, 2003). See also Abby Goodnough, State to Sue Over Uncertified Teachers, N.Y. TIMES, Aug. 1, 2000, at B6 (N.Y.S. to sue to force hiring of certified teachers for N.Y.C. SURR schools).

^{197.} Chicago is another large urban school district with a significant percentage of unlicensed teachers. Mark Stricherz, *Chicago Moves to Curb Unlicensed Teachers*, EDUC. WK., Oct. 10, 2001, at 3.

^{198.} See supra notes 130-131 and accompanying text (describing state accountability systems and reporting a forceful parental argument).

parents are more aggressively seeking to alter or improve the educational opportunities available to their children. Mandatory assignment of a student to a poorly performing or "failing" school may well have consequences for the rest of the child's life, depriving him or her of the possibility of entry into higher education and many jobs and professions. The U.S. Department of Education reports as follows:

Persons with lower levels of educational attainment were more likely to be unemployed than those with higher levels of educational attainment. The 2000 unemployment rate for adults (25 years old and over) who had not completed high school was 6.4 percent compared with 3.5 percent for those with 4 years of high school and 1.7 percent for those with a bachelor's degree or higher.¹⁹⁹

The importance of college is accelerating. A *Business Week* article reported as follows: "High school grads' median weekly earnings are 43% less than those of college grads, far worse than the 28% gap in 1979. And education is likely to become even more essential to prosperity in the future."²⁰⁰ If the school district sought to enforce attendance at a school declared by the state to be poorly performing or "failing," how could the district overcome even a presumption such as that applied by the plurality opinion in *Troxel* in favor of the parents refusal and their demand for a better alternative?²⁰¹ The school district cannot respond to a due process challenge that placement in a school the state rates as poorly performing or failing overcomes the parental right and satisfies its obligations.²⁰²

201. Justice Thomas begins his impassioned concurring opinion in Zelman v. Simmons-Harris, 536 U.S. ____, 122 S. Ct. 2460, 2480 (2002) by emphasizing this point:

Frederick Douglass once said that "[e]ducation . . . means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free." Today many of our inner-city public schools deny emancipation to urban minority students. Despite this Court's observation nearly 50 years ago in *Brown v. Board of Education*, that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education," urban children have been forced into a system that continually fails them.

202. As already noted, state legislatures and educational agencies are setting specific educational requirements that schools must meet. In addition, several state courts have sought to define more specifically the requirements of a minimum satisfactory education. *See, e.g.,* Campaign for Fiscal Equity, Inc. v. New York, 655 N.E.2d 661, 665-67 (N.Y. 1995) (finding basic

^{199.} DIGEST OF EDUC. STAT., supra note 4, at 443.

^{200.} Peter Coy, *The Creative Economy*, BUS. WK., Aug. 28, 2000, at 79. *See also*, DIGEST OF EDUC. STAT., *supra* note 4, at 446 (figure 26, illustrating sharp rise in annual income by increasing level of education attained).

Coupling the Supreme Court's decision in *Stanley* with the newly revived substantive right regarding parental control over their child's education, as articulated by *Troxel*, could provide parents with the opportunity to force changes in traditional school district assignment policies. If a substantial number of parents, whose children are assigned to state-designated, poorly performing or "failing schools" successfully challenged the assignments, the consequences could lead to the closure of inadequate schools and other salutary changes. Parental demands likely will spur the creation of more charter school and voucher options in response. As remedies, courts could order school districts to create and make available to parents school choice options analogous to the remedies used by federal courts in school desegregation cases.²⁰³ Unfortunately, forced deference to parental wishes could also weaken state education laws and practices that seek to protect children from idio-syncratic decisions by their parents.²⁰⁴

Furthermore, denial of the option for home schooling can seriously thwart parents' ability to control the upbringing of their children. In the context of home schooling, the *Troxel* liberty interest, as well as equal protection principles, could assist parents in overcoming state limitations upon home schooling, particularly in states such as California and New York with more comprehensive regulations.²⁰⁵ If a school district, for example, assigns a student to a school with a plethora of uncertified teachers, can it insist, consistent with equal protection principles, that the home-school instructor be a certified teacher? What if the assigned school is rated as poorly performing or failing? Even under limited rational basis review, it may be possible for the parents to argue successfully that there is no rational basis for such a restriction upon home

education should consist of basic literacy, calculating and verbal skills necessary to function productively as civic participants capable of voting and serving on a jury).

^{203.} See, e.g., Green v. County Sch. Bd. of New Kent County, Va., 391 U.S. 430 (1968); Milliken v. Bradley, 418 U.S. 717 (1974). This point, in an analogous context, already has been recognized by home schooling parents

^{204.} Cf. Mozert v. Hawkins County, 827 F.2d 1058 (6th Cir. 1987) cert. denied, 484 U.S. 1066 (1988) and Altman v. Bedford Central Sch. Dist., 245 F.3d 49 (2d Cir. 2001) (parents claiming that certain school educational activities involving Eastern religions and Earth Day violated First Amendment religion clauses).

^{205.} See Mawdsley, supra note 141, and supra note 143 and accompanying text (describing consequences of the California regulations).

schooling.²⁰⁶ Although the U.S. Supreme Court ruled that education was not a fundamental right in San Antonio Independent School District v. Rodriguez,²⁰⁷ one commentator has argued that "the court [sic] in . . . Rodriguez²⁰⁸ left open the possibility of showing that provision to some students, and denial to others, of the skills and knowledge needed for exercising other constitutional rights of citizenship, such as voting, regardless of intent, could burden fundamental rights and trigger heightened equal protection scrutiny."209 The parents could certainly argue that Plyler v. Doe,²¹⁰ which, a decade after Rodriguez, embraced the importance of education, applied an intermediate standard of equal protection review in finding unconstitutional Texas' attempt to exclude or charge tuition to children of illegal immigrants seeking to attend public schools.²¹¹ If an intermediate standard of review is applied, the state would find it much more difficult to defend its policies limiting home schooling. The success of many home schooled students would support the arguments of the parents.²¹²

IV. CONCLUSION

The Supreme Court in Zelman v. Simmons-Harris lifted the bar to state approved school voucher initiatives, but Zelman does not compel voucher programs or any other educational initiatives. Seven of the Supreme Court Justices in *Troxel*, however, appear to be opening the door to some mandatory action. At a time when education is seen as

^{206.} Cf., Yick Wo v. Hopkins, 118 U.S. 356 (1886) (finding state may not selectively apply and administer seemingly impartial law without violating Equal Protection Clause) and Stanley v. Illinois, 405 U.S. 645, 658 n.10 (1972). This point, in an analogous context, already has been recognized by home schooling parents in California. Mary Ann Zehr, *No End Seen to Flap Over Calif. Home School Policy*, EDUC. WK., Oct. 30, 2002, at 23 (home schooling parents arguing that California law does not require teachers at private schools to have teaching credentials).

^{207. 411} U.S. 1 (1973).

^{208.} Id. at 37.

^{209.} Weckstein, *supra* note 175, at 345. *See, e.g.*, Campaign for Fiscal Equity, Inc. v. New York, 655 N.E.2d 661, 665-67 (1995) (attempt by the New York State Court of Appeals to define the "sound basic education" required by the New York State Constitution in part by the skills necessary to vote and to serve on a jury).

^{210. 457} U.S. 202 (1982).

^{211.} Id.

^{212.} See Lynn Schnaiberg, Study Finds Home Schoolers are Top Achievers on Tests, EDUC. WK., Mar. 31, 1999, at 5 (large study supports the success of home-schooled students on standardized tests).

essential for success, and when it is no longer possible to make a facile distinction between public and private schools as charter school and voucher programs continue to balloon, parents may be able to assert their educational choices for their children. Given the importance and emphasis placed upon education today and as the linchpin for the nation's future, it is unlikely that the Supreme Court would disclaim education as a prime function of state and local government or otherwise devalue its significance. Consequently, the substantive due process liberty interests recognized in *Troxel*, and attendant procedural due process rights, could provide much greater leverage to parents seeking to better the education of their children. And, denial of the option for home schooling can seriously thwart parents' ability to control the upbringing of their children.

If the *Troxel* decision gives parents a constitutional right to challenge the decisions of state and local educational officials in matters affecting their children—beyond the right simply to choose between public and private schools to satisfy the compulsory education requirement—what does that right entail? In particular, do parents of children attending poorly performing public schools now have any constitutionally based right to choose the public schools that their children are to attend or to teach their children at home? For the reasons analyzed in Section III, a strong argument can be made to support parents who opt to home school their children. Although the *Troxel* liberty interest would not support a parent's choice of a particular public school, it should support a demand for assignment to a public school rated as satisfactory or for choice of one of the evolving governance options discussed in Section III—charter schools or vouchers.



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