

1-1-2007

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IMPROVING PUBLIC EDUCATION: JUDICIAL INVOLVEMENT V. THE FREE MARKET
by
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Submitted in partial fulfillment of the requirements of the
King Scholar Program
Michigan State University College of Law
under the direction of
Professor G. Staszewski
Spring, 2007

INTRODUCTION

When Chief Justice Warren penned the words “[t]oday, education is perhaps the most important function of the state and local governments...,” he likely did not realize the massive resources that would be required to provide an entire nation of children with an education in the twenty-first century.¹ In order to provide 47 million students with elementary and secondary educations, the United States has created the one of the world’s largest and most expensive service delivery systems.² In 2002, combining federal, state and local tax dollars, the government spent over \$430 billion dollars on education, which is over 100 times more than it cost to run the entire U.S. Postal Service, the second largest domestic service the government provides.³ Despite these colossal resources, the United States’ system of public schools needs reform, because, while this system is “working very well for some students, [it is] dismally failing others.... Students in well-off suburban jurisdictions... score near the top in international math and science exams, while students in low-income, urban districts... test at the level of students in developing countries such as Iran.”⁴

Over the last three decades, proponents of education reform have relied on judicial involvement to increase the quality of education available to all students of public schools, especially those who reside in areas where low property values cripple the schools’ ability to raise funds from the traditional source of education dollars – local property taxes. These reform efforts, often broken down into three distinct waves, have focused on: (1) challenging the federal equal protection clause, based on disparities in funding between school districts; (2) challenges

¹ 347 U.S. 483, 493 (1954).

² PAUL E. PETERSON, *Introduction to CHOICE AND COMPETITION IN AMERICAN EDUCATION* 3 (Peterson ed. 2006).

³ *Id.* at 4-5.

⁴ RICHARD D. KAHLLENBERG, *Public School Choice: Student Achievement, Integration, Democracy, and Public Support* in *EQUITABLE PUBLIC SCHOOL CHOICE IN PUBLIC SCHOOL CHOICE V. PRIVATE SCHOOL VOUCHERS* 137, 155 (Kahlenberg ed. 2003).

to multiple state equal protection and education clauses, also based on funding inequities between districts, and finally, (3) challenges to state education clauses alleging failure to provide students with an adequate education.⁵ While judicial involvement has increased the quality of education in some public schools, this paper claims that controlled school choice, based on the free market principles of choice and competition, is the most promising vehicle for improving the quality of public education.

This paper will first discuss the history of public school finance litigation and the successes and failures wrought by each wave. Also, this paper will investigate the implementation of market-based theories for increasing the quality in education, and the reasons why controlled school choice has the most potential to bring future improvements in public education.

I. WAVE ONE: THE UNITED STATES CONSTITUTION DOES NOT REQUIRE EQUITY IN EDUCATION SPENDING

The equal protection challenges that populate the first wave of education finance litigation focus on attempts to validate the idea that per pupil spending should be equal in all school districts, regardless of the value of the taxable property that makes up the district.⁶

This first wave essentially began and ended with a challenge to the Equal Protection Clause of Fourteenth Amendment to the United States Constitution in *San Antonio Independent School District v. Rodriguez*.⁷

In *Rodriguez*, the United States Supreme Court entertained a challenge to the Texas system of funding public education, brought by the parents of Mexican-American children who attended the public elementary and secondary schools of Edgewood Independent School

⁵ William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 598.

⁶ *Id.* at 600-01.

⁷ 411 U.S. 1 (1973).

District.⁸ In 1970-71, every public school district in Texas imposed a local property tax to raise about 41% of the funds necessary to finance its school.⁹ State aid counted for 48% of funding, and the rest was contributed in the form of federal dollars.¹⁰ Any additional funds a school district wished to spend were also raised through local property taxes.¹¹ In order to showcase the disadvantage at which the Edgewood Independent School District operated, the litigation compared Edgewood, the least affluent school district in the San Antonio area, with Alamo Heights Independent School District, the most affluent district in the San Antonio area.¹² While the Edgewood and Alamo Heights districts were similar in geographic size,¹³ Alamo Heights raised almost 13 times more money from local property taxes than Edgewood.¹⁴ This disparity was magnified when one considered that Edgewood educated four times as many students as Alamo Heights.

Based on these and similar figures, the District Court applied strict scrutiny and held the Texas system of financing public education to be unconstitutional because it discriminated on the basis of wealth and implicated a fundamental right – education.¹⁵

In reversing the District Court’s decision, the United States Supreme Court considered “whether the Texas system of financing public education operate[d] to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny.”¹⁶ The Court concluded that wealth was not a suspect classification and that education was not a fundamental right protected by the

⁸ *Id.* at 4.

⁹ *Id.* at 9 n.21.

¹⁰ *Id.*

¹¹ *Id.* at 10.

¹² *Id.* at 11.

¹³ *Id.* at 13 n.33.

¹⁴ *Id.* at 14.

¹⁵ *Id.* at 15.

¹⁶ *Id.* at 17.

United States Constitution, thereby only requiring the “challenged state action rationally further[] a legitimate state purpose or interest.”¹⁷ The state argued that it only pledged to offer Texas children an “adequate” education through its system of public schools, and the Court agreed that the present financing system rationally furthered the state purpose of keeping control of public schools and their funding firmly in local hands, meeting the constitutional burden.¹⁸

The Court’s statement that “[t]he children in this case... are just receiving ‘a poorer quality education than that available to children in districts having more assessable wealth,’”¹⁹ clearly indicated to reformers that challenges to the federal equal protection clause would not be the means for achieving increased quality in education through equity in spending.

It would be easy to quickly label this first wave of public education finance litigation as a complete failure and move on to the second wave without further analysis. However, it seems that although this wave could have launched extensive reforms to public school finance systems if the United States Supreme Court had decided *Rodriguez* in favor of the plaintiffs, this extensive reform could have possibly done more harm than good.

If the Court had held that education was a fundamental right, and as such, that states must provide compelling state interests to justify each statutory provision it wished to implement, state and local control over public education would no longer be dominant and schemes to finance public schools would become increasing more complex to fashion and less easily implemented. Legislative attention would be focused on creating a sufficiently compelling justification for each statute that regulated public education even in the most minor fashion, rather than on the original purpose of increasing the quality level of education being offered to public school students.

¹⁷ *Id.* at 18 & 55-56.

¹⁸ *Id.* at 24 & 51.

¹⁹ *Id.*

Also, if a certain level of equality between per pupil dollars spent in each districts was strictly required as a component of federal equal protection guarantees, it seems that the federal government could have become a much larger source of financing for public education, which would have to be derived from within the federal budget. States faced with school districts that had varied per pupil dollars would seem to be much more likely to increase demands on federal coffers and rather than focusing on finding state and local funding solutions for public education. The entanglement that would seem likely to develop would be at odds with federalism concerns, increasing federal intrusion into an area that has always been under state and local control.

It is undeniable that challenging the disparities that exist between rich and poor districts based on the federal equal protection clause was a much more efficient avenue because a positive decision for plaintiffs would have been applied to all schools equally, essentially killing 50 birds with one stone. Though, if the Court had held this way, it seems possible that states' initial reaction would have been to take the easiest route in equalizing per pupil dollars – shifting dollars from rich districts to redistribute them to poor districts – which could have damaged the overall quality of education rather than increase it, as well as incense supporters of local control. However, this wave, due to the United States Supreme Court's decision in *Rodriguez*, provided little, if any, improvement in the quality of public education.

II. WAVE TWO: CHALLENGING STATE CONSTITUTION EQUAL PROTECTION AND EDUCATION GUARANTEES TO ACHIEVE EQUITY IN PER PUPIL SPENDING

Following the disappointment of *Rodriguez*, education finance reformers rallied behind the idea of challenging state equal protection clauses and some state education clauses in order to

achieve equity in per pupil spending.²⁰ The second wave was predestined to be much less efficient and likely more expensive than the first wave, because “[t]he need to focus on state constitutions increased the number of jurisdictions in which school finance reformers had to litigate.”²¹ Despite the daunting task of challenging the quality of education finance under 50 different state constitutions, the proponents of education finance reform also found that the language of each individual state constitution differed, with regard to the education clauses; some of which had language which potentially gave the reformers a more persuasive constitutional argument against state interests.²² One of the most important advantages of this wave was that “school finance decisions rooted in state education clauses pose[d] fewer implications for other areas of law than similar decisions involving state equal protection clauses. Thus, state court judges [could] be relatively less concerned about the influence of their school finance decisions on areas outside the educational context.”²³

*Robinson v. Cahill*²⁴ and *Olsen v. State*²⁵ are two second wave cases that showcased the different reactions state courts would exhibit when faced with challenges to state equal protection clauses and state education clauses which alleged the state system of finance public education led to unconstitutional disparities in per pupil spending.

Robinson v. Cahill, a New Jersey Supreme Court case decided before the United States Supreme Court handed down the *Rodriguez* decision, held that education was not a fundamental right, and wealth was not a suspect classification, but declined to rule on the challenge to the

²⁰Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”: From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1157 (1995).

²¹*Id.* at 1157-58.

²²*Id.* at 1158-60 (referencing *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814-16, 823-28 (1985), which specified that state constitution education clauses could be split four different groups: (1) general education, (2) quality of education, (3) specific mandates, and (4) strongest commitment to education).

²³*Id.* at 1159.

²⁴303 A.2d 273 (N.J. 1973), *cert. denied*, 414 U.S. 907 (1977).

²⁵554 P.2d 139 (Or. 1976).

state equal protection clause. However, the plaintiffs also brought challenges based on two constitutional provisions focusing on education.²⁶

The constitutional provision on which the court focused most heavily stated, “[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this State between the ages of five and eighteen years.”²⁷ Based on this constitutional provision, the New Jersey Supreme Court held that “the constitutional demand had not been met...” and this failure to meet the constitutional standard was based on “discrepancies in dollar input per pupil.”²⁸ The court stated that “the existing statutory system is not visibly geared to the mandate that there be a ‘thorough and efficient system of all the children in this state between the ages of five and eighteen years.’”²⁹ The court ordered prospective relief to be determined by the legislature to create a system that would satisfy the education clause within the state’s constitution, which would require the majority of funds to be raised from state tax revenues, rather than heavy reliance on local property taxes.³⁰

Olsen v. State, an unsuccessful second wave case, also was a challenge under the Oregon Constitution’s equal protection and education clauses.³¹ The education clause required the state to “provide a ‘uniform and general system’ of schools.”³² The court characterized plaintiffs’ argument as a challenge that “under the Oregon system the amount of money available for education depends on the value of property in the individual school districts and this varies greatly... [and] this variation in wealth results in *unequal educational opportunities for the*

²⁶ 303 A.2d at 287.

²⁷ *Id.* at 287-288

²⁸ *Id.* at 295.

²⁹ *Id.*

³⁰ *Id.* at 294, 298.

³¹ *Olsen*, 554 P.2d at 140.

³² *Id.*

children of the state.”³³ The court compared the “detriment to the education of the children of certain districts against the ostensible justification for the scheme of school financing,” which the state argued was an interest local control of education.³⁴

The court analyzed educational opportunities in the state of Oregon, finding that “[t]he present financing system does not totally deprive the children of the poorest district in Oregon... of an education...,” even though the poorest districts did not have the same caliber equipment, resources and facilities as the wealthiest districts.³⁵ Some differences between the wealthiest and poorest districts considered were the ranges of class offerings, special programs to prevent drop-outs, the availability of adequate classroom space, the number of administrators and elective instructors.³⁶ However, the present system allowed for a great deal of local control of schools, which the “plaintiffs concede... is a worthwhile objective,” but argued that “the present system diminishes local control for the poorer districts: that is, they cannot raise enough money to give them any options; the poorer districts must use all their funds to fulfill state requirements,” where wealthier schools had access to funds beyond those necessary to meet state requirements.³⁷ Even with this showing, the court concluded “[t]hat some districts have less local control than others because of the disparity in the value of the property in the district does not lead to the conclusion that the Equal Rights Clause has been violated,” and this “is not alone a sufficient basis for striking down the entire system.”³⁸

Plaintiffs’ second challenge, that “the Oregon school financing system violates [the education clause]... of the Oregon Constitution, [which] provides: ‘The Legislative Assembly

³³ *Id.* (emphasis added).

³⁴ *Id.*

³⁵ *Id.* at 145, 21.

³⁶ *Id.* at 145-46, 21-22.

³⁷ *Id.* at 146-47, 22-24.

³⁸ *Id.* at 147, 24.

shall provide by law for the establishment of a uniform and general system of Common schools.”³⁹ The plaintiffs interpreted this section to mean “that amounts available for providing educational opportunities in every district must approach equality.”⁴⁰ However, the Oregon Supreme Court did not agree with this interpretation, holding that the education clause “is complied with if the state requires and provides a minimum of educational opportunities in the district and permits the districts to exercise local control over what they desire, and can furnish, over the minimum.”⁴¹ Based on this interpretation, the court concluded that the Oregon education finance system did not violate the Oregon constitution.⁴²

“Second wave court decisions, taken as a whole, constitute a decidedly mixed record. Many courts upheld state school finance systems, despite per-pupil spending differences, “[indicating]... some limits to the courts’ acceptance of the equality theory.”⁴³ Scholars have noted that a court decision based on a state education clause rather than a state equal protection clause would be less problematic because those decisions would not affect state services beyond education, such as police and fire protection. The second wave still retained a determinative and problematic first wave characteristic: its dedication to equalizing per pupil dollars spent on students.

While the New Jersey Supreme Court held that its state constitution education clause required difference between districts in public school spending to approach equal levels, and ordered the legislature to create a scheme that was less dependent on local property taxes, plaintiffs were unsuccessful in Oregon, despite the fact that their equality claim was based on both the state equal protection clause and the state education clause. This wave was not very

³⁹ *Id.* at 148, 26.

⁴⁰ *Id.*

⁴¹ *Id.* at 148, 27.

⁴² *Id.* at 149, 27.

⁴³ Heise, at 1160.

successful in increasing the quality of education in poor districts because of the massive effort required in challenging 50 different state education clauses and the reluctance of many state courts to intrude upon the historic local domain of public education spending. The Oregon Supreme Court required much more than the plaintiffs' showing of disparate spending between districts in order to induce it to dismantle and rework its entire system of education finance and enter the sacred local domain by detailing how dollars raised locally should be allocated between school districts.

III. WAVE THREE: CHALLENGING THE ADEQUACY OF EDUCATION PROVIDED BY A STATE

Rather than focusing on the dollar differences in per-pupil spending, third wave lawsuits, termed "adequacy" suits, challenged "school finance systems [that]... failed to deliver basic academic skills to students," under state constitution education clauses.⁴⁴ This focus on an adequate education, rather than a right to equal dollars, seemed to be more persuasive to courts than the right to receive a financially equal education, especially because "[m]uch... research shows that there is no consistent relationship between education spending and student achievement."⁴⁵

Scholars also subscribed to the belief that adequacy suits would be more successful than their counterparts in educational equity suits because "[c]ourts in several states that had previously rejected challenges to their school finance systems have abated and, under the burgeoning adequacy standard, found their states' systems unconstitutional."⁴⁶ Three of the

⁴⁴ *Id.* at 95.

⁴⁵ Brian P. Marron, *Promoting Racial Equality through Equal Educational Opportunity: The Case for Progressive School-Choice*, 2002 B.Y.U. EDUC. & L. J. 53, 69 (2002).

⁴⁶ Larry J. Obhof, *Derolph v. State and Ohio's Long Road to an Adequate Education*, 2005 B.Y.U. EDUC. & L. J. 83, 83 (2005).

states that rejected equity challenges but embraced the notion of the state requirement to provide an adequate education to every public school student were Arizona, Ohio, and Washington.⁴⁷

In 1973, plaintiffs in Arizona brought an “equity” suit alleging that “the system of financing public schools in Arizona [was] discriminatory because of the disparity of wealth in school districts; that this disparity result[ed] in inequality in education for the students, and an unequal burden on taxpayers in the poorer districts.”⁴⁸ The Arizona Supreme Court held that “the state’s school financing system was not in violation of the Arizona or United States Constitution, despite a disparity of wealth among school districts and differing tax burdens among counties, whereby the system was rational, reasonable, and neither discriminatory nor capricious.”⁴⁹ However, in 1994, plaintiffs in Arizona again challenged the state’s education financing scheme, but only under the state’s education clause.⁵⁰ Arizona’s education clause required that, “[t]he Legislature shall enact such laws as shall provide for the establishment and maintenance of a *general and uniform* public school system...”and, “[i]n addition to such income the Legislature shall make such appropriations, to be met by taxation, as shall ensure the proper maintenance of all State educational institutions, and shall make such special appropriations as shall provide for their development and improvement.”⁵¹

Plaintiffs claimed that these provisions required that public education funding throughout the state must be “general and uniform.” The Arizona Supreme Court agreed, stating, “[s]chool financing systems which themselves create gross disparities are not general and uniform,” and that “[a]s long as the statewide system provides an adequate education, and *is not itself the cause*

⁴⁷ Paula J. Lundberg, *State Courts and School Funding: A Fifty State Analysis*, 63 ALB. L. REV. 1101, 1103-04 n. 4 (2000).

⁴⁸ *Shofstall v. Hollins*, 515 P.2d 590, 591 (Ariz. 1973).

⁴⁹ Lundberg, at 1103-04 n. 4 (citing *Shofstall*, at 592).

⁵⁰ *Roosevelt Elementary School Dist. No. 66 v. Bishop*, 877 P.2d 806, 811 (Ariz. 1994).

⁵¹ *Id.* at 813 (citing clauses XI and X of the Arizona Constitution).

of substantial disparities, local political subdivisions can go above and beyond the statewide system.”⁵² After making these conclusions, the court held that the state system was *itself causing* the substantial disparities between the wealthy and poor school districts and did not satisfy the constitutional requirement of a “general and uniform school system.”⁵³ The court ordered the “legislature to enact appropriate laws to finance education in the public schools in a way that does not itself create substantial disparities among schools, communities or districts.”⁵⁴ In holding this, the court required the legislature to create a system that at least would provide an adequate education in each Arizona public school.⁵⁵ However, the Arizona legislature has struggled to design a system that meets the requirements described by the court.⁵⁶

Rose v. Council for Better Education, Inc.,⁵⁷ the issue in contention was whether the “Kentucky General Assembly ha[d] complied with its constitutional mandate to ‘provide an efficient system of common schools throughout the state.’”⁵⁸ In holding that the “common school system in Kentucky [was] constitutionally deficient,” the court stated “it is crystal clear that the General Assembly has fallen short of its duty to enact legislation to provide for an efficient system of common schools throughout the state.”⁵⁹

The lower court construed an “efficient” system to mean “a system which required ‘substantial uniformity, substantial equality of financial resources and substantial equal educational opportunity for all students.’”⁶⁰ This language caused the trial court to rule that

⁵² *Id.* at 814-16 (emphasis added).

⁵³ *Id.* at 815-16.

⁵⁴ *Id.* at 816.

⁵⁵ *Id.* at 814-15.

⁵⁶ *Hull v. Albrecht*, 960 P.2d 634, 636 (1998) (stating, “[t]his is the fourth time this litigation has required us to decide whether the legislature has met the mandate of the Arizona Constitution to provide a general and uniform public school system.”).

⁵⁷ 790 S.W.2d 186, 212 (Ky. 1989).

⁵⁸ *Id.* at 189.

⁵⁹ *Id.*

⁶⁰ *Id.* at 191-192.

education was a fundamental right in Kentucky.⁶¹ The Supreme Court of Kentucky analyzed “whether th[e] evidence supports the conclusion... that the Kentucky system of common schools is not efficient.”⁶² The court found that the evidence presented by the appellees was so strong that it overwhelmed any evidence advanced by the appellants.⁶³ Some of the appellees’ evidence led to the following conclusions: (1) “A substantial difference in the curricula offered in the poorer districts contrasts with that of the richer districts...;” (2) “The achievement test scores in the poorer districts are lower than those in richer districts...;” (3) “Student-teacher ratios are higher in the poorer districts;” and (4) “Students in property poor districts receive inadequate and inferior educational opportunities as compared to those offered to those students in the more affluent districts.” *Id.*

Finally, the Kentucky Supreme Court held that the trial court was correct in its finding that the Kentucky public education financing scheme was unconstitutional under the education provision in the Kentucky constitution, reasoning that, “because the assessable and taxable real and personal property in the 177 [school] districts is so varied, and because of a lack of uniformity in tax rates, the local school boards’ tax effort is not only lacking in uniformity but is also lacking in adequate effort.”⁶⁴ The Kentucky Supreme Court held that every part of the Kentucky system of public education was unconstitutional, and the legislature was to be in charge of completely redesigning all aspects of Kentucky public schools.⁶⁵

As to what an efficient system of schools required, the court turned to the opinion’s of experts who stated that “the concept of efficiency [is] part of a three part concept. First, the system should impose no financial hardship or advantage on any group of citizens.... Second,

⁶¹ *Id.* at 192.

⁶² *Id.* at 196.

⁶³ *Id.* at 197.

⁶⁴ *Id.* at 199.

⁶⁵ *Id.* at 215.

resources provided by the system must be adequate and uniform across the state. Third, the system must not waste resources.”⁶⁶ In order to create this efficient system of schools across the state, the court’s direction to the General Assembly was vague – “to recreate a new statutory system of common schools in the Commonwealth,” but it identified the skills that each Kentucky public school student must acquire from an efficient school:

(i) [S]ufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.⁶⁷

The General Assembly was then charged with providing a new system of financing that, if it used property taxes as a source of revenue, must tax property in all political subdivisions at the same rate because the current local tax rates varied greatly, but allowed school districts to decide if they wanted to raise funds beyond those required by the General Assembly.⁶⁸ The General Assembly responded with the Kentucky Education Reform Act of 1990, which overhauled the entire system of Kentucky public schools, including the financing scheme.⁶⁹

Another supporter of providing an “adequate” education believes that this wave would be more effective because “[r]ather than obligat[ing] states to provide the poorest child the identical

⁶⁶ *Id.* at 210.

⁶⁷ *Id.* at 212.

⁶⁸ *Id.* at 216.

⁶⁹ KERA: Resources on the Kentucky Education Reform Act of 1990, <http://www.wku.edu/Library/kera/keralaw.html> (last visited April 26, 2007).

amount of per-pupil funding that the child in the wealthiest district receives, the concept of adequacy requires that states adopt school finance systems that give every district the minimum level of funds necessary to ensure that every child gets an adequate education.”⁷⁰

“The application of an adequacy strategy is easier said than done especially because the measurement of adequacy is often tied to educational outcomes across several vague categories of achievement.”⁷¹ The Seventeen State Supreme Courts which have invalidated school financing based on local property tax-based funding systems have been “persuaded by evidence showing great inequality of funding between the state’s school districts and demonstrating that the state’s poorest school districts fail to meet minimum measures of quality.”⁷²

These adequacy challenges were based solely on individual state education clauses, and encouraged state courts to interpret education clauses to hold that students should be able to receive at least an adequate education from each school district within the state, and if an education financing scheme did not meet this most basic threshold it should be declared unconstitutional. The presence of express education clauses in all state constitutions provided a much sturdier basis for the challenges to public education finance schemes. Challenging the equal protection clause of a constitution is quite vague and, as mentioned above, implicates many other interests than just public education finance, including all matters in which local taxes, especially property taxes, are raised to provide funding for local government services, from police and fire protection, to fall leaf collection and winter plowing. These services could be implicated by decisions resting their legitimacy on equal protection violations. By only implicating the state constitution’s education clause, other local government services will not be affected by any decisions made regarding whether the financing system for public education is

⁷⁰ Marron, at 65.

⁷¹ *Id.* at 65-66.

⁷² Swenson, at 1149.

constitutional. The third wave also seemed to rest upon more solid principles because it allowed each individual state to determine the importance it placed on education quality. A state could decide if it wants to have a long list of explicit requirements for an adequate education, or a state could decide only to require that public education is available to all eligible students. It seems like states would have been more accepting and more adept at implementing standards that it promulgated by and for itself.

This wave was determined to be successful by scholars when eleven of twenty-two challenges benefited plaintiffs, and courts that had previously upheld the legitimacy of education financing schemes were persuaded to strike them down as unconstitutional. Litigation in this wave also led to some states imposing a minimum level of quality of an education that must be received by each pupil in the school. It seems that when the argument is couched in terms of providing an adequate education to all students versus an equal education for all students, state courts were more likely to hold state education financing schemes that prevented the poorest districts from meeting this standard to be unconstitutional. Undertaking the obligation to at least fund every district so that it can provide an adequate education seemed to be a burden that state courts were more likely to undertake than the daunting task of making sure each district spent the same number of dollars per student.

Also, the idea of adequacy is more fluid and forgiving than an all or nothing comparison of dollars. Adequacy encouraged state courts to require that districts have some educational outcomes that could be required in order to increase the quality of education in poor districts

A downside to third wave cases was that the funding schemes of public education would likely always differ between states. The lack of a national education adequacy standard negates the possibility of uniformity unless states are persuaded to adopt standards adopted by other

states. While this made guessing the outcome of any adequacy suit extremely difficult, it also reserved to the states, the option to implement higher standards of educational quality than a national mandate.

However, not all state courts were any more inclined to grant relief based on adequacy challenges any more than they were inclined to grant relief based on dollar for dollar differences in school district funding.

It can be argued that the end of successful education finance challenges to state education clauses was appropriate because the judiciary should never undertake to legislate. However, without judicial intervention into the disparities that exist between the quality of education received in a poor school district and that received in a rich school district, it could be unlikely that the state legislatures would undertake reforms on educational financing schemes that have heavy support within the state, despite the resulting educational inadequacies in students educated in poor school districts. If the usefulness of all previous waves of education finance litigation has passed, the door on judicial activism has closed, and the window for persuasive arguments to implement free market principles in the public education sphere has been thrown wide open.

IV. COMPETITION AND CHOICE: FREE MARKET PRINCIPLES IN PUBLIC EDUCATION

Compulsory assignment to neighborhood schools has long been the hallmark of American public education.⁷³ Many scholars see the current tension involving public education finance and the disparities between wealthy and poor public schools due to the public education system as existing in market where the public schools hold a monopoly, allowing it to trap

⁷³ RICHARD D. KAHLBERG, *Public School Choice: Student Achievement, Integration, Democracy, and Public Support* in *EQUITABLE PUBLIC SCHOOL CHOICE IN PUBLIC SCHOOL CHOICE V. PRIVATE SCHOOL VOUCHERS* 137, 139 (Kahlenberg ed. 2003).

students in poor districts where they have no hope of receiving even an “adequate” public education.⁷⁴ It is argued that the introduction of choice and competition, the likes of which exist in a free market, would work in the elementary and secondary education system to increase the quality of education received by students.⁷⁵ Free market solutions advocated in this area include multiple versions of school choice, including controlled choice, uncontrolled choice, magnet schools, and charter schools, and also the controversial idea of private school vouchers.

A. The Basics of School Choice

At its most basic, school choice allows parents to choose the school they would like their child to attend.⁷⁶ By giving parents a choice of schools, school choice creates an incentive for schools to improve in order to attract students. School Choice takes into account the wishes of parents, making them active participants in their child’s education, creating a system where the responsibility for ensuring a child receive a quality education is shared between the parents and the schools.⁷⁷ Public school choice “attempts to create a system in which ‘no child [will] be trapped in a bad or poor neighborhood school simply because of the economic or social circumstances of his parents.’”⁷⁸ The general idea of school choice has given rise to the implementation of many different species of school choice.

1. *Controlled School Choice*

Professors Charles Willie and Michael Alves, of Harvard and Brown Universities, respectively, advanced the notion of controlled choice.⁷⁹ Controlled school choice “allow[s]

⁷⁴ SCOTT FRANKLIN ABERNATHY, *SCHOOL CHOICE AND THE FUTURE OF AMERICAN DEMOCRACY 2* (2005).

⁷⁵ RICHARD C. LEONE, *forward* to PUBLIC SCHOOL CHOICE VS. PRIVATE SCHOOL VOUCHERS (Kahlenberg ed. 2003).

⁷⁶ KAHLENBERG, at 137.

⁷⁷ James A. Peyser, *School Choice: When, Not If*, 35 B.C. L. REV. 619, 619-20 (1994).

⁷⁸ KAHLENBERG, at 139.

⁷⁹ KAHLENBERG, at 137.

parents and students to choose the public school they would like to attend within a given geographical region; no guarantees are made; districts then honor these choices in a way that promotes racial integration.”⁸⁰ Parents submit their top three choices of schools after being informed about what their choices will mean in regards to their child or children’s education.⁸¹ The program involves parents ranking the importance of educational qualities that they find most appealing and most likely to benefit their child’s education.⁸² For instance, parents may be asked to rank the importance of a highly structured environment, a less structured environment, a curriculum that focuses on science or art, or the school’s proximity to home.⁸³ Schools within the district are associated with certain qualities – creating almost a system of branding.⁸⁴ For instance, “schools will develop distinct themes or pedagogical strategies... families will choose schools based on an emphasis on French, or a back-to-basics approach, or the fact that the school provides for an after-school program....”⁸⁵ Based on the preferences the parent indicates are important to their child’s education, a school that meets the chosen preferences is chosen by a central office.⁸⁶ By using a central officer to make decisions about which child will be assigned to specific schools, controlled school choice limits the possibility that schools will manipulate student enrollment choices to gain students the school believes will be the most beneficial to its school, rather than the school being the most beneficial for the student.⁸⁷ Also, controlled school choice plans have the distinct advantage of paying for student transportation.⁸⁸

⁸⁰ *Id.*

⁸¹ *Id.* at 138.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 148.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 149.

It is the philosophy of controlled school choice that by forcing parents be involved in their child's for the quality of education their child receives, because essentially, the parents will be choosing the quality of the school their child attends.⁸⁹ If their child is receiving a poor education, the parents can elect to send their child to another school – because “[c]ontrolled choice is designed to maximize parent satisfaction.”⁹⁰

The schools which provide the poorest quality education will be weeded out and allowed a probationary period to improve.⁹¹ The pressure is on the school to justify its own existence.⁹² The districts will not continue to provide an inexhaustible line of students to substandard schools, bringing their dollars with them through the doors regardless of the kind of education they leave with.⁹³ If the school cannot attract students because it does not provide quality educational services, the school will be closed after a probation period, and its students will be sent to other, more capable, schools.⁹⁴ Closing inferior schools frees dollars to be used to “franchise” the thriving schools which are most often chosen by parents in order to create more spots for children who wish to attend them.⁹⁵

Studies in areas where controlled school choice has been implemented show that “people are choosing schools that may not be the closest in terms of distance... [but are choosing]...[based on the school’s] perceived quality.”⁹⁶ This is borne out in research that estimates “that roughly 36 percent of all elementary and secondary school children attend neighborhood schools consciously chosen by their parents in deciding where to reside....”⁹⁷

⁸⁹ *Id.* at 138-41.

⁹⁰ *Id.*

⁹¹ *Id.* at 141.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 140.

⁹⁶ *Id.* at 143.

⁹⁷ *Id.* at 146.

Research has shown that the 36 percent who make residence decisions based on the quality of school are wealthier families, because poor families must live where they can afford the cost.⁹⁸

“Moving to controlled choice means that 90 percent [of families] get one of their top choices [of schools] – as opposed to the 36 percent who today [get to] choose a neighborhood school.”⁹⁹

Quality of education, in a controlled school choice environment, ceases to be heavily dependent on wealth, as it is at present.¹⁰⁰

2. *Uncontrolled School Choice*

Uncontrolled school choice is much different from controlled school choice. In an uncontrolled school choice plan, parents are not required to make a decision about which school would be the best choice for their child or children. These uncontrolled plans “leave intact the existing ‘neighborhood’ school attendance areas; that is, children of families in the school’s ‘attendance zone’ are assigned to that school unless their parents choose another school.”¹⁰¹ These plans require parents to be proactive about education, which cannot be guaranteed.¹⁰² Also, without a central officer controlling the assignment of students to schools, schools will likely result in being racially and/or economically segregated due to the schools handpicking the students they accept.¹⁰³ Parents will choose schools based on the makeup of the student body, rather than on the specializations or unique capabilities of schools.¹⁰⁴ Finally, uncontrolled school choice, because parents choosing a school is not required, does not pay for student transportation costs, which “effectively exclude[s] the participation of the poor.”¹⁰⁵ *Id.* at 149.

⁹⁸ *Id.* at 146.

⁹⁹ *Id.* at 146.

¹⁰⁰ *Id.* at 146-47.

¹⁰¹ MATTHEW J. BROUILLETTE, A MACKINAC CENTER REPORT SCHOOL CHOICE IN MICHIGAN: A PRIMER FOR FREEDOM IN EDUCATION 23 (1999).

¹⁰² KAHLBERG at 148.

¹⁰³ *Id.* 147-48.

¹⁰⁴ *Id.* at 148-49.

¹⁰⁵ *Id.* at 148-49.

B. Magnet Schools

Magnet Schools are another variation of school choice. Surfacing mostly in a response to desegregation, these schools “offer alternatives to the traditional curriculum available within districts and typically share three primary characteristics: (1) a curriculum designed around a specific theme or method of instruction...; (2) a selected student population and teaching staff; and (3) students are drawn from a variety of attendance areas.”¹⁰⁶ Magnet schools “aspire to contribute to integration by admitting students from many neighborhoods and using a distinctive curriculum or form of instruction to draw in a racially balanced population.”¹⁰⁷ Magnet schools also receive more funding per student than regular schools, but they are very limited in student admittance.¹⁰⁸ The limited enrollment that accompanies magnet schools often leads to the school choosing the students who are likely to be the most successful.¹⁰⁹ “One study of magnet programs in Philadelphia and Houston found that the policies ‘have reduced racial segregation but have increased the economic segregation of students’ by drawing high-status students away from low-income schools.”¹¹⁰ Studies have also shown that “[s]ome selective magnets reject as many as 95 percent of applicants,” making the likelihood of magnet schools increasing the overall quality of education in a district seem quite low.¹¹¹

C. Charter Schools

Charter schools are “government-sponsored autonomous schools, substantially deregulated and free of *direct* administrative control by the government.”¹¹² “No teacher can be assigned to work in a charter school... and no child can be required to attend a charter school.”¹¹³

¹⁰⁶ BROUILLETTE, at 22.

¹⁰⁷ KAHLENBERG, at 150.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 150-51

¹¹¹ *Id.* at 150.

¹¹² BROUILLETTE at 23.

“Charter schools are a compromise position between the choice advocates and the supporters of the current academic structure.”¹¹⁴ Charter schools do not charge tuition the way a voucher school does, and charter schools are “run nearly independent of the state.”¹¹⁵ Charter schools operate by a free market standard – they are accountable for the performance of the students and finances of the school.¹¹⁶ If they do not meet these standards, the schools are shut down.¹¹⁷ Another free market characteristic is that “[t]he money allocated to charter schools is tied to enrollment – the more students a charter school attracts the more funds it receives. This induces schools to develop and maintain high levels of student performance and innovative programs in order to remain in operation.”¹¹⁸

However, laws regarding charter schools are in the hands of each individual state legislature and

[L]egislators have done the following three things [to undermine charter schools]: (1) placed limits on the number of charter schools that can be opened; (2) allocated to charter schools a portion of the per-pupil funding allocation used to educate that same student in a regular public school; and (3) have given local school boards the power to decide whether a charter is granted.¹¹⁹

Despite skepticism and opposition, nearly a million students attend 3900 charter schools nationwide, but this is a small number compared to over 100,000 public schools that educate around twenty million students.¹²⁰

D. Private School Vouchers

The idea of using government funded vouchers to pay tuition to the school of a parent’s choice dates back to Thomas Paine, and its benefits have been touted for years by Milton

¹¹³ Paul T. Hill, *Introduction to CHARTER SCHOOLS AGAINST THE ODDS 1* (Paul T. Hill, ed. 2006).

¹¹⁴ Marron, at 73.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* 73-74.

¹¹⁸ *Id.* at 74.

¹¹⁹ *Id.* at 74-76.

¹²⁰ HILL, at 2.

Friedman.¹²¹ Friedman argues that just because the government funds education does not mean that education should be limited to government schools.¹²² Instead, Friedman's view is that "the operation of a private market-place of schools will provide greater benefits in efficiency and technical progress by promoting choice and competition."¹²³ Friedman's suggestion is for "governments... [to] require a minimum level of schooling financed by giving parents vouchers redeemable for specified maximum sum per child per year if spent on 'approved' educational services."¹²⁴

As of 2003, the total number of cities and students participating in the voucher programs are very small compared to traditional public schools.¹²⁵ The programs which have received the most attention are the Milwaukee Parental Choice Program, which was the first formal voucher program, the Cleveland Scholarship and Tutoring Program, the Florida Opportunity Scholarship Plan, and the Colorado Opportunity Contract Pilot Program.¹²⁶ Little information seems to be available as to exactly how much the voucher programs increase the quality of education received by students, making it hard to draw conclusions.¹²⁷

Violating the Establishment Clause of the First Amendment is a concern to many who oppose the use of vouchers, because students would have the choice to take government dollars to religious schools.¹²⁸ The Establishment Clause implications that concern vouchers are vast and complicated topics that this paper will not cover.

In all, it seems that opinions concerning private school vouchers to increase quality of education are extremely varied and hard to generalize.

¹²¹ BELFIELD AND LEVIN, at 23.

¹²² *Id.* at 23.

¹²³ *Id.* at 23.

¹²⁴ *Id.* at 23-24.

¹²⁵ *Id.* at 24.

¹²⁶ *Id.* at 24-26.

¹²⁷ *Id.*

¹²⁸ Suzanne H. Bauknight, *The Search for Constitutional School Choice*, 27 J. L. & EDUC. 525, 526 (1998).

V. CONTROLLED SCHOOL CHOICE AS THE VEHICLE TO IMPROVE PUBLIC EDUCATION

While school finance reformers have been valiantly trying to equalize educational opportunities between rich and poor districts through challenges to constitutional provisions, a more effective method for improving public education is the implementation of controlled school choice.

The disparity that exists between the educational opportunities of poor and rich districts has been perpetuated by the traditional American public school system of compulsory assignment to schools based on residence. Parents of children living in property-poor districts where the only choice is to receive an education that is of markedly lower quality due to public school financing systems should have the opportunity to choose a different school for their children, enabling their children to receive a better quality education.

Currently public schools operate a near monopoly, as they vastly outnumber other alternatives.¹²⁹ Because public schools are guaranteed students and funds they have little incentive to disturb the status quo. This essentially means that good quality schools continue to do well and poor quality schools do not improve. Parents who are involved in their child's education continue to be involved in making that education meaningful and parents who are not involved remain apathetic about their child's schooling.

In a competitive marketplace, an enterprise that consistently provides poor quality services loses clients to those entities that provide better quality services. In the public school setting, parents who are economically disadvantaged cannot generally afford to independently send their children to a better quality schools. However, just as poor quality companies lose

¹²⁹ Peterson, at 5.

customers, poor quality schools should be losing students. The best incentive to use to cause schools to improve is by threatening their livelihood – taxpayer dollars.

Empowering parents with the ability to affect the make-up of the “public school market,” by giving them the option of refusing to continue to send their child to a poor quality school will force schools into red alert because parents’ actions threatens school funding and the school’s very existence.

Choice and competition could possibly break the existing monopoly held by the public school system through traditional compulsory assignment based on residence. If parents are given the opportunity to make a meaningful choice about what type of education their children will receive, it seems highly likely that parents are going to be more apt to choose the best education possible, encouraging competition between schools to attract students, which could result in more schools that offer at least an adequate education. If schools have to compete for students or else cease to exist, it seems that the level of education offered must increase in quality. Schools would be forced to create quality programs that would entice parents to choose one school over another. Controlled school choice is the most promising vehicle to improve the quality of public schools because it forces participation by parents, creates incentives for schools to hone their resources to create unique curricula that attract students, and offers dire consequences for schools that do not provide at least an average-quality education.

First, controlled school choice forces parents to make some kind of decision as to what type and quality of education their child receives. While force is obviously not necessary to get all parents involved in their child’s education, it seems more likely that parents whose children attend poor quality neighborhood schools are less likely to be proactive in increasing their child’s

chance to receive a quality education. Controlled school choice forces a parent to become involved in his or her child's education regardless of his or her wishes to participate.

Conversely, uncontrolled school choice requires a parent to bear the burden of attempting to get their child out of a poor quality neighborhood school. This requires the proactive nature that not all parents share. Without the compulsion to act, many parents will simply leave their children in a poor quality school without regard to the value of education they are receiving. Magnet schools, charter schools and private school vouchers face the same problem of uncontrolled school choice- a parent must make a conscious decision to improve the quality of education received by their child.

Not only does controlled school choice force all parents to become involved in their child's education, controlled school choice allows parents to make a meaningful impact on the quality of education their child receives. In a controlled school choice setting, parents can determine the degree of structure, specialization of programs, and other aspects of their child's education by ranking qualities they find to be most important. By marketing each school within the district to have certain specialties and unique curricula, or just an average-quality general education, the schools are encouraged to develop programs and curricula that they excel at teaching. Encouraging schools to develop outstanding programs will increase overall quality in the pool of schools from which parents must choose. Also, when schools are consistently not chosen by parents and operate at a level below what is required, after a probationary period, these schools will be closed. Introducing real consequences to providing an inadequately low level quality education will also encourage schools to increase quality and find ways to attract students, or else cease to exist.

In contrast, uncontrolled school choice, because so few parents of children in poor quality neighborhood schools will likely participate, does not encourage schools to specialize or increase the quality of education they offer. Parents who choose to participate will likely choose to place their children in schools that are wealthier and have historically provided a quality education. Also, uncontrolled school choice lacks the tough consequences of a failing school being closed.

Specialization and unique curricula are also characteristics of magnet schools and charter schools. However, magnet schools do not likely present a viable increase of education quality to be received by students who are currently enrolled in poor neighborhood schools because enrollment in magnet schools is usually severely limited in capacity, making the magnet schools highly selective in their enrollments. This can lead to draining already disadvantaged neighborhood schools of the successful students they presently have. In contrast to magnet schools, charter schools do have an incentive to achieve specialization or implement unique curricula because they do operate solely on the basis of choice and their funding is directly related to their enrollment. The higher the quality of education opportunities offered by the charter school, the more students and dollars it will attract.

However, in the case of charter schools, uncontrolled school choice, and private school vouchers, not only parents must be willing to be proactive in their child's education, but the parents must bear the burden of getting their child to a distant school of better quality. As stated *supra*, controlled school choice requires the school district to pay for student transportation, without which many families would not likely be able to participate due to the prohibitive cost of this transportation.

Even if all charter schools provided transportation, many state legislatures have limited the amount of competition charter schools can create within public school systems. As stated

earlier, each state legislature is responsible for promulgating laws regarding charter schools if they want impose regulation beyond that of the federal government. Many of these laws handicap the impact of charter schools from the beginning, such as allotting lower per pupil state funding than received by traditional public schools. Also, it seems that charter schools face the battle of proving their legitimacy, as they are a relatively new breed of educational option.

Government funded private school vouchers allow students to “vote with their feet” and take their government dollars to private schools rather than attend their assigned public school. Vouchers could increase quality in traditional public school systems by forcing schools to compete with higher quality private schools for government funding by attracting the students to which the government dollars attach. However, as stated above, vouchers require parents to be proactive and also arrange transportation for their children to the private school, which would limit the impact private school vouchers would have on fostering competition between private schools and public schools. Also, the public seems extremely resistant to the idea of allowing students to take government funds to private schools.

There are problems facing many of these free market solutions. The public has reservations about changing the existing system public schools system because that is the only system that has ever operated on a nationwide basis. Also, the entrenchment of public school teachers through vehicles such as unions can prevent candid discussion of the value free market principles could bring to the traditional compulsory assignment public school system.

CONCLUSION

The financing of public education has long been a point of contention in this country due to the fact that a majority of the funding comes from local property taxes. These local property

taxes create disparities of funding between school districts located in areas where property values are high and school districts located in areas where property values are low. In order to solve this problem, it seems that challenges to adequacy and quality of education have been more successful than those challenges based solely on equity of spending per pupil. Also, when challenges are aimed at the education clause of a state constitution seem to have more success than those that challenge the equal protection clause of either the federal or individual state constitutions.

However, free market alternatives that incorporate principles of choice and competition could be a more productive course of public education reform. Controlled school choices, which forces parents to become involved in their child's education and creates incentives for schools to implement high quality programs and unique curricula in order to attract students, and real consequences for schools who offer inadequate education, is the most promising vehicle for improving the quality of public education.