

THE MILWAUKEE PARENTAL CHOICE PROGRAM, ITS POLICIES, AND ITS LEGAL IMPLICATIONS

On April 27, 1990, the Wisconsin legislature inaugurated a new day in education by enacting the Milwaukee Parental Choice Program,¹ a plan to allow some 1,000 low-income children to attend nonsectarian private schools using state tax money.² Although the school choice program is experimental and limited to the city of Milwaukee,³ it is the first to include private schools.

The Milwaukee Parental Choice Program is part of a growing choice movement that could transform the educational landscape and provide new and better opportunities for all children. The idea appears to be gaining momentum, and in the coming decade the move to choice could introduce substantial educational diversity. According to former Milwaukee Public Schools Superintendent Robert Peterkin, "[C]hoice promises to be 'the' issue during the '90s."⁴ If choice takes hold, both parents and children would be the beneficiaries.

1. WIS. STAT. ANN. § 119.23 (West Supp. 1990).

2. The success of the program is described in Wilkerson, *For 345, Poverty Is Key to Door of Private School*, N.Y. Times, Dec. 19, 1990, at B6, col. 3. The article provides anecdotes of students' success, such as that of Javon Williams who used to get in trouble for being disruptive in his old school but who won awards for good behavior in his new school. Particularly telling are the following comments:

"The choice children in my class are considerably below grade level in reading and math and English—that's an absolute reality," said Janet McKenna, who teaches sixth and seventh graders at Urban Day. "It was very frustrating for them. They were very distressed with their grades, which in most cases were not passing. They had found mediocrity and failure to be accepted norms. That's not the case here."

....

Fernando Delgadillo, whose daughters Lisa and Maggie attend the Woodlands School, said, "At their old school, they used to bring home a lot of sheet work. There was a lot of rote learning. Here, the children can reflect and analyze and be creative."

Id.

3. Technically, the program is available in all first-class cities. Milwaukee presently is the only Wisconsin city in this class, although Madison could qualify. To qualify as a city of the first class, a city must have a population of 150,000 and must have proclaimed itself in that class. Madison meets the population requirement (pop. 177,690 (1988)) but has not made the proclamation. *Davis v. Grover*, 159 Wis.2d (Ct.App.) 150, 157 n.4, 165 & n.8, 464 N.W.2d 220, 223 n.4, 226 & n.8, 64 Ed. Law Rep. 1209 (1990), *review granted*, No. 90-1807 (Wis. March 5, 1991).

4. Peterkin, *What's Happening in Milwaukee?*, EDUC. LEADERSHIP, Dec. 1990/Jan. 1991, at 50, 52. *Accord*, Clinchy, *Public School Choice: Absolutely Necessary but Not Wholly*

Educational choice is not a new concept. Both Adam Smith and Thomas Paine proposed the idea,⁵ and the first modern advocate is Milton Friedman,⁶ who coined the term "voucher." Vouchers, as well as tuition tax credits, received widespread attention during the early 1980s.⁷ Recently, however, attention has focused on the concept of school choice, which does not bear the stigma associated with vouchers. According to John Chubb and Terry Moe of the Brookings Institute:

Fortunately, the growing popularity of choice and its incremental adoption in districts and states around the country have helped break the stereotypical identification of choice with vouchers—and helped disassociate it, as well, from the unwarranted stigma that the establishment has succeeded in attaching to the very concept of vouchers. The fact is that all sorts of diverse arrangements are compatible with the basic principles on which choice is founded. Vouchers are not even necessary. Whether private schools are included is simply a matter of policy—they need not be.⁸

While modern choice authorities such as Mary Ann Raywid and Charles Glenn emphasize public school choice, the idea of including private schools in choice plans received recent support from Chubb and Moe.⁹

In addition to scholarly commentary, business leaders¹⁰ and policymakers are addressing the issue. In 1986 the National Governors' Association held a conference on education and appointed a task force to study choice.¹¹ The U.S. Department of

Sufficient, 71 PHI DELTA KAPPAN 289, 289 (1989) ("Today, public school choice is rapidly becoming the latest tidal wave in an ocean of public school reform."); see also Perry, *The Right to Choose a School*, FORTUNE, January 14, 1991, at 48. Interestingly, Peterkin was formerly superintendent of the Cambridge, Massachusetts, school district that began a "controlled choice" program in the 1970s.

5. See A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 758-88 (R. Campbell & A. Skinner ed. 1976); West, *Tom Paine's Voucher Scheme for Public Education*, 33 S. ECON. J. 378 (1985).

6. M. FRIEDMAN, CAPITALISM AND FREEDOM 85-107 (1962). See also his more recent book, M. & R. FRIEDMAN, TYRANNY OF THE STATUS QUO 142-64 (1984).

7. See T. JAMES & H. LEVIN, PUBLIC DOLLARS FOR PRIVATE SCHOOLS (1983).

8. J. CHUBB & T. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS 217-18 (1990).

9. *Id.* Their conclusions are reprinted in Chubb & Moe, *America's Public Schools: Choice Is a Panacea*, BROOKINGS REV., Summer 1990, at 4.

10. E.g., Kearns, *An Education Recovery Plan for America*, 69 PHI DELTA KAPPAN 565 (1988) (Chairman and C.E.O., Xerox Corporation).

11. NATIONAL GOVERNORS' ASSOC., TIME FOR RESULTS: THE GOVERNORS' 1991 REPORT ON EDUCATION 66-93 (1986) [hereinafter TIME FOR RESULTS].

Education held a workshop on the subject in January of 1989¹² and conducted regional meetings around the country later that fall.¹³ It also opened the Center for Choice in Education in December 1990.¹⁴

The choice movement has also produced legislative activity. Although some choice plans have existed during the last two decades, recent interest has spawned new legislative proposals to introduce or expand choice.¹⁵ As of May 1990 six states had adopted statewide open enrollment plans and five had such legislation pending.¹⁶ In another fourteen states open enrollment was receiving widespread attention.¹⁷ Also in 1990 Wisconsin became the first to include private schools as an option.¹⁸

The meaning of choice remains amorphous, however. In one sense, all parents in the United States have educational choice since states cannot constitutionally require parents to send their children to public school.¹⁹ Some observers argue, however, that only those parents who can afford private school or those who can afford to move to any district truly have choice. Ted Kolderie of the Progressive Policy Institute states:

The discussion of choice has to begin with the fact that choice exists today.

Every state has had a choice plan since the *Pierce* decision in 1925. It is a simple plan: kids can go to any schools,

12. Office of Educ. Research & Improvement, U.S. Dep't of Educ., IMPROVING SCHOOLS AND EMPOWERING PARENTS: CHOICE IN AMERICAN EDUCATION (1989) [hereinafter IMPROVING SCHOOLS].

13. Office of Educ. Research & Improvement, U.S. Dep't of Educ., CHOOSING BETTER SCHOOLS: THE FIVE REGIONAL MEETINGS ON CHOICE IN EDUCATION (1990) [hereinafter CHOOSING BETTER SCHOOLS].

14. U.S. Department of Education, Press Release: Cavazos Announces Center for Choice in Education (Dec. 4, 1990); see Cooper, *Parental Choice of Schools: 'Best Way' to Goals*, Wash. Post, Dec. 5, 1990, at A23, col. 1.

15. Some of the more celebrated choice plans are in Cambridge, Massachusetts; East Harlem, New York; and Richmond, California. See, e.g., Rossell & Glenn, *The Cambridge Controlled Choice Plan*, URBAN REV., Summer 1988, at 75; Nathan, *A Powerful Force to Improve Schools*, Learning, SCHOOL ADMIN., Aug. 1989, at 8; J. CHUBB & T. MOE, *supra* note 8, at 210-15.

16. Weiss, *Open Enrollment Plans: Is 'Competition' Working?*, NEA TODAY, May/June 1990, at 3; see also Horowitz, *Pick a School, Any School*, TIME, Sept. 3, 1990, at 70. The six states with open enrollment plans are: Arkansas, ARK. STAT. ANN. § 6-18-206 (Supp. 1989); Idaho, IDAHO CODE § 33-1402 (Supp. 1990); Iowa, IOWA CODE § 282.18 (West Supp. 1990); Minnesota, MINN. STAT. ANN. §§ 120.062-.08 (West Supp. 1990); Nebraska, NEB. REV. STAT. ANN. §§ 79-3401-79-3418 (Supp. 1990); and Ohio, OHIO REV. CODE ANN. §§ 3313.97-.198 (Anderson Supp. 1989).

17. Weiss, *supra* note 16.

18. See *supra* note 1 and accompanying text.

19. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); see also *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

anywhere—private or public—if their parents can pay the tuition or the cost of moving their place of residence. It is in use: lots of people choose. It works. It is inequitable: it discriminates against the poor. A family with a lot of money has a lot of choice. A family with little money has little choice.²⁰

School choice nevertheless means something other than parents' legal right to send their children to a private school. "Choice" in certain contexts means enabling parents to send their children to a public school other than the one determined by their residence. In other contexts it means providing parents with the means to send their children to any school of their choosing. Charles Finn describes both concepts: "Educational choice means the conscious selection of a school, an education program, or a particular set of academic courses, as opposed to involuntary assignment."²¹ Additionally, he states, "So, when we talk about enhancing choice, we're mainly talking about giving working-class and poor people the opportunity to choose schools and programs that the more affluent already have."²²

Part I of this Note discusses the Milwaukee program and the court challenge to the legislation. This Note focuses on the Wisconsin legislation because it is the first choice plan to include private schools. Gary Putka of the *Wall Street Journal* described this "extension of the idea to private schools" as "the most radical yet of the school-choice philosophy in education reform."²³ It therefore raises policy and legal issues not implicated by other choice legislation and provides a concrete setting to discuss these potential problems. Part II of this Note presents the policy issues raised by choice plans and looks at the structure of the Milwaukee

20. T. KOLDERIE, *BEYOND CHOICE TO NEW PUBLIC SCHOOLS: WITHDRAWING THE EXCLUSIVE FRANCHISE IN PUBLIC EDUCATION* 11 (1990). *Accord* Finn, *Educational Choice Theory, Practice, and Research*, EQUITY & CHOICE, Spring 1986, at 43, 44, 45-46. Finn cites data from the Current Population Survey of the U.S. Bureau of the Census indicating that 3.3% of families with incomes under \$7,500 enroll children in private schools compared to 31.0% of families with incomes over \$75,000. *Id.* at 45. He also cites both a national survey and a Minnesota survey indicating that 53% of public school parents took the local schools into account in choosing their residence. *Id.* at 46.

For an argument that this mobility produces some level of competition in the current public school system, see Spicer & Hill, *Evaluating Parental Choice in Public Education: Policy Beyond the Monopoly Model*, 98 AM. J. EDUC. 97, 101-02 (1990).

21. Finn, *supra* note 20, at 44.

22. *Id.*

23. Putka, *Wisconsin to Allow Some Students to Use Education 'Vouchers' at Private Schools*, *Wall St. J.*, Mar. 26, 1990, at A3E, col. 1.

program in view of those issues. Part III addresses some legal issues presented by the Milwaukee program and by potential variations of private school choice plans.

I. THE LEGISLATION AND THE COURT CHALLENGE

A. *Enactment*

The Milwaukee Parental Choice Program was enacted as part of a larger budget bill on April 27, 1990.²⁴ In its final form, the program enables approximately 1,000 low-income students in the Milwaukee public school district to enroll in private nonsectarian schools and provides the participating schools with approximately \$2,500 per student in state funds that otherwise would have gone to Milwaukee Public Schools.

The Milwaukee program is the result of various proposals introduced into the Wisconsin legislature over a period of several years. The modifications and adjustments made by the legislature represent its resolution of issues involving school choice.²⁵

The first choice initiative²⁶ incorporated both public and private school choice alternatives.²⁷ It also addressed equity concerns²⁸ that remained in the enacted version, although the criteria are different.²⁹ The second proposal³⁰ made a significant

24. See 1989 Wis. Laws 336, § 228. The bill had a sunset provision ending the program in the 1994-95 school year. See 1989 Wis. S.B. 542, sec. 228, § 119.23(10). The governor vetoed this provision. See 1989 Wis. Laws 336, § 228.

25. See *infra* text accompanying notes 112-94.

26. 1987 Wis. A.B. 866, sec. 237. This bill was proposed by Governor Thompson in a budget recommendation in early 1988. The bill died, however, in the Joint Committee on Finance. See *Davis v. Grover*, 159 Wis.2d at 168, 464 N.W.2d at 228.

27. The bill would have provided that certain Wisconsin pupils "may attend, at no charge, any public school located in the county in which the city is located, or any private school located in the county in which the city is located that complies with 42 USC 2000d, if space is available and the pupil meets all applicable eligibility requirements." 1987 Wis. A.B. 866, sec. 237, § 119.23(1)(a).

28. Qualifying students were those in grades kindergarten to 6 who were eligible for free lunch program under 42 U.S.C. § 1758(b) and who resided in certain low-income attendance areas, i.e. "an elementary school attendance area that has a high percentage of elementary school resident pupils who meet the income eligibility standards for a free lunch in the federal school lunch program." 1987 Wis. A.B. 866, sec. 237, § 119.23(1)(a).

29. See *infra* notes 44-48 and accompanying text.

30. In 1989 Governor Thompson proposed the second choice plan as part of his budget. 1989 Wis. S.B. 31, sec. 2297. The plan received some support from the Mayor of Milwaukee. Umhoeffer, *Norquist Receptive to School Choice Plan*, Milwaukee J., Jan. 29, 1989, at A1, col. 2. But the Joint Committee on Finance again removed it from the budget bill. *Davis v. Grover*, 159 Wis.2d at 169, 464 N.W.2d at 228.

change regarding religious schools³¹ by limiting program participants to nonsectarian schools.³² The "nonsectarian" language remained in the later bills, including the one enacted.

This change to exclude religious schools did not satisfy some opponents, who raised other issues.³³ Voicing concern over accountability under the choice plans, the Milwaukee School Board proposed one of its own.³⁴ Its plan would have allowed students to attend private nonsectarian schools through a contract process and would have held schools to standards set by the school system.³⁵ This third proposal substantially limited the competitive

31. The proposal would have allowed 1,000 low-income K-6 students residing in Milwaukee County to attend, at no charge, any "nonsectarian private school" located in the county. 1989 Wis. S.B. 31, sec. 2297, § 119.23(1)(a).

32. This decision to exclude religious schools from the choice proposal disappointed some choice proponents. Bradee, *Thompson Shift Causes Disappointment*, Milwaukee Sentinel, Jan. 11, 1989, at 1, col. 3. It also marked the end of the effort to include religious schools.

Governor Thompson's decision to back down on his plan to include religious schools in the choice initiative did not indicate a philosophical shift or any concern with the first amendment but rather his recognition of political reality. When asked why he did so, he responded, "I want to win." *Id.* The decision, however, did not necessarily signal permanent defeat for religious schools. Once the current choice program was enacted, some recognized the possibility of its expansion to include religious schools. See Putka, *supra* note 23.

33. Peterkin indicated he would fight any voucher program, claiming some private schools would not accept academically poor students, the handicapped, or poor children. Umhoeffer, *supra* note 30. Superintendent Herbert W. Grover also criticized the plan. *Id.* He has continued to maintain that schools under such programs lack accountability and that vouchers themselves harm the common school. Grover, *Private School Choice Is Wrong*, EDUC. LEADERSHIP, Dec. 1990/Jan. 1991, at 51; Jones, *Grover Can't Abide an Assault on Public Schools*, Milwaukee J., Aug. 26, 1990, at 1, col. 1.

34. Cohen, *Milwaukee Proposal on Private Schools Stirs Debate*, EDUC. WEEK, May 17, 1989, at _____. The Milwaukee School Board, which opposed the governor's plan, made their proposal in April 1989.

35. *Id.* Supporters called it a "vehicle for school improvement," *id.*, and it was heralded as "appealing" because it was limited choice—it "address[ed] a specific problem—low achievers—without tearing apart an entire urban school system." *School Choice Plan Could Help Poor Pupils*, Milwaukee Sentinel, Apr. 1989, at 8, col. 1. Some board members conceded that it was an "offensive" to advance a choice policy more acceptable than the governor's. Cohen, *supra* note 34. Others, however, viewed it as merely an attempt to derail the choice movement and cause it to fail. *E.g.*, Fund, *Champion of Choice: Shaking up Milwaukee' Schools*, Reason, Oct. 1990, at 38, 38 (interview with Annette "Polly" Williams):

After they [the educational establishment] were convinced choice couldn't be stopped, they tried to hijack the issue and came up with their own version of choice. It basically created another bureaucracy which would have supervised the whole choice process and strangled it. The Milwaukee Public Schools would have selected the students for the choice program, not the parents. Students would have been picked if they met enough of the seven negative criteria they set up. If you were in a family of alcoholics, had a brother in prison and a pregnant teenage sister, and were inarticulate, you would have been a perfect candidate for their choice plan. In other words, a program they hoped would fail.

feature of prior bills, since the choice to use private schools resided with the school system rather than the parents.³⁶

In the plan that ultimately passed, the Wisconsin legislature rejected the contracting out solution and retained the competitive feature of the earlier bills.³⁷ While many in the educational establishment opposed this final bill,³⁸ Annette "Polly" Williams—a black liberal Democrat who twice served as Jesse Jackson's campaign manager—garnered support for the bill and formed a coalition with her Republican colleagues against the liberal establishment.³⁹ In the words of Polly Williams, "We finally won when we got 200 parents to testify for three hours in favor of my bill. In good conscience, my colleagues could not vote against those parents."⁴⁰

36. There was also a fourth proposal that failed to pass. It was introduced as an assembly amendment to the budget on June 28, 1989. 1989 Wis. S.B. 31, A. amend. 8, sec. 2297m. It was a plan similar to the Milwaukee School Board proposal. It provided: "The board may contract with nonprofit, nonsectarian private schools located in the city to provide early childhood and elementary educational programs to pupils enrolled in kindergarten and in grades 1 to 8 . . ." *Id.* § 119.23(1). Pupils were eligible to participate if they met three of eight criteria:

1. The pupil is eligible to participate in the free lunch program under 42 USC 1758(b).
2. The pupil is the child of an unmarried parent.
3. One or both of the pupil's parents did not graduate from high school.
4. The pupil has a brother or sister who is one or more years behind his age group in school in number of credits attained or in basic skill levels.
5. The pupil is low-achieving, as measured by achievement test scores.
6. The pupil has a poor attendance record, as determined by the board.
7. The pupil has social, behavioral or developmental problems as determined by the board.
8. The pupil has language or educational problems, as determined by the board.

Id. § 119.23(2)(a).

This proposal was the first to receive the backing of both Thompson and Peterkin. *Bill Would Aid Private School Option*, Milwaukee J., June 27, 1989, at B1, col. 2. Although the assembly removed this amendment from debate, the legislature requested the legislative council to study the issue. *Davis v. Grover*, 159 Wis.2d at 169, 464 N.W.2d at 228.

37. See 1989 Wis. S.B. 542, sec. 228. It was introduced into the Assembly on October 11, 1989, as Assembly bill 601, 1989 Wis. A.B. 601, sec. 2, and referred to the committee on urban development. The committee held a public hearing in February 1990 in Milwaukee and, in March 1990, recommended passage of an amended version. The Assembly passed it with one additional amendment. The Assembly version was added to the Senate Adjustment Bill, 1989 Wis. S.B. 542, which passed as 1989 Wis. Laws 336.

38. *Wisconsin Governor Expected to Sign Milwaukee Choice Bill; State Would Pay for Poor Students to Attend Private School*, Educ. USA, Apr. 9, 1990, at 241. Peterkin criticized the plan, calling it a "threat to education." *Wisconsin to Allow Some Students to Use Education 'Vouchers' at Private Schools*, Wall Street J., March 26, 1990, at A3E, col. 1.

39. Fund, *supra* note 35.

40. *Id.* at 39.

B. Provisions

The Milwaukee Parental Choice Program provides that, subject to certain limitations, qualifying pupils "may attend, at no charge, any nonsectarian private school located in the city."⁴¹ Section 119.23 applies to Wisconsin cities of the first class.⁴² While the class is open to additional members, Milwaukee is presently the only first-class city.⁴³

1. Eligible Students

To participate in the parental choice program, pupils must be in grades kindergarten to 12 and must reside in a first-class city (i.e. Milwaukee).⁴⁴ A qualifying pupil must also be a member of a family with a total income no greater than 175% of the federally established poverty level.⁴⁵ A student enrolled in a private school during the previous school year cannot participate, unless the private enrollment was under the program.⁴⁶ Further, only one percent of the school district's membership will be allowed to attend private schools under the program in any one

41. WIS. STAT. ANN. § 119.23(2)(a) (West Supp. 1990).

42. The title "Milwaukee Parental Choice Program" does not make it specific to Milwaukee. As the appellate court pointed out in *Davis*, "titles to sections of the statutes 'are not part of the statutes.'" *Davis v. Grover*, 159 Wis.2d at 162, 464 N.W.2d at 225 (citing WIS. STAT. ANN. § 990.001(6) (West. 1985)).

43. See *supra* note 3.

44. WIS. STAT. ANN. § 119.23(2)(a) (West Supp. 1990).

45. *Id.* § 119.23(2)(a)(1). The poverty level is determined in accordance with the criteria established by the director of the federal office of management and budget. *Id.* A family of four would qualify if its monthly income was at or below \$1,853. Wisconsin Department of Public Instruction, *A Background Paper on Private School Choice*, Aug., 1990.

This concern that the choice program assist low-income students appeared in all the choice proposals. The first tied eligibility to the federal free lunch program, see *supra* note 28, as did the second, 1989 Wis. S.B. 31, sec. 2297, § 119.23(1)(a)(1). Assembly amendment 8 used this standard as one of eight criteria. See *supra* note 36. Assembly bill 601 was the first to use a family income of 175% of the federal poverty level as the benchmark for eligibility. 1989 Wis. A.B. 601, sec. 2, § 119.23(2)(a)(1).

46. WIS. STAT. ANN. § 119.23(2)(a)(2) (West Supp. 1990). This provision was not in the governor's 1987 proposal. It first appeared in the governor's second proposal. 1989 Wis. S.B. 31, sec. 2297, § 119.23(1)(a)(5). It also appeared in Assembly amendment 8. 1989 Wis. S.B. 31, A. amend. 8, sec. 2297m, § 119.23(2)(a). It did not appear in Assembly bill 601.

year.⁴⁷ A qualifying student must also meet the procedural requirement of filing an application with a participating school by June 30 prior to the school year in which he plans to participate.⁴⁸

2. Eligible Schools

The program places few conditions upon private schools wishing to participate.⁴⁹ A participating school must inform the Superintendent of Public Instruction of its intent to participate by June 30 preceding the school year.⁵⁰ The school must comply with 42 U.S.C. section 2000d,⁵¹ which prohibits discrimination on the basis of race, color, or national origin. It must also meet all health and safety laws or codes that apply to public schools.⁵² No more than 49% of the school's enrollment may consist of pupils participating in the program.⁵³ In addition, each participating private school must meet one of the following standards:

1. At least 70% of the pupils in the program advance one grade level each year.

47. WIS. STAT. ANN. § 119.23(2)(b)(1) (West Supp. 1990). This feature limiting the number of participating students appeared in all the proposals, although the limitations were different. 1987 Wis. A.B. 866, sec. 237, § 119.23(1)(b) (1,000 pupils); 1989 Wis. S.B. 31, sec. 2297, § 119.23(1)(b) (same); 1989 Wis. S.B. 31, A. amend. 8, sec. 2297m, § 119.23(2)(b) (same); 1989 Wis. A.B. 601, sec. 2, § 119.23(2)(b)(1) (3% of school district's membership); 1989 Wis. S.B. 542, sec. 228, § 119.23(2)(b) (1% of membership).

48. WIS. STAT. ANN. § 119.23(3) (West Supp. 1990). This notification requirement appeared initially in Assembly bill 601. 1989 Wis. A.B. 601, sec. 2, § 119.23(3)(b).

49. *Davis v. Grover*, No. 90-CV-2576, slip op. at 3 (Dane County Cir. Ct., Aug. 6, 1990) ("The Law does not place many conditions upon private nonsectarian schools wishing to participate.").

50. WIS. STAT. ANN. § 119.23(2)(a)(3) (West Supp. 1990). The requirement that private schools provide notice of their intent to participate first appeared in the governor's second proposal, although the time period was significantly longer. 1989 Wis. S.B. 31, sec. 2297, § 119.23(1)(a)(2) (November 1 of prior school year). Assembly amendment 8 did not have such a provision, since the decision to use the private schools resided in the school board. Assembly bill 601 also had such a provision. 1989 Wis. A.B. 601, sec. 2, § 119.23(2)(a)(2) (January 1).

51. WIS. STAT. ANN. § 119.23(2)(a)(4) (West Supp. 1990). Compliance with 42 U.S.C. § 2000d by participating private schools was required under all proposals. 1987 Wis. A.B. 866, sec. 237, § 119.23(1)(a); 1989 Wis. S.B. 31, sec. 2297, § 119.23(1)(a)(3); 1989 Wis. S.B. 31, A. amend. 8, sec. 2297m, § 119.23(1)(a); 1989 Wis. A.B. 601, sec. 2, § 119.23(2)(a)(3).

52. WIS. STAT. ANN. § 119.23(2)(a)(5) (West Supp. 1990). This provision first appeared in Senate bill 542. 1989 Wis. S.B. 542, sec. 228, § 119.23(2)(a)(5).

53. WIS. STAT. ANN. § 119.23(2)(b)(2) (West Supp. 1990). This limitation on the number of pupils a participating school could accept under the program first appeared in the Assembly bill 601. 1989 Wis. A.B. 601, sec. 2, § 119.23(3)(b)(2) (49% of school's enrollment).

2. The private school's average attendance rate for the pupils in the program is at least 90%.

3. At least 80% of the pupils in the program demonstrate significant academic progress.

4. At least 70% of the families of the pupils in the program meet parental involvement criteria established by the private school.⁵⁴

Failure to meet any of these four requirements disqualifies the school from participating in the program the next school year.⁵⁵

There are also procedural requirements that a school must meet. The schools must notify the applicant, in writing, within 60 days of receiving the application, whether the applicant has been accepted.⁵⁶ They must also select students on a random basis,⁵⁷ and they must provide certain information to the superintendent.⁵⁸

Finally, a participating school cannot charge any additional tuition. It is limited to the money it receives under the program.⁵⁹

54. WIS. STAT. ANN. § 119.23(7)(a) (West Supp. 1990). These standards first appeared in Assembly amendment 8. 1989 Wis. S.B. 31, A. amend. 8, sec. 2297m, § 119.23(3)(a). They were not mandatory, however. While the amendment would have required the board to adopt "appropriate educational standards," the board was free to adopt one or more of the four. *Id.* The standards did not appear in Assembly bill 601, however.

55. WIS. STAT. ANN. § 119.23(7)(b) (West Supp. 1990).

56. *Id.* § 119.23(3).

57. *Id.* § 119.23(3). This requirement that participating schools select students on a random basis first appeared in Senate bill 542. 1989 Wis. S.B. 542, sec. 228, § 119.23(7)(b). Prior bills provided that pupils could attend participating private schools if space were available. 1987 Wis. A.B. 866, sec. 237, § 119.23(1)(a); 1989 Wis. S.B. 31, sec. 2297, § 119.23(1)(a)(4); 1989 Wis. S.B. 31, A. amend. 8, sec. 2297m, § 119.23(2)(a); 1989 Wis. A.B. 601, sec. 2, § 119.23(2)(a)(4).

58. There is no language specifically requiring the schools to supply information; however, the legislation certainly contemplates it. The superintendent is required to submit a report comparing the academic achievement, daily attendance record, percentage of dropouts, percentage of pupils suspended and expelled, and parental involvement activities of pupils attending the participating private schools. WIS. STAT. ANN. § 119.23(5)(d) (West Supp. 1990).

59. *See id.* § 119.23(2)(a). The section provides that the students may attend "at no charge." It follows that the participating schools cannot impose additional tuition. Polly Williams indicates that the amount received by the participating schools is less than their costs: "For many it is a sacrifice, since we had to compromise and make the voucher only \$2,500 a year, and parents cannot supplement the voucher with their own money. Many of these schools have costs of \$3,000 or \$3,300 a year." Fund, *supra* note 35, at 40.

The other proposals also provided that participating pupils could attend private schools "at no charge." 1987 Wis. A.B. 866, sec. 237, § 119.23(1)(a); 1989 Wis. S.B. 31, sec. 2297, § 119.23(1)(a); 1989 Wis. S.B. 31, A. amendment 8, sec. 2297m, § 119.23(2)(a); 1989 Wis. A.B. 601, sec. 2, § 119.23(2)(a). The amount participating schools would receive, however, was based on the school's average tuition or its cost, subject to a maximum amount based on some formula. *See infra* note 62. Senate bill 542 was the first to provide a sum unrelated to the school's tuition or cost. *See* 1989 Wis. S.B. 542, sec. 228, § 119.23(4).

3. Transfer of Funds

At the heart of the school choice program, of course, are its funding provisions. Section 119.23 has two such provisions. First, it provides funds to private schools,⁶⁰ allowing some low-income families to choose those schools as an alternative to the public schools. Secondly, it reduces aid to the Milwaukee school district.⁶¹ This second component introduces competition into the choice plan.

The administration of the program is the duty of the Superintendent of Public Instruction. The superintendent, upon receipt of proof of enrollment from the student's parent or guardian, must pay to the private schools the funds that would otherwise go to the public school district.⁶² The payments consist

60. WIS. STAT. ANN. § 119.23(4) (West Supp. 1990). The first proposals provided that payment be made to the pupil's parent or guardian. 1987 Wis. A.B. 866, sec. 237, § 119.23(2)(a)(2); 1989 Wis. S.B. 31, sec. 2297, § 119.23(2)(a). Assembly amendment 8 was the first proposal to provide that payments be made directly to the private school. 1989 Wis. S.B. 31, A. amend. 8, sec. 2297m, § 119.23(4)(a)-(b). Assembly bill 601 and the later bills followed the lead of amendment 8. 1989 Wis. A.B. 601, sec. 2, § 119.23(4); 1989 Wis. S.B. 542, sec. 228, § 119.23(4).

61. WIS. STAT. ANN. § 119.23(5)(a) (West Supp. 1990).

62. *Id.* § 119.23(4). The amount the private schools would receive under the program varied with the proposals. The first provided that the superintendent would pay to the pupil's parent or guardian "an amount equal to the average tuition charged pupils attending the school," provided that the payment did not exceed "an amount equal to the sum of the total amount of state aid to which the board is entitled in that school year under s. 20.255(2) and property taxes levied by the board in that school year, divided by the district's membership." 1987 Wis. A.B. 866, sec. 237, § 119.23(2)(a)-(b).

The second proposal continued the concept of providing for payment of the average tuition at the private school, but put a smaller cap on the amount. The payments could not exceed an amount determined by dividing the total amount of state aid the board was entitled to by the school district's membership and subtracting from this quotient any financial aid received by the pupil in that year. 1989 Wis. S.B. 31, sec. 2297, § 119.23(2)(a)-(b).

Assembly amendment 8 provided that the board pay each contracting private school, for each full-time equivalent pupil served by the private school, an amount equal to at least 80% of the average per full-time equivalent pupil cost for pupils who are enrolled in the district school. 1989 Wis. S.B. 31, A. amend. 8, sec. 2297m, § 119.23(4)(a)-(b).

Assembly bill 601 retreated from the idea of providing the average tuition and limited the payment to the lesser of the school's cost and a formula based on the school district's income. It provided that the superintendent pay to the private school "an amount equal to the private school's cost of educating the pupil, but not exceeding an amount determined by dividing the school district's net school cost by the school district's membership." 1989 Wis. A.B. 601, sec. 2, § 119.23(4). "Net school cost" meant "the sum of the net cost of the general fund and the net cost of the debt service fund for the previous school year, plus any aid received under subch. VI of ch. 121 in the previous school year." *Id.* § 119.23(1)(b). "Net cost" had the meaning given in section 121.004(6) of the code. *Id.*

of four equal installments in September, November, February, and May.

The superintendent must also reduce the aid to the school district.⁶³ The amount of reduction is directly proportional to the number of students participating in the choice program.⁶⁴ In addition, he must insure that aid to other school districts is neither reduced nor increased as a result of the program.⁶⁵

Not all of the school district's funds are reduced ratably, however. Only state aid provided under sections 121.08 and 121.085 is so reduced. Funds from local property taxes and from federal and certain state aid programs are not subject to reduction.

Actual numbers might contribute to a clearer understanding. During the 1989-90 school year, the Milwaukee public school district's total expenditures were \$541,322,598. Of that figure, \$298,083,987, or 55%, came from state aid.⁶⁶ The remaining 45% would not have been subject to reduction, had the choice program been in force that year. Additionally, categorical state aid of \$74,973,041⁶⁷ would also have escaped reduction under the choice program. Only the general aid, which in 1989-90 was \$223,110,946, would have been subject to reduction, and then only to a maximum of one percent.⁶⁸

63. WIS. STAT. ANN. § 119.23(5)(a) (West Supp. 1990). The other proposals would also have reduced the amount of money paid to the school district by the amount of payments to the private school. 1987 Wis. A.B. 866, sec. 237, § 119.23(3); 1989 Wis. S.B. 31, sec. 2297, § 119.23(3)(a); 1989 Wis. A.B. 601, sec. 2, § 119.23(5)(a). Assembly amendment 8 did not explicitly provide for a reduction but the board was responsible for making the payments and would have to pay them from its own funds.

64. The amount of reduction is determined by two steps:

1. Divide the total amount to which the school district is entitled under ss. 121.08 and 121.085 divided by the school district membership.
2. Multiply the quotient under subd. 1 by the number of pupils attending private schools under this section.

WIS. STAT. ANN. § 119.23(5)(a) (West Supp. 1990).

65. *Id.* § 119.23(5)(b). This protection for other school districts was not in the governor's first proposal. It appeared in his second proposal, however, 1989 Wis. S.B. 31, sec. 2297, § 119.23(3)(b), as well as in Assembly bill 601, 1989 Wis. A.B. 601, sec. 2, § 119.23(5)(b).

66. Letter of October 19, 1990, to author from Bambi Statz, Assistant Superintendent, Division for School Financial Resources & Management Services, Department of Public Instruction.

67. *Id.* The categorical aids are as follows: EEN - \$36,581,304; Library - \$1,817,611; Integration - \$21,998,358; Transportation - \$2,374,715; Driver's Ed - \$183,000; and other - \$12,018,053.

68. The analysis of the Wisconsin Legislative Reference Bureau to Senate bill 542 indicated that the state superintendent would pay to private schools "an amount equal to 53% of the average per pupil cost for pupils enrolled in the Milwaukee public schools." Analysis by the Legislative Reference Bureau, 1989 Wis. S.B. 542, at 12.

4. Miscellaneous Provisions

Section 119.23 also has some miscellaneous provisions concerning information distribution, transportation, assignment, and annual reports. The superintendent must ensure that parents and guardians of pupils residing in the city are informed annually of participating schools.⁶⁹ The school board must provide transportation to the private school.⁷⁰ The program also creates a pupil assignment council consisting of one representative of each participating school and which is responsible for achieving a balanced representation of pupils in the participating schools.⁷¹ Finally, the superintendent must submit annual reports to the legislature and the appropriate standing committees.⁷²

C. Regulations and Court Challenges

In implementing section 119.23, Superintendent Grover⁷³ required each participating school to submit a Notice of School's

69. WIS. STAT. ANN. § 119.23(5)(c) (West Supp. 1990). This requirement first appeared in Assembly bill 601. 1989 Wis. A.B. 601, sec. 2, § 119.23(3)(a). An earlier proposal, however, provided for a committee that was to address, among other issues, "[a] means of informing interested parents of the programs." 1989 Wis. S.B. 31, sec. 3044(1)(a)(3).

70. WIS. STAT. ANN. § 119.23(6) (West Supp. 1990). This requirement is a previously existing duty under WIS. STAT. ANN. § 121.54 (West 1973 & Supp. 1990). The district may claim state aid for doing so. This provision for transportation was not in the governor's first choice initiative. It also did not appear in his second proposal, although the governor's committee, *see infra* note 71, was to address the matter. 1989 Wis. S.B. 31, sec. 3044(1)(a)(1). Assembly amendment 8 required the school district to provide transportation but did not allow it to claim state aid. 1989 Wis. S.B. 31, A. amend. 8, sec. 2297m, § 119.23(5). Assembly bill 601 introduced the provision in its present form. 1989 Wis. A.B. 601, sec. 2, § 119.23(6).

71. WIS. STAT. ANN. § 119.23(8) (West Supp. 1990). Provision for a committee to oversee implementation of the choice program first appeared in the governor's second proposal. The governor was to appoint a committee composed of the superintendent of schools of the school districts operating under chapter 119 and four individual residents of the school districts. The committee's duties were to develop a plan for implementing and administering the program. 1989 Wis. S.B. 31, sec. 3044(1)(a). Assembly amendment 8 had a similar provision. 1989 Wis. S.B. 31, A. amend. 8, sec. 2297m, § 119.23(6)(a). Assembly bill 601 changed this concept to a pupil assignment council composed of representatives from the private schools with the same duties as in the current program. 1989 Wis. A.B. 601, sec. 2, § 119.23(7).

72. WIS. STAT. ANN. § 119.23(5)(d) (West Supp. 1990). A provision for evaluating the program first appeared in Assembly amendment 8 to be conducted by the board through the use of "standardized basic educational skills tests or any other method it deems appropriate." 1989 Wis. S.B. 31, A. amend. 8, sec. 2297m, § 119.23(6)(b). Assembly bill 601 did not have such a provision. Senate bill 542 included several provisions for evaluating the program that appeared in the final act, including reports from the superintendent, 1989 Wis. S.B. 542, sec. 228, § 119.23(5)(d), and a financial and performance evaluation audit conducted by the legislative audit bureau, *id.* § 119.23(9)(a).

73. Ironically, Grover, the state official charged with administering the private school choice program, is also one of its most vociferous opponents. *See Grover, supra* note 33.

Intent to Participate form promulgated by the Department of Public Instruction. By submitting the form the schools would promise to comply with explicit requirements of the act as well as a variety of statutory and regulatory provisions, including the following:

- the Wisconsin Pupil Nondiscrimination Act, § 118.13, Stats., and Wis. Adm. Code PI 9;
- Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. § 1681 et seq.;
- the Age Discrimination Act of 1975, as amended, 42 U.S.C. § 6101 et seq.;
- § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794;
- the Family Education Rights and Privacy Act, 20 U.S.C. § 3171;
- the Drug-Free School and Communities Act of 1986;
- "all federal and state constitutional guarantees protecting the rights and liberties of individuals including freedom of religion, expression, association, against unreasonable search and seizure, equal protection, and due process";
- "all regulations, guidelines, and standards lawfully adopted under the above statutes by the appropriate administrative agency";
- "[a]ll applicable federal and state laws" regarding delivery of services to handicapped students under the Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq., § 115.76 et seq., Stats., and Wis. Adm. Code PI 11; and
- public school district standards for staff licensure and development, ancillary services, curriculum, etc. under Wis. Adm. Code PI 8.⁷⁴

74. *Davis v. Grover*, No. 90-CV-2576, slip op. at 4. The Department's rulemaking authority is under Wisconsin's Administrative Procedure Act. WIS. STAT. ANN. § 227.11(2) (West Supp. 1990).

It is interesting to note that the earlier choice proposals conferred on the superintendent the authority to make rules to implement and administer the choice programs. 1987 Wis. A.B. 866, sec. 237, § 119.23(5) ("The state superintendent shall promulgate rules to implement and administer this section, including specifying the number of attendance areas eligible under sub. (1)(a), not to exceed 10."); 1989 Wis. S.B. 31, sec. 2297, § 119.23(5) ("The state superintendent shall promulgate rules to implement and administer this section."); 1989 Wis. A.B. 601, sec. 2, § 119.23(8) (same). This provision did not appear in the last bill, however. *See* 1989 Wis. S.B. 542, sec. 228. The provision authorizing the superintendent to promulgate rules for the choice program would have given the superintendent a large measure of discretion in administering the program. His authority under the enacted program, however, is instead governed by the general rule of Wisconsin's Administrative Procedure Act, which provides that a rule promulgated by an agency "is not valid if it exceeds the bounds of correct interpretation." WIS. STAT. ANN. § 227.11(2)(a)

Grover conditioned receipt of funds under the program on completion of the form.⁷⁵

Six private schools refused to complete the intent form. Instead, they submitted written notice of their intent to participate. Grover refused to recognize the letters as fulfilling the notice-of-intent requirement of section 119.23 and denied them status as program participants.⁷⁶

The schools and several students and parents seeking to participate in the program sued. They brought an action in the Circuit Court of Dane County to enjoin Grover from imposing any requirements beyond those explicitly provided by the act and to compel him to recognize the schools as participants based on their letters of intent.⁷⁷ Petitioners from a prior suit⁷⁸ intervened in the action.⁷⁹ The issues involved the same three constitutional challenges raised in the earlier suit: that the act was void as a

(West Supp. 1990).

Instead of providing the superintendent with wide latitude in administering the program, the legislature carefully circumscribed the superintendent's authority by expressly outlining his duties. In addition to paying over funds to the private school, reducing aid to the school district, and ensuring that aid to other school districts is not decreased, *see supra* notes 60-65 and accompanying text, the superintendent has the following duties:

1. Ensuring the pupils and parents are annually informed of the private schools participating in the program;

2. Annually submitting a report comparing academic achievement, daily attendance record, percentage of dropouts, percentage of pupils suspended and expelled, and parental involvement activities of participating pupils and pupils remaining in the public school; and

3. Monitoring the performance of the pupils attending the private schools under the program to ensure that the private schools are meeting the performance standards of subsection (7)(a) (*see supra* text accompanying note 54).

WIS. STAT. ANN. § 119.23(5)(c)-(d) & (7)(b) (West Supp. 1990). In addition, the superintendent may conduct one or more financial or performance evaluation audits, or both, of the program. *Id.* § 119.23(9)(a).

75. *Davis v. Grover*, No. 90-CV-2576, slip op. at 4.

76. *Id.* at 5.

77. The six schools are Bruce-Guadalupe Community School, Harambee Community School, Highland Community School, Juanita Virgil Academy, Urban Day School, and Woodlands School. *Davis*, No. 90-CV-2576, slip op.

78. Opponents of the choice program had filed a petition with the Wisconsin Supreme Court on May 30, 1990, seeking leave to commence an action under the court's original jurisdiction to challenge the constitutionality of the act under the state constitution. The petitioners in *Chaney* raised the three constitutional issues presented in *Davis*. The Supreme Court dismissed the petition as not within its original jurisdiction. *Chaney v. Grover*, No. 90-1200-OA (Wis., June 26, 1990).

79. The interveners included Wisconsin Association of School District Administrators, Inc.; Wisconsin Education Association Council; National Association for the Advancement of Colored People, Milwaukee Branch; Association of Wisconsin School Administrators; Wisconsin Congress of Parents & Teachers, Inc.; Milwaukee Administrators & Supervisors Council, Inc.; and Wisconsin Federation of Teachers. *Davis*, No. 90-CV-2576, slip op.

local, private bill; that it was violative of the public purpose doctrine; and that it violated the constitutional provision requiring uniform district schools. The action also raised the issue of the extent of the superintendent's authority in implementing the act.

Judge Susan Steingass rejected all three constitutional challenges and upheld the facial constitutionality of the act. Regarding public purpose, Steingass found that section 119.23 "relates to and is premised upon a reasonable legislative assessment of public purpose The Law's public purpose is, obviously, quality education."⁸⁰ Further, the implementation of the public purpose did not result in merely a local benefit but one that was statewide:

The educational lessons and improvements observed in Milwaukee benefit the whole state. If giving parents and students choices in the manner of their education increases the quality of that education, benefit inures not only to a few students in Milwaukee but to our educational system as a whole, both by the lessons learned and the education improved.⁸¹

Steingass also found that the legislation did not lose its public purpose because the state did not retain control over the education that students receive in private schools.⁸²

With regard to uniformity,⁸³ Steingass found that the constitutional provision did not require literal compliance with

80. *Id.* at 8.

81. *Id.* at 9.

82. *Id.* Steingass noted that it

is true that court decisions that have historically approved expenditure of public funds to private institutions for public purposes have relied upon the challenged enactment's requirement of accountability and control. However, no decision has required any particular manner of control and accountability. What is required is "[o]nly such control and accountability as is reasonably necessary under the circumstances to attain the public purpose" [citing *Reuter*, 44 Wis.2d 201, 216, 170 N.W.2d 790, 796 (1969).]

Id. at 9-10. She found that the law "contains such controls as are reasonably necessary" in that it was a pilot project which may or may not be changed once its results were known, it contained numerous internal controls (e.g., annual report, assignment, monitoring), and it required "detailed, direct reporting" to the legislature and standing committees. *Id.* at 10.

83. The uniformity clause of the Wisconsin Constitution reads:

The legislature shall provide by law for the establishment of district schools, which shall be nearly as uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein; but the legislature by law may, for the purpose of religious instruction outside the district schools, authorize release of students during regular school hours.

Wis. CONST. art. X, § 3.

section 121.02, regarding teacher certification and licensure, minimum hours of instruction, and a standardized curriculum.⁸⁴ More fundamentally, however, she found that the uniformity clause did not apply to the private schools because participation in the program did not turn them into public schools.⁸⁵ She believed it more accurate "to characterize participating schools as private schools that accept public school students."⁸⁶

On the final constitutional question, Steingass rejected the argument that the act was a private or local bill in violation of article IV, section 18 of the Wisconsin Constitution.⁸⁷ In support of this finding she relied on *Milwaukee Brewers v. Department of Health and Social Services*,⁸⁸ which proposes a test for analyzing legislation specific to a person, place, or thing.⁸⁹ The court of

84. *Davis*, No. 90-CV-2576, slip op. at 12, 15.

85. *Id.* at 15. Steingass elaborated, "It seems to me, rather, that public schools are one thing but that private schools are another, and that private schools can meet specialized needs of public schools students without necessarily becoming public schools for our purposes." *Id.*

86. *Id.* She also indicated that it may be possible to characterize them as "quasi-public" schools. *Id.* Later in the opinion and in another context, however, she indicated that "whether the participating private schools are regarded as private schools accepting public school students, or as public schools, is . . . irrelevant because these private schools are being supported to some degree by public taxation." *Id.* at 20.

87. The provision reads: "No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." WIS. CONST. art. IV, § 18. Steingass was later reversed on appeal on this issue. *Davis v. Grover*, 159 Wis.2d (Ct.App.) 150, 464 N.W.2d 220.

88. 130 Wis.2d 56, 387 N.W.2d 254 (1986). While she acknowledged that the parties argued whether the challenge should be assessed under *Milwaukee Brewers* or *Brookfield v. Milwaukee Metropolitan Sewerage District*, 144 Wis.2d 896, 426 N.W.2d 591 (1988), Steingass found the framework of the former to be most instructive and most comprehensive. She did not analyze the legislation under *Brookfield*. See *Davis*, No. 90-CV-2576, slip op.

89. The test has two parts:

[A] legislative provision which is specific to any person, place or thing is a private or local law within the meaning of art. IV, sec. 18, unless: 1) the general subject matter of the provision relates to a state responsibility of statewide dimension; and 2) its enactment will have direct and immediate effect on a specific statewide concern or interest.

Milwaukee Brewers, 130 Wis.2d at 115, 387 N.W.2d at 269. Both tests must be met to determine whether certain legislation is an exception to separate bill requirement.

Steingass had little difficulty finding that the general subject matter of § 119.23, "education of children," related to a state responsibility of statewide dimension. *Davis*, No. 90-CV-2576, slip op. at 18-19. She had more difficulty with the second part of the test, however. Nevertheless, she concluded that § 119.23 was addressed to "an urgent educational problem of the most immediate statewide concern." *Id.* at 19. She found first that

its nature, as well as its internal controls and reporting and assessment requirements, make it apparent that the legislature hoped to use it to gather comparative performance information for participating students and public school students. The legislature apparently intends thereby to learn some

appeals viewed the Milwaukee Parental Choice Program as classification legislation,⁹⁰ however, requiring analysis under the six-part test of *Brookfield v. Milwaukee Metropolitan Sewerage District*.⁹¹ The court concluded that section 119.23 failed the first two parts of the *Brookfield* test and was, therefore, unconstitutional.⁹² The case is currently on appeal to the Wisconsin Supreme Court, which has agreed to hear all issues.⁹³

One of the most interesting aspects of the appellate opinion was its invitation to the Wisconsin Supreme Court to reverse the decision and uphold the act. The court of appeals concluded that in its capacity as an "error-correcting court" *Brookfield* compelled it to invalidate section 119.23.⁹⁴ It stressed, however, that "were we not an error-correcting court, we might apply a variation on the *Milwaukee Brewers* test to experimental legislation"⁹⁵ and set out an analysis that would have upheld the statute.⁹⁶

lessons about quality education and choice to the end that these lessons be applied in educational programs in general.

Id. Secondly, she found that

the general subject of educational quality in Milwaukee is a matter of statewide interest and concern Third, given this statewide interest and reporting and information-gathering provisions which are part of the Law, what is learned in this program is intended to have an immediate effect both on education both in Milwaukee . . . and throughout the state.

Id.

90. The court found that it "applies only to a single class, cities of the first class" and "is not facially specific as to persons, places or things." *Davis*, 159 Wis.2d at 161-62, 464 N.W.2d at 225.

91. 144 Wis.2d 896, 426 N.W.2d 591 (1988). The court in *Davis* stated the test as:

(1) The classification must be based on substantial distinctions between the classes it creates. (2) The classification must be germane to the purpose of the law. (3) The classification must be open to additional members and not based on existing circumstances only. (4) The law must apply equally to all members of a class. (5) The characteristics of each class must be so different from those of the other classes as to reasonably suggest the propriety of substantially different legislation. (6) Curative legislation is general if it applies equally to all members of the class.

Davis, 159 Wis.2d at 161, 464 N.W.2d at 224-25 (citing *Brookfield*, 144 Wis.2d at 907-08, 426 N.W.2d at 597).

92. First, the court said it could "discern nothing about a city of the first class (one with a population over 150,000 and proclaiming itself a first class city) which requires it to have the Parental Choice Program." *Davis*, 159 Wis.2d at 163, 464 N.W.2d at 225 ("We are satisfied that mere size does not justify legislation favoring a large city but not a smaller city with a Parental Choice Program."). Second, it found that the classification did not have "a close relationship to the purposes of its provisions," *id.* at 164, 464 N.W.2d at 226: the purpose of the legislation was experimentation, and there was no reason that the experiment should be conducted in a first-class city. *Id.* at 164-65, 464 N.W.2d at 226. The court of appeals did not address the other issues.

93. *Davis v. Grover*, No. 90-1807, *review granted*, (Wis. March 5, 1991).

94. *Davis*, 159 Wis.2d at 167, 464 N.W.2d at 227.

95. *Id.*

96. The court stated that "for the purposes of art. IV, sec. 18 analysis, experimental

Reversing the trial court's decision as it did, the court of appeals did not address the issue of the extent of the superintendent's authority in administering the program. The trial court addressed the question, however, and recognized certain limitations. Although Judge Steingass did not have difficulty with the requirement of an intent form,⁹⁷ she held that "to the extent that the wording of these requirements [on the form] deviates from, exceeds or changes the language of the statute, it exceeds the superintendent's authority."⁹⁸ Thus, she determined that section 119.23 gave the superintendent no authority to impose additional requirements other than those explicitly contained in the act itself.

Steingass nevertheless found that the superintendent could, within certain limitations, impose other requirements on the participating schools provided he had a statutory basis independent

legislation could be put in the specific person, place or thing category, whether or not it is also classification legislation." *Id.*

The court further opined that § 119.23 could meet the first part of the *Milwaukee Brewers* test because "[w]hether nonsectarian private schools have a role in public education is a matter of substantial concern to parents, students, teachers and taxpayers throughout the state." *Id.* at 167-68, 464 N.W.2d at 227. The court had more difficulty in fitting experimental legislation into the second part of the *Milwaukee Brewers* test, which requires a direct or immediate effect upon the matter of statewide concern. Even here, however, the court suggested that a "slightly modified *Milwaukee Brewers* test," *id.* at 168, 464 N.W.2d at 227, could be used to uphold the legislation. Noting that the legislation did not fit comfortably into the second part of the *Milwaukee Brewers* test "because the effect of an experiment is postponed until the results are known," *id.*, the appellate court argued that

when the results of this experimental legislation are known, they are likely, whatever their nature, to have an immediate and direct effect on education in this state. If the results are positive, sec. 119.23 may cause a change in public education. If they are negative, the program envisioned by sec. 119.23 will die or be considerably modified, and other alternatives may be seen in a different light. Whatever happens, a direct and immediate effect on public education will occur.

Id.

97. *Davis*, No. 90-CV-2576, slip op. at 20.

98. *Id.* at 21. Steingass determined that the superintendent properly included the requirement of compliance with § 119.23 on the intent form. She also acknowledged that he may, "in the language and spirit of the Law," include other assurances:

that students be selected on a random basis; that there will be a representative on the pupil assignment counsel; that notice to applicants of acceptance or rejection will be sent in 60 days; that names of students enrolled, membership reports, and financial or performance audits or both will be submitted; that no more than 49% of enrollment will be from the Program; that there will be one of the statutory standards met; that the school is nonsectarian; that there will be compliance with 42 U.S.C. § 2000d; and that all safety and health codes will be met.

Id. at 20-21.

of section 119.23.⁹⁹ These requirements fit into one of two categories. The first category includes requirements that apply to private schools regardless of their participation in the program.¹⁰⁰ With regard to these requirements, Steingass held that the superintendent could not require the participating schools to sign a form assuring compliance unless he required other private schools to do so, "because to require more of them permits at least an inference that these schools are being singled out in part because the superintendent does not approve of the Program."¹⁰¹

The second category relates to statutory provisions that apply to public schools and public school programs or activities.¹⁰² Steingass held that the superintendent could require the participating schools to meet these standards because "the Parental Choice law is a public school program."¹⁰³ Even in these areas, however, she ruled that the superintendent may not "make those burdens more onerous for this Program than for others" and may only require "guarantees of the participating schools in the same manner as he requires it of public schools and other public school programs or activities."¹⁰⁴

In spite of this reasoning, Steingass found that the superintendent did not have authority to require participating schools to comply with the Education of the Handicapped Act.¹⁰⁵ Agreeing that qualified handicapped students cannot be denied access to the choice program, she concluded that not every participating school must provide access for two reasons: first, because not all public schools do; and second, because the federal act does not likely cover placements affected by parents participation in the choice program.¹⁰⁶ Parents, in accepting the

99. See *Davis*, No. 90-CV-2576, slip op. at 21.

100. *Id.* at 21. Steingass determined that WIS. STAT. ANN. §§ 118.165 and 118.167 fit into this category.

101. *Davis*, No. 90-CV-2576, slip op. at 21.

102. Steingass determined the following to be in this category: Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. §§ 1681-1686; the Age Discrimination Act of 1975, as amended, 42 U.S.C. §§ 6101-6107; § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; Title VI of the Civil Rights Act of 1964, 20 U.S.C. § 2000d; the Family Education Rights and Privacy Act, 20 U.S.C. § 3171; the Drug-Free School and Communities Act of 1986, 20 U.S.C. §§ 3171-3197; and the "protection of individual rights and liberties guaranteed by state and federal constitutional provisions." *Davis*, No. 90-CV-2576, slip op. at 21-22.

103. *Id.* at 21.

104. *Id.* at 22.

105. 20 U.S.C. §§ 1400-1485 (1988).

106. *Davis*, No. 90-CV-2576, slip op. at 23 (citing opinion letter of July 27, 1990, of Under-Secretary Ted Saunders of the U.S. Department of Education to Milwaukee Superintendent of Schools, Robert S. Peterkin).

“perceived greater benefits” of the Milwaukee program, forego their rights to other public placement.¹⁰⁷

Relying on the trial court’s opinion, the Department of Public Instruction created emergency rules under its rulemaking authority.¹⁰⁸ The rules purport to establish eligibility criteria and to set requirements for private schools participating in the program and to set forth requirements for private schools to receive state aid.¹⁰⁹ The rules also set requirements for eligible school districts¹¹⁰ and specify the state superintendent’s responsibilities in monitoring the performance of students participating in the program.¹¹¹

II. DEBATE OVER SCHOOL CHOICE

The Milwaukee Parental Choice Program represents a private school choice plan as opposed to a choice plan for public schools.¹¹² To put the Milwaukee program in context, it may be helpful to sketch the differences.

A. Public School Choice

Public school choice plans change the common practice for assigning students. Under the traditional system, the parents’ residence determines the child’s school. With choice programs, however, parents may send their children to any one of a group of public schools. Public school choice plans vary, and each has its distinct purposes.

107. *Id.*

108. *See* WIS. ADMIN. CODE PI §§ 35.01-35.05 (May 1991).

109. *Id.* § 35.03. The requirements include submitting a notice of intent to participate to the state superintendent, *id.* § 35.03(1), adherence to certain procedural requirements, *id.* § 35.03(2), providing certain assurances to the department, *id.* § 35.03(3), providing comparable data to the state superintendent, *id.* § 35.03(4), and meeting continuing eligibility criteria, including pupil advancement criteria and parental advancement criteria, *id.* § 35.03(5).

110. *Id.* § 35.04. These requirements include providing the state superintendent access to pupil record files in order to compare school district data with the private school data, as well as providing access to parental involvement criteria and assistance from school district personnel responsible for school records.

111. *Id.* § 35.05.

112. This division often marks the extent of support of many choice advocates. *See infra* notes 113-27 and accompanying text.

The program that received widespread attention in Minnesota¹¹³ is open enrollment. In open enrollment plans, parents may send their children to any public school in the state.¹¹⁴ Intradistrict and interdistrict transfers are similar, but the choice is limited to schools within the district of residence or to schools within certain participating districts.¹¹⁵ The common thread of these three plans is enabling parents to select which public school their children will attend. Parents choose from among already existing public schools.

Similar to open enrollment plans are majority-to-minority programs. These plans allow any student enrolled in a school in which he is of the majority race to transfer to a school in which he is of the minority race.¹¹⁶ Unlike typical open enrollment plans, which are designed to provide parents with choice, majority-to-minority plans are designed to further desegregation efforts.

Alternative schools and magnet schools are important variations of public school choice. Sometimes called teacher-initiated schools, alternative schools¹¹⁷ emphasize particular educational objectives, such as performing arts or math and science, or have distinct educational philosophies.¹¹⁸ Their organization varies to meet the needs of students. Magnet schools are public schools of high quality usually built in urban areas as part of a desegregation plan.¹¹⁹ The high quality is an incentive for parents to enroll their child. The characteristic common to

113. See, e.g., Rist, "Choice" Sells in Minnesota, but Who Else Will Buy It?, *EXE. EDUC.*, Mar. 1989, at 24; Kolderie, *The Essential Principals of Minnesota's School Improvement Strategy*, EQUITY & CHOICE, Winter 1988, at 47.

114. CHOOSING BETTER SCHOOLS, *supra* note 13, at 6; *The Choices among "Choice,"* SCH. ADMIN., Aug. 1989, at 16-17 [hereinafter *Choices*]; Armor, *After Busing: Education and Choice*, PUB. INTEREST, Spring 1989, at 24, 34-36.

115. CHOOSING BETTER SCHOOLS, *supra* note 13, at 6-7; *Choices*, *supra* note 114, at 16-17; Armor, *supra* note 114, at 30-32.

116. Armor, *supra* note 114, at 31.

117. For an interesting account of how East Harlem developed its alternative school programs, see Brandt, *On Public Schools of Choice: A Conversation with Seymour Fliegel*, EDUC. LEADERSHIP, Dec. 1990/Jan. 1991, at 20.

118. See *id.*; see also Toch, Linnon & Cooper, *Schools That Work*, U.S. NEWS AND WORLD REPORT, May 27, 1991, at 58. The authors of "Schools That Work" use the term "magnet" to describe both alternative and magnet schools.

119. CHOOSING BETTER SCHOOLS, *supra* note 13, at 6; *Choices*, *supra* note 114, at 17; see also *Missouri v. Jenkins*, 110 S.Ct. 1651, 1657 n.6 (1990) ("Magnet schools," as generally understood, are public schools of voluntary enrollment designed to promote integration by drawing students away from their neighborhoods and private schools through distinctive curricula and high quality.") (citing Price & Stern, *Magnet Schools as a Strategy for Integration and School Reform*, 5 YALE L. & POL'Y REV. 291 (1987)).

both these choice plans is diversified educational purposes.¹²⁰ In contrast, open enrollment plans use existing regular public schools that are often identical in organization and purpose.

Other public school choice programs involve postsecondary options and second-chance programs.¹²¹ A postsecondary options plan allows upper level high school students to take courses at a college or university for high school or college credit. Second-chance programs are designed for at-risk students and dropouts who have not succeeded at their regular public schools; these programs allow such students to start again in an alternative school. The purpose of each of these plans is to assist a particular class of students.

B. Private School Choice

The Milwaukee choice program is a private choice plan. Private school choice in this context refers to funding the parents' decision to send their children to a private school. Usually, attempts at private school choice center around vouchers and tuition tax credits.¹²²

Vouchers are like educational coupons provided by the state that parents may redeem at the school of their choice. Under a voucher plan, state public officials would issue a voucher for each school age child. Parents would then enroll their child in a school using the voucher, and the school would redeem the voucher with the public authorities for cash.¹²³

Tuition tax credits are income tax breaks, either at the state or federal level. Under such plans, parents who pay tuition can deduct the amount from their income taxes, up to the amount of

120. Chubb and Moe call choice programs consisting of alternative and magnet schools "dissappointing" because of their limited scope. While acknowledging that such programs have positive consequences on the participating students, they point out that only a small portion of students can attend such schools and, further, that such programs may have a negative impact on the remaining schools because they require additional funding, leaving less for the rest of the schools. J. CHUBB & T. MOE, *supra* note 8, at 208-09.

121. CHOOSING BETTER SCHOOLS, *supra* note 13, at 7-8; *Choices*, *supra* note 114, at 16.

122. CHOOSING BETTER SCHOOLS, *supra* note 13, at 8.

123. Note, *Education Vouchers and Tuition Tax Credits: In Search of Viable Public Aid to Private Education*, 10 J. LEGIS. 178, 179 (1983). For a discussion of proposed voucher plans, see *id.* at 180-85. See also Note, *The Increasing Judicial Rationale for Educational Choice: Mueller, Witters and Vouchers*, 66 WASH. U.L.Q. 363, 367-70 (1988).

the credit.¹²⁴ Such a plan was recently upheld from an establishment clause challenge in *Mueller v. Allen*.¹²⁵

The Milwaukee program adopted the voucher form of private school choice. It is somewhat different from most proposals in that no voucher or certificate is issued to parents. Rather, participating schools send proof of enrollment to the Department of Public Instruction to receive funds from the public authorities. The difference amounts to little more than form, however.

A key issue involving private school choice is whether parochial and church schools should participate. The argument for excluding religious schools is generally couched in terms of separation of church and state, but it has also been suggested that religious institutions are inappropriate educational vehicles.¹²⁶ The earliest proposal in Wisconsin would have included religious schools; however, the legislature resolved the issue by excluding them.¹²⁷

C. *The New Public Schools*

Finally, in view of the issue over the superintendent's power to regulate the schools participating in the Milwaukee program, Judge Steingass' opinion in the *Davis* case, and the decision of the Wisconsin Supreme Court to review all issues in that case, it is helpful to consider a third alternative in the choice debate. Some choice plans would blur present distinctions between public and private schools and introduce a new system of public schools. Chubb and Moe present such a plan their book *Politics, Markets, and America's Schools*. Using as their "guiding principle" the idea that "public authority must be put to use in creating a system

124. Note, *Education Vouchers and Tuition Tax Credits*, *supra* note 123, at 179. For a discussion of past proposals for tuition tax credit plans, see *id.* at 185-91.

125. 463 U.S. 388 (1983).

126. *E.g.*, Levin, *Education as a Public and Private Good*, 6 J. POL'Y ANALYSIS & MGMT. 628, 636 (1987):

[T]his raises a dilemma regarding the role of private schools with narrow political and religious sponsorship to provide important social benefits. If these schools are failing to produce important public goods such as citizen training for democracy, to what degree is the overall functioning of the society impaired? The answer, in general, is that as long as the numbers of persons lacking those orientations are relatively small, little problem exists.

Some research indicates that religious institutions are particularly appropriate as educational vehicles. See J. COLEMAN & T. HOFFER, *PUBLIC AND PRIVATE HIGH SCHOOLS: THE IMPACT OF COMMUNITIES* (1987).

127. See *supra* notes 31-32.

that is almost beyond the reach of public authority,"¹²⁸ they propose to "create a new system of public education."¹²⁹ In essence, the state would set minimal criteria defining a "public school" and allow any group to charter one; existing public and private schools could participate.¹³⁰ Both the state and the district would establish "scholarships" for each child residing in the district and pay the money to the school enrolling the child. The system would have certain restrictions on student selection and payments of additional amounts in tuition.¹³¹

The key element in Chubb and Moe's plan is to make the new public schools as autonomous as possible. They propose minimal requirements defining the new public school "roughly corresponding to the criteria many states now employ in accrediting private schools—graduation requirements, health and safety requirements, and teacher certification requirements."¹³² The resulting autonomy would provide the organization necessary for effective schools.¹³³

Ted Kolderie offers another plan for creating a "new public school system."¹³⁴ The essential feature of his plan is to create new schools "which operate under contract to some public entity"¹³⁵ while concurrently divesting the state of the ownership of existing public schools.¹³⁶ He disagrees, however, with Chubb and Moe's assessment that the new public schools must be autonomous¹³⁷ and argues that his "contract" idea would provide needed "public accountability."¹³⁸ He would also funnel state funds to the new public schools.¹³⁹

In this respect, the Milwaukee Parental Choice Program raises fundamental questions. In *Davis v. Grover*, Judge Stiegass indicated that participating private schools are a type of new public school. Stiegass' holding that the superintendent may

128. J. CHUBB & T. MOE, *supra* note 8, at 218.

129. *Id.* at 219.

130. *Id.*

131. *Id.* at 219-23.

132. *Id.* at 219.

133. See *infra* notes 149-55 and accompanying text.

134. T. KOLDERIE, *supra* note 20, at 13.

135. *Id.*

136. *Id.* at 16-17. This is consistent with his premise that "[t]he state's job is not to run the schools, but to provide a workable system for those who do." *Id.* at 10.

137. *Id.* at 13.

138. *Id.* Kolderie argues that plans to use school-site management or existing private schools under some (usually minimal) public supervision are "flawed" because "no one has yet been able to solve the dilemma of autonomy and public accountability." *Id.* at 12.

139. *Id.* at 15.

require certain concessions from the participating private schools adopts an approach like Kolderie's, with an emphasis on direct accountability to state educational officials. Steingass stated:

[T]he superintendent does have the obligation by statute to supervise and inspect the public schools which include elementary and high schools supported by public taxation. . . . I conclude that whether the participating private schools are regarded as private schools accepting public school students, or as public schools, is here irrelevant because these private schools are being supported to some degree by public taxation.¹⁴⁰

The Wisconsin legislature rejected this approach, however, when it rejected Assembly amendment 8, a plan similar to the Milwaukee School Board proposal to contract to private schools.¹⁴¹ If the legislature created new "public schools" at all, it followed a model similar to Chubb and Moe's. It imposed few requirements on the participating schools, making them as autonomous as possible.¹⁴²

It is doubtful that the Milwaukee choice program creates a new "public school," however. The legislature's intent was that the participating schools remain private schools as traditionally understood.¹⁴³ The only criteria beyond certain procedural requirements are that the participating school be nonsectarian, comply with 42 U.S.C. section 2000d, meet all health and safety laws or codes that apply to public schools, and meet one of four progress standards.¹⁴⁴ On closer review, these provisions appear to be eligibility criteria rather than regulations of participating schools. For instance, a sectarian private school or one that discriminates on the basis of race could not participate in the program, whereas a nondiscriminating, nonsectarian private school is eligible to participate.

D. Fundamental School Choice Issues

The Milwaukee Parental Choice Program represents one resolution of school choice issues. Opinions on whether to adopt

140. *Davis*, No. 90-CV-2576, slip op. at 20.

141. *See supra* note 36.

142. *See supra* notes 49-58 and accompanying text.

143. *See infra* text accompanying notes 210-17.

144. *See supra* notes 51-55 and accompanying text.

school choice, and what form choice should take, are as diverse as the numbers of authors on the subject. Views range from opposition and skepticism to cautious support and advocacy.¹⁴⁵

Even among choice advocates the opinions are diverse. A large number of authors would limit choice to public schools and oppose any kind of private school choice.¹⁴⁶ Others believe that such a limitation would eviscerate any meaningful choice and would extend it to include private schools.¹⁴⁷ Even some of these would impose certain restrictions, however.¹⁴⁸

1. Competition and Markets

Central to the debate over choice is academic achievement. Many choice advocates believe that introducing competition and market forces in the school system will increase student performance.¹⁴⁹ Competition will force schools to become more effective. "Schools that compete for students, teachers, and dollars will, by virtue of their environment, make those changes that allow them to succeed."¹⁵⁰ Schools that fail to produce will not attract students and will be forced to shut down. In other words, poor academic achievement is due to the public school monopoly. Breaking up this status quo would introduce incentives, thereby increasing effectiveness.¹⁵¹

145. *E.g.*, Association for Supervision and Curriculum Development, PUBLIC SCHOOLS OF CHOICE 23-24 (1990) [hereinafter ASCD]; Nathan & Finch, *Voucher/Choice Battle Heats Up. Pro: Families Should Have Choice; Con: Public School Vouchers Jeopardize Equal Opportunity*, SCH. ADMIN., Sept. 1985, at 10.

146. *E.g.*, Raywid, *Public Choice, Yes; Vouchers, No!*, 68 PHI DELTA KAPPAN 762 (1987); Clinchy, *supra* note 4, at 289.

147. *See, e.g.*, IMPROVING SCHOOLS, *supra* note 12, at 18-20; Coons & Sugarman, *The Private School Option in Systems of Educational Choice*, EDUC. LEADERSHIP, Dec. 1990/Jan. 1991, at 54.

148. *See, e.g.*, J. CHUBB & T. MOE, *supra* note 8, at 219-25. Chubb and Moe believe such restrictions should be minimal, however. *Id.*

149. There is strong evidence that students in private schools out-perform their public school counterparts. *See generally* J. COLEMAN, T. HOFFER & S. KILGORE, HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED (1982); Hoffer, Greeley & Coleman, *Achievement Growth in Public and Catholic Schools*, 58 SOCIOLOGY & EDUC. 74 (1985); *see also* Lott, *Why Is Education Publicly Provided?, A Critical Survey*, 7 CATO J. 475, 477 (1987); Spicer & Hill, *supra* note 20, at 103. Choice advocates argue that such a dynamic can be imported into the public via choice. *Id.* at 101-02, 106-07.

150. TIME FOR RESULTS, *supra* note 11, at 12; *see also* Finn, *Education That Works: Make the Schools Compete*, 65 HARV. BUS. REV. 63 (1987).

151. *E.g.*, Weidenbaum, *The Challenge to American Education: Upsetting the Status Quo*, EXECUTIVE SPEECHES, June 1990, at 16. *Contra* Finch, *The Claims of School Choice and Snake Oil Have a Lot in Common*, AM. SCH. BD. J., July 1989, at 31, 31-32. *See also* Rist, *supra* note 113, at 25-26.

Chubb and Moe also stress that school organization in large part determines academic achievement. Effective schools are those with autonomy.¹⁵² The public schools, in contrast, have a bureaucracy that vitiates their effectiveness.¹⁵³ Chubb and Moe's support of choice, therefore, is part of their broader purpose of institutional reform, in which the school system is built on decentralization, competition, and choice.¹⁵⁴ The market will restructure schools as autonomous institutions. This autonomy, coupled with indirect control through competition and parental choice, will provide the incentive for schools to move toward more effective organization.¹⁵⁵

Apparently, the Wisconsin legislature has adopted competition as one of its rationales for the Milwaukee program. The program not only includes private schools, but it provides them with funds that would have gone to the public school district. Further, when asked why she supported the Milwaukee plan rather than an attempt to improve the public schools, Polly Williams, the key sponsor, replied:

We've tried to do that for years, and the best we get is, "Well, we're the experts, you are just parents." We're tired of that excuse. Look, if you go to a doctor and you stay sick, at some point don't you have a right to a second opinion? The choice plan is our second opinion. The folks who run the poverty industry in this town are worried that kids will get a better education in this town at schools that cost half the amount that kids will spend on the public schools. In their shoes, I'd be worried too.¹⁵⁶

152. J. CHUBB & T. MOE, *supra* note 8, at 186-87.

153. *Id.* at 187. *Contra* Shannon, *Less Government Is Not the Answer*, EDUC. LEADERSHIP, Dec. 1990/Jan. 1991, at 61.

154. J. CHUBB & T. MOE, *supra* note 8, at 189.

155. Competition is a normal part of private enterprise. The common assumption regarding education, however, is that it is a proper function of government. There is nevertheless nothing inherent in such an assumption: education could be a totally private function. For a discussion of this issue and of government's role in education, see Cooper, *School Reform in the 1980s: The New Rights Legacy*, 24 EDUC. ADMIN. Q. 282, 284-88 (1988). Cooper describes two alternative positions: that education should be a private enterprise on par with such industries as the food industry; and that government should fund and support education but should not own or control the schools. A third possibility, of course, is the current system of government ownership of schools. See also Lott, *supra* note 149; Spicer & Hill, *supra* note 20. For a discussion of privatization of education, see M. LIEBERMAN, *PRIVATIZATION AND EDUCATIONAL CHOICE* (1989) and M. LIEBERMAN, *BEYOND PUBLIC EDUCATION* (1986).

156. *Fund*, *supra* note 35, at 40.

2. School Diversity and Autonomy

While some choice supporters, such as Mary Ann Raywid and Charles Glenn, believe that choice will produce higher academic achievement, they are less inclined to attribute that success to competition. In fact, they are quite critical of such thinking.¹⁵⁷ Rather, they believe that under public school choice, diverse public schools will meet the needs of the many different types of students and increase academic performance. Students with different backgrounds, interests, talents, and abilities need different school environments; thus, diverse programs will increase performance, not because the schools compete among themselves, but because the diversity enables parents and students to choose a type of school best fitted for individual learning needs.¹⁵⁸ These genuine choices, and not merely choice, are necessary for choice to work. According to Kolderie, "For choice to work—to help the student and to stimulate the district to change—the state will have to provide both choice and *choices*: different schools for kids to choose among where they live."¹⁵⁹ The mere right to choose from identically organized and philosophically oriented schools is not sufficient. "[C]hoice without diversity is no choice at all."¹⁶⁰

The argument for diverse schools rests on the premise that no single way to educate is best. Clinchy states:

[C]hoice requires that we abandon our cherished notion that there can be a single, all-inclusive definition of "educational excellence": a single, standardized approach to schooling; a single, canonized, culturally literate curriculum; and a single way of organizing and operating a school that is suitable for all students and serves all students equally well.¹⁶¹

The goal is to replace standardization with diversity.¹⁶² Schools should specialize in particular areas, such as math and science,

157. *E.g.*, Raywid, *supra* note 146, at 764 ("I cringe at advocates' assurances that competition will improve schools and force the bad ones out of business. Those individuals seem to know little about schools and classrooms, how they work, and what they require to succeed.") Raywid also argues that the analogy between competition in the production of goods and services and competition in education is "misguided." *Id.*

158. *Id.* at 766-67.

159. T. KOLDERIE, *supra* note 20, at 12.

160. Clinchy, *supra* note 4, at 290-92.

161. *Id.* at 290. Accord Raywid, *supra* note 146, at 766; see also Cody, *I Hate To Be a Hypocrite, But . . .*, EQUITY & CHOICE, Winter 1985, at 25.

162. Clinchy, *supra* note 4, at 290; Raywid, *supra* note 146, at 766.

performing arts, or the humanities. The result would be diversified school programs and increased learning.

Choice and diversified schools would also produce greater school and teacher autonomy,¹⁶³ an idea also called school-based or school-site management. Proponents contend autonomy allows the school to establish its own philosophy of education. Additionally, teachers enjoy a greater sense of professionalism, resulting in increased performance and job satisfaction.¹⁶⁴

This argument has substance. Research indicates education is most effective when schools and educators have a common sense of mission. For instance, Catholic schools have outperformed their secular and Protestant counterparts, and this performance may be due to the shared philosophy of the school and school community.¹⁶⁵ Autonomous, diverse schools, therefore, would be more effective because each would be able to define its own educational philosophy and mission.

The Milwaukee program incorporates this concept by providing students with the opportunity to attend diverse educational institutions. Wisconsin legislature, however, rejected the idea of using *only* public schools to create diversity. But it may have gotten the better hand on the choice experts. Even assuming that public schools may be able to create diverse school options, using private schools clearly will create more options in less time.

3. Desegregation, Resegregation, and Equity

Some issues raised by choice involve values unrelated to student performance. The effect of choice on desegregation is often an item of concern. Armor and Lott believe choice can further desegregation.¹⁶⁶ While acknowledging that voluntary desegregation acquired a bad name when the courts rejected "freedom of choice plans" in the South during the 1960s,¹⁶⁷ Armor points to the recent success of court-approved choice plans¹⁶⁸ as proof that choice is effective as a desegregation tool:

163. Raywid, *supra* note 146, at 767.

164. *Id.* at 767; *see also* Clinchy, *supra* note 4, at 292.

165. *See generally* J. COLEMAN, T. HOFFER & S. KILGORE, *supra* note 149.

166. Armor, *supra* note 114, at 28-29; Lott, *supra* note 149, 482-83.

167. Armor, *supra* note 114, at 25.

168. For an order using these alternatives in its desegregation plan, *see* Jenkins v. State of Missouri, 639 F. Supp. 19 (W.D. Mo. 1985), *modified*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987). This Kansas City desegregation plan was recently described in Presser, *Broken Dreams*, A.B.A. J., May 1991, at 60.

The success of magnet and choice programs has revealed a basic principle: effective school integration is attained not by racial balance formulas, but by educational incentives that also promote integration. Program diversity coupled with the right of parents to choose freely among programs can advance integration while satisfying broader needs in the American educational system.¹⁶⁹

Others, however, believe school choice, or at least choice without restrictions, may lead to resegregation of the schools.¹⁷⁰

In addition to racial segregation, some opponents of school choice, or at least private school choice, assert that unrestricted choice will lead to socio-economic stratification. Mary Ann Raywid maintains that vouchers and other forms of private school choice will create a "two-tiered educational system consisting of nonpublic schools and pauper schools."¹⁷¹ This two-tiered system would be ruinous to disadvantaged children and would constitute a "step backward in the march to opportunity."¹⁷² Raywid and others view such a situation as inequitable.¹⁷³ Glenn believes that "[a] system of unrestricted school choice—a true 'free market'—is almost certain to result in significant inequities between schools, as well as in increased racial segregation."¹⁷⁴ To them, the history of vouchers suggests that "only a highly regulated and closely monitored voucher arrangement could protect disadvantaged students from the ills of marketplace."¹⁷⁵

The Milwaukee program does not ignore these equity concerns. Only low-income students can qualify under the program.¹⁷⁶ Thus, the goal is to assist those in the lower socio-economic class and not to fund the private education of the more advantaged. Further, while the statute itself has no explicit provisions to advance

169. Armor, *supra* note 114, at 28; see also Alves & Willie, *Controlled Choice Assignments: A New and More Effective Approach to School Desegregation*, 19 URBAN REV. 67 (1987).

170. See, e.g., Rossell, *The Buffalo Controlled Choice Plan*, 22 URBAN EDU. 328 (1987) (choice results in racial isolation or integration, depending on how choice is used and regulated); Futrell, *Some Equity Concerns about Choice and Vouchers in Education*, EQUITY & CHOICE, June 1986, at 63.

171. Raywid, *supra* note 146, at 763; see also, Toch, Linnon & Cooper, *supra* note 118, at 63-64.

172. Raywid, *supra* note 146, at 763.

173. E.g., *id.* at 764; see also Pearson, *Myths of Choice: The Governor's New Clothes*, 70 PHI DELTA KAPPAN 821 (1989); Moore & Davenport, *Cheated Again: School Choice and Students at Risk*, SCHOOL ADMIN., Aug. 1989, at 12.

174. Glenn, *Putting School Choice in Place*, 71 PHI DELTA KAPPAN 295, 297 (1989).

175. Raywid, *supra* note 146, at 764.

176. See *supra* note 45 and accompanying text.

desegregation, it is clearly designed to assist minorities. The program applies only to the largest city with the largest population of minorities.

4. Parental Prerogative and the Common School

Choice, particularly private school choice, is also desirable because it favors parental involvement in education. The law has always recognized the duty and right of parents to nurture and educate their children.¹⁷⁷ Thus, some argue that as a normative proposition, parents should control the education of their children.¹⁷⁸ Such arguments militate strongly for choice.

Against this view is the recent trend in which the state has assumed more control over education.¹⁷⁹ As state education became more pervasive, parental rights began to conflict with the "right of a democratic society to assure its reproduction and continuous democratic functioning through providing a common set of values and knowledge."¹⁸⁰ This conflict has historically been resolved by "a political compromise combining elements of choice and diversity with uniformity into a system of public schools."¹⁸¹ In the past thirty years, however, public schools have become more uniform at the expense of parents' historical rights. The reaction to these changes may account for the recent support of private school choice.¹⁸²

State involvement in education derives from the view that education serves a public good.¹⁸³ Public schools are necessary to inculcate a dominant set of values and knowledge and to create citizens who can function in a democracy.¹⁸⁴ This homogenization

177. See 1 W. BLACKSTONE, COMMENTARIES *450-51; 2 J. KENT, COMMENTARIES *195.

178. See, e.g., J. WHITEHEAD, PARENTS' RIGHTS 148-53 (1985).

179. 1 H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 573 (2d ed. 1987).

180. Levin, *supra* note 126, 629. Accord ASCD, *supra* note 145, at 23-24; see also Shanker, *Comment*, 6 J. POL'Y ANALYSIS & MGMT. 643 (1987). *Contra* Lott, *supra* note 149, at 482-83.

181. Levin, *supra* note 126, at 631.

182. *Id.*

183. Lott, *supra* note 149, at 483-84; Levin, *supra* note 126, at 629-31.

184. These values include:

racial, ethnic, religious, and class tolerance; respect for cultural pluralism; respect for rights of others; development of a shared national identity and history; inculcation of the Protestant work ethic; recognition of the importance of private property and property rights; promotion of thrift and delayed gratification and of being an active participant in the democratic process.

Spicer & Hill, *supra* note 20, at 101.

through public education seems essential to the proper functioning of a democracy. The idea that education is a public good is therefore closely related to accountability, and some opposition to private school choice is due to the assumption that the schools would not be accountable to the state for the expenditure of state-provided funds.¹⁸⁵

This issue is at the heart of the dispute in *Davis v. Grover* over the extent of the superintendent's authority in administering the program. The Milwaukee program does not endorse state paternalism over education. Rather, it sharply limits the state's role to providing funds. To that extent, it enhances the role of parents. Grover sees this limitation of the state's role as a threat to public education, however, and believes that the participating schools should be as accountable to the state as the public schools.

Grover instituted the requirements at issue in *Davis* to ameliorate the problem of accountability in a program he believes to be "fundamentally flawed."¹⁸⁶ He maintains that the school choice program raises important philosophical issues about the role of education in society today. To him, private school choice "completely disregards the broader society we live in":

Horace Mann talked about a common school—not in the traditional European sense of a school for common people, but a school common to all people, available and equal to all, part of the birthright of every American child. It was to be for rich and poor alike, not only free, but the equivalent in quality of any comparable private institution. The common school was seen as the mechanism not only for educating but also for reinforcing the social values of pluralism, diversity, and equal opportunity for all.

Private school choice says just the opposite. Go off and do your own thing. Resegregate. Pursue any doctrine you want. Start a private school of your own. If it is good for one minority group, equity will soon demand that all other groups have the same opportunity.¹⁸⁷

5. Limitations on Choice

Controlled choice plans attempt to use the advantages of choice but try to moderate any harmful effects by limiting choice

185. See, e.g., Grover, *supra* note 33.

186. Wisconsin Department of Public Instruction, A Background Paper on Private School Choice (Aug. 1990).

187. Grover, *The Perils of Choice* (Aug. 6, 1990).

to some defined standard.¹⁸⁸ Proponents of these plans maintain that, while choice is important for effective schools, so too are certain restrictions that would prevent parents from exercising choice in ways that would increase racial, social, or economic segregation.

The key to obtaining meaningful reform is to increase the competitive pressure on educational providers without facilitating the exercise of household choice based on social mix. This suggests to us that any scheme to increase competition must restrict the ability of households to physically remove their offspring from contact with certain class and racial groups.¹⁸⁹

They believe both choice and control are necessary for effective schools.

In a controlled choice plan, the school system adopts an assignment policy that avoids these harmful results.¹⁹⁰ According to Glenn, a good assignment policy is one that "systematically weighs a number of considerations," which include distance and racial and socio-economic factors.

For example, a child whose older sibling attends a popular school might be given a preference for assignment to the same school. A child who lives in walking distance might be given a similar preference. A child whose presence would make the school more diverse with respect to race or social class might be given a preference as well.¹⁹¹

All forms of choice are carefully controlled so that every parent and student has "an equal chance to benefit from the advantages that choice confers."¹⁹² Glenn also identifies a bad assignment policy as "one that favors those parents who have inside knowledge or influence or who are particularly well organized to take advantage of a complicated process."¹⁹³

The Milwaukee program has some limitations on choice. Currently only certain low-income students may participate, and

188. See Willie, *Controlled Choice Avoids the Pitfalls of Choice Plans*, EDUC. LEADERSHIP, Dec. 1990/Jan. 1991, at 63.

189. Spicer & Hill, *supra* note 20, at 107-08.

190. Glenn, *supra* note 174, at 297; see also Nathan, *Before Adopting School Choice, Review What Works and What Fails*, AMER. SCH. BD. J., July 1989, at 28.

191. Glenn, *supra* note 174, at 297.

192. Clinchy, *supra* note 4, at 292.

193. Glenn, *supra* note 174, at 297.

the program applies to only one city and is limited to one percent of that school district's membership.¹⁹⁴ Apparently, these aspects of the program are part of its experimental nature and are designed to prevent the wholesale destruction of the public schools. The program also creates a committee to ensure a balanced representation of students in the participating schools, although the legislation does not establish any criteria.

III. LEGAL ISSUES

The Milwaukee Parental Choice Program raises a number of legal issues. One, addressed by the trial court in *Davis v. Grover*, involves the authority of the state superintendent to regulate participating private schools.¹⁹⁵ Presumably the Wisconsin Supreme Court will address this issue if it upholds the legislation from the constitutional challenges.¹⁹⁶ How it determines this question may well be the most significant aspect of its decision. In fact, that resolution could have more impact than the choice legislation itself.

Also, not raised in *Davis v. Grover* are constitutional issues resulting from the statutory classifications. Section 119.23 classifies the private schools that may and may not participate in the choice program. Only nonsectarian private schools that comply with 42 U.S.C. section 2000d and with certain health and safety requirements, and that meet certain progress standards under the program can qualify. Such classifications may violate the equal protection clause of the fourteenth amendment.

Implicated by the equal protection issue is a third issue that concerns the establishment clause of the first amendment. A finding that the extension of school choice to religious private schools amounts to the establishment of religion would necessarily end any inquiry into whether the sectarian-nonsectarian classification was a violation of the equal protection clause. Also, even if the equal protection clause did not mandate the inclusion of religious schools in private school choice plans, the possibility that legislatures would consider extending choice to include such schools raises this issue.

194. See *supra* notes 41-47 and accompanying text.

195. See *supra* text accompanying notes 72-75 & 97-111.

196. The Wisconsin Supreme Court has granted review of *Davis v. Grover* and has agreed to hear arguments on all the issues. *Davis v. Grover*, No. 90-1807, review granted (March 5, 1991). Oral arguments are scheduled for October 4, 1991. Meanwhile the program is continuing.

A. *State Regulation of Participating Private Schools*

As *Davis v. Grover* indicates, at issue in private school choice plans is the extent of state officials' authority over participating schools. The trial court in the *Davis* case addressed the superintendent's rights and responsibilities in administering the choice plan.¹⁹⁷ First, Judge Steingass found that the superintendent had no authority to impose any requirements other than those in the statute.¹⁹⁸ Second, she held that the superintendent did have authority to hold private schools to requirements imposed on them under independent legislation.¹⁹⁹

Steingass' third conclusion presents a thorny question, however. She held that the superintendent had authority to impose certain requirements on the participating private schools that are not expressly mandated by the statute and that are not required of other private schools.²⁰⁰ The holding raises the question of the nature of the private schools that participate in the program. Do they remain private schools as traditionally understood, or do they become a hybrid—something between a public and a private school? Any private school choice plan necessarily will face this issue, either expressly in legislation or as in *Davis* through court decision.²⁰¹

Steingass equivocated over the nature of the participating schools. At one point she found that the participation of private schools in the program did not turn them into public schools.

It seems to me, rather, that public schools are one thing but that private schools are another, and that private schools can meet specialized needs of public school students without necessarily becoming public schools for our purposes. . . . Further, students . . . may choose to opt out of public education and accept an education that the district schools might regard

197. *Davis*, No. 90-CV-2576, slip op. at 20-24.

198. *Id.* at 21; see also *supra* note 98 and accompanying text.

199. *Davis*, No. 90-CV-2576, slip op. at 21 ("It is self-evident that these schools must comply, regardless of their participation in the program."); see also *supra* notes 100-01 and accompanying text.

200. See *Davis*, No. 90-CV-2576, slip op. at 21-22; see also *supra* notes 102-04 and accompanying text.

201. The nature of new schools of choice is a contemporary issue. The new Education Secretary Lamar Alexander has proposed a "continuum" of choices between traditional public and private schools. He maintains, "Any school that is supported by public funds and accountable to public authorities might be called a public school, whether it's run by the Smithsonian Institution, the Metropolitan Museum of Art or IBM." *New ED Secretary Says Public Schools Should Be Redefined*, Educ. USA, March 25, 1991, at 201, 201.

as inferior If they do so . . . the public schools may still have an obligation to meet their specialized needs while in private schools. But that does not necessarily make private schools public.

Here it seems more accurate to characterize participating schools as private schools that accept public school students. The students certainly remain public school pupils, but I do not think the private schools lose their character because of that fact.²⁰²

Yet Steingass indicated that the participating schools could be "regarded as quasi-public schools or private schools which accept some public school pupils."²⁰³ She later found that the Milwaukee Parental Choice Program is a public school program and therefore that the participating schools were subject to a variety of standards.²⁰⁴

In effect, the decision and the regulations turn the participating schools into a type of new public school.²⁰⁵ The characteristics of this new public school system vary from those proposed by Chubb and Moe. Chubb and Moe would make the new public schools as autonomous as possible.²⁰⁶ In contrast, the *Davis* trial court holding would make participating private schools subject to a wide range of regulations.²⁰⁷ This result approximates the plan suggested by Kolderie, which would make the new public schools accountable to the state under a contract process.²⁰⁸ In fact, that is how the Department of Public Instruction would hold the participating schools accountable to state officials. The superintendent, before allowing a private nonsectarian school to

202. *Davis*, No. 90-CV-2576, slip op. at 15.

203. *Id.*

204. *Id.* at 21; see WIS. ADMIN. CODE PI § 35.03(3)(c) (May 1991). These include:

4. Pupil nondiscrimination, s. 118.13, Stats.
5. Title IX of the Education Amendments of 1972, 20 U.S.C. ss. 1618 et seq.
6. The age discrimination act of 1975, 42 U.S.C. ss. 6101 et seq.
7. Section 504 of the rehabilitation act of 1973, 29 U.S.C. s. 749.
8. Family education rights and privacy act, 20 U.S.C. ss. 1232g.
9. The drug-free school and communities act of 1986, 20 U.S.C. ss. 3171 et seq.

10. All federal and state constitutional guarantees protecting the rights and liberties of individuals including freedom of religion, expression, association, against unreasonable search and seizure, equal protection, and due process.

205. See *supra* text accompanying notes 128-40.

206. *Supra* notes 128-33.

207. See *Davis*, No. 90-CV-2576, slip op. at 4, 21-22.

208. See *supra* notes 134-39.

participate in the Milwaukee program, would acquire certain assurances from the school—a contract, in other words.²⁰⁹

It is questionable whether the Wisconsin legislature intended this result. Polly Williams testified that the legislation was not designed to make the participating schools quasi-public schools.

Efforts to subject private, non-sectarian schools under the Milwaukee Parental Choice Program to the entire range of regulations applicable to public schools were defeated both in the legislative committee that approved the Milwaukee Parental Choice Program and on the floor of the Legislature. The entire concept of the law is to allow low-income students to attend schools outside the public system. The intent of the law was not to transform those schools into public or *quasi*-public schools.²¹⁰

Although remarks of a single legislator after a bill's passage are in no sense dispositive of legislative intent, nothing on the face of the statute or in the legislative history indicates any other intent. In fact, the legislature rejected the contract plan in Assembly amendment 8.²¹¹ In addition, the legislature specifically chose certain requirements that the participating schools were to meet,²¹² thereby implicitly rejecting others. These requirements appear to represent eligibility criteria rather than state regulations transforming the nature of the participating schools.²¹³ Further, the legislature carefully circumscribed the superintendent's authority in administering the program by giving him detailed responsibilities and even limiting the permissible actions he may take.²¹⁴

A construction that participating private schools retain their character as traditional private schools may be required because the term "private school" is defined in the Wisconsin Code.²¹⁵

209. See *supra* text accompanying notes 73-75.

210. Affidavit of Annette Polly Williams, June 25, 1990, para. 8, Brief for Respondents (Supplemental Appendix), *Davis v. Grover*, 159 Wis.2d (Ct.App.) 150, 464 N.W.2d 220, 64 Ed. Law Rep. 1209 (1990).

211. See *supra* note 36.

212. See *supra* notes 50-59 and accompanying text.

213. See *supra* text accompanying note 144.

214. See *supra* note 74.

215. Section 118.165 provides:

(1) An institution is a private school if its educational program meets all of the following criteria:

(a) The primary purpose of the program is to provide private or religious-

While the definition was enacted primarily for compulsory education purposes,²¹⁶ the code indicates the definition applies to chapter 119, in which section 119.23 is found.²¹⁷ Certainly when the legislature drafted section 119.23 and chose the term "private school," it did so against the backdrop of this definition. This definition of "private school" does not include any consideration of whether the institution receives state aid. The determinative question is whether the school is privately controlled.

Additionally, the Milwaukee Parental Choice Program is designed to provide low-income students the benefit of private schools. A key distinction between private and public schools is the ability of private schools to set their own policies and to operate outside the strictures of state regulation. Imposing requirements on the participating schools vitiates this benefit. William Carr, Acting Administrator of plaintiff Urban Day School, testified to such:

The effect of the range of requirements the Superintendent seeks to impose on UDS [Urban Day School] and other non-sectarian private schools in the City of Milwaukee would be to transform our private schools into public schools. This would destroy the unique character of schools like UDS that has made them especially successful in their educational mission. It also would defeat the very purpose of the law as

based education.

(b) The program is privately controlled.

(c) The program provides at least 875 hours of instruction each school year.

(d) The program provides a sequentially progressive curriculum of fundamental instruction in reading, language arts, mathematics, social studies, science and health. This subsection does not require the program to include in its curriculum any concept, topic or practice in conflict with the program's religious doctrines or to exclude from its curriculum any concept, topic or practice consistent with the programs religious doctrines.

(e) The program is not operated or instituted for the purpose of avoiding the compulsory school attendance requirement under s. 118.15(1)(a).

(f) The pupils in the institution's educational program, in the ordinary course of events, return annually to the homes of their parents or guardians for not less than 2 months of summer vacation, or the institution is licensed as a child welfare agency under s. 48.60(1).

WIS. STAT. ANN. § 118.165(1) (West Supp. 1990).

216. The definition is a legislative response to *State v. Popanz*, 112 Wis.2d 166, 332 N.W.2d 750 (1983), which held the compulsory attendance law void for vagueness and thus unconstitutional as applied to prosecutions involving private schools.

217. The code provides that *in chapters 115 to 121*, the term private school "means an institution with a private educational program that meets all the criteria under s. 118.165(1) or is determined to be a private school by the state superintendent under s. 118.167." WIS. STAT. ANN. § 115.001(3r) (West Supp. 1990).

I understand it, which is to allow more low-income youngsters to avail themselves of these very special educational opportunities.²¹⁸

Steingass gave little weight to these considerations. She nevertheless recognized an important distinction between the participating schools and public schools in her discussion of the application of the Education of the Handicapped Act, acknowledging that with regard to the Milwaukee Parental Choice Program, "[t]here is an element of choice."²¹⁹

There are presumedly some handicapped children whose parents would place them, for perceived greater benefits of the Parental Choice Program. They thereby forego their rights to other public placement. And, if they do so, the private school should not be required to meet these needs exactly as would public schools.

It is, in the end, not the private school's obligation but the public school's obligation to offer participating public school students a free appropriate education if they wish to exercise that right. . . . If they are privately placed by their parents, I do not think that duty passes to the participating private schools.²²⁰

Although Steingass limited this analysis to the application of the Education of the Handicapped Act, it is perfectly rational to extend it to all extra-statutory "assurances" demanded by the superintendent. In choosing to participate in the choice program because of its perceived advantages, parents opt out of the public school system and waive its "assurances." This result should not offend legal standards (and it apparently did not offend the Wisconsin legislature) because of the element of choice.

Furthermore, by requiring accountability to state officials, as argued by Grover, Steingass ignored the private schools' own system of governance. The participating schools exhibit a remarkable level of accountability. Bruce Guadalupe Community School is governed by a twenty-member Board of Directors comprised of parents and interested community members.²²¹

218. Affidavit of William Carr, June 25, 1990, para. 10, Brief for Respondents (Supplemental Appendix), *Davis v. Grover*, 159 Wis.2d (Ct.App.) 150, 464 N.W.2d 220, 64 Ed. Law Rep. 1209 (1990).

219. *Davis*, No. 90-CV-2576, slip op. at 23.

220. *Id.*

221. Affidavit of Susana Liston, July 12, 1990, para. 10, Brief for Respondents (Supplemental Appendix), *Davis v. Grover*, 159 Wis.2d (Ct.App.) 150, 464 N.W.2d 220, 64 Ed. Law Rep. 1209 (1990).

Woodlands School is also governed by a Board of five elected parent members, one parent appointed by the Home and School Association, the principal, and up to five community members.²²² The other participating schools have similar governance as well as significant parental involvement.

Thus, it is not so much lack of accountability that Grover and the educational establishment find objectionable; rather, it is the lack of accountability to the state educational establishment. Such accountability seems necessary if the public school is to perform its role as a democratic institution. Yet the Milwaukee program may be more democratic than the judicial revision, since the legislature's plan leaves with the people the power to determine their own education:

[W]henever a political majority establishes some set of values as central to school, a dissenting family ought to be able to send its child to another more suitable school. . . . On a political level, this policy ensures that no group or political majority can use school socialization to maintain or extend its ideology or political power. The democratic process of formulating public policy is thereby preserved.²²³

These policy considerations as well as the legislative intent behind section 119.23 militate strongly against any decision transforming participating schools into quasi-public institutions. The Wisconsin legislature could have chosen that route, but it carefully chose not to do so, and the courts should not attempt to rewrite the plan. Such a precedent could frustrate future attempts to establish private school choice.

B. Establishment Clause

Although the Milwaukee Parental Choice Program applies only to nonsectarian private schools, it is necessary to address the establishment issue before considering the equal protection question.²²⁴ A determination that choice plans which include

222. Affidavit of Susan L. Wing, July 12, 1990, para. 9, Brief for Respondents (Supplemental Appendix), *Davis v. Grover*, 159 Wis.2d (Ct.App.) 150, 464 N.W.2d 220, 64 Ed. Law Rep. 1209 (1990).

223. Arons & Lawrence, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309, 326 (1980).

224. See *Christian Science Reading Room Jointly Managed v. City of San Francisco*, 784 F.2d 1010, 1013, *modified on other grounds*, 792 F.2d 124 (9th Cir. 1986), 807 F.2d 1466, *cert. denied*, 479 U.S. 1066 (1987).

religious schools violate the establishment clause would end the equal protection inquiry regarding the classification between nonsectarian and sectarian private schools. "The purpose of remedying violations of the state and federal constitutions is clearly a legitimate one."²²⁵ A constitutional requirement imposed by the establishment clause would provide the necessary state interest to meet any equal protection challenge.

A second reason for discussing the establishment question is the possibility of extending the program to include religious schools.²²⁶ The earliest Wisconsin proposal would have allowed private sectarian schools to participate.²²⁷ Moreover, once school choice plans are extended to nonsectarian private schools, it may only be a matter of time before religious private schools are included as well.²²⁸

Modern establishment analysis typically begins with the three-part test of *Lemon v. Kurtzman*.²²⁹ First, the legislation must have a secular purpose; second, it may not have the principal or primary effect of advancing or inhibiting religion; and third, it may not foster excessive government entanglement with religion.²³⁰ Subsequent cases have made further refinements of the second and third prongs.²³¹

225. *Id.*

226. See *supra* note 32.

227. See *supra* note 27.

228. Such a plan was enacted at the local level in Empson, New Hampshire. The program grants \$1,000 property tax breaks to families that send their children anywhere but the local public high school, including parochial or church schools. Butterfield, *Tax Rebate in New Hampshire Town Poses Test for School-Choice Issue*, N.Y. Times, Jan. 30, 1991, at B6, col. 1.

229. 403 U.S. 602 (1971). This note does not attempt an exhaustive analysis of the establishment clause issue. For a brief history of cases involving state aid to religious schools, see Gibney, *State Aid to Religious-Affiliated Schools: A Political Analysis*, 28 Wm. & Mary L. Rev. 119, 121-38 (1986). For more extensive treatment, see the sources cited herein.

230. 403 U.S. at 612-13. The first two prongs were initially developed in the earlier case of *Everson v. Board of Educ.*, 330 U.S. 1 (1947), and subsequently applied in the next parochial aid case *Board of Educ. v. Allen*, 392 U.S. 236 (1968). The excessive entanglement prong was first used in *Walz v. Tax Comm'r*, 397 U.S. 664 (1970). *Lemon* was the first decision to combine all three elements into a single test. Gibney, *supra* note 229, at 123.

231. Under the second prong the Court has considered both the "primary effect" and the "direct and immediate effect," sometimes inconsistently. See Note, *The Increasing Judicial Rationale for Educational Choice*, *supra* note 123, at 375-82 and cases cited therein.

Under the entanglement prong the Court has indicated that there are two concerns: administrative entanglement and political divisiveness. See Choper, *The Religion Clauses of the First Amendment: Reconciling the Difference*, 41 U. Pitt. L. Rev. 673, 681-85 (1980); Note, *The Increasing Judicial Rationale for Educational Choice*, *supra* note 123, at 383-84.

In an article on a voucher proposal in Minnesota, Robert Bruno argues that a plan that includes religious schools would violate all three prongs of *Lemon*.²³² First, the legislation would be unconstitutional if its actual purpose was to divert public money to religious education, even if its stated purpose was otherwise.²³³ This argument, however, ignores the fact that in parochial aid cases the Court has been very quick to find a valid legislative purpose.²³⁴

Second, vouchers have the primary effect of advancing religion. They amount to direct aid to religious schools without any guarantee that the funds will be used solely for secular purposes.²³⁵ Using percentage caps or giving the vouchers to parents would not cure this problem.²³⁶ Third, the relationship between the state and the religious institutions would necessarily constitute excessive entanglement.²³⁷

This analysis misstates the uncertainty in this area of constitutional law, however. It gives little weight to the gamut of establishment clause decisions and ignores the increasing deference that the Court has been giving to state legislators.²³⁸ In finding such a clear violation, it also ignores the murky nature of establishment clause analysis in parochial aid cases.²³⁹

Recent articles have suggested that carefully drafted voucher programs could withstand an establishment clause challenge under *Lemon* and its progeny. Professor Choper, relying on the holdings of *Mueller v. Allen*²⁴⁰ and *Witters v. Washington Department of*

232. Bruno, *Constitutional Analysis of Vouchers in Minnesota*, 53 WEST'S EDUC. LAW REP. 9 (1989).

233. *Id.* at 12-13 (citing *Stone v. Graham*, 449 U.S. 39 (1980)).

234. Gibney, *supra* note 229, at 139. Gibney indicates that this tendency makes the Court appear to be deferring to state legislatures. He maintains, however, that the Court is not deferential because of its searching analysis under the second and third prongs. *Id.*

235. Bruno, *supra* note 232, at 13-14.

236. *Id.* at 16-17.

237. *Id.* at 21-24.

238. Gibney, *supra* note 229, at 134-35 (citing *Commission for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980) and *Mueller v. Allen*, 463 U.S. 388 (1983)). Gibney also noted that the deference was short-lived. *Id.* at 135-37 (citing *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985) and *Aguilar v. Felton*, 473 U.S. 402 (1985)). The article was written prior to the decision in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986).

239. Gibney, *supra* note 229, at 120 ("No area of constitutional law is as muddled as that dealing with state aid to religious-affiliated schools."). Accord Rotunda, *The Constitutional Future of the Bill of Rights: A Closer Look at Commercial Speech and State Aid to Religiously Affiliated Schools*, 65 N.C. L. REV. 917, 929 (1987).

240. 463 U.S. 388 (1983).

Services for the Blind,²⁴¹ states, "The constitutionality of vouchers was apparently resolved in 1986, although the decision in *Witters* . . . must be read carefully in order to discern the answer."²⁴² He adds that five Justices in concurring opinions in *Witters*

clearly described a situation that includes vouchers: the aid goes to all parents who have children in schools—public, private, and parochial; if the vouchers are cashed at parochial schools, that is the product of private choice. Thus, vouchers are now valid but, on the other hand, if aid is provided directly to the schools, it will usually be held invalid. That is where the law stands.²⁴³

Another article proposes a voucher plan that would create voucher schools. These private and public voucher schools would exist alongside traditional public and private schools.²⁴⁴ Voucher schools would be able to redeem state vouchers after satisfying standards that currently apply to private schools. Additionally, every school age child would be entitled to a state voucher annually.²⁴⁵

Relying on the combined holdings of *Mueller* and *Witters*, the author suggests that such legislation would not run afoul of the *Lemon* test. It would have a secular purpose to improve education,²⁴⁶ it would provide neutral assistance to a broad range of citizens,²⁴⁷ and it would not require increasing governmental monitoring of sectarian schools.²⁴⁸

Further, failure of school choice plans to survive *Lemon* analysis would not necessarily doom those plans to constitutional demise. Considering the inconsistency of and dissatisfaction with current establishment clause doctrine and the Court's recent treatment of religious issues, there remains the possibility that establishment clause analysis could be reformulated.²⁴⁹

241. 474 U.S. 481 (1986).

242. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CALIF. L. REV. 5, 12 (1987).

243. *Id.* at 13.

244. Note, *The Increasing Judicial Rationale for Educational Choice*, *supra* note 123, at 384-85.

245. *Id.* at 385.

246. *Id.* at 386.

247. *Id.* at 388.

248. *Id.* at 388-89.

249. See *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 110 S.Ct. 1595 (1990). *Smith* restructured free exercise analysis. It virtually eliminated the compelling state interest standard from a whole class of free exercise challenges. In *Smith*, the

Reformulating establishment clause analysis is appealing for several reasons. First, results under the current test have generated strong dissatisfaction, both among the Justices²⁵⁰ and among commentators. It has been called a "conceptual disaster,"²⁵¹ and the decisions have been described as "irreconcilable,"²⁵² "follow[ing] no consistent principle,"²⁵³ and "ad hoc judgments which are incapable of being reconciled on any principled basis."²⁵⁴ The Supreme Court has provided little guidance to the meaning and application of the test.²⁵⁵ In at least one recent establishment case, the Court has not used the test at all.²⁵⁶

Additionally, the common perception of the current doctrine distorts education by ignoring religious beliefs in society.²⁵⁷ This perception also engenders hostility toward certain religious and social values, which have been systematically excluded from public school.²⁵⁸ Since a primary function of education is the inculcation of values, a serious problem emerges if the schools—the vehicles of value transmission—cannot teach them. Such a school system impedes the transmission of widely shared moral values.²⁵⁹ Concerning these issues, Professor Nowak concludes:

Indeed, the current position of the Court is counterproductive in terms of first amendment values. An absolute rule virtually destroys the freedom of choice in both religious and educational matters for low-income families. Additionally, it limits the variety and quality of educational opportunity which is offered to the children of those families.²⁶⁰

Court held that the first amendment's protection of religious liberty does not require an exemption from criminal laws of general applicability. *See id.* at 1605-06. The Court recognized that there are certain areas where religious objections can play no part. "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 1600.

250. The Chief Justice has indicated his dissatisfaction with establishment clause decisions. *Wallace v. Jaffree*, 472 U.S. 38, 110-12 (1985) (Renquist, J., dissenting).

251. Choper, *supra* note 242, at 6.

252. Gibney, *supra* note 229, at 120.

253. Rotunda, *supra* note 239, at 929.

254. Choper, *supra* note 231, at 680.

255. *See* Gibney, *supra* note 229, at 145-48.

256. *Marsh v. Chambers*, 463 U.S. 783 (1983).

257. *See* Dent, *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863, 868-73 (1988).

258. *See id.*; P. VITZ, *CENSORSHIP: EVIDENCE OF BIAS IN OUR CHILDREN'S TEXTBOOKS* (1986).

259. A recent survey, commissioned by the Graduate School of the City University of New York, indicates that 90 percent of the American population has a religious affiliation. Goldman, *Portrait of Religion in U.S. Holds Dozens of Surprises*, N.Y. Times, Apr. 10, 1991, at A1, col. 1.

260. Nowak, *The Supreme Court, the Religion Clauses and the Nationalization of*

Nor is such a result mandated by the first amendment. Writing while on the Court, Chief Justice Burger stated: "[N]othing in the Religion Clauses of the First Amendment permits governmental power to discriminate *against* or affirmatively stifle religions or religious activity."²⁶¹

C. Equal Protection

The Milwaukee Parental Choice Program raises some equal protection issues as well. The legislation allows some private schools—and the parents and students who choose those schools—to participate in the program while excluding other schools and other parents and students. Schools may participate only if they are nonsectarian, comply with 42 U.S.C. section 2000d, meet all health and safety laws or codes that apply to public schools, and meet one of four progress standards.²⁶²

Under modern equal protection analysis,²⁶³ classifications must bear a certain relationship to some government interest to withstand an equal protection challenge.²⁶⁴ Depending on the type of class or interest involved, courts employ one of three tests—rational basis,²⁶⁵ strict scrutiny,²⁶⁶ or intermediate²⁶⁷—to test legislation.²⁶⁸

Education, 70 Nw. U.L. REV. 883, 909 (1976). Professor Dent presents these problems as free exercise, free speech, and equal protection claims and suggests several remedies, such as deletion of offensive material or equal treatment, excusal from part of public schooling, and alternative instruction. Dent, *supra* note 257, at 920-30. He also suggests reimbursement for private schooling and opines that such a remedy would be constitutional. *Id.* at 930-40.

261. *Meek v. Pittenger*, 421 U.S. 349, 386 (1975) (Burger, C.J., opinion)

262. *See supra* text accompanying notes 51-54 & 144.

263. *See generally* R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 18.1-18.46 (1986 & Supp. 1990).

264. Although the history of the clause indicates that it primarily addresses discriminatory treatment on the basis of race, the Supreme Court has applied it to any classification legislation, using the lesser rational basis standard.

265. *See, e.g.*, *Lyng v. International Union, United Auto., Aerospace and Agric. Implement Workers*, 485 U.S. 360 (1988); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). Under the rational basis test, a classification is upheld if it is rationally related to a legitimate government interest.

266. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967); *Korematsu v. United States*, 323 U.S. 214 (1944). Under this test, a classification is invalid unless the state has a compelling interest and the classification is narrowly tailored to meet that interest.

267. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202 (1982); *Craig v. Boren*, 429 U.S. 190 (1976), *reh'g denied* 429 U.S. 1124 (1977). Under this test, the classification is upheld only if it is substantially related to an important government interest.

268. The Court has applied strict scrutiny analysis to classifications based on race, ethnicity, national origin, alienage and, under the due process clause, to certain fundamental

Whatever test is used, it is clear that excluding schools that do not comply with 42 U.S.C. section 2000d, or meet all health and safety laws or codes that apply to public schools, or meet one of four progress standards would be constitutional. States are under an affirmative duty not to discriminate and cannot assist private parties in discriminatory behavior.²⁶⁹ Additionally, health and safety requirements are an exercise of the police power of the state. If fairly constructed, they would pass equal protection analysis. Also, the very purpose of the choice program is to increase student achievement, so excluding schools that have failed to perform would be eminently reasonable.

As for the classification between nonsectarian and sectarian private schools, the answer is not as clear. Regardless of the standard used, however, the sectarian-nonsectarian classification would be constitutional if state aid to religious schools violated the establishment clause. The constitutional requirement would provide a compelling state interest and satisfy even strict scrutiny analysis. Assuming no first amendment violation, however, two issues become critical. First, what standard of review is required; and second, does a state have an interest that is sufficiently related to the classification.

The legislative classification between nonsectarian and sectarian schools may be subject to the strict scrutiny test. In *Christian Science Reading Room Jointly Managed v. City of San Francisco*,²⁷⁰ the court found that the airport policy of not renting space to any religious organizations, reversing the prior policy of renting space to such organizations, violated the equal protection clause. In dicta responding to the lower court opinion,²⁷¹ the court stated that “[i]t seems clear that an individual religion meets the requirements for treatment of a suspect class.”²⁷² It was more hesitant to opine that the strict scrutiny test applied to religions as a whole: “Whether all religions together constitute a suspect class for purposes of the Equal Protection Clause is a far more

rights. It has applied intermediate analysis to classifications based on gender and illegitimacy. The rational basis test is used for social and economic legislation. See cases cited in *supra* notes 265-67 and R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 263, at § 18.3.

269. *Norwood v. Harrison*, 413 U.S. 455 (1973); see also *Shelly v. Kraemer*, 334 U.S. 1 (1948).

270. 784 F.2d 1010, modified on other grounds, 792 F.2d 124 (9th Cir. 1986), cert. denied, 479 U.S. 1066 (1987).

271. The district court ruled that religions taken as a whole constitute a suspect class and applied the strict scrutiny test to the airport's policy. 784 F.2d at 1012.

272. *Id.* (citations omitted).

complex question that courts have not previously addressed."²⁷³ The court did not address the question. Instead, it expressly relied on the rational basis test to overturn the airport's policy.²⁷⁴ The opinion does suggest, however, the possibility that the strict scrutiny test applies to a classification between nonsectarian and sectarian private schools as found in the Milwaukee Parental Choice Program.

Additionally, while the Court typically applies the rational basis test, the least scrutinizing, to educational legislation,²⁷⁵ it applied a more exacting standard in *Plyer v. Doe*.²⁷⁶ *Plyer* involved a Texas statute that withheld from local school districts any state funds for the education of children who were not "legally admitted" into the United States and that also authorized local school districts to deny enrollment to such children. In holding the statute unconstitutional under the equal protection clause, the Court stated that "the discrimination contained in [the statute] can hardly be considered rational unless it furthers some *substantial goal* of the State."²⁷⁷ The decisive factors that accounted for the higher standard of scrutiny were the importance of education and the extreme hardship that would be imposed on an "underclass"²⁷⁸ — aliens.²⁷⁹

Thus, a legislative classification between nonsectarian and sectarian private schools might require the more exacting intermediate test. Even though courts typically use the rational basis standard to test educational legislation, classification on the basis of religion involves a first amendment right. Arguably, the combination of educational legislation with the exercise of a fundamental right justifies using the intermediate standard.

The second issue of this classification question is whether a state has a sufficient interest that bears an appropriate relationship

273. *Id.* at 1012-13.

274. The court found that the airport's new policy was not rationally related to the purpose of remedying violations of the establishment clause caused by the prior policy since the prior policy did not violate the establishment clause. *Id.* at 1016.

275. *See, e.g., San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

276. 457 U.S. 202 (1982).

277. *Id.* at 231 (emphasis added).

278. *Id.* at 219.

279. The Court noted that the plaintiffs in the case were "special members of this underclass" whose presence in the United States was not "the product of their own unlawful conduct." *Id.* While acknowledging that undocumented aliens cannot be treated as a suspect class, and that education is not a fundamental right, the Court noted that the Texas statute "impose[d] a lifetime hardship on a discrete class of children not accountable for their disabling status." *Id.* at 222. This distinction, coupled with the importance of education, *see id.* at 221-23, provided the justification for the intermediate standard.

under the applicable test. On this issue, it is necessary to identify some state interest for the classification. Without such an interest, limiting school choice to nonsectarian schools would involve unconstitutional discrimination against religious schools and the parents who desire to use them. After such an interest is identified, the next step is to determine if the interest bears a rational or substantial relationship or is narrowly tailored to the state interest.

Absent a constitutional prohibition, however, there seems little reason for prohibiting religious schools from participating in a choice program.²⁸⁰ One possible state interest justifying the sectarian-nonsectarian classification is to avoid interaction between state and religious institution. If such interaction does not amount to entanglement, however, it is questionable whether the purpose would amount to a legitimate or important state interest, and it would be even more difficult to show that it is a compelling interest. Rather, such a purpose would seem to be hostile toward values protected by the first amendment.

This equal protection issue is a novel question. Yet Professors Arons and Lawrence have suggested a similar equal protection violation. They claim that the present method of public school finance and control "discriminates against the poor and working class, and even a large part of the middle class."²⁸¹ It presents families that hold views different from the majoritarian school system with a choice of either giving up their values to obtain a free education in a government school or paying twice, once through taxes and once through tuition, to preserve those values among their children.²⁸² Families unable to pay this double price for private school are constrained by compulsory education laws to submit to an education inconsistent with their religious and political values.²⁸³

Application of this rationale to the issue at hand would likewise result in a finding that legislation is unconstitutional.

280. See *Christian Science Reading Room*, 784 F.2d at 1016 (holding that where there is no violation to remedy, the policy did absolutely nothing to advance the airport's purpose). The court's holding was narrow, however. The court stated, "Based on the record before us, it is far from clear that the Airport would have adopted its new policy but for its mistaken view that it was compelled by law to do so. We have no way of knowing what policy the Airport would have adopted had it had a proper understanding of the meaning and effect of the constitutional provisions." *Id.* It indicated that revenue considerations, *id.* at 1013, or the desires of the traveling public, 792 F.2d at 124, could serve as legitimate interests under the rational basis test. Neither of these considerations, however, are applicable to private school choice legislation.

281. Arons & Lawrence, *supra* note 223, at 326.

282. *Id.* at 327.

283. *Id.* at 326.

Excluding parents from private school choice plans simply because they would choose a school representing their religious values presents the same dilemma to parents. They would have to pay twice or submit their children to an education inconsistent with their values.

CONCLUSION

As the first school choice plan to include private schools, the Milwaukee Parental Choice Program is part of the changing mood that has given school choice momentum. At the same time, the judicial trend appears to be moving toward the acceptance of vouchers, the most familiar form of private school choice. Constitutional scholars admit that school vouchers is "an idea whose time may be near."²⁸⁴ Considering these factors, private school choice proposals will increase in the near future.

Although competition and academic achievement are the impetus behind school choice legislation, the policies and precise contours of such programs are still malleable. As the first private school choice plan, the Milwaukee program will provide precedent on the ability of state legislators to design truly diverse programs. The Wisconsin legislature could have adopted a program with a large measure of accountability to the state; it instead chose to enact an experimental choice plan with minimal state-imposed regulations, using private schools that are relatively free to innovate. Imposing administrative regulations on the participating schools that are in no way suggested by the enacting legislation will only hamper the ability of state legislators to design unique programs to face the challenging educational problems in the next decade.

This debate over the precise nature of private school choice is currently working its way through the Wisconsin court system. The Wisconsin Supreme Court could, by upholding the appellate court, defer resolution of the issue. If the court upholds the act, however, it will be the first to address the nature of the new schools of choice. What they write on this new slate could benefit parents and their children. Hopefully, it will follow the lead of the legislature and give the participating schools the freedom from the monopoly system needed to be truly innovative.

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284. Choper, *supra* note 242, at 12.