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School Choice in 2003: An Old Concept Gains New Life

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The concept of school choice is not new, just as the institution of public schooling is not particularly old. Even as public schools were becoming more common in the mid-nineteenth century in the United States and abroad, John Stuart Mill concluded that in light of the controversies over what should be taught and how it should be taught in state-run schools, the government should “leave to parents to obtain the education where and how they pleased, and content itself with helping to pay the school fees of the poorer classes of children, and defraying the entire school expenses of those who have no one else to pay for them.”² Back then, Maine and Vermont began to pay private school tuition for students in towns without public schools.³ These voucher-like “tuitioning” programs are still in operation today, although they no longer allow students to attend religious private schools.⁴

I. The Rise of Voucher Programs

In the 1920s, the Supreme Court of the United States affirmed the right of parents to direct their children’s schooling. In *Meyer v. State of Nebraska*, the Court ruled that a state statute forbidding public and private school teachers from instructing students in languages other than English conflicted with the Fourteenth Amendment and infringed upon both the teacher’s rights and the rights of parents “to control the education of their own.”⁵ Two years later, in *Pierce v. Society of Sisters*, the Court struck down an

1. Reprinted with permission from New York University’s *Annual Survey of American Law*, Vol. 59, Issue 3 (2003).
2. JOHN STUART MILL, *ON LIBERTY* 119 (Prometheus Books 1986) (1869).

Author’s Note

On January 23, 2004, the District of Columbia joined 11 states or districts that have voucher or tax credit parental choice laws. In fewer than 20 years, the nation has gone from two such programs to 12. In those two decades, 40 states and the District adopted charter school laws, a quarter initiated public school choice open enrollment laws, and home schooling became legal in all 50 states. The movement to empower families to choose the best schools for their children is growing in strength and number with the support of key legal decisions and positive research. In New York University’s *Annual Survey of American Law* (Vol. 59, Issue 3[2003]), Heritage analyst Krista Kafer recounts the legal and legislative history of school choice from its beginnings in the nineteenth century to the rise of the modern movement.

For this reprint, several developments have been updated in footnotes.

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Oregon law mandating that all children attend public schools. In this decision, Justice McReynolds wrote for the Court:

Under the doctrine of *Meyer v. Nebraska* . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.⁶

It would be another thirty years, however, before the concept of parental choice in education would find embodiment in the policy of vouchers. In 1955, in an article titled “The Role of Government in Education,” Milton Friedman, who would later win the Nobel Prize in economics, first used the word “voucher” in suggesting that parents be given grants to pay for their children’s education.⁷ With a few exceptions, the policy would not gain traction until twenty years later, when lawmakers began to consider giving parents choice within the public system and then within the private system.

By the late 1990s, the school choice movement had become a diverse and dynamic movement encompassing public school open enrollment, charter schools, home schooling, virtual schools, tax deductions and credits, and vouchers.

From the time Milton Friedman first used the word “voucher” until the 1980s, little happened to advance the case of parental choice. In the early 1970s, the federal Office of Economic Opportunity initiated a voucher program in predominately low-income, minority schools in Alum Rock, California. Christopher Jencks at Harvard University’s Center for the Study of Public Policy designed the program. He proposed giving poor students vouchers they could use at any participating public or private school. The school would have to accept the voucher as full funding and would have to give parents information about the schools’ programs and academic performance. Ardentlly opposed by the teachers unions, the program shriveled into a limited public school choice program.⁸ Attempts to establish a voucher program by popular referenda failed in Maryland in 1972 and in Michigan in 1978.⁹

The tide began to turn in the late 1980s with the passage of public school choice laws that allow students to transfer to other schools within (intradis-

3. In Maine and Vermont, district and state funds enable students in districts without public schools to attend private, non-sectarian schools or public schools in other districts. The Vermont law dates back to 1869. The law was amended in 1902 (Act 27) and in 1927 (Act 31). ME. REV. STAT. ANN. tit. 20-A, §§ 2901, 2951, 5001-A (West 1993); VT. STAT. ANN. tit. 16, § 821-4 (West 1989 B.Supp. 2002); see Libby Sternberg, *Lessons from Vermont: 132-Year-Old Voucher Program Rebuts Critics*, CATO INST. BRIEFING PAPERS (CATO Inst., Wash., D.C.), Sept. 10, 2001 at 1–3.

The Maine legislature passed the Free High School Act in 1873 to provide state funds for education to school districts. Districts were authorized to erect public schools or pay tuition for students in private schools. The law has been amended several times. ME. REV. STAT. ANN. tit. 20-A (West 1993); Christopher W. Hammons, *The Effects of Town Tuitioning in Vermont and Maine*, 1 SCHOOL CHOICE ISSUES IN DEPTH 1, 8 (2002), available at <http://www/friedmanfoundation.org/schoolchoiceworks/mainevermontstudy.pdf> (last visited Apr. 10, 2003); *Vindicating the Supreme Court: Fighting for Parental Liberty by Stopping Religious Discrimination*, INST. FOR JUST. LITIG. BACKGROUNDER (Inst. for Just., Wash., D.C), at http://www.ij.org/media/school_choice/maine/backgrounds.html (last visited Mar. 26, 2003).

4. In 1980, Maine Attorney General Joseph Brennan issued an opinion stating that inclusion of religious schools violated the Establishment Clause of the U.S. Constitution. A year later the legislature enacted a law to exclude sectarian schools. ME. REV. STAT. ANN. tit. 20-A, § 2951 (West 1993).
5. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).
6. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).
7. Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* 143 (Robert A. Solo ed., 1955).
8. *SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW* 40–41 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999).
9. John Gehring, *Voucher Battles Head to State Capitals*, EDUC. WK., July 10, 2002, at 24.

trict choice) or outside (interdistrict choice) of their home districts. Minnesota began to offer statewide interdistrict open enrollment in 1988.¹⁰ By 2003, six states allowed students to attend any public school in the state, with few restrictions.¹¹ Nine states require districts to offer intradistrict or interdistrict public school choice.¹²

In many cases, transfers are subject to space, desegregation orders, or other restrictions. For example, under Nebraska's 1989 law, student transfers are subject to restrictions of space and legal requirements for racial balance. Students may exercise their transfer option only once in their academic career (unless their family moves). The law does not address choice of schools within district boundaries, and each district is free to set its own policy. Transportation is available for all low-income children who qualify for free lunches under the National School Lunch Program or who are disabled. A district may provide transportation for free or for a fee to other children; otherwise, transportation is the responsibility of the parent.¹³

II. The Development of Charter Schools

In 1992, Minnesota opened the nation's first charter school. Charter schools are privately run public schools operated by teachers, parents, com-

munity leaders, or other groups under a charter agreement with a sponsor—usually the school district, state, or university. While freed from many state and district statutes, regulations, and rules, these independent schools are accountable to the sponsor to fulfill the terms of the charter and raise student achievement. Most significantly, charter schools are shut down when they fail to meet the terms of their charter.¹⁴

Since 1991, forty states and the District of Columbia have enacted laws to establish charter schools.¹⁵ Today, there are 2,700 such schools serving 684,000 students.¹⁶ State laws vary widely, as do individual charter schools, but a few generalizations can be made. According to research commissioned by the U.S. Department of Education, charter schools serve diverse populations, are smaller than district public schools, and have strong parental involvement.¹⁷ The Center for Education Reform's 2002 Survey of American Charter Schools found that charter schools are successfully educating children who are poorly served by traditional public schools and that these charter schools are both innovative and cost-effective.¹⁸ Freed from many state and district laws and rules, charter schools have the flexibility to innovate and respond to the needs of their student bodies. In some states,

10. MINN. STAT. ANN. § 124D.03 (West Supp. 2003).

11. See *School Choice: State Laws* (Educ. Comm. of the States, Wash., D.C.), available at <http://www.ecs.org/clearinghouse/13/75/1375.htm> (last visited June 15, 2003) (explaining that Arizona, Colorado, Delaware, South Dakota, Utah, and Washington have non-performance based mandatory interdistrict and intradistrict school choice laws).

12. In California, Illinois, and Ohio, districts must allow intradistrict transfers, and in Arkansas, Iowa, Minnesota, Nebraska, Oklahoma, and Wisconsin students may transfer to schools in the other districts. In other states, the district sets intradistrict policy, and interdistrict choice is available only in participating districts, only for specific populations or at the expense of parents. *Id.*

13. NEB. REV. STAT. ANN. §§ 79-238, 79-241, 79-605 (R.S. Supp. 2002).

14. See *Answers to Frequently Asked Questions, About School Choice*, (Center for Educ. Reform, Wash., D.C.), available at http://edreform.com/school_reform_faq/school_choice.htm (last visited Mar. 31, 2003).

15. UPDATE: On March, 10, 2004, the Washington State legislature passed a charter school bill. When the bill is signed, then Washington will become the 41st state to adopt charter schools.

16. See *Charter School Highlights and Statistics At-A-Glance* (Center for Educ. Reform, Wash., D.C.), Feb. 24, 2003, available at <http://www.edreform.com> (last visited Mar. 31, 2003); S.B. 75, Reg. Sess. (Md. 2003) (Maryland's charter school bill will be effective July 1, 2003).

17. *A Decade of Public Charter Schools: Evaluation of the Public Charter Schools Program:2000-2001*, SRI INT'L EVAL. REPORT, (SRI Int'l, Wash., D.C.), at <http://www.sri.com/policy/cep/choice/yr2.pdf> (last visited Mar. 31, 2003).

18. See *Charter Schools 2002: Results from CER's Annual Survey of America's Charter Schools* (Christian Braunlich & Melanie Looney, eds., 2002) (Center for Educ. Reform, Wash., D.C.), 2002, available at http://edreform.com/charter_schools/survey2002.pdf (last visited Mar. 26, 2003).

for example, charter schools may hire teachers according to their own standards and are not bound by state certification or district oversight. Other schools may choose to implement a longer school year or school day. Some may adopt a back-to-basics curriculum not available in other schools in the district. Still others may adopt an arts or science focus.¹⁹

Recent charter school developments include “virtual charter schools” that provide educational programs via the Internet. One company offering on-line schooling, K12, founded by former U.S. Secretary of Education William Bennett, has expanded to enroll kindergarten through fifth grade students in Arkansas, California, Colorado, Florida, Idaho, Minnesota, Ohio, Pennsylvania, and Wisconsin. Home-schooling families, discussed *infra*, may purchase the school’s on-line curriculum.²⁰ Some states, like Alaska and North Dakota, that have offered publicly funded correspondence courses since the 1930s are now able to provide coursework via the Internet.²¹

Charter schools have not been immune to legal challenges. The Missouri School Boards Association challenged the Missouri Charter School Act, contending that it was unconstitutional and that it violated several state laws; in late 1999, a judge dismissed the lawsuit.²² The case revolved around a particular charter school that had yet to open. Without addressing the constitutional issues, Cole

County Circuit Court Judge Byron Kinder wrote, “[d]ue to a lack of evidence demonstrating that the African-American Rite of Passage Inc., will open a charter school in the St. Louis area in the near future, no justiciable controversy presently exists between the parties.”²³

In 2001, the Utah Supreme Court upheld Utah’s charter school law, dismissing a challenge by the Utah School Boards Association as “unreasonable.”²⁴ The lawsuit challenged the constitutionality of this charter school law on the grounds that the state constitution authorizes the state board of education to control one uniform system; the court, however, ruled that the state constitution allows the state school board to oversee charter schools, as it grants the board authority over “such other schools and programs that the Legislature may designate.”²⁵

III. Home Schooling

Like other forms of parental choice, home schooling has grown significantly over the past two decades, moving from a choice on the fringe in the 1960s to become a growing mainstream movement.²⁶ During the 2001–2002 school year, as many as two million children in grades K–12 were home-schooled—approximately 3% of the fifty-three million school-age children in the United States. The home-school population is growing at a rate of 7% to 15% a year.²⁷

19. *Id.*

20. *See*, K12, *Education for a Lifetime*, at <http://www.k12.com/> (last visited March 26, 2003).

21. *See generally*, *Elementary, Middle, and High School Distance Education* (N.D. Div. of Indep. Study), at www.ndisonline.org/NDIS.html (last visited Mar. 26, 2003); *Alyeska Central School: First in Distance Education for Alaska* (Alaska Dep’t of Educ.), at http://www.educ.state.ak.us/Alaskan_Schools/ACS/mission.html (last visited Mar. 26, 2003).

22. *St. Louis Bd. of Educ. v. African-Amer. Rite of Passage, Inc.*, No. CV 199902 (Mo. Cir. Ct. 1999); *see Education Reform Update*, (Center for Educ. Reform), Jan. 10, 2000, available at <http://www.edreform.com/update/000110.htm> (last visited Mar. 31, 2003).

23. Matthew Franck, *School District’s Challenge to Charters is Dismissed Move May Do Little to Help Schools Open*, ST. LOUIS POST-DISPATCH, Dec. 28, 1999, at D1.

24. *22. Utah Sch. Bds. Ass’n v. Utah State Bd. of Educ.*, 17 P.3d 1125, 1130 (Utah 2001).

25. *Id.* at 1129 (quoting UTAH CONST. art. X, § 2); *see also* Associated Press, *Charter Schools Are Ruled Constitutional*, UTAH DESERET NEWS, Jan. 19, 2001, at B2; *Education Reform Newswire*, Vol. 3, No. 4 (Center for Educ. Reform), Jan. 23, 2001, available at <http://www.edreform.com/update/2001/010123.html> (last visited Mar. 31, 2003).

26. *See Home School Laws* (Home Sch. Legal Defense Assoc., Va.), at <http://www.hslda.org/laws> (last visited Mar. 26, 2003) (compiling home-school laws in each state).

27. *See Frequently Asked Questions* (Home Sch. Legal Defense Assoc., Va.), at www.hslda.org/research/faq.asp#1 (last visited Mar. 26, 2003).

In general, home-schooled students achieve at higher levels than their public school peers on nationally-normed standardized tests in all subjects.²⁸ Home-schooled students are active outside of school, with the average home-school student participating in five extracurricular activities such as dance, sports, music, and volunteerism. Nearly all home-schooled students participate in at least two extracurricular activities.²⁹ In 1999, home-schooled students even started their own honor society, Eta Sigma Alpha. The society has grown to twenty chapters nationwide.³⁰

IV. Tax Incentives for School Choice

The first state to adopt tax deductions and credits for education expenses was Iowa. In 1987, the Iowa legislature enacted a program of tax credits and deductions that allowed families earning less than \$45,000 to deduct up to \$1,000 per child from their state income tax liability for education expenses.³¹ For taxpayers who used the standard deduction, the law allowed them a tax credit of up to fifty dollars for each child for education expenses. The legislature repealed the deduction and the income threshold, and increased the credit to 10% in 1996.³² In 1998, the legislature amended the law to allow families to take a tax credit of 25% of the first \$1,000 spent on their children's education.³³

In 1997, Minnesota enacted a law that allows families earning up to \$33,500 to take a refundable

tax credit of up to \$2,000 (\$1,000 per student) for education expenses, excluding tuition.³⁴ Minnesotans have been able to deduct education expenses since 1955. The 1997 law raised the maximum deduction to \$1,625 for expenses associated with elementary school, including tuition, and up to \$2,500 for middle and high school expenses.³⁵

In 1999, Illinois approved an education tax credit, which gives families an annual tax credit of up to 25% of education-related expenses (including tuition, book fees, and lab fees) that exceed \$250, up to a maximum of \$500 per family.³⁶ After enactment, the Illinois Federation of Teachers filed a lawsuit contending the tax credit contradicted religious establishment provisions in the Illinois Constitution. Judge Loren Lewis of the Franklin County Circuit Court dismissed the suit, declaring the tax credit constitutional, citing the United States Supreme Court decision in *Mueller v. Allen*, which upheld the Minnesota education tax deduction, as the controlling precedent.³⁷ In 2001, the Fifth District Appellate Court of Illinois upheld the circuit court opinion. Justice Rarick wrote, "The credit at issue here does not involve any appropriation or use of public funds Funds become available to schools only as the result of private choices made by individual parents."³⁸

Meanwhile, the Illinois Education Association, People for the American Way, and others filed a second lawsuit alleging the credit violated several pro-

28. Brian Ray, *Home Education Across the United States*, HOME SCHOOL LEGAL DEFENSE LEAGUE, available at <http://www.hslda.org/docs/study/1997/default.asp> (last visited Apr. 9, 2003).

29. *Id.*

30. Ellen Sorokin, *Home-Schoolers Start a New Honor Society*, WASH. TIMES, Jan. 4, 2003, at 1.

31. Kirsten Goldberg, *Lawmakers Adopt Income-Tax Credits for Tuition in Iowa*, EDUC. WK., May 20, 1987, at 1.

32. *Legislative Update*, EDUC. WEEK, June 5, 1996, at 1.

33. IOWA CODE ANN. § 422.12 (West 1998, West Supp. 2002); see also Robert C. Johnston, *Despite Talk, Lawmakers Slow To Copy Tax Credits*, EDUC. WK., June 3, 1998, at 13.

34. MINN. STAT. ANN. § 290.0674 (West 2002).

35. See Lisa Larson & Nina Manzi, *Minnesota's Public School Fee Law and Education Tax Credit and Deduction 3*, MINNESOTA HOUSE OF REPRESENTATIVE RESEARCH DEPARTMENT (Jan. 2003), available at <http://www.house.leg.state.mn.us/hrd/pubs/feelaw.pdf>.

36. 35 ILL. COMP. STAT. 5/201 (2002 West).

37. See *Illinois Court Dismisses Case Against Tuition Tax Credit, Important Victory for School Choice*, INST. FOR JUSTICE WEB RELEASE (Inst. for Justice, Wash., D.C.) Dec. 7, 1999, available at http://www.ij.org/media/school_choice/illinois/12_7_99pr.shtml (last visited Apr. 1, 2003).

38. *Griffith v. Bower*, 747 N.E.2d 423, 427 (Ill. App. Ct. 2001), appeal denied, 755 N.E.2d 477 (Ill. 2001).

visions of the Illinois Constitution concerning religious establishment and the use of public funds.³⁹ Judge Thomas Appleton of the Sangamon County Circuit Court dismissed the case stating that the credit allows families to spend more of their own money on education and does not involve the expenditure of government funds.⁴⁰ The decision was appealed. Justice Rita Garman wrote for the Fourth District Appellate Court that the tax credit neither constituted an appropriation of public funds nor violated the establishment clause. Further, the tax credit served a public purpose and met the requirement of “reasonableness and uniformity in non-property-tax classifications.”⁴¹

A new kind of tax credit was enacted in Arizona in 1997. The Arizona law allows individuals to take a tax credit of up to \$500 for donations to organizations that provide scholarships to students in private schools.⁴² Individuals donating to public school extracurricular activities can receive a tax credit of up to \$200.⁴³ From 1998 to 2000, the tax credit program applied to more than 19,000 scholarships, with more than 80% of the recipients selected on the basis of financial need.⁴⁴ During those years, the credit generated \$32 million. Nevertheless, the credit can be considered revenue neutral because the public school system saves money when students who had been educated at public expense leave the system to attend private schools, and these savings offset the revenue loss of the tax credit.⁴⁵

The Arizona tax credit survived a legal challenge. The Arizona Education Association, Arizona School Boards Association, People for the American Way, and Americans United for Separation of Church and State filed a lawsuit in the Arizona Supreme Court alleging the credit violated the religious establishment provisions of the Arizona and U.S. Constitutions. On January 26, 1999, the state supreme court upheld the tax credit plan in a three to two ruling.⁴⁶ On First Amendment grounds, the majority stated that the program met the three-prong test for conformity with the Establishment Clause established in *Lemon v. Kurtzman*.⁴⁷ The court also compared the Arizona tax credit program to the Minnesota program upheld by the U.S. Supreme Court in *Mueller v. Allen*,⁴⁸ stating:

In both, parents are free to participate or not, to choose the schools their children will attend, and to take advantage of all other available benefits under the state tax scheme. Moreover, these programs will undoubtedly bring new options to many parents. Basic education is compulsory for children in Arizona, A.R.S. § 15-802(A), but until now low-income parents may have been coerced into accepting public education. These citizens have had few choices and little control over the nature and quality of their children’s schooling because they have been unable to afford a private education that may

39. *2nd Illinois Court Dismisses Case Against Tuition Tax Credit, Resounding Victory for School Choice, Teachers’ Union Argument Branded “Absurd,”* INST. FOR JUSTICE WEB RELEASE (Inst. for Justice, Wash., D.C.), Apr. 4, 2000, available at http://www.ij.org/media/school_choice/illinois/12_7_99pr.shtml (last visited Apr. 1, 2003).

40. *Id.*

41. *Toney v. Bower*, 744 N.E.2d 351, 363 (Ill. App. Ct. 2001), *appeal denied*, 754 N.E.2d 1293 (Ill. 2001).

42. ARIZ. REV. STAT. ANN. § 43-1089.01 (1998).

43. ARIZ. REV. STAT. ANN. § 43-1089.01 (1998); Hal Mattern, *Private-School Tax Credit Signed Opponents Say Law Is Voucher System*, ARIZ. REPUBLIC, Apr. 8, 1997, at B1.

44. Dan Lips, *The Arizona Scholarship Tax Credit: A Model for Federal Reform*, GOLDWATER INST., July 31, 2002, at 7, available at <http://www.goldwaterinstitute.org> (last visited May 12, 2003); Carrie Lips & Jennifer Jacoby, *The Arizona Scholarship Tax Credit: Giving Parents Choices, Saving Taxpayers Money*, (Cato Inst., Wash. D.C.), Sept. 17, 2001, available at <http://www.cato.org/pubs/pas/pa414.pdf> (last visited Apr. 9, 2003).

45. *Id.*

46. *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), *cert. denied*, 528 U.S. 921 (1999).

47. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

48. *Mueller v. Allen*, 463 U.S. 388, 390–91 (1983).

be more compatible with their own values and beliefs. Arizona's tax credit achieves a higher degree of parity by making private schools more accessible and providing alternatives to public education.⁴⁹

Likewise, the court held that the program did not violate the state constitution which provides that no "public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment" because the court did not consider money raised by the tax credit to be "public money."

In 2001, Pennsylvania and Florida approved similar tax credits for corporations. Pennsylvania's tax credit program allows corporations to receive a credit for contributions to nonprofit organizations that provide scholarships or organizations that provide grants to public schools for innovative programs. The maximum credit is \$100,000, and the state may award no more than \$30 million worth of credits per year. Families must meet income eligibility guidelines to receive scholarships.⁵⁰

Florida's corporate income tax credit provided scholarships for 15,000 students statewide during the 2002–2003 school year. Under this program, a corporation can donate as much as \$5 million to a tuition scholarship fund, for which the company will receive a tax credit for the entire amount donated. The program provides low-income students with either a scholarship worth \$3,500 or the full cost of tuition, whichever is less, to attend a private school, or a \$500 scholarship to attend a public school in another district.⁵¹

Tax credits burst on the national scene when President George W. Bush included a tax credit in his fiscal year 2003 budget. Congress reacted with the introduction of the Back to School Tax Relief Act of 2002, which would have provided low-income parents with a tax deduction for expenses related to elementary and secondary education in public or private schools. Although approved by the House Ways and Means Committee in September 2002, the bill received no further consideration.⁵²

V. Legal Challenges to Choice Programs

Voucher programs made similar progress during the 1990s. The Maine and Vermont programs aside, the first voucher program was established in 1990 for low-income students in Milwaukee, Wisconsin. Under the Milwaukee Parental Choice Program, more than 10,000 students from families at or below 175% of the poverty level may use the voucher to attend private or religious schools of choice.⁵³ The American Civil Liberties Union, the teachers union, the National Association for the Advancement of Colored People, Americans United for Separation of Church and State, People for the American Way, and others filed a lawsuit contending that the program violated both the First Amendment and the Wisconsin Constitution. The Wisconsin Supreme Court, however, upheld the program in 1998.⁵⁴

Specifically, the court decided that the program does not violate the First Amendment because it has a secular purpose and does not advance religion or create an excessive entanglement between the state and religious schools chosen by the families.⁵⁵ Concerning the state constitution, which states that

49. *Kotterman*, 972 P.2d at 615.

50. PA. STAT. ANN. tit. 24, § 20-B (Act 2002-237); see also Don Soifer, *Schaffer Introduces Tuition Tax Credit Proposal*, THE HEARTLAND INST., Aug. 1 2002, at <http://www.heartland.org/PrinterFriendly.cfm?theType=artId&theID=1024> (last visited Apr. 10, 2003).

51. FLA. STAT. ANN. § 220.187 (West 2003).

52. The Back to School Tax Relief Act of 2002, H.R. 5193, 109th Cong. (sponsored by Representative Bob Schaffer (R-CO)), to the House (2002), available at <http://thomas.loc.gov> (last visited Apr. 1, 2003).

53. WIS. STAT. § 119.23 (1999).

54. *Jackson v. Benson*, 578 N.W.2d 602 (1998); see *Milwaukee School Choice Case* (Inst. for Justice, Wash, D.C.) at <http://www.ij.org/cases/index.html> (last visited Apr. 9, 2003); see generally, Marya DeGrow, *Educational Vouchers and Tax Credits: A State-by-State Summary of Current Programs* (The Independence Inst.), Dec. 18, 2002, at <http://i2i.org/Publications/IB/Education/2002f.htm> (last visited Apr. 10, 2003).

no person shall be compelled to support religious institutions and that no money “shall . . . be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries,” the court declared:

In this context, this court has held that public funds may be placed at the disposal of third parties so long as the program on its face is neutral between sectarian and nonsectarian alternatives and the transmission of funds is guided by the independent decisions of third parties...and that public funds generally may be provided to sectarian educational institutions so long as steps are taken not to subsidize religious functions.⁵⁶

In 1995, the Ohio legislature enacted the Cleveland Scholarship and Tutoring Program, which allows parents of K–8 school students to use vouchers worth up to \$2,250 for tuition at a private or religious school of choice.⁵⁷ The program, which serves over 5,000 students, endured several legal battles culminating in the June 27, 2002, decision of the Supreme Court of the United States in *Zelman v. Simmons-Harris*.⁵⁸ The Court concluded that the use of public money to underwrite tuition at private and religious schools does not violate the Establishment Clause of the Constitution as long as parents make the decision regarding where the voucher is used.⁵⁹ Given the range of options and the responsibility of the parent to choose from among them, the Supreme Court concluded that the Cleveland program is neutral with regard to religion—even

though the majority of voucher recipients chose religious schools. In the Court’s decision, Chief Justice Rehnquist wrote, “[w]e believe that the program challenged here is a program of true private choice, consistent with *Mueller*, *Witters*, and *Zobrest*, and thus constitutional. As was true in those cases, the Ohio program is neutral in all respects toward religion.”⁶⁰

VI. The Post-*Zelman* Legal Era

The Supreme Court’s ruling opens the door to new programs in other states. Free from the cloud of uncertainty, state legislatures and Congress may now consider voucher programs on their merits.

In Houston, Texas, then-District Superintendent of Schools Rod Paige initiated a small voucher-like plan in 1996 that allows students in overcrowded schools to transfer to nonsectarian private schools.⁶¹ Referred to as “educational contracting,” the practice was expanded in 1998 to provide similar options for students who were struggling in poorly performing schools. Since then, the Houston school board has voted to allow more students to participate in this program of limited choice.⁶²

Florida boasts two statewide voucher programs established in 1999: Opportunity Scholarships for students in schools that have failed state assessment benchmarks in two out of four years, and McKay Scholarships for disabled students. Opportunity Scholarships allow students to attend another public or private school. During the 2002–2003 school year, nearly 9,000 children attending ten schools were deemed eligible for scholarships under the A+

55. *Jackson*, 578 N.W.2d at 621.

56. *Id.*; see also *Press Release, Becket Fund Hails Wisconsin Supreme Court Decision on School Voucher Program*, BECKET FUND (June 10, 1998), available at <http://www.becketfund.org/press/061098.html> (last visited Mar. 29, 2003).

57. *Cleveland Scholarship and Tutoring Program*, SCHOOL CHOICE NEWS, at <http://www.schoolchoiceinfo.org/img/pdf/cleve2001full.pdf> (last visited Apr. 9, 2003).

58. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); Caroline Hendrie, *Applications for Cleveland Vouchers Soar After High Court Ruling*, EDUC. WK., Sept. 4, 2002, at 34.

59. *Zelman*, 536 U.S. at 662–63; George Clowes, *Parents Are Winners in Supreme Court Ruling*, SCH. REFORM NEWS, Vol. 6, No. 8 (Aug. 2002).

60. *Zelman v. Simmons-Harris*, 536 U.S. at 651 (2002).

61. See Houston Independent School District’s Educational Contracting Program at http://www.houstonisd.org/HISD/portal/article/front/0,2731,20856_2524_14954,00.html (last visited Mar. 27, 2003) (giving an overview of the Educational Contracting Program).

62. Darcia Harris Bowman, *Voucher-Style Program Offers Clues to Paige’s Outlook*, EDUC. WK., Jan. 10, 2001, at 39.

accountability program.⁶³ Authorized as a small pilot program in 1999 and expanded in 2000 and again 2001, the McKay Scholarship Program provides disabled students with vouchers to attend another public or private school if their parents are dissatisfied with their academic progress. Approximately 9,000 students used McKay Scholarships in the 2002–2003 school year.⁶⁴

Although Florida's tax credit and McKay scholarship remain unchallenged, the state's Opportunity Scholarship is under fire. A Florida circuit court struck down the voucher program in August 2002 for conflicting with the state's Blaine amendment, which prohibits tax money from flowing to religious institutions.⁶⁵ Supporters of vouchers, including Governor Jeb Bush, have challenged the decision. The state has appealed the circuit court's decision, and the judge has allowed the program to continue while the case makes its way through the courts.⁶⁶

Currently, thirty-seven states have so-called Blaine amendments.⁶⁷ Vestiges of an anti-Catholic movement, these provisions are named after Congressman James Blaine of Maine for his efforts to

add such language to the U.S. Constitution.⁶⁸ In the mid-nineteenth century, anti-Catholic and anti-immigrant bigotry found expression in American institutions and politics. The emerging public schools were commonly Protestant in character, requiring, for example, the reading of the Protestant King James Version of the Bible in classrooms. Efforts to secure funding for Catholic schools were resisted. After the Civil War, a new wave of anti-Catholicism found a friend in U.S. Representative James Blaine of Maine, who hoped to prevent the funding of "sectarian" institutions through the adoption of a Constitutional amendment.⁶⁹ Although he failed, his efforts and those of similarly minded individuals are felt in thirty-seven states (but not Maine).⁷⁰

The pernicious history of Blaine provisions is increasingly acknowledged. In *Mitchell v. Helms*, Justice Thomas wrote:

[H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress's

63. *Education Reform Newswire*, Vol. 4, No. 23 (Center for Educ. Reform, Wash, D.C.), June 18, 2002, available at <http://www.edreform.com/update/2002/020618.html> (last visited Mar. 26, 2003).

64. Alan Richard, *Florida Sees Surge in Vouchers*, EDUC. WK., Sept. 4, 2002 at 1.

65. *Holmes v. Bush*, No. CV 99-3370, 2002 WL 1809079 (Fla. Cir. Ct. Aug. 5, 2002); Michael A. Fletcher, *Florida's Voucher Law Is Struck Down*, WASH. POST, Aug. 6, 2002, at A7.

66. *Holmes v. Bush*, No. CV 99-3370, 2002 WL 1809079 (Fla. Cir. Ct. Aug. 5, 2002); see also, Alan Richard, *supra* note 62.

67. There are Blaine amendments in every state but Arizona, Tennessee, Ohio, Vermont, Rhode Island, Connecticut, New Jersey, West Virginia, Iowa, Louisiana, North Carolina, Maine, and Maryland. See, e.g., ARIZ. CONST. art. IX, § 10; FLA. CONST. art. 1 § 3. See Blaine Amendments: States, at <http://www.blaineamendments.org/states/states.html> (last visited Apr. 1, 2003); see also Clint Bolick & Richard D. Komer, *School Choice Answers to Frequently Asked Questions About State Constitutions' Religion Clauses*, (Inst. for Justice, Wash., D.C.), Sept. 6, 2002, available at <http://www.house.gov/judiciary/komcr091702.pdf> (last visited Apr. 1, 2003).

68. U.S. Senator James Blaine of Maine failed to pass a constitutional amendment in 1875 that intended to block efforts by Catholic schools to receive public funding. As a result, supporters shifted focus to state constitutions. Certain existing states amended their constitutions and new states had to adopt such provisions as a condition of statehood (some states had enacted Blaine-like amendments before 1875). The suggested Blaine Amendment to the Constitution read "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations." *What Are Blaine Amendments?*, THE BECKET FUND FOR RELIGIOUS LIBERTY, (2003) at www.blaineamendments.org/intro/whatis.html.

69. See JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 151–53 (Brookings Inst. Press, Wash., D.C. 1999).

70. *What Are Blaine Amendments?*, *supra* note 67.

consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that “sectarian” was code for “Catholic.”⁷¹

In *Kotterman v. Killian*, the Arizona Supreme Court Chief Justice Zlaket wrote, “The Blaine Amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to what was perceived as a growing ‘Catholic menace.’”⁷²

Twenty-nine states have “compelled support” language which states that no one can be compelled to support a religious institution. These provisions originated in colonial times to prevent individuals from being compelled to support a colony’s established church. Some states have both types of language.

While Wisconsin, Ohio, and Arizona courts have upheld school choice programs in spite of state constitutional provisions, other state courts, such as those in Florida and Vermont, have struck down programs because of these constitutional provisions.

The provisions continue to cast a legal cloud over legislative proposals.⁷³

Blaine’s day, however, may be coming to an end. A future court decision may require state constitutions to be interpreted as parallel to the U.S. Constitution—that is, as neutral with regard to religion.⁷⁴...

VII. Privately Financed Voucher Programs

While courts and legislatures argue policy, concerned individuals have quietly provided more than 100,000 children the opportunity to attend a private school over the past ten years. In 1991, J. Patrick Rooney, then-chairman of the Golden Rule Insurance Company in Indianapolis, Indiana, inspired the nation’s first privately funded scholarship organization: the Educational CHOICE Charitable Trust.⁷⁵ In its first year of operation, the organization gave scholarships to 500 children. Currently, more than 1,850 children in grades K–8 receive scholarships of up to \$1,000 toward their education.⁷⁶

Over the past decade, more than one hundred privately funded organizations have invested \$500 million in children’s education by providing vouchers that range from \$1,500 to \$5,000 per year. Children First America (“CFA”), for example, has played a central role in helping to establish many scholarship programs, and continues to provide support for new and existing scholarship organizations. In addition, CFA provides information regarding parental

71. *Mitchell v. Helms*, 530 U.S. 793, 828 (2000).

72. *What Are Blaine Amendments?*, *supra* note 67.

73. For programs upheld, see *Holmes v. Bush*, No. CV 99-3370, 2002 WL 1809079 (Fla. Cir. Ct. Aug. 5, 2002); *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), *cert. denied*, 528 U.S. 921, and *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998). For programs struck down, see *Chittenden Town Sch. Dist. v. Dep’t of Ed.*, 738 A.2d 539 (Vt. 1999), *cert. denied*, 528 U.S. 1066 (1999); *Asociacion de Maestros v. Torres*, 1994 WL 780744 (PR 1994.). See also Bolick and Komer, *supra* note 65.

74. UPDATE: On February 25, 2004, the Supreme Court of the United States expressly reserved the issue of the constitutionality of Blaine Amendments for a future case in which such a challenge would be squarely presented. In its *Locke v. Davey* decision that day, the Court carved out a very narrow exception to its neutrality principle by upholding a Washington state policy that prohibits a particular state college scholarship from being used for training for the religious ministry. Although the decision itself is disappointing, the Court majority took great pains to point out the unique history opposing public funding of clerical training at the nation’s founding and distinguished the state provision in question from a Blaine Amendment. The opinion is available at <http://www.supremecourtus.gov/opinions/03pdf/02-1315.pdf>. Instead of supporting bigoted Blaine Amendments, as some have erroneously argued, the decision in *Locke v. Davey* may actually hasten the day when the Supreme Court declares them unconstitutional.

75. *Trends and Issues: School Choice*, Clearinghouse on Educational Management, Ctr. of Educ., Univ. of Oregon, at http://eric.uoregon.edu/trends_issues/choice/intersectional.html#private_vouchers (last visited Apr. 11, 2003).

76. *Annual Report 2001–2002*, EDUCATIONAL CHOICE CHARITABLE TRUST, available at <http://www.choicetrust.org/annualreport.pdf> (last visited June 15, 2003).

choice to local, state, and federal leaders, parents, and the public.⁷⁷ In 1998, John T. Walton and Theodore J. Forstmann founded the Children's Scholarship Fund ("CSF"), a multimillion dollar foundation that matches funds raised in communities throughout the country. The CSF sponsors nearly 34,000 students at 7,000 schools in forty-nine states.⁷⁸

Researchers have studied the impact of both privately financed and publicly funded voucher programs. Over the past two years, they have confirmed earlier research demonstrating that choice can improve academic performance for at-risk students, promotes parental satisfaction and involvement, and fosters competition and accountability in public school systems.⁷⁹

In September 2002, the U.S. General Accounting Office released a report that considered the research findings on seventy-eight privately funded scholarship programs. It found studies showing that parents who used vouchers were more satisfied with their children's schooling with regard to such factors as safety, academics, parent-teacher communication, and learning environment. Other studies documented the academic gains of African-American students who had received vouchers.⁸⁰

In 2002, researchers at Harvard University, Mathematica Policy Research, Inc., and the University of Wisconsin released a study showing that the academic achievement of low-income African American students who had received privately funded

scholarships in New York City had risen significantly.⁸¹ Black students who had participated in the program for three years had scores on standardized tests that were 9.2 percentile points higher than the scores of those who remained in the public schools. Even students who participated in the program for fewer than three years experienced gains in achievement.⁸²

In October 2002, Manhattan Institute scholars Jay P. Greene and Greg Forster released "Rising to the Challenge: The Effect of School Choice on Public Schools in Milwaukee and San Antonio," a new study showing the positive impact of school choice on public school productivity. The authors found academic improvement in public schools that had been exposed to competition with private schools and charter schools in these two locations.⁸³ Greene made similar observations about Florida's Opportunity Scholarship Program, finding that vouchers provide a strong incentive for schools to improve in that state as well.⁸⁴

VIII. Recent Developments In School Choice

It is impossible to overstate the importance of research in the post-*Zelman* era, as the Court's green light has given lawmakers a chance to evaluate school choice policy on its own merits. Last year, over forty proposals to authorize vouchers, tax credits, or charter schools were introduced in state

77. See Children First America, at <http://www.childrenfirstamerica.org> (last visited Mar. 6, 2003).

78. See *About CSF*, Children's Scholarship Fund, <http://www.scholarshipfund.org/index.asp> (last visited Mar. 6, 2003).

79. See Daniel P. Mayer, et al., *School Choice in New York After Three Years: An Evaluation of the School Choice Scholarship Program Final Report*, HARVARD UNIV. & MATHEMATICA POLICY RESEARCH, INC., Feb. 19, 2002 at 37-40, available at <http://www.ksg.harvard.edu/pepg/pdf/nyc%20yr3%20MPR-PEPG%20full.rep%202.19.02.pdf> (last visited Apr. 1, 2003); see also Institute for Justice School Choice Research Center (listing a collection of publications and Internet sources) at http://www.ij.org/publications/other/sc_research_center.shtml (last visited Mar. 27, 2003).

80. U.S. GEN. ACCOUNTING OFFICE, GAO-02-752, *SCHOOL VOUCHERS: CHARACTERISTICS OF PRIVATELY FUNDED PROGRAMS 3* (Sept. 2002), available at <http://www.gao.gov/new.items/d02752.pdf> (last visited Mar. 6, 2003).

81. Mayer, *supra* note 79.

82. *Id.*; see also *New Research Finds School Voucher Programs Raise Academic Achievement*, WHITE HOUSE BULLETIN (May 22, 2002), available at <http://64.239.47.23/pw/wb/WBO20522.htm> (last visited Apr. 10, 2003).

83. Jay P. Greene & Greg Forster, *Rising to the Challenge: The Effect of School Choice on Public Schools in Milwaukee and San Antonio*, MANHATTAN INST., Oct. 2002, available at http://www.manhattan-institute.org/cb_27.pdf (last visited Apr. 9, 2003).

84. Jay P. Greene, *An Evaluation of the Florida A-Plus Accountability and School Choice Program*, MANHATTAN INST., Feb. 2001, available at http://www.manhattaninstitute.org/html/cr_aplus.htm (last visited Apr. 9, 2003).

legislatures. This year promises even greater activity at both the state and federal levels.

In January 2002, President George W. Bush signed the No Child Left Behind Act, which gives students in failing public schools the right to transfer to higher-performing public schools or receive supplemental services such as tutoring.⁸⁵ The policy was implemented unevenly, however, and because of insufficient capacity or will within the public system, not all eligible students were allowed to transfer. In response, parents of students in failing schools in New York City and Albany, New York have filed a lawsuit claiming that the school districts denied their children the educational options mandated by the federal law.⁸⁶

Months later, a presidential commission recommended expanding educational opportunities for special-needs students served by the Individuals with Disabilities Education Act (“IDEA”),⁸⁷ which is due for reauthorization this year. The commission concluded that “Parental and student choice is an important accountability mechanism and IDEA should include options for parents to choose their child’s educational setting.”⁸⁸ While thousands of children with disabilities throughout the nation are educated in private schools at public expense under the law, most children do not have this option.

This year, the President has proposed a voucher plan for students in the District of Columbia as part

of a \$75 million Choice Incentive Fund in his FY 2004 budget.⁸⁹ The budget also includes a \$2,500 refundable tax credit for parents transferring their child out of “failing” schools, as defined under the No Child Left Behind Act, as well as funding for charter and magnet schools.⁹⁰

In April 2003, Colorado Governor Bill Owens signed H.B. 1160, which authorizes a statewide voucher program for low-income students in poorly performing school districts.⁹¹ In other states, numerous new voucher, tax credit, and charter school proposals have been introduced and several have made legislative progress. Maryland Governor Robert Ehrlich signed a bill to make Maryland the fortieth state to enact charter school legislation.⁹² The Washington Senate approved a bill, S.B. 5012 authorizing charter schools.⁹³ The Utah House and Senate approved two education tax credit bills; however, neither was approved in the other chamber prior to session adjournment.⁹⁴ Governor Jeb Bush of Florida proposed allowing districts to use vouchers to meet the mandate for new, smaller class sizes that was passed by referendum in November 2002, given that the cost of enabling students to transfer from overcrowded public schools to private schools would be lower than the cost of building additional public school capacity.⁹⁵ Another proposal to expand corporate tax credit scholarships to military families, H.B. 805, passed in the Florida House of Representatives.⁹⁶ By the end of the session, the

85. No Child Left Behind Act, 20 U.S.C. § 6301 (2002).

86. *Staton v. New York City Dep’t of Educ.*, No. ___ (N.Y. Sup. Ct. filed Jan. 27, 2003); Mark Walsh & Joetta L. Sack, *Suits Contend Officials Fail to Obey ESEA*, EDUC. WK., Feb. 5, 2003, at 1.

87. Individuals with Disabilities Education Act, 20 U.S.C. § 1400–1487 (1994 & Supp. IV 1998).

88. U.S. DEP’T OF EDUC., PRESIDENTIAL COMMISSION ON EXCELLENCE IN SPECIAL EDUCATION, *A New Era: Revitalizing Special Education for Children and Families*, (July 2002) available at <http://www.ed.gov/inits/commissionsboards/whspecialeducation> (last visited Apr. 9, 2003); see Exec. Order No. 13,227, 66 Fed. Reg. 51,287 (Oct. 2, 2001).

89. UPDATE: The D.C. voucher proposal was signed into law on January 23, 2004.

90. Budget of the United States Government Fiscal Year 2004, available at <http://www.whitehouse.gov/omb/budget/fy2004/pdf/budget.pdf> (last visited Apr. 17, 2003).

91. See, S.B. 03-077, 64th Gen. Assem., Reg. Sess. (Colo. 2003); S.B. 03-099, 64th Gen. Assem., Reg. Sess. (Colo. 2003); S.B. 03-001, 64th Gen. Assem., Reg. Sess. (Colo. 2003); H.B. 03-1137, 64th Gen. Assem., Reg. Sess. (Colo. 2003); H.B. 03-1160, 64th Gen. Assem., Reg. Sess. (Colo. 2003), available at http://www.state.co.us/gov_dir/stateleg.html.

92. S.B. 75, Reg. Sess. (Md. 2003) (effective July 1, 2003).

93. See S.B. 5012, Reg. Sess. (Wash. 2003), available at <http://www.leg.wa.gov/wsladm/bills.cfm> (last visited Apr. 9, 2003).

94. See S.B. 34, Gen. Sess. (Utah 2003); H.C.R. 3, Gen. Sess. (Utah 2003), available at <http://www.le.state.ut.us/> (last visited Apr. 17, 2003). [UPDATE: In March 2004 the Utah legislature passed a voucher program for disabled children.]

Senate and House agreed on legislation to increase the corporate tax credit program's cap from \$50 million to \$88 million.⁹⁷

IX. Conclusion

How legislation will fare in Congress, of course, remains to be seen. Support for school choice among some legislators goes only as far as their front door. According to a Heritage Foundation survey of Members of the previous (107th) Congress, 47% of Representatives and 50% of Senators send their children to private schools. (The percentage of the general population that sends their children to private schools is approximately 10%). Sadly, many of the same policymakers who exercise choice in their own children's education voted to block legislation that would have given lower-income parents the range of options that they themselves enjoy. Vote for vote, had these Members acted in a way that was consistent with their own practices, the proposals would have passed.⁹⁸

In the end, positive research and legal decisions are useful only if they become the foundation for better laws. In reality, school choice is not new. As the Black Alliance for Educational Options ("BAEO"), a school choice advocacy group, puts it, "[p]arental school choice is widespread — unless you're poor."⁹⁹ The simple truth is that families

with means have always been able to move to areas with good public schools or afford tuition at private schools.

Over the past two decades, nine states have adopted publicly funded voucher or tax credit programs, forty states and the District of Columbia have enacted charter school laws, and others have established public school choice within and between school districts. Momentum is building. But despite these programs and the work of private philanthropy, too many children remain in failing schools. While the nation spends more than \$422 billion¹⁰⁰ each year on elementary and secondary education, over half of the nation's low-income fourth grade students cannot read at a basic level.¹⁰¹

No one school can serve all students equally well. Ultimately, school choice is about enabling all parents to enroll their children in the schools—public, public charter, private, or home schools—that best meet their individual needs. School choice maximizes the benefits of America's sizable investment in education to ensure that all children have an opportunity to succeed.

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95. Joni James & Steve Harrison, *Vouchers Proposed to Reduce Class Sizes: Governor Says It's Cost Effective*, MIAMI HERALD, Jan. 24, 2003, at 1.

96. H.B. 805, 2003 Leg., 1015th Sess. (Fla. 2003); *School Choice News* (listing links to articles on proposed legislation), at <http://www.schoolchoiceinfo.org/news/?category=9&action=categorySearch> (last visited Mar. 26, 2003).

97. See *Florida Senate 2003, A Session Summary: Education*, SENATE COMM. ON EDUC. at <http://www.flsenate.gov/publications/2003A/senate/reports/summaries/pdf/education.pdf> (last visited June 15, 2003).

98. Jennifer Garrett, *Heritage Foundation Backgrounder: Another Look at How Members of Congress Exercise School Choice*, THE HERITAGE FOUNDATION (May 22, 2002), at <http://www.heritage.org/Research/Education/BG1553.cfm> (last visited Apr. 3, 2003).

99. Kate Zernike, *A Shift, But Just How Big?*, N.Y. TIMES, June 30, 2002, at 3.

100. This is the latest figure available from U.S. Department of Education for 2000 and includes private, local, state, and federal spending. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2001 33, available at <http://nces.ed.gov/pubs2002/digest2001/ch1.asp> (last visited Mar. 27, 2003). [UPDATE: In 2003, the United States spent \$454 billion on public K–12 education.

101. NAEP assessment results provide information about what students know and can do as well as what they should know and be able to do on a variety of subjects. The three achievement levels for each grade (4, 8, and 12) are Basic, Proficient, and Advanced. See U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, THE NATION'S REPORT CARD: FOURTH GRADE READING 2000 39–40 (2001).