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A Legal and Historical Study of Parental Choice: Implications for Public Education

Derrel James Bryan

University of South Florida

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A Legal and Historical Study of Parental Choice: Implications for Public Education

by

Derrel James Bryan

A dissertation submitted in partial fulfillment
of the requirements for the degree of
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University of South Florida

Co-Major Professor:  Arthur Shapiro, Ph.D.
Co-Major Professor:  Steven Permuth, Ed.D.
William Benjamin, Ph.D.
Steve Lang, Ed.D.

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Abstract

This study provides an analysis of the historical and legal constructs of parental choice and implications for public education. While qualitative in nature, the historic record provides important detail in establishing a foundation for understanding parental authority in determining the education of children. An overview of major education legislation from the Colonial era to the No Child Left Behind Act of 2001 is discussed as well as the legal analysis which consists of U.S. Supreme Court decisions influential in the debate over parental authority in determining the education of children. Conclusions include (a) data supporting parental choice as a growing phenomenon in which the power and influence of the federal government over public education is increasing and represents a fundamental shift from an egalitarian focus to a performance driven, standards-based approach; (b) opposition to parental choice is varied depending upon interest group and the type of parental choice in question; (c) the U.S. Supreme court consistently supports parental rights in determining the education of children; and (d) parental choice is here to stay. Implications of expanded parental choice options include (a) increasing federal control over k-12 public education, (b) less emphasis upon addressing social ills and more emphasis on quality of education, (c) resegregation occurring as “equal access” issues are considered secondary to improving academic performance, and (d) accountability, student performance, competition and other market factors will dominate the parental choice debate.
Chapter One

Introduction

The history of public schooling and law has much to say about choices parents make regarding public education. Public schooling in America contains many historical examples of how the subject of public school choice has changed in context due to ever-evolving legal and political landscapes. DeMitchell (1993, p. 369) argues that children are often caught in the middle of this contentious debate:

This conflict between parents’ wishes and the decisions of school authorities has historically occurred in several areas including compulsory education, placement in special education classes and in curriculum decisions. An intense debate about the proper balance of power that parents and the government should exercise over the education and futures of children in society is being heard in the halls of legislative bodies and in numerous courtrooms. Both sides of the debate conjure up visions of the other side using children as the unwitting tools of adults’ agendas for the direction of society.

“Parental choice” is a contemporary term that has become a rallying cry for parents and others seeking to wrest away control of education from state government. Efforts are underway across America to revise parental freedom in choosing the kind of education children receive. Raywid (1989), lists three premises that underlie the case for parental choice: (1) “there are many viable and desirable ways to educate children; (2)
there is no one best program that can respond to the diverse educational preferences
found in a pluralistic, democratic society; and, (3) it is desirable to offer diversity in
school programs to meet family value patterns and orientations.”

Rofes (1992) describes parental choice as meaning different things to different
people, in different states and localities. For some, parental choice means that parents are
free to choose whether their children go to a private or to a public school or to receive
their education at home. For others, parental choice means that families have a
substantial influence on which public school their children attend by choosing where to
live. In today’s public education context, the definition of parental choice refers to
governmental plans and policies that purport to give parents an increased voice in
determining where their children will attend elementary and secondary school.

The current debate over charter schools, vouchers, magnet schools, home
schooling and other methods of choice illustrate a wide variety of opinions and interest
among proponents on both sides of the argument. Former Superintendent Stierheim, (as
and competition is here to stay. Why not give that choice to our parents and students
within our public school system?” The choice options offered in the Miami-Dade district
hope to address a number of problems, such as (a) loss of school funding due to charter
school and voucher students, and (b) offer incentives for parents to keep their children in
district schools.

Halle (2002) discerns that within the parental choice environment, some
approaches work and some fail. Families, like school boards, are free to choose what
suits them. Choice advocates anticipate that under the prodding of competition akin to that prevailing in business and industry, failing schools would be forced to undergo meaningful revitalization if they hoped to continue attracting students. Meanwhile, parents would be financially empowered to decide what type of schools, public or private, they wanted their children to attend. The latter would benefit from enhanced accessibility (Ritter, 2002).

Proponents of the public schools often express anti-parental choice sentiment and charge that universal choice will result in renewed segregation and deeply divide society. Critics also allege that choice plans will further weaken and impoverish public education. Ritter (2002, p. 22) argues “widespread acceptance [of parental choice options] would undermine the political will necessary to fix the ailments currently afflicting public education. School choice would exacerbate racial inequality, further segregation and ultimately contribute to the demise of the democratic, secular common school ideal.”

Two United States Supreme Court cases, Brown v. Board of Education (1954) and Pierce v. Society of Sisters (1925) serve as historical and legal points of reference to illustrate how public schools have been the battleground for generations of Americans in determining who controls the education of our children (as cited in DeMitchell, 1993). Lartigue (2002) cites Brown as the catalyst for a variety of interest groups that, historically, have supported efforts to exercise choice in determining which school, if any, their children should attend. As an example, in response to the Brown decision, white racists supported the concept of vouchers for creating segregated academies as a means to avoid sending white children to public school with black students. Therefore,
many public school supporters argue that school choice efforts will lead to resegregation
and are merely attempts to “turn back the clock” to a system of dual education for blacks
and whites. Ironically, many contemporary inner-city black parents, whose children
attend segregated urban public schools, support the same voucher concept (but not for the
same reasons) as a means to expand educational opportunity for their children. Hence,
historically opposite viewpoints embrace a common attempt to challenge the authority of
state-controlled public schools. In addition, *Brown* set the course for future direct
federal involvement in local school district’s treatment of minority students (Janssen,
2001).

In *Pierce*, the Court decided in a 9-0 decision that Oregon’s Compulsory
Education Act (1922) violated the “liberty of parents and guardians to direct the
upbringing and education of children under their control.” Like *Brown*, this was a
landmark decision that established parental control over educational matters. It is also
ironic that a major group that supported the Oregon Act was the Ku Klux Klan who
claimed to be “front rank defenders of the public schools” (Lartigue, 2002, p. 2). This
claim was in response to perceived influence by the Catholic Church in creating schools
exclusively for the expansion of their dogmatic beliefs.

Recent trends have converged to require that state government exercise a more
definitive role in the governance of education. Evidence to support amplified
government influence includes increasing school expenditures, greater demand for
accountability, and augmented teacher power (Campbell, Cunningham, Nystrand &
Usdan, 1980). Public school bureaucracies that maintain a system of perceived failing
schools along with others that are content to maintain the status quo are viewed as old-fashioned relics fearful of creating a competitive learning environment for students.

The concept of parental choice exemplifies the disparity of socio-economic forces in determining schooling opportunities for students, and confusion exists about the issue. Wealthy families, as some would argue, have always had educational options, or parental choice, to choose where their children attend school. Nevertheless, for most families, particularly the poor, educational choices have been reduced; therefore, the belief that all families should have educational options that have been exclusively for the rich is a strong factor in the parental choice movement.

Oftentimes, as a requirement to meet court-ordered mandates to achieve racial balance, students would be bused from the neighborhoods in which they lived to public schools across town in spite of the fact that a neighborhood school would be closer and more convenient. Subsequent demographic changes, in response to court-ordered desegregation plans, resulted in the “white flight” phenomena in which white families moved out of inner cities to the suburbs in order to avoid sending their children to schools in which the majority of students were members of minority groups (e.g. African-American, Latino, etc.). As a result, schools and communities became increasingly segregated, despite noble efforts by the courts to integrate student bodies.

Two recent and significant events, passage of the No Child Left Behind Act of 2001 (NCLB), a federal law, and the United States Supreme Court decision Zelman v. Simmons-Harris (2002), are changing the political and legal landscape for proponents of parental choice. According to Eugene Hickok (as cited in Olson, 2002, p.26),
Undersecretary of the United States Department of Education, “the guiding principle in writing the regulation for NCLB was ‘what do we think will be in the best interests of students?’” Under NCLB, students attending public schools designated as failing to make “Adequate Yearly Progress” (AYP) and, therefore, needing improvement, corrective action, or restructuring are allowed to attend other public schools not under sanctions (see Appendix One). The law was forthright and the regulations are clear that school districts must comply and may not use “lack of capacity” to deny students in schools deemed in need of improvement the option of transferring to a better school. Districts operating under court-ordered desegregation plans are also ordered to negotiate measures with the courts that will allow for choice options for students (ESEA Analysis, 2002). Michael Heffernan (as cited in Gewertz, 2002), president of Miami-based Floridians for School Choice, says history shows that an overwhelming majority of parents, offered with a choice of schools, stick with the ones in their neighborhoods. A school’s academic performance is only one of a number of factors that influence such decisions, he says, noting that disciplinary effectiveness, safety, and geographic convenience to work or home also apply. Heffernan states, “The parents’ question tends to be, ‘How is my child doing?’ as opposed to ‘How well are the public schools doing?’ The decision tends to be based on intimate, personal, individual reasons, rather than global assessments (p.11).”

Problem Statement

Throughout our nation’s history, the education of children has changed dramatically. In the journey from Colonial America’s absence of compulsory public education to the most recent federal legislation No Child Left Behind Act of 2001, school
children have been subjected to a myriad of transformations, most of which were
designed to improve learning. Questions emerge as to how these changes influenced the
role of parents in determining the education of their children? In addition, the concept of
parental authority, or choice, evolved with other significant issues that impact children’s
schooling creates conflict in determining whether the government, or parents, should
have the final say in deciding the schooling of a child.

While a body of literature exists that discusses the nature of parental choice, little
analysis that examines the legal and historical implications parental choice has on public
education is available. As an example, Fish (2002) comments on the expanding national
debate about the controversial topic of vouchers; “We don’t know a great deal about
them. There has not been a single objective study done by a researcher with a rock solid
methodology. Every report smacked of outright bias, or was funded by an agency with a
particular agenda”(p.9).

The Purpose of the Study

The purpose of this study is to analyze the transformation of the concept of
parental choice within the historic and legal context of the public schools.

Research Questions

Therefore, the research questions posed in this study are

1. What are the historic and legal benchmarks regarding parental choice within
   the context of the public schools?

2. What are the legal implications of parental choice within the context of recent
   state and federal legislation and United States Supreme Court decisions?
3. How do the historic and legal benchmarks regarding parental choice relate to each other?

Rofes (1992) describes parental choice as the “education issue of the new decade” (p. 504). The idea of providing parents or families with a greater range of educational options appears to be increasingly popular and widely accepted by those of all political and philosophical persuasions. Coulson (1997) contends that choices made by parents in the educational market place have been consistently better than those imposed upon them by government-appointed experts. Recent polls suggest that most adults in the U.S. support educational choices for families (with even stronger support among urban and minority families). Rofes (1992) cites a timely confluence of developments-- cultural, political, and economic-- each of which has helped move different but overlapping constituencies behind the parental choice banner:

These developments are: (1) widespread concern about the quality of elementary and secondary public education; (2) diminished confidence in the effectiveness of government and increased faith in the comparative ability of private institutions; (3) growing apprehension of international threats to American economic superiority; (4) persistent pressure to ease tax burdens; (5) and resentment on the part of parents who want to provide their children education delivered through religious institutions that opting for such forfeits economic benefits accruing to families using public education (p.505).

Parental choice models a variety of forms. Within the public school arena, choice options include choices that allow parents to choose within specific parameters. The
choice of a particular classroom teacher or school within or outside a school district or
the choice of a magnet school would be examples of public school choice. Semi-private
choice would involve parents choosing charter schools or home schooling for their
children. Public-private choice involves the use of public funds (vouchers) to support
choices that can include private, even religious schools. The public-private choice debate
has been the most controversial.

The constitutionality of allowing public funds (vouchers) to support private
education, particularly religious schools (a separation of church and state issue), is a topic
of heated debate within legislative bodies and challenges in the courts. The recent 5-4
ruling by the U.S. Supreme Court in the *Zelman* decision marked a fundamental change
in the debate. The ruling specifically stated that publicly funded vouchers for private
education did not violate the Establishment Clause of the First Amendment (Destro,
2002). Nevertheless, the ruling does not mean that all states must or will adopt voucher
programs. The decision to allow vouchers on a state-by-state basis, then, becomes a
political decision, and debate will loom over state court challenges and the impact these
decisions have on the success or failure of vouchers as an expression of parental choice.

In determining who has the authority to instill the value of education to children,
DeMitchell (1993) makes the case that:

Both parenting and the teaching power of the state have an inculcative function.
But, when parents assert their right to make educational decisions regarding their
children, this can infuse the states educational processes, programs and goals of
promoting the general welfare for preparing students for the broader society.
Conversely, educational decisions made in the public schools may contradict values taught at home and encroach on parental sovereignty of parents over their children (p. 370).

Gliedman (1991) notes the irony of parents spending tax money on dreams for their children’s future but lacking direct control over the way such money is spent.

Specifically, the issue of parental choice impacts the future of public schools more than any other reform measure. It has the potential to alter the public education landscape drastically and is, therefore, worthy of further study.

Definitions

Parental Choice. Parental choice means different things to different people depending on location. According to Rofes (1992), the term means that parents are free to send their children to public or private school or to teach them at home. For others, parental choice means that families have a substantial influence on which public school their children attend by choosing where to live. In today’s educational context, the definition of parental choice refers to governmental plans and policies that purport to give parents an increased voice in determining where their children will attend elementary and secondary school.

School Choice. Defined as a means of providing individual parents or families with some range of alternatives in their children’s education, school choice allows families to make choices they believe are best suited for their children (Tompkins, 1991, Metcalf, Muller, & Legan, 2001). There is obvious similarity in the terms: parental choice and school choice. For purposes of this study parental choice will be used to
describe decisions by parents in choosing the education for their children.

Charter Schools. According to Vergari (1999), charter schools are defined as “legally and fiscally autonomous educational entities operating within the public school system under charters, or contracts” (p. 113). The charter is negotiated between organizers and sponsors. The organizers may be teachers, parents, or other groups from the public or private sector. Local school boards, universities, state school boards or other public authorities may sponsor charter schools. The organizers manage the schools, and the sponsors monitor compliance with the charter. The charter contains provisions regarding issues such as curriculum, performance measures, and management and financial plans.

Magnet Schools. Magnet schools are defined as schools (a) that offer a special or distinctive program attractive to students of all races, (b) that students enter on a voluntary basis (McMillan, 1980), and (c) that are, in fact, racially mixed and thus serve to decrease segregation. Magnet schools are often used as mechanisms to raise academic achievement and to achieve racial desegregation. They are racially mixed public schools that draw students on a voluntary basis by offering educational innovations attractive to parents.

Home Schooling. Home schooling as defined by Tompkins (1991) is one of three basic educational alternatives parents have as both a right and duty in providing education for their children. The other two are the right to select a private or tutorial program that conforms to parents’ educational philosophy or to attempt to influence the public school system as the action parents take in removing their children from the public schools and providing their education within the home. Home schooling is becoming a
very popular and growing phenomenon within the educational community. Little regulation or oversight exists in most states concerning children that are home-schooled.

*Adequate Yearly Progress (AYP).* This term is defined within the framework of this study as a component of the *No Child Left Behind Act of 2001.* AYP is defined by each state, and schools are measured in a number of categories including test participation, graduation rate, student attendance, and performance measures in reading, language arts, and math skills. Student subgroup performance is also a critical factor in that ethnic origin and economic and special needs status are a factor in determining whether or not schools meet AYP. Schools that fail to make “adequate yearly progress” are designated in need of improvement, and parents of children who attend those schools may opt to send their children to schools that are not in improvement status. Further sanctions including a new governance structure for the school or district may be required if deficiencies are not corrected within a prescribed time frame.

*Benchmark.* Benchmark is defined by the *American Heritage Dictionary* as “something that serves as a standard by which others may be measured” (benchmark, p. 122, 1976). For the purpose of this study, benchmarks will be discussed in terms of historical and legal landmarks as determined by important court cases and legislative acts.

*Delimitations and Limitations of the Study*

For the purpose of this study an assumption was made that the topic, “parental choice”, relates to an historical and legal analysis and describes implications for public education. No consideration was given to implications for private education or home
schooling, although both terms are mentioned as components of parental choice.

The research idea is that the state as the governmental authority over education has through the course of American history taken control over the education of children from parents. The information included in this study includes historical documentation, federal and state court cases, federal and state statutory law, and analysis thereof. The information is limited in its scope as key elements of the ongoing debate over parental choice, namely, the No Child Left Behind Act of 2001 (NCLB) and the United States Supreme Court case, Zelman v. Simmons-Harris. They continue to influence legislators, jurists, and educational policymakers.

The results of this study are relevant to school leaders and educational policymakers. Nevertheless, implications concerning public education may be generalized beyond the scope of this study.

Summary

Parental choice is defined in many ways and within different contexts. Contemporary scholars, public education officials, business leaders, politicians, and parents are engaged in a debate that will set the course of future action to determine who controls the education of children. Outcomes of this debate will establish the framework for the next wave of education reform.
A chronological analysis of major United States Supreme Court decisions and federal legislation, (i.e., Civil Rights Act of 1964, No Child Left Behind Act of 2001, Individuals with Disabilities Act (IDEA) establish a basis of study that will have far reaching effects upon parents and public schools; therefore, the need to study this topic is both timely and profound.

Organization of the Study

This study is a legal and historical analysis of parental choice and the implications it has for public schools.

Chapter Two contains a review of the related literature involving historical information, case law, and statutory law as it pertains to the issue of parental and state control of children’s education.

Chapter Three presents methods to obtain data. Court records, historical documents, federal statutes, and other information relevant to this qualitative study is presented. A triangulation approach was used in which legal and historical information regarding the issue of parental choice and implications for public education were studied.
Chapter Two

Review of the Literature

Introduction

The literature relevant to this study is presented in this chapter. This study is an analysis of the historical and legal implications of parental choice within the context of public education.

The literature presented follows two strands. The first strand is an historical perspective of public education as it relates to the authority of parents or the state to determine who governs the education of children. The second strand discusses specific United States Supreme Court decisions and other relevant federal and state case and statutory law as pertaining to parental rights and public education.

Historical Perspective

According to the Mackinac Center for Public Policy (1999a), early colonial America was arguably the freest civil society that has ever existed. This freedom extended to education, which meant that parents were responsible for, and had complete control of, their children’s schooling. Parents could choose the kind of education they wanted for their children, and no one was forced to pay for education they did not use or approve. The intellectual roots of parental choice, however, can be traced back even farther than the colonial period (Rofes, 1992). Coulson (1997) contends that Athenian
society, early Islam, and Roman culture thrived on the concept of free market education whereby parents decided on the educational processes for their children.

Gutman (1987) describes three distinct theories from Plato, John Locke, and John Stuart Mill that account for societal differences concerning purposes of education. Referred to as the family state, state of families, and state of individuals, each treats questions of education as part of a principled political theory. Plato argued that the family state must exhibit absolute authority over education in order to establish harmony between individual virtue and social justice (p. 3). John Locke maintained that parents are the best protectors of children’s rights and argued that educational interests of children are best left in the hands of parents. This view described by Gutman as the state of families, is radically different from the family state (p. 4.). The state of the individual extends from the logic of John Stuart Mill’s liberal conception of education. Gutman further explains this theory as the:

Ideal educational authority is one that maximizes future choice without prejudicing children towards any controversial conception of the good life. The state of individuals thus responds to the weakness of both the family state and the state of families by championing the dual goals of opportunity for choice [original emphasis] and neutrality [original emphasis] among conceptions of the good life (p. 5).
Finally, Gutman (1987, p. 5) asserts the difficulty in defining the educational role of the state in explaining:

As long as we differ not just in our opinions but in our moral convictions about the good life, the state’s educational role cannot be defined as realizing the [original emphasis] good life, objectively defined, for each of its citizens. Neither can educational authorities simply claim that a good education is whatever in their opinion is best for the state.

In his classic work, *The Wealth of Nations*, Adam Smith (1776) urged that government provide funds for parents to purchase educational services for their children in the open market, engendering competition and responsiveness. Colonial America’s Thomas Paine (1791) refined Smith’s argument suggesting that government expand educational opportunities available to less affluent families through what contemporary scholars have called “a negative income tax scaled progressively in favor of the poor” (p. 162) Mill (1859) elaborated further on Paine’s idea, contending that parents be legally required to provide an adequate education for their children, but when they could not, that the government be required to pick up what the parents could not afford. Economist Milton Friedman (1955) brought the parental choice idea into the late twentieth century, arguing that government should stop providing education and, instead, begin providing funds that would enable all parents to choose where their children would receive an education.

The federal Constitution (proclaimed the “law of the land” by Congress in 1788 and ratified by the 13th state in 1789) contained no mention of public education or public
schools (Campbell, et al., 1980). One should not conclude, however, that a national education policy was not present. Hirschland and Steinmo (2003) make the case that “even before the Constitution was signed, America’s nascent central government, the Continental Congress, made its first foray into the provision of education” (p. 343). Although a weak government, it did manage to agree to policies that would promote and support public education. The Northwest Ordinance (May 20, 1785) mandated that “there shall be reserved the lot No. 16 of every township, for the maintenance of the public schools, within the said township” (as cited in Hirschland & Steinmo, 2003, p. 344). The Ordinance marked the beginning of a pattern in which the central state supported the provision and finance of public education in a way that is at once decisive and at the same time hidden. This pattern of land transfer from federal to state governments in support of public education expanded repeatedly in response to more resources in support of education to total more than 77 million acres of land by the end of the 19th century. By 1854 alone and according to government records, these transfers for educational purposes totaled much more than 52 million acres. Thus, the groundwork provided by the ordinance demonstrates the commitment of the founding elite in favor of supporting education (p. 341).

Benjamin Franklin, James Madison, and other prominent early American leaders attempted to push their ideas about education reform during the Constitutional Convention, but their ideas fell flat against the fear that the national government was gaining too much power (Hirshland & Steinmo, 2003). Thus, the Tenth Amendment to the Constitution was created and serves as an oblique reference to the power of the states
to deal with educational issues since those powers were not specifically delegated to the federal government (Bill of Rights, Tenth Amendment, United States Constitution, 1791). Therefore, education is considered a “reserved power” and falls into the category of state oversight. The basis of state control over education was well established as early as 1820 by constitutional and statutory provisions of the states that made up the Union (Campbell et al., 1980). Ten new states were added to the original 13, and each had incorporated language in their constitutions paying some attention to education (Hirschland & Steinmo, 2003).

Hirschland and Steinmo (2003) contend that the popular notion of education as always perceived as a local issue is a myth:

There is little doubt that localism as a fixture of American education has been a strength, providing a multitude of educational approaches and policy innovations crucial to the nation’s dynamism. Yet at times, strong national policies on behalf of educational provision and reform have been required to make right the great inefficiencies and inequities promulgated by this very localism. In fact, we find that early on, the country’s enormous resource wealth (specifically land) concentrated in the hands of the central government offered national progressive elites a powerful means of shaping the development of American educational policy and provision at all levels (p.12).

Provisions for compulsory attendance and tax support for schools were particularly important in the establishment of public education. Both reflected the growing power of the state over a function once left to individuals and the church
(Campbell et al., 1980). Beginning with Massachusetts in 1852 and extending to Mississippi in 1918, each of the 48 states enacted compulsory education laws. This action affirmed that minimum school attendance was no longer a question for the parent but for the state (Kilpatrick, 1990).

The American system of schooling evolved in the late eighteenth and early nineteenth century, largely based on models of Prussian and Napoleonic origins (Mackinac Center, 1999d). During this period many European nations began to adopt the view that the state should be the guardian of national character and culture. In 1806, Holland became the first country to adopt a national system of state-regulated education. Prussia followed in 1819 when it adopted a centralized government system of education.

The first public schools, referred to as “common”, are considered America’s original government schools since they were supported to some degree by local taxes but funded primarily through private means (Mackinac Center, 1999d). Meserli (1972) describes the common school as largely a response to ensure greater equity and consistency in the quality of education that sporadic funding and the varying efforts of private education could not guarantee. They were first built in the Puritan Commonwealth of Massachusetts to inculcate the Calvinist Puritan religion in the children of the colonies and create an obedient and orderly society (Kilpatrick, 1990). Martin Luther, John Calvin, and the Puritans influenced the religious base of the public schools (Gliedman, 1991). The Puritan association of education and morality greatly impacted the Commonwealth of Massachusetts as Puritan school law shares a missionary zeal with mid-nineteenth century school reforms (p. 407). The 1780 Massachusetts
Constitution empowered the Massachusetts legislature to create schools to “countenance and inculcate the public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections and generous sentiments among the people” (Mackinac Center, 1999d, p. 4). The city of Boston then laid the foundation for the first tax-funded school system in any American city. Primary education was the families’ responsibility and children had to be literate to enter tax-funded grammar schools at age seven. Compulsory attendance laws did not exist, and private schools flourished alongside the tax-funded schools.

Thurston and Roe (1947) suggest the notion of state control of education emerging during the American colonial period. Evidence to support this conclusion is held in the first public school law of the colonies, enacted in Massachusetts in 1642. The law was a response to perceived weakening of the family as the center for the Puritan way of life. In the words of William Gouge, an early seventeenth century preacher, “a family is as a school wherein the first principles and grounds of government are learned” (Gliedman, 1991, p. 407). Gliedman surmises, “Behind this continuity lay a fear that the Puritan way of life was breaking apart” (p. 407). When schools were established, they “formed a kind of appendage to other, far more important and more comprehensive agencies: the church, the community at large, and above all, the family itself” (p. 407). Bailyn (as cited in Gliedman, 1991) describes the 1642 law as an attempt to promote homogeneity in response to a perceived crisis. The law was “one of a series of experiments aimed at shoring up the weakening structures of family discipline” (p. 407). Society’s elders watched as young men thought about leaving their towns to settle
elsewhere. Family-dominated apprenticeships had failed to provide a cultural center, and lawmakers responded with an attempt to instill Puritan values through formal schooling. The Puritans also wanted to spread the art of reading if for no other purpose than to ensure themselves a numerous clergy (Bendiner, 1969). The law required heads of families to teach their children and apprentices to read, and was strengthened five years later to provide for public support for schools (Morgan, 1966). The law proclaimed that its immediate purpose was to promote the ability to read the Bible. Schools were deemed necessary in the first place because parents were thought to need assistance in teaching children (Gliedman, 1991). The 1642 Ordinance was quite specific in delegating the responsibility for education to the “townsmen.” The words of the Ordinance clearly describe the intent of the law:

This Court, taking into consideration the great neglect of many parents and masters in training up their children in learning and labor…do hereupon order and decree that in every town the chosen men appointed for managing the prudential affairs of the same shall henceforth stand charged with the care of the redress of this evil, so as they shall be sufficiently punished by fines for the neglect thereof upon presentment of the grand jury, or any other information or complaint in any court within this jurisdiction; and for this end they, or the greater number of them, shall have the power to take account from time to time of all parents and masters, and of their children, concerning their calling and employment of their children, especially of their ability to read and understand the principles of religion and the capital laws of this country (as cited in Campbell et al., 1980, p. 187).
While compulsory school laws were passed by all the New England colonies except Rhode Island, compulsory attendance laws were not. These Puritan commonwealths required that parents and masters assume responsibility for the education of their children. This was a reflection of their English background, in which education was conceived as a private and not a public matter (Campbell, et al., 1980, p. 62). Connecticut and New Hampshire modeled its school laws after those of Massachusetts (Mackinac Center, 1999d).

The middle and southern colonies presented another picture. The middle colonies were more diverse with many different religious sects (e.g. Quakers, Catholics, and Lutherans) and, therefore lacked the singleness of purpose found in the New England colonies. Primary education became a church or parochial responsibility and secondary education a private matter (Campbell, et al., 1980, p. 62). In New York state in 1795, the legislature appropriated funds for the purpose of encouraging and maintaining school systems in its cities and towns. Towns that took advantage of this revenue opportunity were required to provide matching funds, and parents were also required to pay tuition. Private schools were eligible for government funding and discrimination against schools that provided religious education did not exist (Mackinac Center, 1999d). Leaders in the southern colonies were, for the most part, adherents of the Anglican Church and were willing to support it as long as it did not interfere with their way of life. The well-to-do believed education to be a private matter (Campbell, et al., 1980). Hirschland and Steinmo (2003) note that most southern state constitutions provided only vague or tepid language urging the creation of a formal system of schooling in their founding
documents. Hostility arose to any educational plan that included educating African-Americans. In fact, most southern states had laws against educating African-Americans punishable by fines, jail, or both (p. 348). Monroe (as cited in Hirschland & Steinmo, 2003, p.348) noted, “The aristocratic character of society prevailing throughout the early United States was more influential in the South because of large land holdings, the dominance of the landed aristocracy in politics, and the system of slavery.”

In 1647, the Act of Massachusetts General Court, also known as “Ye Olde Deluder Satan” Act passed. This law, so named because Satan had for too long deluded men into ignoring the Scriptures, made town teachers available to “all such children as shall resort to him” (as cited in Gliedman, 1991, p. 398). This legislation was important not only because it provided for the formal education of children, but because it enunciated the principle of state authority in the control of schools (as cited in Campbell, et al., 1980, p. 94). The law also provided that “those that sent their children be not oppressed by paying much more than can have taught them for in other towns” (as cited in Gliedman, 1991, p. 407). As trade grew and other religious sects moved into the Massachusetts Commonwealth, enforcement of school laws grew lax and private schools sprang up to teach the more practical commercial subjects. By 1720, Boston had more private schools than taxpayer-financed ones (Mackinac Center, 1999a). Nevertheless, these two statutes (1642 and 1647) laid the groundwork for two major components of the public school system: (a) compulsory education decreed by the state, and (b) communities directed to maintain schools out of local taxation (Bendiner, 1969, p. 22).
Connecticut laws governing schools were much stronger than the Massachusetts Ordinances. Parents found negligent in observing the laws, were directed by town selectmen to take children from their parents or apprentices from masters and place them with acceptable masters until age 21 for boys and 18 for girls. Justification for this action was implied in the law in that an educated citizenry is imperative if representative government is to survive (Campbell, et al., 1980, p. 188).

The academy became the dominant form of secondary education throughout the eighteenth and early nineteenth centuries. They were generally organized as individual corporations operated by self-perpetuating boards of trustees and financed through private endowment or a combination of endowment and tuition. State governments found this form of organization for secondary education desirable public policy and promoted it through grants of land or money to individual academies. Academies were conceived by Americans of the time as public institutions. The term “public” implied the performance of broad social functions and the service of a large, heterogeneous, nonexclusive clientele rather than control and ownership by the community or state (Mackinac Center, 1999d).

Thomas Jefferson offered to the Virginia General Assembly, in 1779, the most definitive plan for a state school system during the Colonial period. In his plan he proposed all free children, girls and boys, attend schools for three years without paying tuition and for longer than that at private expense if their parents, guardians, or friends thought proper (Campbell, et al., 1980, p. 63). Jefferson’s proposal is noteworthy even though it did not become law but laid the foundation for similar proposals later.
Private education was in demand and successful in New England between 1800 and 1840. Funded primarily through private means, private schools of every sort (church schools, academies, seminaries, dame schools for primary education, charity schools for the poor, and private tutors) existed (Mackinac Center, 1999d). Literacy rose from 75 percent to between 91 and 97 percent. In the South during the same time period, the rate grew among the white population from between 50 and 60 percent to 81 percent.

In Massachusetts, a state school law passed in 1789 recognized the existing system of educational governance, in which individual towns and school districts set standards for the schools within their territories (as cited in Gliedman, 1991, p. 408). State law required only that teachers instruct virtue, that schools submit to inspection by local ministers and selectmen, and that towns of certain populations make available schooling for a particular number of years. The law was followed by legislation in 1801 that granted local districts power to raise money through taxation for support of district schools.

In May 1817, the first movement toward state-controlled education in America began. A group of Bostonians who wanted to establish a system of government primary schools began an effort to phase out private primary schools. They argued that many poor parents could not afford to send their children to private schools. A survey was conducted and determined that 96 percent of the city’s children were attending schools, despite the fact that the schools were private and no compulsory attendance laws existed. Notwithstanding the survey results and the decision by the Boston School Committee’s recommendations against the proposal, a vigorous campaign conducted in the press.
focused on several hundred children who were not attending school. In 1818, the city government acquiesced and created a new Primary School Board that would oversee the newly formed government funded-schools. As a result, Boston became the first American city to have a complete, government-financed school system from the primary to the secondary level (Mackinac Center, 1999d). The primary disagreement with the organizers and operators of most private schools was on the fundamental issues of religious doctrine.

Two significant developments occurred in popular education during the three decades that preceded the Civil War. The first is that the foundations were laid for a government takeover of education, and the second is that the historic role of schools in transmitting religious traditions gave way to more secular goals (Mackinac, Center, 1999b). In addition Tyack, James, & Benavot (as cited in Hirschland & Steinmo, 2003, p. 31) states, “[B]y 1837, complaints over education from local and state authorities reached the point that Congress moved to distribute the surplus monies taken in by the federal government back to the states.” The money was not expressly earmarked for education but played a large role in providing a basic foundation for educational services. Eventually, twenty-eight million dollars was turned over in the form of loans and never recalled. All but four states used this “loan” to support schools, indicating the high priority states placed on education. Hirschland & Steinmo (2003) contend this evidence supports “the role of the American central state as benefactor of education, couched within its policy of land management and distribution of the proceeds from the sales of federal lands and fiscal surplus” (p. 31).
The educational reform movement that marked the turning point in United States educational history originated in, and dominated by the example of Massachusetts and by its political leaders, particularly Horace Mann (Mackinac Center, 1999b). Mann, an early advocate of universal public education, proclaimed that the public schools should promote responsible citizenship, foster economic prosperity, instill a common morality, and reduce class and ethnic conflict in a heterogeneous population (Imber, 2001). The work of Horace Mann set a precedent for others to follow in the establishment of public, or common, schools (Campbell, et al., 1980, p. 64). The common school movement, as Mann and other contemporaries described it, would instill in all children a set of common experiences (Imber, 2001, p.40). Mann was appointed secretary of the Massachusetts Commonwealth first Board of Education in 1837. Trained as an attorney, Mann served for ten years in the Massachusetts legislature prior to his appointment as Secretary. The organizational model Mann adopted and used in Massachusetts and elsewhere was based on the Prussian educational system described by French philosopher Victor Cousin in his 1833 book *Report on the Condition of Public Instruction in Germany, and Particularly Prussia* (Mackinac Center, 1999b). The Prussian system was a state-controlled system that extended from the lower grades through the university levels. Schools were established, supported, and administered by a central authority. In addition, the state provided teacher training, made efforts to create a uniform curricula, enforced compulsory attendance laws, and punished parents for withholding their children from school.
Mann and his supporters did not seek direct authority over the schools. They worked to extend the state’s role in defining what the curriculum and preparing those who would teach. During his tenure on the Board of Education, he accomplished three objectives: (a) state collection of educational data, (b) state adoption of textbooks through the establishment of state approved school libraries in each district; and (c) state control of teacher preparation through the establishment of “Normal Schools” (teacher colleges) (Mackinac Center, 1999b). He led a campaign during the 1840s to establish a statewide, interconnected system of public schools. According to Mann, these schools would prevent children from “the same nature by which the parents sunk into error and sin … and the course of ancestral degeneracy” (as cited in Gliedman, 1991, p. 408). Mann, raised an orthodox Calvinist, rejected his upbringing in favor of Unitarianism, who at the time believed they were preserving the essence of Christianity by purging sectarian and divisive doctrines. Mann clearly wanted to counter the predominant influence of Calvinism by marginalizing it in the minds of Massachusetts’ students (Mackinac Center, 1999b). In his view, a state system could address the widespread need better than the old district system:

Though undoubtedly it is the duty of parents and of religious teachers, to cooperate with the Common School teachers in their religious instruction, yet it is only in the Common School that thousands of the children in our Commonwealth can be instructed (as cited in Gliedman, 191, p. 408).

Reformer emphasis shifted away from voluntary initiatives for improving the techniques and resources available for instruction to state action promoting a uniform
system of education. Voluntary efforts lost ground to state coercion as the diversity of local schools was defined as a problem and schools not accountable to the political process were condemned as a threat to the best interests of society (Mackinac Center, 1999b).

As a major component of his work, Mann made the State Board of Education and the state superintendency respected and necessary agencies for education and for government (Campbell, et al., 1980, p. 63). The creation of the office of the superintendent at the district level and other full-time positions began to create an educational establishment that gave public education a lobbyist that had not existed before (Gliedman, 1991, p. 409). This system, a step up from the anarchy of extreme localism, gave the school board new functions and subjected it to new pressures (Bendiner, 1969, p. 29).

Bendiner (1969) notes Mann’s critical attitude toward outlying communities in the poor efforts to promote schooling (p. 29). He was not opposed to the principle of local control per se but based his opposition on the demonstrated inability as well as unwillingness to these very small units to provide adequate schools (Campbell, et al., 1980, p. 94). Campbell et al. claim that school districts emerged out of the need to meet the educational demands of rural residents. Whereas, towns were able and willing to support school systems, farms and villages were not. Thus, educational inequality was set in practice and has been present ever since. Mann’s and other reformers’ primary purpose was to bring local school districts under centralized town authority and to achieve some degree of uniformity among the towns through a state agency. They
believed that Mann could transform popular schooling into a powerful instrument for social unity (Mackinac Center, 1999b). Efforts at reform by others responded to perceived economic and social threats. Mann was bothered by the possibility that urban parents were unresponsive to their children’s education (Gliedman, 1991, p. 408).

“Without a state system, he argued, individual teachers would lack the guidance of uniform methods, discipline, and curricula necessary to carry out their tasks” (as cited in Gliedman, 1991, p. 408).

Campbell et al. (1980) note some revisionist historians, namely Katz, who questions the motives of Mann and other early public school founders. For instance, Katz (as cited in Campbell et al., 1980, p. 64) states, “What they did not admit … was that the bureaucratic structure, apparently so equitable and favorable to the poor, would in fact give differential advantage to the affluent and their children, thereby reinforcing rather than altering existing patterns of social structure.”

While Puritans were contending with irreligion within their own ranks, Protestants of the mid-nineteenth century decried a threat from abroad. Some of Mann’s supporters were responding directly to the large influx of Irish immigrants in Massachusetts. They wanted the public schools to be “secular churches” that assimilated Catholics into the mainstream Protestant culture (as cited in Gliedman, 1991). On the other hand, Lartigue (2002) argues that the discriminatory roots and bigotry within the public schools are traced back to the 1840s when lawmakers cut off funding to public schools after the influx of Catholic immigrants. Gliedman (1991, p. 409) points out the irony that the parents of foreign-born children were now workers of American
manufacturers and merchants and that individuals who perceived these workers as lazy supported an 1851 Massachusetts compulsory attendance law in the hopes that the children of the working class would learn discipline. Others who supported the law were concerned with child exploitation. The law required all children in Massachusetts between the ages of eight and fourteen to attend school for twelve weeks out of the year. This reform movement altered the direction and control of elementary and secondary education in the United States. The reforms contradicted many of the principles for which Americans had fought for less than a century earlier: (a) a country founded in objection to central government authority allowed for bureaucratic management of its schools; (b) a country synonymous with “free enterprise” and distrust of legally protected monopolies built a government monopoly in schooling; and (c) a country that stretched the exercise of individual choice to its practical limits in nearly every sphere of life severely limited the exercise of choice in schooling, assigning the responsibility for education to discretion of government authorities (Mackinac Center, 1999c).

Hirschland and Steinmo (2003) note that the onset of the Civil War characterized the beginning of accelerated growth in the power of the American federal government. This period represents the era of the last great land grants to the states on behalf of education by the federal government. The Morrill Act of 1862 came after the secession of the southern states, when their approval was no longer necessary for the provision to pass in Congress. In the years leading up to the Civil War, the southern states had become increasingly hostile to any perceived intrusion by Washington, D.C. in issuing land even for the seemingly benevolent use of education. The act gave 30,000 acres of
land to each state for each senator and representative in Congress as provided in the 1860 census.

Bendiner (1969) suggests that public education in the South was late in coming. The Civil War, followed by Reconstruction within an impoverished economy along with the aristocratic concepts of a pyramidal society, allowed for very slow development of public schools. The costly burden of operating a dual system of schools necessitated by the concept of segregation kept the South about a half-century behind the rest of the country in the development of public schools. One might have concluded following the Civil War that the federal government would expand aid for education due to the need for assistance of the war-torn states. Hirschland and Steinmo (2003) discern that the federal role in education was largely rebuked. The central government had little in educational resources and was coupled with the fact that most states did not want federal intervention or support for educational efforts. In particular, southern states considered the idea of educating over four million blacks an abomination. An example of this feeling by southern elites can be described in reaction to the creation of the Bureau of Refugees, Freedman and Abandoned Lands (BRFAL) in 1865. The mission of the BRFAL under the direction of the War Department was to “aid in the reconstruction of the South and contribute to the betterment of the millions of freed slaves” (p. 356). Over six million dollars was deployed on behalf of education. The money opened and staffed more than 2,500 schools and introduced education to more than 150,000 children for the first time (p. 356). More than liberate African-Americans, these efforts contributed to the anti-carpetbagger, antigovernment sentiment among the southern elite. According to
Cubberly (1934), the “friends” from the North were “strangers coming to show them the way; from communities unlike theirs, with usages and ways such as they had never known” (as cited in Hirschland & Steinmo, 2003, p. 356).

The creation of the Department of Education in 1867 signaled a partial success of the federal government’s role in the provision of education. According to Lee (1949), hostilities toward the establishment of the department were regional, but the absence of the southern states voting as a block allowed for its creation (as cited in Hirschland & Steinmo, 2003, p. 356). The reentry of the southern states into full voting rights in Congress led to intensified state hostility toward the department’s mission and especially resentment of the increased specter of central control. By 1869, the department was downgraded to that of a bureau and operated under the auspices of the Department of the Interior with its budget greatly diminished. Hirschland and Steinmo describe this period as a critical juncture in direct federal involvement in education. The path of federal influence was decreasing due to the fact that localists from the North and South did not want the federal government telling them whom to educate and how to do so (p. 57).

The period between 1872 and 1880 saw 11 bills for direct federal aid to education introduced in Congress. Four came to the floor and only two received consideration, each finally failing (as cited in Hirschland & Steinmo, 2003, p. 357). In 1870 the Hoar Bill was introduced for the purpose of establishing a federal system of educational oversight that could “compel by national authority the establishment of a thorough and efficient system of public instruction throughout the whole country … not to supercede, but to stimulate, compel and supplement action by the State” (p. 356). Anti-reformers
were successful in defeating this legislation and another more restricted piece of legislation submitted by New Hampshire Senator Henry W. Blair. The so-called Blair Bill was submitted five times between 1882 and 1890 and was defeated each time even though the bill proposed funding to states in support of education with limited strings attached.

Lee (as cited in Hirschland & Steinmo, 2003) notes that the Blair Bill provided a clear perspective as to how the politics of education were viewed during the post-Civil War years. The intent of the Blair Bill was to provide federal monies to states that would maintain minimum educational provisions and standards. Among these standards were free common schools open to all children without distinction of race or color. The bill was repeatedly passed out of the Senate but was killed in the House. The defeat in the House was attributed to organized resistance by Southern opposition that suspected “the fear of the difficulty of controlling more educated Negroes and the potential of upsetting the traditional patterns of race relationships was the major cause of Southern opposition” (as cited in Hirschland & Steinmo, 2003, p. 358). Hence, the Blair Bill was the last bill of its type considered in Congress for over 30 years.

Hirschland and Steinmo cite American regionalism as an explanation of inadequate federal response to regional political power over the national agenda. The failure of federal consolidation in education during this period in the face of dismantled race relations would form the legacy of the system characterized by an unequal system with little direction coming from the federal government (p. 358).
During this time another educational reform was developing in the New England state of Massachusetts. The creation of the public high school was an idea that drew controversy. Gliedman (1991) concluded that wealthier merchants and entrenched school officials who saw the economic benefit of requiring students to stay in school longer probably supported the high school. On the other hand, many parents resented the fact that their children would be attending school much longer than they believed necessary. As compulsory schools became more common, ideas emerged that, at least as far as education was concerned, children belonged to the government and not to their parents (Kilpatrick, 1990).

Gliedman argues that the theory of the American system of public school governance differs from the present reality. Theoretically, because elective bodies control major aspects of the school organization and curriculum, the public school is accountable to taxpayers and voters. In reality, educational governance systems fail to provide accountability. The states delegate power to state commissions and at the local level school boards delegate administrative power to unelected administrators that may, or may not carry out the policies of the Board (Gliedman, 1991, p. 410). Ritter (2002) concurs in that the common school should be viewed with skepticism, for in the present reality they are nothing more than idealism and myth. For the most part, public schools are neighborhood schools differentiated by race, ethnicity, and household income. We normally think of accountability as responsiveness to those governed. Schools directly govern the lives of children and their parents and only indirectly the lives of other citizens (Gliedman, 1991, p. 410).
Parents are often two steps removed from educational governance. They lack voting power over bureaucratic administration and effective representation on local school boards. During the Puritan era, parents were closely involved with their children’s education because they spent much of their time at home. The Industrial Revolution and the Progressive era found fewer parents at home and having less control over their children’s lives (Gliedman, 1991, p. 411). The growth of sexual stereotypes regarding the workplace during the nineteenth century also affected parental governance. Fathers working outside the home and mothers doing housework disqualified mothers from effective participation in school governance. Cooperation between teachers and mothers did occur, but women did not exercise any real control over school policies.

The growth of “professionalism” blocked parental governance in the nineteenth century. Larson defines professionalism as “the process by which producers of special services seek to constitute and control a market for their expertise” (cited in Gliedman, 1991, p. 411). Gliedman contends that full-time educators may have been viewed as intelligent people able to afford the time and money needed to attend schools of higher education. The growth of a specialized “education track” for professionals probably contributed to a hardening of lines between parents and educators. Only the most courageous parent would have challenged the authority of a high-level educator.

According to Katz (as cited in Gliedman, 1991, p.412), scientific methodology—the IQ test and the abuses of measurement—were the most durable contributions of the progressive movement. These tests seemed to insulate the education profession from the need to explain to parents the basis for classifying their children. In response to this
dilemma, Gliedman ponders as to how most parents could control a system that was beyond their expertise and understanding (p. 415).

Parental governance allows parents to express objectives for their children’s education without mediation by others. In addition, this concept of schools can increase parents’ awareness of obstacles of learning and empower them to rectify problems (Gliedman, 1991, p. 416). Gliedman suggests that the dangers of parental governance could include (a) majority control of minority sensibilities, (b) deviation of parental groups in some areas from the broad consensus of the rest of the nation, and (c) exclusion of concerned groups of teachers and adults without children, as they may be necessary to guide parents with little educational background (p. 395).

In his 1971 work, *Class, Bureaucracy, and Schools*, Katz (as cited in Imber, 2001, p. 40) posited that the structure of American education has remained constant since about 1880. The United States has long recognized the right of parents to exercise some control over their children’s education and public schools are society’s attempt to structure its future (p. 41). Some educators view the role of the public school to provide an educational program that parent’s preference, prejudice, or ignorance might otherwise prevent students from obtaining. Common schooling does not mean common thinking, but it does mean common experiences (Kilpatrick, 1990). Jenks (1966) captures the conflict surrounded by the debate concerning political influence within public schools.

The essential issue in the politics of American education has always been whether laymen or professionals will control the schools. Professionals always want more money for the schools, while laymen always want to trim the budget.
Professionals want a curriculum that reflects their own ideas about the world, and this means a curriculum that embodies “liberal” ideas and values they picked up at some big university. Laymen frequently opposed this demand, insisting that the curriculum should reflect more conservative mores (p. 18).

Pincus (1985) delineates two schools of conservative thought on schools. The Heritage Foundation, a coalition of fundamentalist ministers and a few political ideologues, guide one, called the New Right conservatives. These groups advocate decentralization of the public schools with a return to parental control. Decentralization is accomplished by eliminating all federal funding through the elimination of the U.S. Department of Education. Second, tuition tax credits for parents of children in private and parochial schools should be adopted by the federal government. Tax credits would allow more children to attend private and parochial schools and would increase diversity, competition, and, therefore, educational standards. Tax credits are viewed as a “financial facility” to give parents more choice in the education of their children. Centrist conservatives are individuals and groups that fall somewhere between the New Right and traditional liberals. The issue of parental choice within centrist conservatives is mixed. Some promote more support for private schools to enhance competition and choice while others place the public schools at the top of the list (p. 339).

Beatrice and Gross (1985) discern a need for choice about school and program assignments, for both teachers and for students. When alternative school environments are constructed to add resources to disadvantaged schools and to accommodate all levels of need, they will promote innovation, accountability, and choice. The politics of
schooling, not the intrinsic value of the concepts themselves, will determine divestiture of schools or diversity (p. 368). Governors and legislators are playing a much greater part in policymaking for education than was once the case (Campbell et al., 1980, p. 69).

**Case Law**

Educating youth is of prime importance to parents and the state (DeMitchell, 1997). Tension between the purposes of our majoritarian government and desires of individuals to live their lives unrestricted readily clash in the area of education. The role of parents as arbiters of their children’s education has undergone significant redefinition over the past half-century, partly reflecting greater judicial deference to the role of the state (and their agents, the local school districts) in a broader range of education areas. Statutory and judicial restriction on the custodial rights of parents, and children’s rights as limitations on the welfare principle of protecting children, probably have had some effect on curtailing the rights of parents in relation to the school. Judicial rationale for supporting parents against school boards relied on common law presumption of soundness of parental judgment. Early cases show undeterrable confidence placed in parents (Mawdsley, 1990). For example, an Illinois court in 1877 reflected the presumption in favor of parents by stating that even if parental decisions represented a misfortune for their children the parents’ decisions would be upheld if they did not “affect the government of the school or incommode the other students or teachers” (as cited in DeMitchell, 1997, p. 309).

Within common law, a parent had a duty to provide for the education of children (as cited in Tompkins, 1991). Despite the later development of the public schools, this
tradition was reaffirmed by the U.S. Supreme Court in *Pierce v Society of Sisters* (1925) as the “high duty to recognize and prepare [the child] for additional obligations” (p. 322). At the same time, the Court has, on a variety of occasions announced that parents have a right as well as a duty to provide for the education of children:

A fundamental right protects the historical and traditional choices of parents. The state interest in its continued vitality and existence as a democratic system should also be protected. The child’s over-all interests are protected by giving primary decision-making power to the parent, while the state stands as secondary guarantor of the protection of the child’s health and physical welfare interests” (as cited in Tompkins, 1991, p. 322).

Relying on a common law presumption that “the natural love and affection of parents for their children would impel them [to give their children] an education suitable to their station in life.” Early courts assumed parents had “the responsibility of preparing children entrusted to their care and nurture, for the discharge of their duties in life” (as cited in Mawdsley, 1990, p. 275). Hogan identified five discernible stages of court action in education. The first period, prior to 1850, was one of “strict judicial laissez faire” in that education was viewed as a local matter and even state courts were reluctant to intervene. The second period, from 1850 to 1950, identified as the “stage of state control” during which few cases reached the U.S. Supreme Court. A body of case law then developed at the state level and failed to meet constitutional standards and requirements. The third period, a “reformation stage”, is characterized by federal decisions that bring state-sanctioned policies and practices into conformity with
constitutional provisions. The fourth period has been one of “education under supervision of the courts” in which the federal courts have taken on enforcement responsibilities to ensure program implementation. The final stage is a new era in which “strict construction” as cited in the U.S. Supreme Court case of San Antonio Independent School District v. Rodriguez, is applied (as cited in Campbell et al., 1980, p. 167).

Prior to 1890, only three cases dealing with parental rights of a child’s education were before the U.S. Supreme Court. 140 cases were heard between 1966 and 1984 (Kilpatrick, 1990). According to Tompkins (1991), a review of U.S. Supreme Court case law on parental rights in education can be divided into two time periods: the Lochner-era cases and the one modern case, Wisconsin v. Yoder (1972). The Lochner-era cases are considered important in extending the right of parents to choose to send their children to private school (p. 309). Three U.S. Supreme Court cases make up the Lochner-era trilogy: Meyer v. Nebraska (1923), Pierce v. Society of Sisters (1925), and Farrington v. Tokushige (1928).

In Meyer v. Nebraska (1923) a private tutor was convicted of violating a state law prohibiting the teaching of foreign languages to children of an elementary age. The Court held that the state statute violated the teacher’s right to teach and upheld the power of the State to impose compulsory education to regulate all schools, to “conduct its schools as to ‘foster a homogeneous people.’” Although the rights of parents were not represented in this case, the Court stated “The teacher’s right to teach and the right of students to engage him to instruct their children are within the liberty of the [fourteenth] Amendment” (Tompkins, 1991, p. 311). Thus, the Court found that parents had the right
to contract for teaching services that they wanted for their children. Parents’ rights were upheld but so were the rights of the State to establish its public school curriculum and to compel students to attend school (DeMitchell, 1997). The Court also said, “The American people have always regarded education and the acquisition of knowledge as matters of supreme importance which should be diligently promoted” (as cited in DeMitchell, 1997, p. 370). DeMitchell notes, however, “[T]his case cannot be read to mean that parents’ right to contract for educational services trumps the right of the public school to prescribe its curriculum (p. 371). Meyer served as the basis for the Court’s landmark decision two years later in Pierce (p. 312). In the Pierce case, two private schools challenged a state statute, the Oregon Compulsory Education Act of 1922 that forced parents to send their children to public schools. The plaintiffs argued that the law interfered with parents’ and guardians’ rights as a part of their liberty to “direct the education of children by selecting reputable teachers and places” (as cited in DeMitchell, 1997, p. 513). The Court ruled the Oregon Act was in violation of the Fourteenth Amendment and, as such, upheld the existence of not only sectarian but nonsectarian private schools as well (Campbell, et al., 1980, p. 425). In Pierce, the Court declared that while a state may require all children to attend school, the Constitution prohibits a state from insisting that all children attend public school (Imber, 2001, p. 40). The case gave states the power to insist “studies plainly essential to good citizenship must be taught” (p. 40) in all schools, public and private, regardless of what parents might want. Therefore, two legitimate interests identified by the Court—(a) the broad power of the State to direct the public schools, and (b) parents’ right and “high duty” to direct the upbringing and
education of their children—became competing interests that were the legacy of Pierce (DeMitchell, 1997). Courts do not allow states to regulate private schools any more than necessary. As in Meyer, no parent was directly represented; however, the Court stated the intent of the Oregon act:

Unreasonably interfere[d] with the liberty of parents to direct the upbringing of children under their control. The child is not a mere creation of the state. Parents have the right to determine their children’s education. It is not seriously debatable that the parental right to guide one’s child intellectually and religiously is a most substantial part of the liberty and freedom of the parent” (as cited in Tompkins, 1991, p. 315).

Since 1925, nonpublic schools have been considered an acceptable alternative to public schools (Campbell, et al. 1980, p. 12). Three years later in Farrington v. Tokushige, (1928) the Court applied the due process clause of the Fifth Amendment to strike down a federal law in the Territory of Hawaii as too restrictive of private schools (as cited in Tompkins, 1991, p. 315). The Court rejected the contention that the government’s interest could totally control private schools and choices by parents.

Tompkins (1991) concludes that the Supreme Court did not address the issue of parental rights and state interests between Farrington in 1927 and Wisconsin v. Yoder (1972). Nevertheless, Kilpatrick (1990) identifies three cases—Cochran v. Louisiana (1930); Everson v. Board of Education (1947); and Allen v. Board of Education (1968)—in this time period that deal with topics related to parental rights. In Cochran a Louisiana law providing free textbooks for children attending public and parochial schools alike
was challenged. The U.S. Supreme Court declared the law constitutional and, in so doing, created a new doctrine called the “child benefit” theory (Campbell, et al. 1980, p. 13). Justice Richardson, in his dissenting opinion in Everson v. Board of Education of the Township of Ewing (1947) describes this as the practice of “states sustaining statutes granting free transportation or free school books to children attending denominational schools on the theory that the aid is a benefit to the child rather than to the school” (par. 39).

In Wisconsin v. Yoder the plaintiffs were parents (Old Order Amish) who were seeking to discontinue public education after the eighth grade in favor of community-based vocational education (Tompkins, 1991, p. 316). The contention of the parent’s was that the compulsory school attendance statute interfered with their first amendment rights of freedom of religion. The Court held with the Amish claim yet described very narrow criteria that made doubtful any attempt to mount a successful first amendment challenge to the statute (p. 318). The narrowly defined criteria in the Yoder decision (a) placed the burden upon parents to show constitutionally impermissible interference with their religion is great, (b) required that parent’s claim must be supported by unchallenged testimony of acknowledged experts in education and religious history, and (c) acknowledged the fact that the parents could point to nearly three hundred years of consistent Amish practice and substantial evidence of a sustained faith pervading and regulating the parents’ entire mode of life (Tobak & Zirkel, 1984). The Court also stated, “The history and culture of Western Civilization reflect a strong tradition of parent concern for the nurture and upbringing of their children. This primary role of the parents
in the upbringing of their children is now established beyond debate as an enduring American tradition” (as cited in DeMitchell, 1997, p. 371). Chief Justice Burger, who wrote the majority opinion in Yoder, implies a fundamental and primary right of parental choice of a child’s education that is rooted in history: “This case involves the fundamental interests of parents, as contrasted with that of the state, to guide the religious future and education of their children” (Wisconsin v. Yoder, 1972). For the State, education is perhaps the most important function of government (DeMitchell, 1997). Tompkins (1991) summarizes that the previous cases (Lochner-era and Yoder) did little to offer parents protection against state compulsory attendance laws.

The U.S. Supreme Court in Roe v. Wade (1973) reasoned “decisions make it clear that only personal rights can be deemed ‘fundamental’ and included in this personal privacy guarantee” (as cited in Tompkins, 1991, p. 311). They also make it clear that the right has some extension to activities relating to “marriage, child rearing, and education” (p. 311). Justice Douglas, concurring in Doe v. Bolton (1973), set forth a list of fundamental rights under the heading of “freedom of choice in the basic decisions of one’s life.” The list included “education and upbringing of children” (as cited in Tompkins, 1991, p. 311). The right of parents to influence or effect changes in their children’s education has never been absolute. In Tompkins’ analysis of Yoder, he concludes that the majority of the Court found two state interests in the education of children. The first interest is the necessity of the state “to prepare citizens to participate intelligently and effectively in our open political system if we are to preserve freedom and independence” (p. 312). Preservation interests are therefore, considered a compelling
state interest in that the welfare of the state is considered of more primary importance
than that of the individual child (p. 311). The second interest is in preparing children “to
be self-reliant and self-sufficient participants” (p. 312). This second interest, according
to Tompkins, is only secondary and not a compelling interest. It becomes a primary and
compelling interest only if the parent fails to protect the child’s welfare. Tompkins
asserts that this line of reasoning opens the door for parents to determine whether, or not
their children will attend public schools:

Parents have a right and a duty to provide for the education of their children.
Concerning that duty parents who would choose educational alternatives to public
schools have three choices: to select a private institution or a tutorial program, to
attempt to influence the public school system, or to provide for the instruction of
the child at home” (p. 312).

The U.S. Supreme Court in *Prince v. Massachusetts* 321 U.S. 158, 166 (1944)
defined the “public interest” as “the general interest in youth’s well being:”

Neither rights of religion nor rights of parenthood are beyond limitation. Acting
to guard the general interest in youth’s well-being, the state as parens patriae may
restrict the parent’s control by requiring school attendance, regulating or
prohibiting the child’s labor and in many other ways” (p. 313).

presumption that parents act in the best interest of the child:

The law’s concept of the family rests upon the presumption that the parents
possess what a child lacks in maturity, experience, and capacity for judgment
required for making life’s difficult decisions. More important, historically it has been recognized that natural bonds of affection lead parents to act in the best interests of their children” (as cited in Tompkins, 1991, p.313).

This judicial deference to the primacy of the parent is a product of the presumption of care exercised by parents generally as opposed to the state:

Parents typically possess sensitivity to the child’s personality that the state cannot match, and because the closeness of the familial relationship provides strong assurance that parents will use their special knowledge of the child to act in his best interests. Finally, the parental right of control serves the interests of all citizens in preserving a society in which the state cannot dictate that children be reared in a particular way. If the state could control the upbringing of children it could impose an orthodoxy by indoctrinating individuals during the formative period of their lives (Tompkins, 1991, p. 313).

When children are compelled to attend schools devoid of sensitivity for deeply rooted familial values, the state’s interest in “lifestyle preparation” (see Justice White’s concurring opinion, Yoder) may be seen for what it is—a direct assault on the transmittal of unapproved teachings by the family (Tompkins, 1991, p. 313).

Tompkins (1991) proposes a fundamental privacy right of parents to choose an alternative to public school education for children (home schools). The right finds support in a reasonable construction of Supreme Court pronouncements in the Meyer line of education cases (substantive due process), in Yoder (historical and traditional rights of
Tompkins (1991) notes that the state’s interest in the child pales in comparison to that of the parent:

Reassessment shows that the state does not have a primary interest in developing self-reliance and self-sufficiency in children. This is the interest of the child and only when the parent fails may the state step in to protect the welfare interests of the child. Until then, the state interest is not of a compelling nature. Only the interests of the state in the operation of the franchise is inherent in the nature of the state and thus able to rise to a compelling level (p. 314).

“Greater judicial scrutiny” is required when the state impinges on parental choices of education. Such application would require states “to couch their regulation of private education in terms of quantifiable academic goals” (Tompkins, 1991, p. 316).

The due process and equal protection clauses of the Fourteenth Amendment have become the two most important means used by the federal courts to invalidate state laws and overturn state decisions (as cited in Campbell, et al., p. 169). One of the most sensitive areas regarding parental direction of children’s education concerns the extent to which children in public schools can be provided with a setting compatible with parental values. Courts have consistently upheld the right of parents to inculcate morals as long as such inculcation does not offend the best interests of society or their children (as cited in Mawdsley, 1990). A clear awareness exists that public schools have an inculcative function that at some point may conflict with parents’ views, perhaps not so much
regarding an individual child as children generally in the community (as cited in Mawdsley, 1990). Mawdsley discerns that the main buttress of parental control within the public school setting is excusal of a child from objectionable material. Parents who bypass an excusal option and seek to eliminate the objectionable item or practice from the public school have seldom been successful regardless of the legal theory they pursued (p. 277). Mawdsley surmises that tough questions arise when excusal from objectionable items or practice would require a corresponding obligation on the part of the school to provide a substitute satisfactory to the parent.

*Zelman v. Simmons-Harris (2002)*

The decision by the United States Supreme Court in *Zelman* marked the culmination of a series of litigation that challenged state control of public education. In 1996, the Ohio Legislature adopted the Cleveland Scholarship and Tutoring program. The new and unique program followed thirty years of desegregation litigation and educational reforms that failed to improve the Cleveland City School District. Under this plan, students receiving scholarships could use them to attend a private school or a public school in a neighboring district or hire a private tutor. Scholarships were awarded on a sliding scale but would not exceed $2,500. Payments were made in the form of a check payable to the parents, who would designate the school to which the check would be sent. Parents must then go to the school and endorse the check (Destro, 2002).

The Ohio Supreme Court upheld the program and concluded that the “School Voucher Program has a secular legislative purpose, does not have the primary effect of advancing religion, and does not excessively entangle government with religion” (Destro,
The plaintiffs then filed suit in the Northern District of Ohio. The Court ruled that the Program violated the Establishment Clause and concluded, “[M]oney goes to religious institutions as a result of a ‘genuinely independent and private choice of individuals,’ and “advances religion.” The U.S. Court of Appeals for the Sixth Circuit affirmed the decision (Destro).

On June 27, 2002, the U.S. Supreme Court reversed the decision, holding that “neutral educational assistance programs that … offer aid directly to a broad class of individual recipients defined without regard to religion” are constitutional (Destro, 2002). The Court’s majority opinion focused on the context in which the program was enacted and the multiple educational options available to Cleveland parents of school-age children. The question asked of the U.S. Supreme Court by the state of Ohio centered around whether the Establishment Clause prohibits Ohio’s program from authorizing parents to use the scholarships at any private school, whether religious or not. The Court found that “[t]here is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing school system” (Destro). The Court further determined that the Establishment Clause question “must be answered by evaluating all [original emphasis] options Ohio provides Cleveland school children, only one of which is to obtain a program scholarship and then choose a religious school” (Destro). None of the dissenting opinions explained any perceptible difference between scholarship schools, magnet schools, or community schools.
Previous case law in the Establishment Clause area such as *Mueller, Witter’s, and Zobrest* make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. The Court noted that they “have never found a program of true private choice to offend the Establishment Clause” (*Zelman v. Simmons-Harris*, 2002).

The Court found that the program did not create a financial incentive to undertake religious indoctrination. It is part of a multifaceted program by the state of Ohio to provide educational opportunities to children of a failed school district. Assistance is provided to a broad class of individuals without reference to religion. The program permits participation of all schools within the district, religious or nonreligious. Financial disincentives exist for religious schools in that they receive less than half the government assistance than community public schools and only one third that of magnet schools (*Destro, 2003*). The Court looked at the Ohio program as one that attempted to help poor children in failing schools, not as an endorsement of religious schooling in general.

*Destro* notes Justice O’Connor’s concurring opinion as tied closely to the facts of the case and focuses on three important points. First, proper inquiry requires an evaluation of all the reasonable educational options. The facts are critical in cases arising under the Establishment Clause, saying that failing to look at all the educational options is “to ignore how the educational system in Cleveland actually functions.” Second, this “decision when considered in light of other long standing government programs that
impact religious organizations and prior Establishment Clause jurisprudence [does not] mark a dramatic break from the past” (Destro). Third, the share of public resources that reach religious schools is not as significant. The amount is very small in comparison to the amount religious institutions already receive from federal, state, and local governments (Destro, 2002).

Justice Thomas’ opinion focused on the civil rights implications of the case:

Frederick Douglas once said that “… [e]ducation … means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free.” Today many of our inner city public schools deny emancipation to urban minority students. Despite this Court’s observation nearly 50 years ago in Brown v. Board of Education, that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education,” urban children have been forced into a system that continually fails them. These cases present an example of such failures. Besieged by escalating financial problems and declining academic achievement, the Cleveland City School District was in the midst of an academic emergency when Ohio enacted its scholarship program (Zelman v. Simmons-Harris, (2002).

In Justice Thomas’ view, failure to provide education to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality, and alienation. The least society can do is to arm minorities with the education to defend themselves from some of discrimination’s effects (Destro, 2002).
Justice Stevens’ dissent focused on the method by which the majority reached its conclusions. In his opinion the Court should “ignore three factual matters that are discussed in length: (a) the severe educational crisis that confronted the Cleveland City School District; (b) the wide range of choices that have been made available to students within the public school system and (c) the voluntary character of the private choice to prefer a parochial education over an education in the public schools” (Destro, 2002).

Justice Souter’s dissent focused on his objection to the use of any public funds to support educational programs run by religious institutions. In his view, the Court was wrong when it focused on all the funds the State of Ohio makes available for public education as the backdrop for a decision on whether the program is “neutral” with respect to religion (Destro, 2002). Justice Breyer also concurred with other dissenters in that he “emphasized the risk that publicly financed voucher programs pose in terms of religiously based social conflict’” (Destro). In his view the Court’s prior interpretation of the Establishment Clause “appreciated the diversity of contemporary American society” (Destro). According to Fish, the Zellman decision did not break the ice for programs but for process. The process debate continues in the state of Washington where the latest court battle involves two college students seeking to complete their teaching credentials by student teaching at private religious schools. The state prohibits the practice based on state constitutional language barring government aid to religion. Walsh (2002) explains that this suit is the latest in a series of lawsuits backed by the Institute for Justice, a Washington, D.C.-based legal organization that helped win the Zelman case. Their strategy is to remove as many state obstacles as possible to vouchers and other means of
school choice. At least 37 states have constitutional provisions prohibiting state aid to religious institutions. Most were the results of efforts of Rep. James G. Blaine, who led a failed effort in the 1870s to add similar language to the U.S. Constitution.

_No Child Left Behind Act of 2001_

The _No Child Left Behind Act of 2001_ (NCLB) was signed into law on January 8, 2002 and is considered a landmark in education reform designed to improve student achievement and change the culture of America's schools. President George W. Bush describes this law as the “cornerstone of my administration”. Clearly, our children are our future, and, as President Bush has expressed, “Too many of our neediest children are being left behind.”

With passage of _No Child Left Behind_, Congress reauthorized and reinforced the _Elementary and Secondary Education Act of 1965 (ESEA)_—the principal federal law affecting education from kindergarten through high school. In amending _ESEA_, the new law represents a sweeping overhaul of federal efforts to support elementary and secondary education in the United States. The law is built on four common-sense pillars: accountability for results, an emphasis on doing what works based on scientific research; expanded parental options, and expanded local control and flexibility (_No Child Left Behind_, 2001).

This federal law expands the federal government’s role in elementary and secondary education. Through the ESEA, the federal government’s role in K-12 education was primarily one of providing aid to disadvantaged students and investing in educational research and development. NCLB emphasizes accountability by making
federal aid for schools conditional on those schools meeting academic standards and abiding by policies set by the federal government (*No Child Left Behind*, 2001). Strict requirements and deadlines are set for states to expand the scope and frequency of student testing, revamp their accountability system, and guarantee that a teacher qualified to teach in his or her subject area staffs every classroom. Quality of schools must improve every year as the percentage of students proficient in reading and math must continue to grow, and the test-score gap between advantaged and disadvantaged students must narrow. NCLB pushes state governments to help low-achieving students in high-poverty schools meet the same academic performance standards that apply to all students.

NCLB (2001) has four basic points:

1. Accountability for results is a major component of the legislation. Title I responsibility for disadvantaged children is strengthened by requiring all states to implement statewide accountability systems covering all students. States must meet standards in reading and mathematics, test all students annually in third grade through eighth and develop statewide goals ensuring that all students reach proficiency within 12 years. Goals and assessment results must be maintained by all states for categories of students considered “disadvantaged” based on poverty, race, ethnicity, disability, and limited English proficient. Failure to show progress toward statewide proficiency goals will require schools and school districts to develop improvement, corrective action, and re-structuring plans to get back on course to meet the standards.

2. Emphasis is placed on doing what works based on scientific research. Special emphasis is placed on utilizing education programs and practices that, through scientific
research, have demonstrated to be highly effective.

3. Parents are offered expanded choice options. NCLB offers more options to parents. Students attending a Title I school that fails to improve are given the opportunity to attend a better school within their district. Those who attend a persistently failing school are permitted to use Title I funds to obtain supplemental educational services from the public or private sector.

4. Expanded local control and flexibility provides for adaptability to each community. The intent of NCLB is to give states and local school districts greater flexibility in the use of Federal education funds in exchange for meeting accountability requirements. As a result, less “red tape” exists and more attention is directed toward meeting student needs. Under the provision, schools have more freedom to practice innovation and allocate resources as they see fit.

For the purposes of this study, guidelines allowing for parental choice within the context of NCLB will be reviewed. Proponents of this legislation, namely, the Bush administration, contend that in this new era of education, children will no longer be trapped in the dead end of low-performing schools. Under *No Child Left Behind* (2001), such schools must use their federal funds to make needed improvements. In the event of a school’s continued poor performance, parents have options to ensure that their children receive the high-quality education to which they are entitled. Implications of poor performance could mean that children can transfer to higher-performing schools in the area or receive supplemental educational services in the community, such as tutoring, after-school programs, or remedial classes. Children are eligible for school choice when
the Title I school they attend has not made adequate yearly progress in improving student achievement—as defined by the state—for two consecutive years or longer and is, therefore, identified as needing improvement, corrective action, or restructuring. Any child attending such a school must be offered the option of transferring to a public school in the district—including a public charter school—not identified for school improvement, unless such an option is prohibited by state law. *No Child Left Behind* requires that priority in providing school choice be given to the lowest achieving children from low-income families. As of the 2002-03 school year, school choice is available to students enrolled in schools that have been identified as needing improvement under the *ESEA* as the statute existed prior to the enactment of *No Child Left Behind*.

Under *No Child Left Behind* (2001), school districts are required to notify parents if their child is eligible for school choice because his or her school has been identified as needing improvement, corrective action, or restructuring. They must notify parents no later than the first day of the school year following the year for which their school has been identified for improvement.

States are required to ensure that school choice is offered as an option to parents in the event their child is attending a school that is “persistently dangerous” or has been the victim of a violent crime while on school grounds (*No Child Left Behind*, 2001).

Schools and districts receiving Title I funds must provide choice for eligible students as described above. If they do not, parents are encouraged to contact their state department of education (*No Child Left Behind*, 2001).

Children attending Title I schools may have school choice options outside their
own district. For instance, a school district may choose to enter into a cooperative agreement with another district that would allow their students to transfer into the other district’s schools. In fact, the law requires that a district try “to the extent practicable” to establish such an agreement in the event that all of its schools have been identified as needing improvement, corrective action, or restructuring (No Child Left Behind, 2001).

Subject to a funding cap established in the statute, districts must provide transportation for all students who exercise their school choice option under Title I. They must give priority to the lowest-achieving children from low-income families (No Child Left Behind, 2001).

Supplemental educational services are additional academic instruction designed to increase the academic achievement of students in schools that have not met state targets for increasing student achievement (adequate yearly progress) for three or more years. These services may include tutoring and after-school services. They may be offered through public or private sector providers that are approved by the state, such as public schools, public charter schools, local education agencies, educational service agencies, and faith-based organizations. Private-sector providers may be either nonprofit or for-profit entities. States must maintain a list of approved providers across the state organized by the school district or districts they serve, from which parents may select. States must also promote maximum participation by supplemental educational services providers to ensure that parents have as many choices as possible (No Child Left Behind, 2001). In addition, children are eligible for school choice when they attend any “persistently dangerous school”, as defined by the individual state. Any child who has been the victim
of a violent crime on the grounds of his or her school is also eligible for school choice.

Summary

Parental versus state control over children’s education has been an evolutionary process that began in early Colonial America. Subsequent political, social, and economic conditions laid the foundation for a gradual transfer of authority to the state and away from parents.

Nineteenth and early twentieth century court cases tended to support a common law parental right of control over their children’s education, although the right was not absolute. Absent statutory language, courts have shifted presumption of control away from parents to school boards. Courts also focus on parent’s failure to present supporting reasons that demonstrate an abuse by school board discretion or a violation of constitutional rights. Parental efforts on a broad range of constitutional issues have been unsuccessful in reversing board decisions (Walsh, 2002).

The current debate is shaped by two significant events: (a) No Child Left Behind Act of 2001, and (b) The U.S. Supreme Court case Zellman v. Simmons-Harris (2002). Circumstances created by this federal law and Court decision give parents a renewed sense of awareness in the opportunity to choose educational alternatives for their children.
Chapter Three

Method

Introduction

This study examines the legal and historical implications of parental choice within the context of public education. The fundamental problem of who controls the education of children, parents or the state is at the heart of the current debate involving the future of public education. This study focuses on a legal and historical analysis of the problem and poses implications that affect educational policy. United States Supreme Court cases were selected for this study that helped to define or limit parental decisions with regard to the education of their children. Legislation was selected that was pivotal in promoting expansion, limiting, or otherwise modifying a course of action regarding parental authority over children’s education.

Research Questions

The research questions posed in this study are

(1) What are the historical and legal benchmarks regarding parental choice within the context of the public schools?

(2) What are the legal implications of parental choice within the context of recent state and federal legislation and United States Supreme Court decisions?

(3) How do the historic and legal benchmarks regarding parental choice relate to each other?
Purpose of the Study

The purpose of this dissertation is to analyze the transformation of the concept of parental choice within the historic and legal context of the public schools.

The problem and purpose of this study are clearly embedded within the theoretical framework of parental choice (i.e., parents choosing the school their children will attend versus the state making that determination) and the ever-evolving historic and legal context in which parental choice impacts public schools. The historical literature suggests that public schools grew out of an increasingly complex society whereby parental roles changed with respect to providing education for children. Rapidly expanding immigration patterns stretched the boundaries of traditional familial roles as a response to socioeconomic opportunity and challenges. The Puritan influence throughout Colonial America preceded educational reformers such as Horace Mann who, during the mid-nineteenth century, laid the foundation for contemporary public schools. Case law follows the historical path of parental control over children’s education. Prior to the 20th century, federal or state courts had little impact upon parental authority with regard to the determination of the educational interests of the child. Nevertheless, this scenario changed rapidly following the U.S. Supreme Court decision of Pierce v. Society of Sisters (1925). According to Yudof, Levin, and Kirp (1992), Pierce establishes the basic constitutional framework within which states control and regulate schooling. The power of the state to compel attendance at a school is unquestioned, but, as the case indicates, limits on the authority of the state to eliminate or to circumscribe educational choices are
expressed. This decision set the stage for a significantly altered legal landscape with regard to parental rights over children’s education. Increased governmental authority and less parental control are noted in case law throughout the last half of the twentieth century. In addition, the recent United States Supreme Court decision, Zelman v. Simmons-Harris (2002) has the potential to change the debate regarding choices parents may make regarding the education of their children.

This analysis and interpretation will reflect the constructs, language, models, and theories that structured the present study. In this study, the analyses and interpretations are presented in historical terms and within legal constructs related to parental and state authority in determining the education of children.

Yudof et al., (1992, p. 3) note the complexity of parent/school relationships:

In every state American children are legally obliged to attend school or receive some minimum level of instruction in the home. Today, most children attend publicly run schools whose policies are determined by state and local officials. In many states private schools are also governmentally regulated and home schooling is permissible in some circumstances. These facts of American schooling are familiar to most citizens. Less generally understood are such matters as how this pattern came to be; its implications for children, parents, educators, and society; the nature and scope of legitimate community and individual interests; and-most significantly … the constitutional and statutory bases of the educational structure.
The impetus for the compulsory schooling movement has been a matter of much discussion and debate (Yudof et al., 1992, p. 3). According to Tyack, James, and Benavot (1987, as cited in Yudof, et al., p.14) the movement had varied roots:

Over the long perspective of the last century and a half, both phases of compulsory school attendance may be seen as part of significant shifts in the functions of families and the status of children and youth. Much of the drive for compulsory schooling reflected an animus against parents considered incompetent to train their children. Often combining fear of social unrest with humanitarian zeal, reformers used the powers of the state to intervene in families and create alternative institutions of socialization.

The research problem examines who decides, parents or the state, what kind of education, public or private, is most appropriate for a child. The data presented in this study shall include historic and legal documents and interviews of stakeholders within the field of parental choice. The data are limited in scope as the legal landscape is constantly changing due to varied interpretations and legislative responses to key elements of this debate. The results of this study may be relevant to school district leaders and education policy/decision-makers and may or may not be generalizable beyond the scope of this study. Nevertheless, the concept of parents having the freedom to determine the education of their children is a growing trend and has been demonstrated to be effective in communities across the country.

Historical and legal constructs embedded within a qualitative design is the methodology used to examine the question of who controls the education of children.
This study involves ethnographic techniques, using a triangulation approach in an examination of historical and legal documents along with interviews with noted authorities on the subject of parental choice.

Triangulation is considered a process of using multiple perceptions to clarify meaning, verifying the repeatability of an observation or interpretation. Triangulation serves also to clarify meaning by identifying different ways the phenomenon is being seen (Flick, 1998, as cited in Denzin and Lincoln, 1999).

Denzin and Lincoln (1999) describe qualitative research:

[It is] a situated activity that locates the observer in the world. It consists of a set of interpretive, material practices that make the world visible. These practices transform the world. They turn the world into a series of representations, including field notes, interviews, conversations, photographs, recordings, and memos to the self. At this level, qualitative research involves an interpretive, naturalistic approach to the world. This means that qualitative researchers study things in their natural settings, attempting to make sense of, or interpret phenomena in terms of the meanings people bring to them (p. 3).

Adler (1996) concurs in that “qualitative approaches cross the boundaries between various institutions and the social and cultural contexts in which they exist to tell a story of why things happen (p. 6).

Merriam (2001) concludes that most qualitative research inherently shapes or modifies existing theory in that (a) data are analyzed and interpreted in light of the concepts of a particular theoretical orientation, and (b) a study’s findings are almost
always discussed in relation to existing knowledge (some of which is theory) with an eye to understanding how the present has contributed to expanding the knowledge base.

Qualitative research involves the studied use and collection of a variety of empirical materials—case study; personal experience, introspection, life story, interview, artifacts; cultural texts and productions, observational, historical, interactional, and visual texts—that describe routine and problematic moments and meanings in individuals’ lives. Frequently a commitment by the researcher is made to use more than one interpretive practice in any study (Denzin and Lincoln, 1999).

Flick (1998) notes that qualitative research is inherently multi-method in focus. The use of multiple methods, or triangulation, reflects an attempt to secure an in-depth understanding of the phenomenon in question. Objective reality can never be captured; things are known only through their representations. Triangulation is not a tool or strategy of validation, but an alternative to validation. The combination of multiple methodological practices, empirical materials, perspectives, and observers in a single study is best understood, then, as a strategy that adds rigor, breadth, complexity, richness, and depth to any inquiry (pp. 229-30).

Qualitative research is an interdisciplinary, trans-disciplinary, and sometimes counter-disciplinary field. It crosscuts the humanities and the social and physical sciences. Qualitative research is many things at the same time. It is multi-paradigmatic in focus. Its practitioners are sensitive to the value of the multi-method approach. They are committed to the naturalistic perspective and to the interpretive understanding of human experience. At the same time, the field is inherently political and shaped by

Much qualitative research is based on a holistic view that social phenomena, human dilemmas, and the nature of cases are situational and influenced by happenings of many kinds (as cited in Denzin and Lincoln, 1999).

This study, historic in technique and account, focuses on the use of primary source material. The study is a legal and historical work that takes into account research techniques common to legal research and historiography and the use for primary source material. Adler (1996) states, “Legal research in education covers: (a) those formal acts of government that shape public education, (b) legal cases that involve education agencies, and/or (c) development of legal precedents” (p. 5). In addition, Russo (1996) discerns the relevancy of history and precedent in framing research questions, “Rooted in the historical nature of the law and its reliance on precedent, legal research requires students to look to the past to locate authority that will govern the disposition of the question under investigation” (p. 35). Finally, Merriam (2001) concludes the critical importance of comprehensive analysis of information, “To understand an event and apply that knowledge to present practice means knowing the context of the event, the assumptions behind it, and perhaps the event’s impact on the institution or participants” (p. 40).

Data was collected through interviews, observation, and document analysis.
The characteristics of description, interpretation, and understanding are found in
generic qualitative research. Qualitative research attempts to translate holistically,
through a description of what has occurred in the human experience, in relationship to the
context in which the researcher exists (Janssen, 2001, p. 103). According to Merriam
(2001), “Qualitative research is an umbrella concept covering several forms of inquiry
that help us understand and explain the meaning of social phenomena with as little
disruption of the natural setting as possible” (p. 5). Adler (1996) notes, “Rather than
making a claim to rigid objectivity, qualitative researchers make the subjective
involvement of the researcher explicit in reporting the research” (p. 6). Locke, Spirduso,
and Silverman (1993) note the unique requirements of the qualitative researcher:

The researcher is the primary instrument for inquiry in qualitative research. With
rare exceptions, he or she must interact directly with study participants,
determining from moment to moment how to behave, what to notice, and record,
and how a particular line of inquiry does or does not offer promise for answering
the research question at hand (p. 99).

Qualitative inquiry, which focuses on meaning in context, requires a data
collection instrument sensitive to the underlying meaning when gathering and
interpreting data. “Structured interviews are used to gather specific information and are
usually used after the researcher has studied the site long enough to develop some notions
that they want to test or explore” (Adler, 1996, p. 13).
Locke et al. states the need for the qualitative researcher to pursue research in a manner that encourages little disruption of the natural setting:

Most qualitative research is naturalistic in that the researcher enters the world of the participants as it exists and obtains data without any deliberate intervention to alter the setting. Detailed description of context in what people do or say form the basis for inductive rather than deductive analysis (p. 100).

In addition, “qualitative research requires that you have the ability to deal with ambiguity, collect a lot of data, find patterns and connections within the data, and write the ‘story’ presented by the data” (Adler, 1996, p. 4).

Three orientations identified by the literature “trace the philosophical roots of qualitative research of phenomenology and symbolic interaction, while quantitative research is most commonly linked to positivism” (Merriam, 2001, p. 4). According to Carr and Kemmis (1986, as cited in Merriam, 2001, p. 4), “three distinct forms of educational research exist; positivist, interpretive, and critical.” Merriam defines these three:

In positivist forms of research, education or schooling is considered the object, phenomenon, or delivery system to be studied. Knowledge gained through scientific and experimental research that is objective and quantifiable. “Reality” in this perspective is stable, observable, and measurable. In interpretive research, education is considered to be a process and school is a lived experience. Understanding the meaning of the process or experience constitutes the knowledge to be gained from an inductive, hypothesis–or theory generative
(rather than a deductive or testing) mode of inquiry. Multiple realities are constructed socially by individuals. In the third orientation, critical research education is considered to be social institution designed for social and cultural reproduction and transformation. Drawing from Marxist philosophy of critical theory, and feminist theory, knowledge generated through this mode of research is an ideological critique of power, privilege, and oppression in areas of educational practice (p. 4).

N. Q. Patton (1985) proposes qualitative research:

Is an effort to understand situations in their uniqueness as part of a particular context and interactions. This understanding is an end in itself, so that it is not attempting to predict what may happen in the future necessarily, but to understand the nature of that setting—what it means for participants to be in that setting, what their lives are like, what’s going on for them, what their meanings are, what the world looks like in that particular setting—and in the analysis to be able to communicate that faithfully to others who are interested in that setting … The analysis strives for depth of understanding (p. 1).

Understanding within the appropriate context allows the researcher to focus on the total environment within which the problem is framed. Merriam (2001) discerns, “The key concern is understanding the phenomenon of interest from the participants’ perspective, not the researcher’s. This is sometimes referred to as the emic, or insider’s perspective, versus the etic, or outsider’s view” (p. 6). A second characteristic of qualitative research, according to Merriam, is that the researcher is responsive to the
context. He or she can adapt techniques to the circumstances; the total context can be considered and what is known about the situation can be expanded through sensitivity to nonverbal aspects. The researcher can process data immediately, can clarify and summarize as the study evolves, and can explore anomalous responses (Guba and Lincoln, 1981). Qualitative research usually involves fieldwork and employs an inductive research strategy. The literature indicates multiple research approaches:

This type of research builds abstractions, concepts, hypotheses, or theories rather than test existing theory. Qualitative researchers build toward theory from observation and intuitive understandings gained in the field. In contrast to deductive researchers who “hope to find data to match a theory, inductive researchers hope to find a theory that matches their data (Goetze and LeCompte, 1984, p. 4).

In addition to the inductive process, Merriam (2001) notes a variety of information that may be needed to support study findings:

Research findings can be in the form of themes, categories, topologies, and concepts. In addition, data in the form of participants’ own words direct citations from documents, excerpts of video tapes, and so on are likely to be included to support the findings of the study (p. 8).

*Types of Qualitative Research*

Qualitative research in education falls into five basic categories that may be classified as ethnography, phenomenology, grounded theory, case studies and one described as basic or generic.
Basic or generic qualitative studies are those that exemplify the characteristics of qualitative research. Merriam (2001) emphasizes qualitative studies, “Probably the most common form of qualitative research in education, researchers who conduct these studies simply try to understand a phenomenon, a process, or the perspectives and world-views of the people involved (p. 11).

Generic research identifies recurrent patterns in the form of themes or categories and may delineate a process. Ethnography is a broad category often used to describe a good deal of qualitative research (Adler, 1996, p. 8). According to Adler, historically, ethnography was where qualitative research began and, thus, is the underlying theory upon which later varieties of qualitative research were constructed. Ethnography is defined as naturalistic because it gathers data from natural settings without trying to manipulate what is under study as one would in an experimental design (p. 9).

Ethnographic qualitative research focuses on society and culture and uncovers, and describes beliefs, values, and attitudes that structure the behavior of a group. Rather than starting with a hypothesis that is to be tested and proven or disproved, the ethnographer starts with some general questions. Thus, the ethnographer works inductively (as cited in Adler).

“Participant observation characterizes most ethnographic research and is crucial to effective fieldwork. Participant observation combines participation in the lives of the people under study with maintenance of a professional distance that allows adequate observation and recording of data” (as cited in Adler, 1996, p. 45). Adler discerns, “The process of ‘observation’ means much more than watching what happens. It means
watching with a purpose to gather data that will address the research questions” (p. 12). An ethnographic study focuses on the culture and social regularities of everyday life, “[A] rich, thick description is a defining characteristic of ethnographic studies” (Merriam, 2001, p. 156). Adler (1996, p. 10) notes that doing ethnography requires the underlying theory:

1. Start with a question that is phrased in ethnographic terms (phrased as a search for information rather than as a hypothesis);

2. Use field study techniques (observations, interview, documentation, and artifact collection); and,

3. Make a clear connection between the data and a cultural explanation in the report (“subjects respond in this way because of these cultural experiments”).

Ethnography is much more than a set of techniques for gathering data. The written ethnographic account is not a verbatim transcript of every observation, interview, or document (Adler, 1996, p. 10). “The ethnographer’s task is not only to collect information from the emic [viewpoint] … but also to make sense of all the data from an etic … social scientific perspective” (as cited in Adler, 1996, p. 21).

Phenomenology is concerned with the basic structure of phenomena and uses data that are the participant’s and the investigator’s first experience of the phenomena. The suspension of judgment is critical in phenomenology studies. “The researcher must set aside personal viewpoints in order to see the experience for itself” (Janssen, 2001, p. 105). Glaser and Straus (as cited in Janssen, 2001, pp. 102-03) have devised a strategy for developing substantive theory that applies to a specific aspect of educational practice.
The theory is grounded in the data and emerges from the information. The methodology is called grounded theory. Grounded theory is designed to build inductively a theory regarding some aspect of practice in the real world.

Adler (1996, p. 9) states, “The conduct of research and reporting of the findings [in qualitative research] must allow for careful examination by other scholars.” Haphazard or sloppy research processes compromise the usefulness of the work. In addition, Cronbach and Suppes, (1969) affirm the importance of quality research, “The report of a disciplined inquiry has a texture that displays the raw materials entering the argument and the logical processes by which they were compressed and rearranged to make the conclusion credible” (p. 16).

The data collected for this study is based on documents I had available. The data have been selected by the nature and purpose of the study in addressing the basic research question of determining if the state or parents control the education of children.

“Documents is a term used broadly to refer to printed and other materials relevant to a study, including public records, personal documents, and physical artifacts” (Merriam, 2001, p. 70). Guba and Lincoln (1981, p. 253) have noted that “the first and most official injunction to anyone looking for official records is to presume that if an event happened, some record of it exists.” The primary public records used in this study are legal documents related to United States Supreme Court decisions relating to parental versus state control over the education of children.

Another means of collecting data in qualitative research is observation. “It offers a firsthand account of the situation under study and, when combined with interviewing
and document analysis, allows for a holistic interpretation of the phenomenon being investigated” (Merriam, 2001, p. 111). This study involves collecting input from national leaders on the subject of parental choice. Data are collected in the form of surveys, personal conversations, and written communication. These documents are considered research-generated documents for the purpose of this study.

Fieldwork, as participant observation is often called, involves going to the site, program, or setting to observe the phenomenon under study (Merriam, 2001). The observer is focused on the presenters, recording what is important to record and remember, and the observer must do with as much detail as possible. Guba and Lincoln (as cited in Merriam, 2001, p. 119.) defined researcher-generated documents:

Researcher-generated documents are documents prepared by the researcher or for the researcher by participants after the study has begun. The specific purpose for generating documents is to learn more about the situation, person, or event being investigated. The researcher might request that someone keep a diary or log of activities during the course of the investigation. Or a life history of an individual or historical account of a program might be solicited to illuminate the present situation.

Guba and Lincoln (1981, citing Clark, 1967) have suggested a list of questions that a researcher should consider about documents used for data collection:

1. What is the history of the document?
2. How did it come into my hands?
3. What guarantee is there that it is what it pretends to be?
4. Is the document complete, as originally constructed?

5. Has it been tampered with or edited?

6. If the document is genuine, under what circumstances and for what purposes was it produced?

7. Who was/is the author?

8. What was he trying to accomplish? For whom was the document intended?

9. What were the maker’s sources of information? Does the document represent an eyewitness account, a secondhand account, a reconstruction of an event long prior to the writing, an interpretation?

10. What was or is the maker’s bias?

11. To what extent was the writer likely to want to tell the truth?

12. Do other documents exist that might shed additional light on the same story, event, project, program, or context? If so, are they available, accessible? Who holds them? (pp. 238-39).

This checklist was considered in the collection of the data.

Validity

My intent is to contribute results in this study that are trustworthy and believable, therefore, reliability, validity, and ethics are major concerns. Winter (2000) discerns the lack of standardization or formal rules within qualitative research:

Unlike quantitative research, there are no standardized or accepted tests within qualitative research and often the nature of the investigation is determined and adapted by the research itself. There may not be any hypothesis or findings as
such. Instead, the “validity” of the research resides with the representation of the actors, the purposes of the research and appropriateness of the processes involved.

Qualitative research attempts to “pick up the pieces” of the unquantifiable, personal, in depth, descriptive and social aspects of the world (p. 1).

In a holistic, or comprehensive approach to qualitative research Becker (2000) suggests:

Qualitative researchers are more likely to be concerned with … (a) whether data are accurate, in the sense of being based on close observation of what is being talked about or only on remote indicators; (b) whether data are precise, in the sense of being close to the thing discussed and thus being ready to take account of matters not anticipated in the original formation of the problem; and (c) whether an analysis is full or broad, in the sense of knowing about a wide range of matters that impinge on the question under study, rather than just a relatively few variables.

Merriam (2001) states, “All research is concerned with producing valid and reliable knowledge in an ethical (original emphasis) manner” (p. 238). Trustworthiness and understanding of the data are primary rationales in determining the quality of the research (p. 199). Winter agrees with Merriam’s assertions that the quality of the research is dependent upon ethical considerations. Nevertheless, he also argues that “validity is not a single, fixed or universal concept, but rather a contingent construct, inescapably grounded in the processes and intentions of particular research, methodologies and projects” (p. 1).
Hammersley (1987, as cited in Winter, 2000) defines validity as “[a]n account is valid or true if it represents accurately those features of the phenomena, that it is intended to describe, explain or theorize” (p. 4).

Winter (2000) acknowledges complexity in addressing qualitative research and cites disagreement among authors in attempts to define validity and reliability:

Insofar as “validity” definitions are concerned, two common strands begin to emerge: Firstly, whether the means of measurement are accurate. Secondly, whether they are actually measuring what they are intended to measure. However, it is with the definition of “reliability” and its confusion with “validity” that the greatest disagreement appears between authors. The notions of accuracy, more commonly attributed to “validity”, appear to be associated with “reliability” also. What authors do seem to attribute to “reliability” more commonly than to “validity” is the degree of replicability. From this summary, it is possible to suggest that the aggregated definition of “validity” could be that of accuracy, and the definition of “reliability” that of replicability. Whatever the differences in definition and classification are … it is these two concepts—accuracy and replicability—which appear to underpin their aggregated goals and means (p. 3).

Hammersley (as cited in Winter, 2000, p.74) describes the difference in qualitative research with precision and its relationship to validity:

We can measure the length of a large object in terms of meters, centimeters or millimeters. In that order, these scales represent an increasing degree of precision.
Note that this is independent of the accuracy of the measurement. On this usage, a score may be very precise but highly inaccurate. How precise we want our measurement to be will depend upon our purposes. Other things being equal, the more precise the scale, the more difficult it is to achieve high levels of “validity.” There is often the temptation to be more precise than the level of “validity” with which an object is being measured justified.

Winter (2000) cautions, “Even in qualitative research, which thrives on accurate description, measures which are too precise…can confound and obscure the more general purposes of the research and analysis” (p. 4). In addition, he notes for some researchers (mainly qualitative), “Validity’ is not a singular acid test that can be applied to the research process as a whole. The “validity” measure can be applied differently depending upon the researcher’s beliefs as to what stage of the research process is in need of validation. Such an approach may perceive validity as referring only to measurement, observers, scores, instruments, relationships between scores or observable variations, rather than to the whole research process” (p. 4).

Maxwell (1992, as cited in Winter, 2000) identifies five typologies of validity as they relate to various stages of research:

1. Descriptive Validity—That which is concerned with the initial stage of research, usually involving data gathering.

2. Interpretive Validity—Within the qualitative paradigm, an inextricable element of data collection. Interpretation is couched within the rhetorics that
the researcher uses to describe a situation and is mutually constructed between researchers and subjects.

3. Theoretical Validity—A more abstract analysis than the descriptive and interpretive validities concerning the immediate physical and mental phenomena studied. Theoretical validity goes beyond the concrete and descriptive and concerns itself with the constructions that researchers apply to, or develop, during the research.

4. Generalizability—The degree to which the account is believed to be generalizable clearly distinguishes qualitative from quantitative research. Sampling, a vital consideration in establishing the validity of a statistical test, is usually purposeful in qualitative research as opposed to random. Qualitative research almost exclusively limits itself to ‘internal’ generalizations, if indeed it seeks to claim any form of generalizability at all; and,

5. Evaluative Validity—Application of an evaluative framework. Evaluation is an almost inescapable, and often unconscious, consequence of the research process itself. Recognizing that evaluation of some sort is an inescapable inevitability within research, enables the control of that evaluation, and offers a measurement of the research in terms of its overall validity.

Validity in this study is addressed by using triangulation, checking interpretations, and involving participants in all phases of the research and researcher biases and assumptions. Reliability is enhanced by explaining the assumptions and theory.
underlying the study and triangulating the data (Merriam, 2001, p. 198). Primary data sources include federal and state court documents, research documents, survey instruments, and conversations with established national leaders on the topic of parental choice.

Guba and Lincoln (1981, as cited in Merriam, 2001) support the notion that proper attention must be paid to ethical considerations involving qualitative research:

Ensuring validity and reliability in qualitative research involves conducting the investigation in an ethical manner. While well-established guidelines for the ethical conduct of research date back to the late 1940’s, only recently has attention been given to the ethical concerns unique to qualitative research (p. 378).

Guba and Lincoln point out that in an experimental study discussion occurs:

About validity and reliability of the instrumentation, the appropriateness of the data analysis techniques, the degree of relationship between the conclusions drawn and the data upon which they presumably rest, and so on. It is not much different in a qualitative study; were the interviews reliable and validly constructed; was the content of the documents properly analyzed; do the conclusions rest upon data (as cited in Adler, 1996, p.11)?

Miles and Huberman (1994) set forth the need in qualitative research to delineate reliability from quantitative comparisons:

Because of the unique character of each ethnographer, questions of reliability are not addressed in the same way as they would be in quantitative research. In
ethnography the research can never be repeated in exactly the same way.

Concepts such as ‘dependability’ and ‘consistency’ seem to be more useful as tests of ethnographic research (p. 8).

Janssen (2001) concludes, that ethnographic analysis is used in examining the data so as to “reach across multiple data sources and condense them, with somewhat less concern for the conceptual or theoretical meaning of these observations “(p. 111).

The trustworthiness of qualitative research is enhanced when concerns for internal validity, reliability, and external validity are addressed based on the qualitative literature (Janssen, 2001).

Reality, according to Guba and Lincoln (1981, as cited Merriam) is a set of multiple constructions made by humans. Winter (2000) describes reality in qualitative research as “concerned with the negotiation of ‘truths’ through a series of subjective accounts. Whereas, quantitative researchers attempt to disassociate themselves as much as possible from the research process, qualitative researchers have come to embrace their involvement and role within the research” (p. 8).

LeCompte and Preisle (1993) list four factors that lend support to the claim of high internal validity of ethnographic research:

First, the ethnographer’s common practice of living among participants and collecting data for long periods provides opportunities for continual data analysis and comparison to refine constructs; it ensures a match between researcher categories and participant realities. Second, informant interviews, a major ethnographic data source, are phased in the empirical categories of participants;
they are less abstract than many instruments used in other research designs.

Third, participant observations, the ethnographers second key source of data is conducted in natural settings reflecting the life experiences of participants more accurately than do more contrived laboratory settings. Finally, ethnographic analysis incorporates researcher reflection, introspection, and self-monitoring that Erickson (1973) calls disciplined subjectivity, and these expose all phases of the research to continual questioning and reevaluation (p. 342).

Winter (2000) adds to the discussion of validity for qualitative research by contrasting the typical cause and effect relationships found in quantitative studies:

Qualitative research “validity” also partially requires an “internal validity”, but is not centrally concerned with issues of cause and effect, and is not so harsh in its isolation and categorization of particulars within the phenomena. External validity is the secondary, yet still very important goal of qualitative research. The measure of external validity is the extent to which the results can be generalized and thus applied to other populations. A test can have very high internal validity and very low external validity at the same time. Threats to external validity are similar to those for internal validity, except that the test itself is more likely to pose a threat as an alternative explanation for similar results. External validity is often of no importance to qualitative research and the attempt to achieve it can seriously hinder its overall validity. However, qualitative findings are best generalizable to the development of theories and not wider populations (p. 8).
Qualitative research embodies a vast and evolving body of techniques that can be modified or developed as research demands. What this vast range of research methods and techniques demonstrates is that, as Maxwell (as cited in Winter, 2000, p. 284) concludes, “a method in itself is neither valid nor invalid; methods can produce valid data or accounts in some circumstances and invalid ones in others.” Therefore, Winter suggests that “validity is not a feature of a particular methodology, process or test, within qualitative research and all that remains is how representative the description is and how justifiable the findings” (p. 8). According to Woolcott (1992, as cited in Winter, p. 204), many researchers claim that ‘understanding’ is more pertinent to qualitative research than validity.

**Triangulation**

Triangulation, one of six basic strategies that the literature suggests to enhance internal validity, was used for this study. Merriam (2001) cites the literature to define triangulation:

> Triangulation means using multiple investigators, multiple sources of data, or multiple methods to confirm the emerging findings. This procedure for establishing validity in case studies was cited in an article by Foreman (1948) more than forty years ago. In a more recent article, Mathison (1988) points out that the triangulation may produce data that are inconsistent or contradictory. She suggests shifting the notion of triangulation away from “a technological solution for ensuring validity” and instead relying on a “holistic understanding” of the situation to construct ‘plausible explanations’ about the phenomena being studied.
“Good research practice obligates the researcher to triangulate, that is, to use multiple methods, data sources, and researchers to enhance the validity of research findings (Merriam, 2001, p. 204). Triangulation should provide a richer and more complex description (Adler, 1996, p. 13). Russo (1996) makes the case that triangulation can create a synergistic effect:

The use of complimentary methods can help bring research questions into clearer focus and can also offer solutions that might not have been considered had a single method been employed. Further, as Gestalt psychology suggests, by applying a variety of complementary techniques, the researcher’s efforts can exceed the whole of its parts. Moreover, each of the different methods of inquiry is particularly well suited to the nature of the question it seeks to answer (p. 56).

Reliability

In terms of reliability, the traditional definition does not apply to qualitative research. Merriam (2001) notes, “Reliability refers to the extent to which research findings can be replicated. In other words, if the study is repeated will it yield the same results? Reliability is problematic in the social sciences simply because human behavior is never static (p. 205). Guba and Lincoln (as cited in Merriam, p. 206) suggest that the researcher think about the “dependability or consistency” of the results contained from the data. “The question then is not whether the findings will be found again but whether the results are consistent with the data collected.” Based on the qualitative research literature, if an investigator uses the triangulation technique, reliability and internal validity are strengthened. Using multiple investigators, multiple sources of data, or
multiple methods to confirm emerging findings are noted by Merriam as ways in which triangulation can be used to enhance reliability (p. 204).

Another concern dealing with the trustworthiness of qualitative research is external validity or the extent to which the findings of one study can be applied to other situations (Merriam, 2001, p. 207). Generalizability of the results for qualitative research centers on “whether it is possible to generalize from a single case, or from qualitative inquiry in general, and if so in what way” (p. 208)?

Cronbach (1969) describes the proper relationship in addressing generalizations in qualitative research:

Instead of making generalization the ruling consideration in our research, I suggest that we reverse our priorities. An observer collecting data in one particular situation is in a position to appraise a practice or proposition in that setting, observing effects in context. In trying to describe and account for what happened, he will give attention to whatever variables were controlled but he will give equally careful attention to uncontrolled conditions, to personal characteristics, and to events that occurred during treatment and measurement. As he goes from situation to situation, his first task is to describe and interpret the effect anew in each locale, perhaps taking into account factors unique to that locale or series of events. Generalization comes late when we give proper weight to local conditions any generalization is a working hypothesis, not a conclusion (p. 122).
Cronbach and Suppes (1969) view of generalization in terms of qualitative research (and supported by Patton) is utilized in this study. Qualitative research should “provide perspective rather than truth, empirical assessment of local decision-makers theories of action rather than generation and verification of universal theories, and context bound extrapolation rather than generalizations” (p. 123). External validity in qualitative research is enhanced when working hypotheses, concrete universals, naturalistic generalizations, and user generalizations include rich descriptions, typicality, and multi-site designs.

Ethics is also a component related to the trustworthiness of qualitative research. Merriam (2001) discerns the importance of ethical behavior in qualitative research:

Although researchers can turn to guidelines and regulations for help in dealing with some of the ethical concerns likely to emerge in qualitative research, the burden of producing a study that has been conducted and disseminated in an ethical manner lies with the individual investigator. No regulation can tell a researcher when the questioning of a respondent becomes coercive, when to intervene in abusive or illegal situations or how to ensure that the study’s findings will not be used to the detriment of those involved. The best a researcher can do is to be conscious of the ethical issues that pervade the research process and to examine his or her, own philosophical orientation vis-à-vis these issues (p. 218). The literature shows that in any research, internal validity, reliability, external validity, and ethics are a major concern for a qualitative researcher. This study uses the
tripulation method and the criteria associated with triangulation to ensure that these concerns are met.

A Legal and Historical Analysis of Parental Choice: A Triangulation Approach

Selected federal and state law in addition to United States Supreme Court cases are reviewed in this study. Beginning in the 1600’s in Massachusetts Bay colony to the recent efforts of the George W. Bush administration, several important legislative acts have been passed that have significantly influenced parental rights in relation to public education. Among those included for survey in this study are:

1. “Ye Olde Deluder Satan” Act of 1620,
2. Land Ordinance of 1785,
3. Northwest Ordinance (1787),
4. Morrill Act of 1862,
5. Oregon State Compulsory School Attendance Act,
6. Elementary and Secondary Education Act (1965),
7. Individuals with Disability Education Act (1976),
8. Milwaukee Parental Choice Program (1993),
9. McKay Voucher Plan (Florida), and
10. “No Child Left Behind Act of 2001.”

Additional data are derived by examining decisions made by the United States Supreme Court that relate to the issue of determining parental rights within the context of the public schools. Records from court documents, primary historical source material,
observation, interviews, and anecdotal evidence are used in the triangulation to compare key elements of the analysis.

United States Supreme Court cases that helped to define or limit parental decisions regarding the education of their children were selected for this study. These cases illustrate fundamental issues of law concerning state authority versus parental control in the determination of a child’s education. Further, the decisions rendered demonstrate the complexity and variations of interpretation with regard to separation of church and state issues, conflicting claims of liberty and authority, and the proper balance the courts attempt to protect individual rights of parental choice versus the state responsibility to provide for an educated citizenry.

The following court cases are analyzed:

Contemporary Response from Educational, Religious, and Political Authorities.

The final data element in this study consists of discourse and exchange among the author and noted authorities in the field of parental choice. The question of who controls the education of children, the parents or the state, is the fundamental research idea and the focus of dialogue with selected respondents. Examination of this topic is complex and cannot be properly studied without analysis of contemporary thought. The definition of parental choice varies depending upon the particular circumstance in which the term is described. For example, Vitteriti (1999) argues that “our education system’s failure to provide equal learning opportunities to America’s poor helps to perpetuate their social and political inequality” (p. 2) and that the solution to the problem could be provided if universal school choice were allowed for every public school student. In contrast, Hess (2003) makes the case that parental authority to choose a school for a child may not be consistent with the public’s insistence on schools serving the public interest.

Subcategories of parental choice may include private school vouchers, charter schools, magnet schools, and home schooling. Noted experts in the field of education, education
law, and political institutions are surveyed to determine the impact of concurrent 
examination of this topic.

I worked to choose four names among those and others listed in the field of 
parental choice:

1. Jerry Wartgow, Supt. Denver public Schools;
2. Jay P. Greene, senior fellow, Manhattan Institute, advocate of school choice;
3. Jim Warford, K-12 Chancellor for Florida public schools;
4. Carolyn Boyle, coordinator—Coalition for Public Schools—Texas;
5. Rep. Kent Grusendor—chairman, House Committee on Education—Texas;
6. David J. Ferrero—career educator and scholar;
7. Randall Moody—Manager of federal policy for the National Education 
   Association;
8. Anthony J. Williams—Mayor of Washington D.C. and proponent of voucher 
   plan;
9. Ralph Neas—President, People for the American Way Foundation;
10. Chip Mellor—President and general counsel for the Institute for Justice; 
    advocates school choice;
11. Barry W. Lynn—executive director of Americans United for Separation of 
    Church and State;
12. Jacques Barzun—former dean, provost and history professor at Columbia 
    University; opposed to vouchers;
13. Michael J. Wang—Louisiana Gov. Mike Foster’s education policy advisor;
14. Frank Shepherd & Harold Johnson—attorneys with Pacific Legal Foundation that represents Teachers for Better Education, a group of public school teachers who support Florida’s voucher plan; (opportunity scholarships);

15. Frank Brogan—President, Florida Atlantic University, former Lieutenant Governor of Florida and proponent of opportunity scholarships;

16. Dr. James Dobson—Founder of Focus on the Family, nonprofit dedicated to preservation of the home; supports parental choice, home schooling, and vouchers for public education.

17. John McKay—former Pres. Fla. Senate; sponsor McKay Scholarships (vouchers for handicapped children);

18. Frosty Troy—Editor, Oklahoma Observer, proponent of public education; opposed to vouchers;

19. Nicolas J. Penning—Senior Legislative Analyst, American Association of School Administrators;

20. Dr. Willard R Daggett—President, International Center for Leadership in Education;

21. Dr. Larry Coble—Professor, University of North Carolina-Charlotte and president of the Coble Group, education consultants;

22. Dr. David Mosrie—Chief Executive Officer, Florida Association of District School Superintendents; and,

23. Mrs. Dawn Wooten—educational consultant and former high school principal.
Merriam (2001) cites Patton in describing the interview as a prime mechanism in collecting a “special kind of information” (p. 491) in a qualitative study:

We interview people to find out from them those things we cannot directly observe … We cannot observe feelings, thoughts, and intentions. We cannot observe behaviors that took place at some previous point in time. We cannot observe how people have organized the world and the meanings they attach to what goes on in the world. We have to ask people questions about those things. The purpose of interviewing, then, is to allow us to enter into the other person’s perspective (p. 219).

The following questions were posed, in survey form, to each respondent:

1. What should the role of the state or parents be in determining the education of their children?

2. Horace Mann, an early advocate for universal public education, proclaimed that the public schools should promote responsible citizenship, foster economic opportunity, instill a common morality, and reduce class and ethnic conflict in a heterogeneous society. In light of this definition how do you view public education today?

3. In the debate over parental control of children’s education, at what point do state and parent interests clash?
4. Charter schools, magnet schools, and vouchers signal patterns of choice that are emerging for parents of children who attend public schools. How do you see these patterns working in terms of redefining the institution of public education?

Summary

The legal aspect of this study examines a chronology of case law that covers the evolution of parental rights in determining the education of children. Major U.S. Supreme Court decisions (e.g., Pierce v. Society of Sisters, Wisconsin v. Yoder, and Zelman v. Simmons-Harris) were studied as a basis for establishing the context within which the research questions are framed. Parental rights as discussed in Pierce were further defined in Yoder as an Establishment clause issue and finally in Zelman as a choice option for parents in the form of vouchers.

Historically, Horace Mann and the emergence of the “Common School” appear in the mid-nineteenth century as the precursor to the development of the public school as an institution in America. Little was done to challenge the authority of state-controlled schools and local school boards until the latter part of the twentieth century. During this time the public schools were criticized for failing to provide an adequate education and existing within a vast bureaucracy designed to perpetuate itself and not improve.

Finally, the current debate over parental choice rages with parents, scholars, government officials, politicians, clergy, the business community, and the educational establishment expressing strong opinions regarding this controversial issue. These
opinions are represented in the interviews and survey questions listed previously in this chapter. The demise of public education is viewed by anti-parental-choice advocates as obvious if the trend toward extending vouchers to parents continues. On the other hand, parental choice supporters view the expansion of choice as the only solution to saving a generation of Americans from the failing institution known as the public schools.
Chapter Four

Results of the Study

Introduction

Following English common law, American colonists took responsibility for the education of their children. According to Blackstone (as cited in Wheeler, 1995, p. 78) “The right and obligation of parents to direct the intellectual and moral upbringing of their children was as important as the right and duty to feed, clothe, and otherwise tend to the basic needs of the offspring.” Wheeler (1995) suggests the societal expectations of the colonial era are described in the U.S. Supreme Court decision *Sch. Bd. Dist. v. Thompson* (1909):

At common law the principal duties of parents to their legitimate children consisted in their maintenance, their protection, and their education. While the municipal laws took care to enforce these duties, yet it was presumed that the natural love and affection implanted by Providence in the breast of every parent had done so more effectively than any law. For this reason the parent, and especially the father, was vested with supreme control over the child, including its education. Except where modified by statute, that authority still exists (p. 78).

Because of this common law notion, few colonies enacted statutes concerning education, and those that did provided no means for enforcement (as cited in Wheeler, 1995). In keeping with the thoughts of the colonists, the framers of the Constitution did
not specifically address the issue of education. Wheeler concludes that the founding fathers thought that education was so obviously a parental decision, that they need not address it (p. 341). The parental right to educate one’s child may be thought of as an individual right that the Constitution does not list explicitly, but has been found by the Court to be fundamental. A fundamental interest is a basic, constitutionally protected right with which the government may not interfere without a compelling reason. Since parental liberty has been included as one of these protected rights, state government cannot interfere without a compelling reason to override this liberty (p. 341).

Thomas Paine (1792, as cited in Coons and Sugarman, 1978, p. 22) was the first American to suggest distribution of public resources to the family to purchase children’s education. Paine’s ideas were not entirely his own and were influenced by European contemporaries such as Adam Smith. Smith, in *Wealth of Nations* (1776) exposed the protected monopoly in schools and universities. He states, “The endowment of schools and colleges have [sic] … not only corrupted the diligence of public teachers, but have rendered it almost impossible to have any good private ones”(as cited in Coons and Sugarman, 1978, p. 22). Smith’s principal interest was to put creativity and energy to the test and stimulation of the market (p. 23).

According to Glenn (1988), many believed that the state was the appropriate agency for taking on the task of reshaping immigrants into Americans. James Carter (1836, as cited in Glenn, p. 75) wrote in his influential *Essays on Popular Education* that a democratic society is dependent upon education:
Upon this topic of popular education, a free (original emphasis) government must be arbitrary (original emphasis). For its existence depends upon it. The more ignorant and degraded people are, the less do they feel the want of instruction, and the less they will seek it … if any one class of men, however small, be suffered as a body to remain in ignorance, and to allow their families to grow up without instruction, they will increase in greater ratio compared with their numbers, more than the enlightened classes, till they have a preponderance of physical power.

Thus, in Carter’s opinion, popular education could not be left to chance and only a universal and mandatory system of public schools could achieve what was necessary. Carter called for a state monopoly of popular education, which meant elementary schools that would be attended by a broad mass of people. The objective of this system was to shape future citizens to a common pattern (as cited in Glenn, 1988). Edward Everett, governor of Massachusetts in 1837, voiced the same connection between a “free” government and schooling when he announced, “[I]t is plain that education is universally and indispensably necessary” (as cited in Glenn, p. 76). The churches could not effectively serve as a primary socializing agency of society, which must become a primary objective of government. Therefore, popular education was not only the most effective but the only effective means of creating future citizens (p. 77).

Poor students and not foreign students were initially the concern of the Massachusetts education reformers. Horace Mann (1838) possessed a sense of stewardship and social responsibility while serving in the General Court (Massachusetts legislature). His success in this lawmaking body and being an ally to the Boston elite
paved the way for his most significant reform effort of all: the creation of the Board of Education to which he was appointed the first secretary. Mann was zealous in his pursuit for the advancement of the “common school” and in his introductory remarks for the third year of the *Common School Journal* (1841), he declared the genius of the common school:

> The Common school is the greatest discovery ever made by man. Let the Common School be expanded to its capabilities, let it be worked with the efficiency of which it is susceptible, and nine tenths of the crimes of the penal code would become obsolete (p. 15).

Mann and others articulated the mission of the Common School as “the development of ideas and opinions” and as such, was the highest calling of public education. This argument has been called into question from several U.S. Supreme Court rulings restricting the power of public education to seek to foster “a homogenous people with American ideal,” (as cited in Glenn, 1988, p. 82), “to standardize its children” (p. 82), or to achieve an “officially disciplined uniformity” (p. 82).

Thomas Paine’s suggestions of the late 18th century reappeared in the work of J. S. Mill during the 1850s (as cited in Glenn, 1988). Where Paine had emphasized the family, Mill was more concerned with the child. He did not conclude that the child should be herded into a state institution for his liberation. Mill believed parents should be required to provide adequately for their children’s education. Where they could not meet all tuition, the state should make up the difference.

After 1875, in response to nativist attitudes, enthusiasm for public education soared. Fear of unchecked immigration and the influence of sectarian (mainly Catholic)
schools were perceived as threats to “American” culture. Widespread anti-Catholic sentiment resulted in efforts by many states to require children to attend public schools and therefore guarantee the perpetuation of a homogenous civic and social structure. Troen (1972, as cited in Novella, 1998, p.7) discerns the emergence of publics support for a single model of efficient, compulsory schooling:

In the last third of the nineteenth century, systems of mass compulsory schooling were established in most countries of the Western world. What was at stake was not literacy or school attendance as such: high rates of literacy, almost universal school enrollment compulsory schooling. Rather, what was significant was an international acceptance of rational, compulsory-schooling model, a commitment of substantial proportions of public funds to the schooling enterprise and … irreversible breakthroughs in the actual enforcement of what came to be understood as the one model of efficient schooling.

As teachers assumed more power in loco parentis over educational space (circumscribed as it was by central authority), the authority of parents eroded. The price of schooling was the surrender of parents’ prerogatives during school hours.

Good (1956) notes resistance from the general public when the state attempts to impose additional power and concludes, “In view of the fact that compulsory attendance education almost always faced stiff opposition from ‘the unwillingness of the people to accept the principle that the state should be given the right to interfere with the traditional
authority of parents.” Troen (1972) supports Good’s conclusion and declares, “It is no wonder that the matter was taken up in the courts (p. 7).”

The first case to test the constitutionality of this legislation took place in Ohio. The Court decided in 1891 that an 1877 compulsory education law was constitutional. The decision declared that the welfare of the minor child was so important the state had the right to interfere with the parents. More typical has been the decision that compulsory schooling benefits the community and the state (Novella, 1998, p.8).

Losing the right to oversee the religious development of their children was bitterly resented by many parents, and the establishment of parochial schools was tolerated until the Oregon Compulsory School Attendance Act of 1922 was passed. This law declared that all children in Oregon were to attend public schools (Novella, 1998). In 1925, in response to the Oregon Act, a Roman Catholic teaching order, The Society of Sisters, and Hill Military Academy sued to have the law declared unconstitutional. The U.S Supreme Court decision in this case, Pierce v. Society of Sisters, (1925) refused to uphold the Oregon requirement that all children must attend the public schools and thus stifled legislative attempts to require public education (Coons and Sugarman, 1978, p. 19).

Janssen (2001, p.42) suggests, “Education for the public has only been recognized as necessary since the beginning of the twentieth century.” Notwithstanding the work of Horace Mann and others of the mid-nineteenth century that promoted the concept of the “common school”, education was considered a privilege and not a necessity for most Americans. Only the elite received lessons designed primarily to learn and preserve the heritages of the homelands. Sager (1999, p.4) adds, “The idea of access to a free
education by everyone is a relatively new concept that emerged during the twentieth century.” In the 1960s economist Milton Friedman put Mill’s analysis into modern economic terms. Friedman (as cited in Coons and Sugarman, 1978, p. 20) rejected the wisdom of governmental provision of education through public schools. He proposed vouchers spendable in state-approved schools and an equal division of the education budget among pupils of the state.

Coons and Sugarman (1978) describe efforts to give the family a role in publicly financed education. Shifts in the functions of families and status of children and youth brought about reformers. Those with animus against parents who were considered incompetent used the power of the state to intervene in family control of children’s education; therefore, fear of social unrest along with humanitarian zeal fueled the debate for compulsory education (p. 21).

Coons and Sugarman (1978) describe three groups that have promoted the choice of families to determine the education of their children: (a) Friedman’s economists, (b) parents’ rights enthusiasts, and (c) radical philosophers who proposed abstract arguments with no detail or description of what the relationship of parents, children or the state would be (p. 22).

The economists. The economists, led by Friedman, was eager to create a market where consumer tastes govern what is produced and the market is the best mechanism to match what is offered to what is desired. Consumer sovereignty is the ultimate test (Coons and Sugarman, 1978, p. 23).
The Parents’ Rights Enthusiasts. The parents’ rights view of family choice has grown up around the U.S. Supreme Court’s holding in Pierce. Since that 1925 decision, Pierce has become the political symbol of authority of parents over their children’s education. Probably for most Americans, the interest of individual children is the key justification for public support of education. The chief issue is whether family choice would be a blessing for children, not whether it is a right of the parents. The principle in Pierce may ultimately rest on the assumption of consistency between parental choice and the child’s interest. If that choice were proven harmful to the child, Pierce itself would become insupportable (Coons and Sugarman, 1978).

The Radicals. Mill’s emphasis on the child’s liberty resurfaced in the 1950s and 1960s. Paul Goodman, John Holt, and a handful of other radical critics painted a new image of school as a jail. Everett Reimer, Ivan Illich, and others added the argument that school was the opiate of the technocratic consumer society and ought to be abolished. These critics shared the view that school was essentially stultifying and public resources for learning should expand rather than contract the opportunities for human choice (as cited in Coons and Sugarman, 1978, p. 24). Coons and Sugarman conclude that the problem with this argument has been the tendency of these critics to apply plausible standards of adolescent autonomy to younger children (p. 24). Childhood liberty is possible only within a protective regime that is ready to act as a backdrop when necessary to ensure that the child survives in good health and with a growing capacity to exercise his/her ultimate liberty. The “liberation” thesis gains relevance as the child advances in age. Until that point at which the child sheds the last vestige of natural subordination,
important decisions must and will be made concerning the form and degree of domination (p. 24).

In the late 1960s, new advocates of educational choice began to give the debate broader dimensions (Coons and Sugarman, 1978, p. 25). They proposed to incorporate administrative guarantees into any plan in order to diminish the risk that experimentation with choice would seriously injure the interests of children. Unrestricted parental power was considered insufficient protection and, as a result, regulatory structures were designed to prevent neglect or abuse by either parents or educators. The accepted objective of reformers became constitutional and policy commitments that could be reconciled with choice.

The 1980s witnessed public education under attack for ineffectiveness and lack of preparation for higher education. For the first time, voices were questioning the very premises upon which Horace Mann’s “common school” was based (Glenn, 1988, p. 278). According to Glenn, the perennial question in education is whether the state has a right (or a duty) to insist upon compulsory socialization of children in values that conflict with those of at least some parents, in the name of some higher or social good. He concedes, the battle for children’s minds is continuous (p. 279).

Nationwide polls in the United States have shown repeatedly that choice is highly valued by parents. Although 87 % of American students attend public schools, 49 % of the parents of public school students responded, in 1986, that they would prefer to send their children to a private or church-related school. Nonwhite respondents were even
more supportive of a system of educational vouchers than were white respondents (Arons, 1986).

The evolution of access to a free public education for everyone is now considered a fundamental right of citizens and, as such, subject to governmental oversight balanced with wants and desires of parents to remain in control of their children’s education.

This qualitative study focuses on the legal and historical context within which parents make decisions regarding the educational choices for their children within the framework of the public schools. The research questions posed are:

1. What are the historical and legal benchmarks regarding parental choice within the context of the public schools?

2. What are the legal implications of parental choice within the context of recent state and federal legislation and United States Supreme Court decisions?

3. How do the historic and legal benchmarks regarding parental choice relate to each other?

Legal Benchmarks

The legal history of parental rights versus government control of children’s education began during the latter half of the 19th century. State passage of compulsory education laws paved the way for eventual confrontation from parents who asserted an imposition of state authority in their lives. The following U.S. Supreme Court cases provide evidence of a trail of litigation that emerged as defining the role of parents and government in determining the education of children. These cases represent significant legal decisions regarding parental rights, government authority over children’s education
and the interrelated issues surrounding each (i.e., religious freedom, neutrality, freedom of speech, etc.).

Meyer v. Nebraska (1923). The first U.S. Supreme Court decision recognizing the parental right to oversee one’s child’s education was the 1923 case of Meyer v. Nebraska (1923). In this case, a teacher was tried and convicted in the District Court of Hamilton, Nebraska of teaching reading in the German language to a ten-year-old child. This action was in violation of a state statute that prohibited such until after the eighth grade. The Supreme Court of Nebraska affirmed the judgment of conviction. It held that the state statute forbidding teaching of foreign language did not conflict with the Fourteenth Amendment, but was a valid exercise of the police power of the state. The following excerpts from the majority opinion explain the reasons advanced to support the decision:

The salutary purpose of the statute is clear. The legislature had seen the baneful effects of permitting foreigners who had taken residence in this country, to rear and educate their children in the language of their native land. This condition was found to be inimical to our own safety. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language. The obvious purpose of the statute was that the English language should be and become the mother language of all children reared in the state. The U.S. Supreme Court declared the law unconstitutional (Meyer v. Nebraska, 1923).
The problem for the Court’s determination was whether the state statute, as construed and applied, unreasonably infringes on the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment. “No State shall … deprive any person of life, liberty, or property … without due process of law (Meyer v. Nebraska, (1923).”

While the Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration. It denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts (Meyer v Nebraska, (1923).

The American people have always regarded education and acquisition of knowledge as matters of supreme importance that should be diligently promoted. The Ordinance of 1787 declares religion, morality, and knowledge as necessary to good government and the happiness of mankind. Schools and the means of
education shall be forever encouraged (*Meyer v. Nebraska*, (1923)).

Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable for his station in life, and nearly all States, including Nebraska, enforce this obligation by compulsory laws (*Meyer v. Nebraska*, (1923)).

Education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling has always been regarded as useful, honorable to the public welfare. The plaintiff taught this language in school as part of his occupation. His right to teach and the right of parents to engage him so to instruct children are within the liberty of the Fourteenth Amendment (*Meyer v. Nebraska*, (1923)).

The legislature has attempted to materially interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own (*Meyer v. Nebraska*, (1923)).

The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means (*Meyer v. Nebraska*, (1923)).

The Court appreciates the desire of the legislature to foster a homogenous people
with American ideals. But the means adopted exceed the limitations upon the power of the State and conflict with the rights of the plaintiff (Meyer v. Nebraska, (1923).

The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. The concern in this case was the decision made by the State Supreme Court that stated that a mere incident of abuse to an occupation that is ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper. The conclusion by the Court was that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State (Meyer v. Nebraska, (1923).

In Wheeler’s (1995, p. 78) analysis the Court limits parental rights by stating that their rights may be subject to reasonable state restrictions. The parental right to educate one’s child is not an explicit individual right listed in the Constitution; however, the U.S. Supreme Court has found this right to be fundamental.

State courts have been left to decide to what extent the state can regulate education (Wheeler, 1995). The U.S. Supreme Court in this case indicated that states have a legitimate interest in the education of children and may specify reasonable regulations regarding private school curriculum. The Court has limited a state’s control by mandating that the state must pursue the least drastic means of achieving a compelling state interest.

Two years after Meyer, the U.S. Supreme Court clarified the importance of the parental role in education in the landmark case, Pierce v. Society of Sisters (1925). This case, often referred to as the “Magna Carta” of parochial schools, means that the state cannot force its children to attend public schools. Parents have the right to send their children to qualified private schools (Miller, 2002).

Howard (2001) makes the case that the compulsory public school movement that began in the late 19th century in the United States was at its zenith when the Society of Sisters filed suit to have an Oregon compulsory attendance law declared invalid. He states the religious sentiment behind the law:

Confronted by increasing waves of immigrants in the late 19th century and World War I period, the native American-mostly Protestant-populace became alarmed at the growth of private and religious schools. Casting the school in its familiar role as socializing agent, the American public turned to the public schools to ‘Americanize’ the immigrant children, and the materials used by the public schools heavily reflected a pro-Protestant and anti-immigrant, and particularly anti-Catholic, flavour.

In allowing the challenge to the law, the U.S. Supreme Court struck down the Oregon law as unconstitutional and held that a state law compelling a child’s attendance at a public school constitutes an impermissible violation of the parent’s liberty interest under the Fourteenth Amendment:
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 fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instructions from public teachers only. The child is not the mere creature of the State, those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations (Howard, 2001).

This 1925 decision of the U.S. Supreme Court stands for the proposition that parents have a constitutionally protected right to make decisions concerning the education of their children (Wheeler, 2001).

The Fourteenth Amendment to the Constitution of the United States describes a fundamental issue in determining the rights of parents and states, in part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This provision provides the basis of the legal argument whereby the U.S. Supreme Court determined in *Pierce v. Society of Sisters*, (1925) that “the fundamental theory of liberty upon which all governments of this Union rest excludes any general power of the State to standardize its children by forcing them to accept instruction from public
teachers only (p. 10).” This case was in response to a 1922 Oregon law (as previously mentioned) known as the Compulsory Education Act that had the manifest purpose of requiring children between the ages of eight and sixteen to attend public schools. Two Oregon corporations, The Society of Sisters and Hill Military Academy, alleged, and the Court upheld, that this law conflicts with the right of parents to choose schools where their children “will receive appropriate mental and religious training, the right of the child to influence the parents’ choice of a school, the right of schools and teachers therein to engage in a useful business or profession” (p. 523).

Butts and Cremin (1953, as cited in Novella, 1998, p. 8) discern patriotism and loyalty to America as key arguments for passage of the law:

Those who favored the law hearkened back to the arguments used in building the common school ideal of the early nineteenth century. They claimed that the demands of citizenship required the state to see to it that all potential citizens be given appropriate training in their responsibilities; that the increase in juvenile delinquency followed upon an increase of numbers attending nonpublic schools; that attendance at a common school would prevent religious hostility and prejudice; and that instruction in American government and institutions for immigrant children could best be done when children of all classes and creeds attend school together. The crowning argument was made that loyalty to America could best be taught in public schools and that if the law were declared unconstitutional the state would have no means of prohibiting the teaching of
subversive doctrines by bolshevists, syndicalists, or communists in private schools.

On the other hand, Novella cites the prosecution’s argument:

It is not seriously debatable that the parental right to guide one’s child intellectually and religiously is a most substantial part of the liberty and freedom of the parent. The statute in suit trespasses, not only upon the liberty of the parents individually, but unto their liberty collectively as well. It forbids them, as a body, to support private and parochial schools and thus give their children such education and religious training as the parents may see fit.

As a result of this decision, Pierce stands as a landmark case in determining legal boundaries affecting state and parental control over the education of children.

The appellees alleged that the Compulsory Education Act caused withdrawal from its schools of children who would otherwise continue, and their income had steadily declined. The enactment conflicted with the right of parents to choose where their children receive appropriate mental and religious training, the right of the child to influence the parents’ choice of a school, and the right of schools and teachers to engage in a useful business or profession. In addition, unless enforcement of the measure was enjoined, the corporation’s business and property would suffer irreparable injury (Novella, 1998).

The District Court ruled that the Fourteenth Amendment guaranteed appellees against the deprivation of their property without due process of law consequent upon the lawful interference by appellants with the free choice of patrons, present and prospective. It
declared the right to conduct schools was property and that parents and guardians, as part of their liberty, might direct the education of children by selecting reputable teachers and places. The schools were not unfit or harmful to the public, and enforcement of the challenged statute would unlawfully deprive them of patronage and thereby destroy the owner’s business and property. Finally, the threats to enforce the Act would continue to cause irreparable injury, and the suits were not premature (Pierce v. Society of Sisters, (1925).

While the U.S. Supreme Court found some merit in the plea of the defendants, it sided with the plaintiff:

As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in the Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations (Pierce v. Society of Sisters, (1925a).

The U.S. Supreme Court affirmed the decision of the District Court. Justice McReynolds delivered the opinion of a unanimous Court:

The exact question involved in the present case has never been passed upon by any American Court. Perhaps the cases that come nearest are those on whether the school authorities have the right to exclusive control over the list of studies to
be taken by pupils in the public schools, or whether the parents have a limited right of selection. The opinions on this question are in hopeless conflict (*Pierce v. Society of Sisters*, 1925).

If a State cannot compel certain children to attend the public schools, it cannot compel any children to do so. An attempt to do so would clearly be a violation of the “equal protection of the laws” clause of the Fourteenth Amendment (*Pierce v. Society of Sisters*, 1925b).

This act is not designed and intended to promote compulsory education. It adds nothing to the standard of education; it does not broaden the educational field (*Pierce v. Society of Sisters*, 1925b).

This Court must know that the true purpose of the act, as well as its plain and intended practical effect, was the destruction of private primary, preparatory and parochial schools for they certainly could not survive the denial of the right of parents to have their children thus educated in the primary grades. Such drastic and extraordinary legislation is a portentous innovation in America (*Pierce v. Society of Sisters*, 1925b).

The statute abridges the freedom of four classes closely interrelated: (a) the freedom of the private and parochial schools, (b) the freedom of teachers engaged in those schools, (c) the freedom of parents and guardians, (d) the freedom of children (*Pierce v. Society of Sisters*, 1925b).

There is involved in this case a far more important group of individual rights, namely, the rights of the parents and guardians who desire to send their children
to such schools, and the rights of the children themselves. Reflection should soon convince the court that those rights, which the statute seriously abridges and impairs, are of the very essence of personal liberty and freedom (*Pierce v. Society of Sisters*, (1925b)).

It is not seriously debatable that the parental right to guide one’s child intellectually and religiously is a most substantial part of the liberty and freedom of the parent (*Pierce v. Society of Sisters*, (1925b)).

The statute in suit trespasses not only upon the liberty of the parents individually but upon their liberty collectively as well. It forbids them, as a body, to support private and parochial schools and thus give to their children such education and religious training as the parents may see fit, subject to the valid regulations of the State. In that respect the enactment violates the public policy of the State of Oregon and the liberty that parents have heretofore enjoyed in that State (*Pierce v. Society of Sisters*, (1925b)).

The legislative power of a state in relation to education does not involve the power to prohibit or suppress private schools and colleges (*Pierce v. Society of Sisters*, (1925b)).

No claim can arise that school children are deprived, by this law, of liberty without due process of law. It will be admitted by all that children under sixteen years of age cannot be given liberty of choice as to their education; this must be under the control either of the State, or of their parents, or of both the State and their parents. If any persons have been deprived of liberty without due process of
law it is the parents of the school children. The determination of this last point brings us to the question of the respective authority of the state and of parents over minor children (*Pierce v. Society of Sisters*, (1925b)).

Even in the freest country no person can possess absolutely uncontrolled liberty, either with respect to himself personally, or to his children. A parent cannot have a more complete right of control over the actions of his child than over his own actions. Liberty of all is subject to reasonable conditions deemed essential by the governing body to the safety, health, peace, good order, and morals of the community (*Pierce v. Society of Sisters*, (1925b)).

The discretionary powers of a State are broad enough to permit it to decide that compulsory attendance at public schools is a proper “precautionary measure against the moral pestilence of paupers, vagabonds, and possibly convicts (*Pierce v. Society of Sisters*, (1925b)).”

Thus, *Pierce* asserted the right of parents to choose the educational setting for their children. State power was, therefore curbed by forbidding the erection of a monolithic educational system that all must attend (New York State Association, 1998).

*Minersville School District v. Board of Education* (1940). The local board of education of Minersville, Pennsylvania, required both teachers and pupils to salute the national flag as a part of daily school exercise. Two students were expelled from the public schools for failure to participate in this ceremony. The students were Jehovah’s Witness for whom the Bible as the Word of God is the supreme authority. The children had been brought up conscientiously to believe that such a gesture of respect such as
saluting a flag is forbidden by command of Scripture (Minersville School District v. Board of Education, (1940).

The children were of an age for which Pennsylvania makes school attendance compulsory; thus, they were denied a free education. Their parents had to put them in private schools. Their father filed suit on behalf of the children to be relieved of the financial burden of placing his children in the private schools. He sought to require the officials of the Minersville school district to discontinue the exact participation of the flag salute ceremony. The District Court granted relief and was affirmed by the Circuit of Appeals. The U.S. Supreme Court granted certiorari (to review the affirmanse of a decree) to give the matter full reconsideration (Minersville School District v. Board of Education, (1940).

Justice Frankfurter delivered the opinion of the Court:

1. A grave responsibility confronts this Court whenever, in the course of litigation, it must reconcile the conflicting claims of liberty and authority. But when the liberty invoked is liberty of conscience, and the authority is authority to safeguard the nation’s fellowship, judicial conscience is put to its severest test. We must decide whether the requirement of participation in such a ceremony, exacted from a child who refuses upon sincere religious grounds, infringes without due process of law the liberty guaranteed by the Fourteenth Amendment (Minersville School District v. Board of Education, (1940).

2. The First Amendment, and the Fourteenth, sought to guard against repetition of those bitter religious struggles by prohibiting the establishment of a state religion
and by securing for every sect the free exercise of its faith. So pervasive is the
acceptance of this precious right its scope is brought into question, as here, only
when the consciences of individuals collide with the felt necessities of society

3. When does the constitutional guarantee compel exemption from doing what
society thinks necessary for the promotion of some great common end, or from a
penalty for conduct which appears dangerous to the general good? Our present
task is to reconcile two rights in order to prevent either from destroying the other

4. To stigmatize legislative judgment in providing for this universal gesture of
respect for the symbol of our national life in the setting of the common school as a
lawless inroad on that freedom of conscience which the Constitution protects,
would amount to no less than the pronouncement of pedagogical and
psychological dogma in a field where courts possess no marked and certainly no
controlling competence (Minersville School District v. Board of Education,
(1940).

5. But the courtroom is not the arena for debating issues of educational policy. So to
hold would, in effect, make us the school board for the country. That authority
has not been given to this Court, nor should we assume it (Minersville School

6. Great diversity of psychological and ethical opinion exists among the Court
concerning the best way to train children for their place in society. Because of
these differences and because of reluctance to permit a single, iron-cast system of education to be imposed upon a nation compounded of so many strains, the Court has held that, even though public education is one of the most cherished democratic institutions, the Bill of Rights bars a state from compelling all children to attend the public schools (*Minersville School District v. Board of Education*, (1940).

7. What the school authorities are really asserting is the right to awaken in the child’s mind considerations as to the significance of the flag contrary to those implanted by the parent. In such an attempt the state is normally at a disadvantage in competing with the parent’s authority so long—and this is the vital aspect of religious toleration—as parents are unmolested in their right to counteract by their own persuasiveness the wisdom and rightness of those loyalties that the state’s educational system is seeking to promote (*Minersville School District v. Board of Education*, (1940).

8. The preciousness of the family relation, the authority and independence that give dignity to parenthood, indeed the enjoyment of all freedom presuppose the kind of ordered society that is summarized by the flag of the United States. A society dedicated to the preservation of these ultimate values of civilization may, in self-protection, utilize the educational process for inculcating those almost unconscious feelings that bind people together in a comprehending loyalty, whatever may be their lesser difficulties and differences (*Minersville School District v. Board of Education*, (1940).
West Virginia State Board of Education v. Barnette (1943). The sole conflict in West Virginia State Board of Education v. Barnette (1943) was between government authority and rights of the individual. The state asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

In this case the West Virginia State Board of Education adopted a resolution ordering that a salute to the flag become “a regular part of the program of activities in the public schools” and that all teachers and pupils shall be required to participate in the salute. Refusal to salute the flag was regarded as an act of insubordination and dealt with by expulsion. Readmission to school was denied by statute until compliance. Meanwhile, the expelled child was “unlawfully absent” and open to proceedings against as a delinquent. Parents or guardians were liable for prosecution and, if convicted, subject to fine and/or imprisonment (West Virginia State Board of Education v. Barnette, (1943).

Objections to the salute were raised by the Parent Teachers Association, Boy and Girl Scouts, Red Cross, and the Federation of Women’s Clubs. Some modifications were made but no concessions were made to Jehovah’s Witness. The Witnesses are a religious group that teaches that obligations imposed by God are superior to that of laws enacted by a temporal government. In this case the Witnesses interpreted the flag to be a “graven image” and, thus, refused to salute it. Children of this faith were expelled from school
and threatened with exclusion for no other cause. Officials threatened to send them to reformatories. Parents were prosecuted and threatened with prosecution for causing delinquency (West Virginia State Board of Education v. Barnette, (1940).

Appellees brought suit in U.S. District Court and asked for an injunction to restrain enforcement of this law. The Board of Education moved to dismiss the complaint alleging that the law and regulations were an unconstitutional denial of religious freedom, freedom of speech, and invalid under the “due process” and “equal protection” clauses of the Fourteenth Amendment. The District Court restrained enforcement of the law and the Board of Education submitted the case to the U.S. Supreme Court by direct appeal (West Virginia State Board of Education v. Barnette, (1940).

The U.S. Supreme Court affirmed the decision of the District Court of the Southern District of West Virginia and, as such declared the action as a violation of the First and Fourteenth Amendment. A prior case, Minersville School District v. Gobitis (1941) was overruled (West Virginia State Board of Education v. Barnette, (1943).

Justice Jackson delivered the opinion of the Court. The following summary lists the salient points:

1. The sole conflict in this case is between the authority of the state and rights of the individual. The state asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude (West

2. The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. Conflicts, as described in this case, most frequently require intervention of the state to determine where the rights of one end and those of another begin. Nevertheless, the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so (West Virginia State Board of Education v. Barnette, (1943).

3. The question that underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under the Constitution (West Virginia State Board of Education v. Barnette, (1943).

Wheeler (1995) concludes, “It was the First Amendment’s right of free speech of the parents which the Court sought to protect. The Court upheld the parents’ First Amendment religious right in this regard.” In addition, the Court stated, “[I]f there is any fixed star in our Constitution constellation, it is that no official … can proscribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion (p. 642).”

Justice Frankfurter’s dissenting opinion is noteworthy to mention, in part, due to the perceived right of the State of West Virginia to impose laws that promote good citizenship:

I must differ from my brethren with regard to legislation like this. I cannot bring my mind to believe that the “liberty” secured by the Due Process Clause gives this
court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen. All that is in question is the right of the state to compel participation in this exercise by those who choose to attend the public schools … As to its public schools, West Virginia imposes conditions which it deems necessary in the development of future citizens. But the practical opportunities for obtaining what is becoming an increasing measure the conventional equipment of American youth may be no less burdensome than that which parents are increasingly called upon to bear in sending their children to parochial schools because the education provided by public schools, though supported by their taxes, does not satisfy their ethical and educational necessities. Parents have the privilege of choosing which schools they wish their children to attend. And the question here is whether the state may make certain requirements that seem to it desirable or important for the proper education of those future citizens who go to schools maintained by the states, or whether the pupils in those schools may be relieved from those requirements if they run counter to the consciences of their parents. Not only have parents the right to send children to schools of their own choosing but the state has no right to bring such schools under a strict government control or give affirmative direction concerning the intimate and essential details of such schools, intrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum, and textbooks (West Virginia State Board of

Everson v. Board of Education of the Township of Ewing (1947). A New Jersey statute authorized district boards of education to make rules and contracts for the transportation of children to and from schools other than private schools. A board of education resolution authorized the reimbursement of parents for fares paid for the transportation by public carrier of children attending public and Catholic schools. The Catholic schools operated under the superintendency of a Catholic priest and, in addition to a secular education, gave religious instruction in the Catholic faith. A taxpayer challenged the validity under the Federal Constitution of the statute and resolution so far as they authorized reimbursement to parents for the transportation of children attending sectarian schools (Everson v. Board of Education, (1947).

The New Jersey Supreme Court held that the state legislature was without power under the state constitution to authorize reimbursement to parents of bus fares paid for transporting their children to schools other than public schools. The New Jersey Court of Errors and Appeals reversed the decision holding that neither the statute nor the resolution violated the state constitution or the provisions of the Federal Constitution in issue (Everson v. Board of Education, (1947).

The U.S. Supreme Court affirmed the decision and held:

1. The expenditure of tax-raised funds thus authorized was for a public purpose and did not violate the due process clause of the Fourteenth Amendment;
2. The statute and resolution did not violate the provision of the First Amendment (made applicable to the states by the Fourteenth Amendment) prohibiting any “law respecting an establishment of religion (Everson v. Board of Education, 1947).”

A summary of Justice Black’s opinion of the Court establishes the notion that church and state issues may operate in concert and not opposed to each other:

1. The contention here is that the state statute and the resolution, insofar as they authorized reimbursement to parents of children attending parochial schools, violate the Federal Constitution in these two respects, which to some extent overlap. First, they authorize the State to take by taxation the private property of some and bestow it upon others to be used for their own private purposes. This, it is alleged, violates the due process clause of the Fourteenth Amendment. Second, the statute and the resolution forced inhabitants to pay taxes to help support and maintain schools that are dedicated to, and regularly teach, the Catholic Faith. Taxes levied for the purpose of supporting religious institutions are alleged to be abuse of state power to support church schools contrary to the prohibition of the First Amendment, which the Fourteenth Amendment made applicable to the states (Everson v. Board of Education, 1947).

2. The fact that a state law passed to satisfy a public need coincides with the personal desires of the individuals most directly affected is certainty and was an inadequate reason for the Court to say that a legislature has erroneously appraised the public need (Everson v. Board of Education, 1947).
3. Changing local conditions create new local problems that may lead to a state’s people and its local authorities to believe that laws authorizing new types of public services are necessary to promote the general well-being of the people. The Fourteenth Amendment did not strip the states of their power to meet problems previously left for individual solution (Everson v. Board of Education, 1947).

4. The argument that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose does not apply. In addition, it does not follow that a law that has a private, rather than a public, purpose because it provides that tax-raised funds will be paid to reimburse individuals on account of money spent by them in a way that furthers a public program. Subsidies and loans to individuals such as farmers and home-owners, and to privately owned transportation systems, as well as many other kinds of businesses, have been commonplace practices in state and national history (Everson v. Board of Education, 1947).

5. The Court cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. The truth exists that children are helped to get to church schools. Moreover, the state could deny municipal and other services to church schools that would make the task far more difficult for the schools to operate. Such is obviously not the purpose of the First Amendment. That amendment requires the
state to be neutral in its relations with groups of religious believers and
nonbelievers; it does not require the state to be their adversary. State power is no
more to be used so as to handicap religions than it is to favor them (Everson v.


The Court said that parents may in the discharge of their duty under state compulsory
education laws, send their children to a religious rather than a public school if the school
meets the secular educational requirements the state has the power to impose. The
parochial schools apparently met New Jersey requirements. The State contributes no
money to the schools; it does not support them. Its legislation, as applied, does no more
than provide a general program to help parents get their children, regardless of their
religion, safely and expeditiously to and from accredited schools (Everson v. Board of

Brown v. Board of Education (1954). Cases from Kansas, South Carolina,
Virginia, and Delaware considered as a common legal question caused the U.S. Supreme
Court to issue a consolidated opinion in the Brown decision. In the case from each state
African-American children sought the aid of the courts in obtaining admission to the
public schools of their community on a nonsegregated basis. In each instance, the
African-American children had been denied admission to schools attended by white
children under laws requiring or permitting segregation according to race. The
segregation was alleged to deprive the plaintiffs equal protection of the laws under the
Fourteenth Amendment. In each of the cases (except the Delaware case), a three judge
Federal District Court denied relief to the plaintiffs on the “separate but equal” doctrine
announced by the Court under *Plessy v. Ferguson* (1896). Under the “separate but equal” doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though the facilities are separate. In the Delaware case, the Supreme Court of Delaware adhered to the doctrine, but ordered that the plaintiff’s be admitted to the white schools because of their superiority to the African-American schools (Legal Information Institute).

The plaintiff’s contention was that the segregated schools are not “equal” and cannot be made “equal”; hence, they are deprived of the equal protection of the laws. The Court heard argument during the 1952 term and re-argument during the 1953 term. Re-argument was largely devoted to circumstances surrounding the adoption of the Fourteenth Amendment in 1868. The investigation was inconclusive due to the wide-ranging views of the Amendment and its intent (Legal Information Institute).

Chief Justice Warren delivered the opinion of the Court. In summary, Justice Warren describes the importance of public education:

1. In approaching this problem, the clock cannot be turned back to 1868 when the Fourteenth Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. The Court had to consider public education in light of its full development and its place in American life throughout the Nation. Only in this way can segregation be determined that in public schools plaintiffs are deprived of the equal protection of the laws (Legal Information Institute).

2. Education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both
demonstrate recognition of the importance of education to a democratic society. Education is the very foundation of good citizenship. The future is doubtful for any child to succeed in life if he/she is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right that must be made available to all on equal terms (Legal Information Institute).

3. The Court concluded that segregating children in public schools solely on the basis of race, even the physical facilities and other “tangible” factors may be equal, deprive the children of the minority group of equal educational opportunities (Legal Information Institute).

4. In addition, the Court concluded that, in the field of public education, the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal. Therefore, the Court held that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment (Legal Information Institute).

5. Finally, the Court announced that the primary question, the constitutionality of segregation in public education, is a denial of the equal protection of the laws (Legal Information Institute).

Thus, the Brown decision meant that white and African-American children could not be forced to attend separate public schools.

Engel v. Vitale (1962). The First Amendment prohibits the enactment of any law “respecting an establishment of religion”. State officials may not compose an official
state prayer and require that it be recited in the public schools of the state at the beginning of each school day—even if the prayer is denominationally neutral and pupils who wish to do so may remain silent or be excused from the room while the prayer is being recited (Legal Information Institute).

In summary, Justice Black further defined the U.S. Supreme Court’s position on the separation of church and state:

1. The Board of Education of Union Free School District No. 9, New Hyde Park, New York, directed the school district’s principal to cause a prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day. This procedure was adopted on the recommendation of the Board of Regents, a governmental agency to which is granted broad supervisory, executive, and legislative powers over the state’s public school system (Legal Information Institute).

2. The teacher who leads the prayer is on the public payroll. The children in the classroom are a “captive audience” (Legal Information Institute).

3. A religion is not established in the usual sense merely by letting those who choose to do so say the prayer the public school teacher leads. Yet once government finances a religious exercise, it inserts a divisive influence into communities (Legal Information Institute).

4. The First Amendment teaches that a government neutral in the field of religion better serves all religious interests (Legal Information Institute).

5. Everson v. Board of Education, (1947) complicated the issue when it allowed
taxpayer money to be used to pay “the bus fares of parochial school pupils as part of a general program under which” the fares of pupils attending public and other schools were also paid. The Everson case seems out of line with the First Amendment since public funds could be used to satisfy other needs of parochial school students—lunches, books, and tuition being obvious examples (Legal Information Institute).

6. Justice Rutledge’s dissent in Everson stated appropriate First Amendment philosophy: “The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. Public money devoted to payment of religious costs, educational or other, brings the quest for more. It is the very thing Jefferson and Madison experienced and sought to guard against, whether in its blunt or in its more screened forms. The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefit; or all will embroil the state in their dissensions (Legal Information Institute).

Wisconsin v. Yoder (1972). Members of the Old Order Amish religion and the Conservative Amish Mennonite Church were convicted of violating Wisconsin’s compulsory attendance law (which requires a child’s school attendance until age 16) by declining to send their children to public or private school after they had graduated from the eighth grade. Evidence presented showed that the Amish provide continuing informal education to their children designed to prepare them for life in the rural Amish community. Also, the respondents sincerely believed that high school attendance was
contrary to the Amish religion and way of life and that they would endanger their own 
salvation and that of their children by complying with the law. The State Supreme Court 
sustained the respondents’ claim that application of the compulsory school attendance 
law to them violated their rights under the Free Exercise Clause of the First Amendment, 
made applicable by the Fourteenth Amendment (Wisconsin v. Yoder, (1972).

On petition of the State of Wisconsin, the U.S. Supreme Court granted the writ of 
certiorari to review the decision of the Wisconsin Supreme Court holding that the 
respondent’s convictions of violating the state’s compulsory attendance law were invalid. 
The U.S. Supreme Court affirmed the decision of the Wisconsin Court:

1. The Court determined that the state’s interest in universal education is not totally 
   free from a balancing process when it impinges on other fundamental rights, such 
   as those specifically protected by the Free Exercise Clause of the First 
   Amendment and the traditional interests of parents with respect to the religious 

2. Respondents provided evidence that they sincerely believed that high school 
   attendance was contrary to their own religion and would endanger their salvation 
   and that of their children by complying with the law (Wisconsin v. Yoder, (1972), 
   pp-229-34).

3. Further, the Court concluded that the state’s claim that it is empowered, as parens 
patriae,[original emphasis] to extend the benefit of secondary education to 
children regardless of the wishes of their parents cannot be sustained against a 
free exercise claim of the nature revealed by this record. The Amish introduced
convincing evidence that accommodating their religious objections by foregoing one or two additional years of compulsory education did not impair the physical or mental health of the child. In addition, the lack of formal education did not result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society (Wisconsin v. Yoder, (1972), p. 212).

In presenting the opinion of the Court, Chief Justice Burger stated legitimate concerns of the Amish people:

Respondents defended on the ground that the application of the compulsory attendance law violated their rights under the First and Fourteenth Amendments, … that their children’s attendance at high school, public or private, was contrary to the Amish religion and way of life. [H]igh school attendance with teachers who are not of the Amish faith … interposes a serious barrier to the integration of the Amish child into the Amish religious community (Wisconsin v. Yoder, (1972).

No doubt the power of the state to impose reasonable regulation for the control and duration of basic education exists. Providing public schools ranks at the very apex of the function of a state. Yet, even this paramount responsibility was in Pierce v. Society of Sisters (1925), made to yield to the right of parents to provide an equivalent education in a privately operated system. There, the Court held that Oregon’s statute compelling attendance in a public school from age eight to 16 unreasonably interfered with the interests of parents in directing the rearing of their offspring, including their education in church-operated schools (Wisconsin v. Yoder, (1972).
Wisconsin v. Yoder concludes, therefore, that, however strong the state’s interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests (p. 212). This case does not become easier because respondents were convicted for their “actions” in refusing to send their children to public high school. In this context, the belief and action cannot be neatly confined in logic-tight compartments.

The State’s broader contention was that its interest in its system of compulsory education was so compelling that even the established religious practices of the Amish must give way. The value of all education must be assessed in terms of its capacity to prepare the children for life (Wisconsin v. Yoder, (1972), p. 212).

The state attacks the respondents’ position as fostering “ignorance” from which children must be protected by the state. No one can question the state’s duty to protect children from ignorance, but this argument does not square with the facts disclosed in the record (Wisconsin v. Yoder, (1972), p. 212).

Planned Parenthood of Southeastern Pennsylvania et al. v. Casey, Governor of Pennsylvania (1992). At issue in Planned Parenthood of Southeastern Pennsylvania et al. v. Casey, Governor or Pennsylvania (1992) are five provisions of the Pennsylvania Abortion Control Act of 1982, which requires that a woman seeking an abortion give her informed consent prior to the procedure and specifies that she be provided with certain information at least 24 hours before the abortion is performed. The District Court held all the provisions unconstitutional and permanently enjoined their enforcement. The Court of Appeals affirmed in part and reversed in part, striking down the husband notification
provision but upholding others. The U.S. Supreme Court affirmed in part, reversed in part, and remanded. Justice O’Connor delivered the opinion of the Court and summarized the boundaries between individual liberty and societal demands:

1. Reaffirmed the fundamental question resolved by *Roe v. Wade* (1973) principles of institutional integrity, and the rule that *Roe’s* essential holding be retained and reaffirmed as to each of its three parts: (a) recognition of a woman’s right to choose to have an abortion before fetal viability and to obtain it without undue interference from the state; (b) a confirmation of the state’s power to restrict abortions after viability, and (c) the principle that the state has legitimate interests from the outset of the pregnancy in protecting the health of a woman and the life of the fetus that may become a child (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, (1992).

2. *Roe v. Wade* determined that a woman’s decision to terminate her pregnancy is a “liberty” protected by the substantive component of the Due Process Clause of the Fourteenth Amendment. The adjudication of substantive due process claims may require the Court to exercise reasoned judgment in determining the boundaries between the individual’s liberty and the demands of organized society. The Court’s decisions have afforded constitutional protection to personal decisions relating to marriage, procreation, family relationships, child rearing and education, and contraception, and have recognized the right of the individual to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child (*Planned Parenthood of
Chief Justice Rehnquist, Justice White, Justice Scalia, and Justice Thomas concluded that the *Roe* Court reached too far when it analogized the right to abort a fetus to the rights involved in *Pierce v. Society of Sisters* (1925), *Meyer v. Nebraska* (1923), *Loving v. Virginia* (1967), *Griswold v. Connecticut* (1965), and thereby deemed the right to abortion to be “fundamental”. None of these decisions endorsed an all-encompassing “right of privacy” as *Roe* claimed. Because abortion involves the purposeful termination of potential life, the abortion decision must be recognized as different in kind from the rights protected in the earlier cases under the rubric of personal or family privacy and autonomy (*Planned Parenthood of Southeastern Pennsylvania v Casey*, (1992).

In addition, Justice O’Connor noted, “The Court’s decisions have afforded Constitutional protection to personal decisions relating to child rearing and education (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, (1992).”

*Zobrest et al. v. Catalina Foothills School District* (1993). A deaf child and his parents filed suit after a school district refused to provide a sign language interpreter to accompany the child to classes at a Roman Catholic high school. They alleged that the Individuals with Disabilities Act (IDEA) and the Free Exercise Clause of the First Amendment required the school district to provide the interpreter and that the Establishment Clause did not bar such relief. The District Court granted the school district summary judgment on the ground that the interpreter would act as a conduit for the child’s religious inculcation, thereby promoting his religious development at government expense in violation of the Establishment Clause. The Court of Appeals

In a 5-4 decision, the U.S. Supreme Court reversed the decision of the Appeals Court and offered the following rationale:

1. The Establishment Clause does not prevent the school district from furnishing a disabled child enrolled in a sectarian school with a sign language interpreter in order to facilitate his education. Government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit (Zobrest et al. v. Catalina Foothills School District, (1993).

2. The service in this case is part of a general government program that distributes benefits neutrally to any child qualifying as disabled under the IDEA, without regard to the sectarian/nonsectarian, or public/nonpublic nature of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of an individual parent’s private decisions (Zobrest et al. v. Catalina Foothills School District, (1993).

3. Since the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter’s presence there cannot be attributed to state decision-making (Zobrest et al. v. Catalina Foothills School District, (1993).
4. In this case, the child is the primary beneficiary, and the school receives only an incidental benefit. In addition, an interpreter, unlike a teacher or guidance counselor, neither adds to nor subtracts from the sectarian school’s environment but merely interprets whatever material is presented to the class as a whole. No absolute bar to the placing of a public employee in a sectarian school exists (Zobrest et al. v. Catalina Foothills School District, 1993).

Florence County School District Four et al. v. Carter (1993). Respondent Shannon Carter, a student classified as learning disabled was enrolled in the petitioner school district. School officials met with her parents to formulate an Individual Education Plan (IEP), as required under the Individuals with Disabilities Act. The parents requested a hearing and challenged the school district’s IEP as inappropriate. In the meantime, Shannon’s parents enrolled her in a private academy that specialized in educating children with disabilities. After the state and school district determined the IEP to be appropriate, the parents filed suit, claiming that the school district had breached its duty under IDEA to provide Shannon with a “free appropriate public education” and sought reimbursement for tuition and other costs incurred at the private academy. The District Court upheld the parent’s request and the Appeals Court rejected the school district’s argument that reimbursement is never proper when the parents choose a private school that is not approved by the state or that does not comply with all of the requirements (Florence County School District Four v. Carter, 1993).

In a unanimous decision, the U.S. Supreme Court held that reimbursement for parents who unilaterally withdraw their child from a public school that provides an
inappropriate education under IDEA is permissible (*Florence County School District Four v. Carter*, (1993)).

The Court held, in summary, that the parents were entitled to reimbursement of fees charged to place their child in a private school and rejected the school district’s argument of an undue financial burden:

1. IDEA’s grant of equitable authority empowers a court to order school authorities retroactively to reimburse parents if the court ultimately determines that the private placement, rather than the proposed IEP, is proper under the Act (*Florence County School District Four v. Carter*, (1993)).

2. The private school’s failure to meet the definition of a “free appropriate public education” does not bar parents from reimbursement because the section’s requirements cannot be read as applying to parental placements. The requirements that the education be “provided … under public supervision and direction” and that the IEP designed by “a representative of the local educational agency” and “established,” “revised,” and “reviewed” by the agency, will never be met in the context of a parental placement. Therefore, to read them as applying to parental placements would effectively eliminate the right of unilateral withdrawal recognized in *School Community of Burlington v. Department of Education of Massachusetts* (1984) and would defeat IDEA’s purpose of ensuring that children with disabilities receive an education that is both appropriate and free. Requirements that the school meet the standards of the state educational agency do not apply to private parental placements. The Court declared an
obvious inconsistency with the Act’s goals if parents were forbidden from educating their child at a school that provided an appropriate education simply because that school lacked the stamp of approval of the same public school system that failed to meet the child’s needs in the first place. The parent’s failure to select a state-approved program in favor of an unapproved option does not in itself bar reimbursement (Florence County School District Four v. Carter, (1993); see also School Community of Burlington v. Department of Education of Massachusetts).

3. The Court rejected the school district’s argument that allowing reimbursement for parents puts an unreasonable burden on a financially strapped local school district. School officials that conform to IDEA’s mandate to give the child a free appropriate public education in a public setting or place the child in a private setting of the state’s choice need not worry about reimbursement claims. Also, parents who change their child’s placement during the pendency of review proceedings are entitled to reimbursement only if a federal court concludes both that the public placement violated IDEA and that the private placement was proper under the Act. Total reimbursement is not appropriate if a court fashioning discretionary equitable relief under IDEA determines that the cost of private education was unreasonable (Florence County School District Four v. Carter, (1993).

In School Community of Burlington v. Department of Education of Massachusetts, the Court recognized the right of parents who disagree with a proposed
IEP to unilaterally withdraw their child from public school and place the child in a private school. IDEA’s grant of equitable authority empowers a court to order school authorities retroactively to reimburse the parents if the court ultimately determines that the private placement, rather than the proposed IEP, is proper.

*Mitchell v. Helms* (2000). Chapter 2 of the Education Consolidation and Improvement Act of 1981 channels federal funds via state educational agencies to local educational agencies, which in turn lend educational materials and equipment, such as library and media materials and computer hardware and software, to public and private elementary and secondary schools to implement “secular, neutral, and non-ideological” programs. The enrollment of each participating school determines the amount of Chapter 2 aid that it receives. In an average year, about 50% of Chapter 2 funds spent in Jefferson Parish, Louisiana, are allocated for private schools, most of which are Catholic or otherwise religiously affiliated. Respondents in this case filed suit alleging that Chapter 2, as applied in the parish, violated the First Amendment’s Establishment Clause. The District Court agreed and concluded that Chapter 2 had the primary effect of advancing religion because the materials and equipment loaned to the Catholic schools were direct aid and the schools were pervasively sectarian. The Fifth Circuit agreed and invalidated Chapter 2 aid to sectarian schools (*Mitchell v. Helms*, 2000).

In a 6-3 decision, the U.S. Supreme Court reversed the appellate decision and offered the following rationale as it relates to the issue of parental choice:

1. As a way of assuring neutrality, the Court has repeatedly considered whether any governmental aid to a religious institution results from the genuinely
independent and private choices of individual parents. No incentive is offered to undertake religious indoctrination where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion and is made available to both religious and secular beneficiaries on a nondiscriminatory basis (Mitchell v. Helms, (2000).

2. The respondent’s chief argument was that direct, non-incidental aid to religious schools is always impermissible and inconsistent with the Court’s more recent cases. The purpose of the direct/indirect distinction is to present “subsidization” of religion and the Court’s more recent cases address this concern through the principle of private choice. If aid to schools, even “direct aid” is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any “support of religion”. Although the presence of private choice is easier to see, when aid literally passes through individual hands, the Court could find no reason why the Establishment Clause requires such a form. Whether a program is labeled “direct” or “indirect” is a rather arbitrary choice that does not further the constitutional analysis (Mitchell v. Helms, (2000).

3. Chapter 2 allocates aid based on the private choices of students and their parents as to which schools to attend. Thus, no problem is evident that Chapter 2 could fairly be described as providing “direct” aid (Destro, 2002).
Justice O’Connor, joined by Justice Breyer, concluded that *Agostini v. Felton*, (1999) controls the constitutional inquiry in this case and required reversal of the Fifth Circuit’s judgment that the Chapter 2 program is unconstitutional. Troubling to the justices was the announcement by the plurality of a rule of unprecedented breadth for the evaluation of Establishment Clause challenges to government aid programs. Reliance on neutral criteria employed as a basis for distributing aid and the approval of actual diversion of government aid to religious indoctrination is in tension with the Court’s precedents. They concluded that the Court should not treat a per capita aid program like Chapter 2 the same as true private choice programs (*Destro*, 2000, see also, *Agostini v. Felton*, (1999).

*Zelman v. Simmons-Harris* (2002). For thirty years, the Cleveland City School District had operated under desegregation litigation and educational reforms that had failed to improve the public schools. In 1996, The Ohio Legislature enacted legislation (Cleveland Tutoring and Scholarship program) that initiated litigation that ultimately led to the U.S. Supreme Court decision *Zelman v. Simmons-Harris*, (2002). The plan adopted by the legislature was designed to offer “scholarships” to students who were attending Cleveland City Schools and allow them to attend a private school, a school in a neighboring district, or receive tutorial services. The scholarships were allocated on a sliding scale and no one would receive more than $2,500. The payments were made in the form of a check made payable to the parents and the parents would have to go to the school of their choice to endorse the check (*Destro*, 2002).
Immediately controversy arose over the issue of the check becoming a “school voucher”. When challenged in court, the Ohio State Supreme Court upheld the program and declared it to have a secular legislative purpose. On appeal, however, to the federal District Court, the Court ruled that the program violated the Establishment Clause and advanced religion. In addition, the Court emphasized that all the options offered to Cleveland City school children must be determined in order to adequately assess the Establishment Clause issue (Destro, 2002).

The Court cited *Mueller*, *Witters*, and *Zobrest* cases as examples of previous case law whereby government aid were found to be neutral with respect to religion. Defining characteristics included (a) providing assistance to a broad class of citizens, who (b) direct government aid to religious schools, (c) as a matter of true and independent choice. The Court noted that Establishment Clause issues have never offended true private choice (Destro, 2002).

The Ohio program was considered multifaceted and there was no financial incentive to undertake religious indoctrination. The law was merely an attempt by the state of Ohio to help children trapped in a failed school district. In fact, religious disincentives existed for religious schools since the voucher amount was often less than half of the tuition required for other students (Destro, 2002).

Justice O’Connor concurred with the majority opinion and offered three points of emphasis:

1. All the reasonable options should be properly evaluated;
2. The decision does not differ greatly from other Establishment Clause cases of the past; and,

3. The resources the religious schools receive is insignificant in comparison to other resources in comparison to other resources provided by federal, state, and local governments (Destro, 2002).

Justice Thomas likened the opinion to civil rights issues and characterized the importance of education as “emancipation” for urban minority students as a major reason for the rationale behind the Zelman decision. In his view, the systematic failure to provide quality educational opportunity for minority youth could no longer be ignored (Destro, 2002).

Justice Stevens’ dissent focused on process or methods and argued that the factual evidence as described by Justice O’Connor were irrelevant and should not be considered. Also in dissent, Justice Breyer and Souter objected to the use of any public funds for religious institutions (Destro, 2002).

Erik S. Jaffe (2002), an attorney representing the Center for Individual Freedom, the Cato Institute, the Milton and Rose D. Friedman Foundation, and the Goldwater Foundation submitted a brief of Amici Curiae in support of the petitioners in the Zelman case. The following summarizes the information included in the brief:

1. This case is of particular importance to the Center for Individual Freedom due to the constitutional protections for the free exercise of religious choice, and the constitutional requirement of the religion-neutral provision of public benefits, including publicly funded education (Jaffe, 2002).
2. Issues of increased choice in the educational marketplace and the interaction of First Amendment Establishment Clause and Free Exercise values are also of interest to the Cato Institute and Center for Individual Freedom (Jaffe, 2002).

3. This case raises the rights of low-income parents in Cleveland to make a free choice of schools, including religious schools, and is of critical interest to the Milton D. and Rose Friedman Foundation. The Friedman Foundation is dedicated to promoting public understanding of the need for major reform in K-12 education, specifically highlighting the role that competition through educational choice plays in achieving that reform (Jaffe, 2002).

4. The Goldwater Institute advocates public policy founded upon the principles of limited government, economic freedom and individual responsibility. This case raises the issue of whether a program designed to rescue economically disadvantaged students from a failing public school system by providing scholarships that parents may use to choose private, religious or public schools violates the First Amendment (Jaffe, 2002).

Jaffe’s argument before the Court consisted of the following points:

1. Private choice breaks the nexus between government decision-making and any benefits to religious institutions that may result as a secondary consequence of private decisions on how to use government benefits (Jaffe, 2002).

2. In questions regarding the existence of choice and alleged favoritism, an accurate and complete context is essential. Therefore, in order to determine whether the Ohio voucher program allows for genuinely private choice, it must be
evaluated in the context of the full range of publicly funded educational alternatives to the parents of Cleveland schoolchildren (Jaffe, 2002).

3. That many of the parents participating in the voucher program have selected religious schools for their children merely reflects their private decisions and does not cause the program to violate the Establishment Clause (Jaffe, 2002).

4. The school participation and other criteria defining the voucher program do not discriminate in favor of religious schools. The voucher program merely adds a small improvement over the complete lack of funding and is a first step in the direction of neutrality, not a violation of the Establishment Clause (Jaffe, 2002).

The central issue in this appeal is whether and to what extent school selection by parents under the Ohio voucher program is a product of genuinely independent private choice. State creation of such private choice does not offend the Establishment Clause regardless of whether the individual exercise of such choice results in greater or lesser attendance at religiously oriented schools. The fundamental requirement is an equality of opportunity, not a preordained outcome (Jaffe, 2002).

Jaffe (2002) argues that genuine private choice between the secular and religious satisfies the Establishment Clause. The Ohio Court of Appeals recognized that this case hinges upon whether the Ohio voucher program has the principal or primary effect of advancing or inhibiting religion (Jaffe, 2002). In this case the “primary effect” issue turns mainly on whether any state funds ultimately reaching religious schools flow to them “only as a result of the genuinely independent and private choices of aid recipients (Jaffe, 2002, p.22).” Private choice is critical to Establishment Clause analysis because it
breaks the nexus between the government and the ensuing results.

Interjecting private choice between the government decision to subsidize education for a class of students and the final parental decisions of which schools their children will attend eliminates both the perception and the reality of any government decision to advance or inhibit any religious educational option. The government merely supports educational choice. The ensuing choices that result are then attributable to the parents and students, not to the government (Jaffe, 2002).

A multitude of private choices regarding which schools students will attend is the antithesis of monolithic government support for a favored religion against which the Establishment Clause was meant to guard. Private decision-making also shifts the “attribution” of any decision to pay religious school tuition to the parents choosing that school for their child and away from the government. Such shifted attribution reflects the reality of the decision-making and furthers the additional Establishment Clause goal that government not engage in symbolic endorsement of or opposition to religion (Jaffe, 2002).

Where the criteria defining the available choices of publicly funded education are neutral toward religion, parents’ choice of a religious school for their children is the result of a “genuinely independent” private choice and, therefore, no Establishment Clause violation (Jaffe, 2002).

Vouchers must be evaluated within the full context of state-funded educational options. In considering whether genuinely independent private choice existed in this case, the Sixth Circuit looked only to the choices provided parents by the voucher
program itself and ignored the variety of other state-funded educational options that were also open to parents eligible for the voucher program (Jaffè, 2002).

Cleveland parents had a variety of state-funded educational options:

1. The local public school option allows parents to direct over $7,000 per pupil of state funds to the secular education of their children and may obtain additional voucher program funds for supplemental private tutoring (Jaffè, 2002).

2. Parents dissatisfied with traditional public school options may elect to send their children to publicly funded Community Schools (charter schools), which provide greater educational autonomy. Students at Community Schools receive over $4,500 of state support. Private, secular schools are also eligible to convert to Community Schools. Religious schools are not eligible to become part of the Community Schools program (Jaffè, 2002).

3. Finally, parents may select fully private schooling for their children and receive up to $2,250 from the state for tuition at any private school that meets the program’s admission requirements. Both religious and secular schools have qualified for and accepted students under the voucher program (Jaffè, 2002).

Jaffè (2002) contends that the court of appeals misunderstood the relevance of other state-funded educational options to its analysis of the voucher program. Both the independence of any private choice to send children to religious schools using vouchers and the overall primary effect of the voucher program in general can only be determined
in the full context of Cleveland’s publicly funded educational system.

Absent a proper baseline for evaluating state activity or parental choice, any state conduct that benefits religion if viewed in isolation could be said to advance or endorse religion. The dispute in this case turns on the allegation of preferential state funding in support of religious schooling and has nothing to do with public versus private administration of the particular schools (Jaffe, 2002).

Contrary to the Sixth Circuit’s view, it and this Court are not being asked to evaluate the legality of educational options other than the voucher program, but rather to evaluate the voucher program itself in the context of those other options (Jaffe, 2002).

Parents have genuine choice between religious and nonreligious schools. At core, Ohio has said to Cleveland parents, “We will devote public money to the education of your children; you pick the schools.” Parents are free to select from a palette of alternatives including public, private, secular, and religious schools. Among those various options open to Cleveland parents, no state pressure or incentive exists to select a religious school over a secular school. The vouchers given to parents selecting private schools for their children, however, are thousands of dollars less per pupil than the amount expended on those alternatives, and the parents still must pay 10 or 25 % of the tuition (Jaffe, 2002).

Religious schools outnumber nonreligious schools in participation in the voucher program, but that has no impact on the freedom of independence of the parents’ choice. From the parents’ perspective, therefore, choice is abundant. That such private choices result in greater or lesser attendance at religious schools in any given year does not
impact the Establishment Clause analysis, much less demonstrate a constitutional violation (Jaffe, 2002).

Schools have nondiscriminatory access to the Ohio Voucher Program. In fact, the court of appeals’ contention that the participation criteria for schools are non-neutral is simply wrong as a matter-of-fact. None of the criteria in any way makes reference to religion, except to the extent that they forbid discriminating against students on the basis of their religion which is hardly an attempt to favor religious schools (Jaffe, 2002).

Participation criteria serve neutral and valid state goals. Residency requirements, basic educational standards, priority to low-income voucher students and nondiscriminatory policies serve the neutral secular goals of helping those students most in need (Jaffe, 2002).

The assumption that the greater number of religious schools somehow pressures parents to select those schools denies the essential free will of the parents doing the choosing and assumes, without support, that they mindlessly or randomly select among private schools and hence are channeled to religious institutions by sheer probabilities (Guthrie, 2001).

A parent’s choice of a religious school is genuine and independent, and the burden should be on any challengers to prove otherwise. Because religious schools and their sponsoring institutions are supposedly richer in human, physical, and financial assets than secular schools and their patrons, they are said to be given preferential treatment by a voucher program that limits payments and asks schools to share the cost of educating Cleveland students. Merely articulating the argument accurately should be
sufficient to refute it (from Revolution to Reconstruction, 1994).

The Establishment Clause only bars government from directly favoring religion. Nothing in the language of the Constitution requires government to affirmatively exclude religious institutions from neutral programs under which they might have greater success than secular institutions (Guthrie, 2003).

**Historical Benchmarks**

As previously discussed, the seeds of public education were sown very early in our country’s history. Massachusetts led the New England Colonies and ultimately influenced the first national attempt to instill the concept of public schools in the minds of American citizens. The following legislative overview represents benchmark efforts by lawmaking bodies to codify the role of public education in America.

*Ye Olde Deluder Satan*” Act (1647). In 1647, Massachusetts Bay Colony enacted the General School Act of 1647, also known as the “Ye Olde Deluder Satan” Act, referring to the need to educate its citizens, lest Satan dominate society through idle and ignorant citizens. Every town having more than 50 families were required to establish a grammar school (a Latin school to prepare students for college). This act specifically rendered schooling a lay-controlled government function of special local government (Documents of American History, 1958). Shortly thereafter, all the other New England colonies, except Rhode Island, followed its example (Carter and Commager, 1953).

A major component of this act was the establishment of the school board. At their inception, these “citizen boards” were responsible for making, implementing, and
adjudicating rules for their schools. The role of school boards has been evolving since. Over time, it has changed as higher levels of government have become more active in education policy matters (Indiana Historical Bureau, 2003).

*Land Ordinance of 1785.* The Land Ordinance of 1785, authorized under the Articles of Confederation, was the first attempt by Congress to consolidate schools and make education mandatory. This ordinance set aside what was known as Section Sixteen in every township in the new Western Territory for the maintenance of public schools. Public schools were organized to corral the best minds for training for public leadership (Letters of Delegates, 1785).

With the cession of the state lands assured, Congress proceeded to administer the new national domain. An ordinance was adopted on May 20, 1785, which laid the foundations of American land policy until the passage of the Homestead Act in 1862. After Indian title had been purchased, the ceded lands were systematically surveyed, prior to sale or settlement, into townships six miles square. Of the thirty-six sections of 640 acres in each township, the sixteenth was reserved “for the maintenance of public schools.” After the survey, the land might be sold at a minimum price of $1.00 per acre. Few settlers had the necessary capital to make so large a purchase, and the debt-ridden national government received relatively small revenue from its lands until the terms of sale were liberalized (*Meyer v. Nebraska*, (1923).

The Ordinance specified land set aside for public education:

There shall be reserved for the United States out of every township, the four lots, being numbered 8, 11, 26, 29, and out of every fractional part of a township, so
many lots of the same numbers as shall be found thereon, for future sale. There shall be reserved the lot N 16, of every township, for the maintenance of public schools, within the said township; also one third part of all gold, silver, lead and copper mines, to be sold, or otherwise disposed of as Congress shall hereafter direct (Lincoln Boyhood National Memorial, 2002).

David Jackson, delegate to the Congress, stated his views of the Ordinance in a letter to fellow delegate George Bryan: “You have seen the Land ordinance. (1) It was but little in the house until it was ready to pass; it does not please me fully; it was a compromise between the prejudice of education (if I may use the expression) in the eastern & middle states with respect to their original mode of locating their lands; the eastern people contending for the propriety of locating by townships, & the middle & some of the southern folks being in favor of a division in small tracts, so as to suit the circumstances of all classes (Van Zant, 2003).”

Northwest Ordinance—Land Ordinance of 1787. Two years later, Congress passed the Ordinance of 1787, or more popularly called the Northwest Ordinance, which declared, “Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged (Morrill Act, 2003).” This legislation was very similar to the previous Ordinance passed in 1785 and required that one section in each township be set aside for the purpose of establishing and maintaining a public school, marking the first time that the issue of public education was addressed at a national level (Branson 1990).

Historians note that the point of this document is that education is necessary to
become a good citizen and to have a strong government. Children would be encouraged to go to school; however, religion is not specifically to be part of the curriculum. Schools then began to form everywhere over the next one hundred plus years. Instead of township-appointed teachers, they were subsidized to an extent by the government and the rest by state taxes. Schools began teaching more than just religion, reading, and spelling. Sciences were part of the new curriculum. Thus, the federal government was able to create a public school system furnished to all children, especially in the new and ever-growing West (Morrill Act, 2003).

“Knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged,” so wrote the Continental Congress in the Northwest Ordinance of 1787 (Shi, 2003). With this ordinance, Congress established a precedent for support of public education that would grow to substantial commitments in later years (Shi, 2003). Land was the key to the federal government’s early involvement, and was the most readily available resource in the unopened continent. As public lands were surveyed into six-mile square townships, a one square mile section in each township was reserved for the support of public schools. The land itself was rarely used for school construction but rather was sold off, with proceeds used to fund the school program (Branson, 1990). The system invited misuse by opportunists, and a substantial portion of the educational land grants never benefited education. Nevertheless, land-grant support became a substantial factor in providing education to most American children who could never hope to attend private or charity-supported schools (Shi, 2003).
Morrill Act of 1862. In 1862, as the rapidly expanding scope of the Civil War startled the world, the United States Congress passed several major bills long stalemaled by Southern opponents. With the secession of 11 Southern states, Congressional Republicans were eager to enact a national economic program to promote industrial development and raise tax revenues. One major initiative was designed to accelerate economic growth by improving technical knowledge related to farming, mining, and industry (Shi, 2003). The Morrill Land Grant Act of 1862, signed enthusiastically by President Lincoln on July 2, 1862, enabled states to address the need for practical education by establishing colleges for agriculture, the mechanical arts, and military sciences (Chase, 1996). The Act was intended to enable many more Americans to pursue government-subsidized higher education (Morrill Act, 2003).

Vermont Senator Justin Morrill sponsored the Morrill Act. Sen. Morrill later explained, “The land-grant colleges were founded on the idea that a higher and broader education should be placed in every State within reach” of the working classes (Morrill Act, 2003). Chase (1996) claims the Morrill Act “…played a big role in making the U.S. economy the world’s most productive.” The act made possible the ability for new Western states to establish colleges for their citizens. The new land-grant institutions (over 70 were established), emphasized agriculture and mechanical arts, and opened opportunities to thousands of farmers and working people previously excluded from higher education. This act, “donating public lands to the several States and Territories which may provide colleges for the benefit of agriculture and the Mechanic arts.” marked the first Federal aid to higher education (Shi, 2003).
The Morrill Act committed the federal government to grant each state 30,000 acres of public land issued in the form of “land scrip” certificates for each of its Representatives and Senators in Congress. These land grants (which eventually grew to an allocation of over 100 million acres) laid the foundation for a national system of state colleges and universities. State colleges brought higher education within reach of millions of students, a development that could not help but reshape the nation’s social and economic fabric (New York State Association, 1998; Roots of Independence, 1998).

Selected excerpts from the First Morrill Act, Act of July 1862, as relating to higher education, demonstrate the intent of the legislation:

Chap.CXXX.—AN ACT Donating Public La nds to the several States and Territories which may provide Colleges for the benefit of Agriculture and Mechanic Arts.

SEC.4.(6) That all monies derived from the sale of lands aforesaid by the States to which lands are apportioned and from the sales of land scrip hereinbefore provided for shall be invested in bonds of the United States or some other safe bonds:… (8) Provided, That the moneys so invested or loaned shall constitute a perpetual fund, the capital of which shall remain forever undiminished (except so far as may be provided in section 5 of this Act), and the interest of which shall be inviolably appropriated, by each State which may take and claim the benefit of this Act, to the endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes on the several pursuits and professions of life …

SEC. 5.(9) And be it further enacted, That the grant of land and land scrip hereby authorized shall be made on the following conditions, to which, as well as to the provisions hereinbefore contained, the previous assent of the several States shall be signified by legislative acts:

First … and the annual interest shall be regularly applied without diminution to the purposes mentioned in the fourth section of this act, except that a sum, not exceeding ten per centum upon the amount received by any State under the provisions of this act may be expended for the purchase of lands or sites or
experimental farms, whenever authorized by the respective legislatures of said states.

Second. No portion of said fund, nor the interest thereon, shall be applied, directly or indirectly, under any pretence whatever, to the purchase, erection, preservation, or repair of any building or buildings.

Third. Any State which may take and claim the benefit of the provisions of this act shall provide, within five years from the time of its acceptance as provided in subdivision seven of this section, at least not less than one college, as described in the fourth section of this act, or the grant to such State shall cease; and said State shall be bound to pay the United States the amount received of any lands previously sold; and that the title to purchasers under the State shall be valid.

Fourth. An annual report shall be made regarding the progress of each college, recording any improvements and experiments made, with their cost and results, and such other matters, including State industrial and economical statistics, as may be supposed useful (Buckstein, 2000).

The second Morrill Act became law in 1890. This act provided additional financial support for the original land-grant colleges and extended the land-grant program to the former Confederate states. The 1890 act also required each state to demonstrate that blacks were not being denied admissions to such colleges. Southern states complied by designating a separate land-grant college for blacks (Robson, 1999).

Oregon Compulsory Education Act of 1922. On November 7, 1922, the voters of Oregon adopted, under the initiative provision of its Constitution, the Oregon Compulsory School Act, requiring all children between the ages of eight and 16 years to attend public schools. Four exceptions were granted in the law: (a) children physically unable to attend school, (b) children who had completed the eighth grade, (c) children who live too great a distance from school, and (d) children being given private instruction (who must pass an examination every three months) (Novella, 1998).

At this time in America, bigotry was strong. Waves of immigrants coming to America and seeking freedom were often met by resistance from those unable to accept
different customs and religions. When some immigrants placed their children in private, often Catholic, schools, the stage was set for political conflict. At that time in Oregon, the Ku Klux Klan was a powerful force and strongly supported the passage of the Act. The measure was also supported by an array of civic and political leaders, including the soon-to-be Governor Walter Pierce (Robson, 1999).

The law, effective September 1, 1926, described conditions of attendance:

Any parent, guardian or other person in the State of Oregon, having control or charge or custody of a child under the age of sixteen years, and of the age of eight years or over, at the commencement of the term of public school of the district in which said child resides, who shall fail or neglect or refuse to send such child to a public school for a period of time a public school shall be held during the current year of said district, shall be guilty of a misdemeanor and each day’s failure to send such child to a public school shall constitute a separate offense. Provided that in the following cases, children shall not be required to attend public schools (A Case History, 2003, p. 2).

According to Novello (1998), this law represented a considerable acceleration in coercion and was successfully disputed in 1925. Three judges of the United States Court, sitting en banc at Portland, united in a decision that the law was unconstitutional, and the case was appealed and brought before the U.S. Supreme Court on June 1, 1925. In a unanimous decision (9-0), the Court affirmed the decision of the lower court by concluding that the law was unconstitutional (A Case History, 2003, p.4).

No question was raised by the Court concerning the power of the state,
reasonably, to regulate all schools, to inspect, supervise, and examine them, their
teachers, and pupils, to require all children of proper age to attend some school, and to
require certain standards of curriculum and teacher training (A Case History, p. 5). The
resulting U.S. Supreme Court decision is hailed as a landmark case in affirming the rights
to parents to choose options other than the public schools for their children’s education.

*The Civil Rights Act of 1964.* This Act is considered a landmark in legislative
attempts to improve the quality of life for African-Americans and other minority groups.
The historic *Brown v. Board of Education* decision by the U.S. Supreme Court in 1954
provided momentum for civil rights leaders to pursue Congress to pass legislation that
would protect civil rights in many areas, including education. The practice of separating
African-American and white children in public schools had always been unpopular
among civil rights leaders who viewed proper education as a means for African-
Americans to escape racial discrimination. They argued that the mere fact of segregation
in schools doomed African-Americans to inferior education and deprived whites and
African-Americans of an important educational experience. In the *Brown* decision, the
U.S. Supreme Court struck down the legal support for maintaining “separate but equal”
educational facilities. This historic ruling meant that white and African-American
children could not be forced to attend separate public schools (A Case History, 2003,
p.7).

The *Brown* decision was an important feature in establishing the climate of public
opinion that began to encourage federal action to protect civil rights. A voting rights bill
was passed in 1957 and 1960. Moderate gains were made for minorities with the passage
of this legislation. More importantly, they foreshadowed increasing support for more substantial civil rights guarantees in future legislation (A Case History, 2003, p. 8-9).

Although President Kennedy did not propose civil rights legislation to the Congress in 1961 and 1962, he implemented, by executive action, steps to ensure minority rights in voting, employment, housing, transportation, and education. Social conditions of the times hastened the movement towards civil rights legislation. Minority groups became more vocal in their demands and many white Americans began to see the need for civil rights laws (A Case History, 2003, p.10-11).

African-Americans continued to point out a number of social inequalities during the early 1960s. Segregation was widespread in public city buses, park facilities, restrooms, employment, and educational opportunity. Sit-ins and boycotts were effectively used by minority leaders, particularly Dr. Martin Luther King, Jr., whose policy of nonviolent protest resonated with citizens across the country. Protest marches often escalated into violence in the form of riots, bombings, and acts of brutality. President Kennedy was forced in some circumstances to call out federal troops to maintain order. By 1964, unmistakable signs were present that indicated social conditions for African-Americans required legislative attention in the U.S. Congress (Civil Rights Act, 1964a).

The politics of the Civil Rights Act of 1964 must be viewed from a number of perspectives. President Kennedy’s record on civil rights issues reflected the political circumstances of the time. His record as a senator from Massachusetts and as President did not indicate major support for civil rights legislation one way or the other. Upon
Kennedy’s death, however, and Vice President Lyndon Johnson’s ascension to the presidency, coupled with a volatile social climate, political momentum increased dramatically to pass a major civil rights bill (Civil Rights Act, 1964b).

The debate in Congress was long, drawn out, and contentious. Filibusters were held to stifle debate. In the end, however, through political influence exerted by President Johnson, Democratic Senators Mike Mansfield, Hubert Humphrey, and Republican leader Senator Everett Dirkson, a bi-partisan bill was passed (Civil Rights Act, 1964b).

According to the Civil Rights Act of 1964, its stated purpose is as follows:
To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the Civil Rights Act of 1964 (Civil Rights Act, 1964b).

The Civil Rights Act of 1964, Public Law 88-352, 78 STAT 241, contains eleven titles. The Act enforces the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission

This Act has been amended several times (e.g., Equal Employment Opportunity Act, Pregnancy Discrimination Act of 1978, and the Civil Rights Act of 1991) and is considered the most important civil rights legislation in the modern history of the United States. The most important title from an educational point of view is Title VI. Title VI requires, among other things, that federal funds to institutions (including schools and other educational institutions) be withheld if institutions did not comply with the mandates of the Act. Specifically, the Act states that no person, on the basis of race, color, or national origin be excluded from or denied the benefits of any program receiving federal financial assistance (Applying Federal Civil Rights Laws, 2000).

Within the arena of public school choice, federal civil rights laws also play a role. For example, one of the fastest growing areas of public school reform is the charter school movement. Charter schools are public schools under contract, or charter, between a public agency and groups of parents, teachers, community leaders, or others who want to create alternatives and choice within the public school system. Charter schools create choice for parents and students within the public school system while providing a system of accountability for student achievement. These schools also encourage innovation and provide opportunities for parents to play wide and varied roles in shaping and supporting the education of their children. As a result, charter schools can spur healthy competition to improve public education (Applying Federal Civil Rights Laws, 2000).
Charter schools are given expanded flexibility with respect to statutory and regulatory requirements. Federal legislation provides support for the creation of charter schools as a means of promoting choice and innovation within the public school systems. Nevertheless, charter schools, like all public schools, must operate in a manner consistent with civil rights laws (National Education Association, 2002).

The U.S. Department of Education, Office for Civil Rights (OCR), enforces a number of civil rights laws that apply to public schools. As previously mentioned, Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin. Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of gender in education programs. Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability, and the Age Discrimination Act of 1975 prohibits discrimination on the basis of age. These laws apply to programs and activities that receive federal financial assistance. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990, which prohibits discrimination on the basis of disability by public entities, including public schools. Title II applies to entities regardless of whether they receive federal financial assistance (National Education Association, 2002). In addition, the U.S. Department of Justice, Civil Rights Division (CRD) also works on a variety of legal issues involving elementary and secondary schools (Elementary and Secondary School Act, 1965).

*Elementary and Secondary School Act of 1965.* The Elementary and Secondary Education Act (ESEA), designed by Commissioner of Education Francis Keppel, was passed on April 9, 1965, less than three months after it was introduced. The ESEA is the
first and largest comprehensive federal education law that provides substantial monetary funds for kindergarten through twelfth grade education. As mandated in the act, the funds are authorized for professional development, instructional materials, resources to support educational programs, and parental involvement promotion. According to the National Education Association (as cited in President Lyndon B. Johnson’s remarks, 1966), “The ESEA is [the] government’s single largest investment in elementary and secondary education.” The act was originally authorized through 1970; however, the government has reauthorized the ESEA every five years since its enactment. As a result of the reauthorizations, the act has undergone numerous name changes and presidencies. This piece of legislation constituted the most important educational component of the “War on Poverty” launched by President Lyndon B. Johnson. Through a special funding (Title I), it allocated large resources to meet the needs of educationally deprived children, especially through compensatory programs for the poor. The Elementary and Secondary Education Act was developed under the principle of redress, which established that children from low-income homes required more educational services than children from affluent homes (Schugurensky, 1966).

Section 201 of the Elementary and Secondary Education Act declares policy regarding financial assistance to children in poverty:

In recognition of the special educational needs of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial
assistance … to local educational agencies serving areas with concentration of children from low-income families to expand and improve their educational programs by various means (including pre-school programs) which contribute to meeting the special educational needs of educationally deprived children (Schugurensky, 1966).

President Lyndon B. Johnson, upon signing the Elementary and Secondary Education Act of 1965, remarked about the importance of education as an American ideal:

From our very beginnings as a nation, we have felt a fierce commitment to the ideal of education for everyone. It fixed itself into our democratic creed. Over a century and a quarter ago, the President of the Republic of Texas, Mirabeau B. Lamar, proclaimed education as ‘the guardian genius of democracy…the only dictator that free men acknowledge and the only security that free men desire.’ But President Lamar made the mistaken prophecy that education would be an issue ‘in which no jarring interests are involved and no acrimonious political feelings excited.’ For too long, political acrimony held up our progress. For too long children suffered while jarring interests caused stalemate in the efforts to improve our schools. Since 1946 Congress tried repeatedly, and failed repeatedly, to enact measures for elementary and secondary education. Now, Congress has passed the most sweeping educational bill ever to come before Congress. It represents a major new commitment of the Federal Government to quality and equality in the schooling that we offer our young people. I predict that all of those
of both parties of Congress who supported the enactment of this legislation will
be remembered in history as men and women who began a new day of greatness
in American society … By passing this bill, we bridge the gap between
helplessness and hope for more than 5 million educationally deprived children.
We put into the hands of our youth more than 30 million new books, and into
many of our schools their first libraries. We reduce the terrible time lag in
bringing new teaching techniques into the Nation’s classrooms. We strengthen
State and local agencies which bear the burden and the challenge of a better
education. And we rekindle the revolution—the revolution of the spirit of tyranny
of ignorance (as cited in Schurgurensky, 1966).

Following enactment of the bill, President Johnson stated that Congress, which
had been trying to pass a school bill for all America’s children since 1870, had finally
taken the most significant step of this century to provide help to all school children. He
argued that the school bill was wide reaching because “it will offer new hope to tens of
thousands of youngsters who need attention before they ever enroll in the first grade and
will help five million children of poor families overcome their greatest barrier to
progress: poverty (Civil Rights Project, 1995).” He also contended that there was no
other single piece of legislation that could help so many for so little cost: “For every one
of the billion dollars that we spend on this program, will come back tenfold as schools
dropouts change to school graduates (Title I, 1995).”

According to Schurgurensky, the Elementary and Secondary Education Act is an
example of political strategy. After President Kennedy’s assassination, Johnson decided
to respond to civil rights pressures and religious conflicts over education by linking educational legislation to his “War on Poverty”. Commissioner of Education Keppel outlined three options in recommending political strategy for Johnson. The first was to provide general aid to public schools, even though such action could generate negative reaction from Catholic schools. The second was to aid both private and public schools, which could create constitutional obstacles, and possibly create a negative reaction from the National Education Association and large sectors of the Democratic Party, who objected to federal aid to public schools. The third option, and the one that was eventually followed, was to emphasize the educational aid to poor children because such action could endorse the support of most groups (The Elementary and Secondary Education Act, 2002).

According to Spring (1993, as cited in the Elementary and Secondary Education Act, 2002), the ESEA had at least three major consequences for future legislative action. First, it signaled the switch from general federal aid to categorical aid and tied federal aid to national policy concerns such as poverty. Second, it addressed the religious conflict by linking federal aid to educational programs directly benefiting poor children in parochial schools, and not the institutions in which they enrolled. Third, the reliance of state departments of education to administer federal funds resulted in an expansion of state bureaucracies and larger involvement of state governments in educational decision-making.

The ESEA outlines and provides funds for many programs essential for public education. These programs cover a wide range of educational spectrum including:
1. Title I (aimed to assist disadvantaged to meet high standards). This program became the largest educational component of President Johnson’s “War on Poverty” (Apling, Jones, and Smole, 2002).

2. The Eisenhower Professional Development Program;

3. Education Technology;

4. Class Size Reduction;

5. Safe and Drug Free Schools;

6. Bilingual Education;

7. Native American Education;

8. Charter Schools;

9. Head Start;

10. Community Learning Centers.

Many programs exist today due to the ESEA of 1965. The act proved to be a catalyst for future educational legislation. A few of the pivotal acts that derived from the ESEA include the Individuals with Disabilities Education Act, the Bilingual Education Act, and the Goals 2000: Educate America Act. All these acts allocate funds and stipulate rights to all children receiving an education (Individuals with Disabilities Act, 2002).

According to the Home School Legal Defense Association (HSLDA) (as cited in Halle, 2002), “over the past 30 years, … [ESEA] has been filled with expensive and dangerous federal programs, including Goals 2000 and School-to –Work.” Despite Washington’s mammoth spending in education reform over the last 30 years, schools
continue to decline. Consequently, conservatives in Congress worked hard over the years to change the ESEA and return education decisions to states and local communities. HSLDA continues to work on the behalf of home educators to protect their right to home school and decrease the federal role in education (p. 40).

*Individuals with Disabilities Act (IDEA)*. For most of our nation’s history, schools were allowed to exclude certain children, especially those with disabilities. Following the passage of the Elementary and Secondary Education Act of 1965, advocates acting on behalf of handicapped children began urging Congress for special legislation that would address their needs. As a result, Congress passed the Education for All Handicapped Children Act or Public Law 94-142, in 1975. This law shifted responsibility to the schools and was the beginning of special education as we know it today. The law has been amended many times and is now known as the Individuals with Disabilities Education Act, or IDEA (Individuals with Disabilities Act, 1973).

The Legislative History of the IDEA includes the following legislative acts:

1. P.L. 89-10. The Elementary and Secondary Education Act of 1965 (ESEA) formed the statutory basis upon which early special education legislation was drafted (Individuals with Disabilities Act, 1973);

2. P. L. 93-280. The Education Amendments of 1974 included Title VI, which was the Education of the Handicapped Amendments of 1974, (the first time an education for all children with disabilities was mentioned) (Individuals with Disabilities Act, 1973);

This act mandated a free appropriate public education for all children with disabilities, ensured due process rights, mandated individual education plans and least restrictive environment, and became the core of federal funding for special education (as cited in Apling, et al., 2002, p. 5);

4. Amendments to the Education for Handicapped Children Act in 1983, 1986, 1990 (which renamed the law IDEA), and 1992) (Apling, et al., 2002, p. 5); and,


The IDEA both authorizes federal funding for special education, and related services (i.e., physical therapy) assist children with disabilities to benefit from special education (Apling, et all, 2002, p. 6). IDEA sets out principles under which special education and related services are to be provided. The major principles include requiring that:

1. States and schools make available a free appropriate public education (FAPE) to all children with disabilities, generally between the ages of 3 and 21; States and school districts identify, locate, and evaluate all children with disabilities, regardless of the severity of their disability, to determine which children are eligible for special education and related services (Parental Rights, 2002);

2. Each child receiving services has an individual education program (IEP) spelling out the specific special education and related services to be
provided to meet his or her needs; the parent must be a partner in planning and overseeing the child’s special education and related services as a member of the IEP team (U.S. Department of State, International, 2003);

3. “To the maximum extent appropriate,” children with disabilities must be educated with children who are not disabled, and states and school districts provide procedural safeguards to children with disabilities and their parents, including a right to a due process hearing, the right to appeal to federal district court and, in some cases, the right to receive attorneys’ fees (People for the American Way, 2003);

4. Under current law, parents have the opportunity to choose a private school for their handicapped child under certain conditions. These conditions generally relate to a disagreement with the public school system’s determination of the proper placement or program for the child. The parent is responsible for the costs, unless proven at a due process hearing that the school district has failed or is unable to provide the student with an appropriate education and the school chosen is appropriate to meet the child’s educational needs (Apling, et al., 2002, p. 6);

5. The reauthorization of IDEA is currently under way. Congress is proposing new components of the law that will include provisions for expanded choice options for parents of disabled students. U.S. Secretary of Education, Rod Page, sets the stage for the Bush Administration’s proposals for the modified version of IDEA:
Every child in America deserves the highest-quality education, including our children with disabilities. Our goal is to align IDEA with the principles of No Child Left Behind by ensuring accountability, more flexibility, and more options for parents and an emphasis on doing what works to improve student achievement. IDEA must move from a culture of compliance with process to a culture of accountability for results. A core principle of IDEA is identifying and serving all children with disabilities regardless of the type of school they attend traditional public, public charter, private and parochial. IDEA currently empowers parents of children with disabilities to participate in the selection of schools and services for their children and where those services will be provided. Yet too often these policies for students with disabilities are limited by arbitrary decisions. IDEA should expand opportunities to help parents, schools, and teachers choose appropriate services and programs for children with disabilities, including the charter and private schools of their choice. States should then measure and report academic achievement results for all students benefiting from IDEA funds, regardless of what schools they choose to attend (Apling, et al., p. 7).

In addition, the President’s Commission on Excellence in Special Education recommended expanded parental options:

Increase Parental Involvement and School Choice. Parents should be provided with meaningful information about their children’s progress, based on objective assessment results, and with educational options. The
majority of special education students will continue to be in the regular public school system. In that context, IDEA should allow state use of federal special education funds to enable students with disabilities to attend schools or to access services of their family’s choosing, provided states measure and report outcomes for all students benefiting from IDEA funds. IDEA should increase opportunities for parents to make informed choices about their children’s education. Consistent with the No Child Left Behind Act, IDEA funds should be available for parents to choose services or schools, particularly for parents whose children are in schools that have not made adequate yearly progress under IDEA for three consecutive years (Apling, et al. 2002, p. 8).

Apling, et al., (2002) makes the case that the unique nature of IDEA as both a grants program and also a civil rights act, suggests additional issues could arise with respect to expanded choice or a federal voucher program for children with disabilities (p. 7).

One set of issues with respect to a potential IDEA voucher program involves the extent to which the rights of children with disabilities and their parents guaranteed under IDEA would continue under a federal special education voucher system. An IDEA voucher program would allow federal funds to flow to private schools. The question then would become what student and parental rights and private school obligations would apply to those funds (Apling, et al., 2002, p. 7).

Legislative language would be the key in determining what rights will apply.
Student and parent rights at issue include not only those listed in IDEA, but those delineated in section 504, and the Americans with Disabilities Act, as well as other constitutional rights. Private schools are covered under Title III of the ADA. Nevertheless, Title III specifically exempts entities controlled by religious organizations from coverage, thus limiting ADA coverage of religiously affiliated schools (Apling, et al., 2002).

Regardless of the receipt of federal funds, certain constitutional rights regarding an education for children with disabilities may apply:

It could be argued … that if a state chooses to educate children without disabilities, it must also educate children with disabilities and the existence of a federal voucher does not negate that responsibility. On the other hand, it could be argued that if the state was willing to provide a free appropriate public education and the parents opted to place their child in a private school with a federal voucher, there are no other obligations on the state (Apling, et al., p. 9). Other issues that could determine the structure of vouchers could include

1. Formula allocation and distribution of voucher funds to parents (Apling, et al., 2002, p. 9),

2. The amount of the voucher and the issue of whether or not the amount will be determined by the type of disability (Apling, et al., 2002, p. 8),

3. Use of the voucher and limitations, thereof, (e.g. Ex. tuition only, or transportation and other expenses) (Apling, et al., 2002, p.8).

4. Allowing private schools to charge more than the amount of the voucher
Another set of issues could involve the requirement of a least restrictive environment. One could imagine, under a voucher system, private schools that specialize in serving children with certain disabilities. These specialized schools might attract few, if any, nondisabled children. Thus children in such schools would not be educated with their nondisabled peers, even if those children’s disabilities were mild enough to permit their being educated full-time in regular public classrooms (Committee on Education, 2003).

Eligibility for vouchers remains a question. Some federal public choice programs are linked to evidence over time of school failure. On the other hand, programs such as Florida’s McKay Scholarships are available to parents who express dissatisfaction with their child’s educational progress (Committee on Education, 2003).

The IDEA Parental Choice Act of 2003 has been introduced in Congress to promote increased parental choice and flexibility in the IDEA system, which would ensure that parents can make the best educational decisions for their children. Specifically, the bill would encourage states to develop innovative, flexible choice programs for children with disabilities and permit states that have such programs to allow federal funds to follow the child based on the parents’ choice. “School choice, particularly for children with disabilities, provides a constructive way to continue to improve public education by insisting on excellence for every child,” said Rep. John Boehner. “I strongly believe that parents are in the best position to determine where their child should be educated. We should allow all parents the right and the responsibility to
have that choice (Disability Rights Education, 2003).”

In a companion bill to H.R. 1350, the House “Improving Education Results for Children with Disabilities Act” proposes major revisions to IDEA. Rep. Jim DeMint (R-SC) and House Education and Workforce Chairman Rep. John Boehner (R-OH) introduced this measure as H.R. 1373 on March 20, 2003 (see Appendix 3). The bill uses positive language in discussing innovation, “genuine independent choice” and “academic accountability” (Disability Rights Education, 2003).

The IDEA Rapid Response Network (RRN) suggests the terms are highly misleading. The key to this bill is financial and other support for state programs that allow IDEA funds to be used to pay part of the tuition of private schools for students with disabilities. Any child who has an IEP in place and has attended a public school may receive funds to pay toward tuition, fees, and transportation at a private school (Disability Rights Education, 2003).

Federal IDEA funds may be used to augment the state program funds for parents who choose this program. These funds may also be used to pay for “reasonable additional expenses … of any necessary accommodations to allow children with disabilities who are being educated in a school identified for school improvement … to be provided supplemental educational services” if they are eligible (Disability Rights Education, 2003). This section is written vaguely, and presents difficulty in determining what the decision parameters would be for funding allocations or what the services might include (Disability Rights Education, 2003).
In the area of accountability, RRN describes four areas of concern:

1. Private schools in this program are prohibited “from discriminating against eligible students on the basis of race, color, or national origin,” but not on the basis of disability. Failing to include disability as a nondiscriminatory item is a key omission. Also left out of the anti-discrimination platform are religion and gender, underscoring the fact that faith-based and same-sex schools may participate in the program (Disability Rights Education, 2003).

2. Private schools that receive these funds are required “to be academically accountable to the parent for meeting the educational needs of the student.” This statement does not include the requirement that the private school comply with or provide the services specified in the child’s IEP, though the child must have an IEP in force in order to be eligible for the program. Nowhere is academic accountability defined (Disability Rights Education, 2003).

3. If a parent participates in this program and uses state and federal funds to pay their child’s tuition to attend a private school, their participation “fulfills the State’s obligation … with respect to the child during the period in which the child is enrolled in the selected school (Disability Rights Education, 2003).”

4. The bill states that “a private school accepting those funds shall be deemed, for both the programs and services delivered to the child, to be providing a free appropriate public education and to be in compliance with Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) (Disability Rights Education, 2003).”

Without any other provision than that the school is part of the program and
receives funds, it is off the legal hook because it is automatically deemed in compliance with the law (American Humanist Association, 2003).

Throughout the bill, reference is made to the phrase “genuine independent choice” for parents and the placement of their children. Two fallacies are noted in these options:

1. School administrators may pressure parents to elect a State voucher program as a way to remove a child who presents challenges from their jurisdiction (American Humanist Association, 2003), and

2. Parents who make this “genuine independent choice” will lose their legal rights and protections under IDEA, which is not applicable to private schools even when they receive state and federal funding (American Humanist Association, 2003).

In a letter to House members, education, disability, religious, civil rights and civil liberties, labor, and other advocacy organizations urged rejection of the effort to include H.R. 1373, the “IDEA Parental Choice Act,” as an amendment to the Individuals with Disabilities Education Act (IDEA). The letter included the following points of opposition:

1. The DeMint voucher proposal undermines public accountability. Funding would be provided to private schools without any accountability measures. Private schools accepting the vouchers would not be required to administer annual assessments, publicly report on student achievement, give parents individual, descriptive reports on their children’s yearly progress toward proficiency in reading and math, or deploy highly
qualified teachers. Public schools must meet all of these requirements and more (American Humanist Association, 2003).

2. The DeMint voucher proposal would not improve student achievement.

Voucher programs lack scientific, research-based evidence of effectiveness and are, therefore, inappropriate. The only recourse parents have if a private school fails to provide appropriate education or special services is to transfer their child to another school (American Humanist Association, 2003).

3. The DeMint voucher program threatens students’ and parental rights.

Under the IDEA, local school districts can place children with disabilities in private schools if the local school district is unable to meet the child’s IEP. In other words, because authority remains with the school district to ensure that the child receives the needed services, public accountability is retained and parental rights are preserved. Under H.R. 1373, no such accountability for the preservation of student and parental rights by private schools can be assured (American Humanist Association, 2003);

4. The DeMint voucher proposal undermines children’s IDEA rights.

Participating private schools could be deemed legally in compliance with both IDEA and the Rehabilitation Act, and yet not be required to fulfill the requirements of either law, and neither the parents nor the public would have recourse to challenge a denial of services or failure to accommodate a child with disabilities (Kava, 2003); and,
5. The DeMint voucher proposal undermines civil rights. H.R. 1373 is also silent on the question of whether private schools accepting federal dollars must comply with other civil rights laws. No provisions are in the proposal regarding employment discrimination on the basis of religion, gender, and disability (Kava, 2003, p. 1).

The original purposes of IDEA are to ensure that all children with disabilities have available to them a free, appropriate public education that emphasizes special education and related services in the least restrictive environment, and to ensure that the rights of children with disabilities and parents of such children are protected. The DeMint voucher proposal contradicts and undermines the purpose and principles of this act (Kava, 2003).

*Milwaukee Parental Choice Program.* In a report from the Wisconsin Legislative Bureau, Kava (2003) chronicles the history and overall impact of the Milwaukee Parental Choice Program (MPCP). He states, “The program was established in 1989 Act 336. Under this act, state funds are used to pay for the cost of children from low-income families to attend, at no charge, private schools located in the City of Milwaukee. Pupils began attending private schools under the program in 1990-91” (p. 2). Initially, only nonsectarian private schools could participate in the program. Under 1995 Act 27, the program was expanded to include sectarian schools, and several other changes were made in the program. The changes were challenged in court, and a preliminary injunction was issued prohibiting implementation of the modifications, except in nonsectarian schools. In June 1988, the Wisconsin Supreme Court found that the Act 27 changes passed
constitutional scrutiny in all issues before the Court, and the full program became effective in 1998-99 (Kava).

Program requirements included four general categories:

1. Pupil eligibility. Participation is limited to pupils in grades kindergarten through twelve (K-12) who reside in the city of Milwaukee. The pupil’s family income must not exceed 175% of the federal poverty level. In the school year prior to initial enrollment in a private school, the student must have been either enrolled in a public school in Milwaukee, the choice program or grades kindergarten through three in a private school in Milwaukee, or not enrolled in school (Kava, 2003);

2. Limits on the number of Participants. No more than 15% of the public school membership can attend private schools under the program. If the total number of available spaces in the private schools is greater than the maximum number of pupils allowed to participate, the Department of Public Instruction must prorate the number of spaces available at each participating private school. If a private school rejects an applicant due to lack of space, the pupil may transfer his or her application to another participating private school that has space available (Kava, 2003);

3. Admission and selection procedures. Families participating in the program must be notified by the State Superintendent of the private schools participating in the program. Private schools, within 60 days of receiving an application must notify an applicant, in writing, whether the
pupil has been accepted. The State Superintendent must ensure that the private school accepts students on a random basis. In addition, students attending a choice school may allow sibling preference at that school. A student assignment council composed of one representative from each participating private school makes annual recommendations on how to achieve balanced student representation in the program (Kava, 2003); and,

4. Requirements of the private schools. Participating schools must meet all health and safety laws and codes that apply to the public schools. The schools must notify the State Superintendent by February 1 of each year of their intent to participate in the program. The participating school must also agree to comply with federal law that prohibits discrimination on the basis of race, color, or national origin (Kava, 2003).

Each private school is required to meet at least one of the following standards in order to be eligible to participate in the program the following year:

1. At least 70% of the students advance one grade level each year (Kava, 2003),

2. The school’s average attendance rate for students in the program must be at least 90% (Kava, 2003), and,

3. At least 80% of the pupils in the program demonstrate significant academic progress (Kava, 2003).

4. At least 70% of the families of students in the program meet parental involvement criteria established by the school (Kava, 2003).

The private school cannot require a student to participate in any religious activity
in the school if the parent or guardian submits a written request to the school asking the student to be exempt from such activities. Each private school is subject to uniform accounting standards and is required to submit an annual independent financial audit to the Department of Instruction (Kava, 2003, p 3).

Responsibilities of the Milwaukee Public Schools include that transportation be provided but only to the extent it is required to be provided for other private school students under current law. The school district is eligible to receive categorical funding for students who are transported at district expense (Kava, 2003).

Kava (2003) notes that private school participation, since 1991, at the program’s inception, has increased from seven in 1991 to 103 in 2002-03. Student membership in the program has increased from 300 to 11,350. Currently, the number of student participation remains below the statutory maximum of 15%, which was approximately 14,900 students for 2002-03.
Table 1

*Participation in the Choice Program*

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Private Schools</th>
<th>Aid Membership</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990-91</td>
<td>7</td>
<td>300</td>
</tr>
<tr>
<td>1991-92</td>
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<td>1992-93</td>
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</tr>
<tr>
<td>2002-03</td>
<td>103</td>
<td>11,350</td>
</tr>
</tbody>
</table>


In terms of program funding, the State Superintendent is required to make four equal payments in September, November, February, and May of each school year. The checks are sent directly to the private school. The parent or guardian is required to endorse the check for the use of the private school. The total payment is equal to the
lesser of the following: the private school’s operating and debt service cost per pupil related to educational programming, or the amount paid per pupil in the previous school year plus the amount of the per pupil revenue limit increase provided to school districts in the current year. Provisions are also made for summer school payments (Kava, 2003, p. 6).

The choice program is funded through a separate appropriation. The State Superintendent is required to ensure that payments to public schools are neither reduced nor increased as a result of payments to choice schools. A school district’s revenue limit calculation was not affected by the choice reduction. A school district could increase its property tax levy to offset any aid reduction made related to the choice program. Since choice funding was categorized in a separate allocation, estimated costs of the choice program resulted in higher funding levels for general school aid than normal. An equalization formula allowed some districts to receive more funds than before the implementation of the choice program. Other districts experienced a reduction (Kava, 2003).

In 2001, the finance structure for choice schools was amended. The new provision resulted in the general fund of the state paying for 55% of the choice program and Milwaukee public schools paying 45%. Total funding for the program has increased from $0.7 million in 1990-91 to an estimated $65.6 million in 2002-03 (Kava, 2003).

Almost immediately, the Milwaukee parental choice program was challenged in court. In May 1990 the State Supreme Court was petitioned by several teachers, administrators, parent groups, and the Milwaukee branch of the NAACP. The petitioners
argued that the program was unconstitutional because it violated (a) the doctrine that public funds may be expended for only public purposes because the program “contains no educational controls, measures or standards of accountability.” (b) The state constitutional requirement that schools be as uniform as practicable, and (c) the state constitutional provision prohibiting the Legislature from passing a private or local provision as part of a multi-subject bill (Kava, 2003).

The State Supreme Court denied the request. Shortly thereafter, six private schools in Milwaukee, several pupils, and their parents brought an action in the Circuit Court of Dane County seeking to compel the State Superintendent from imposing any requirements on participating schools beyond those already specified in the law. The parties who previously asked the State Supreme Court to review the program joined as intervenors in the Circuit Court action and asked again that the law be declared unconstitutional (Kava, 2003).

In August 1990, the Circuit Court ruled that the program was not unconstitutional. The Court stated, “The Milwaukee choice program is the Legislature’s attempt to improve the quality of education to the benefit of the entire state” (Kava, 2003, p. 7). Further, the Court held that the legislation “has sufficient accountability and control to maintain its public purpose” (Kava, 2003, p. 7). With regard to the uniformity clause challenge, the Court reasoned that the private schools participating in the program do not become public school districts even though they accept public school students and are, therefore, not required to meet the statutory standards required of public school districts (Kava, 2003).
In addition, the Court agreed with the U.S. Department of Education that the private schools were not required to comply with federal and state laws regarding education for handicapped children. While the private schools may not deny qualified handicapped students access to their program, the responsibility to offer them a free and appropriate education still rests with the public schools (Kava, 2003).

In November 1990, the Court of Appeals reversed the Circuit Court decision and declared the program unconstitutional by concluding that it was a local/private provision passed as part of a multi-subject bill. In March 1992, the State Supreme Court, by a 4-3 vote, reversed the Court of Appeals decision and ruled that the choice program was not unconstitutional (Kava, 2003).

In 1995, the choice program was expanded to include sectarian schools, and a number of changes were made to the program. The changes were challenged in Circuit Court, and an injunction prohibiting implementation of the changes was issued. An action for removal of the case from the Circuit Court was filed before the Wisconsin Supreme Court, and in March 1996, the Supreme Court declared it was evenly divided on the issues. The matter was therefore, returned to the Circuit Court, and the injunction continued (Kava, 2003, p. 7).

In August 1996, the Circuit Court made permanent the injunction relating to expanding the choice options to sectarian schools and lifted the injunction to nonsectarian schools (Kava, 2003).

In January 1997, the Circuit Court issued a ruling that found that the expansion of the choice program to sectarian schools violated the state Constitution (prohibiting state
support of religious societies). The program as it relates to nonsectarian schools was declared to be constitutional (Kava, 2003).

In August 1997, the Court of Appeals concluded that the expansion of the choice program to sectarian schools was invalid under the ban stated in the state constitution prohibiting direct payments of money from the state treasury for the benefit of religious societies. In June 1998, the Wisconsin Supreme Court reversed the decision of the Court of Appeals and upheld the constitutionality of the choice program. The injunction barring the implementation of the choice program was dissolved, and program expansion took effect in the 1998-99 school year. In November 1998, the U.S. Supreme Court declined, without comment, to hear an appeal from the Wisconsin Supreme Court decision (Kava, 2003).

Five evaluative reports from 1990-91 through 1994-95 were conducted by Professor John Witte of the University of Wisconsin-Madison. In general, the evaluations concluded the program had accomplished the purpose of making alternative school choices available to low-income families whose children were not succeeding in school; parents were very satisfied with the program and have been highly involved in their children’s education with the attendance rates comparable to the Milwaukee public school system elementary average; the attrition rate declined during the first four years and leveled off in the fifth year, and during the last two years attrition was comparable to mobility rates in the public schools of Milwaukee; and no systematic evidence confirmed that test scores improved when controlled for gender, race, income, grade, and prior achievement (Kava, 2003).
The Wisconsin Legislative Audit Bureau also evaluated the program and agreed with all of Witte’s conclusions except student performance. On this issue the audit bureau concluded that the data were not sufficient to support any conclusion (Kava, 2003).

In addition, the Legislative Audit Bureau made other findings:

1. The choice program had not had a substantial fiscal impact on the Milwaukee Public Schools (Kava, 2003);
2. Most parents heard about the program through informal sources such as friends, or relatives, and most selected choice schools based on perceived educational quality (Kava, 2003).
3. About three-quarters of the choice schools could be classified as religious (Sandham, 1999);
4. Comparison of student academic performance was difficult since not all schools administer the same standardized testing (Sandham, 1999); and,
5. Revenue to Milwaukee public schools was not significantly impacted by the choice program. Costs to Milwaukee property taxpayers were higher than they would have been in the absence of the choice program (Nazareno, 2000).

McKay Scholarship Program. State Senator John McKay of Florida served as President of the Florida Senate when he proposed a plan to offer “opportunity scholarships” or vouchers to students with disabilities. McKay, father of a child with learning disabilities, often expressed frustration with the public schools in their attempts to provide quality educational services to his children. He claimed the current system to
be elitist and realized that many parents of special needs children cannot afford private
education for their children (Committee on Education, 2002).

First attempts at this program, called the McKay Opportunity Scholarships, was
the development of a pilot effort that would provide vouchers to parents of special needs
students in four counties who could prove their children’s needs were not being met by
public schools. Parents seeking vouchers would be required to document a child’s lack
of progress at school, using evidence such as test scores that were below grade level. The
pilot program would be limited to 5% of students with disabilities in Broward, Clay,
Sarasota, and Santa Rosa counties in the first year. It would expand to 10% of student
enrollment in those counties in the second year, and 20% after that. Under McKay’s
plan, voucher values would range from $6,000 to $25,000, depending on the severity of
the disability (Committee on Education, 2002).

Florida Governor Jeb Bush signed the McKay Scholarship program into law on
June 2, 2000. Senator McKay stated, “There are situations where you don’t have the
right environment, and we should not limit the ability of parents to find other venues that
their children can get a proper education.” Federal laws and a U.S. Supreme Court
decision protect the educational rights of children with disabilities and enable parents to
require school districts to pay for a private education if the public school cannot provide
specific services.

McKay emphasized the costly and complex process involved in taking advantage
of rights provided for students with disabilities:

Exercising those rights can be costly and complicated. The Supreme Court
decision is easily enforceable, provided you get an attorney and know how to quote the public law. This program is in line with the Supreme Court decision and makes it easier for parents to help their children get an appropriate education.” The program the Legislature passed does not allow parents to select any school. Private schools must elect to participate and parents must choose from those participating schools (Committee on Education).

Education Reform Subcommittee Chairman Michael Castle (R-DE), a House leader in special education reform, said that Congress can learn “how Florida has moved to increase parental choice in the education of disabled students so the parents can ensure their disabled sons and daughters are receiving quality education (as cited in Apling, et al., 2002, p.4).”

Diane McCain, director of the Choice Office in the Florida Department of Education, discussed the benefits of school choice in ensuring accountability in special education:

We believe that school choice is a method for making our educators more accountable to parents in Florida. With the McKay Program, our legislature has empowered parents to choose their children’s schools. Parents are given flexibility perhaps for the first time. Before the McKay Program, the decision regarding services was made by the school district (Rotherham and Meade, 2004). McCain continued. “Children at risk, children in the juvenile system, and children with special needs have had the decision made by local school districts. With the McKay Program, parents also have an option (Rotherham and Meade, 2004).”
Because of no additional cost to the state, the program simply lets parents, rather than school district administrators, decide which school should receive the educational funds already being spent on their child (Pacer Center, 2003).

In the first year of the scholarship program, an estimated 1,000 students and 139 schools participated. The second year saw substantial increases in both students (5,000) and schools (400) (Disability Rights Education, 2003).

Rotherham and Meade (2003) discern that Republicans are proposing school choice as a panacea for all manner of educational problems. In addition to believing that school choice invariably drives innovation, voucher proponents also argue that parental satisfaction should be the ultimate arbiter of school performance. These reasons explain why they see school choice as the most logical reform for the nation’s complicated and troubled education system. The rush for vouchers in special education is driven more by a political agenda than any specific special education reform issue. Currently, special education already operates as a de facto choice program for some parents, and not without considerable abuse. Whether or not Congress adds a voucher component to IDEA, states today have the option of creating their own state-level McKay-like programs, which conservative policy analysts have urged them to do. While potentially addressing some special education problems, these vouchers will create other problems and increase, rather than decrease, perverse incentives for parents and educators in special education (Apling, et al., 2002).

According to the Pacer Center (2003), The Florida McKay voucher program is touted as a model, yet it has never undergone scientifically based evaluation to determine
whether it is producing better outcomes for participating students with disabilities. When
children enroll in the program, they give up all their due process rights under the Federal
IDEA. Among these rights are due process, procedures to resolve disputes, progress
reporting, implementation, and annual review of the student’s IEP by appropriately
licensed teachers. If parents disagree with the non-public school, their only option would
be to reenroll their child in the public school. In addition, if the student’s original IEP
were out of date, a reevaluation would be required. The proposal is described as a
Nonpublic School Choice program for upper income families of children with less severe
disabilities. Nonpublic schools can select whom they wish to enroll. They do not have to
abide by federal or state civil rights laws. They are not prohibited from discriminating
against a student based on disability status or other protected classifications. Most
children with disabilities will not meet the admission requirements of nonpublic schools
and, therefore, would be denied access to the proposed program. Proposed funding will
cover only a portion of the tuition thereby limiting access to many middle and low-
income families (Apling, et al., 2003).

State programs, with Florida’s McKay program serving as a model do not cover
nearly the full cost or tuition and related expenses for private school attendance. Thus,
many families will lack the resources to benefit from this program and will not have
access to this “choice (Apling, et al., 2003).”

Perhaps of greatest importance, the McKay Scholarship statute (See Appendix 3)
notes that, in accepting a scholarship the parent “is exercising his or her parental option to
place his or her child in a private school (Apling, et al., 2003).” The U.S. Department of

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Education (ED) has concluded that even though the state of Florida and local educational agencies (LEAs) in the state have made a free appropriate public education (FAPE) available to eligible children with disabilities, as IDEA requires, parents may choose other alternatives:

… [If] parents elect to place their children private schools through the Scholarships Program, then such children are considered “private school children with disabilities” enrolled by their parents … Under IDEA, such parentally placed private school students have no individual entitlements to … special education and related services in connection with those placements” (Miller, October 17, 2003).

The Department of Education also pointed out that federal nondiscrimination laws with respect to individuals with disabilities do not apply directly to participating private schools because Title II of the Americans with Disabilities Act (ADA) does not apply to private schools and section 504 of the Rehabilitation Act of 1973 depends on the acceptance of federal funds (Miller, October 17, 2003).

Recently, Florida Education Commissioner Jim Horne proposed legislation that will fix the state’s voucher problems following a string of embarrassing incidents that showcased loopholes in the original laws, including the McKay Scholarship Program. Recommended changes included:

1. Notifying scholarship funding organizations (SFO) of any students receiving both McKay scholarships or Opportunity scholarships. Duplication will be eliminated (Miller, October 17, 2003);

2. Private schools must be in existence for three years or provide a surety
bond, or a letter of credit (Miller, October 17, 2003);

3. Requiring private schools participating in the scholarship program to annually submit a sworn compliance form relating to state laws (Miller, October 17, 2003).

4. Requiring all personnel with direct student contact to have Florida Department of Law Enforcement (FDLE) fingerprint and criminal background check (Miller, October 17, 2003).

5. Requiring private schools to administer one of the nationally norm-referenced tests identified by department to scholarship students. Students with disabilities for whom standardized testing is not appropriate are exempt from the testing provision. The Department of Education must identify all nationally norm-referenced tests that are comparable to the norm-referenced test included in the FCAT (currently the SAT 9). Results would go to parents and a third party research entity. The research entity would report to the state on the aggregate learning gains of the students (Miller, October 17, 2003).
Table 2

*Participation Data by Race and Grade Level, 2001-2002*

<table>
<thead>
<tr>
<th>Breakdown of Data</th>
<th>Numbers of Participants</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Race</strong></td>
<td></td>
</tr>
<tr>
<td>White</td>
<td>2119</td>
</tr>
<tr>
<td>Black</td>
<td>1243</td>
</tr>
<tr>
<td>Hispanic</td>
<td>879</td>
</tr>
<tr>
<td>Asian</td>
<td>19</td>
</tr>
<tr>
<td>American Indian</td>
<td>8</td>
</tr>
<tr>
<td>MultiRacial</td>
<td>63</td>
</tr>
<tr>
<td>Other</td>
<td>52</td>
</tr>
<tr>
<td><strong>Grade Level</strong></td>
<td></td>
</tr>
<tr>
<td>Elementary (K-5)</td>
<td>1870</td>
</tr>
<tr>
<td>Middle (6-8)</td>
<td>1809</td>
</tr>
<tr>
<td>High (9-12)</td>
<td>704</td>
</tr>
<tr>
<td><strong>Total (as of April 2002)</strong></td>
<td><strong>4383</strong></td>
</tr>
</tbody>
</table>

Source: 2001-2002 McKay Student Data, John McKay Scholarship Program, Florida Department of Education
Table 3

Types of Disabilities Among Students Using McKay Vouchers, 2002-2003

<table>
<thead>
<tr>
<th>Type of Disability</th>
<th>% Students</th>
</tr>
</thead>
<tbody>
<tr>
<td>Educable Mentally Handicapped</td>
<td>7.7%</td>
</tr>
<tr>
<td>Trainable Mentally Handicapped</td>
<td>1.6%</td>
</tr>
<tr>
<td>Orthopedically Impaired</td>
<td>0.9%</td>
</tr>
<tr>
<td>Speech Impaired</td>
<td>7.7%</td>
</tr>
<tr>
<td>Language Impaired</td>
<td>9.7%</td>
</tr>
<tr>
<td>Deaf or Hard of Hearing</td>
<td>0.6%</td>
</tr>
<tr>
<td>Visually Impaired</td>
<td>0.2%</td>
</tr>
<tr>
<td>Emotionally Handicapped</td>
<td>8.9%</td>
</tr>
<tr>
<td>Specific Learning Disabled</td>
<td>51.4%</td>
</tr>
<tr>
<td>Gifted</td>
<td>0.5%</td>
</tr>
<tr>
<td>Hospital Homebound</td>
<td>0.9%</td>
</tr>
<tr>
<td>Profoundly Mentally Handicapped</td>
<td>0.1%</td>
</tr>
<tr>
<td>Dual-Sensory Impaired</td>
<td>0.02%</td>
</tr>
<tr>
<td>Autistic</td>
<td>2.2%</td>
</tr>
<tr>
<td>Severely Emotionally Disturbed</td>
<td>1.8%</td>
</tr>
<tr>
<td>Traumatic Brain Injured</td>
<td>0.2%</td>
</tr>
<tr>
<td>Developmentally Delayed</td>
<td>0.5%</td>
</tr>
<tr>
<td>Other Health Impaired (includes ADD/ADHD)</td>
<td>5.1%</td>
</tr>
</tbody>
</table>

Source: Data from the Florida Department of Education Choice Office
Since the Elementary and Secondary Education Act first passed Congress in 1965, the federal government has spent more than $242 billion through 2003 to help educate disadvantaged children. Yet, the achievement gap in this country between rich and poor and white and minority students remains wide (Apling, et al., 2002). In response to this critical need, President George W. Bush, on January 8, 2002, signed the *No Child Left Behind Act of 2001*. This legislation is considered a landmark in education reform and is designed to improve student achievement and change the culture of America’s schools. President Bush describes this law as the “cornerstone of my administration.” Clearly, our children are our future, and, as President Bush has expressed, “Too many of our neediest children are being left behind (Introduction, *No Child Left Behind*, 2001).”

The *No Child Left Behind Act* (NCLB) amended and reauthorized the Elementary and Secondary Education Act (ESEA) (Committee on Education, 2003). NCLB is built upon four common-sense pillars: (a) accountability for results, (b) an emphasis on doing what works based on scientific research, (c) expanded parental options, and (d) expanded local control and flexibility (Introduction, *No Child Left Behind*, 2001, p. 3). NCLB established an important historical precedent for the portability of federal Title I funds, in which money follows the child. Supporters of DeMint legislation note that the same principle should be applied to federal special education funds when children with special needs are otherwise being denied the opportunity for a quality education (p. 2).

The *No Child Left Behind Act* contains many opportunities for parents to be involved in and informed about their children’s education. Each state must measure
every public school student’s progress in reading and math in each of grades 3 through 8 at least once during grades 10 through 12. Assessments must be aligned with state academic content and achievement standards. They will provide parents with objective data on where their child stands academically (Introduction, No Child Left Behind, 2001). Also, the law requires states and school districts to give parents easy-to-read, detailed report cards on schools and districts, telling them which ones are succeeding and why. Included in the report cards are student achievement data broken out by race, ethnicity, gender, English language proficiency, migrant status, disability status and low-income status, as well as important information about the professional qualifications of the teacher (Elementary and Secondary Education Act, 1965). The intent of the law is also designed to prevent children from being trapped in low-performing schools. Schools must use funds to make needed improvements. In the event of a school’s continued poor performance, parents have the option of ensuring their children receive the high quality education to which they are entitled. Parents with children in schools that do not meet state standards for at least two consecutive years may transfer their children to a better performing public school, including a public charter school, within their district. If they do so, the district must provide transportation, using Title I funds if necessary. Students from low-income families in schools that fail to meet state standards for at least three years are eligible to receive supplemental educational services in the community, such as tutoring, after-school programs, or remedial classes (Elementary and Secondary Education Act, 1965). The law also provides certain parents’ rights within their child’s education:
1. School districts must notify parents of high school students that military recruiters have access to students’ names, addresses, telephone numbers, and other additional information. Military recruiters are entitled to this information unless the parent says no (National PTA, 2004);

2. Parents of children identified as needing English language assistance must be notified within 30 days of the start of the school year that they have the right to remove their child from the bilingual education program. If a child is placed in a program mid-year, parents must be notified of their right to decline participation within two weeks of that placement (National PTA, 2004);

3. Parents of children that attend a Title I school must be notified of the right to request information about the professional qualifications of classroom teachers. The school must notify parents if a teacher who is not highly qualified teaches their children for more than four consecutive weeks (National PTA, 2004);

4. Parents must be informed of the academic achievement and progress of their school in comparison with other schools in their district and state (National PTA, 2004).

5. School districts must allow students who attend a “persistently dangerous” public school, or students who have been a victim of a violent criminal offense while on school grounds, to transfer to a safe public school within
the school district (National PTA, 2004). NCLB puts a special emphasis on implementing educational programs and practices that have been clearly demonstrated to be effective through rigorous scientific research. Federal funding will be targeted to support such programs (Karp, 2003).

U.S. House Education and Workforce Committee Chairman John Boehner (R-OH) declared in the following excerpts the continued support of NCLB by the President as he proposed increased funding for the programs:

Today’s announcement by President Bush demonstrates he remains committed to providing generous funding for public education linked to high standards and accountability even in a time of war and economic uncertainty. … The federal government is now spending far more money than at any other time in history for elementary and secondary education which means it’s more important than ever that states and federally funded schools use these funds to get results for our children. A lot is being spent and a lot is being expected. … Contrary to the false claims made by some, the No Child Left Behind Act did not promise any specific overall funding amount beyond the large increases that were provided in FY 2002. … No one has ever said education reform will be easy. But our nation’s children are worth every ounce of effort. I congratulate the President for this decision. And I commend the teachers and principals across the nation who are using these resources to bring about education results for the children who are our nation’s future (Karp, 2003).
In a speech commemorating the second anniversary (January 8, 2004) of NCLB, President Bush offered these comments at Westview Elementary in Knoxville, Tennessee:

I mentioned the No Child Left Behind Act. We’re here to discuss that piece of bipartisan legislation. It is legislation that I would call historic, because for the first time, the federal government is spending more money, and now asking for results. See, in the past it used to be we would send a check and hope something happened. And now the federal government is sending checks, at record amounts, I might add, for Title I students and teacher training and reading programs. … And so we’ve worked with the states and local governments to develop an accountability system all around the country, accountability systems which says that, first of all, we believe in the worth and intelligence of every child, an accountability system that tests curriculum to determine whether they’re working, accountability systems that enable us to address problems early before they are too late. … The No Child Left Behind Act is a great piece of legislation which is making a difference around our country. We’ve got some people here from around America that are going to discuss what they’re doing to accomplish the national objectives in a positive way. The national objective is to challenge the soft bigotry of low expectations and raise the standards for every single child. … You don’t know unless you measure. Listen, I’ve heard every excuse in the book about measurement: you’re testing too much, you’re teaching the tests, don’t test.
If you don’t test, you have a system that just shuffles the kids through. And that’s unacceptable. It’s unacceptable to quit on a kid early, and just say, move through and hope you learn. What you’ve got to do is measure to determine where they are, and then you can compare districts and compare states. … And as a result of strong accountability measures and good teachers and more funding, the results are positive, the fourth grade math test scores around the nation are up nine points since 2000. In other words, we’re beginning to achieve; meet national objectives, which is a more literate group of students. The reading-eighth grade math scores are up five points. … We’re making a difference. … I say, we. It’s not the federal government that is making the difference. The federal government is the funding mechanism for Title I students, for some teacher training programs. The truth of the matter is, the responsibility for educational excellence resides at the local level. Teachers must be free to teach, principals must be free to lead, superintendents of schools must be comfortable with making changes where change is needed. The best education policy is local control of schools (President Discusses No Child Left Behind, Jan. 8, 2004).

Not everyone is as supportive of NCLB as the previous information might suggest. Karp (2003) makes the case that this piece of federal legislation “may well be the worst education bill ever passed by the federal government.” He outlines many reasons why NCLB is a poor effort to reform schools and concludes with regard to the choice provisions that the bill:

[w]ill create chaos and produce greater inequality within the public school system
without increasing the capacity of receiving schools to deliver better educational
services. … These same transfer and choice provisions will not give low-income
parents any more control over school bureaucracies than food stamps give them
over the supermarkets (Karp, 2003, p. 8).

NCLB represents the single biggest assault on local control of schools in the
history of federal education policy. It includes provisions to push prayer, military
recruiters, and homophobia into schools while pushing multiculturalism, teacher
innovation, and creative curriculum reform out (Karp, 2003, p. 9).

The Bush administration is trying to use NCLB to promote an aggressive agenda
of privatization, including attempts to revive a voucher movement that has been defeated
in every state referendum where people had a chance to vote (Karp, 2003, p. 10). NCLB
represents a virtual nationalization of control over local schools, and its highly
prescriptive and punitive sanctions are the kind of wrongheaded social engineering by
Washington that political leaders like the President have supposedly rallied against for
years (p. 11). The NEA is trying to bring a lawsuit to force a suspension of NCLB
sanctions as an unfunded mandate from Washington.

NCLB does not invest in building new schools in failing districts or in building
new capacity in receiving schools. The law does not provide any support for receiving
schools to handle an influx of students, (especially ones with a history of educational
struggles), nor does the law make rich districts open their doors to students from poor
districts. A relatively few parents may get additional school choices for their children in
districts where open seats exist. However, the main impact will be to artificially
manufacture a demand for transfers that are not available and that instead can be channeled into new voucher schemes that will ultimately move funds and students to profit-making private school corporations (Neill, 2003).

The “highly qualified teacher” provisions of NCLB do not measure the quality of teaching. They track credentials and the link between formal credentials and classroom effectiveness has always been a problematic one (Neill, 2003, p. 2). These characteristics are part of the bureaucratic, one-size-fits-all plan of NCLB schooling.

As one observer described it, “NCLB is not the answer to a crisis in public education. NCLB is a tool for creating crisis (Neill, 2003, p. 3).” Neill discerns that many education reformers believe that NCLB is a fundamentally punitive law that uses flawed standardized tests to label schools as failures and punishes them with counterproductive sanctions. The legislation needs to be rewritten, particularly in the areas of accountability and assessment. The unfunded mandate to eliminate all test-score gaps in 12 years assumes that schools by themselves can overcome the educational consequences of poverty and racism. So far, the federal government has failed to meet the social, economic, and health-related needs of many children, and NCLB itself does not authorize nearly enough funding to meet its new requirements.

The one-size-fits-all assessment requirements annual testing in reading and math and periodic testing in science and the accountability provisions attached to them are rigid, harmful, and ultimately unworkable. They will promote bad educational practices and deform curricula in significant ways (Neill, 2003).

In districts where some schools are labeled “failing” and some are not, the new
law may force increased class sizes by transferring students without creating new capacity. The Bush administration has said overcrowding does not matter (Neill, 2003). For those left behind, the final step is to “reconstitute” the school. Among a list of options in the law are to turn it into a charter school or privatize its management. These marketplace “solutions” to the difficult and complex problems of schooling will not improve the public school system but may lead to dismantling it (Neill, 2003).

Two national education organizations are focusing on the identified weaknesses of the law and are working for changes. The American Association of School Administrators (AASA) has opposed NCLB from the beginning and continues to work for changes in Congress. The National Education Association has passed a series of resolutions opposing high-stakes testing and calling for changes in NCLB. NEA has also endorsed legislation that would reduce some of NCLB’s more harmful impacts.

Survey Questions

The following information represents responses to questions designed to elicit feedback on the topic of parental choice. Through the course of investigating the legal and historical implications of parental choice I discovered many who cited strong opinions on this topic. Twenty-three participants were asked to complete a questionnaire containing four questions relating to the research topic. The following information represents contemporary attitudes and opinions regarding the topic of parental choice. Respondents were solicited from experts in the field of parental choice. Authors, researchers, and political and education leaders were asked to respond to the questions.
(1) What should the role of the state or parents be in determining the education of their children?

Respondent # 1

Parents should have the role in determining how their children will be educated. See *Pierce v. Society of Sisters*, U.S.S.C. circa 1923.

Respondent # 2

State provides resources (some constitutions mandate that) and parents provide guidance to school boards, administrators and teachers as well as provide for well-being of their children and insuring they are ready to learn & assist in that—Also they can vote for pro-public education candidates.

Respondent #3

The responsibility needs to be shared. The State has a collective responsibility to assure all [original emphasis] are provided access to and opportunity to succeed in a rigorous and relevant curriculum. Parents need to support their child to succeed in this curriculum and monitor schools to fulfill their responsibilities to each child.

Respondent # 4

It is the parent’s responsibility to see that their child attends school & until a child reaches majority age—18—the school choice is the parents’.”
Respondent # 5

Both should play a major role—the decisions regarding a child’s education should be made jointly whenever appropriate.

Respondent # 6

The state should do its best in providing a free, public, and equitable education for all [original emphasis] children. This includes quality instruction and assistance with quality facilities. Parents should express opinions, concerns, and offer support to the local district. Parents may also lobby legislators and local school officials.

Respondent # 7

As I answer this and the remaining questions on the issue of parental choice, allow me to explain my background on this subject. First, as an area superintendent in a school district with more than 60,000 students, in 1990 I chaired a parent committee that developed the first countywide magnet school in the district. This was in response to an historically black school that was desegregated in the 1970’s as a middle school and was losing enrollment at a rapid pace. This magnet school continues to enjoy success to date.

From there, I became the school superintendent in 25,000+ student district that implemented the first controlled open enrollment student assignment plan in the eastern U.S. in 1991. The plan was designed to balance the district’s need to desegregate schools based upon a thirty year federal court order and the desire of
parents to ensure the safety and educational quality of their children. The school
district was declared “unitary” by the federal courts in 1997, due in large part to the
controlled choice student assignment plan that we implemented.”

After that experience, I became the Director of the Division of Public Schools
for the State of Florida in 1996. In that position, I oversaw the operation of the
office of school choice which was responsible for the supervision of charter schools
and eventually the Florida school voucher program. So, it might be said that I have
seen choice from every angle over the last 14 years –district staff level,
superintendent of schools and division director at the state level.

Based upon this experience, I believe that public school [original emphasis]
choice is a viable concept in public education today. It is based upon the concept
that parents will be attracted to quality schools and that the school district will
respond to or “fix” under-selected schools. In short, competition will drive reform.
Based upon my experience, there is a strong element of truth in that concept.
However, I have found parents will sometimes make choices based on issues other
than educational quality. For example, I have seen parents select schools based
strictly on school location. In some cases, it is the convenience of the location in
regards to work or home as opposed to quality and in other cases the location issue is
based upon other reasons. In some cases, parents will select the lowest rated school
in the district based upon convenience.

In spite of extensive experience with school choice, I do not believe in the
concept of vouchers to private schools. As we have experienced in Florida, vouchers

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have implications regarding entanglement of church and state as well as the possibility of charlatans exploiting parents and children based upon pure greed and economic gain. So, state control and oversight of a public school choice program is critical, in my opinion.

In my view, it is a delicate balance between the school district’s ability to respond to the demands of parents and the district’s need to ensure that all children receive a quality education in a safe and caring environment. Creating that type of environment requires the district to guard against racial isolation, socio-economic isolation and elitism in student assignment.

Respondent #8

Parental input is critical in determining the direction of public education but the state has the overriding responsibility of ensuring equity and equality in our public schools.

(2) Horace Mann, an early advocate for universal public education, proclaimed that the public schools should promote responsible citizenship, foster economic opportunity, instill a common morality, and reduce class and ethnic conflict in a heterogeneous society (Imber, 2000). In light of this definition how do you view public education today?

Respondent #1

My belief is that public education is largely a failure. We spend a lot of money for less than an acceptable return. The significant datum about public education in my opinion is not the amount of money spent or that needs to be spent,
but rather how little or low the return.

Respondent # 2

It’s the glue that keeps our society together.

Respondent # 3

The same goals exist today. However, we now need to add the academic skills to be life-long learners, succeed in higher education and success in the workplace.

Respondent # 4

I view public education in a very positive light. I view the society that surrounds it a less supportive, more self-oriented, more racist with greater class division caused primarily by a national government that passes laws to increase wealth for the wealthy, increase poverty among the poor, & reduce anyone’s responsibilities for ending the class divided.

Respondent # 5

I do not believe that Mr. Mann’s objectives are being achieved. However, this is far from the sole fault of the public system. Failure to achieve these noteworthy goals is a society shortcoming.

Respondent # 6

I personally view public education taking a major step backwards with the obvious re-segregation of schools around race and class.
First of all, Horace Mann and Thomas Jefferson were visionaries regarding public education. All you have to do is view the world around us to see the strife created by ethnic violence, in Northern Ireland to the former Soviet Union to the recent conflict in Iraq, to name only a few. Societies without the foundation of a free, universally accessible public education pay a price in ethnic repression, class-based societies and economic and social strife. Unlike the U.S., these nations and societies have no common cornerstone of universally accessible K-12 education to build a common understanding among groups and a national sense of pride.

Therefore, I believe strongly in the Horace Mann definition of quality education. With today’s emphasis on student performance based upon test scores, I am deeply concerned that the cornerstone of our democracy is being undermined in the name of school choice. Under the guise of choice provisions of No Child Left Behind (NCLB) and Florida’s voucher program, we may be creating elite and racially/economically/educationally isolated schools. In the end if this trend continues, there will be a clear demarcation of societal class based upon publicly funded voucher programs. We will then begin the spiral that other nations have faced with ethnic/economic class conflict. It may take a generation or so to get there, but the trend seems clear.

After spending 35 years in public education attempting to do my part to
ensure equity, accessibility and quality for all students, this trend is most disturbing to me. It is my hope that we will soon figure out an appropriate balance between the role of public school choice for parents and the government’s need to ensure our way of life as a democratic society. No other institution is more critical in maintaining our democracy than flourishing public schools as defined by Thomas Jefferson and Horace Mann. Public schools have served as the common thread of our society in the U.S., a vehicle by which children of immigrants with the concept of the American dream and a vehicle through which they could achieve that dream. No other nation in the world has an ideology like ours and public schools are the transmitters of that ideology to native born or foreign born children.

Respondent # 8

Parental choice has eroded the basic foundations of public education that provided for equity and equality. The concept of parental choice has promoted segregation and distinct socio-economic divisions within our schools.

(3) In the debate over parental control of children’s education, at what point do state and parent interests clash?

Respondent # 1

The clash in many places, but on one macro level, the clash at the intersection of teacher union dominated/self–interested control over the public schools and the decisions of most parents and their authority, even in the poorest areas to provide an educational opportunity for their children.
Respondent # 2

The state’s role is to provide resources & standards. Parents can shape those policies by voting & helping their children learn.

Respondent # 3

When the need of one child (as perceived by the parent) is in conflict with the collective needs of all children.

Respondent # 4

Parents may make whatever school decisions they wish, but not all with state financial support. Public dollars shall be spent for public purposes and public institutions, when it comes to young to teen-age children, whose developing must not be swayed by any religion at state expense.

Respondent # 5

When the child is not performing to his or her abilities and the survival of the “public education system” takes priority over the child’s needs.

Respondent # 6

The clash happens when they (parents) are selfish to the point that they do not see the “greater good” and fail to demonstrate a social consciousness that exemplifies public education—not a private education in a public setting.

Respondent #7

In some ways, that point of clash depends on the system of choice under review. As is true of all rights in a democratic society, there are limits to individual
rights. For example, the right to free speech cannot be exercised by falsely screaming “fire” in a crowded theater. By the same token, parents have a right to demand a quality educational program in a safe and caring environment for each of their children. However, that right has some limitations based upon such fundamental concepts as the separation of church and state, and the government’s need to ensure that no child is isolated based upon racial, religious, ethnic or economic reasons. That’s why it was called controlled [original emphasis] open enrollment in the school district where we implemented district-wide choice, in 1991. The control was based upon the need to balance schools based upon space and the need to avoid isolation by any one group of students.

Respondent # 8

When in the name of parental choice, citizens are segregating themselves based on race, socio-economic states, and class, the state must take the lead in providing a rich, culturally diverse environment for our schools.

(4) Charter schools, magnet schools, and vouchers signal patterns of choice that are emerging for parents of children who attend public schools. How do you see these patterns working in terms of re-defining the institution of public education?

Respondent # 1

The ‘early returns’… e.g. Jay Green’s studies, etc. indicate that not only does parental choice … especially vouchers … provide an opportunity for those who otherwise would not have it, but the competition in the form of discussed operating expenditures and the stigma of having students leave a school incents them to
improve. Indeed, one of the first two Fla. voucher schools in Pensacola is now closed, which is as it should be for any failing operation.

Respondent # 2

Public charters & magnet schools with proper supervision & standards are fine. Vouchers, giving public money for use by parents in private and religious schools, will lead to the destruction of public schools which will in turn foster religious intolerance, crumbling the wall between church & state and resegregation of our education system.

Respondent # 3

Will focus attention on the needs of students more than in the past. Some schools have leaned in recent years toward meeting the needs of the employers first–then the needs of students next. This will reverse this trend.

Respondent # 4

Schools that operate under the aegis of publicly elected or appointed school boards are the only ones that should receive public tax/revenue support. Magnet schools were the first such non-traditional schools to receive that public support with public board oversight. Charter schools are the next type of schools to bring controversy. As long as they operate under the authority & oversight of an elected/appointed public school board, they tend to be acceptable to the public education community. Vouchers, outright tax revenues grants to attend religious, unconstitutional schools or other “private” schools, both categories of which do not have to comply with civil rights laws, are totally unacceptable to public
educators, and, if enacted with further build an income class & possibly religious
class divide.
Respondent # 5

   Competition promotes productivity and monopolies result in mediocrity.
Where as charter schools and vouchers provide quality education, I believe that
the public sector will improve. I do not believe that any of the above will result in
destruction of the public system. Its challenges are high and cannot be achieved
by protecting the status quo.
Respondent # 6

   I see these concepts as generally failing, with a few exceptions. Overall
parents tend to be more concerned with where their children go to school (close to
home) and who they go to school with (children who look like their own
children).
Respondent # 7

   It is important to take these concepts in the question one at a time. First,
charter schools were legislated in Florida to provide a spark of innovation for
public schools. Supposedly, since charter schools didn’t have to deal with the
bureaucracy that governed other public schools, they could try some innovative
programs which could be studied and adopted by other public schools. At the
same time, there would be the added benefit of taking students out of over-
crowded public schools and reduce the need to build new educational facilities.
Further, unsuccessful charter schools would be closed by the school district as a
means of guaranteeing that every student enrolled in a charter school would receive a quality education. Those were the concepts espoused by legislative sponsors of the charter school legislation in Florida.

However, charter schools have not lived up to any of these expectations in Florida. First of all, I am not aware of one, single innovative educational program to emerge in Florida as a result of charter schools. To the contrary, most of the successful charter schools in Florida operate a highly traditional educational program. So, the first concept of sparking innovation in other public schools has not been evident in Florida after more than 9 years of operation of charters.

Secondly, charter schools have received an inordinate share of the state facility funding program (Public Education Capital Outlay or PECO) in Florida over the last 6 years. Prior to that time, charters received no funding to construct or renovate facilities. Even though they serve less than 1% or 2% of the students in Florida, in 2004 charter schools are budgeted for PECO funds that are equal to almost 25% of what’s available to all school districts. So, the facility argument in Florida has proven to be false.

Finally, a number of districts have attempted to close poorly managed or poorly operated charter schools. Their efforts were often thwarted at the state level when these closures were appealed to that level. Further, the federal level has developed and increased funding for “charter school rescue” programs. These highly developed assistance programs are designed to help charter schools operate in a more “normal fashion” to avoid charges of corruption and church/state issues. So, in my
view, all the tenets upon which charters were begun in Florida are unrealized.

My view of magnet schools is somewhat different. As long as the magnet program is not designed to “skim off” all high performing students or isolate groups such as ESE students, I believe that magnet schools hold a great deal of promise for public education. A well designed magnet program in a medium sized school district in Florida would offer programs that would meet the needs of every student and parent, in an ideal situation. In theory, programs would be developed based upon community input that would include parents, non-parents, civic leaders and business leaders. Programs designed with that kind of input would meet parent and community needs and fulfill all aspects of Horace Mann’s definition of public education. Programs designed on political power of special interest groups or other less inclusive means would not fill that purpose. Based upon my experience, I have seen districts attempt to meet this ideal. The most recent example is the Pinellas County school district controlled open enrollment program. If it is not undone by the requirements of NCLB, if may be a model program of magnet schools for others to emulate.

As for vouchers, I am adamantly opposed to the concept. The concept is based upon an elitist principle that is wrought with legal and moral issues. It is the antithesis to the concept held by Horace Mann and Thomas Jefferson regarding the purpose of public schools. I see this trend as dangerous to our survival as a democratic nation.
In summary, I think magnets have the potential to help us individualize institutions of public education while charter schools may help in that regard even though there is no evidence of that to date in Florida. On the other hand, vouchers are not only detrimental to public schools but also to our democratic society in general, in my view.

Respondent # 8

Because we are now experiencing this sentiment for exclusion and non-tolerance for diversity in our schools, we will see more and more parents exercising their parental choice option and place their children in exclusive magnet, charter, or all one-race schools. Diversity in public schools is no longer valued.
Chapter Five

Conclusions/Implications

Problem Statement

Throughout our nation’s history, the education of children has changed dramatically. In the journey from Colonial America’s absence of compulsory public education to the most recent federal legislation No Child Left Behind Act of 2001, school children have been subjected to a myriad of transformations, most of which were designed to improve learning. How have these changes influenced the role of parents in determining the education of their children? Has parental authority, or choice, evolved with other significant issues that impact children’s schooling?

The Purpose of the Study

The purpose of this dissertation is to analyze the concept of parental choice within the historic and legal context of the public schools.

Research questions

The research questions posed in this study are:

1. What are the historic benchmarks regarding parental choice within the context of the public schools?
2. What are the legal benchmarks regarding parental choice within the context of the public schools?

3. How do the historic and legal benchmarks regarding parental choice relate to each other?

**Legal Analysis**

What began in Colonial America as a basic tenet of English Common law is that parents have supreme control over the education of their children. This idea and practice was a mainstay in American society throughout the 19th century and only during the early 20th century did the U.S. Supreme Court offer an opinion regarding the definition of parental authority over the education of children. The U.S. Supreme Court has upheld the parental interests to educate one’s child under the Bill of Rights’ freedom of speech and religion interests. The right has also been held to be fundamental under substantive due process (Wheeler, 1995, p. 78).

*Meyer v. Nebraska* (1923) was the first in a series of U.S. Supreme Court decisions that brought constitutional issues related to the Fourteenth Amendment and Establishment Clause to the federal level and, therefore, laid the groundwork for a national debate on educational issues. Following *Meyer*, in 1925 the landmark case of *Pierce v. Society of Sisters* (1925) proclaimed the limited role of the public schools and affirmed parents’ rights to determine where they could send their children to school. This case is still considered the “Magna Carta” for parents of home-schooled children in that many cite the decision as evidence of judiciary approval for parents’ rights to choose the proper course for their children’s education (Wheeler, 1995).
Howard (2001) explains further the significance of *Meyer* and *Pierce*: 

Over the years, *Pierce* has assumed greater significance within American constitutional jurisprudence, far beyond the education context. Indeed, not only were *Pierce* and *Meyer* the first two cases where the U.S. Supreme Court used the Due Process Clause of the 14th Amendment to invalidate state laws, the expanded concept of individual liberty articulated in those decisions formed the basis in part for the broad expansion of civil liberties engineered by subsequent courts, including the Warren and Burger Courts. …The line of cases protecting, as enumerated aspects of liberty, the right to teach one’s child a foreign language [*Meyer*], the right to send one’s child to a private school [*Pierce*], the right to procreate, the right to be free of certain bodily intrusions, and the right to travel abroad, had set the stage for the most important substantive due process decision of the modern period, *Griswold v. Connecticut* [state law cannot prohibit married couples from using birth control]. As part of the Supreme Court’s development of the larger, unenumerated right to privacy under the 14th Amendment, the expanded concept of personal liberty first articulated in *Pierce* and *Meyer* lay at the foundation of the Warren Court’s decision in *Griswold* and the Burger Court’s landmark ruling in *Roe v. Wade* that a woman has a constitutionally protected right to have an abortion during the period in which the fetus is not viable, and *Pierce* was expressly referenced as precedent in both cases.
The notion that parents should have a constitutionally protected right to direct their children’s education has many intriguing consequences, such as, if the state cannot prohibit a parent from sending a child to a private, parochial or alternative school does that also mean that the state must fund those placements; the implications of the *Pierce* line of reasoning for the school voucher debate; and, more fundamentally, whose right is this anyway the parent’s or the child’s? But none of these or other contentious issues will ever be addressed if our courts adopt a “decide-only-if necessary-and-duck-if-possible” demeanor (p. 2).

Government authority versus the rights of individuals was brought to the forefront of the schooling debate during the 1940’s in *Minersville School District v. Board of Education* (1940) and *West Virginia State Board of Education v. Barnette* (1943). These cases tested Establishment Clause issues of freedom of religion and speech and the power of the state to impose restrictions on that freedom. The Court asserted, in both cases, that constitutional protections could not be limited by state-imposed regulations even though the proposed laws were perceived as beneficial to society as a whole. Once again, the right of the individual to choose against a state imposition was upheld by the highest Court in the land (*Minersville School District v. Board of Education*, (1940).

In addition, in *Everson v. Board of Education of the Township of Ewing* (1947), the U.S. Supreme Court affirmed a “neutrality” principle and ruled that the responsibility of government in dealing with public funds distributed to private and sectarian schools was not a violation of the Establishment Clause. The case involved the use of public funds to support public transportation for students to attend public and private/sectarian
schools. The Court concluded that the use of such funds that were distributed in a neutral manner and for the benefit of large groups of citizens supported the position that government is neither friend nor adversary to religious institutions. This case introduced the complex debate of separation of church and state issues with regard to public education and is often cited in cases involving similar issues.

In 1954, another landmark case, *Brown v. Board of Education*, established the principle that “education is the most important work of the state,” and it is a right that must be established on equal terms. The equality debate, as defined in *Brown*, broadened the spectrum of public education. Through government rule and policy, the power of the state increased to define, in deliberate terms, practices that focused on equal access to public schools. Integration of white and African-American students into the public school environment was possible because of the increased state authority and diminished parental authority.

Following *Brown*, several U.S. Supreme Court cases further defined the role of government and that of parents:

*Engels v. Vitale* (1962). This case involved a challenge to mandatory prayer in the public schools. The Court declared the practice in violation of the Establishment Clause and affirmed “government neutrality in the field of religion better serves all religious interests.” The case, in disallowing school prayer, strengthened the role of government control of public education and established fundamental boundaries that should not be crossed in dealing with religious issues.
Wisconsin v. Yoder (1972). This case involved a decision of Amish parents to withdraw their children from the public schools after completion of the eighth grade due to a conflict with their established religious beliefs. The Court agreed with the claims of the parents and through very deliberate rationale affirmed the rights of the parents to withdraw their children from the public schools without penalty of law. This case reintroduced the issue of parental rights into the legal debate over whether or not certain students may be exempt from compulsory attendance requirements.

Planned Parenthood of Southeastern Pennsylvania, et al. v. Casey, Governor of Pennsylvania (1992). This case established the right to an education as a “liberty” interest “protected by the substantive component clause of the Fourteenth Amendment.” The Court affirmed protection for personal decisions.

It is important to note the distinction between a liberty interest and property interest as defined by the Court. In Board of Regents v. Roth [1992] Justice Stevens described liberty interests as “requiring a broad definition and denoting not only freedom from bodily intrusions but also the right of the individual to contract, to engage into an occupation, acquire knowledge, marry, establish a home, raise children and worship God (p. 1)”. On the other hand, property interests created by rule or state law “require a person to have more than an abstract need or desire for it. The purpose of a property interest is to protect the claims upon which people rely their daily lives.” The constitutional right to a hearing protects those claims.

Zobrest et al. v. Catalina Foothills School District (1993). The decision involved the question of whether or not public funds could be used to support the placement of a
special education child in a sectarian school. In this case, the Court reaffirms “neutral benefits to a broad class of citizens, without reference to religion are not subject to Establishment Clause challenges.” A parental decision to place their child in a private school was upheld by the Court and, therefore, strengthened parental rights in determining the education of children.

*Florence County School District Four et al. v. Carter (1993).* This case, similar in nature to *Zobrest*, allowed for parents of a disabled child to place the child in private placement due to allegations that the public school placement was not meeting the needs of the child’s fundamental rights under the Individuals with Disabilities Education Act (IDEA) to a “free appropriate public education.” This decision reinforced the rights of parents and parents of special education children in particular to determine the proper educational placement of their children.

*Mitchell v. Helms (2000).* The question of whether or not public funds may be legally distributed to public and private schools, including sectarian schools, was decided by the Court. The majority opinion stated, “There is no incentive to undertake religious indoctrination where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.” The rationale of the Court continues as reinforced by prior decisions in *Everson* and *Zobrest*.

The most recent U.S. Supreme Court ruling dealing with parental choice, *Zelman v. Simmons-Harris* [2001], represents, in a 5-4 decision, a declaration interpreted by many to allow public school vouchers as an option from which parents can choose to
send their children to private schools at public expense. The opportunity for genuine independent choice, particularly among low-income parents, is a hallmark of this decision. Advocates of school choice hail this decision as the culmination of recent court actions in which parental rights have been strengthened. In addition, the emphasis of neutrality noted in the majority opinion in allowing public funds to be directed toward private and even sectarian schools represents a continuation of judicial opinions favorable to departure from previous Court decisions prohibiting “entanglement” of public and private funds. Nevertheless, when measured against the mood and attitude of the country with regard to allowing parents to choose the school their children will attend, the ruling seems consistent.

In summary, the legal decisions cited in this study reflect the complexity of the issue of parental choice within the public school environment. The maintenance of proper balance of parental control versus governmental authority has been the challenge for jurists since the Meyer decision in 1923. Indeed, Justice Frankfurter in Minersville v. Pennsylvania (1940) appropriately captured the dilemma faced by the Courts when he stated, “Our present task is to reconcile two rights in order to prevent either from destroying the other.”

Fish (2002, p. 41) concludes that the Zellman decision did not break the ice for programs but for process. The process debate continues in several states including Washington, Colorado, Florida, and Georgia. In addition, Washington, D.C. has received a federal appropriation to allow vouchers as a means of allowing low-income children in the public schools to attend private schools. (This action represents the first time a direct
federal appropriation was used to support the concept of allowing public funds to be channeled directly to private schools.) U.S. Secretary of Education Rod Paige called the passage of the Washington, D.C. voucher initiative as part of a broader push for school choice that would “help create an educational system that makes no distinction between the poor and the privileged in terms of the quality of education received” (Hendrie, 2004).

Historical Analysis

The historical implications of parental choice are no less important than those explained in the context of legal decisions. The historical evidence presented in this study describes an evolutionary process whereby regional efforts that began in Massachusetts Bay in 1647 (Ye Olde Deluder Satan Act) led to modern-day developments, on a national level, as expressed in the No Child Left Behind Act of 2001.

The continuing struggle for balance between governmental authority and rights of parents with regard to their children’s education is displayed very early in our country. Seeds were sown in Massachusetts Bay colony to require compulsory schooling and thus began efforts to impose public education upon the general populace. Motivations for creation of such laws were described in various ways, most notably describing the need to develop an educated citizenry considered essential in maintaining a democratic and orderly society.

Beginning in Colonial America with the “Ye Olde Deluder Satan” Act in 1647, and continuing to the first national government established under the Articles of Confederation, the emphasis upon the importance of public education was grounded in
legislation. The Land Ordinances of 1785 and 1787 represented for the first time a commitment on a national level to create a mechanism for the beginnings of public schools. This commitment signified the changing role of schooling through the recognition that mandatory education prepared the best minds in the country for public leadership. No longer was the responsibility to provide education merely a personal issue based on decisions of parents. The historical record of the Ordinances suggests the final product to be one of political compromise. This precedent-setting legislation reinforced the value of education to the future of the country and declared the support, “necessary for good government (Letters of Delegates, 1787).” The central focus of the Ordinances provided a mechanism whereby parcels of land could be sold for the sole purpose of supporting public schools. While very few school buildings were ever constructed on the parcels set aside for public education, the resulting revenue generated from the sale of such lands underscored the national interests of promoting the importance of education, namely the public schools.

Land influenced federal educational policy during the 19th century. As a result, the federal role in educational provision was much more effective in the period before what is touted as the great consolidation of national administrative capacities than after. Paradoxically, it is these early, successful efforts by the central state on behalf of education that seem to have undermined a subsequent federal role in education during the most intense period of state consolidation at the end of the 19th and early 20th centuries. The federal government may have run out of land to help finance and shape educational policy in the United States, but little doubt exists that, by the turn of the century, it had
effectively “primed the pump.” In a set of outcomes analogous to the history of mineral
eextraction in late 19th century America, federal investment in education set in motion a
series of increasing returns that encouraged further private investment as well as state and
local commitment to continued educational opportunity for average American citizens (as
cited in Hirschland and Steinmo, 2003).

In 1862, the Morrill Act further emphasized the significance of the federal
government’s importance in higher education. This law is credited with helping to
reshape the nation’s social and economic fabric through the subsidization of colleges of
agriculture, the mechanical arts, and military schools. Land grants to states that
eventually totaled more than a million acres laid the foundation for a national system of
state colleges and universities. This act became law at a time when the nation was in the
midst of a civil war and was passed only as the result of the fact that southern lawmakers
were no longer in Washington and, therefore, unable to vote against the legislation. The
lasting influence of the Morrill Act is evident in the highly successful land grant
institutions of higher learning that remain today. Their success is testimony to the
influence of national policy directed toward promotion of education.

The Oregon Compulsory Education Act of 1922 represented an attempt by the
citizens of Oregon to require all students, between certain ages, to attend the public
schools. This state law is important as a historical benchmark for laws that influence
public education. The law was passed during a time in American history when
immigration was very high, and as a result, a great deal of resentment was levied against
immigrants, mainly Catholic, who were sending their children to Catholic schools.
Therefore, bigotry, prejudice, and nativist attitudes influenced this legislation. The law did not withstand a constitutional challenge and led to the landmark U.S. Supreme Court decision *Pierce v. Society of Sisters* (1925) that established the right of parents to choose the school, public or private, their children attend.

The passage of the Civil Rights Act of 1964 signified the culmination of many months of social and political strife in America. The stage was set in 1954 with the *Brown* decision declaring unconstitutional the “separate but equal” (*Gong Lum v. Rice*, 1927) provision established by *Plessy v. Ferguson* in 1896. The struggle for civil rights for African-Americans continued at a slow but deliberate pace under the Eisenhower administration, picking up speed with Kennedy and finally accomplishing the goal of becoming federal law under the administration of President Lyndon Johnson. The climate of public opinion regarding civil rights steadily grew in favor of the passage of the Civil Rights Act due in large part to the work of civil rights leaders such as Dr. Martin Luther King, Jr. Although Dr. King practiced and preached nonviolence as a means of civil disobedience, others did not. Boycotts, sit-ins, marches, and other means of protest were often met with violence and brutality. These actions raised the awareness of the American people, and soon political action followed. This law is important to public education due to the fact that Title VI of the Act gives the Attorney General the authority to bring suit against those institutions that refuse to follow the law and allow equal access for all students to public educational opportunities. In addition, the authority of the federal government to withhold funds from states and school districts for failure to comply with civil rights requirements was a very influential component of the
In 1965, following the passage of the Civil Rights Act of 1964, Congress passed and President Johnson signed the first comprehensive federal education law, the Elementary and Secondary Education Act (ESEA). In this bill large sums of money were allocated for K-12 education (Title I). These funds were designed for professional development, instructional materials, and resources to support special programs. The principle of redress was introduced in the law that established the practice of providing more funding for low-income children rather than for other children of more affluent means.

ESEA was the most important educational component of President Johnson’s “War on Poverty.” The political strategy to target poor children allowed Johnson to build political support on a bipartisan level and, therefore, pass the legislation (very few had the political will to vote against helping poor children). The Act also signified the switch from general aid to categorical aid and led directly to the expansion of state bureaucracies. The larger bureaucratic infrastructure required more expansive authority and decision-making power on the part of the states. Increased power obviously tipped the balance of power toward the state in determining educational authority in children’s education.

Critics of public education, namely those that support privatization of public schools and homeschoolers, cite the ESEA as “useless and expensive” in promoting many national efforts that have operated contrary to the rights of parents and their authority over the schooling of their children (Miller, 2002).
The Individuals with Disabilities Education Act (IDEA) represented a new dimension in public education with the concept of requiring a “free appropriate public education” (FAPE) for students with disabilities. Implementation of the law meant providing due process rights to determine proper placements and additional opportunities for parents to choose the proper educational placements for their disabled children. IDEA presented a dual responsibility for the federal government. It was both a grants program and a civil rights bill. This two-part responsibility allowed a new opportunity for parents to have influence and choice in the decisions determining the educational placement of their children.

IDEA is currently under consideration for reauthorization. The Bush Administration and the Republican leadership in Congress has sponsored components of the reauthorization initiative to include specific provisions that will allow for parents to have more flexibility in determining the school, public or private, their children will attend.

In a bold move in 1990, the Milwaukee public school system adopted a program designed to expand educational opportunity for children from low-income families. The program, called the Milwaukee Parental Choice Program, allowed state funds to be used to pay the costs of education for low-income children in Milwaukee’s private and religious schools. The Wisconsin State Legislature approved the program as a legislative “attempt to improve the quality of education (Kava, 2003)” in Milwaukee public schools. It was designed as a K-12 opportunity with limits on enrollment, random selection, and the requirement that private schools that participated must comply with
antidiscrimination laws; however, private schools were not considered part of the public school system and were not held to the same reporting and academic standards as the public schools. In addition, private schools were not required to comply with the Individuals with Disabilities Education Act (IDEA).

The contentious issue of providing state funds to sectarian schools was the subject of major legal challenges to this law. The program provided for parents choosing to participate in the program and, if selected, providing for direct payment of state funds to be sent to the private school. The parent would be required to endorse the check. Following several legal challenges, the Wisconsin State Supreme Court upheld the program, and the U.S. Supreme Court, upon appeal, refused to hear the case. Outside evaluation of the program indicates that it has grown in participation significantly since inception. Also, parents seem to be satisfied with the opportunity to make other choices for their children’s education although no clear evidence suggests that academic achievement has significantly increased (Kava, 2003).

When Florida Governor Jeb Bush signed the McKay Scholarship Program into law in June 2000, he instituted a new dimension in the continuing evolution of school choice. The McKay program was a response from a leading Florida lawmaker, Senator John McKay, President of the Florida Senate, who is also the father of a disabled child. In promoting the bill, Senator McKay argued on behalf of families who described an “elitist” public school system and a private system that was financially out of reach. Eligibility for the program was based simply upon a child’s lack of progress at a public school.
Federal law and previous U.S. Supreme Court decisions have established “educational rights” for children with disabilities and require public school districts to pay for private education if public schools cannot provide the services. These rights as defined under IDEA allows for expanded choice opportunities for parents. McKay defined school choice as “making educators more accountable to parents (Herrington and Weidner, 2002).” This definition implied a change in the rules for placement decisions made on behalf of disabled students. No longer would school districts be allowed to determine placements with only token input from parents. The McKay program made parents having the opportunity to choose the placement with or without consent of the school district.

Supporters of the McKay program argued that this innovation in special education would not cost any more than the traditional program; only the placement would differ. Critics contend that no scientific evaluation is able to determine the effectiveness of the program and the funding mechanism will ultimately deny access to middle class and low-income families. In addition, private schools are not bound by nondiscriminatory laws and, therefore, are not required to accept children with disabilities that may have severe or profound handicaps.

Apling notes that the McKay Scholarship experience suggests that participation rates can be quite high if eligibility requirements are modest, and schools are permitted substantial flexibility. Indeed, this is one argument for vouchers and other choice programs, such as charter schools, namely, that by reducing regulatory requirements, schools are freed to be more creative and provide better education. Nevertheless, the
degree of freedom from legal requirements may be inversely related to the degree that IDEA guarantees and protections follow the child and the IDEA funding to the private school. One can surmise that the greater the degree to which federal statutes and regulations are applicable to publicly funded children with disabilities served in private schools, the more likely some or many private schools will choose not to participate (Apling, et al., 2002).

The signing of the No Child Left Behind Act of 2001 (NCLB) by President Bush represented a bi-partisan attempt by the federal government to influence public, K-12 education more than ever before. Considered “landmark” legislation, Bush pronounced this bill to be the “cornerstone of his administration (President Discusses No Child Left Behind, 2004).” Officially described as another reauthorization of the 1965 Elementary and Secondary Education Act (ESEA), NCLB brought into national focus the issues of accountability and public school choice more than ever before. The bill highlighted the term “portability”, which means the money follows the child and introduces the concept, on a national level. In addition, student progress is measured in terms of subgroup performance, namely race/ethnic, economic, special education, gender, and limited-English proficient students.

NCLB, in conjunction with the Zelman v. Simmons-Harris U.S. Supreme Court decision, brought the issue of parental choice to the national forefront. In a twist of good timing for supporters of school choice, the President’s Commission on Special Education recommended that the IDEA include vouchers in its report released on the heels of the Zelman decision upholding the use of publicly financed tuition vouchers at religious
schools (Goldstein, 2002). A highlight of NCLB allows for parents of children who attend schools that do not measure up to performance standards to choose to send their children to other schools that do meet accountability guidelines at district expense. Along with this provision is the requirement that parents must be notified of other issues regarding their children’s education. Other requirements of the bill call for a wide variety of categories:

1. Military recruiters must be given directory information on students unless parents disallow it;
2. Parents must be informed of students’ participation in bilingual education programs and may choose not to include their children in them;
3. Schools’ performance in comparison with other schools must be shared with parents;
4. Teacher quality is measured by attainment of certain credentials; and,
5. The perceived safety of the school is measured according to criteria established to determine a “safe school” (Karp, 2003).

Widespread criticism accompanied the passage of the bill and continues today. Three major educational organizations, the National Education Association (NEA), the American Association of School Administrators (AASA), and the National School Boards Association (NSBA) opposed the legislation and point out several areas that could lead to “chaos and inequality” within the public school environment. “Vouchers have been shown time and again to drain dollars from public schools and fail to improve student achievement,” said Anne L. Bryant, the executive director of the National School
Other topics of criticism include local, state, and national issues:

1. NCLB gives the federal government more control over K-12 education than ever before. Increased federal power is perceived as an assault on local control;
2. Separation of church and state issues are less clear;
3. Teacher creativity and innovation take a less important role due to the increase and emphasis of “high stakes” testing;
4. School choice provisions will lead to increased privatization and vouchers that is an attempt to dismantle public education;
5. No provisions are in the law for creating infrastructure or expanding the ability of the public schools to add space in order to accommodate children who transfer under the choice provisions; and,
6. The “one size fits all” concept of schooling requires schools to ignore the educational consequences of racism and poverty that can hamper student performance (Neill, 2003).

Overall, the bill assumes “market place” solutions based on competition, and the freedom of parents to choose schools for their children will ultimately result in significant improvement in our nation’s schools. Fish concludes that open markets and competition are desirable traits for public education:

Free markets warrant caution, but contain wisdom. They suggest that the aggregate creation, one of all the people together, will find an order and
intelligence beyond what any acting alone or in small groups could create. What better place to do this than in our newspapers, at town meetings, and on the floors of our state legislatures (p. 41).

For schools that do not improve powerful sanctions, including the threat of takeover by the state or some other entity lies at the heart of NCLB. Schools that consistently perform at low levels will lose the opportunity to govern themselves. Navarett (2003) discerns the threat of parental choice as incentives to improve the public schools:

According to Pres. Bush, it is only with the threat that parents with choices might choose something else that schools have any incentive to perform better, to inspire students and to set higher standards. Accountability without consequences means nothing. If parents don’t have choices besides the public schools there is no accountability. Eighty four per cent of public school teachers are white. A teaching profession that is predominantly white is standing in the way of a reform movement that provides schooling options to other people’s children. The effect is to deny opportunity to African-Americans and Latinos. School choice is much more than a political issue. It is the new civil rights movement (p. 3).

In summary, the historical legacy of parental choice is grounded in the desire of the state and federal government to promote and maintain public education as beneficial to American society. Clearly, the recognition that public education is essential to creating good citizens that in turn create a progressive and just society is demonstrated in the historical information presented in this study.
Survey Questions—Analysis

The following analysis is based on solicited responses experts in the field of parental choice.

(1) What should the role of the state or parents be in determining the education of their children?

Six of eight respondents concluded that a delicate balance exists between parents and the states in determining the role each should play in the education of children. States are charged with providing resources while parents have the role and responsibility to provide guidance to school boards through political influence, lobbying, and voting for interests that support public schools. Two respondents indicated that parents have the legal responsibility and authority to choose the school their children will attend.

(2) Horace Mann, an early advocate for universal public education, proclaimed that the public schools should promote responsible citizenship, foster economic opportunity, instill a common morality, and reduce class and ethnic conflict in a heterogeneous society (Imber, 2000). In light of this definition how do you view public education today?

Three respondents concluded that public education is failing and not achieving Mann’s vision for schooling. The failure of society to support the public schools was listed as a reason for failure along with lack of return on investment and moving “backwards” toward resegregation around race and class. One listed parental choice as a key factor in eroding the foundations of public education. Three respondents viewed
public education as generally favorable with the need to further emphasize life long 
learning, higher education, and success in the workplace. One respondent commented on 
the importance of universal public education as the “cornerstone of our democracy” and 
the reason we do not have class-based societies and widespread social and economic 
strife. Mann’s vision as the public schools serving as the vehicle to achieve the American 
dream may not happen unless a proper balance between the role of parents and the state’s 
need ensure a democratic way of life is achieved.

(3) In the debate over parental control of children’s education, at what point do 
state and parent interests clash?

The clash depends, according to one respondent, on the system of choice under 
review. Constitutional considerations require limitations upon certain decisions such as 
separation of church and state, civil rights, and economic issues. On a larger perspective, 
one respondent described self-interest of teacher unions conflicting with the authority of 
parents to provide educational opportunity for their children. Another describes the need 
of one child versus the collective needs of all children. Counter to that, the clash occurs 
when the survival of the “system” takes priority over the child’s needs. One concluded 
that the clash occurs when citizens segregate themselves around race and socioeconomic 
issues with little regard to cultural diversity. A final respondent discusses the concept 
vouchers as the extreme method of choice that causes the conflict with parents and the 
state. Charters and magnet schools are fine, yet the voucher concept has the potential to 
destroy the public schools.
(4) Charter schools, magnet schools, and vouchers signal patterns of choice that are emerging for parents of children who attend public schools. How do you see these patterns working in terms of redefining the institution of public education?

Respondents varied in their opinions regarding patterns of choice. For the most part, vouchers were considered a negative attempt to promote choice among parents. Characteristics describing vouchers ranged from (1) fear that using public funds to support choice options in private/religious schools will lead to the destruction of public schools; (2) re-segregation, religious, and class conflict; and, (3) expressions of an elitist attitude which is dangerous. Elitism is exacerbated by the belief of voucher advocates that monopolies such as the public schools result in mediocrity, and, therefore, competition created by the stigma of a having students leave a school is incentive to improve. The private sector considers competition healthy and promotes productivity, so why should the public school bureaucracy be any different?

On the other hand, respondents in favor of public school choice concluded that charter schools and magnet schools are desirable, particularly in promoting the needs of students over the needs of employees. Proponents of public school choice believed that the public sector would improve because of choice if tax support were dedicated only for public schools.

Three respondents expressed cynicism with regard to choice concepts. One alluded to the obvious pattern that parents are more concerned where their children go to school and with whom rather than the quality of education provided. Another expressed
concern that innovative charter schools have failed in Florida. He cited evidence that the charter movement had produced nothing other than traditional educational programs or offerings. In addition, an inordinate amount of funding has been directed toward charter schools at the expense of public schools. One discerned that diversity in public schools is no longer valued due to parental choice.

Finally, one respondent expressed hope that the ideals Mann and Jefferson had in mind could be realized through magnet schools. Magnet choice options appear more promising due to the fact that they embrace quality educational opportunity coupled with a desire to embrace a diverse student body.

Conclusions

1. Public schools play a valuable role in fostering peace and progress in a heterogeneous society by requiring children to understand the existence of ways of life different from their own. Based on Imber, I conclude that public schools should not try to convert children to beliefs and values that contradict home teachings yet play a valuable role in letting children know that other ideas are worthy of study and understanding (Imber, 2001).

2. The National Center for Education Statistics collected data from 1993-1999 on the topic of parental choice. Upon analysis, I drew the following conclusions:

   a. More families are choosing the public schools their children will attend;
   b. More school districts are allowing parents to send their children to a public school other than their assigned school;
c. The percentage of children in grades 1-12 whose parents sent them to assigned public schools declined from 80% to 76% from the period 1993-1999.
d. Black students were more likely to attend a chosen public school than white or Hispanic students;
e. White students are more likely to attend a private school rather than a black or Hispanic student. (The data suggests that family income and the availability of private schools, private scholarships, and public school choice programs affect this conclusion rather than racial or ethnic preference); and,
f. More students are attending chosen public schools, particularly in the Western United States (i.e., Washington, Colorado, and Arizona) (Contexts of Elementary and Secondary Education, 2002).

3. Provisions for parental choice are considered in significant state and federal education reform initiatives (i.e., Florida’s McKay Opportunity Scholarship Program and the federal No Child Left Behind Act of 2001).

   i. Hirschland and Steinmo caution, however, that the institutionalism and fragmentation of American public education may derail any serious attempt at reform:

   ii. Any work on behalf of educational reform must be undertaken with a conscious and realistic eye toward the profound effects that the historically rooted institutional fragmentation of power in the
United States has had on education and its implications for meaningful national reform plans. Failure to do so will not yield the intended reforming results and will instead maintain the status quo. This is a status quo characterized by an often unequal system of education in a country whose many hopes and inspirations are tied to the very faltering system of public education from which it expects so much. In addition, contributing to, as it now does, only 10% of the educational funding in this country leaves the federal government holding far too little in the way of resources to affect fundamental change. This fact makes it difficult, if not impossible, to overcome the inherent inequalities of contemporary education rooted in the political development that has empowered local over egalitarian interests. Regardless of political persuasion, the politics of the left and the right are equally challenged by this reality and face the same hurdles to meaningful reform. Whether it be securing a system of educational vouchers or mandating more equal or targeted spending for all children regardless of where they live, change that emanates from the center will prove to be difficult if not impossible (p. 360).

4. Opposition to parental choice opportunities for parents comes from a variety of interest groups. Vouchers draw the most resistance as demonstrated by vigorous efforts of the National Education Association (NEA), the American Association
of School Administrators (AASA), and the American School Board Association (ASBA) opposing legislation designed to expand voucher opportunities. Public school choice options such as magnet schools and charter schools are generally supported by the public school community.

5. The U.S. Supreme Court has consistently protected parental rights in education. U.S. Supreme Court decisions cited in this study indicate a patterned response to legislation that attempts to impose the power of the state over the rights of the individual. In protecting the rights of parents to choose a teacher or a school as defined in *Meyer* and *Pierce*, the Court has handed down decisions that changed the perception and role of public education in the United States. While serving in its judicial capacity as determiner of constitutional validity, the Court has extended civil rights, religious freedom, and currently plays the role of lead agent of educational reform in approving choice opportunities for parents. Hirschland notes, however, “the gross inequalities throughout the system of U.S. education cannot be adequately addressed due to institutional protection of local authority embedded in the U.S. Constitution (Hirschland and Steinmo, 2003, p. 359).”

6. The federal government is seeking more power and influence in directing public education. Hirschland perceives, and I support, the proposition that continuing efforts to increase federal control over the public schools will not be as easy as passing legislation. Hirschland and Steinmo do not have high expectations for meaningful change:
7. The awkward and institutionally challenged federal machinery is still not up to the task. Flying in the face of entrenched local interests and (often racist) attitudes—including socioeconomic disparities, as they impact educational funding—hopes for meaningful change should not be high (p. 360).

8. Historical evidence with regard to recent legislation and legal decisions are in support of parents having the opportunity to survey a wide range of options and select the type of school that offers the best educational opportunity for their children.

9. Home schooling is rapidly becoming a legitimate for parents. Miller cites optimism in the form of legislation offered by the Religious Liberty Protection Act (RLPA), recently passed by the House of Representatives and pending in the Senate. RLPA is an attempt to undo the damage of recent Supreme Court decisions undermining religious freedom protections. The Act restores the compelling state interest that had protected religion prior to 1990 and which resulted in decisions like *Pierce* and *Yoder*. No guarantee exists that the federal courts would recognize such a right under the act. Nevertheless, the act could restore the test that produced *Pierce* and *Yoder*. Such action could create reasonable hope that courts would extend protection to home-schoolers (Miller, 2002).

10. Parental Choice is here to stay. I concur with the superintendent of schools Scott Cowart, Monroe County School District, Georgia: “We might as well get used to
it. Choice is here to stay. There is no point fighting it, we should instead spend our time on learning how to deal with it (personal conversation, April, 15 2004).”

11. The capacity of public schools to support and sustain high-stakes testing is rapidly becoming a key component of the k-12 education environment. Emphasis upon student performance as a tool to measure school, teacher, and administrator effectiveness is a response to perceived pressure to improve the public schools.

12. A precarious balance exists between competing parties, namely the state and parent, with regard to the issue of parental choice. A shift one way or the other swings the pendulum to a point whereby individual freedoms may be compromised by state control, or the need to promote a societal need may be compromised by individual wishes and desires contrary to state design.

Summary

Parental choice within the context of the public schools is a complex issue that warrants time and consideration on the part of parents, school officials, lawmakers, and community leaders. Seemingly fundamental in its scope, the concept of parents choosing the education for their children is a relatively new term for most Americans. The perception of state-controlled public schools as an integral component of our democratic society was unquestioned until recently. The advent of an emerging generation of parents, lawmakers, and judges has successfully challenged the K-12 education establishment with laws and federal court decisions that is changing the role of the public schools.
While the concept of parental choice within the public school environment has made significant inroads in the form of magnet and charter schools, an active and vociferous group is demanding privatization and vouchers as acceptable options. This debate has shaken the bedrock of public schools. Proponents and critics of choice agree that the winners of the debate will ultimately shape the future of public education.

Implications

I have found through analysis of the legal and historical records a variety of attitudes toward parental choice that suggest important implications for educational policy makers, educational leaders, lawmakers, and other interested parties.

1. The federal government will continue efforts to increase control and influence over K-12 public education.
2. Schools as institutions for addressing “social ills” (e.g., racism, poverty, teen pregnancy) will redirect their efforts toward focusing on academic improvement and quality of education.
3. Parental authority over children’s education will continue to gain momentum as evidenced by increasing numbers of homeschoolers, choice legislative options, and perceptions that the public schools are failed institutions.
4. Resegregation will occur as emphasis will be placed on quality of education as opposed to “equal access” issues. In addition, parental choice will become a popular political tool for law makers intent upon changing K-12 education.
5. An increasingly diverse K-12 student population coupled within a “high stakes” testing and standards environment will create a rigid structure for learning in which little flexibility will be allowed to meet individual student needs.

6. Within the legal domain, principles of neutrality, religious freedom, and education as a “liberty” interest will continue to influence the federal courts.

7. Accountability for teachers and school administrators, as measured by student performance based on educational standards, will continue as the benchmarks upon which the quality of public education is determined.

8. Competition among public schools will become more of an issue as school “grading”, the threat of state sanctions, and the risk of losing local control loom over the heads of public school officials.

Recommendations for further study include:

1. Analysis of attitudes and/or perceptions of choice opportunities from parents whose children attend “failing” schools.

2. Analysis of attitudes and/or perceptions of choice opportunities from students who attend “failing” schools.

3. Analysis of education advocacy groups’ (i.e. PTA, NAACP, Home school associations) perceptions of parental choice.

4. Analysis of political implications of parental choice with regard to local, state and national education goals.
5. Analysis of the increasing federal influence in public education.
REFERENCES


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Appendix 1

No Child Left Behind Act of 2001

Title I: Improving the Academic Achievement of the Disadvantaged.

Sec. 1116. Academic Assessment and Local Educational Agency and School Improvement

(5) Failure to Make Adequate Yearly Progress After Identification.-In the case of any school served under this part that fails to make adequate yearly progress, as defined by the State under section 1111(b)(2), by the end of the first full school year after identification under paragraph (1), the local educational agency serving such school-

(A) shall continue to provide all students enrolled in the school with the option to transfer to another public school served by the local educational agency in accordance with subparagraphs (E) and (F);

(B) shall make supplemental educational services available consistent with subsection (e)(1); and

© shall continue to provide technical assistance.

(6) NOTICE TO PARENTS.-A local educational agency shall promptly provide to a parent or parents (in an understandable and uniform format and, to the extent practicable, in a language the parents can understand) of each student enrolled in an elementary school or secondary school identified for school improvement under paragraph (1), for corrective action under paragraph (7), or for restructuring under paragraph (8)…
Appendix 1 (cont.)

(F) an explanation of the parents’ option to transfer their child to another public school under paragraphs (1)(E), (5)(A), (7)(C)(i), (8)(A)(i), and subsection (c)(10)(C)(vii) (with transportation provided by the agency when required by paragraph (9) or to obtain supplemental educational services for the child, in accordance with subsection (e).
Appendix 2

Title IV of the Civil Rights Act of 1964

U.S. C. Title 42-The Public Health and Welfare
Chapter 21-Civil Rights
Subchapter IV-Public Education

2000c. Definitions

As used in this subchapter-

“Secretary” means the Secretary of Education.

“Desegregation” means the assignment of students to public schools and within such schools without regard to their race, color, religion, sex, or national origin but “desegregation” shall not mean the assignment of students to public schools in order to overcome racial imbalance.

(c) “Public school” means any elementary or secondary educational institution, and “public college” means any institution of higher education or any technical or vocational school above the secondary school level, provided that such public school or public college is operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source.

“School Board” means any agency or agencies which administer a system of one or more public schools and any other agency which is responsible for the assignment of students to or within such system.
Appendix 2 (cont.)

2000c-2. Technical assistance in preparation, adoption, and implementation of plans for desegregation of public schools

The Secretary is authorized, upon the application of any school board, State, municipality, school district, or other governmental unit legally responsible for operating a public school or schools, to render technical assistance to such applicant in the preparation, adoption, and implementation of plans for the desegregation of public schools. Such technical assistance may, among other activities, include making available to such agencies information regarding effective methods of coping with special education problems occasioned by desegregation, and making available to such agencies personnel of the Department of Education or other persons specially equipped to advise and assist them in coping with such problems. (retrieved from the world wide web: www.Maec.org/laws/title4.html 12/03/03)
Appendix 3

Excerpts from legislation that established “The John M. McKay Scholarships for Students with Disabilities Program”:

F.S. 229.05371 (1) The John M. McKay Scholarships for Students with Disabilities Program is established to provide the option to attend a public school other than the one to which assigned, or to provide a scholarship to a private school of choice, for students with disabilities for whom an individual education plan has been written in accordance with rules of the Commissioner of Education or the State Board of Education. Students with disabilities include K-12 students who are mentally handicapped, speech and language impaired, deaf or hard of hearing, visually impaired, dual sensory impaired, physically impaired, emotionally handicapped, specific learning disabled, hospitalized or homebound, or autistic.

(2) Scholarship Eligibility—The parent of a public school student with a disability who is dissatisfied with the student’s progress may request and receive from the state a John M. McKay Scholarship for the child to enroll in, and attend a private school … if:

(a) …the student has spent the prior school year in attendance at a Florida public school….and

(b) The parent has obtained acceptance for admission of the student to a private school that is eligible for the program…and has notified, in writing, the school district of the request for a scholarship at least 60 days prior to the date of the first scholarship payment…For the purposes of continuity of educational choice, the scholarship shall remain in force until the student returns to a public school or graduates from high school.

(3) School District and Department of Education Obligations.—

(a) A school district shall timely notify the parent of the student of all options available pursuant to this section and offer that student’s parent an opportunity to enroll the student in another public school within the district. The parent is not required to accept this offer in lieu of requesting a John M. McKay Scholarship to a private school…The parent is responsible to provide transportation to a public school chosen that is not consistent with the school board’s choice plan under s.228.057.

(c) If the parent chooses the private school option and the student is accepted by the private school pending the availability of space for the student, the parent of the student must notify the school district 60 days prior to the first scholarship payment and before entering the private school in order to be eligible for the scholarship when a space
Appendix 3 (cont.)

(d) becomes available for the student in the private school.
(e) The parent of a student may choose, as an alternative, to enroll the student in and transport the student to a public school in an adjacent school district which has available space and has a program with the services agreed to in the student’s individual education plan already in place….the school district shall accept the student and report the student for the purposes of the Florida Education Finance Program.

(4) Private School Eligibility.—…a private school must be a Florida private school, may be sectarian or nonsectarian, and must:
(a) Demonstrate fiscal soundness…by providing the Dept. of Education with a statement by a certified public accountant confirming that the private school desiring to participate is insured and the owners or owner have sufficient capital or credit to operate the school for the upcoming year serving the number of students anticipated with expected revenues from tuition and other sources that may be reasonably expected.
(b) Notify the Department of Education of its intent to participate in the program under this section by May 1 of the school year preceding the school year in which it intends to participate.
(c) Comply with the antidiscrimination provisions of 42 U.S.C. s. 2000d.
(d) Meet state and local health and safety laws and codes.
(e) Be academically accountable to the parent for meeting the educational needs of the student.
(f) Employ or contract with teachers who hold baccalaureate or higher degrees, or have at least 3 years of teaching experience in public or private schools, or have special skills, knowledge, or expertise that qualifies them to provide instruction in subjects taught.
(g) Comply with all state laws relating to general regulation of private schools.
(h) Adhere to the tenets of its published disciplinary procedures prior to the expulsion of a scholarship student.

(5) Obligation of Program Participants.—
(a) A parent who applies for a …Scholarship is exercising his or her parental option to place his or her child in a private school. The parent must select the school and apply for admission of his or her child..
(b) The parent must have requested the scholarship at least 60 days prior to the date of the first scholarship payment.
(c) Any student participating in the scholarship must remain in attendance throughout the school year unless excused for illness or other good cause, and must comply with the school’s code of conduct.
(d) The parent must comply with the school’s parental involvement requirements.
Appendix 3 (cont.)

If the parent requests that the student participating in the scholarship program take all statewide assessments required pursuant s. 229.57, the parent is responsible for transporting the student to the assessment site designated by the school district.

e) Upon receipt of a scholarship warrant, the parent to whom the warrant is made must restrictively endorse the warrant to the private school for deposit into the account of the private school.

(6) Scholarship Funding and Payment.—
(a)1. The maximum scholarship granted for an eligible student with disabilities shall be a calculated amount equivalent to the base student allocation in the Florida Education Finance Program multiplied by the appropriate cost factor for the educational program that would have been provided for the student in the district school to which he or she was assigned, multiplied by the district cost differential.
2. In addition, a share of the guaranteed allocation for exceptional students shall be determined and added to the calculated amount.
(b) The amount of the scholarship shall be the calculated amount or the amount of the private school’s tuition and fees, whichever is less.
(d) The school district shall report all students who are attending a private school under this program.
Appendix 4

IDEA Parental Choice Act

1st Session

H. R. 1373

To provide options to States to innovate and improve the education of children with disabilities by expanding the choices for students and parents under the Individuals with Disabilities Education Act.

IN THE HOUSE OF REPRESENTATIVES

March 20, 2003

Mr. DEMINT (for himself, Mr. BOEHNER, Mr. HOEKSTRA, Mrs. MUSGRAVE, and Mr. FEENEY) introduced the following bill; which was referred to the Committee on Education and the Workforce

A BILL

To provide options to States to innovate and improve the education of children with disabilities by expanding the choices for students and parents under the Individuals with Disabilities Education Act.
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'IDEA Parental Choice Act of 2003'.

SEC. 2. AMENDMENTS TO THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT.

(a) RESEARCH AND INNOVATION TO IMPROVE SERVICES AND RESULTS FOR CHILDREN WITH DISABILITIES- Section 672(b)(2) of the Individuals with Disabilities Education Act (20 U.S.C. 1472(b)(2)) is amended by adding at the end the following:

'(I) Supporting the post-award planning and design, and the initial implementation (which may include costs for informing the community, acquiring necessary equipment and supplies, and other initial operational costs), during a period of not more than 3 years, of State programs that allow the parent of a child with a disability to make a genuine independent choice of the appropriate public or private school for their child, if the program--

'(i) requires that the child--

'(I) have been determined to be a child with a disability in accordance with section 614; 

'(II) have spent the prior school year in attendance at a public elementary or secondary school unless the child was served under section 619 or part C during such year; and
Appendix 4 (cont)

(III) have in effect an individualized education program (as defined in section 614(d)(1)(A));

(ii) permits the parent to receive from the eligible entity funds to be used to pay some or all of the costs of attendance at the selected school (which may include tuition, fees, and transportation costs);

(iii) prohibits the selected school from discriminating against eligible students on the basis of race, color, or national origin; and

(iv) requires the selected school to be academically accountable to the parent for meeting the educational needs of the student.

(b) CHILDREN ENROLLED IN PRIVATE SCHOOLS BY THEIR PARENTS- Section 612(a)(10)(A) of the Individuals with Disabilities Education Act (20 U.S.C. 1412(a)(10)(A)) is amended by adding at the end the following:

(iii) PARENT OPTION PROGRAM- If a State has established a program described in section 672(b)(2)(I) (whether statewide or in limited areas of the State) that allows a parent of a child with a disability to use public funds to pay some or all of the costs of attendance at a public or private school--

(I) funds allocated to the State under section 611 may be used to supplement those public funds, if the Federal funds are distributed to parents who make a genuine independent choice as to the appropriate school for their child;
Appendix 4 (cont.)

`(II) the authorization of a parent to exercise this option fulfills the State's obligation under paragraph (1) with respect to the child during the period in which the child is enrolled in the selected school; and

`(III) a private school accepting those funds shall be deemed, for both the programs and services delivered to the child, to be providing a free appropriate public education and to be in compliance with section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794).'.

(c) PERMISSIVE USE OF FUNDS- Section 613(a)(4) of the Individuals with Disabilities Education Act (20 U.S.C. 1413(a)(4)) is amended by adding at the end the following:

`(C) SUPPLEMENTAL EDUCATIONAL SERVICES FOR CHILDREN WITH DISABILITIES IN SCHOOLS DESIGNATED FOR IMPROVEMENT- For the reasonable additional expenses (as determined by the local educational agency) of any necessary accommodations to allow children with disabilities who are being educated in a school identified for school improvement under section 1116(b) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6316(b)) to be provided supplemental educational services under section 1116(e) of such Act on an equitable basis, if such children with disabilities are eligible children (as defined in section 1116(e)(12)(A) of such Act).'.

(d) ALLOWING CHILDREN TO RECEIVE EARLY INTERVENTION SERVICES UNTIL AGE 6-
Appendix 4 (cont.)

(1) IN GENERAL- Section 632(5) of the Individuals with Disabilities Education Act (20 U.S.C. 1432(5)) is amended--

(A) in subparagraph (A), by striking `and' at the end;

(B) in subparagraph (B), by striking the period at the end and inserting `; and'; and

(C) by adding at the end the following:

`(C) may also include, at a State's discretion, a child aged 3 through 5, who previously received services under this part and who is eligible for services under section 619, if services provided to this age group under this part include an educational component that promotes school readiness and incorporates scientifically based pre-literacy, language, and numeracy skills.'.

(2) REQUIREMENTS FOR STATEWIDE SYSTEM- Section 635 of the Individuals with Disabilities Education Act (20 U.S.C. 1435) is amended by adding at the end the following:

`(c) TREATMENT OF CHILDREN AGED 3 THROUGH 5- If a State includes children described in section 632(5)(C) in the system described in section 633, the State shall be considered to have fulfilled any obligation under part B with respect to the provision of a free appropriate public education to those children during the period in which they are receiving services under this part.'.
About the Author

Derrel J. Bryan received a Bachelor of Arts degree in Social Science Education from the University of South Florida in 1972 and earned a Master of Arts degree in Administration and Supervision from Western State College, Colorado in 1988. He began teaching in the public schools and coaching in December of 1972. Bryan’s educational career has spanned 30 years, and includes experience as a district administrator, principal, and superintendent of schools in one Florida (Hardee) and one Georgia (Peach) school district.

Bryan entered the Ed.D. program for Educational Leadership and Policy Studies at the University of South Florida-Lakeland campus during the fall of 1999. He currently serves as principal of Lake Placid Middle school in Lake Placid, Florida.