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How Legislation and Litigation Shape School Choice

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Executive Summary

Since its appearance on the educational landscape, school choice has engendered considerable controversy. Those controversies are captured in two forms of “law”—legislation and litigation. Government legislation at all levels codifies the results of political struggles around school choice and defines choices available to parents. Those unhappy with the results have brought litigation to determine whether the policies are consistent with constitutional provisions and other existing laws. This policy brief examines the relationships between various forms of school choice and the legal authority that both binds and bounds them. As the discussion will show, both the development of and legal challenges to school choice in its various forms can be traced to a tension between the legal principle that parents should be able to direct the upbringing of their children and the legal principle of *parens patriae* (the government is the ultimate guardian), which forms the foundation for compulsory education in the United States. As such, school choice legislation and litigation go to the very heart of public education and the societal values it reflects.

In light of recent legal events, the following recommendations are offered to officials to guide their work as they consider the implications of the choice initiatives established, the purposes they intend to serve, and the civic principles embedded by their adoption:

- Examine parental choice programs to ensure that they espouse the values of the communities they serve in a manner consistent with federal and state constitutional guarantees.
- Ensure that parental choice programs serve educational opportunity and equity rather than undercut them.
- Consider carefully the implications of any choice program, not only for those who “choose” but also for those who do not.
- Engage the research community not only to inform the debate about effectiveness, but also to track the implications of the various choice programs undertaken.

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Introduction

Since its appearance on the educational landscape, school choice has engendered considerable controversy. Those controversies are captured in two forms of “law”—legislation and litigation. Legislation at all governmental levels codifies the results of political struggles around school choice and defines the actual choices available to parents. Numerous forms of school choice have been created through this political process, including magnet schools, interdistrict choice, intradistrict choice, charter schools, home schooling, and voucher programs. These choice programs vary with respect to the children eligible to participate, the universe of schools from which a parent may choose, and the funding that may support the choice. Likewise, litigation has been brought to determine whether those legislative enactments are consistent with constitutional provisions and other existing laws. When courts have determined that school choice exceeds legal boundaries, programs have been struck down. Legislation and litigation, therefore, have shaped school choice in direct and significant ways. This brief examines the relationships between various forms of school choice and the legal authority that both binds and bounds them.¹ As the discussion will show, both the creations of and legal challenges to school choice can be traced to a tension between the legal principle that parents should be able to direct the upbringing of their children and the legal principle of *parens patriae* (the government is the ultimate guardian), which forms the foundation for compulsory education in the United States.

Parens Patriae and the History of School Choice Legislation

Parens Patriae

In order to understand how legislation and litigation shape school choice, it is first necessary to understand how various school choice options came to be. Writ large, school choice—the concept that parents decide where and how their children will be educated—has always existed. Initially, of course, education existed only for the wealthy, and any education received was closely aligned with the occupation and status of the parents. It was not until the 19th century that formal public education, supported by a governmental body, began to be offered.² Not long after, the first compulsory education laws were adopted, first in

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Massachusetts in 1853 and by the majority of states by the end of century.³ Like many laws designed to promote the “general welfare,” compulsory education provisions stem from the legal principle known as *parens patriae*.

Parens patriae is Latin for “father of his country” and refers to the common law doctrine that the state serves as parent to us all.⁴ In other words, the state has interests independent from its citizens that may even outweigh the individual interests of those citizens. As applied to schools, it refers to the state’s interest in ensuring an educated citizenry and in defining what it means to be educated.⁵ Thus, *parens patriae* forms the legal foundation for compulsory school attendance laws. Even if a parent believes that education serves no purpose, that parent may not elect to withhold educational opportunities from a son or daughter. The state may legitimately and lawfully compel all parents to educate their children and penalize any parent who refuses.

But the doctrine of *parens patriae* is not without limits. Several lawsuits have been filed over the years asserting that the state has overstepped its boundaries with respect to compulsory schooling. The Supreme Court’s 1925 decision in *Pierce v. Society of Sisters* best illustrates the balance of interests that must be struck.⁶ Private school operators challenged an Oregon statute that required children to attend public schools in order to satisfy compulsory attendance requirements. The Court agreed with the schools that the law unjustifiably

interfere[d] 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 the Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.⁷

Accordingly, states have the authority to compel children to be educated and to define reasonable minimum expectations for that education, but may not require *public* education. As such, it can be argued that *Pierce* was the first important school choice decision.

Modern School Choice Develops

For many years, then, school choice was limited to a selection between public and private schools for those parents with the means to pay for private education. Children enrolled in whatever public school served their neighborhood or community, and place of residence dictated the public school available to parents.⁸

Those opposed to desegregation in the aftermath of the Supreme Court’s decision in *Brown v. the Board of Education* capitalized on the distinction between universal public school access and controlled private

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school access as a means to subvert the Court's directive to dismantle segregation with "deliberate speed."⁹ For example, officials in Prince Edward County, Virginia, refused to desegregate, choosing instead to close all public schools and provide vouchers to private schools, which they knew to be limited and segregated. These so-called "choice academies" operated in several southern states, including Alabama, Georgia, Louisiana, Mississippi, and Virginia.¹⁰ The Supreme Court struck down the Prince Edward County plan as unconstitutional in 1964 in *Griffin v. County School Bd. of Prince Edward County*.¹¹ Similarly, five years later, the Court struck down a "freedom of choice" plan that allowed students to select which public school they wished to attend in the previously segregated New Kent County, Virginia, Schools (*Green v. County School Board*).¹² In *Green*, the Court held that public officials had an obligation to take affirmative steps to desegregate public schools and that relying on parental choice, given the history of *de jure* segregation, was an insufficient response to the constitutional injury declared by *Brown*. Accordingly, racial politics and school choice became intertwined.¹³

Also during the 1950s and 1960s, the primary market-based arguments for school choice, the foundational policy arguments, also evolved. Economist Milton Friedman most influenced ideas about school choice.¹⁴ In his seminal 1962 work, *Capitalism and Freedom*, Friedman argued that all parents, rich and poor alike, should have available to them the option to enroll their child in any school.¹⁵ To support those selections, he proposed that parents be provided a "voucher" that could be redeemed at any school, thus creating competition between schools, which, he maintained, would spur excellence in an effort to retain students.

Friedman's idea, however, was not put into practice until the 1970s, and then, only on a modest scale. The application of school choice that evolved during that decade continued the earlier linkage of race and choice, but with an opposite goal. In contrast to earlier efforts to harness parental choice to retain segregation, during this period some school districts began employing choice options as a means to desegregate schools.¹⁶ Often as part of court desegregation orders, school districts created magnet schools, each with a special curricular focus, as a way to attract parents to enroll their children in schools they would not ordinarily attend in order to encourage voluntary integration.¹⁷ Thus, parents could choose to have a child attend a neighborhood school or a magnet school with some special attraction. However, although choices were available, Friedman's concept of competition among schools was largely absent.

Also in the early to mid-1970s, the federal government initiated an early experiment in school choice in Alum Rock, California, to test its effect on student achievement and other things.¹⁸ Sponsored by the Office of Equal Opportunity, the program allowed parents to choose among public schools. Officials originally intended the experiment to include

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private schools, but that aspect of the study was never implemented. The results proved not to be instructive, however, due to what study authors concluded were a number of design flaws. Still, the concept of studying a link between achievement and parental choice would foreshadow choice programs that developed later.

During the 1970s and early 1980s, school districts and states also began to develop intradistrict and interdistrict choice programs. Intradistrict choice programs allow students to enroll in any school in the district or a portion of the district without regard to residence. Frequently, urban districts divide their schools into attendance zones. Students are guaranteed enrollment within their zone and at a school in which a sibling is enrolled. Open seats are then filled by those residing outside the zone, although there may be some limits on publicly provided transportation. These programs have generally been initiated by local officials, although states may support efforts through funding. Perhaps one of the earliest and best known examples of this type of choice began operation in East Harlem, New York, in Manhattan's District No. 4.¹⁹

Interdistrict programs allow students to enroll in a school in another school district. There are generally two types of such programs. The first, city-suburban transfer programs, were typically initiated by state legislatures as a means of voluntary integration. They fund transfers between neighboring districts as means to reduce racial isolation in urban areas.²⁰ The second type of interdistrict choice program allows open enrollment in any public district in the state. As a rule, these public school choice programs grant enrollment priority based on residence, with outside choosers competing for remaining available slots. Currently, approximately 41 states have adopted some sort of interdistrict open enrollment policy.²¹

Statewide open enrollment plans illustrate a shift in the rationale for choice programs. These programs and other school choice plans evolved in the 1980s and 1990s as a means to advance general school reform. It was at this time that political bodies began to embrace Friedman's idea of an educational marketplace. Partly in response to the 1983 National Commission on Excellence in Education report entitled *A Nation at Risk*, which argued that public schools were generally failing in their mission, policymakers at all levels began to look more favorably at choice programs, including voucher programs and charter school programs, on the theory that competition would motivate school authorities to achieve excellence. Perhaps the most vocal champions of this argument were John Chubb and Terry Moe of the Brookings Institution. Chubb and Moe argued that school choice had the capacity to radically reform publicly funded education. As they explained:

Choice is a self-contained reform with its own rationale and justification. It has the capacity *all by itself* to bring about the kind of transformation that, for years, reforms have

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been seeking to engineer in myriad other ways. . . .The whole point of a thoroughgoing system of choice is to free schools from . . . disabling constraints by sweeping away the old institutions and replacing them with new ones. Taken seriously, choice is not a system-preserving reform. It is a revolutionary reform that introduces a new system of public education.²²

The most complete expression of this idea was the enactment of voucher programs in Milwaukee and Cleveland, created as a means to allow parents to exit these troubled urban systems by providing eligible low-income students public funds to pay tuition at participating private schools in each city.²³

Also during this period, Minnesota introduced public charter schools, which are relieved from state regulation in exchange for being bound by a performance contract. As will be discussed more fully below, 40 states, the District of Columbia and Puerto Rico have now enacted public charter school legislation.²⁴

Finally, technological advances allowed schools, districts and states to create virtual educational alternatives in the form of cyber schools. At least fifteen state educational agencies now operate some form of virtual school,²⁵ while more than 200 charter schools offer the same option to parents and students, though not all deliver instruction exclusively via the Internet.²⁶

As these publicly funded school choice initiatives were developing, states also relaxed compulsory education statutes to allow parents to educate their children at home. Prior to the 1980s only two states, Nevada and Utah, allowed parents to meet compulsory attendance laws by home schooling. By the middle of the 1990s, home schooling was allowed in all fifty states, though states vary with regard to how much regulation governs home schools.²⁷

While all of these options evolved from state and local policies, the federal government, too, played a role. Congress used its power of the purse to enact a number of statutes that supported the various efforts through funding, often in the form of grants. For example, the Magnet School Assistance Program was enacted in 1984 and provided funds to local school districts employing magnet schools in their integration efforts.²⁸ Likewise, the Charter School Expansion Act of 1998 created grants to support the expansion of charter schools in those states permitting them.²⁹ Versions of both these laws exist today as part of the No Child Left Behind Act of 2001 (NCLB).³⁰ In addition, NCLB employs school choice as a penalty for schools that fail to demonstrate adequate yearly progress (AYP) toward universal student proficiency on state assessments of reading, math, and science achievement. NCLB's choice provisions will be described in greater detail below and, as will be shown, mark a dramatic shift in federal support for choice.

How Legislation and Litigation Shape School Choice

As this discussion illustrates, legislation has evolved at all levels to govern an array of school choice options. As each option developed, parents were provided with another means of satisfying compulsory school attendance provisions. Table 1 lists each type of school choice and the level of legislation or policy making that controls the implementation of the school choice options available to parents.

Table 1: Legislation that Defines and Governs Forms of School Choice

	Federal	State	Local
Charter Schools	Federal funds to support development	State laws define	Local school districts serve as authorizers and operators
Cyber Schools		State laws define	Local board decision
Home schooling		State law defines	Local policies may allow partial enrollment & participation in activities
Interdistrict Choice			
- <i>City/Suburban Plans</i>	NCLB encourages for schools that fail to make AYP	State laws define	Local policy directs/elects participation
- <i>Statewide Open Enrollment</i>	NCLB encourages for schools that fail to make AYP	State laws define	Local policy directs/elects participation
Intradistrict Choice			
- <i>Magnet Schools</i>	Federal law encourages through funding	State law may encourage through funding	Local board decision
- <i>Intradistrict transfer</i>	NCLB requires for some students		Local board decision
Vouchers		State laws define	

Litigation Shapes School Choice

In the same way that legislation shapes the school choices available to parents, so too has litigation fashioned the programs currently operating. As with any controversial policy, opponents have sometimes used the court system to mount formal legal challenges to school choice. In some instances, litigants alleged that policy-makers had exceeded boundaries set either by federal or state constitutional guarantees, or both. Others mounted challenges asserting that a program was operating in ways that violated statutory requirements.

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The scope of this brief does not permit an exhaustive review of school choice litigation; however, the majority of legal issues raised by such cases fall into six categories, each of which is briefly discussed below:

1. Whether the school choice program violates the establishment or free exercise of religion clauses, or both, in state and federal constitutions.
2. Whether the operation of school choice programs results in discrimination on the basis of race.
3. Whether the regulation of choices impinges on parents' rights without adequate due process in violation of state and federal constitutions.
4. Whether the school choice program is consistent with states' constitutional obligations to offer a public education under each state constitution.
5. Whether school choice programs must provide access and programming to allow children with disabilities to participate in the program.
6. Whether the choice program operates in a manner consistent with statutory requirements.

Religion Clause Cases

The First Amendment contains two religion clauses. The first, the Establishment Clause, prohibits government officials from adopting any policy or practice "respecting an establishment of religion."³¹ The second clause of the same amendment prohibits government officials from prohibiting the free exercise of religion.³² School choice has sparked litigation under both clauses. Establishment Clause cases center on whether a particular choice results in state support or sponsorship of religion or religious teaching. Free Exercise cases examine whether state rules regarding various choice options result in an impermissible infringement on parents' or students' exercise of religious beliefs.

Arguably the legal issue receiving the most public press centers on the whether states can include private religious schools in any voucher program. The Milwaukee, Cleveland, and Washington, D.C., programs all allow private religious schools to participate in their programs, providing public funding for both religious and secular education.³³ Challengers to both the Milwaukee and Cleveland programs alleged that allowing public funds to purchase private religious education violated the Establishment Clause of the First Amendment to the United States Constitution.³⁴ The question was resolved by a sharply divided U.S. Supreme Court in *Zelman v. Simmons-Harris* in 2002, when the Court upheld the Cleveland program.³⁵ The five-member majority held that the program served a

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legitimate secular purpose of providing low-income families a means to purchase educational opportunities for their children. In addition, the Court held that as long as parents (the recipients of the aid) were not held to religious criteria for participation and had available to them a “genuine choice” from among a variety of secular and sectarian schools, the program was not unconstitutional. A key factor in the ruling was the fact that the decision to enroll in a religious school was made by private individuals, not the state.

While *Zelman* settled the matter under the federal constitution with respect to similarly designed programs, some have questioned whether state constitutions will be similarly interpreted.³⁶ Some state constitutions appear to set a higher standard for public funds that aid religious institutions even indirectly. So far, however, cases making such claims have generally been decided on other grounds.³⁷

Charter schools, too, have been challenged on religious grounds.³⁸ One recent case considered whether the curriculum adopted by charter schools had improperly employed religious teachings. The Ninth Circuit Court of Appeals reversed the lower court’s dismissal of the claim, allowing it to go forward.³⁹ Since charter schools are public schools, the same rules regarding the teaching religious subjects apply to charter schools.⁴⁰ That is, public school teachers may teach *about* religion, but may not teach religion *per se*.⁴¹

Sometimes, however, the challenge is brought by parents wanting more, not less, religious instruction. This type of litigation asserts that parents’ right to exercise their religion is unnecessarily abridged by various policy enactments. For example, parents living in a Maine school district without a high school filed suit on the premise that limiting their publicly funded choices to public schools or non-sectarian private schools violated their right to freely exercise their religion as they wished their children to be educated in a religious school. The Supreme Court of Maine rejected the claim, reasoning that while the parents preferred religious education, obtaining it was not central to the exercise of their beliefs.⁴² Accordingly, their rights to free exercise had not been violated. After the U.S. Supreme Court upheld vouchers in *Zelman*, some Maine parents renewed this objection in federal court. However, the result was the same.⁴³ The court relied on earlier decisions and the Supreme Court’s holding in a higher education case. That case, *Locke v. Davey*, determined that while religious choices could be made available without offending the Establishment Clause, the Free Exercise Clause did not compel states to include religious options in the choice programs they developed.⁴⁴

Discrimination Cases

Given the history of school choice and its connection to desegregation and the directive from *Brown v. Board of Education*, it is a bit ironic to note that even school choice initiatives aimed at integrating

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public schools frequently have had to be defended against claims of discrimination under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.⁴⁵ As policymakers employed these programs as a means to voluntary integration, programs often used race-conscious student selection processes. That is, students' requests to transfer to a preferred school would be granted only if enrollment aided the district or school in creating integrated educational environments. Such systems necessarily resulted in some students being denied transfer requests on the same basis. These students and their parents have challenged such systems as violating the Equal Protection Clause.

Such litigation recently culminated in the Supreme Court decision in *Parents Involved In Community Schools v. Seattle School District Number 1*.⁴⁶ A narrow majority of the Court found unconstitutional the voluntary intradistrict choice programs implemented in Seattle and Louisville. However, no majority of justices agreed on both the holding and the legal reasoning. Chief Justice Roberts and Justices Scalia, Thomas, and Alito concluded that race would be a proper consideration for student enrollment only when plans are used to remedy judicial findings of state discrimination. Justice Kennedy, while agreeing that the Seattle and Louisville programs violated the Fourteenth Amendment, concluded that race-conscious objectives could be pursued as long as they did not result in a student being denied an admission request based on race. Because this decision is so recent, policymakers have only begun to consider its implications for other choice programs that seek to attain racial diversity by persuading parents to enroll students in schools they might not have attended otherwise.

Due Process

As mentioned earlier, *Pierce v. the Society of Sisters* determined that Oregon had unreasonably limited parents' rights to control the upbringing of their children by requiring attendance at public schools. In constitutional terms, this conclusion is an example of a substantive due process violation. Substantive due process, guaranteed under the Fourteenth Amendment, is an issue of fundamental fairness. Violations occur when government policymakers overreach their authority and deny a citizen or group of citizens liberty or property without adequate due process—that is, without adequate justification. All government policies and practices must, at a minimum, be rationally related to a legitimate state interest.

Examples of substantive due process cases in relation to school choice are evident in home-schooling litigation. Some Arkansas parents, for example, attacked the state's requirement that home-schooled students submit to achievement testing, arguing that it violated their right to control their child's education. The court disagreed, finding the requirement a reasonable restriction on home schooling.⁴⁷ Likewise, a Maine court

upheld a state requirement that home schoolers submit their educational plan for approval.⁴⁸ These two examples also illustrate how difficult substantive due process claims are to win. Unless parents allege that the liberty denied is an explicit constitutional right (freedom of religion, for example), courts will usually apply only the lowest level of scrutiny and require only that the state behave reasonably. Even when religious beliefs are involved in a case, courts sometimes rule against parents if they conclude that the state has sufficient justification for monitoring the educational practices of home schoolers.⁴⁹

Another due process argument that has been somewhat more successful relates to the vagueness of a state's statutory language with respect to "private schools." For example, in *Wisconsin v. Popanz*, a father argued that his conviction for noncompliance with the compulsory education statute should be overturned because the state law at the time required only that a child attend a "public or private school." He argued that he satisfied the requirement by educating his children at home. Moreover, he claimed—and the court agreed—that the term "private school" was unconstitutionally vague, thus depriving him of due process.⁵⁰

Education Clause Cases

Cases brought under the education clauses of state constitutions argue that school choice programs are invalid because they conflict with the specific educational mandate to the legislature with regard to public schools. For example, when charter schools were created in Michigan, a group of taxpayers filed suit, alleging that they were not sufficiently "public" to receive taxpayer funding under the Michigan constitution. The Michigan Supreme Court rejected this claim, finding that the state legislature had maintained sufficient state control over its charter schools to maintain consistency under the state's Education Clause.⁵¹ To date, all challenges to charter school programs under state constitutions have been similarly rejected and all programs upheld.

In contrast, the Florida Supreme Court recently struck down a voucher program as contrary to its constitution's Education Clause. The program at issue, the Opportunity Scholarship Program (OSP), allowed children who attended a public school deemed substandard to use the state monies to enroll in any private school, using funds that otherwise would have gone to the substandard school. The Florida Supreme Court determined that the constitutional mandate to the legislature to create a "uniform" system of public education precluded the OSP because the state lacked the necessary control over the private schools. Moreover, the Court read the constitution as requiring that public education be provided solely through public schools.⁵²

Similarly, the Colorado Supreme Court invalidated a voucher program as contrary to the state's constitutional mandate that local school boards control publicly funded education. Since students taking advantage

of the Colorado Opportunity Contract Pilot Program would enroll in private schools at public expense, the program limited boards' ability to control their funds, raised, at least in part, through local taxes. The court concluded that the program directly violated the explicit local control requirement established in Article IX, Section 15 of the Colorado Constitution.⁵³

As these three examples illustrate, the precise wording of an individual state's constitutional provision regarding education may permit some choice programs prohibited in other states. Likewise, within an individual state, some forms of choice may be held to be consistent with the state constitution's education clause, while other forms of choice may not.

Special Education Cases

School choice litigation has also addressed the questions of whether and how special education requirements apply when parents may select their child's school. At issue are two concepts protected under federal disability law: access and appropriate programming. Access is the concept that publicly funded benefits ought to be provided without discrimination on the basis of disability, as required under Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act (ADA). Accordingly, when policy-makers make school choice available to parents and students, they must ensure that children with disabilities and their parents are eligible to participate. Once access is provided, consideration must be given to the kinds of services necessary to make the access meaningful.

Access to voucher programs for children with disabilities has generated only limited litigation. In fact, the only decision on the issue is a trial court opinion on a challenge to the original version of the Milwaukee Parental Choice Program. In that decision, the judge determined that participating private schools needed only to accept children with disabilities to the same extent required of nonparticipating private schools. This ruling meant that participating schools had to accept voucher students with disabilities unless doing so would require them to substantially alter their educational program. The court determined that since the schools were not required to provide special education and related services, they could not be required to comply with the Individuals with Disabilities Education Act (IDEA).⁵⁴

Access to and programming in other publicly funded choice options has also sparked legal challenge, but most often in the form of administrative challenges and policy letters.⁵⁵ The combined lessons from these challenges can be expressed in four reasonably clear directives:

1. All publicly funded choice programs must be accessible to children with disabilities.⁵⁶

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2. Parents and children can not be required to waive needed services in order to participate in the choice program.⁵⁷
3. A student's right to "free appropriate public education" must be preserved in any choice program delivered in public schools.⁵⁸
4. States need to determine which entity (the sending district, receiving school or district, a combination, or some other entity) will serve as the responsible "local education agency" for purposes of IDEA.⁵⁹

Even when a program complies with these requirements, school choice clearly complicates the application of special education law. Numerous authors have commented on the tension between allowing parents to select a school and the strict IDEA requirement that all placement decisions be made by a team of persons knowledgeable about the child's abilities and needs.⁶⁰ What happens if parents "choose" a program that the team considers inappropriate? How must school authorities reconcile choice and appropriateness under the IDEA?

The answer to these questions under current law appears to be that parents may choose, so long as their choices are consistent with the concept of a free, appropriate public education (FAPE) as guaranteed by both IDEA and Section 504. Choice programs, therefore, must consider how to provide the necessary services in order to make FAPE available.⁶¹

Statutory Construction Cases

Finally, a review of school choice litigation must include cases involving statutory issues. Such cases require courts to determine whether a particular program is consistent with existing laws or how a particular provision should apply in a particular instance.

The latter type of case is exemplified in judicial review of charter denials, revocations, or non-renewals. Because some charter statutes explicitly allow for judicial appeals of charter school denials,⁶² disappointed charter school aspirants have often used this option to force authorizers to reconsider their application.⁶³

In addition to such review of authorization decisions, other cases may allege that a particular choice option is invalid given existing statutory requirements. For example, when a school district in Wisconsin created a cyber charter school and allowed students living outside of the district to enroll via statewide open enrollment, challengers raised three statutory issues: (1) that the school was not located within school district boundaries as required by the state's charter school law; (2) that since some of the students never attend a school physically located within district boundaries, payments from resident school districts to the district operating the cyber charter school violated the state's open enrollment statute; and (3) that since parents assume the primary instructional role,

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the school violated statutory requirements that only licensed teachers teach in public schools. The Wisconsin Court of Appeals found merit in each claim and determined that the challengers were entitled to summary judgment on each allegation.⁶⁴ In clarifying its ruling, the court explained:

We express no opinion on the merit of [the cyber charter school's] educational model, or on the relative competencies of licensed teachers and dedicated parents to recognize and make the most of "teachable moments." [The cyber charter school] may be, as its proponents claim, a godsend for children who would not succeed in more traditional public schools, as well as a welcome new option for parents who want their children to receive a home-based education for any number of reasons. But it is also a public school operated with state funds, and its operation violates the statutes as they now stand. It is for the citizens of this state, through their elected representatives in the legislature, to decide whether and how their tax money is going to be spent. If the citizenry wants tax money spent on virtual schools like [the challenged school], that is fine. Let the citizens debate it and set the parameters, not the courts.⁶⁵

As this quotation makes clear, courts are limited to applying existing statutes. As more innovations occur, whether through school choice or not, they must comply with existing statutory frameworks or risk litigation to force such compliance. Alternatively, those statutes must be revised to allow for new conceptions of education and choice.

Table 2, following, provides a summary of the types of litigation filed with respect to each type of school choice.

It is interesting to note that voucher programs and charter school programs have prompted the broadest array of legal challenges. As both vouchers and charters arguably best illustrate Friedman's competition model, it is not surprising that they would encounter the most litigation. It is equally unsurprising that home schooling has faced the fewest legal challenges, since it is an exit from public funding.

Table 2: Issues Raised in Litigation of School Choice Options

	Religion Clauses	Discrimination	Due Process	Education Clause	Special Education	Statutory Issues
Charter Schools	✓	✓		✓	✓	✓
Cyber Schools					✓	✓
Home- schooling	✓		✓			✓
Interdistrict Choice						
- City- Suburban Plans		✓				
- Statewide Open Enrollment		✓			✓	
Intradistrict Choice						
-Magnet Schools		✓			✓	
-Intra- district transfer		✓			✓	
Vouchers	✓	✓		✓	✓	✓

Recent Developments

As this discussion illustrates, both legislation and litigation have played and continue to play an important role in shaping school choice. Three recent developments in the relationship between law and school choice deserve further discussion: the expansion of charter schools, NCLB’s choice provisions, and the recent Supreme Court decision regarding voluntary integration programs.

The Expansion of Charter Schools

Charter schools first appeared in Minnesota in 1990. By 2003, the number of states allowing charter schools had increased to 40, with approximately 2,700 schools serving 684,000 students.⁶⁶ Current estimates put the numbers at more than 4,000 charter schools serving more than a million students.⁶⁷ By any measure, these figures show that charter

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schools have become a feature of many states' public educational systems. Given the fact that charter schools have enjoyed broad bipartisan support,⁶⁸ including federal funding through the Charter Schools Expansion Act, it is not surprising that their number and influence have increased since their introduction a decade and a half ago.

The growth of charter schools has been accompanied by the evolution of charter school laws. Charters were established, at least in part, as a way to introduce market-driven education in a public-only context.⁶⁹ In return for some freedom from traditional regulation through state statutes and administrative codes, charter schools agree to accountability through performance contracts and parental choice. States have periodically examined this tradeoff to determine whether charter schools are both sufficiently autonomous and sufficiently accountable. In some instances, states have made statutory schemes more permissive by allowing new entities to authorize charters and by further relaxing other state controls. In other cases, states have increased their regulatory hold on charter schools by adopting more stringent standards for adoption, operation, renewal, and revocation.⁷⁰ Charter school proponents refer to such tightening of state control as "regulatory creep," a phenomenon they believe should be avoided.⁷¹ However their actions are viewed, state policymakers clearly remain involved in determining how to fit charter schools into the public school system.

NCLB's Choice Provisions

A second recent and notable development involves the choice provisions codified as part of the No Child Left Behind Act. Congress is currently in the process of reauthorizing NCLB and therefore its members are examining the law's merits and shortcomings as they determine whether and how to revise its existing provisions. As matters currently stand, however, school choice is an integral part of NCLB. When the law was enacted, the U.S. Department of Education named four "pillars" as its foundation, one of which was "more choices for parents."⁷² This "pillar" led to several school choice provisions—perhaps most notably as part of NCLB's accountability system, which imposes choice as a penalty for schools not making "adequate yearly progress" for two consecutive years.

"Adequate yearly progress" (AYP) refers to a school's incremental progress toward NCLB's mandated goal of having 100% of students score at or above proficiency standards on state assessments in reading, math, and science by 2014. Students must be tested annually in grades 3-8 and once during grades 9-12. While states set the curricular standards and develop the assessments, both must be approved by the United States Department of Education. States also set progressively more stringent goals for schools each year (the annual AYP) as they target 100% proficiency in each subject.

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Schools must annually report test scores to the public, including a comparison of scores disaggregated by race, socioeconomic status, gender, language, and disability. A school could be declared “in need of improvement” if it tests less than 95% of its student population or if too few students meet proficiency standards set for each assessment. Moreover, all goals must be met, not only for the student population as a whole, but also for each disaggregated group. For example, a school could be declared “in need of improvement” because only 90% of students learning English took the state’s assessment. Likewise, if test scores revealed that all groups except children with disabilities had met the proficiency standards, the school would be deemed “in need of improvement” and the accountability provisions would apply.⁷³

Penalties for failure to meet AYP are substantive. Schools designated “in need of improvement” for two or more consecutive years are subject to NCLB’s choice provisions. Schools in such circumstances must notify parents of the situation and allow student transfers to other public schools that have met AYP. In addition, schools must set aside a portion of the funds received under NCLB to cover transportation costs for the students. If a school does not test enough students or student test scores do not demonstrate sufficient progress for a third consecutive year, NCLB funds must be made available to parents to allow them to purchase supplemental educational services (tutoring). When a school fails the standards for a fourth year, the district must take corrective action; if failure persists into a fifth consecutive year, the district must restructure the school. Restructuring may include converting the school to a charter school, if it is not one already. Moreover, the penalties are cumulative. That is, parents with children entitled to supplemental educational services are also entitled to transfer to a school of their choice. In addition, if an entire school district is declared “in need of improvement” under NCLB for a fourth consecutive year, the state must take corrective action, with one suggested alternative being to permit students to transfer to another school district. Finally, parents with children enrolled in schools deemed “persistently dangerous” must be given the option to choose another school regardless of how well or poorly students perform academically in the dangerous school.⁷⁴

These NCLB provisions are significant as they represent the first federalized school choice program. They were controversial at the time of adoption and remain controversial now.⁷⁵ In fact, President Bush first argued for NCLB to include private as well as public school choice.⁷⁶ Under the bill he originally proposed, parents would have been given a voucher to attend any public or private school whenever a public school failed to perform at the required standard. Although private school choice did not survive the political process,⁷⁷ the fact that Congress embraced any form of school choice as means to school reform marks an important advancement of Friedman’s market-based conception of school accountability. Whether current choice provisions will remain when

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NCLB is reauthorized sometime in 2008 or 2009 will reveal much about the country's commitment to and confidence in school choice as a tool to leverage educational improvement.

The Impact of *Parents Involved*

Finally, as noted above, the Supreme Court's decision in *Parents Involved in Community Schools v. Seattle School District Number 1* will likely have significant impact on school officials' efforts to integrate student populations through controlled parental choice programs. Chief Justice Roberts concluded simply that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." And yet, it is clear that the tie between race and opportunity has not yet been broken. Indeed, research documents the resegregation of America's schools along racial lines, with many more schools now more racially isolated than they were even a decade ago.⁷⁸ While Justice Kennedy's opinion holds out hope that policymakers may still pursue integrated education as a goal, the decision in *Parents Involved* severely restricts current efforts to do so. Literally hundreds of programs exist across the country that use parental choice as an inducement to integrate. Those plans must now all be reviewed to determine whether they might similarly be considered in violation of the Constitution. Further litigation examining boundaries of those programs seems inevitable.

Many consider the decision in *Parents Involved* to be a dramatic shift away from the promise of integrated education and equal educational opportunity espoused by *Brown*. Justice Breyer's dissent forcefully made this point when he concluded:

Finally, what of the hope and promise of *Brown*? For much of this Nation's history, the races remained divided. It was not long ago that people of different races drank from separate fountains, rode on separate buses, and studied in separate schools. In this Court's finest hour, *Brown v. Board of Education* challenged this history and helped to change it. For *Brown* held out a promise. It was a promise embodied in three Amendments designed to make citizens of slaves. It was the promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools. It was about the nature of a democracy that must work for all Americans. It sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live. . . . The last half-century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*. The plurality's position, I

fear, would break that promise. This is a decision that the Court and the Nation will come to regret.⁷⁹

Justice Breyer's comment recognizes that the Court's decision will require any school choice program that includes race-conscious provisions to determine whether its criteria are allowed. Programs similar to those in Seattle and Louisville are no longer permissible as a means to integrate public schools.

How then may integration be accomplished? Many consider Justice Kennedy's concurrence to be the roadmap for such an examination. Clearly Justice Kennedy wrestled with the issues laid bare by *Parents Involved*⁸⁰ and worried about the effects the decision would have on the racial composition of public schools. While ultimately invalidating the Seattle and Louisville choice programs and what he characterized as "crude" systems of classifying individual students by race,⁸¹ he expressed the view that "[t]his Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children."⁸² He listed six methods by which he believed such a goal could be accomplished consistent with the constitution: (a) "strategic site selection of new schools;" (b) "drawing attendance zones with general recognition of the demographics of neighborhoods;" (c) "allocating resources for special programs;" (d) "recruiting students and faculty in a targeted fashion;" (e) "tracking enrollments, performance, and other statistics by race";⁸³ and (f) "if necessary, a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component."⁸⁴

It remains to be seen whether this decision will curtail parental choice programs in the locales they now operate. Justice Kennedy does not explicitly name parental choice as one of the six factors, though the first (strategic site selection), the fourth (recruiting students and faculty), and the last (an individual examination of student characteristics including race as one factor among many) may be related to various choice initiatives. However, the Court's decision could cause officials to dismantle existing race-conscious choice programs in order to avoid litigation on the issue. Alternatively, they may simply continue to allow parental choices without regard to impact on the racial composition of student populations. What is inescapable, however, is that the decision in *Parents Involved* requires such an examination of each program to determine whether it aligns with guidelines the ruling provides. More litigation on the relationship of race and choice is likely as policy-makers grapple with the application of *Parents Involved*.

Discussion

As this examination illustrates, law shapes school choice in tangible and unmistakable ways. The work of legislators at federal, state

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and local levels defines and funds various choice options. The work of jurists and litigators considers whether those initiatives and their implementation are lawful. Whether through legislation or litigation, sources of law continually re-examine the balance struck between *parens patriae*—the state’s interest in compelling and controlling education—and parents’ individual liberty to make decisions for themselves and their children.

Of course, school choice is not limited to the United States, but also has a place in other countries’ educational systems. David Plank and Gary Sykes report that school choice is gaining in popularity and operates to some extent in a number of countries including England, Chile, South Africa, the Czech Republic, China, Australia, New Zealand, and Sweden.⁸⁵ In fact, while not specifying school choice as it has come to be defined in the United States, the United Nations Universal Declaration of Human Rights asserts that “[p]arents have a prior right to choose the kind of education that shall be given to their children.”⁸⁶ Of course, the particular contours of the choices available to parents in any country depend on the laws binding them.

It is therefore fitting to emphasize the fact that law not only defines and constrains parental choices, it is also a codification of collective values. With the input of their constituents, politicians and other policymakers debate the wisdom and effectiveness of various programs. Eventually decision makers ratify any compromises by making formal policy pronouncements. Each provision reflects the collective will and principles that survived the democratic, decision-making process. Even decisions about funding speak to what a body politic most values.

What values, then, do choice programs espouse? That question is at the heart of the debate surrounding school choice. The answer depends on the type of choice, its breadth, and the details of its operation. Does choice serve as an instrument to another deeply held commitment such as diversity or opportunity, or is choice itself the value? Will school choice help the collective achieve the vision desired, or will it undercut the very values it intends to promote? If parental choice results in racially homogeneous schools, does that comport with or debase the concept of “public” schools? Likewise, if parents select a school or a curriculum that emphasizes science but omits art, are the children being sufficiently “educated” for the public? If parents have the predominant voice in educational policies through school selection and control of educational funds, how do schools then serve the childless portions of the electorate? Do schools serve only parents and children, or do they serve communities? These debates have long swirled around conceptions of parental choice.⁸⁷

As such debates continue, whether in the form of reviewing current choice initiatives or considering the development of new forms of choice, law will play an inevitable role. This conclusion is unavoidable simply because law reflects the democratic processes created by the body politic. The creation and review of policy in the form of “law” is the means by

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which we collectively consider the relationship between the citizen and the state, between private choices and the public good. As Tyack and Cuban explain:

In continuing the tradition of trusteeship of the public good, this engaged debate about the shape of the future, all citizens have a stake, not only the students who temporarily attend school or their parents. And this is the main reason that Americans long ago created and have continually sought to reform public education.⁸⁸

Legislation and litigation are the products of our public struggle concerning the role of public education in a democratic society. Since the nation's founding, many have considered and continue to consider public education a necessary predicate for democracy to function.⁸⁹ That realization suggests that parents' choices will likely always be constrained by some measure of state control, maintaining the constant tension identified earlier between *parens patriae* and parents' rights to direct their children's education. How robust either principle is in relation to the other will depend on how particular forms of choice strike a balance between them. Legislation will continue to codify those balances and other choice arrangements, and litigation will continue to probe their consistency with existing constitutional and statutory requirements. The legislative and judicial activities reviewed here—in particular the three recent developments of charter school expansion, the advent and reauthorization of NCLB, and recent Supreme Court decision curtailing the use of race in the Seattle and Louisville choice programs—demonstrate that the balance between *parens patriae* and parents' rights is in constant flux. Legislation and litigation are two tools that capture the status of that equilibrium at any given moment in time.

Recommendations

As policymakers undertake the daunting task of defining public education for current and future generations, it is likely that school choice will continue to play some role. Accordingly, the following recommendations are offered to officials to guide their work as they consider the implications of the choice initiatives established, the purposes they intend to serve, and the civic principles embedded by their adoption.

- Examine parental choice programs to ensure that they espouse the values of the communities they serve in a manner consistent with federal and state constitutional guarantees.
- Ensure that parental choice programs serve educational opportunity and equity rather than undercut them.

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- Consider carefully the implications of any choice program, not only for those who “choose” but also for those who do not.
- Engage the research community not only to inform the debate about effectiveness of various options, but also to track the implications of the various choice programs undertaken.

Notes and References

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- ⁶ *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 45 S.Ct. 571 (1925).
- ⁷ *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, at 534-535 (1923).
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- ⁹ *Brown v. Board of Education of Topeka*, 349 U.S. 294, 301, 75 S.Ct. 753, 757 (1955).
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- ³⁵ *Zelman v. Simmons-Harris*, 536 U.S. 639, 122 S.Ct. 2460 (2002).
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- ⁴⁷ *Murphy v. State of Arkansas*, 852 F. 2d 1039 (8th Cir. 1988).
- ⁴⁸ *McDonough v. Ney*, 599 D. Supp. 679 (D.Me. 1984).
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- ⁵⁷ *Fallbrook Union Elementary School District*, 16 IDELR 754 (OCR 1990); *San Francisco Unified School District*, 16 IDELR 824 (OCR 1990); *Chattanooga Public School District*, 20 IDELR 999 (OCR 1993).
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- ⁷⁹ *Parents Involved in Community Schools v. Seattle School District Number 1*, 127 S.Ct. 2738, at 2836 (2007) (Breyer, J., dissenting).
- ⁸⁰ In fact, sixty-four *amicus curiae* (friend of the Court) briefs were filed in conjunction with *Parents Involved*; 11 briefs supported the petitioners' view that the programs were unconstitutional, while 53 argued that the programs operated consistent with the constitution and should survive scrutiny.
- ⁸¹ *Parents Involved in Community Schools v. Seattle School District Number 1*, 127 S.Ct. 2738, at 2790 (2007) (Kennedy, J., concurring).
- ⁸² *Parents Involved in Community Schools v. Seattle School District Number 1*, 127 S.Ct. 2738, at 2797 (2007) (Kennedy, J., concurring).
- ⁸³ Strategies listed as a-e in the text may be found at: *Parents Involved in Community Schools v. Seattle School District Number 1*, 127 S.Ct. 2738, at 2792 (2007) (Kennedy, J., concurring). Kennedy argues here that employing any one or combination of these strategies would be constitutionally permissible and would not require an application of strict scrutiny to be found so.
- ⁸⁴ It should be noted that Kennedy cautioned that any use of race as part of a review of multiple factors prior to admission would still have to satisfy the dictates of strict scrutiny. That is, such a use of race would have to be necessary and narrowly tailored to a compelling state interest. Moreover, Kennedy's use of the modifying phrase –“if necessary”- also suggests that such a use would only be proper if other non- or less race-conscious means could be proven ineffective. *Parents Involved in Community Schools v. Seattle School District Number 1*, 127 S.Ct. 2738, at 2793 (2007) (Kennedy, J., concurring).
- ⁸⁵ Plank, D.N. & Sykes, G. (2003). *Choosing Choice: School Choice in International Perspective*. New York, NY: Teachers College Press
- ⁸⁶ United Nations Universal Declaration on Human Rights, Article 26. Retrieved January 11, 2008, from <http://www.hrweb.org/legal/udhr.html>.
- ⁸⁷ See eg.: Chubb, J.E. & Moe, T.M. (1990). *Politics, Markets & America's Schools*. Washington, DC: The Brookings Institution
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- ⁸⁸ Tyack, D. & Cuban, L. (1995). *Tinkering toward Utopia: A Century of Public School Reform*. Cambridge, MA: Harvard University Press, p. 142.
- ⁸⁹ Goodlad J.I. & McMannon, T.J. (Eds.), (1997). *The Public Purpose of Education and Schooling*. San Francisco, CA: Jossey-Bass.
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