I. INTRODUCTION

Parents in Chicago face an education crisis. Chicago Public School District 299 (CPS) manages some of the worst performing public schools in the nation, and only fifty-four percent of students graduate from high school within six years. Academic standards in CPS are well below college readiness benchmarks, so it is hardly surprising that CPS high school students struggle to attain acceptable scores on standardized tests for college admissions or even graduate academically prepared for college. In fact, only six percent of graduating CPS students will graduate from a four-year college. Of the more than 403,000 students enrolled in CPS, eighty-six percent are low-income and eighty-six percent are either Latino or Black. What is more alarming, considering the CPS student demographics, is that eighty-two percent of Title I schools in CPS are in Federal School Improvement Status for failing to meet minimum academic achievement standards. That means 444 out of 544 Title I schools are failing in CPS.

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1 Top 100 Worst Performing Public Schools in the U.S., NEIGHBORHOOD SCOUT http://www.neighborhoodscout.com/neighborhoods/school-district/ratings/worst100 (last visited April 30, 2012).
6 Title I schools receive supplemental funds to assist in teaching large concentrations of low-income students attending a school. For more explanation, see supra, note 186.
Only seventy-three schools in CPS are not Title I schools. The lack of student achievement cannot be ignored.

In similarly dire education environments, states across the nation have established school voucher programs designed to give families with children in failing schools a choice in education. School voucher programs allow parents to determine which school their student will attend, but state funds are then used as payment for the student to attend the parentally chosen school, whether public or private, sectarian or secular. Ten states and the District of Columbia currently provide school voucher programs, but each with varying eligibility rules, values of the vouchers, and number of students participating. However, these school voucher programs have faced tumultuous legal battles because school voucher programs enable students to attend private religious schools, which blur the line between Church and State and sometimes causes conflicts with state regulations. After decades of legal battles about school voucher programs, the Supreme Court of the United States declared in 2002 that school voucher programs are, in fact, Constitutional, if designed properly.

Armed with Constitutional right, school voucher programs are now increasing in popularity across the nation. According to a 2008 poll, forty-four percent of Americans

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8 Id.  
10 Ronna Greff Schneider, § 1:30 Vouchers, 1 EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION (2011).  
11 The ten states are: Arizona, Colorado, Florida, Georgia, Indiana, Louisiana, Ohio, Oklahoma, and Utah, Wisconsin. See Green & Moran, infra note 17.  
supported permitting students and parents to choose a private school to attend at the public’s expense— the largest level of support since 2002. Despite this tempered popularity, school voucher opponents have shifted their legal battles into the state courts and constructed arguments based on provisions found in the state’s constitution.

In this article, I will show that a school voucher program is not only a necessary component of a state’s relationship with children and parents, but also that the reprehensible condition of the public education system in Chicago, Illinois, mandates that school vouchers are made available to parents living within the boundaries of CPS. Part II will examine the development of a state’s relationship with children and families, the surprising recognition of parental rights through Supreme Court cases, and then explain how this evolving relationship relates to school choice. Part III will review three Supreme Court cases that expanded how public money could be used for education when a private school was involved, which is the foundation of any school voucher program. After establishing that foundation, Part IV will analyze the history of two school voucher programs that serve as cornerstones for additional programs and offer a comparison of current school voucher programs in the United States. In Part V, I will define the types of current legal battles in state courts regarding school voucher programs. Part VI will provide background information relevant to school vouchers in Illinois: the state constitution, the current shape of education in Illinois— particularly in CPS, public opinion toward education and elected officials, and the recent legislative history of Illinois lawmakers. In Part VII, you will find my argument that the Illinois legislature has an obligation to establish a school voucher system for students attending failing schools in CPS based on the

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state’s relationship with Chicago children and families, the failure of these students to achieve adequate yearly progress, and the State’s responsibility to provide all students an adequate education.

II. PARENTAL CHOICE

Over the last century, the relationship between states and parents has gradually changed as a consequence of a few significant cases that developed the boundaries of this relationship. Parental right gives parents the power to control the upbringing and education provided to his or her child. Remarkably, the Supreme Court cases that initially formed parental rights grounded these rights in the Due Process Clause of the Fourteenth Amendment of the United States Constitution instead of in the freedom of religion or freedom of speech guaranteed by the First Amendment. The Supreme Court has yet to fully outline the boundaries of parental rights, but the following cases shaped the relationship between state governments and families. The cases are of note here because they helped sculpt school voucher programs decades later. In 1923, the Supreme Court heard Meyer v. Nebraska, the first of many noteworthy parental rights cases. The case was born in the wake of World War I, which caused anti-German sentiment to flood the country. As a result of that feeling, many states banned foreign language instruction in both public and private schools, including Nebraska. Nebraska enacted a law in 1919 that forbid any individual to teach a subject in a foreign language to a student who

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18 See infra note 20, 26, 36, 43.
19 See infra note 36 at 535.
21 Id. at 78.
23 Id.
had not passed the eighth grade.\textsuperscript{26} Violators were punished by a monetary fine.\textsuperscript{27} In May 1920, Robert Meyer, a teacher at Zion Parochial School in Nebraska, taught reading in German to a 10-year-old child who had not yet graduated from the eighth grade.\textsuperscript{28} Meyer was convicted in district court of violating the state law, and the state supreme court affirmed the judgment.\textsuperscript{29} In February 1923, the case reached the Supreme Court.\textsuperscript{30} In a decision reached shortly after, the Supreme Court held the Nebraska law to be unconstitutional, because it infringed on the liberty guaranteed by the Fourteenth Amendment.\textsuperscript{31} The Court noted that that liberty included freedom from bodily restraint… 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.\textsuperscript{32}

Furthermore, the Court stated that it is a natural duty of a parent to give his or her child an education, which gives the parent the right to engage teachers to instruct her children.\textsuperscript{33} This case is monumental because it was the first case in which the Supreme Court held that parents have a protected fundamental liberty interest in decisions regarding the care, custody and control of their children, and conferred upon parents the right to control their child’s upbringing without unreasonable state interference.\textsuperscript{34}

\textsuperscript{26} Meyer v. Nebraska, 262 U.S. 390, 397 (1923).
\textsuperscript{27} Id.
\textsuperscript{28} Id. at 396-97.
\textsuperscript{29} Id.
\textsuperscript{30} Id. at 390.
\textsuperscript{31} Id. at 399.
\textsuperscript{32} Id.
\textsuperscript{33} Id. at 400.
Following *Meyer*, the Supreme Court continued to shape parental rights with *Pierce v. Society of Sisters* in 1925. At the time of the case, the Oregon had passed, but not yet implemented, a law requiring every parent of a child between the ages of eight and sixteen to send the child to a public school. Failure to comply with this compulsory attendance law resulted in a misdemeanor. Two organizations that operated private schools sought to enjoin the state from enforcing the law stating that enforcement of the law would impair or destroy education by private schools. These plaintiffs also alleged that the law conflicted with a parent’s right to choose an appropriate education, as granted in *Meyer*, and the organization’s right to engage in commerce by operating the private schools. The Supreme Court ultimately struck down the Oregon law because it abridged the liberty of parents to direct the upbringing and education of their children. The Court succinctly stated, “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.” This case reaffirmed the Court’s earlier decision from *Meyer* that parents have a protected fundamental liberty interest in decisions regarding the care, custody and control of their children, and it also validated a parent’s choice to control his or her child’s education, which included the ability to select a private school to provide that education.

Almost two decades later in 1944, the Supreme Court again wrestled with the relationship between parents and the state in *Prince v. Massachusetts*. Sarah Prince, the guardian of her

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36 *Pierce*, 268 U.S. at 530.
37 *Id*.
38 *Id.* at 529-33.
39 *Id.* at 530-31.
40 *Id.* at 534-535.
41 *Id.* at 535.
42 *Id.* at 534-35.
nine-year-old niece, provided the girl with copies of Jehovah’s Witness religious materials and allowed her to stand on a street attempting to sell the materials.\textsuperscript{44} Prince was then convicted of violating a Massachusetts law that forbade children from selling magazines, newspapers, and other merchandize in any public place.\textsuperscript{45} Prince argued that her actions were protected by the freedom of religion clause under the First Amendment applied by the Fourteenth Amendment to the states and by parental right secured by the due process clause of the Fourteenth Amendment.\textsuperscript{46} The Court identified the two claimed rights at stake: one, a parent’s right to bring up a child without restraint, and two, the child’s right to observe the ways in which he or she is raised.\textsuperscript{47} While the Supreme Court affirmed the judgments against Prince, it recognized the private realm of family life that the state cannot enter.\textsuperscript{48} Despite that recognized privacy, the Court held that the family is not beyond regulation in the public interest, but the balance is “delicate.”\textsuperscript{49} Nonetheless, the Court explained, “acting to guard the general interest in youth's well being, the state as \textit{parens patriae} may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor, and in many other ways.”\textsuperscript{50} \textit{Prince} reminds us again that parents have a protected fundamental liberty interest in decisions regarding the care, custody and control of their children, but this liberty is ultimately balanced with the state’s interest in the child’s well-being.\textsuperscript{51}

The Supreme Court last considered the parameters of the state’s relationship with parents in \textit{Wisconsin v. Yoder} in 1972.\textsuperscript{52} At the time of the lawsuit, Wisconsin had a compulsory

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\begin{itemize}
\item \textsuperscript{44} \textit{Id.} at 161-62.
\item \textsuperscript{45} \textit{Id.} at 160-61.
\item \textsuperscript{46} \textit{Id.} at 164.
\item \textsuperscript{47} \textit{Id.} at 165.
\item \textsuperscript{48} \textit{Id.} at 166.
\item \textsuperscript{49} \textit{Id.} at 165-66.
\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} \textit{Id.} at 166.
\item \textsuperscript{52} \textit{Wisconsin v. Yoder}, 406 US 205, 208 (1972).
\end{itemize}
attendance law that required parents to send their children to a public or private school through age sixteen. However, three Amish parents refused to enroll their children in any school after the eighth grade, because they claimed it was contrary to their Amish religion and way of life. Each parent was convicted of violating the law and fined five dollars. The Wisconsin Supreme Court overturned the convictions, and the United States Supreme Court heard the case in 1971. The Court found that although the State has a responsibility for the education of its citizens, this responsibility is balanced with the interest of parents to control their children’s religious upbringing and education. The Court cited “convincing evidence” that the parents’ interest in raising their children in the Amish religion would “not impair the physical or mental health of the child, nor result in an inability to be self-supporting, or to discharge the duties and responsibilities of citizenship, or in any way materially detract from the welfare of society.” Ultimately, the Court held that the First and Fourteenth Amendments prevented Wisconsin from compelling the Amish parents to enroll their children in school through age sixteen.

Remarkably, less twenty years after the Court’s first parental rights case, the Court, in this opinion, classified a parent’s right in the control of her child’s upbringing as “now established beyond debate as an enduring American tradition.” This case showed that a parent’s fundamental liberty interest in decisions regarding the care, custody, control, and education of their children are viewed as primary considerations in State action; additionally, the State still has an interest in the well-being and education of children.

53 Id. at 207.
54 Id. at 207-209.
55 Id. at 208-209.
56 Id. at 205.
57 Id. at 213-214, 231.
58 Id. at 206.
59 Id. at 236.
60 Id. at 232.
61 Id. at 213.
These cases shaped the relationship between states and families by outlining the responsibilities and considerations of each. A parent now has an identified interest in the education and control of his or her child, while the State also has an interest in and responsibility for the well-being and education of all its citizens.\textsuperscript{62} Although a parent serves as the primary provider of care, custody and control of her children, a State’s support is necessary to provide quality education and support for the family.\textsuperscript{63} The parental rights cases above form the foundation for future legal battles regarding the education of all children, because school vouchers programs must take into consideration the relationship between the state, families, and the greater public interest. Today, the primary method parents use to educate their children for “additional obligations”\textsuperscript{64} is the public school system. However, this method needs to be reexamined and evaluated when it nullifies a child’s potential to successfully acclimate to society, which failing public schools do. When states pause to consider the responsibilities owed to parents regarding the education of children, sustained support of continually failing schools will no longer be acceptable. Formulating a school voucher program is a solution that can fulfill state responsibility and rectify the problems of failing school systems.\textsuperscript{65}

\textbf{III. SETTING THE LEGAL FOUNDATION FOR SCHOOL VOUCHERS}

Before examining school voucher programs, it is important to understand how that response to failing schools even became a possibility. In preparation for the implementation of school vouchers, a foundation needed to be established that paved the way for public funds to enter private institutions. Three cases formed this foundation before school voucher programs became a legitimate option for parents regarding their children’s education.

\begin{itemize}
\item\textsuperscript{62} *Id.* at 232, 235.
\item\textsuperscript{63} *Id.* at 213.
\item\textsuperscript{64} *Pierce*, 268 U.S. at 535.
\item\textsuperscript{65} Shelby Slawson, \textit{Changing American Schools: The Intersection of Choice and the Constitution}, 22 REV. LITIG. 759, 759-60 (2003).\end{itemize}
Beginning in 1983, the case of *Mueller v. Allen* commenced the path toward school voucher programs. In this case, Minnesota taxpayers challenged the constitutionality of a Minnesota statute allowing state taxpayers, when computing their state income tax, to deduct expenses incurred in providing “tuition, textbooks and transportation” for their children attending elementary or secondary school. The suit was filed against the Minnesota’s Commissioner of Revenue and parents who had taken the tax deduction. The plaintiffs argued that the statute provided unconstitutional assistance to parochial schools. The Court of Appeals affirmed the district court’s ruling that the statute was constitutional, because: (1), it was facially neutral; (2), it was available to any parents regardless of the type of school their children attended; and (3) the statute did not “excessively entangle” the state in religion. The Court’s justification of the statute via the breadth of its availability became important in later school voucher programs. By allowing state tax breaks for a parent’s expenses arising from a child’s attendance at a private school, the wall between church and state began to erode.

Next, the Court allowed public funds to directly enter a private school in the case of *Witters v. Washington Department of Services for the Blind*. Under the terms of a Washington statute, petitioner Larry Witters, who suffered from a progressive eye condition, was eligible for vocational rehabilitation assistance paid for by the state. However, he attended a private Christian college and studied the Bible, ethics, speech, and church administration to become a pastor. Because Witters attended a private religious college, the state subsequently denied him

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67 *Id.* at 392.
68 *Id.*
69 *Id.* at 394.
70 *Id.* at 392, 403.
71 *Id.* at 397.
73 *Id.* at 483.
74 *Id.*
the assistance allowed for in the statute, citing a clause in the Washington State constitution that forbade “the use of public funds to assist an individual in the pursuit of a career or degree in theology or related areas.”

Witters fought the decision initially in an administrative hearing, then through state superior court, the state supreme court, and finally the United States Supreme Court. In evaluating the program, the Supreme Court relied on the *Lemon* test established in *Lemon v. Kurtzman*. The *Lemon* test is used to determine whether state action has the effect of establishing religion. The test has three parts: (1), the statute must have a secular legislative purpose; (2), its principal or primary effect must be one that neither advances nor inhibits religion; and (3), the statute must not foster an excessive government entanglement with religion. If any of these prongs are violated, the government's action is deemed unconstitutional under the Establishment Clause of the First Amendment to the United States Constitution. The *Witters* Court stated that it was permissible under the Establishment Clause to provide a physically handicapped student with vocational rehabilitation assistance payments even if the student attends a religious school, like petitioner Witters. In making its decision, the Court highlighted the following facts: (1), the public money ultimately flowed to religious institutions “only as a result of the genuinely independent and private choices of aid recipients”; (2), the aid was available without regard to the institution benefited; (3), no financial incentive was created to attend a religious institution; and (4), no significant portion of the proceeds of this assistance ended up flowing to religious institutions. By enabling Witters to receive the state-

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75 *Id.* at 483-84.  
76 *Id.* at 484.  
77 *Id.*  
79 *Id.*  
80 *Id.*  
81 *Witters*, 474 U.S. at 489.  
82 *Id.* at 488.
sponsored assistance despite his attendance at a private religious school, this case further opened the door for public funds aiding private school students by their own or their parents’ choice.

The last foundational case was decided in 1993 when the Supreme Court heard *Zobrest v. Catalina Foothills School District.* Petitioner James Zobrest, who had been deaf since birth, attended the respondent school district for grades six through eight who provided Zobrest with a sign-language interpreter. Zobrest and his parents enrolled him in a private religious school for ninth grade but asked the school district to provide him with an interpreter for his classes at the private school, pursuant to the Individuals with Disabilities Education Act (IDEA) and its Arizona counterpart. The school district refused on the basis that doing so would violate the United States Constitution. The case went to the Court of Appeals for the Ninth Circuit who decided that allowing a publicly employed interpreter from the school district to interpret for Zobrest at his private school would violate the Establishment Clause of the First Amendment. The Court held that if the school district fulfilled the petitioner’s request, it would create the appearance that the government was a “‘joint sponsor’ of the school’s activities.” However, the Supreme Court reversed this decision and held that the Establishment Clause did not actually bar the school district from providing the requested interpreter. The Court reiterated its opinions in *Mueller* and *Witters* by stating that aid given to a broad class of individuals, defined without respect to religion, could not immediately violate the Establishment Clause just because

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84 *Id.* at 3-4.
85 *Id.* at 4.
88 *Zobrest*, 509 U.S. at 3.
89 *Id.* at 4.
90 *Id.* at 3, 5.
91 *Id.*
some of the proceeds benefited religious institutions. An indirect economic benefit to a religious institution could only occur if “without an IDEA interpreter, the child would have gone to school elsewhere; and that the school, then, would have been unable to fill that child's spot.”

Before these cases were handed down from the Supreme Court, the Establishment Clause was interpreted to create an impenetrable barrier between any religious organization or school and the government. However, one should note that the Establishment Clause does not require the separation of church and state, rather it prohibits laws respecting the establishment of religion. As a result of these foundational cases, the interpretation of the Establishment Clause softened to allow tax deductions for educational expenses related to attendance at either public or private schools, assistance to students with disabilities attending private colleges, and more recently, assistance to students with disabilities in private high schools. Without the principles laid out in the above cases, a school voucher program would have faced extreme judicial and public scrutiny based on the fact that school vouchers allow public funds to pay a child’s tuition at a school of the parent’s choosing, which is often a private religious school. With the growing inadequacy of public school systems across the United States, the frameworks laid out in Mueller, Witters, and Zobrest, enabled states to craft original legislation creating school voucher programs that, although challenged, eventually allowed an increase in the quality of education and parental choice regarding education decisions. In the next section, you will see how these foundational cases paved the road to the creation of school voucher programs in two initial states. Furthermore, you will see how the Supreme Court applied these foundational decisions to school voucher programs.

92 Id. at 8.
93 Id. at 10.
94 Id. at 24.
96 Mueller, 463 U.S. at 392, 403; Witters, 474 U.S. at 489; Zobrest, 509 U.S. at 3, 5.
IV. SCHOOL VOUCHER PROGRAMS

One way many states have chosen to improve compulsory education is by allowing parents to choose the school their children attend and extending the school enrollment options to include public charter schools and secular or non-secular private schools. This method is called a school voucher program, and it provides parents with state-funded scholarships that help finance their children’s education. The school voucher program idea originated in 1955 from economist Milton Friedman who was intrigued by the idea of competition among private schools that either recruited and successfully educated students or went out of business. Friedman thought that allowing parents to choose among private schools that competed for public subsidies accompanying a student’s enrollment would force these schools to become more effective at educating all children. In Friedman’s view, this type of private competition was more desirable that publically controlled education.

A. Milwaukee Parental Choice

Friedman’s idea was not put into action for students until 1990 when Wisconsin legislators established the Milwaukee Public School System. At inception, the Milwaukee Parental Choice school voucher program provided tuition vouchers to one percent of low-income children in the district so they could enroll in private schools located in Milwaukee. In the

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98 Id.
101 Id.
103 Id.
program’s first year, 341 students enrolled in seven private schools.\textsuperscript{104} In the 2010-2011 school year, 20,189 students participated in the program.\textsuperscript{105} Over the years, the state adjusted the percentage of students allowed to participate in the program and now the maximum is 22,500 students.\textsuperscript{106} About sixty percent of these participants are Black, which is about the same proportion as the general enrollment in the district.\textsuperscript{107} The program requires that a student’s family’s income does exceed 300 percent of the poverty level established annually by the federal government, so the program is intended exclusively for low-income families.\textsuperscript{108} However, once a student enters the school voucher program, she may continue to participate even if her family income rises above that threshold.\textsuperscript{109} The state currently provides $6,442 each year as private school tuition for those students participating in the program.\textsuperscript{110}

Despite its status as the nation’s oldest and largest school voucher program for low-income families today, its constitutionality has twice been challenged in court.\textsuperscript{111} In 1992, the Wisconsin Supreme Court upheld the program, ruling that the “socioeconomic disparities and the educational problems” present in the Milwaukee Public School District necessitated “legislative attention” to improve the educational opportunities of low-income students in Milwaukee.\textsuperscript{112} In 1998, the Wisconsin Supreme Court again considered the constitutionality of the program.\textsuperscript{113} The subsequent decision stated that permitting religious schools to participate in the program did not violate Wisconsin’s constitutional provision against spending state funds for religious

\begin{itemize}
\item \textsuperscript{104} Id.
\item \textsuperscript{106} Id.
\item \textsuperscript{107} BUDGET BRIEFS, supra note 102.
\item \textsuperscript{108} Milwaukee Parental Choice Program, supra note 105.
\item \textsuperscript{109} Id.
\item \textsuperscript{110} Id.
\item \textsuperscript{111} Id.
\item \textsuperscript{112} Davis v. Grover, 166 Wis. 2d 501, 546 (1992).
\item \textsuperscript{113} Jackson v. Benson, 218 Wis. 2d 835, 856 (1998).
\end{itemize}
purposes.\footnote{Id. at 879-80.} The court held that the program did not violate the U.S. Constitution’s First Amendment Establishment Clause, which prevents a state from enacting laws that have the purpose or effect of advancing or inhibiting religion, because it met the three-pronged \textit{Lemon} test.\footnote{Id. at 879-80; see also \textit{Lemon}, 403 U.S. at 612-613.} The school voucher program in Milwaukee passed the \textit{Lemon} test because: (1) the government’s expenditure had a legitimate secular purpose; (2), it did not have the primary effect of advancing religion; and (3), it did not lead to excessive entanglement between the state and participating private, religious schools.\footnote{\textit{Jackson}, 218 Wis. 2d at 857-69.}

\textbf{B. Cleveland Scholarship and Tutoring Program}

While the Milwaukee Parental Choice program continued to expand despite facing legal challenges, Ohio legislators established the Cleveland Scholarship and Tutoring Program in 1995 to begin in the 1996-1997 school year.\footnote{The Cleveland Scholarship and Tutoring Program: Some Basics, \textsc{National Center for the Study of Privatization in Education}, available at www.ncspe.org/publications_files/PB01.pdf.} The program helps students in Kindergarten through twelfth grade attend private schools in Cleveland with a lottery selection process that gives preference to low-income families.\footnote{Cleveland Scholarship and Tutoring Program, \textsc{Ohio Department of Education}, http://www.ode.state.oh.us/GD/Templates/Pages/ODE/ODEPrimary.aspx?page=2&TopicRelationID=672 (last visited April 30, 2012) (select “Cleveland Parent Information”).} Depending on the participating family’s income, the state currently pays either seventy-five percent or ninety percent of the private school’s annual tuition, up to $4,250 for Kindergarten through eighth grade tuition or $5,000 for high school tuition.\footnote{When first created, the program only gave $2,250 to families regardless of the student’s grade. \textit{Id.}} In the 2010-2011 school year, 5,678 students received school vouchers to attend forty different private schools.\footnote{Ohio – Cleveland Scholarship and Tutoring Program, \textsc{The Friedman Foundation For Educational Choice}, http://www.edchoice.org/School-Choice/Programs/Cleveland-Scholarship-and-Tutoring-Program.aspx (last visited April 30, 2012).}
This program is notable not only because it was the second school voucher program to be established in the nation, but also because it gave rise to the most significant school voucher lawsuit to this day.\textsuperscript{121} Shortly after the Ohio legislature approved the school voucher program, a group of Ohio taxpayers challenged the program in state court on state and federal grounds, and the Ohio Supreme Court held that the program did violate some provisions of the Ohio constitution.\textsuperscript{122} The legislature quickly fixed the problems, but in July 1999, the respondents again filed action, this time in United States District Court, seeking to enjoin the school voucher program because it allegedly violated the Establishment Clause of the United States Constitution.\textsuperscript{123} The District Court agreed, granted a preliminary injunction, and ultimately granted summary judgment for the respondents.\textsuperscript{124} A year later, the Court of Appeals affirmed the judgment, finding that the program advanced religion in violation of the Establishment Clause.\textsuperscript{125} Finally, the Supreme Court granted certiorari in 2001 and heard arguments for the case in 2002 to decide whether the Ohio school voucher program had the effect of advancing or inhibiting religion.\textsuperscript{126} The Court carefully examined the amount and type of choices the school voucher program gave Cleveland parents, noting that parents may choose for their children to remain in public school, remain in public school with publicly funded tutoring aid provided through the program, obtain a school voucher and choose a religious school, obtain a school voucher and choose a nonreligious private school, enroll in a community school, or enroll in a

\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} \textit{Id.} at 649; \textit{Taylor v. Simmons-Harris}, 533 U.S. 976 (2001).
magnet school. The parents received varying degrees of financial support from the state based on the school selected in the voucher program, but private schools received only half the government assistance given to community schools and one-third the assistance given to magnet schools. The Court stated that the funding levels of the school options actually created disincentives for parents to choose private schools for their children, because the parents would be liable to co-pay a portion of the private school tuition. In the end, the Court held that the program did not violate the Establishment Clause, because it provided benefits directly to a “wide spectrum of individuals, defined only by financial need and residence in a particular school district.” It was important to the Court that (1), the benefits were given to the parents to make their own choices about school enrollment and not to the school itself, and (2), the program provided a wide range of school choices including public and private, secular and religious, so the outcomes were the result of choices by private individuals, not the government. Simply put, the Zelman Court held that school voucher programs are constitutional despite public funds reaching religious institutions.

Zelman further relaxed the Establishment Clause interpretation because the amount of aid no longer carried any weight in the Court’s analysis, like it did in Witters. Had the Supreme Court instead invalidated the school voucher plan in Zelman, “it would have established national standards and greatly deterred state activity in this arena... But after these cases, instead of a national standard, the legality of such measures will likely depend on state constitutional

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127 Zelman, 536 U.S. at 655. Community schools are schools that receive funding from the state but are run by their own school boards, so they are independent of any school district. Magnet schools are public schools that emphasize a particular subject area, teaching method, or service.
128 Id. at 654.
129 Id. at 640, 654.
130 Id. at 662-63.
131 Id. at 646.
132 Id. at 646.
133 Id. at 419.
134 Crocker, supra note 99 at 421.
principles.”134 Thus, because the Supreme Court found that school voucher programs in general conform to the Establishment Clause of the United States Constitution, it enabled more states to establish such programs. This move only incited school voucher opponents to shift their legal battles into state courts, which will be discussed in Section V.135

C. Other United States School Voucher Programs

Since the origination of school voucher programs in Wisconsin and Ohio, states across the nation have established similar programs that allow parents to decide how public money is used to educate their children. In fact, in the 2011-2012 school year, fifteen different school voucher programs served 81,590 students in the United States.136 Currently, school voucher programs operate in Arizona, Colorado, Florida, Georgia, Indiana, Louisiana, Ohio, Oklahoma, and Utah, Wisconsin, and Washington, D.C.137 The following table provides details about school voucher programs excluding the programs previously discussed above in Milwaukee and Cleveland.138 It is important to note that in addition to school vouchers, many states offer tax credits to individuals or corporations for educational expenses or donations made to student scholarships, organizations, or individuals.139 Although these tax credit programs can help parents manage the financial stress of educational expenses, they differ from school voucher programs and thus are not discussed in this article.

135 Crocker, supra note 99 at 421.
137 Green & Moran, supra note 17 at 276.
139 Voucher Strategy Center, supra note 11.
<table>
<thead>
<tr>
<th>State</th>
<th>Program Name</th>
<th>Date Started</th>
<th>Number of Students Served in 2010-2011</th>
<th>Average Cost of Voucher or Range of Amount</th>
<th>Eligibility Rules</th>
<th>Cost of Program Annually</th>
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<td>Empowerment Scholarship Account</td>
<td>Enacted July 2011; begins in 2011-2012 school year</td>
<td>Not available</td>
<td>$5,000 to $30,000 depending on disabilities; parents receive 90 percent of state per-pupil expenditure adjusted for services needed for child’s disability</td>
<td>Student must have Individualized Education Plan or 504 Plan and have attended a public school for at least 100 days of previous fiscal year or who are receiving a voucher from a school tuition organization</td>
<td>Not available</td>
</tr>
<tr>
<td>Colo.</td>
<td>Douglas County Choice Scholarship Pilot Program</td>
<td>Approved in 2011; currently enjoined</td>
<td>500</td>
<td>Lesser of private school tuition or 75 percent of per-pupil public revenue ($4,575)</td>
<td>Student must currently be attending school in Douglas County School District; family must reside in Douglas County School District for at least one year</td>
<td>Not available</td>
</tr>
<tr>
<td>DC</td>
<td>DC Opportunity Scholarship Program</td>
<td>2004</td>
<td>1,012</td>
<td>Up to $7,500</td>
<td>Students must reside in DC; family’s annual</td>
<td>$8.6 million</td>
</tr>
<tr>
<td>State</td>
<td>Scholarship Program</td>
<td>Year</td>
<td>Amount</td>
<td>Tuition and Fees</td>
<td>Income Requirements</td>
<td>Funding Information</td>
</tr>
<tr>
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</tr>
<tr>
<td>Fl.</td>
<td>McKay Scholarship Program</td>
<td>1999</td>
<td>21,054</td>
<td>Equal to public school cost for student tuition and fees; Average voucher cost = $6,627</td>
<td>Family's annual income must be less than 185 percent of federal poverty rate</td>
<td>$152 million</td>
</tr>
<tr>
<td>Ga.</td>
<td>Special Needs Scholarship Act</td>
<td>2007</td>
<td>2,550</td>
<td>Equal to public school cost for student tuition and fees; Average voucher cost = $6,342</td>
<td>Students must have Individualized Education Plan (IEP) and have attended a Florida public school in any of the five years prior to the 2010-2011 school year</td>
<td>$15.9 million</td>
</tr>
<tr>
<td>In.</td>
<td>Choice Scholarship Program</td>
<td>2011; begins in 2012-2013</td>
<td>Maximum of 7,500 in first year, 15,000 in second</td>
<td>90 percent or 50 percent of tuition cost depending on household income</td>
<td>Student must have attended any Indiana public school for preceding two semesters; family’s annual income must be less than 150 percent of federal poverty rate</td>
<td>Not available</td>
</tr>
<tr>
<td>La.</td>
<td>Student Scholarships for Educational</td>
<td>2008</td>
<td>1,697</td>
<td>Up to $6,300 per student</td>
<td>Student must be entering K-6 grade,</td>
<td>$7.8 million</td>
</tr>
<tr>
<td>State</td>
<td>Program Name</td>
<td>Eligibility</td>
<td>Funding</td>
<td>Description</td>
<td></td>
<td></td>
</tr>
<tr>
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<td></td>
<td></td>
</tr>
<tr>
<td>La.</td>
<td>School Choice Pilot Program for Certain Students with Exceptionalities</td>
<td>have attended an academically unacceptable public school; family must reside in Orleans Parish and have income less than 250 percent of the federal poverty rate</td>
<td>Up to $3,000 per student</td>
<td>Student must live in Caddo, East Baton Rouge, Jefferson, Lafayette, Orleans or St. Tammany parishes; has IEP; is not gifted/talented; is entered grades 1-8</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ohio</td>
<td>Jon Peterson Special Needs Scholarship</td>
<td>Not available; limited to 5 percent of special needs population, about 12,965 students</td>
<td>90 percent of student’s special education funding amount, with cap of $20,000; voucher amount is deducted from resident school district and redirected to the</td>
<td>Students must have IEP</td>
<td>Could cost $259 million in 2012-2013 school year</td>
<td></td>
</tr>
<tr>
<td>State</td>
<td>Program Name</td>
<td>Year</td>
<td>Amount Available</td>
<td>Description</td>
<td>Eligibility</td>
<td>Total Spending</td>
</tr>
<tr>
<td>--------</td>
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<td>------------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------------------</td>
<td>---------------</td>
</tr>
<tr>
<td>Ohio</td>
<td>Educational Choice Scholarship Program</td>
<td>2005</td>
<td>15,411; 30,000</td>
<td>For grades K-8, up to $4,250; in grades 9-12, up to $5,000; voucher amount is deducted from resident school district and redirected to the provider/parent.</td>
<td>Student must be assigned to public school rated in “academic emergency” or “academic watch” for two of last three years or is a school ranked in the bottom 10 percent statewide based on performance.</td>
<td>$71.6 million</td>
</tr>
<tr>
<td>Ohio</td>
<td>Autism Scholarship Program</td>
<td>2004</td>
<td>2,027</td>
<td>Up to $20,000 depending on services needed in IEP; voucher amount is deducted from resident school district and redirected to the provider/parent.</td>
<td>Student must be age 3 to 21, identified as autistic, and residing in Ohio.</td>
<td>$32.2 million</td>
</tr>
<tr>
<td>Okla.</td>
<td>Lindsey Nicole Henry Scholarship for Students with Disabilities</td>
<td>2010</td>
<td>10</td>
<td>Equal to public school cost for student tuition and fees, whichever is less; Average voucher cost.</td>
<td>Students must have IEP and have attended a public school in the state in the previous year.</td>
<td>$114.8 million</td>
</tr>
<tr>
<td>State</td>
<td>Program</td>
<td>Year</td>
<td>Funding</td>
<td>Eligibility</td>
<td>Requirements</td>
<td>Cost</td>
</tr>
<tr>
<td>--------</td>
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<td>----------------------------------------------------------------------------</td>
<td>---------------------------------------------------</td>
<td>----------</td>
</tr>
<tr>
<td>Utah</td>
<td>Carson Smith Scholarship Program</td>
<td>2005</td>
<td>$6,381</td>
<td>For students who receive more than three hours of special education services a day, up to $6,442. For students who receive less than three hours of special education services a day, up to $3,865</td>
<td>Students must have IEP</td>
<td>$3.2 million</td>
</tr>
<tr>
<td>Wisc.</td>
<td>Racine Parental Choice Pilot Program</td>
<td>2011</td>
<td>Not available</td>
<td>Not available</td>
<td>Student must live in Racine Unified School District</td>
<td>Not available</td>
</tr>
</tbody>
</table>

The information provided about school voucher programs across the nation serves as a guide for other states to expand the educational options given to parents in their state. Now that the oldest school voucher program is more than twenty years old and many legal battles have played out in federal and now state court, other states can use this information as a starting point.
in considering if and how school vouchers would benefit the state and cater to the needs of children and parents.\textsuperscript{140}

V. SCHOOL VOUCHER PROGRAM BATTLES IN STATE COURT

While \textit{Zelman} opened the constitutional door for school voucher programs, it did not make the opposition to school voucher programs vanish. States still face a number of challenges resulting from their unique state constitutions that must be overcome before school voucher programs can be implemented nationwide.\textsuperscript{141} As noted by a school voucher opponent after the \textit{Zelman} decision, “many state constitutions have related clauses that are more rigorous and more far-reaching than the First Amendment.”\textsuperscript{142} In addition to legal battles involving a state’s constitution, additional arguments will be waged using political and policy grounds.\textsuperscript{143} Opponents remain a “powerful political force against voucher programs.”\textsuperscript{144}

Instead of focusing on the political opposition to school vouchers, in which every criticism of school voucher programs can be countered by a comparably supportive view, it is more valuable to assess the state constitutional concerns that ultimately govern how school vouchers will be viewed. This paper will do just that. There are three reasons a state could resist implementing a school voucher program on state constitutional grounds.\textsuperscript{145} One reason is that state constitution provisions suggest that all schools in the state must have substantially the same educational programming and administrative structure.\textsuperscript{146} For example, this provision is found in Florida’s state constitution:

\textsuperscript{141} See 78 A.L.R.5th 133 (2000).
\textsuperscript{142} Green & Moran, supra note 17 at 278.
\textsuperscript{143} Crocker, supra note 99 at 416.
\textsuperscript{144} Id. at 423.
\textsuperscript{145} See Green & Moran, supra note 17.
\textsuperscript{146} Green & Moran, supra note 17 at 279.
The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.\footnote{FLA. CONST. art. 10, § 1(a).}

Fourteen states have similar constitutional provisions that mandate the establishment of a uniform system of public schools: Colorado, Florida, Idaho, Indiana, Minnesota, Nevada, New Mexico, North Carolina, North Dakota, Oregon, South Dakota, Washington, Wisconsin, and Wyoming.\footnote{Id.} Despite the provisions for a uniform system, Florida, Indiana, and Wisconsin have established school voucher systems, with Colorado in the process of implementing its newly designed program.\footnote{Andrea Rael, \textit{Douglas County School Voucher Program Halted; Now What, And Who Pays?}, HUFFINGTON POST (Aug. 16, 2011), http://www.huffingtonpost.com/2011/08/16/douglas-county-voucher-injunction_n_928808.html (last visited May 1, 2012).} In an opinion by the Supreme Court of Wisconsin that certainly benefitted the school voucher movement in that state, the court ruled in \textit{Davis v. Grover} that the state’s uniformity clause “was intended to assure certain minimal education opportunities for the children of Wisconsin” rather than serve as a mandate that every student attend a public school.\footnote{\textit{Davis v. Grover}, 166 Wis. 2d 501, 539 (1992).} In that case, the uniformity clause “requires the legislature to provide the opportunity for all children to receive a free uniform basic education.”\footnote{Id.} Clearly, a uniformity clause is not a complete bar to establishing a school voucher system.

Another reason states do not use school voucher systems is because the state constitution has local control provisions that authorize school boards to supervise education within their
districts, and school voucher programs dilute that control. In Colorado, the relevant provision is as follows:

The general assembly shall, by law, provide for organization of school districts of convenient size, in each of which shall be established a board of education, to consist of three or more directors to be elected by the qualified electors of the district. Said directors shall have control of instruction in the public schools of their respective districts.

There are six states with local control provisions: Colorado, Florida, Georgia, Kansas, Montana, and Virginia. But Florida, Georgia, and potentially Colorado, have overcome local control provisions in favor of school voucher programs.

The last reason a state would not implement a school voucher program is the existence of funding provisions in the state constitution. These provisions could either, (1), explicitly bar the funding of private schools, (2), bar funding to any school that is not under exclusive control of the state, (3), limit the money raised for education to public schools, or (4), require public money to be spent for public purposes. One example of a state with a funding provision that limits public funding to private schools is Arizona:

No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

There are twenty states that have one of these funding provisions in their constitution: Alaska, Arizona, California, Connecticut, Georgia, Hawaii, Illinois, Massachusetts, Michigan,

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152 Green & Moran, supra note 17 at 288.
153 COLO. CONST. art. IX, § 15.
154 Green & Moran, supra note 17 at 288-89.
156 Green & Moran, supra note 17 at 294.
157 Id.
158 ARIZ. CONST. art. 12, § 1.
Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Rhode Island, South Carolina, South Dakota, Texas, Washington, and Wyoming.\textsuperscript{159} Regardless, Arizona and Georgia have established school voucher programs.\textsuperscript{160} In Arizona, a number of legal battles have marked the fight for school vouchers. Over the last decade, Arizona has faced substantial challenges to two different school voucher programs established for some of the most at-risk children in the state.\textsuperscript{161} In 2006, the Arizona legislature established two voucher programs to benefit foster children and children with disabilities.\textsuperscript{162} The voucher money would be paid to parents to use for school tuition at a religious or nonreligious school of their choice.\textsuperscript{163} However, a group of individuals filed suit in 2007 to enjoin the superintendent of schools from implementing the programs, alleging that the programs violated the Arizona constitution.\textsuperscript{164} Through a contentious trial that involved decisions from the Maricopa County Superior Court, Court of Appeals, and Supreme Court of Arizona, the final decision was that the voucher programs did violate the Arizona constitution because public funds were ultimately aiding private and religious schools.\textsuperscript{165} This decision forced the Arizona legislature to return to the drawing board to reconstruct a new school voucher program that is in place today.\textsuperscript{166}

\textsuperscript{159} Green & Moran, supra note 17 at 294.
\textsuperscript{163} Id.
\textsuperscript{164} Id. at 80.
\textsuperscript{165} Id. at 83.
Although there are certainly challenges to overcome regarding school voucher programs in every state, the state constitutional obstacles are amenable in most states.\footnote{See Allen M. Brabender, \textit{The Crumbling Wall and Free Competition: Formula for Success in America's Schools}, 79 N.D. L. REV. 11 (2003).} To be sure, there are some states in which the state constitution heavily restricts the possibility of establishing a school voucher program regardless of the state’s responsibility to education all children and their legal relationship with parents,\footnote{Green & Moran, \textit{supra} note 17 at 278-305.} but for other states, constitutional concerns of opponents are only a small deterrent in the larger school voucher movement.\footnote{See Gary Schaer, \textit{Opinion: Here’s how Opportunity Scholarship Act benefits students}, THE RECORD (March 19, 2012), \url{http://www.northjersey.com/news/opinions/schaer_032012.html}; Kevin Mooney, \textit{Louisiana Legislature Prepares to Debate Expansion of Voucher Program}, THE PELICAN POST (March 12, 2012), \url{http://www.thepelicanpost.org/2012/03/12/louisiana-legislature-prepares-to-debate-expansion-of-voucher-program}; Nirvi Shah, \textit{Special Ed. Vouchers May Open Doors for Choice}, EDUCATION WEEK (February 27, 2012), http://www.edweek.org/ew/articles/2012/02/29/22vouchers_ep.h31.html?tkn=OTXF286JlgjwpkAvRhHsKc3mHKDdX4VneE5%2F&cmp=clp-edweek.} 

VI. FACTORS AFFECTING SCHOOL VOUCHER POTENTIAL IN ILLINOIS

Although the implementation of a school vouchers program in Illinois has already faced many political and constitutional dilemmas, there is strong potential, not to mention need, to establish an effective school voucher system in Illinois for the students and families living in Chicago. Certainly the need for a better education system in Illinois extends well beyond the City of Chicago, but taking a lesson from the programs in Ohio and Wisconsin, it is important to start a small, effective program then build upon that strength to create a further reaching, but just as valuable program.\footnote{See \textit{Ohio’s Dramatic Expansion of School Choice Praised by Nation’s Original Voucher Organization}, THE FRIEDMAN FOUNDATION FOR EDUCATIONAL CHOICE (June 30, 2011), http://www.edchoice.org/Newsroom/News/Ohio-s-Dramatic-Expansion-of-School-Choice-Praised-by-Nation-s-Original-Voucher-Organization.aspx.} Considering the surmountable provisions of the Illinois Constitution, the reprehensible conditions of public education in Chicago, and the recent drive in the Illinois
legislature for a school voucher program, conditions are favorable to establish such a program.\textsuperscript{171} Not only that, Illinois has a responsibility to parents to include school vouchers in Chicago’s current school choice structure in order to better educate the thousands of students currently enrolled in CPS schools. Let us examine the factors contributing to this argument.

**A. Illinois Constitution**

Because *Zelman* pushed legal battles about school voucher programs into state courts and implicated state constitutions, it is important to examine the Illinois Constitution to understand how opponents to school vouchers will frame their arguments within the state.\textsuperscript{172} Two sections of the Illinois Constitution relating to the education of its citizens are relevant in this discussion:

A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities. The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law. The State has the primary responsibility for financing the system of public education.\textsuperscript{173}

This section reiterates the state’s responsibility in educating the citizens of the state.\textsuperscript{174} As it states, Illinois has an obligation to provide for “high quality public educational institutions and services.”\textsuperscript{175} Also included in this section is a statement that allows the Illinois legislature to provide for other free education.\textsuperscript{176} While it ends by stating that it explicitly has a duty to fund public [emphasis added] education, the fact that the state constitution leaves open the door that


\textsuperscript{173} ILL. CONST. ART. 10, § 1.

\textsuperscript{174} Id.

\textsuperscript{175} Id.

\textsuperscript{176} Id.
the legislature can establish other types of “free education” means that school vouchers could be one of those established types.\textsuperscript{177} The Illinois Constitution also includes a public funds provision:

Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose.\textsuperscript{178}

The third section of article ten of the state constitution is what will most likely give school voucher proponents the biggest opposition. This section includes a prohibition on using public funds to support or sustain a school controlled by a religious organization.\textsuperscript{179} On its face, this would not prohibit a school voucher program that included only choices of public charter schools or nonreligious private schools, but it could prohibit religious schools from participating.\textsuperscript{180}

B. Student Achievement

Without a doubt, Illinois faces enormous challenges when it comes to educating the 2,098,145 students in Kindergarten through twelfth-grade living in the state.\textsuperscript{181} However, each year, state standardized test results show that at least a quarter of Illinois students are not meeting minimum standards in reading and one-fifth of students are not meeting minimum standards in

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\textsuperscript{178} ILL. CONST. art. 10, § 3.
\textsuperscript{179} Id.
\textsuperscript{181} Annual Report 2011, ILLINOIS STATE BOARD OF EDUCATION (January 2012), http://www.isbe.net/reports/annual11/toc.htm (select “complete report”).
\end{flushright}
Achievement is even lower for low-income and minority students. Specifically in Chicago, less than one-third of eleventh-grade Hispanic CPS students passed the state reading test while more than twice that percentage of White students passed the test in 2007. Forty percent of low-income students in CPS do not meet minimum reading standards, and more than twenty-five percent of low-income students do not meet minimum math standards. Sadly, students with disabilities in CPS fare even worse: sixty percent do not meet minimum reading standards and forty-eight percent do not meet minimum math standards. Out of 3,904 Illinois public schools, 2,525 (about sixty-five percent) are Title I schools. Furthermore, almost thirty-two percent of all Title I schools are in Federal School Improvement Status, a special designation by the United States Department of Education that identifies when the school has failed to perform annually. Furthermore, Illinois has one of the worst achievement gaps in mathematics.\textsuperscript{182} 2011 Illinois State Report Card, ILLINOIS STATE BOARD OF EDUCATION (December 16, 2011), http://webprod.isbe.net/ereportcard/publicsite/getsrchcriteria.aspx (Under “State Report Card” select radio button next to “English”; select “2011” in dropdown menu next to fiscal year; select “Get Card”).\textsuperscript{183} OUNCE OF PREVENTION, STARTING EARLY TO CLOSE THE ACHIEVEMENT GAP (2009), available at http://www.ounceofprevention.org/advocacy/index.php (search for “Starting Early to Close the Achievement Gap”; select first search result).\textsuperscript{184} 2011 Illinois State Report Card, supra note 182.\textsuperscript{185} Id. Title I schools are schools where at least 35 percent of the children in the school attendance boundary are from low-income families or at least 35 percent of the enrolled students are from low-income families. These schools are eligible to receive federal Title I funds. “Low-income” is most frequently defined as eligible to receive free and reduced-price school lunch. Title I funds from the federal government are to be used for programs designed to improve the academic achievement of children from low-income homes. 20 U.S.C. 6301.\textsuperscript{186} Id. "Federal school improvement status" applies only to schools that receive Title I funds. If Title I schools do not meet Adequate Yearly Progress (AYP) for two consecutive years, as determined by standards set by No Child Left Behind, the school is placed in "Choice" School Improvement Status, which means they must develop an improvement plan, provide students the option to transfer to a different school and provide them transportation to get there, and use part of their Title I funds for professional development for their teachers and staff. If a school does not make AYP for three consecutive years, they will be in "Supplemental Services" School Improvement Status, which means that in addition to all the "Choice" requirements above, they must also use some of their Title I funds to support students by providing tutoring or after-school programs from a state-approved provider. If a school fails AYP for four years in a row they enter "Corrective Action" Improvement Status, where they must provide both "Choice" and "Supplemental Services" as well as choose one of the following: replace responsible staff, implement a new curriculum, decrease a school’s management authority; appoint an external expert to advise school, or restructure the internal organization of the school. Finally, if a school fails AYP for 5 years or more, they must plan to and implement one of the following: chartering, reconstitution, contracting, state takeover, or another major governance restructuring. 20 U.S.C.A. § 6301 (West 2002).
the nation—only seven states have a greater disparity in educational attainment.\textsuperscript{189} One-quarter to one-half of eighteen- to twenty-four-year-olds in rural and inner city areas of Illinois have no high school diploma, compared to only two to eleven percent of those living the suburbs and parts of downstate Illinois.\textsuperscript{190} These statistics, coupled with the statistics describing the poor student achievement in the Chicago in Part I, show that Illinois is neglecting its responsibility to fully educate its children, as required by the Illinois constitution.\textsuperscript{191} Unfortunately, it is Illinois children and parents that immediately suffer when Illinois fails to improve public education and expand school choice options in the state.

C. Public Opinion

Public opinion informs public officials, and, in turn, affects public policy itself. While leaders of teachers unions are especially hostile to the idea of school vouchers, others in Illinois are not only more open to the idea of school vouchers, but also dissatisfied with the current system of public education, which is a positive factor for school voucher policy in the state.\textsuperscript{192} Fifty-seven percent of Illinoisans rated the Illinois public school system as “fair” or “poor.”\textsuperscript{193} This attitude was strongest among thirty-six to fifty-five-year-olds (sixty-nine percent), Black (sixty-five percent), Asians (sixty-nine percent), women (sixty-one percent), and Chicago-area residents (sixty-two percent). Not surprisingly, only nineteen percent of Illinoisan report that a

\textsuperscript{188} The achievement gap in education refers to “the disparity in academic performance between groups of students.” Achievement Gap, EDUCATION WEEK (July 7, 2011), http://www.edweek.org/ew/issues/achievement-gap/.

\textsuperscript{189} The seven states with greater differences in college attainment between whites and minorities in ascending order are: Connecticut, South Dakota, Massachusetts, Nebraska, North Dakota, California, and Colorado. PUBLIC AGENDA TASK FORCE AND ILLINOIS BOARD OF HIGHER EDUCATION, PUBLIC AGENDA FOR COLLEGE AND CAREER SUCCESS (2008), available at http://www.ibhe.state.il.us/masterPlanning/materials/070109_PublicAgenda.pdf.

\textsuperscript{190} PUBLIC AGENDA TASK FORCE AND ILLINOIS BOARD OF HIGHER EDUCATION, supra note 189.

\textsuperscript{191} See ILL. CONST. ART. 10, § 1.


\textsuperscript{193} Id.
regular public school is their top choice for their own child’s educational provider. One survey of Illinoisan reports that thirty-nine percent of state residents would prefer a private school setting, twenty-three percent would prefer a charter school education, and seventeen percent would prefer homeschool their children. While not an overwhelming percentage now, fifty-sixty percent of Illinois residents favor allowing parents the option of using public funds to send their child to a private school if that private school offered a better education. This support was more prevalent for residents aged thirty-six and older than among those younger than thirty-six-years-old. Notwithstanding this support, knowledge about school vouchers is very low; it is estimated that thirty-eight percent of Illinoisans have never heard of school vouchers. Probably most importantly for state elected officials, Illinoisans report that they are more likely to vote for a state representative, state senator, or governor who supports school vouchers.

D. Legislative Action

During President George W. Bush’s tenure, education law came to the forefront of America’s attention. The passage of the federal No Child Left Behind Act of 2001 (NCLB) brought public school choice into federal law, but NCLB only passed when President Bush agreed to remove the voucher program provisions from the bill. While controversial, NCLB mandates that parents with a child enrolled in a school identified as under-performing have the

\[^{194}\text{Id.}\]
\[^{195}\text{Id.}\]
\[^{196}\text{Id.}\]
\[^{197}\text{Id.}\]
\[^{198}\text{Id.}\]
\[^{199}\text{Id.}\]
ability to transfer that child to a better-performing public or public charter school.\textsuperscript{201} Although the school voucher program was removed from the federal law, individual state legislatures have worked to include it in state legislation.\textsuperscript{202}

The first step the Illinois legislature accomplished regarding education choices for parents was in 1999.\textsuperscript{203} That year, the Illinois legislature approved a tax credit covering educational expenses for students in any private or public school, including tuition, books, and lab or activity fees for Illinois residents under the age of twenty-one who are enrolled in Kindergarten through twelfth grade beginning in 2000.\textsuperscript{204} The credit is worth a maximum of $500, but the average tax credit is only about $290.\textsuperscript{205} In 2008, an estimated 249,314 families saved more than seventy-two million dollars total by claiming the education tax credit.\textsuperscript{206} This makes it easier for families to choose a private school for their children, because the financial stress of paying for primary or secondary education is decreased by the tax credit. This legislative decision shows that Illinois lawmakers are open to the idea of helping parents assert their right to educate their children how they wish.

Unfortunately, the next step taken by the Illinois legislature was not as helpful for Illinois parents. In early 2010, Illinois Representative James Meeks (D-Chicago), a strong education equity advocate\textsuperscript{207}, sponsored a bill that would have enabled 30,000 students in CPS’s worst-performing and most-overcrowded elementary schools to use taxpayer-funded vouchers to attend

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\textsuperscript{201} Id.

\textsuperscript{202} American Education: School Vouchers Overview, NOW WITH BILL MOYERS (March 26, 2004), http://www.pbs.org/now/society/vouchers.html.


\textsuperscript{204} IL ST CH 35 § 5/201(m) (West 2012).

\textsuperscript{205} Illinois – Tax Credits for Education Expenses, supra note 203; Voucher Strategy Center, supra note 12.

\textsuperscript{206} Illinois – Tax Credits for Education Expenses, supra note 203.

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private schools. This would have created the largest school voucher program in the nation. Illinois annually spends about $11,500 per student, but the proposed voucher would have only be worth $3,700, none which would have been taken from local property tax revenue. The proposed legislation faced heavy opposition from teachers unions who argued that the legislature should be voting for an increase in income tax that would help all students, not just a few, and that school voucher effectiveness is still controversial. However, lawmakers opposed the bill for various reasons. Representative Art Turner (D-Chicago) opposed the measure because he stated that improvements to the education system needed to happen through improvements in the students’ home lives. Although some legislators attempted to argue that the voucher program would have been unconstitutional, Representative Jim Durkin (R-Western Springs) cited the Zelman case as reason to support the bill. Representative Meeks fired back at opponents by saying, “Even if we pass a tax increase, that money can’t go to schools right away… So what do parents… who are trapped in failing school districts do while the General Assembly is trying to solve the education funding?” According to Meeks, the bill would give those parents a relief from sending their children to the worst schools in CPS. The bill did have additional supporters. Representative Durkin stated that he was unwillingly to oppose a bill that could give Chicago students a better opportunity for an education.


Long & Monchir, supra note 208.

Id; *Our Opinion: School voucher pilot program deserves support*, supra note 207.

Long, supra note 209.

Id.

Long & Monchir, supra note 208.

Our Opinion: *School voucher pilot program deserves support*, supra note 207.

Id.

See Long, supra note 209.

Long, supra note 209.
(D-Chicago) argued that the bill was “one of the most important” education bills they will consider, because it was about giving parents school choice.219 Other proponents argue that school vouchers would save taxpayers money and create healthy competition between the public and private sectors.220 Ultimately, the Illinois school voucher legislation passed through the Senate with a vote of thirty-three to twenty221, but it was defeated by twelve votes in the Illinois House in May 2010.222 It seems like the voucher proposal was defeated primarily as a result of the heavy political pressure applied teachers unions.223 Yet, in the 2012 legislative session, education reformers were again lobbying state legislators to develop and implement a school voucher program that targets students attending underperforming schools and students who live in economically depressed areas of the state.224

VII. CONCLUSION

To further the educational goals of parents in CPS and the responsibility of Illinois to educate all children, I challenge state lawmakers to again propose and successfully establish a school voucher program that specifically supports low-income families that meet specific income criteria with children attending Kindergarten through twelfth grade in CPS and give them a choice in education.

A properly implemented school voucher program will not violate any federal or state law or constitution. While opponents argue that public money should not be used to support private

219 Id.
221 Our Opinion: School voucher pilot program deserves support, supra note 207.
222 Long & Monchir, supra note 208.
224 Thomason, supra note 220.
religious schools, there are a number of ways public money currently supports private religious schools: states allow tax deductions for educational expenses related, state agencies provide rehabilitation and vocational support for student in private colleges, and school districts are required to provide appropriate assistance to students with disabilities attending private schools.225 And, those examples are not exhaustive of the ways in which public funds support children and families in educational settings across the nation because, over the years, the Establishment Clause has softened to allow this support.226 More importantly for this paper, the United States Supreme Court previously declared that state school voucher programs in general do not violate the Establishment Clause.227 Thus, the only impediments to school vouchers in Illinois are state factors based upon the state constitution, political and public support, and public need.

The Illinois Constitution contains language barring the state from creating legislation compelling a person to attend or support a specific ministry, along with a form of the Blaine Amendment, which forbids direct government aid to educational institutions that have any religious affiliation.228 Despite these controlling constitutional provisions, history has given Illinois a way around provisions that could otherwise impede school voucher program developments.229 Many public programs currently permit public aid to flow to religiously affiliated organizations, and the state courts have approved these funding structures.230 Furthermore, the United States Supreme Court and the Supreme Court of Illinois has found

225 Mueller, 463 U.S. at 392, 403; Witters, 474 U.S. at 489; Zobrest, 509 U.S. at 3, 5.
227 Zelman, 536 U.S. at 662-63.
228 See ILL. CONST. art. 10, § 3.
229 See infra, Part V. See also Zelman, 536 U.S. at 662-63.
indirect or restricted payments to be constitutional.\textsuperscript{231} In \textit{Zelman}, Ohio’s school voucher program for Cleveland students skirted the Establishment Clause by ensuring that the program provided the voucher benefits directly to a “wide spectrum of individuals, defined only by financial need and residence in a particular school district.”\textsuperscript{232} Thus, if Illinois established a school voucher program in which all students living inside the CPS boundary were eligible for the voucher, a variety of schools participated, including public and private, secular and religious; and the voucher benefits were given to parents to make their own choices about enrollment in such schools, that school voucher program is likely to be upheld despite the Illinois constitutional provision.\textsuperscript{233} The history of other programs provides a blueprint for an Illinois school voucher plan despite the restricting constitutional provisions.\textsuperscript{234} Also important to note is the fact that Illinois does not have uniformity or local control provisions that temper school voucher development in other states. Because the Illinois Constitution seems amenable to school vouchers in the state, it is important to understand that the state’s relationship with children and parents necessitates greater educational choice when public education continually fails the public. 

The factor holding school vouchers back in Illinois is the state legislature. The Illinois legislature is the key in improving education. In 1992, the Wisconsin Supreme Court upheld the Milwaukee School Choice program, ruling that the “socioeconomic disparities and the educational problems” present in the Milwaukee Public School District necessitated “legislative attention” to improve the educational opportunities of low-income students in Milwaukee.\textsuperscript{235} There is no difference between the Milwaukee Public School District and CPS. Certainly if the

\textsuperscript{231} See \textit{Zelman}, 536 U.S. at 662-63.
\textsuperscript{232} \textit{Zelman}, 536 U.S. at 662-63.
\textsuperscript{233} See \textit{id}.
\textsuperscript{235} \textit{Davis}, 166 Wis. 2d at 546.
Illinois can create and pass a school voucher bill, the Illinois Supreme Court will also see the oppressive socioeconomic disparities and the educational problems in CPS that necessitates the implementation of such a bill.\textsuperscript{236} Even if the Illinois legislature crafted a school voucher program that targeted low-income families that meet specific income criteria and children who attend low-performing public schools, the number of eligible families in Chicago is likely to be immense. But if Illinois legislators take note of the school voucher programs in existence across the nation, the program can be successful. Like many other school voucher programs have learned over the years, a pilot program should start small and expand appropriately over time. I want to recognize that the reason Illinois does not currently have a school voucher program is not for lack of trying on behalf of state legislators. But trying is not good enough. In 2010, the proposed school voucher legislation was hotly contested by teachers unions and lacked support from representatives outside of Chicago.\textsuperscript{237} These types of opponents do not widely vary across the nation, yet out of forty-one states that introduced school choice legislation in 2011, thirteen states overcame that opposition to successfully enact those bills into law.\textsuperscript{238} It is possible in Illinois. To frame the argument in a way more amendable to wide support, school vouchers do not create a new entitlement—they only alter the way a current entitlement is delivered and the effectiveness of that delivery.

Considering the poor performance of most CPS schools, it is easy to understand why parents have become increasingly dissatisfied with public school education and need alternatives that are more effective.\textsuperscript{239} Because Illinois fails to provide a public education system that

\textsuperscript{236} \textit{Id.}
\textsuperscript{237} See Long & Monchir, supra note 208.
\textsuperscript{238} Long & Monchir, supra note 208.
\textsuperscript{239} Crocker, supra note 99 at 421.
prepares all CPS children for a productive life beyond high school,\textsuperscript{240} it has an obligation to provide additional educational options that can fulfill that responsibility. Although CPS already offers parents the choice of attending a tuition-free public charter school,\textsuperscript{241} this option does not do enough to satisfy the state’s obligation to educate. Considering the consequences, both negative and positive, of education, it is understandable why parents seek more than a minimally performing public school system or comparable charter school.\textsuperscript{242} Illinois cannot risk failing another generation of Chicagoans by forcing parents to sacrifice a better education for their children. As recognized in \textit{Prince}, “a democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.”\textsuperscript{243} Without an effective education system, Illinois will not produce a democratic society. While I cannot argue that establishing a school voucher system for families in CPS will solve every education-related problem in Chicago, there is no reason to dismiss the option. Abysmal student achievement data proves the need for a school voucher program. The students and parents of Illinois deserve the opportunity to attain an excellent education regardless of who provides that opportunity, and they need that opportunity now.

In stark contrast to the CPS student achievement results, school voucher programs have produced strong levels of student academic achievement and parental support in other states.\textsuperscript{244}


\textsuperscript{243} \textit{Prince}, 321 U.S. at 158, 168.

\textsuperscript{244} See Pete McDonough, \textit{Opinion: NJ Already a Voucher Success Story}, NJ SPOTLIGHT (June 2, 2010), http://www.njspotlight.com/stories/10/0601/2122; Stuart Butler, \textit{Butler: Learning from Sweden’s school voucher...
In fact, eighth-grade students in the Milwaukee Parental Choice Program performed nine to twelve percentage points higher in statewide math, reading, and science tests than their similarly disadvantaged peers.\textsuperscript{245} Students who participated in the D.C. Scholarship Opportunity Program graduated at a rate of ninety-one percent, more than twenty-one percentage points higher than those who were not offered scholarships.\textsuperscript{246} In two consecutive surveys of low-income parents with children in Louisiana’s Student Scholarships for Educational Excellence program demonstrated satisfaction rates of more than ninety percent.\textsuperscript{247} To address financial opposition, an analysis of the Choice Scholarship Program signed into law in Indiana could save taxpayers $1.8 million per year for every 1,000 participating students, according to the Legislative Service agency’s Office of Fiscal and Management Analysis.\textsuperscript{248} Even the neighboring state of Wisconsin has seen strong success in their school voucher programs.\textsuperscript{249} In the Milwaukee Public School District, where one-half of Black males do not graduate from high school, many students enrolled in the school voucher program choose to attend Messmer Catholic School.\textsuperscript{250} At Messmer, eighty-five percent of students graduated and continued on to a four-year college and four percent went on to a two-year school or into the military.\textsuperscript{251} The school only had a one percent dropout rate. Every single analysis has shown that students who accept vouchers have seen positive benefits including improved test scores, higher graduation rates and increased parental satisfaction.\textsuperscript{252} The difference is undeniable.

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\textsuperscript{245} \textsc{American Federation for Children, School Vouchers: A Look at Programs Across the Nation, available at} \url{http://www.federationforchildren.org/factsheetstoolbox} (select “Voucher Briefing Book”).
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\textsuperscript{246} Id.
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\textsuperscript{247} Id.
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\textsuperscript{249} \text{Long & Monchir, supra note 208.}
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\textsuperscript{250} Id.
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\textsuperscript{251} Id.
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\textsuperscript{252} Id.
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School voucher programs are a necessary component of parental rights, especially when the current public education system fails to adequately educate all citizens. The development and recognition of parental rights through Supreme Court cases laid the foundation for allowing parents to participate in a school voucher program and decide where their children will attend school. In Pierce, the Supreme Court succinctly stated, “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.” Indeed, a child should not be forced to attend a failing school because of the state’s failure to provide parents with a better choice for education. Both parents and the state have a duty to prepare Illinois children for success after high school, but this is only possible if the state permits both public and private schools to compete for the opportunity to educate students. That competition will not only save the state money, but force educational providers to become more efficient and effective with state money. In Meyer, the Supreme Court stated that it is a natural duty of a parent to give his or her child an education, which gives the parent the right to engage teachers to instruct her children. Parents contract with the state to provide an education to children, but if the state cannot provide an appropriate education in the current public school system, as evidenced by failing student achievement in CPS, the state must endeavor to fulfill their obligation through additional educational choice. Based on the facts about Illinois law and public education, there is no reason to delay establishing a school voucher system for the benefit of Illinois parents in

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255 Pierce, 268 U.S. at 535.
256 See Thomason, supra note 220.
257 Meyer, 262 U.S. at 400.
Chicago. Thousands of parents and education reform advocates across the state are tired of waiting for the state to fix one of its greatest inequities.\textsuperscript{258} School vouchers must happen now.

\textsuperscript{258} Our Opinion: School voucher pilot program deserves support, supra note 207.