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## Ohio Charter Schools and Educational Privatization: Undermining the Legacy of the State Constitution's Common School Approach

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OHIO CHARTER SCHOOLS AND EDUCATIONAL  
PRIVATIZATION: UNDERMINING THE LEGACY OF THE  
STATE CONSTITUTION’S COMMON SCHOOL APPROACH

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#### I. INTRODUCTION

“I think Governor Taft must be trying to privatize Ohio’s schools.”<sup>1</sup>

Public education in the State of Ohio is in turmoil. Many public school administrators began the 2004-2005 school year with fewer teachers, less funding, and more students than the previous year.<sup>2</sup> A record number of local public school districts submitted tax levies to the voters this past year in an effort to raise essential funds locally, and a record number of these levies failed.<sup>3</sup> Meanwhile, Ohio

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<sup>1</sup>Statement by the principal of a Cleveland Public Elementary School in a middle-class neighborhood after explaining that she would begin the 2004-2005 school year with fewer teachers, less funding, and more students. Interview with anonymous Principal, Cleveland Public Schools, (April, 2004).

<sup>2</sup>Patrick O'Donnell, *School Budgets on Chopping Block Statewide; Area Districts Aren't Alone in Making Cuts*, THE PLAIN DEALER, May 2, 2004, at B1 (noting that the 2.1% increase in state funding for the 2004/2005 school year is outpaced by inflation and the rising cost of health care); *Desperate Districts; Look at the Aug. 3 Ballot and Discover Further Evidence of the Statehouse Failure to Overhaul School Funding*, AKRON BEACON JOURNAL, July 20, 2004, at 3 (noting that as many as 4,000 teachers were eliminated statewide).

<sup>3</sup>Michael Scott, *Reeling School Districts Start Cutting*, THE PLAIN DEALER, Feb. 10, 2005, at B1 (chronicling the recent February, 2005 school levy failures); Katie Byard, *Akron, Ohio, Area's School-Tax Pass Rate is Average, Study Says*, AKRON BEACON JOURNAL, Nov. 4, 2004; Katie Byard, *Akron, Ohio-area Schools Hope Presidential Election Brings Votes for Funding*, AKRON BEACON JOURNAL, Oct. 18, 2004 (stating that “on the Nov. 2 ballot in Ohio [v]oters will decide slightly more than 300 issues [related to school tax requests]”); Katie Byard,

historically provides private schools with more state aid than any other state<sup>4</sup> and continues to spend state money supporting privatization experiments, such as vouchers and charter schools managed or owned by private entities.<sup>5</sup> Finally, despite Ohio Supreme Court rulings in the *DeRolph* case declaring the General Assembly's system of providing for public schools unconstitutional, and unequivocally requiring the General Assembly to overhaul the system,<sup>6</sup> the General Assembly has not complied with the spirit of the Court's ruling. Like the entire issue of school funding, the reasons for the General Assembly's inaction are incredibly complex and interwoven.

This Note argues that Ohio has become a political science experiment in educational privatization and that "Community Schools" have become the laboratories. That is, one of the main reasons that the State of Ohio under-funds public education is that the state's guiding educational policy is privatization. The Ohio courts can address this issue by recognizing that the Ohio Constitution's

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*Wayne County, Ohio, Teachers, Administrators Won't Take Raises Amid Budget Woes*, AKRON BEACON JOURNAL, July 22, 2004 ("Statewide, there will be 103 school tax issues on the Aug. 3 ballot – the highest ever since August elections were initiated in 1984. . . . 'This levy is not going to make us flush,' said Superintendent Steve Caples. 'The levy [will] allow only a bare-bones budget' . . .").

<sup>4</sup>GERALD W. BRACEY, *THE WAR AGAINST AMERICA'S PUBLIC SCHOOLS: PRIVATIZING SCHOOLS, COMMERCIALIZING EDUCATION* 98 (2002) (quoting from Dennis J. Willard and Doug Oplinger, *Charter Experiment Goes Awry*, Akron Beacon Journal, Dec. 12, 1999, at A1).

<sup>5</sup>See Douglas Oplinger & Dennis J. Willard, *Legislature Ok's Two-Year Budget--\$51.2 Billion Plan Continues Pattern of Curbing Aid for Public Schools, Backing Charters, Vouchers*, AKRON BEACON JOURNAL, Jun. 22, 2005, at A1; Sandy Theis, *Taft Plans to Expand Vouchers*, THE PLAIN DEALER, Feb. 10, 2005, at A1 ("Private schools would benefit; public education gets little boost."); Thomas Suddes, *Catholic Vote Could Matter in November*, THE PLAIN DEALER, May 12, 2004, at B9 ("[I]t's likely that no state spends proportionately more than Ohio . . . to help parents afford non-public (i.e., often Catholic) schools."); Scott Stephens, *Ohio Virtually Booming With Cyber Schools*, THE PLAIN DEALER, June 27, 2004, at A1 ("Ohio is leading the nation in cyber-schools, and not just by a little. It's a virtual rout."); Scott Stephens, *Schools Out \$376 Million to Charters; Cuyahoga Will Transfer \$71 Million*, THE PLAIN DEALER, Nov. 17, 2004, at B1. Ohio spent approximately 424 million dollars on charter schools during the 2004-2005 school year, an increase of 122 million over the previous year. Doug Oplinger & Dennis J. Willard, *Budget Clauses Benefit Charters – Ohio House Bill Meant to Cap Growth Restricts Public Districts*, AKRON BEACON JOURNAL, Apr. 23, 2005, at A1. Of that 424 million, one private, for-profit Educational Management Corporation ("EMO"), White Hat Management, received 107 million, or about 25 percent of the total. *Id.*

<sup>6</sup>*DeRolph v. State of Ohio*, 780 N.E.2d 529 (Ohio 2002) [hereinafter *DeRolph IV*]; *DeRolph v. State of Ohio*, 754 N.E.2d 1184 (Ohio 2001) [hereinafter *DeRolph III*]; *DeRolph v. State of Ohio*, 728 N.E.2d 993 (Ohio 2000) [hereinafter *DeRolph II*]; *DeRolph v. State of Ohio*, 677 N.E. 2d 733 (Ohio 1997) [hereinafter *DeRolph I*]. *DeRolph I* was initially filed in 1991. In addition, the final decision related to the case was *The State ex rel. State of Ohio v. Lewis*, 789 N.E.2d 195 (Ohio 2003), in which the Court issued a writ of prohibition to the trial judge of the case, finally and unambiguously relinquishing jurisdiction over the case. This decision is sometimes referred to as *DeRolph V*. Thus, the litigation spanned at least a decade and included four successive admonitions from the Court to the General Assembly to execute their constitutional mandate regarding public education.

approach to public education is inconsistent with privatization. The Ohio Constitution is inconsistent with privatization because the Constitution views education as a public benefit and requires that the state *assure* that every child receives an adequate education, while privatization views education as a private benefit and sees the state as responsible for giving every family the opportunity to pursue a free education. Charter schools, and the arguments raised by their opponents, exemplify this conflict.<sup>7</sup> Therefore, the Ohio courts should invalidate the privatization aspects of charter school laws in order to redirect the educational policy of the state toward the constitutional conception of public schooling. An opportunity to do so is currently before the Ohio Supreme Court in the form of a constitutional challenge to Ohio's "community schools." ("Community school" is Ohio's name for the type of schools generally known as charter schools.<sup>8</sup> This Note will use the terms "charter schools" and "community schools" interchangeably.)

The narrow purpose of this Note is to evaluate the constitutionality of charter schools under the Ohio Constitution. Charter schools (i.e., Ohio community schools) are nominally public schools that are funded by the state, but independently operated and governed.<sup>9</sup> Privatization generally and charter schools specifically are hotly contested topics with both strong and baldly self-serving arguments on all sides.<sup>10</sup> Therefore, instead of addressing privatization head-on, this Note attempts to discuss privatization in the limited context of the current constitutional claims against Ohio community schools.<sup>11</sup> This Note argues that several modes of privatization that are embedded in the Ohio community school laws are fundamentally inconsistent with the Ohio Constitution. Therefore, the legal challenges to community schools should be decided in favor of the plaintiffs, and the Ohio General Assembly should be required to eliminate community schools or, better still, significantly revise their governing statutes.

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<sup>7</sup>State of Ohio *ex rel.* Ohio Cong. of Parents and Teachers v. State of Ohio Bd. of Educ., No. 03AP-508, 2004 Ohio App. LEXIS 4009 (10th Ohio Ct. App. 2004). The plaintiff's Third Amended Complaint at the trial court level sets forth the claims against charter schools in detail. See Plaintiff's Third Amended Complaint, Ohio Cong. of Parents and Teachers v. State of Ohio Bd. of Educ., Franklin County Court of Common Pleas, *available at* <http://cpeinfo.ohea.org/Archives/Amended%20Complaint%20March%202002.htm> (last visited Aug. 31, 2005). For more information on this case at the trial court level, see Judge McGrath's trial court opinion. Ohio State Federation of Teachers v. State of Ohio Bd. of Educ. (2003) No. 01-CVH-05-4457, Franklin County Court of Common Pleas, *available at* <http://ds.columbuslawlib.org:8080/docushare/dsweb/GetRendition/Document-2247/html> (last visited Aug. 31, 2005).

<sup>8</sup>State *ex rel.* Ohio Cong. of Parents and Teachers v. State Bd. of Educ., 105 Ohio St. 3d 1437 (2005) (granting *certiorari*); see also *Justices to Mull Suit Opposing Charter Schools*, THE TOLEDO BLADE, Feb. 17, 2005, at A6.

<sup>9</sup>*Id.* at 2. Ohio community school—i.e., charter school—laws are set forth in chapter 3314 of the Ohio Revised Code. OHIO REV. CODE ANN § 3314 (LexisNexis 2004).

<sup>10</sup>Henry M. Levin, *Studying Privatization in Education* in PRIVATIZING EDUCATION: CAN THE MARKETPLACE DELIVER CHOICE, EFFICIENCY, EQUITY, AND SOCIAL COHESION? 4 (Henry M. Levin ed., 2001); Kevin B. Smith, *The Ideology of Education: The Commonwealth, the Market, and America's Schools* 2 (2003).

<sup>11</sup>State *ex rel.* Ohio Congress of Parents and Teachers, 2004 Ohio App. LEXIS 4009.

Because “school choice”<sup>12</sup> is currently a potent political issue, such a judicial ruling could help to maintain or augment political pressure on the Ohio General Assembly to enact a system of public education that is consistent with the Common School ideology of a single, state-funded system of universal education that is at the heart of the Ohio Constitution’s education clause.<sup>13</sup> Charter schools could be an aspect of the constitutional system, although not in their present form.

Part II of this Note briefly discusses the current state of public education in Ohio and outlines the *DeRolph* litigation and its implications. Part III focuses on the “thorough and efficient” education clause<sup>14</sup> in the Ohio Constitution and analyzes its meaning from an historical perspective. Part IV addresses the theory behind the privatization of education in general, briefly discusses the history of privatization, and introduces different types of educational privatization in Ohio. Part V compares the ideology behind the education clause in the Ohio Constitution with privatization ideology and concludes that the two ideologies are in conflict. Part VI discusses *Ohio Congress of Parents & Teachers v. State of Ohio Board of Education*,<sup>15</sup> a pending Ohio case challenging the constitutionality of community schools, and evaluates the plaintiffs’ claims within the context of the privatization aspects of Ohio’s community school laws. After predicting that the Ohio Supreme Court will uphold Ohio’s community school laws, the section proposes general revisions to the Ohio charter school laws to bring them within the confines of the Ohio Constitution. Finally, the Note suggests that an outcome in the case that is consistent with the Ohio Constitution could act as a catalyst for a political shift in the guiding educational policy of the General Assembly away from community school legislation grounded in privatization ideology and toward a constitutional *community* school.

## II. PUBLIC EDUCATION IN OHIO AFTER *DEROLPH IV*

### A. *DeRolph v. State of Ohio*

The *DeRolph* case is important to any discussion of public education in Ohio because it broadly defines the current legal and political landscape surrounding the issue. In the most recent decision in the ongoing litigation, the Ohio Supreme Court held in 2002 that the current system of providing public education to Ohio’s children

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<sup>12</sup>“‘School Choice’ is an umbrella term that is used to discuss various reform proposals including tuition vouchers, charter schools, and magnet school programs.” Molly O’Brien & Amanda Woodrum, *The Constitutional Common School*, 51 CLEV. ST. L. REV. 581, 583 n9 (2004).

<sup>13</sup>OHIO CONST. OF 1851, art. VI, § 2. This clause of the Ohio Constitution, known as the “thorough and efficient” clause, provides as follows:

The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.

*Id.*

<sup>14</sup>*Id.*

<sup>15</sup>*State ex rel. Ohio Congress of Parents and Teachers*, 2004 Ohio App. LEXIS 4009.

violates the “thorough and efficient” clause of the Ohio Constitution.<sup>16</sup> That clause states, in pertinent part, that: “The general assembly shall make such provisions, by taxation or otherwise, as . . . will secure a thorough and efficient system of common schools throughout the state . . . .”<sup>17</sup> However, after finding a constitutional violation the Court refused to retain jurisdiction over the remedy, leaving it to the Ohio General Assembly alone to create a “thorough and efficient” system in compliance with the Constitution.<sup>18</sup> Much has been written about school funding and the intricacies of the *DeRolph* case declaring the system unconstitutional.<sup>19</sup> Therefore, a brief summary of the case history should suffice here.

In 1991, an alliance of 275<sup>20</sup> mostly poor and rural school districts calling themselves “the Ohio Coalition for Equity and Adequacy of School Funding” brought suit against the State of Ohio.<sup>21</sup> The Coalition claimed that the system of funding education was completely inadequate and violated the Ohio Constitution. After a victory for the Coalition in the Perry County Common Pleas Court in front of Judge Linton Lewis Jr. the State appealed all the way to the Ohio Supreme Court, which affirmed Judge Lewis’s finding of unconstitutionality.<sup>22</sup>

Ohio Supreme Court Justice Francis Sweeney’s 1997 majority opinion in *DeRolph I* adeptly summarized the problems with Ohio’s public schools and the method of funding them.<sup>23</sup> Contrary to the national trend, Ohio public schools were

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<sup>16</sup>*DeRolph IV*, 780 N.E.2d at 530.

<sup>17</sup>Ohio Const. of 1851, art. VI, § 2.

<sup>18</sup>*Lewis*, 789 N.E.2d at 203.

<sup>19</sup>For an early survey of national school funding litigation, see Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 310 (1991). Numerous articles have also been written about school funding in Ohio and the *DeRolph* litigation specifically. See, e.g., Michael L. Stokes, *Judicial Restraint and the Presumption of Constitutionality*, 35 U. TOL. L. REV. 347 (2003); Josh Kagan, Note, *A Civics Action: Interpreting “Adequacy” in State Constitutions’ Education Clauses*, 78 N.Y.U.L. REV. 2241 (2003); Thomas B.R. Christenson, II, *State School Funding: DeRolph v. State*, 97 OHIO ST. 3d 434, 2002 Ohio 6750, 780 N.E.2d 529, *Decided December 11, 2002*, 29 OHIO N.U.L. REV. 839 (2003); Ronald M. McMillan, *Please Senator, I Want Some More: The General Assembly Gets an “F” from the DeRolph Court*, 45 CLEV. ST. L. REV. 773 (1997); James C. Joslin, Note, *Developing a School Funding Remedy Framework for Ohio and Beyond*, 56 OHIO ST. L.J. 1247 (1995); Morris L. Hawk, Comment, “*As Perfect As Can Be Devised*”: *DeRolph v. State of Ohio and the Right to Education in Ohio*, 45 CASE W. RES. 679 (1995).

<sup>20</sup>Two-hundred and seventy-five school districts represented almost half of the total (612) public school districts in Ohio. The Coalition eventually grew to over 500 districts. Interview with Jayne Geneva, Ohio Coalition for Equity and Adequacy of School Funding, in Cleveland, Ohio (Feb. 7, 2005) (on file with author).

<sup>21</sup>*DeRolph v. State of Ohio*, No. 22043, (Perry County, July 1, 1994); Scott Stephens, *School Funding: Textbook Failure; Court Edicts, Genuine Efforts Haven’t Solved Ohio’s Problem*, THE PLAIN DEALER, October 17, 2004, at A1.

<sup>22</sup>*DeRolph I*, 677 N.E.2d 733.

<sup>23</sup>*Id.*

primarily dependant on local property taxes, not state funds, for revenue.<sup>24</sup> Furthermore, the amount of money given to each district by the state was based on the amount of money in the state budget at the time, not the cost of educating a child or maintaining a school.<sup>25</sup> As a result of this deeply flawed funding structure, as of 1996 ninety-five percent of Ohio school buildings needed repairs, only seventeen percent of schools' heating systems were adequate, districts lacked sufficient funds to comply with the state mandated teacher to student ratio, and Ohio ranked last among the states in number of computers per student.<sup>26</sup> As Justice Sweeney observed, education "ranks miserably low in the state's priorities," despite "the historical notion that the education of our youth is of utmost concern and that Ohio children should be educated adequately so that they are able to participate fully in society."<sup>27</sup>

Although the legislature addressed some of the Court's concerns and enacted some legislation designed to narrow the funding gap between wealthy and poor school districts, the same basic issues and positions remained throughout the subsequent *DeRolph* cases in 2000, 2001, and 2002.<sup>28</sup> Chief among the General Assembly's failures was the failure to allocate a per-pupil amount deemed sufficient to provide a constitutionally adequate education.<sup>29</sup>

As Justice Resnick stated in her *DeRolph IV* concurring opinion, "[i]t becomes obvious that the only practical solution to the dilemma posed by this case lies with the citizens of Ohio."<sup>30</sup> Nonetheless, there may still be a limited role for the Court to

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<sup>24</sup>*Id.* at 738.

<sup>25</sup>*Id.* The amount of state aid "is determined as a result of working backwards through the state aid formula after the legislature determines the total dollars to be allocated to primary and secondary education in each biennial budget. Thus, the foundation level reflects political and budgetary considerations at least as much as it reflects a judgment as to how much money *should* be spent . . . ."

*Id.*

<sup>26</sup>*Id.* at 742-744.

<sup>27</sup>*Id.* at 745.

<sup>28</sup>*See DeRolph II*, 728 N.E.2d at 1020 ("[T]he mandate of the Constitution has not yet been fulfilled. . . . The most glaring weakness in the state's attempts to put in place a thorough and efficient system of education is the failure to specifically address the overreliance on local property taxes."); *DeRolph III*, 754 N.E.2d at 1184 (holding that the Court would not continue to exercise jurisdiction partially because the legislature had made improvements but mostly because "no one is served by continued uncertainty and fractious debate."); *DeRolph IV*, 780 N.E.2d at 530 (vacating the decision in *DeRolph III* and holding that "*DeRolph I* and *II* are the law of the case, and the current school funding system is unconstitutional"). Justice Resnick's characterization of Justice Moyer's concurring opinion is also instructive. *Id.* at 532. "[T]he Chief Justice ignores the deficiencies in the legislative response thus far and . . . seems to believe that a battle half-fought is equivalent to a resounding victory as long as this court is no longer involved in this case." *Id.*

<sup>29</sup>Debbie Phillips, Executive Director, Ohio Fair Schools Campaign, Address at the City Club of Cleveland Panel Discussion: Fixing Ohio School Finance: The Governor's Blue Ribbon Task Force on Financing Student Success (Jan. 10, 2005).

<sup>30</sup>*DeRolph IV*, 780 N.E.2d at 534. Justice Resnick goes on to propose that the voters pass a constitutional amendment requiring an adequate amount be spent on public education. *Id.*

play in this drama.<sup>31</sup> By taking a strong stance on politically sensitive issues such as privatization legislation, the Court might be able to activate the solution that Justice Resnick identified – the political process.

*B. The State of Education in Ohio*

Meanwhile, the Ohio economy has taken a steady turn for the worse, and state funds in general are scarce.<sup>32</sup> State aid to education increased by 3.2 percent in 2003, followed by 2.4 percent in 2004, and 2.1 percent for 2005.<sup>33</sup> However, given that the national inflation rate is approximately two percent and health care costs are increasing at a rate of approximately four percent, this “increase” is actually a decrease in terms of percentage of district need.<sup>34</sup>

The economic downturn in the state also affects citizens’ willingness to vote for local school tax levies. Because local property tax revenue is still fundamental to the state system of providing for public education (in spite of the *DeRolph* Court’s mantra), record numbers of school districts put school levies on the ballots in the fall of 2004.<sup>35</sup> However, only forty-five percent of school issues on the November 2004 ballot passed statewide, representing the lowest annual success rate in a decade.<sup>36</sup> Many districts will have to continue to cut staff and programs simply to meet operating expenses, and some teachers in districts across the state have agreed to forego standard pay raises.<sup>37</sup> It is important to emphasize that these school levies, for the most part, are necessary to meet basic needs and not to add additional programs or build posh administrative offices.<sup>38</sup> Therefore when a levy does not pass, any discretionary expenses, such as extracurricular activities, must be cut in order to meet basic operating expenses.<sup>39</sup> Once those programs are cut they fall out of the

<sup>31</sup>*Id.* at 533. Justice Resnick’s concurring opinion states that:

The Chief Justice [in his dissenting opinion] bemoans the fact that further litigation may be inevitable in light of the decision today, calling that possibility an ‘unfortunate eventuality.’ However, what the Chief Justice’s imperceptive view ignores is that as long as the General Assembly does not definitively fix the school-funding problem, which is its task alone, or at least make a realistic effort to do so, further litigation will be inevitable as a matter of course, since the court is the only body that definitively determines the constitutionality of laws.

*Id.* (citations omitted).

<sup>32</sup>*Ohio Heading in Wrong Direction; Work Force Must be Educated for Jobs in New Economy*, DAYTON DAILY NEWS, Jan. 2, 2005, at B7 (quoting excerpts from a speech by U.S. Senator Mike DeWine, in which he asserts that “[s]ince 2000, Ohio has lost more jobs than any other state – a quarter million or 37 percent of all jobs lost nationwide”).

<sup>33</sup>O’Donnell, *supra* note 2.

<sup>34</sup>*Id.*

<sup>35</sup>Byard, *Ohio-area Schools Hope Presidential Election Brings Votes for Funding*, *supra* note 3.

<sup>36</sup>Byard, *Akron, Ohio, Area’s School-Tax Pass Rate is Average*, *supra* note 3.

<sup>37</sup>Byard, *Wayne County, Ohio, Teachers, Administrators Won’t Take Raises Amid Budget Woes Teachers Wont Take Raises*, *supra* note 3.

<sup>38</sup>*Id.*; Geneva, *supra* note 20.

<sup>39</sup>Geneva, *supra* note 20.

general budget and it becomes increasingly difficult and costly for the school to re-institute them.<sup>40</sup> In this way a school district's resources are whittled away levy by levy, until the district is incapable of providing anything more than a bread-and-water education.

### III. EDUCATION AND THE OHIO CONSTITUTION

Both the text and the history of the Ohio Constitution's education clause reveal that, as the Ohio Supreme Court declared in *DeRolph*, Ohio must do more than provide a bread-and-water education. The Ohio Constitution requires that "[t]he general assembly shall . . . secure a thorough and efficient system of common schools throughout the state . . ."<sup>41</sup> The use of the word "shall" here should not be overlooked. It clearly indicates that the framers of the Ohio Constitution of 1851 intentionally placed an *affirmative duty* on the Ohio General Assembly to provide for public schools. As the following discussion will demonstrate, the framers understood the term "common schools" to have a well-defined and particular meaning: i.e., free, universal, public schools dedicated to fostering democratic citizens for the good of society.<sup>42</sup>

Recognition of the importance of universal education is part of the nation's founders' ideal of national democracy as well as Ohio's state legacy. People like George Washington, Thomas Jefferson, John Adams, Benjamin Franklin, Noah Webster, and Benjamin Rush wrote about the crucial role education would play in a successful republic.<sup>43</sup> Each of these men understood that a well-educated *citizen* has a fundamental role in a democratic republic and that it was the responsibility of government to promote enlightened citizenship. Thus, an understanding of education as a benefit to society at large as opposed to only the individual has always been part of the American ideology.<sup>44</sup> Ohio history clearly illustrates the strength and prevalence of this notion of democracy and education, further demonstrating its importance as a first principle in discussing contemporary school reform movements.<sup>45</sup>

This section briefly addresses early national conceptions of universal education and the subsequent Common School movement in order to put the Ohio Constitution's particular approach to education in its broader context. It then discusses education and the history of the Ohio Constitution and analyzes the meaning of the education clauses in the Constitution of 1851, the basis of our current Constitution.

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<sup>40</sup>*Id.*

<sup>41</sup>OHIO CONST. OF 1851, art. VI, § 2 (emphasis added).

<sup>42</sup>*See generally* O'Brien & Woodrum, *supra* note 12. The article by O'Brien & Woodrum is a key reference for the section on the constitutional history of education in Ohio.

<sup>43</sup>1 SUSAN C. HASTINGS ET AL., *BALDWIN'S OHIO SCHOOL LAW*, 1-2 (2003); Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society, 1780-1860* 5-9 (1983).

<sup>44</sup>KAESTLE, *supra* note 43, at 5-9.

<sup>45</sup>*See generally* O'Brien & Woodrum, *supra* note 12.

A. *Notions of Universal Education in the Early Republic*

In his farewell address in 1796, George Washington said, “[p]romote, then, as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened.”<sup>46</sup> Recognition of the unique and central role of the *public* in republican government led logically and directly to the promotion of education urged here by Washington.<sup>47</sup> On the same grounds, John Adams argued for government sponsorship of universal education: “The whole people must take upon themselves the education of the whole people, and must be willing to bear the expenses of it.”<sup>48</sup> Perhaps the “founding father” most famous for advocating for universal education, is Thomas Jefferson.<sup>49</sup> In his frequently cited book on the history of American education, Carl Kaestle writes:

In the preamble of his 1779 bill for free schools in Virginia, Thomas Jefferson laid out the basic logic of state-sponsored schools for republican citizenship. Citizens must choose leaders wisely, defeat ambition and corruption in politics, and protect liberty by keeping a vigilant eye on government. All citizens should have a chance not only to vote but to be elected. The government needs wise and honest laws, Jefferson argued, and thus it needs educated and virtuous lawmakers. In a republic, these men must be chosen ‘without regard to wealth, birth or other accidental condition.’ Because there are many people who cannot afford a good education, Jefferson argued, all should share the cost, in order to foster the best possible representative government.<sup>50</sup>

Jefferson unequivocally connected citizenship with education, and viewed the state society as the beneficiary of an educated citizenry. Since education served an essential (and essentially) civic purpose, Jefferson believed that it was the state’s responsibility to provide that education.<sup>51</sup>

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<sup>46</sup>HASTINGS, *supra* note 43, at 1.

<sup>47</sup>KAESTLE, *supra* note 43, at 5.

<sup>48</sup>HASTINGS, *supra* note 43, at 2.

<sup>49</sup>One could speculate that there are two potential reasons for this – first, his eloquent and prolific writing influences researchers to turn to him first for the founders’ approach to any given topic, and second, he proposed a plan for universal public education in Virginia. With the exception of Benjamin Rush, none of the other founders attempted to materialize universal education to that extent. KAESTLE, *supra* note 43, at 6-9 (citing Thomas Jefferson, *Bill for the More General Diffusion of Knowledge* (1779)).

<sup>50</sup>KAESTLE, *supra* note 43, at 6 (citations omitted).

<sup>51</sup>Molly O’Brien, *Free at Last? Charter Schools and the “Deregulated” Curriculum*, 34 AKRON L. REV. 137, 141 (2000).

*B. Common Schools*

It was not until the middle of the nineteenth century, however, that the ideal of universal public education actually came to fruition,<sup>52</sup> in the form of the “Common School.”<sup>53</sup> The Common School movement began in Massachusetts and spread throughout the midwestern states and territories. Its chief proponent was Horace Mann, Superintendent of Massachusetts Common Schools in 1837, and a national voice articulating the Common School ideology and advocating for the spread of Common Schools.<sup>54</sup> That is, ‘common’ in the sense of universally available to all classes of people—recalling Jefferson’s words above, “without regard to wealth, birth or other accidental condition.”<sup>55</sup> The Common School ideology followed Jefferson and his colleagues’ logic that universal education plays a central role in a republican society. In a nation of immigrants, pioneers, and entrepreneurs, the Common School “would bring together diverse groups of classes and people; it would be the engine of social mobility and economic opportunity; it would produce virtuous citizens for self-government.”<sup>56</sup> In addition, national identity, patriotism, and a set of shared values—at the time based in Protestantism—would promote the success of the republic by creating an affinity among citizens.<sup>57</sup> Common School proponents argued that enlightened national and state citizenship could only develop through the mechanism of Common Schools. Furthermore, the Common School advocates popularized “the view that education was an economic benefit to the entire community.”<sup>58</sup> They argued that education is a public benefit because republican society in general is better served by an enlightened electorate.

The Common School movement in Ohio began in 1829.<sup>59</sup> The movement began as a grassroots effort by a teachers’ organization but gained momentum with the appointment of Samuel Lewis as the first Superintendent of Common Schools in 1837. Lewis adhered to the Common School ideology popularized by Horace Mann

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<sup>52</sup>Jefferson’s and Rush’s plans for universal public schooling in Virginia and Pennsylvania respectively did not succeed in the state legislatures of the early republican period. KAESTLE, *supra* note 43, at 8-9.

<sup>53</sup>*See generally*, KAESTLE, *supra* note 43. Kaestle’s book is dedicated to the history of the Common School movement, including its ideological foundation in the early republic. It is a detailed and very frequently referenced work. *See, e.g.*, O’Brien, *supra* note 51; Kagan, *supra* note 19; MARIS A. VINOVSIS, *EDUCATION, SOCIETY, AND ECONOMIC OPPORTUNITY: A HISTORICAL PERSPECTIVE ON PERSISTENT ISSUES* (1995).

<sup>54</sup>*See* KAESTLE, *supra* note 43, at 75; O’Brien & Woodrum, *supra* note 12, at 599.

<sup>55</sup>O’Brien & Woodrum, *supra* note 12, at 599.

<sup>56</sup>*Id.*

<sup>57</sup>*See* KAESTLE, *supra* note 43, at 75 (discussing in great detail the ideology underpinning the common school movement in the chapter entitled, “The Ideology of Antebellum Common-School Reform”). Kaestle says that the ideology of common schools had three primary sources: republicanism, Protestantism, and capitalism. *Id.*

<sup>58</sup>VINOVSIS, *supra* note 53, at 92.

<sup>59</sup>*See generally* O’Brien & Woodrum, *supra* note 12. O’Brien and Woodrum’s article, *The Constitutional Common School*, traces the development of common schools in Ohio in considerable detail. *Id.*

in the eastern United States, and traveled the state giving speeches promoting Common Schools and lobbying state legislators.<sup>60</sup> With the assistance of the teachers' organization and a commissioned report on education in Europe by prominent Ohio citizen and Professor Calvin Stowe, the ideology of common schooling took root in Ohio.<sup>61</sup> As a result, the ideology of the Common School was the prevailing public and political opinion in 1850 at the time of the Ohio Constitutional Convention, and it became the basis of the education clauses in the resulting Constitution.<sup>62</sup>

### C. Ohio Education Clause

The Ohio Constitution of 1851, however, was not the first of Ohio's foundational documents to reference universal education. Article III of the *Northwest Ordinance* stated that "schools and the means of education shall forever be encouraged."<sup>63</sup> Like other progressive ideas (e.g., abolitionism<sup>64</sup>) that found expression in the *Northwest Ordinance* before they were manifested in the established state governments or the fragile federal government, this "encouragement" clause expressed the enlightened founders' view of the role of education in a republic. Predictably, it was repeated in Ohio's first constitution, the Constitution of 1802.<sup>65</sup> In addition, the Bill of Rights of

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<sup>60</sup>*Id.*

<sup>61</sup>*Id.* Calvin Stowe was a relative of author Harriet Beecher Stowe. His report, commissioned by the Ohio General Assembly, supported the common school rationale advanced by Superintendent Lewis and the national common school movement. Stowe argued that creating a sense of national identity would bring the diverse population together around a set of shared ideals. He "asserted that education was also the way to avoid the 'evils of an ignorant and unbridled democracy.'" *Id.* at 601. O'Brien & Woodrum speculate that this particular view arose out of the election of populist Andrew Jackson as President. *Id.*

<sup>62</sup>*Id.* at 611. O'Brien & Woodrum state that "by 1849 public sentiment in favor of free universal public schooling was strong." *Id.* They go on to point out that, during the Constitutional Convention,

debates on the specific wording of the provisions were lively. Notably, however, the education activists had succeeded in capturing the rhetorical high ground. In every session, the idea that an education ought to be provided to every child in the state was assumed. Free common schooling was presented and accepted as a matter of patriotism, economic urgency, and democratic necessity.

*Id.* at 612.

<sup>63</sup>ORDINANCE OF THE NORTHWEST TERRITORY (1787), art. III. "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Id.*

<sup>64</sup>Article VI of the *Northwest Ordinance* states that "there shall be neither slavery nor involuntary servitude in the said territory." *Id.* The United States Constitution, crafted the same year, explicitly protected slavery for a period of years for fear that doing otherwise would make ratification impossible.

<sup>65</sup>OHIO CONST. OF 1802, art. VIII, § 25.

That no law shall be passed to prevent the poor in the several counties and townships within this state from an equal participation in the schools, academies, colleges and universities within this state, which are endowed, in whole or in part, from the revenue arising from donations made by the United States, for the support of schools and colleges; and the doors of the said schools, academies, and universities, shall be open

the Ohio Constitution of 1802 guaranteed access to schools supported by the state fund, regardless of wealth or social class.<sup>66</sup>

### 1. The “Thorough and Efficient” Clause

In light of the Common School movement, the Ohio Constitution of 1851 treated education in unprecedented detail and fundamentally shifted the state’s official posture toward a state system of public education from encouragement to guarantee. The debate in the Constitutional Convention produced the “thorough and efficient” clause that remains the central clause related to public education.

*The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.*<sup>67</sup>

Although the delegates to the convention debated various relevant issues such as the role of religion in public schools, the extent of the curriculum in the “fancy branches,” the funding system, and the branch of government entrusted with responsibility for the schools, not once did they question the appropriateness of universal, tax-supported public education under the Common School model.<sup>68</sup>

Instead, there were numerous statements and debates centered on the necessity of prioritizing universal public education and ensuring its viability into the future based on a fundamental belief that it would benefit the state. For example, Delegate Samuel Quigley said:

The great and important business of securing a general education, and of conducting a well regulated system of common schools, requires perseverance, energy, and vigilance . . . . The language of this section is expressive of the liberality worthy of a great State, and a great people. There is no stopping place short of a common school education to all the children in the State . . . . Intelligence is the foundation-stone upon which this mighty republic rests—its future depends upon the impulse, the action of the present generation in the promotion of literature.<sup>69</sup>

Emphasizing the importance of an education clause that would ensure the necessity of future generations to make improvements in the public school system,

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for the reception of scholars, students and teachers, of every grade, without any distinction or preference whatever, contrary to the intent for which said donations were made.

*Id.* See also O’Brien & Woodrum, *supra* note 12, at 593.

<sup>66</sup>*Id.* at 594 (noting that this clause was not interpreted as guaranteeing access to state funded schools independent of race).

<sup>67</sup>OHIO CONST. OF 1851, art. VI, § 2 (emphasis added).

<sup>68</sup>O’Brien & Woodrum, *supra* note 12, at 693.

<sup>69</sup>Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio, 1850-51 14-15 [hereinafter Debates of 1850-51].

Delegate Archibold suggested replacing the word “common” with the word “useful” in that “[h]e wanted to see a system of schools as perfect as could be devised . . . .”<sup>70</sup> Delegate J. McCormick made it clear that the requirement of the legislature should be unequivocal; that encouragement should give way to constitutional command.

Under the old Constitution it is provided that public schools and the cause of education shall be forever encouraged; and, under this constitutional provision, we have trusted the General Assembly for forty-eight years; and we may trust them for forty-eight years longer, without any good result . . . . Our system of common schools, instead of improving in legislative hands, has been degenerating; and I think it is time that we establish and carry out an efficient system of common school education . . . .<sup>71</sup>

Finally, the discussion of race and education at the convention debates reveals the delegates’ commitment to the notion that education is a public benefit. When Delegate William Sawyer proposed an amendment that free education be provided only to white children, he was rebuked on both moral and practical grounds. On the practical side, Delegate Taylor argued in response that it would be unwise to leave *anyone*, black or white, under-educated because an under-educated person is a burden on the state.

I knew that this Convention was not prepared to increase the political rights of the black man; but I had hoped that all were willing to provide against his becoming the pest of society, by being deprived of all opportunities for education. Shall we not secure protection to ourselves and our children by relieving the colored population of Ohio, from the absolute necessity of growing up in vice and ignorance?<sup>72</sup>

There are blatantly racist overtones to the dialogue; however, it illustrates the Common School ideology of education as an essential component of a republican society that should, therefore, be provided by the state.

Thus, the famous “thorough and efficient” clause arose out of the Common School movement to become an enduring part of the Ohio Constitution.<sup>73</sup>

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<sup>70</sup>*Id.* at 698. As summarized by the Convention reporter, [h]e hoped to see common schools advance, not only to meet such demands as are now made upon them, but to meet higher and greater requisitions. Then the common of the future will need to be far above the common of the present. He wanted to see a system of schools as perfect as could be devised, and to see it improve so as to keep pace with the most rapid progress of the most rapid element of our social or political constitution.

*Id.*

<sup>71</sup>*Id.* at 702.

<sup>72</sup>*Id.* at 11.

<sup>73</sup>O’Brien & Woodrum, *supra* note 12, at 616 (“[T]he vision of schooling that would be incorporated into the Constitution was the common school ideal: universal, free, non-sectarian education for self-government, enlightenment, and economic advancement.”). In addition to the “thorough and efficient” clause of Article VI, § 2, the Ohio Constitution also addresses education in Article VI, § 3 and Article XII, § 5. Article VI, § 3 provides for local control of city school districts through elected school boards. Article XII, § 5 requires the state to

## IV. PRIVATIZATION

Ohio has not been assertive in finding funds to fulfill its affirmative duty to provide a thorough and efficient Common School education as mandated by the Ohio Constitution. In fact, Governor Taft's February 2005 state budget proposal called for "ship[ping] more money to private schools," but proposed little assistance for struggling public schools.<sup>74</sup> Many observers and commentators speculate that the reason for this has to do with a conservative national and state agenda toward the privatization of government programs.<sup>75</sup> Since education is the largest line item in the state budget it is a prime candidate for privatization efforts.<sup>76</sup>

With this in mind, the current legal battle over Ohio's community schools pits generally conservative advocates of privatization against supporters of traditional public schools reflecting the Common School ideal.<sup>77</sup> Community schools have become a battlefield in this ideological war because of their particular characteristics: community schools are "public" schools funded with public dollars but exempt from

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disclose the purpose of a state tax in order for that tax to be valid. Although not exclusively an educational provision, this clause is relevant to the claim that Ohio charter schools are in fact partially supported by local tax dollars but nominally entirely supported by state funds. *See infra* § VI.

<sup>74</sup>*See* Theis, *supra* note 5 ("While [Governor] Taft's budget attempts to ship more money to private schools, he's calling for only slight increases for public schools, many of which are in districts that continue to seek tax increases to avoid cuts in personnel and programs.").

<sup>75</sup>Doug Oplinger and Dennis J. Willard, *School Battle Eludes Voters, Takes Its Cues from Coalitions: Powerful Organizations Turn Education into a War of Words, Litigation and Money*, THE AKRON BEACON JOURNAL, Dec. 15, 1999, at A1. In their series of articles on privatization in education in Ohio, Oplinger and Willard discuss the various lobbyists and special interest groups vying for control over educational policy in Ohio. They suggest that, with the elections of Republican Governors George Voinovich and Bob Taft, the "school choice" movement associated with privatization has received considerable executive support and definitely has the upper hand. *Id.* The privatization movement in Ohio has also been recognized by the national press. *See* Sam Dillon, *Voters to Decide on Charter Schools*, THE NEW YORK TIMES, Oct. 25, 2004, at A15 (quoting Western Michigan University researcher Gary Miron stating that Ohio charter schools "are very much about privatization"). The privatization agenda is also readily apparent in the current debate over Social Security. The essence of President Bush's Social Security plan is privatization, and the administration seems unabashed in saying so.

<sup>76</sup>*See* Ohio Department of Education, FY 2004 – FY 2005 Operating Budget Analysis 109 at <http://www.lbo.state.oh.us/fiscal/budget/FiscalAnalysis/125GA/EDU.pdf> (last visited Aug. 31, 2005) [hereinafter FY 2004 – FY 2005 Operating Budget Analysis]; *see also generally* Julie Huston Vallarelli, Note, *State Constitutional Restraints on the Privatization of Education*, 72 B.U. L. REV. 381 (1992).

<sup>77</sup>*See* State of Ohio *ex rel.* Ohio Congress of Parents and Teachers v. State Of Ohio Bd. of Educ., No. 03AP-508, 2004 Ohio App. LEXIS 4009. *See also* *Charter School Foes Appeal Court Ruling*, AKRON BEACON JOURNAL, Oct. 13, 2004, at A5; Jennifer Smith Richards, *Charter Schools Focus of 3rd Suit*, THE COLUMBUS DISPATCH, June 10, 2004, at 1C.

many state laws and regulations applicable to traditional public schools.<sup>78</sup> They are often owned and/or operated by for-profit entities.<sup>79</sup>

Based on this, community school opponents argue that community schools violate the Ohio Constitution by diverting public funds to private beneficiaries,<sup>80</sup> and that, in practice, community schools do not aid in equalizing educational opportunity for all – the goal of Ohio’s “Constitutional Common School.”<sup>81</sup>

Many community school proponents respond that there is nothing inherently wrong with privatization and that it will improve public schooling and equal opportunity through school choice, economic efficiency, and competition among local schools.<sup>82</sup>

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<sup>78</sup>See *State ex rel. Ohio Congress of Parents and Teachers*, 2004 Ohio App. LEXIS 4009, at \*2.

<sup>79</sup>Willard & Oplinger, *Charter Experiment Goes Awry*, *supra* note 4. Under the heading “EMOs Dominate,” the authors note that the original conception of charter schools in Minnesota did not include for-profit enterprises but instead focused on a blend of innovative pedagogy and community involvement. However,

[n]ow education management companies [EMOs] dominate the charter school movement. . . . [Seventy] percent of the charter schools in [Michigan] were run by EMOs during the 1998-99 school year, up from 50 percent the year before. . . . In Ohio . . . EMOs control 45 percent of the state and local funds [allocated to charter schools] and enroll 46% of the students.

*Id.* The most recent study of Ohio charter schools indicates that influence of EMOs continues to increase. Alexander Russo, *A Tough Nut to Crack in Ohio: Charter Schooling in the Buckeye State* 5 (February, 2005), available at [www.ppionline.org/documents/Ohioreport\\_0201.pdf](http://www.ppionline.org/documents/Ohioreport_0201.pdf) (last visited Aug. 31, 2005). As of 2004, “[s]ixty-six percent of charter school students in Ohio attend schools run by education management organizations; 25 percent of charter school students [were] enrolled in [cyberschools] . . .” *Id.*

<sup>80</sup>At the heart of the plaintiffs’ claims is the assertion that aid to community schools deprives the local school district in which the community school sits of state funds. See *State ex rel. Ohio Congress of Parents and Teachers*, 2004 Ohio App. LEXIS 4009, at \*22-23. This claim is hotly contested by the state and by charter school advocates. See, e.g., Terry Ryan, *Setting the Record Straight on Ohio Charter Schools*, THE EDUCATION GADFLY, July 7, 2005, Vol. 5, No. 24, <http://www.edexcellence.net/institute/gadfly/issue.cfm?id=199#2375>. Crucial to the inquiry is the fact that state money follows the child from the traditional school district to the community school, and the claim that the state deducts from the funds it gives to the district more per community school pupil than it provides per-pupil in state aid. See *Charter School Tiff Not for the Courts*, DAYTON DAILY NEWS, June 18, 2004, at A12. Therefore, the state is essentially shifting local funds to community schools or reducing the state funds per-pupil. Furthermore, economies of scale make it difficult for public schools designed to serve a certain number of students to serve less students at the same cost. See PEARL ROCK KANE & CHRISTOPHER J. LAURICELLA, *ASSESSING THE GROWTH AND POTENTIAL OF CHARTER SCHOOLS IN PRIVATIZING EDUCATION: CAN THE MARKETPLACE DELIVER CHOICE, EFFICIENCY, EQUITY, AND SOCIAL COHESION?* 203, 228 (Henry M. Levin ed., Westview Press 2001) (noting that “it costs as much to run a class for twenty-one students as it does for twenty-six”).

<sup>81</sup>O’Brien & Woodrum, *supra* note 12, at 586.

<sup>82</sup>See, e.g., BRENNAN, DAVID L., *VICTORY FOR KIDS: THE CLEVELAND SCHOOL VOUCHER CASE* (Brown, Cynthia, ed., New Millennium Press 2002).

Both positions are vulnerable to theoretical and statistical attack.<sup>83</sup> The Ohio Constitution, however, supports the community school opponents' position: The Ohio Constitution is fundamentally incompatible with the privatization aspects of Ohio's community school laws. Therefore, it is essential to understand privatization theory, and the ways in which privatization manifests itself in Ohio community schools.

#### A. Privatization Theory in Education

The word "privatization" entered the lexicon remarkably recently, perhaps as a result of the decline of communism.<sup>84</sup> Literally, "to privatize" means "to turn over (a public property, service, etc.) to private interests."<sup>85</sup> Although privatization is now a powerful and prevailing global movement, in the United States it began overtly with the Reagan administration's emphasis on the importance of small government and decentralization of government services.<sup>86</sup> As one of the primary government programs of the states, education quickly became part of the privatization discussion.<sup>87</sup> According to Henry M. Levin, Director of the nonpartisan National Center for the Study of Privatization in Education (NCSPE), national educational policy is currently moving increasingly toward decentralized solutions and market ideology (i.e., privatization).<sup>88</sup> Levin defines privatization in education as "the establishment of schools operated by non-governmental authorities, whether for profit or not-for-profit."<sup>89</sup>

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<sup>83</sup>LEVIN, *supra* note 10, at 4 (stating that there is little constructive discourse on privatization between adherents and detractors, "[e]ach side tends to elaborate, and often, to overstate its position and exaggerate the strength of the evidence supporting its stance"). Mr. Levine's organization, the National Center for the Study of Privatization in Education (NCSPE), is specifically designed to be a nonpartisan and neutral research organization. *See* NCSPE, *available at* [www.ncspe.org](http://www.ncspe.org) ("The center provides independent, non-partisan information on and analysis of privatization in education.").

<sup>84</sup>SAMUEL FLAM & WILLIAM KEANE, *PUBLIC SCHOOLS, PRIVATE ENTERPRISE* 15 (Rowman & Littlefield Pub. Inc. 1997) (stating that research identified no dictionary entries for the word prior to 1983).

<sup>85</sup>WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1143 (4th ed. 2000).

<sup>86</sup>FLAM & KEANE, *supra* note 84, at 16. In fact, President Reagan commissioned the *President's Commission on Privatization in 1983* to study and promote privatization of government services. *Id.* at 17. *See also* Barbara Miner, *For Profits Target Education*, in *EDUCATION, INC.: TURNING LEARNING INTO A BUSINESS* 131, 137 (Alfie Kohn & Patrick Shannon eds., 2002).

<sup>87</sup>FLAM & KEANE, *supra* note 84, at 14.

<sup>88</sup>Levin, *supra* note 10, at 3. *See also* Henry A. Giroux, *Schools for Sale: Public Education, Corporate Culture, and the Citizen-Consumer* in *EDUCATION, INC.: TURNING LEARNING INTO A BUSINESS* 101, 106-07 (Alfie Kohn & Patrick Shannon eds., Heinemann 2002); MICHAEL ENGEL, *THE STRUGGLE FOR CONTROL OF PUBLIC EDUCATION: MARKET IDEOLOGY VS. DEMOCRATIC VALUES* 3 (2000).

<sup>89</sup>Levin, *supra* note 10, at 4-5.

### 1. The Market Ideology<sup>90</sup> Underlying Privatization

The basic rationale behind privatizing education is that the free market can deliver a higher quality education at a lower cost than the government because of the inefficiency inherent in government bureaucracy.<sup>91</sup> Privatization advocates argue that public education is a wholly bureaucratic institution; that bureaucracies are slow to change, and therefore the status quo overwhelms the wishes of parents, students, or other interested parties who attempt to advocate for educational reform.<sup>92</sup> Proponents of privatization view the free market as value-neutral, promoting efficiency, results-oriented change, and natural responsiveness to primary stakeholders' needs. They favor privatization as a market-based alternative to "government schools."<sup>93</sup> Parents and students, the consumers of education, are best situated to know what they want from a school, in fact do know what they want and will choose to optimize the return on their investment; therefore, private companies competing for students have every incentive to deliver the highest quality education at the lowest possible price.<sup>94</sup> These incentives, argue market adherents, simply do not exist in the non-competitive, monopolistic government system of public education. Therefore, it is not surprising that schools are failing; they have no built-in incentive to succeed and have the ball-and-chain of bureaucracy to hold them back.<sup>95</sup>

Privatization advocates also argue that the same incentives address educational consumers' (i.e. parents' and students') moral and social needs without privatization itself being a value-based system.<sup>96</sup> These needs, like academic and vocational considerations, are simply factored into the rational decision consumers make in the

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<sup>90</sup>Noted educational historian Carl Kaestle defines "ideology" as follows:

[A] set of apparently compatible propositions about human nature and society that help an individual interpret complex human problems and take action that the individual believes is in his or her best interest and the best interest of the society as a whole. Ideology is the aspect of culture that attempts to justify and defend a set of social relations and institutions.

KAESTLE, *supra* note 43, at 76.

<sup>91</sup>Numerous commentators, politicians, and social scientists argue that applying market theory to education will ultimately improve it and therefore justify privatization. The most often quoted study was conducted by John Chubb and Terry Moe in 1990. JOHN CHUBB & TERRY MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* (1990). Many other authors on both sides of the issue discuss and summarize the market ideology. See, e.g., R. David Walk, Jr., *Counterpoint: How Educational Management Companies Serve Charter Schools and their Students*, 32 J.L. & EDUC. 241 (2003) (arguing in favor of privatization); SMITH, *supra* note 10, at 5 (arguing against privatization but citing Chubb & Moe's argument that public education is bureaucratic, rule-based, and mired in mediocrity because bureaucracy is inherently inefficient and traditional public schooling concentrates power in the bureaucracy).

<sup>92</sup>SMITH, *supra* note 10, at 5.

<sup>93</sup>*Id.* at 2 (noting that privatization advocates began to refer to traditional public schools as "government schools," and that they use it as a pejorative term).

<sup>94</sup>*Id.* at 4 (calling this "public choice theory" and discussing it in some detail).

<sup>95</sup>CHUBB & MOE, *supra* note 91, at 186.

<sup>96</sup>SMITH, *supra* note 10, at 2.

school choice marketplace. Thus, the market ideology underlying privatization presents a unified theory for universal education in which each individual parent and/or student gets the services they need from state funds distributed to private educators. However, as this Note will discuss below in sections IV-VI, opponents of privatization, and the Ohio Constitution, take a fundamentally different approach to education that challenges the coherence of the market ideology underlying privatization.

## 2. The Dimensions of Privatization: Economic, Political, and Social

Privatization of education exists on several levels, some more obvious than others.<sup>97</sup> The economic dimensions of privatization are the most apparent. Transferring responsibility for public education from government agencies to private entities means shifting control of tax dollars from the public to private sector.<sup>98</sup> The government will maintain a minimal regulatory influence, but market considerations, as opposed to political considerations, will predominantly govern the use of the funds.<sup>99</sup> Similarly, the political aspects of privatization are not difficult to recognize. Policy considerations are fundamental to the extent to which states privatize or maintain control of public education. For example, if market ideology is the prevailing political philosophy in a state, then deregulation, volunteerism, and other forms of privatization will be more likely to find political support and occur.<sup>100</sup>

The social dimensions of privatization are more subtle. For example, when Coca-Cola contracts with a cash-strapped school district for the exclusive vending and advertising rights in all district schools, Coke is asserting a private (non-nutritious) influence over district school children.<sup>101</sup> “The curriculum therefore reflects the values of the groups in society who enjoy the power to promote their interests.”<sup>102</sup> The power to influence students’ values in this way may be described

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<sup>97</sup>Amy Stuart Wells & Janelle Scott, *Privatization and Charter School Reform: Economic, Political, and Social Dimensions in PRIVATIZING EDUCATION: CAN THE MARKETPLACE DELIVER CHOICE, EFFICIENCY, EQUITY, AND SOCIAL COHESION?* 234, 236 (Henry M. Levin ed., 2001).

<sup>98</sup>This applies to the varying degrees of privatization that might be accomplished by, for example, contracting out. That is, governments privatize an aspect of education when it contracts with a private company to provide a specific, limited service, such as transportation. Educational Management Companies, or “EMOs” are a more complete form of privatization via contracting in which the government contracts with a private company to manage all aspects of a school. *Id.* at 235.

<sup>99</sup>*See, e.g.,* Walk, *supra* note 91, at 243; WELLS & SCOTT, *supra* note 97, at 236 (discussing privatization advocates and their theories); BRUCE FULLER, *THE PUBLIC SQUARE, BIG OR SMALL?: CHARTER SCHOOLS IN POLITICAL CONTEXT in INSIDE CHARTER SCHOOLS: THE PARADOX OF RADICAL DECENTRALIZATION* 18-19 (Bruce Fuller ed. 2000) (summarizing Chubb & Moe’s position regarding market forces, bureaucracy, and education).

<sup>100</sup>WELLS & SCOTT, *supra* note 97, at 236. “Volunteerism” refers to voluntary organizations providing a service that government agencies traditionally provide. *Id.* For example, religious organizations that provide shelter for the homeless engage in volunteerism.

<sup>101</sup>ALFIE KOHN, *WHAT DOES IT MEAN TO BE WELL EDUCATED? AND MORE ESSAYS ON STANDARDS, GRADING, AND OTHER FOLLIES* 15 (2004).

<sup>102</sup>O’Brien, *supra* note 51, at 146.

as a form of social capital. Different schools' comparative access to private sources of social capital is a form of social privatization.<sup>103</sup> More specifically, schools' ability to raise funds from private donors, dependence on those funds, selective marketing to sort out needy students, or the probability of finding uniquely skilled local volunteers is privatization to the extent that it allows non-governmental entities to exercise control over government services. These social dimensions of privatization should not be ignored because they may significantly affect the practical likelihood that privatization can deliver on the promise of equal educational opportunity for all children that is at the heart of the Ohio Constitution.<sup>104</sup>

### B. Basic Types of Educational Privatization

Total adherence to the market theory discussed above would mean that education would not be public at all and would have to be purchased.<sup>105</sup> Therefore, all mainstream proposals to privatize education include public funds channeled to private service-providers. There are, however, different types and varying degrees of privatization that are worth identifying and loosely categorizing.

There are two main categories of privatization in education, which this Note will refer to as "*state non-public aid*" and "*state sponsorship*." First, *state non-public aid* describes when the government maintains control of education but provides private institutions with funds to reimburse them for taking on a portion of the state's responsibility for public schooling.<sup>106</sup> State non-public aid includes the transfer of state funds to non-public schools for the benefit of children in the non-public schools for certain services and supplies. Examples include busing, supplies such as textbooks, and administrative assistance.<sup>107</sup> Second, *state sponsorship* occurs when the government acts to shift some or all of its responsibility to provide a public education onto a private entity. State sponsorship consists primarily of contracting out,<sup>108</sup> Educational Management Organizations (EMOs),<sup>109</sup> vouchers,<sup>110</sup> tax credits,<sup>111</sup> and, most relevant to this Note, charter schools.<sup>112</sup>

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<sup>103</sup>WELLS & SCOTT, *supra* note 98, at 236.

<sup>104</sup>*Id.*

<sup>105</sup>SMITH, *supra* note 10, at 6.

<sup>106</sup>A historical note illustrates the sea change in the relationship between public and private schooling during this century. In the first half of the century, the public school ideal was so strong that the state of Oregon attempted to require not only that all students attend school, but that all students attend a *public* school. *Pierce v. Society of Sisters*, 268 U.S. 510 (1924). The U.S. Supreme Court invalidated this law, upholding parents' right to choose to send their children to non-public schools. *Id.* However, the case is indicative of the profound difference between the state practically attempting to eliminate private schools and the state providing monetary aid to private schools.

<sup>107</sup>*See* OHIO REV. CODE ANN. § 3317.06 (LexisNexis 2004). This section is entitled: Payments for providing textbooks, services, and educational equipment to students at non-public schools. *Id.*

<sup>108</sup>A public school district contracting with a private company to provide some aspect of the educational program is probably the most common form of privatization. For example, a small school district might contract with a landscaping company to mow its lawns rather than establish its own grounds department. Frank R. Kemerer, *The Legal Status of Privatization and Vouchers in Education* in *PRIVATIZING EDUCATION: CAN THE MARKETPLACE DELIVER*

The distinction between these two types of privatization is most useful as a descriptive device, but also marks the stages in the expansion of privatization efforts in education. While state non-public aid has been part of many states' systems of public education for decades, state sponsorship, particularly the more extensive forms such as vouchers, EMOs, and charter schools, is a relatively recent development that corresponds with the larger movement toward privatizing government services.

### C. History of Educational Privatization in Ohio

In the last decade, Ohio has had the distinction of leading the nation in the first privatization category: aid to non-public schools.<sup>113</sup> This ranking is indicative of Ohio's political attention to privatization efforts since the administration of former Governor and current U.S. Senator George Voinovich.<sup>114</sup> In fact, many journalists, politicians, school administrators, and observers speculate both on and off the record that there is a concerted political effort to privatize Ohio's schools.<sup>115</sup> Whether or not the trend is by design, it is a simple fact that Ohio has enacted significant privatization legislation in the past several decades.

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CHOICE, EFFICIENCY, EQUITY, AND SOCIAL COHESION? 39, 40 (Henry M. Levin ed., 2001) ("School districts routinely contract with private organizations to provide such services as bus transportation, meals, maintenance, and special education for severely disabled children").

<sup>109</sup>Educational Management Organizations ("EMOs") are companies that specialize in contracting to manage all or most of the aspects of a public school. For obvious reasons, EMOs might be thought of as simply the most extensive version of contracting out. FLAM & KEANE, *supra* note 85, at 162.

<sup>110</sup>"[A]n instrument used for the transfer of public funds to a person, program, school, or business that educates students in a setting other than a public school." *Id.* at 164. Cleveland, Ohio (along with Milwaukee, Wisconsin) served as a national testing ground for educational vouchers. The state provided an educational voucher for urban students to use at a qualified private school of their choice. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (finding the Cleveland voucher program constitutional under the U.S. Constitution). *See also* Theis, *supra* note 5 (discussing the current expansion of the Ohio Voucher program proposed by Governor Taft in his February 2005 "State of the State" address).

<sup>111</sup>*See* KEMERER, *supra* note 108, at 48-49.

<sup>112</sup>*See* LEVIN, *supra* note 10, at 4.

<sup>113</sup>*See* Willard & Oplinger, *supra* note 4.

<sup>114</sup>Doug Oplinger & Dennis J. Willard, *Voucher System Falls Far Short of Goals*, AKRON BEACON JOURNAL, Dec. 14, 1999, at A1.

<sup>115</sup>For example, Oplinger and Willard quote Ohio Senator Ben Espy, who said, "lawmakers have wondered for years why there was so much pressure from the executive branch and legislative leaders to fund vouchers and charter schools." Dennis J. Willard and Doug Oplinger, *State Asked to Investigate Schools*, AKRON BEACON JOURNAL, Dec. 17, 1999, at C1. In addition, Ohio public school funding coalition leaders Jayne Geneva and William Phillis explicitly state that they believe there is a concerted effort among Ohio politicians to privatize Ohio's schools. Geneva, *supra* note 20; Telephone Interview with William Phillis, Executive Director, Ohio Coalition for Equity and Adequacy in School Funding (Jan. 11, 2005); *see also supra* note 1.

## 1. State Aid to Non-Public Schools

The first important wave of privatization legislation in Ohio occurred in the 1960s and falls into the first privatization category discussed above—state non-public aid.<sup>116</sup> In the late 1960s the state enacted legislation providing transportation for non-public school children.<sup>117</sup> In 1975, the Ohio General Assembly enacted legislation approving expenditures for auxiliary services such as audiovisual equipment and required curricular items such as health textbooks for non-public schools.<sup>118</sup> Additional legislation was enacted in 1982 providing non-public schools with state funds for administrative costs.<sup>119</sup> This amount was then increased by fifty percent in 1996.<sup>120</sup> Including transportation, auxiliary costs, administrative costs, and other various aid, by 1997 the state was giving over 125 million dollars to non-public schools and, since 1974, had given almost 1.6 billion dollars in state aid.<sup>121</sup>

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<sup>116</sup>RICHARD E. MAXWELL ET. AL., OHIO SCHOOL FINANCE: A PRACTITIONER'S GUIDE 24 (2d ed. 1996). Ohio was not the first and is far from the only state to provide monetary aid to non-public schools. See generally *id.* at 168-69. The key case setting forth the rationale for providing state aid to non-public schools is *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930). In *Cochran*, the U.S. Supreme Court upheld a law providing some state funding to non-public schools on the theory that the money was not technically benefiting the school, but actually benefited the children in the school. 281 U.S. 370. Since these children would have been educated by the state but for their private school enrollment the Court found it reasonable to allow for state aid for their benefit. This is known as the “child benefit theory.” MAXWELL, at 169-70. Notably, the Court in *Cochran* did not mandate such aid, it merely permitted it. *Id.* at 169.

<sup>117</sup>MAXWELL, *supra* note 116, at 169 (noting that no line item for this expense has ever been added to the State budget despite the fact that it is a significant expense borne solely by the state education budget).

<sup>118</sup>*Id.*; OHIO REV. CODE ANN. § 3317.06 (LexisNexis 1975). In 1973 the Ohio General Assembly passed a similar, but less substantial, auxiliary services act that was struck down by the U.S. Supreme Court in *Wolman v. Essex*, 421 U.S. 982 (1975). MAXWELL, *supra* note 116, at 24. The 1975 version was more deftly drafted and passed constitutional muster in *Wolman v. Walter*, 433 U.S. 229 (1977). *Id.*

<sup>119</sup>MAXWELL, *supra* note 116, at 168-69.

<sup>120</sup>MAXWELL, *supra* note 116, at 22, 168-69 (“Governor Voinovich is urging the expansion of Ohio’s contribution to non-public schools even though this state currently has one of the most extensive programs in the nation”). See also Oplinger & Willard, *supra* note 115, describing in detail former Governor George Voinovich’s consistent efforts to increase aid to non-public schools and emphasizing his connections with Catholic bishops and Ohio parochial schools. For example, Voinovich said: “In many districts in the state, I suspect the non-public schools will be receiving a much greater increase in terms of state reimbursement than some public schools.” *Id.* In addition, the article notes EMO White Hat Management founder David Brennan’s relationship with Voinovich and quotes from a letter to Catholic Bishop Anthony Pilla written by Brennan: “You are providing an opportunity for a lot of kids who wouldn’t ordinarily have a chance to have a good education, and we should really see if we can’t stimulate more state support for a non-public school system.” *Id.*

<sup>121</sup>MAXWELL, *supra* note 116, at 24.

In 1996, then Ohio Governor George Voinovich announced that Ohio was number one in the nation in providing aid to children in private schools.<sup>122</sup>

## 2. State Sponsorship of Privatization

The second wave of privatization relates to state sponsorship and occurred in the 1990s under Governors Voinovich and Taft. Following the national and international trend toward privatization, conservative politicians and special interest groups in Ohio began aggressively advocating for “school choice” reforms of Ohio public schooling.<sup>123</sup> The first of the major state sponsorship efforts in Ohio was the Cleveland voucher plan, while the second was state charter school legislation.

### a. Educational Vouchers

The idea of educational vouchers has a long history in the United States.<sup>124</sup> NCSPE director Henry Levin calls educational vouchers a radical development and defines them as “certificate[s] parents can use to pay all or a portion of tuition at any school that meets state guidelines for eligibility.”<sup>125</sup> Most educational vouchers, including Cleveland’s, however, provide an amount that is less than the tuition of the private school, thus requiring parents to provide the remainder of tuition “as a gesture of sacrifice and shared responsibility.”<sup>126</sup>

The voucher experiments in Cleveland, Ohio and Milwaukee, Wisconsin in the 1990s were the first major test of the idea’s viability and constitutionality.<sup>127</sup> The voucher experiment in Cleveland grew out of George Voinovich’s effort to reform Ohio’s schools during his first term as Governor and the recommendations of the Governor’s Commission on Educational Choice, appointed by Voinovich in 1992.<sup>128</sup> At the time, the Commission’s chairman, David Brennan, expressed views definitely favoring privatization ideology, indicating the connections between the “school choice” movement and privatization. Brennan refers to public schools as “government schools,” and, in 1992, said of Ohio’s public schools, “[w]e have a system that would be the envy of Soviet Russia. Total centralization . . . .”<sup>129</sup>

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<sup>122</sup>Oplinger & Willard, *supra* note 114.

<sup>123</sup>See Oplinger & Willard, *supra* note 75.

<sup>124</sup>LEVIN, *supra* note 10, at 6 (noting Milton Friedman’s voucher plan in 1962).

<sup>125</sup>*Id.* at 3.

<sup>126</sup>*Id.* at 11.

<sup>127</sup>*Id.* at 4.

<sup>128</sup>BRENNAN, *supra* note 82, at 33. The author, David Brennan, was the chairman of the Commission and is now the owner of White Hat Management, one of the largest EMOs in Ohio. Doug Oplinger & Dennis J. Willard, *Reading, Writing, Revenue—White Hat Continues its Rapid Expansion in the For-Profit Education Industry*, AKRON BEACON JOURNAL, Aug. 15, 2005, at A1.

<sup>129</sup>Oplinger & Willard, *supra* note 75. The authors point out that David Brennan has continued to advocate for “school choice” on a national level. In 1998, he gave a one thousand dollar campaign contribution to Tom Tancredo of Colorado, a United States Representative “who pledged to abolish public education.” *Id.* See also Oplinger & Willard, *supra* note 128; Doug Oplinger & Dennis J. Willard, *David Brennan’s White Hat*

*b. Charter Schools; Ohio Community Schools*

Charter schools represent the other component of the state sponsorship wave of educational privatization legislation in Ohio. In 1997, Ohio officially joined what commentators describe as the fastest growing form of school choice reform in the nation<sup>130</sup> by enacting charter school legislation.<sup>131</sup> Although Ohio was not one of the first states to enter the charter school arena, it has made up for a slow start with accelerated growth. In fact, Ohio is now leading the nation by a wide margin in a variety of charter school known as “cyberschools” or “e-schools:” “schools in which students complete their coursework online using home computers.”<sup>132</sup> As of September 2004, according to Ohio Department of Education statistics, there were 210 charter schools operating in the state, enrolling over 52,000 students.<sup>133</sup> In addition, out of 44 states with charter school laws, Ohio’s is characterized as the 11<sup>th</sup> “strongest” by a leading charter school advocacy group because it leaves charter schools relatively unconstrained by government regulations.<sup>134</sup> That is, Ohio charter

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*Management Changes the Way Business, Politics, and Educational Vouchers Mix*, AKRON BEACON JOURNAL, Dec. 13, 1999, at A1.

<sup>130</sup>O’Brien, *supra* note 52, at 152.

<sup>131</sup>OHIO REV. CODE ANN. § 3314 (LexisNexis 2004).

<sup>132</sup>Stephens, *Ohio Virtually Booming with Cyber Schools*, *supra* note 5. One half of all of the cyberschools in the nation are located in Ohio. E-mail from Jayne Geneva, Ohio Coalition of Equity and Adequacy in School Funding (Feb. 11, 2005, 3:45 EST) (on file with the author). In 2003-2004, Ohio provided cyberschools with \$290 million in state aid. *Id.* Many of the cyberschools are operated by for-profit EMOs. Stephens, *Ohio Virtually Booming with Cyber Schools*, *supra* note 5. As of March, 2005, 48 of the 249 charter schools in Ohio were cyberschools, Doug Oplinger & Dennis J. Willard, *Charter Schools Expansion Expensive*, AKRON BEACON JOURNAL, Mar. 20, 2005, at A1, and 15,800 of the 62,000 charter school students in Ohio are enrolled in cyberschools. Andrew Welsh-Huggins, *E-Schools May Get New Rules*, AKRON BEACON JOURNAL, Mar. 15, 2005, at B5.

<sup>133</sup>Russo, *supra* note 79, at 5 (citing Ohio Department of Education statistics). More recent Ohio Department of Education data cited in newspaper articles indicates that “[a]bout 63,000 students are enrolled in 249 charter schools this year (2005), receiving about \$424 million in state . . . tax dollars this year.” *Facts About Charter Schools in Ohio*, AKRON BEACON JOURNAL, Mar. 24, 2005, at A6. “Over the past five years, the number of charter schools in Ohio has nearly tripled from 68 to 249 while the number of students attending them has nearly quadrupled from 16,717 to 62,702.” Jim Provance, *Ohio Lawmakers Aim to Curb Growth of Charter Schools*, THE TOLEDO BLADE, May 27, 2005, at A1. This rapid expansion has caused some state legislators to advocate for slower or no charter school expansion recently. *Id.* In fact, State Senator Teresa Fedor, D-Toledo, recently initiated an investigation into the allegedly hasty and reckless approval of new charter schools by the Lucas County Educational Service Center. See, e.g., Doug Oplinger & Dennis J. Willard, *Charter Schools in Question—Official Approved at Least 78 Schools in 18 Months, Senator Says*, AKRON BEACON JOURNAL, July 6, 2005, at B1.

<sup>134</sup>THE CENTER FOR EDUCATION REFORM, CHARTER SCHOOL LAWS ACROSS THE STATES: RANKING AND SCORECARD 9 (8th ed. 2004), available at [http://www.edreform.com/\\_upload/charter\\_school\\_laws.pdf](http://www.edreform.com/_upload/charter_school_laws.pdf) (last visited Aug. 31, 2005) [hereinafter *CER Rankings*]. The “strength” of a state’s charter school law, according to The Center for Education Reform, is basically inversely proportional to the restrictions placed on charter schools by the state; i.e.,

schools are not subject to most of the various curricular and noncurricular mandates made to public schools by the state.<sup>135</sup> This deregulation is a classic form of privatization in that it shifts control of a traditionally public responsibility to a private provider.

The genesis of charter schools, however, has little to do with privatization.<sup>136</sup> One charter school opponent called Ohio community schools “a great idea . . . that has been hijacked by people whose idea is to privatize public education.”<sup>137</sup> Ohio’s “strong” charter school laws are more apt to allow for-profit companies such as EMOs to become heavily involved, making charter schools a business. In fact, EMOs make up almost half of Ohio charter schools and most of the state’s largest cyberschools are run by EMOs.<sup>138</sup> In addition, as discussed later in further detail, Ohio charter schools also exhibit other more subtle dimensions of privatization such as market and social isolation from democratic citizenship and community goals.<sup>139</sup>

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the more private in character the better. The more schools allowed, the more chartering authorities available (particularly other than the local school board), the greater variety of charter applicants (including for-profit entities, etc.), the more new starts (as opposed to conversions of traditional public schools), the more restrictions and regulations that can be waived (compared to the regulations applicable to traditional public schools), and the more autonomous the schools are (contractually, fiscally, and legally), the stronger the law is. THOMAS L. GOOD & JENNIFER S. BRADEN, *THE GREAT SCHOOL DEBATE: CHOICE, VOUCHERS, AND CHARTERS* 128 (2000). Ohio has been rising in The Center for Education Reform’s rankings, probably indicating that the charter school laws in Ohio are getting stronger with subsequent revisions. In December of 1998, Ohio had fifteen operating charter schools and its laws were rated twenty-third strongest. The Center for Education Reform, *Charter School Legislation: State Rankings* (1998) reprinted in GOOD & BRADEN at 29. Thus, it has risen twelve slots in six years.

<sup>135</sup>*CER Rankings*, *supra* note 134; Geneva, *supra* note 20.

<sup>136</sup>Oplinger & Willard, *supra* note 4.

<sup>137</sup>Russo, *supra* note 79, at 29 (quoting Ohio Federation of Teachers President Tom Mooney).

<sup>138</sup>The for-profit nature of Ohio charter schools is now so prevalent that a recent article in a major Ohio newspaper defined charter schools as “for-profit schools that private groups began opening a decade ago with the help of local and state tax dollars.” Stephanie Warsmith & Katie Byard, *Losing Ground: Public School Enrollments Are Sinking in Ohio’s Big Cities as Residents Opt for Alternatives, Forcing Deep Budget Cuts*, AKRON BEACON JOURNAL, Jan. 23, 2005, at A1. This is simply incorrect, but it indicates the intimate connection between charter schools and privatization in Ohio. Public perception has shifted from viewing charter schools as innovative public schools to viewing them as private, market-based alternatives to traditional public schools. See also Oplinger & Willard, *David Brennan’s White Hat Management Changes the Way Business, Politics and School Vouchers Mix*, *supra* note 129 (noting that Brennan has “turned his attention to charter schools, which may [allow] him to focus on an important principle: making money”); Stephens, *Ohio Virtually Booming with Cyber Schools*, *supra* note 5; Welsh-Huggins, *supra* note 132 (noting that as of March, 2005, 72 percent of students attending cyberschools attend three privately run cyberschools).

<sup>139</sup>See generally WELLS & SCOTT, *supra* note 97, at 234, 237 (noting that the way charter school laws are written allow for or produce privatization effects).

Like vouchers, Ohio charter schools are politically and legally contested because of their privatization aspects. However, unlike the resolved voucher litigation, the legal challenges to charter schools in Ohio have just begun. A state constitutional challenge to Ohio's charter school law, *Ohio Congress of Parents & Teachers*, is the subject of discussion in section VI below.

#### V. COMPARISON OF IDEOLOGIES – PRIVATIZATION AND THE OHIO CONSTITUTION

The history of the “Constitutional Common School” in Ohio demonstrates that the Common School is at the heart of the Ohio Constitution's conception of a democratic and universal public education. Not only was the ordinary common or “public” school the goal, but the framers of the Ohio Constitution of 1851 passionately stated their adherence to that ideology. With this in mind, it seems useful to compare privatization ideology with the basic theoretical underpinnings of the Constitution's understanding of what would constitute a “thorough and efficient system” of education.

There are two related concepts that are central to the Constitutional Common School system, and antithetical to the privatization ideology. First, the purpose of public education is to foster republican citizenship and shared democratic values, and second, the beneficiary of education under the Constitutional Common School model is the state.

##### A. Formal Equality vs. Equal Opportunity

The gravamen of the constitutional argument against privatization can be stated as follows: Privatization faithfully *expects* market forces to provide an equal educational opportunity, whereas the Ohio Constitution *requires* the state to deliver on that promise. (Once again, note the framer's use of the word “shall” in the education clause within the ideological context of the Common School movement.) Privatization as a method of satisfying the private benefit purpose of education (within the context of privatization ideology) relies on the market to deliver equal opportunity in education.<sup>140</sup> In contrast, the goal of providing an equal opportunity to all classes, races, etc. of children is apparent in the Common School movement and the convention debates.<sup>141</sup> This is a fine, but significant, distinction. The distinction leads to the conclusion that, instead of affirmatively pursuing equal educational opportunity for all children, privatization stops at a point closer to “formal equality.”

Formal equality is a concept in constitutional law that “seeks fairness by preventing governments from using certain traits, notably race and gender, to disable individuals.”<sup>142</sup> It is a relatively easy burden to shoulder because it has only negative content; it simply prohibits unfair provisions of services as opposed to requiring provision of services to level the playing field.<sup>143</sup> Although somewhat lacking in

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<sup>140</sup>Smith discusses this concept in terms of “public choice theory.” SMITH, *supra* note 10, at 4.

<sup>141</sup>Equality of social class was an explicit goal, but racial equality was not an intended outcome for the framers of Ohio's constitution. Debates of 1850-51, *supra* note 69, at 11.

<sup>142</sup>James Wilson, Why a Fundamental Right to a Quality Education is Not Enough, 34 AKRON L. REV. 383, 387 (2000).

<sup>143</sup>*Id.*

substantive content as well, “equal opportunity” recognizes a more affirmative duty of the state to create the conditions necessary to provide an education that equalizes opportunities for all classes of Ohio children.<sup>144</sup>

An analogy can be drawn between the neutrality of the market and the negative content of formal equality. That is, under a pure market approach (privatization) the state provides funds but the market ensures their equal distribution. Thus, privatization proponents argue that the state is relieved of any possibility of discriminating against any interest yet children still benefit from a system that provides for their educational needs through market forces acting to provide equal opportunities for all.<sup>145</sup>

A leap of faith is required to believe in the market’s capacity to deliver equal educational opportunity to children. First, market theory depends on the notion that parents are capable of maximizing educational returns for their children via school choice. But, as numerous commentators conclude, this is highly unlikely to be the case.<sup>146</sup> More importantly, education is primarily about the child, not the parent. It is wildly improbable that children, (e.g., kindergarteners) are the rational economic actors upon which privatization theory depends. Basing the state system of education on parental choice therefore subjects some children to the bad choices of their parents in a public context. That is, the state may not interfere with parents’ legitimate privacy interest in the freedom to make a bad (or good) choice to send their child to a private school,<sup>147</sup> but the same choice in the privatization context is essentially sponsored by the state. Ultimately, a state system that undermines the public benefits purpose of public schools risks creating a system in which the quality of a child’s education depends on the quality of their parent’s choices. Unfortunately, this may be a recipe for perpetuating a hereditary class system.

On the other hand, the Common School ideology is more in line with the notion of equal opportunity and the tendency toward affirmative rather than negative state duties. Recognition of social inequalities and the need to use education to avoid making them part of a child’s inheritance is embedded in the Common School philosophy and, as a result, the Ohio Constitution. The shift in the Constitutional language from encouragement to guarantee is indicative of the affirmative nature of

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<sup>144</sup>*Id.* at 387-88.

<sup>145</sup>Wells & Scott, *supra* note 97, at 236 (citing M. Carnoy, *School Improvement: Is Privatization the Answer? in Decentralization and School Improvement: Can We Fulfill the Promise?* 163-201 (J. Hannaway and M. Carnoy eds., 1993)).

<sup>146</sup>*See, e.g.,* Alfie Kohn, *Privatization of Schools in EDUCATION, INC.: TURNING LEARNING INTO A BUSINESS* 102 (Alfie Kohn & Patrick Shannon eds., 2002). Kohn says that “[p]rivatizing schools is predicated on an almost childlike faith in competition . . . .” *Id.* He also notes that shifting to a market basis means shifting resources to marketing schools, not delivering educational benefits. *Id.* Benveniste et. al. continue this line of reasoning by noting that parents are uncertain about education and wary of radical curricula. Therefore, the market incentive is toward the status quo, not innovation. LUIS BENVENISTE ET. AL., *ALL ELSE EQUAL: ARE PUBLIC AND PRIVATE SCHOOLS DIFFERENT?* xv (2003). *See generally* Makani N. Themba, *“Choice” and Other White Lies in EDUCATION, INC.: TURNING LEARNING INTO A BUSINESS* 140 (Alfie Kohn & Patrick Shannon eds., 2002) (concluding that school choice is simply not a reality for many segments of the population).

<sup>147</sup>*Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925).

the state's responsibility for education.<sup>148</sup> Again, relating this to the Ohio framers' debate regarding educating freemen is instructive. The solution that the framers chose was rooted more in equal opportunity than formal equality. The "thorough and efficient" clause in the Ohio Constitution uses the word "*shall*" to create a positive state duty to all Ohio children.<sup>149</sup> It *does not* frame the state's responsibility as a negative right for certain races or classes to attend public schools.

In addition, the affirmative state duty approach acknowledges that private goals are not always in line with state goals.<sup>150</sup> For instance, some might argue that privatized schools can provide the state system of public schools that emphasizes the importance of democratic citizenship contemplated by the Ohio Constitution. However, "democratic citizenship" is not likely to be a marketable idea to parents who look to education for its private benefits and are concerned mostly with ensuring economic advantage for their children.<sup>151</sup> Thus, without active state involvement, it is unlikely that schools will promote democratic citizenship because there is no economic incentive to do so. In contrast it is the very *absence* of a driving market ideology that makes this a viable goal for public schools.<sup>152</sup>

### B. Private vs. Public Benefits

The way individuals view the goals of education and the way the state views the goals of education may be significantly different. An individual tends to think primarily about what an education will do for himself or her family. Society at large, on the other hand, is likely to have a much broader view that emphasizes the benefits that education confers on the state. Privatization advocates prioritize individual goals and believe that the market can best provide for the natural diversity of individuals' educational preferences through choice.<sup>153</sup> The opposing view, which is at the heart of the Common School ideology, prioritizes the notion that the benefits of education accrue to everyone in society, even those people who have no direct personal stake in schools such as families without children.<sup>154</sup> It is clear from the history of Ohio's Constitutional Common School that the framers intended to prioritize the latter view that education is a public benefit.

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<sup>148</sup>Kagan, *supra* note 1920, at 2258 (stating that State Constitutions' 'adequacy clauses' "create positive state duties . . . rather than negative rights").

<sup>149</sup>The clause states that: "The general assembly *shall* . . . secure a thorough and efficient system of common schools throughout the state . . ." OHIO CONST. art. VI, § 2 (emphasis added).

<sup>150</sup>ENGEL, *supra* note 88, at 89.

<sup>151</sup>*Id.* In some respects, the discussion of which is beyond the scope of this Note, the private benefits approach may threaten to initiate a "tragedy of the commons" cycle. *See generally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (Dec. 13, 1968).

<sup>152</sup>*Id.*

<sup>153</sup>LEVIN, *supra* note 10, at 8 ("[T]he goal of meaningful choice is to address private benefits."). Some privatization advocates take a more radical position. Based on the idea that families and individuals are the beneficiaries of education, they argue that all education should be financed privately; that the state should not be involved at all. Levin calls this an uncommon but important view. *Id.* at 6.

<sup>154</sup>*Id.* at 7.

This intention is evident in both the principles of the Common School movement and the content of the convention debates. Central to the Common School ideology is the belief that shared experiences will inculcate common civic values and promote the ultimate goal of the Common School system: the furtherance of an egalitarian democratic republic.<sup>155</sup> Therefore, an approach that emphasizes market exploitation of educational niches created by the private preferences of individual families is inconsistent with the Common School ideology. In other words, an approach that replaces the “melting pot” metaphor with the “tossed salad” metaphor conflicts with the framer’s intent to use schools to create an integrated society.<sup>156</sup> Furthermore, the delegates’ discussion of educating freemen plainly illustrates that they conceived of public education as a public benefit. In fact, the Ohio Constitution Debates of 1850-51, quoted *supra* in section III, C, 1, clearly imply that the framers cared little about the private benefits that an education would confer on an African American individual. The argument that carried the day was that freemen should be educated in order to benefit white society—the contemporary conception of Ohio society.<sup>157</sup>

Modern commentators note that public schools have traditionally served an important role in “processing” difficult social and political issues, e.g., racism or the Vietnam War.<sup>158</sup> That is, students in local public schools learn to deal with the complex social issues of the day because students with diverse backgrounds and perspectives attend the same school. In contrast, proponents of privatization would view this social function as a distraction from the academic goal of schools.<sup>159</sup> To be sure, the academic purposes of education have public benefits. However, academics are only part of the Common School ideology. Therefore, to the extent that the pursuit of private educational benefits prioritizes academic goals it may short-change the democratizing function of public schools that is central to the Common School ideology.<sup>160</sup>

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<sup>155</sup>O’Brien, *supra* note 51, at 144. More polemic commentators such as Henry A. Giroux take very strong positions on this issue. For example, Giroux says, “democratic culture cannot survive unless schooling gets treated as a public good rather than a private good.” GIROUX, *supra* note 88, at 105.

<sup>156</sup>O’Brien, *supra* note 51, at 169-70. This is a classic metaphor most often used in the context of multiculturalism. Although the imagery is not as potent, it seems that the most accurate conception of the idea would be the scientific distinction between a *mixture* and a *solution*.

<sup>157</sup>Debates of 1850-51, *supra* note 69, at 11.

<sup>158</sup>For example, Smith notes that democratic conflict being played out in schools is consistent with their purpose and serves an important democratic role. SMITH, *supra* note 10, at 9.

<sup>159</sup>*Id.* at 10.

<sup>160</sup>Smith points out that this democratizing function of public schools can be a double-edged sword. At the same time that shared experiences and participation in an institution reflecting the social and political values of the community promotes democratic awareness and responsibility, it also may propagate the “dominant socio-economic hierarchy and embed it in successive generations.” SMITH, *supra* note 10, at 12. Smith goes on to suggest, however, that market reforms might only exacerbate this problem. *Id.* However, this brings up a larger issue that is beyond the scope of this note. That is, what, exactly, are the democratic values referenced here? See FULLER, *supra* note 99, at 8-10 (discussing the issue under the heading

Likewise, the criticism that “government schools” are ineffective because of their inherently bureaucratic nature is inconsistent with the democratic process itself.<sup>161</sup> This is precisely because bureaucracy is inherent in the democratic process, and any large organization. Therefore, privatization as a method of eliminating bureaucracy is an implicit attack on the democratic process.<sup>162</sup> This is not to say that the more schools become knotted by bureaucracy, the better they are enacting their constitutional purpose. It is only meant to further illustrate the fundamental contrasts between the privatization ideology at the heart of the school choice movement and the democratic emphasis of the Common School movement out of which the Ohio Constitution’s approach to education arose.

#### VI. CONSTITUTIONALITY OF OHIO CHARTER SCHOOLS

This history and an informed reading of the text of the Ohio Constitution make it clear that the ideology of privatization is incompatible with the Ohio Constitution. The question then is whether and to what extent Ohio community school laws demonstrate privatization characteristics.<sup>163</sup> In attempting to answer this question, this section will discuss the plaintiffs’ claims in the *Ohio Parents & Teachers* case, a current Ohio state case challenging the validity of Ohio community schools under the Ohio Constitution.<sup>164</sup>

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“What Rendition of Democracy for America?”). The common school ideal is vulnerable to criticism “for promoting uniformity at the cost of individuality . . . .” O’Brien & Woodrum, *supra* note 12, at 641. There is an argument that the idea of teaching a certain set of values is inconsistent with the modern understanding of values as less universal and relative to culture, faith, etc. *Id.* Without entering too far into this particular debate however, it seems plausible to argue that the political form of democracy has certain civic values embedded within it that define the core values of the constitutional common school in every era. *Id.*

<sup>161</sup>SMITH, *supra* note 10, at 9.

<sup>162</sup>*Id.*

<sup>163</sup>Although there are numerous books and articles about charter schools, there is surprisingly little unbiased or legal commentary regarding the character of *Ohio* charter schools. This is probably because Ohio’s charter school legislation is relatively recent (1997). For example, Bruce Fuller’s book *Inside Charter Schools*, includes an extensive index with no entry for Ohio. FULLER, *supra* note 99. A very recent and thorough source of information on Ohio’s charter schools is a study by the Progressive Policy Institute. Russo, *supra* note 79. Other valuable sources of information on Ohio Charter schools include the publications of the Ohio Department of Education, Office of Community Schools *available at* [http://www.ode.state.oh.us/community\\_schools](http://www.ode.state.oh.us/community_schools) (last visited Aug. 31, 2005), the Ohio Legislative Office of Education Oversight, *available at* <http://www.loeo.state.oh.us> (last visited Aug. 31, 2005), and websites of interest groups such as the Center for Education Reform (CER), *available at* <http://www.edreform.com> (last visited Aug. 31, 2005).

<sup>164</sup>*State ex rel. Ohio Congress of Parents and Teachers*, 2004 Ohio App. LEXIS 4009. There are other cases challenging Ohio’s charter schools as well, including federal court cases. Russo, *supra* note 79, at 23. This particular case, however, has a published appellate opinion and represents charter school opponents’ state constitutional arguments well. *Id.*

*A. Ohio Parents and Teacher's Case: Summary  
of the 10th Appellate District Decision*<sup>165</sup>

The plaintiffs/appellants in this case are coalitions advocating on behalf of public schools, school districts, and teachers' unions. The Ohio Board of Education, along with various community schools, are the defendants/appellees, while White Hat Management, LLC, a "limited liability corporation that controls various community schools," is an intervening defendant/appellee.<sup>166</sup> There are six claims at issue. First, the plaintiffs claim that community schools are not part of the state system of Common Schools mandated by the "thorough and efficient" clause of the constitution because they are not owned by the public or managed by elected officials.<sup>167</sup> Second, the plaintiffs claim that community schools are allowed to operate with diminished standards in violation of the same clause.<sup>168</sup> Third, plaintiffs allege that the method that the state uses to fund community schools diverts funds from local school districts and thereby deprives them of the ability to satisfy the "thorough and efficient" clause.<sup>169</sup> Fourth, the plaintiffs allege that "community schools violate Section 3, Article VI, Ohio Constitution, in that community schools are not subject to local voter control" and "unconstitutionally create a shadow system of privately owned and managed schools that circumvent local control through locally elected school boards."<sup>170</sup> Fifth, the plaintiffs contend that community schools unconstitutionally take locally voted and levied property tax revenues without distinctly saying so.<sup>171</sup> Lastly, the plaintiffs claim that "community schools are not bona fide not-for-profit corporations, but, instead, are dominated by private interests and, therefore, improperly tap into public funds."<sup>172</sup>

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<sup>165</sup>The procedural posture of the case is as follows: The plaintiffs filed their third amended complaint in the Franklin County Court of Common Pleas in April of 2002. *State ex rel. Ohio Congress of Parents and Teachers*, 2004 Ohio App. LEXIS 4009, at \*2. In May of 2003, that court dismissed claims four through seven, which challenge the constitutionality of Ohio community schools. *Id.* The defendants then filed an appeal in the Tenth Appellate District of the Ohio Court of Appeals. The trial court chose to address the constitutional claims first, and therefore only claims four through seven are relevant to the appeal. *Id.* at \*4. After determining that the trial court's decision is a final appealable order (given that they did not yet address other claims in the complaint), the appellate court addressed the merits of the defendants' claims. *Id.* at \*5. The court applied the de novo standard of review because of the grant of summary judgment at the trial level. *Id.* at \*10.

<sup>166</sup>*Id.* at \*1-2. See *supra* notes 128-29 for more discussion of White Hat Management and its founder's (David Brennan) connection to privatization and education in Ohio.

<sup>167</sup>*State ex rel. Ohio Congress of Parents and Teachers*, 2004 Ohio App. LEXIS 4009, at \*11-12.

<sup>168</sup>*Id.* at \*13.

<sup>169</sup>*Id.*

<sup>170</sup>*Id.* at \*20.

<sup>171</sup>*Id.* at \*22 (relating to "Section 5, Article XII, Ohio Constitution, which provides: . . . every law imposing a tax shall state, distinctly, the object of the same, to which only, it shall be applied").

<sup>172</sup>*Id.* at \*24-25. This particular claim relates to borrowing provisions in the community school laws and to

In its opinion, the Tenth District Courts of Appeals first concluded that, because the legislature specifically stated that community schools were part of the state's system of public education, they were Common Schools within the language of the Ohio Constitution.<sup>173</sup> Then, the court rejected the lower court's finding that the *DeRolph* case barred re-litigation of the plaintiffs claims related to diminished standards and diversion of funds.<sup>174</sup> The court affirmed dismissal of the claims related to local control by elected school boards, reasoning that the Constitution gives the General Assembly broad authority to provide for a thorough and efficient system of common schools, and that modifying school districts is within that power.<sup>175</sup> As to the diversion of funds and disclosure to voters of the purpose of a local tax, the court concluded that the claim raises issues of fact and reversed the lower court dismissal.<sup>176</sup> Lastly, the court sent the final issue—private gain from public funds—back to the trial court as well, reasoning that it could be better addressed by the trial court.<sup>177</sup> Thus, the appellate court did little to resolve the substantive issues and remanded the matter to the Franklin County Court of Common Pleas. The Ohio Supreme Court granted certiorari on February 16, 2005, and the Court will likely hear oral arguments at the end of 2005.

### B. Analysis of the Plaintiff's Constitutional Claims

The claims in *Ohio Parents & Teachers* now before the Ohio Supreme Court can be summarized as follows: community schools violate the Ohio Constitution by de facto operating outside the state system of public education, diverting state funds from local school districts, and funneling public funds meant to provide a public benefit to private beneficiaries. Each of these claims is legitimate under the theory that privatization is unconstitutional.

#### 1. Operating Outside the State System of Public Education

Ohio charter school laws, like those of other states, are designed to permit innovation by removing many state regulations applicable to traditional public schools.<sup>178</sup> This is consistent with the original purpose of charter schools, which was

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Section 4, Article VIII, Ohio Constitution, which provides: The credit of the state shall not in any manner, be given or loaned to, or in aid of, and individual association or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever.

*State ex rel. Ohio Congress of Parents and Teachers*, 2004 Ohio App. LEXIS 4009, at \*\*24-25.

<sup>173</sup>*Id.* at \*12-13.

<sup>174</sup>*Id.* at \*13-19.

<sup>175</sup>*Id.* at \*21.

<sup>176</sup>*Id.* at \*23.

<sup>177</sup>*Id.* at \*\*25.

<sup>178</sup>Legislative Office of Education Oversight (LOEO), *Community Schools in Ohio: Final Report on Student Performance, Parent Satisfaction, and Accountability*, (Dec. 2003), available at [http://www.loeo.state.oh.us/reports/PreEleSecPDF/CS\\_Final\\_Web.pdf](http://www.loeo.state.oh.us/reports/PreEleSecPDF/CS_Final_Web.pdf)

that they would serve as laboratories for educational reform and experimentation within the public school model.<sup>179</sup> In fact, Ohio charter school legislation exempts community schools from over one hundred state regulations: from the requirement to pay full-time employees while on jury duty, to the required twenty-five-to-one student-teacher ratio, to supervision by a local school board, to less stringent teacher certification requirements.<sup>180</sup> This plethora of exemptions is one of the main reasons Ohio's charter school laws are considered "strong" by national charter school advocates.<sup>181</sup>

However, as the court noted in *Ohio Parents & Teachers*, the exemptions do not necessarily place community schools outside the boundaries of the state system of public education. The Ohio Constitution clearly gives the legislature the authority to create a system of Common Schools in the state and does not specify how that should be accomplished.<sup>182</sup> On the other hand, as one commentator put it, saying a charter school is a public school doesn't necessarily make it so—it must function as a public school.<sup>183</sup>

*a. Exemptions Placing Charter Schools Outside the Common School System*

Certain types of exemptions lead to results that substantially privatize community schools. Because privatization characteristics are incompatible with the Ohio Constitution, these exemptions are unconstitutional in that they cause charter schools not to function as a public school.

*i. Exemption from the Democratic Purpose of Education*

Section 3313.602(B) and (C) of the Ohio Revised Code exempt community schools from the requirement "that the 'principles of democracy and ethics' are

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[hereinafter LOEO Final Report] (noting that community schools trade freedom from regulations for accountability).

<sup>179</sup>O'Brien, *supra* note 51, at 139-40.

<sup>180</sup>See LOEO Final Report, *supra* note 177, at A1-A13 (listing thirteen pages of over one-hundred Ohio Revised Code sections from which community schools are exempt). Some other examples of exemptions include: §§ 3301.07 (State Board of Education minimum standards on teacher training etc.); 3313.01-.18 (School Boards); 3313.202 (provision of health insurance to employees); 3313.602(A) (policy on reciting the pledge of allegiance); 3313.609 (retaining certain chronic truants); 3313.811 (prohibiting the sale of anything for profit unless all profits are used for school purposes or activities); 3313.97 (intradistrict open enrollment, except for the requirement of notice within the community); 3317.022(c)(5) (special education funds must be spent on special education students). *Id.* See also Scott Stephens, *Charters Use Teachers Not Fully Certified, Traditional Schools Held to Higher Standards When Picking Instructors*, THE PLAIN DEALER, Feb. 24, 2005, at A1 (noting that fifty-five percent of teachers in Ohio charter schools are fully state-certified compared to ninety-eight percent of teachers in traditional Ohio public schools).

<sup>181</sup>See CER, *supra* note 163.

<sup>182</sup>*State ex rel. Ohio Congress of Parents and Teachers*, 2004 Ohio App. LEXIS 4009 at \*12-13.

<sup>183</sup>Robert J. Martin, *Charting the Court Challenges to Charter Schools* 109 PENN. ST. L. REV. 43, 50 (2004).

emphasized and discussed in appropriate parts of the curriculum” and that the schools encourage employees to be aware of their role in instilling democratic values.<sup>184</sup> This explicitly undermines the democratic focus of the Constitutional Common School. Proponents of charter schools might argue that they are not designed to undermine anything, but only to deregulate charter schools in order to promote innovation. It would have been easy, however, not to exempt charter schools from this requirement. This exemption is a repudiation of the framer’s democratic purpose for public education. Furthermore, it epitomizes the distinction between the private benefits view of education put forward by privatization advocates and the public benefit view that underpins the Constitutional Common School.<sup>185</sup>

Exemption from the democratic purpose of public education is no small matter. In addition to the Ohio Constitution’s requirement that public schools educate for citizenship as well as knowledge, the United States Supreme Court has cited the democratic purpose of public schools as a justification for limiting a right as fundamental as free speech. For example, in *Bethel School District v. Fraser* the U.S. Supreme Court held that the First Amendment did not prohibit a school from disciplining a student for lewd speech because such speech undermined the schools’ educational mission.<sup>186</sup> In his majority opinion, Chief Justice Burger reasoned that “[t]he process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order.”<sup>187</sup> The Chief Justice also noted that:

[Public] education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation. . . . In [*Ambach v. Norwick*] we echoed the essence of this statement of the objectives of

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<sup>184</sup>OHIO REV. CODE ANN. § 3313.602(B)-(C) (LexisNexis 2004). These sections provide as follows:

(B) In the development of its graded course of study, the board of education of each city and exempted village school district and the governing board of each educational service center shall ensure that the principles of democracy and ethics are emphasized and discussed wherever appropriate in all parts of the curriculum for grades kindergarten through twelve.

(C) Each city, local, exempted village, and joint vocational school board shall adopt policies that encourage all certificated and noncertificated employees to be cognizant of their roles in instilling ethical principles and democratic ideals in all district pupils.

*Id.* City, village and vocational schools are specifically mentioned in these subsections while community schools are not. In other portions of the code, e.g., subsection (D) of § 3313.602, community schools are specifically mentioned. OHIO REV. CODE ANN. § 3313.602(D) (LexisNexis 2004). *See also* LOEO Final Report, *supra* note 178, at A-5.

<sup>185</sup>*See supra* § V, B entitled “Public vs. Private Benefits”.

<sup>186</sup>*Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986).

<sup>187</sup>*Id.* at 683.

public education as the [inculcation of] fundamental values necessary to the maintenance of a democratic political system.<sup>188</sup>

This and other similar cases underscore the historical and contemporary understanding of the importance of a democratic purpose for public schools.<sup>189</sup> It is a fundamental concept that should not be jettisoned by Ohio charter school laws.

*ii. Exemption from Control by the School Board*

Another exemption—exempting community schools from control by local school boards and vesting that control in the State Board of Education—seems legitimately within the public realm.<sup>190</sup> The State Board of Education is still a public governing body. However, as of July 1, 2005, the Ohio Department of Education is no longer responsible for primary oversight of charter schools. Instead, that responsibility has been delegated to various “sponsors” including a church, a cultural group, and a housing development contractor.<sup>191</sup> These private groups essentially control who receives the millions of dollars of state money going to charter schools.

With this in mind, the reality is that control of many community schools, perhaps the majority, ends up in the hands of private EMOs.<sup>192</sup> Coupled with the observation

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<sup>188</sup>*Id.* at 681 (quoting C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968) and *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)) (citations and quotations omitted).

<sup>189</sup>*Id.*; see also *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

<sup>190</sup>OHIO REV. CODE ANN. § 3314.02(C) (LexisNexis 2004). This section of the community school laws requires a charter school to have a sponsor. Prior to 2005, most community schools were sponsored by the State Board of Education. See LOEO Final Report, *supra* note 178. However, after July 1, 2005, tax-exempt, education-oriented entities meeting certain requirements will be able to act as community school sponsors. OHIO REV. CODE ANN. § 3314.02(C)(1)(f) (LexisNexis 2004). In practice, community schools have always been able to contract with an EMO after receiving their charter through a tax-exempt sponsor; however, this change will make the form even less of an obstacle to the substance. See also WELLS & SCOTT, *supra* note 97, at 246; Oplinger & Willard, *Charter Experiment Goes Awry*, *supra* note 4 (noting that only non-profits can start a charter school but that they often work hand in hand with EMOs such that it is hard to distinguish one from the other).

<sup>191</sup>Doug Oplinger & Dennis J. Willard, *Charter School Oversight Shifts—Regulation by Private Entities Sparks Fears of Conflict of Interest*, AKRON BEACON JOURNAL, Jul. 23, 2005, at A1. A sponsor is responsible for approving charter school contracts and for the accountability of the charter school. The following groups are among the entities that may sponsor charter schools: any local public school district, Ashe Cultural Center (an African-American cultural group), Auglaize County Educational Service Center, Buckeye Community Hope Foundation (a developer of federal housing projects), Ohio Council of Community Schools (headed by Allison Perz), St. Aloysius Orphanage, and Educational Resource Consultants of Ohio (affiliated with Christ Tabernacle Ministries of Excellence). Doug Oplinger & Dennis J. Willard, *School Sponsors*, AKRON BEACON JOURNAL, Jul. 23, 2005, at A4. See also *Charter School Conflict Suggested*, THE CINCINNATI POST, Jul. 25, 2005, at A6 (noting that “[m]any sponsors . . . can conduct much of their work in private because they are not subject to Ohio’s open meetings and open records laws”).

<sup>192</sup>Over seventy percent of state funding and charter school enrollment goes to EMOs, and, of the EMOs over half are for-profit entities. The Ohio Coalition for Equity and Adequacy, *Community Schools in Ohio: Overview to Ohio Community Schools Spreadsheets* (Sept. 17,

that oversight of community schools has been chronically lacking since their inception, schools operated by EMOs are functionally outside the state system of common schools.<sup>193</sup> When an EMO exercises total control over a school, the motivation to educate is dominated by private, market-based concerns as opposed to public, citizenship concerns. The end, profit, is almost certain to influence the means.<sup>194</sup> This will not be an accident or a possible side effect, but instead the intended essence of the for-profit charter school.

*b. Profit-Motive Undermines the Fundamental Purposes  
of the Constitutional Common School System*

One commentator asserts that there are two ways to make money operating schools: cut wages and/or cut services.<sup>195</sup> The approach of Ohio's largest EMO, White Hat Management, seems to bear out this hypothesis. White Hat teachers are unusually relatively inexperienced. In 2003-2004 the average White Hat teacher had 2.2 years of experience and a salary of \$29,000 while the average public school teachers had 14 years of experience and a salary of \$46,700.<sup>196</sup> In addition, some White Hat schools have large student-teacher ratios; one school reported a ratio of

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2004), [http://www.ohiocoalition.org/pdfs/Funding\\_for\\_Charter\\_Schools.pdf](http://www.ohiocoalition.org/pdfs/Funding_for_Charter_Schools.pdf), at 5 [hereinafter Community Schools Overview]. These numbers are up over twenty percent since from 1999. Oplinger & Willard, *Charter Experiment Goes Awry*, *supra* note 4. Nationally, ten to twelve percent of charter schools are operated by EMOs. Walk, *supra* note 91, at 241. Therefore, Ohio, in which sixty-six percent of charter schools are operated by EMOs, is well above the national average. Russo, *supra* note 80, at 5. In fact, in its overview of privatization in public education, Education Week magazine calls EMOs the "second wave" in the charter movement. Education Week Research Center: Privatization of Public Education (2005), available at <http://www.edweek.org/rc/issues/privatization-of-public-education> (last visited Aug. 31, 2005).

<sup>193</sup>See Oplinger & Willard, *Charter Experiment Goes Awry*, *supra* note 4 (detailing the state's gross disregard for its oversight responsibilities during the first few years of Ohio community schools); Community Schools Overview, *supra* note 192, at 10 (describing the lack of accountability to which community schools have been held as of 2004); Russo, *supra* note 79, at 31 (describing the serious lack of accountability data available on community schools and including increased accountability and oversight in concluding policy recommendations).

<sup>194</sup>WELLS & SCOTT, *supra* note 97, at 247-48. *But see* Walk, *supra* note 92, at 243.

<sup>195</sup>MINER, *supra* note 86, at 138.

<sup>196</sup>Jennifer Mrozowski, *These Schools Sell Education for Profit*, CINCINNATI ENQUIRER, Jun. 30, 2005, at 1A (quoting national charter school researcher Gary Miron concerning for-profit charter schools: "In large part, a lot of money is siphoned off for management fees. It doesn't get to instruction."); Doug Oplinger & Dennis J. Willard, *Parents Have Freedom of Choice, But Not Freedom of Information*, THE AKRON BEACON JOURNAL, Dec. 12, 1999, at A1. This difference in salary and experience is not specific to White Hat schools, but true of charter schools in general. Scott Stephens, *Teachers Leaving Charter Schools*, THE PLAIN DEALER, Jul. 1, 2005, at B1 (citing a study conducted by a Ohio State University research group established by the Ohio Board of Regents). One reason that teachers at charter schools are relatively inexperienced is that half of them leave each year. Jennifer Mrozowski, *Charters Have High Turnover*, CINCINNATI ENQUIRER, Jul. 3, 2005, at 1C.

ninety-three to one.<sup>197</sup> Moreover, White Hat has cut costs by not offering services like gifted programs and instead has done just the opposite by offering a high school diploma for computer-based tutoring for three hours per day designed to achieve ninth grade proficiency.<sup>198</sup>

Furthermore the numerous cyberschools, many of them operated by for-profit EMOs, that have opened in the past several years demonstrate how far deregulation has allowed community schools to stray from the Constitutional Common School goals of democratic citizenship. In common language, “community cyberschool” would be an oxymoron. Instead of bringing all the diversity of the community together in a common learning environment, cyberschools by their nature isolate individuals from the community.<sup>199</sup>

Similarly, charter schools can interfere with the democratic purpose of education in more subtle ways such as de facto pupil selectivity. That is, certain societal groups (defined by wealth, religion, etc.) are strategically excluded or included because of the design of the specific charter school. Studies of charter schools in California and Michigan concluded that charter school laws can allow for and even compel schools to become more private and expand financial and other inequalities.<sup>200</sup> Some ways in which charter schools may purposely or inadvertently exclude certain students or families include: targeted recruitment of certain types of students (especially via first-come-first-serve enrollment), mandatory parent meetings/involvement, and geographic distribution of charter schools.<sup>201</sup> This is privatization to the extent that certain children, often of poor, undereducated, or unconcerned parents, are sorted out. The Ohio law, O.R.C. § 3313.97, exempting charter schools from open school district enrollment might have this effect.<sup>202</sup> Although charter schools are not exempt from notifying families within the immediate vicinity of the charter school under this law, during the first several years no charter school designed to serve the generalized public needs of a neighborhood community had opened in Ohio.<sup>203</sup>

On the other hand, no available study of Ohio charter schools has found the kind of targeted recruitment strategies discussed in the California study.<sup>204</sup> The most

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<sup>197</sup>Community Schools Overview, *supra* note 192, at 9; Stephens, *Teachers Leaving Charter Schools*, *supra* note 195 (noting that the average student-teacher ratio in Ohio charter schools is 30-1 compared to 19-1 in traditional public schools).

<sup>198</sup>*Id.*; See also Oplinger & Willard, *Charter Experiment Goes Awry*, *supra* note 4 (also noting that, although EMOs were making profits, there was no evidence that they were reducing costs).

<sup>199</sup>See generally ENGEL, *supra* note 88, at 86. See also Welsh-Huggins, *supra* note 132 (noting that student/teacher interaction has been an issue in Ohio cyberschools and that Ohio state legislators will “look at online academies to ensure that pupils interact with teachers”).

<sup>200</sup>WELLS & SCOTT, *supra* note 97, at 234-35; Oplinger & Willard, *Parents Have Freedom of Choice, But Not Freedom of Information*, *supra* note 196.

<sup>201</sup>WELLS & SCOTT, *supra* note 97, at 250-53 (calling charter school’s ability to control who enrolls as “refining the art of excluding the unwelcome”).

<sup>202</sup>OHIO REV. CODE ANN § 3313.97 (LexisNexis 2004).

<sup>203</sup>Oplinger & Willard, *Charter Experiment Goes Awry*, *supra* note 4.

<sup>204</sup>WELLS & SCOTT, *supra* note 97, at 234-35.

recent data indicates that “Ohio’s charter schools serve higher percentages of poor and minority students than traditional public schools in the state.”<sup>205</sup> Nonetheless, it is likely that the scope of deregulation enacted by Ohio’s “strong” charter school laws has had a social privatization effect. As one researcher stated it, “[t]he potential is there for various kinds of sorting and selection . . . [t]hat we regard as a dysfunctional development.”<sup>206</sup> In fact, the social privatization effect of Ohio charter schools may be to further isolate underprivileged children. The fact that charter schools serve a higher percentage of poor children simply indicates increased segregation of the poor from the affluent, thereby subverting the integration goal of the Constitutional Common School.

Another aspect of deregulation that the plaintiffs’ claims address is the creation of a competing “shadow system” of charter schools operating with diminished academic standards.<sup>207</sup> The “thorough and efficient” clause contemplates one system of state-funded public education. Prior to the Constitutional Convention of 1850-51 Ohio schools were fragmented, with state money going to various disconnected sectarian schools.<sup>208</sup> The convention delegates regarded this competition among schools as “the greatest impediment to the advancement of education.”<sup>209</sup> They purposely chose to avoid creating competing factions by requiring a system of Common Schools.<sup>210</sup> However, the current rules, particularly § 3314.02, purposely create charter schools to compete with struggling traditional public schools in hopes of fostering improvement via competitive market forces.<sup>211</sup> Ironically, charter schools are then given a competitive advantage in that they are exempt from many of the state mandates that increase costs and dictate the degree and manner of services provided.<sup>212</sup> It seems patently unfair to assert that the neutrality of a competitive

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<sup>205</sup>Russo, *supra* note 79, at 14.

<sup>206</sup>Oplinger & Willard, *Parents Have Freedom of Choice, But Not Freedom of Information*, *supra* note 195.

<sup>207</sup>*State ex rel. Ohio Congress of Parents and Teachers*, 2004 Ohio App. LEXIS 4009, at \*20; Scott Stephens, *Charter Schools Get a Break: Rules Let Low Scores Draw a Passing Grade*, THE PLAIN DEALER, Sept. 9, 2004, at B1.

<sup>208</sup>O’Brien & Woodrum, *supra* note 12, at 640.

<sup>209</sup>*Id.*

<sup>210</sup>*Id.*

<sup>211</sup>OHIO REV. CODE ANN. § 3314.02 (LexisNexis 2004). This section allows for the creation of new charter schools in urban and “challenged” school districts. Thus, school districts that are already struggling in “academic watch” or “academic emergency” are subject to competition from a charter school. *Id.* The idea behind this is to give parents a way out of struggling traditional public schools, but also to provide market-based incentives for improvement.

<sup>212</sup>For example, §§ 3317.022(C)(5), .023 of the Ohio Revised Code exempt community schools from provision of educational services requirements such as the student teacher ratio, the manner in which special education funds are spent, and special education staffing. *See also* OHIO REV. CODE ANN. § 3313.202 (LexisNexis 2004) (exempting community schools from “requirements related to the provision of life, health, accident, and legal insurance benefits for school district employees”); LOEO Final Report, *supra* note 177, at A-3. These are significant costs that community schools are able to manage in ways that traditional public

market will promote improvement and then create a system in which charter schools have a significant market advantage due to statutory exemptions. The plaintiffs' claims that deregulation creates a shadow system seem valid in light of the fact that charter schools and traditional schools are operating under significantly different standards; the absence of a level playing field suggests that there are really two playing fields.

*c. Competition is a Pretext for Privatization of the Public School System, not a Stimulant to the Constitutional Common School System*

This unfairness indicates that competition within the public system is really a pretext for privatization of the system. In fact, there is significant evidence that many of the key players involved in creating Ohio's educational policy are adamant advocates of privatization, and that a considerable amount of lobbying and promotion has been designed to undermine the public's faith in the public school system.<sup>213</sup> For example, Governor Taft appointed Deborah Owens Fink to fill a vacant spot on the Ohio Board of Education. Ms. Fink was formerly a contributor to the Buckeye Institute, a conservative Ohio think tank championing the "elimina[tion of] most of government and allowing free enterprise to solve society's problems."<sup>214</sup>

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schools cannot. In addition, the cyberschool saga indicates that charter school exemptions have allowed certain families or students to avoid mandatory proficiency testing. That is, a significant number of students enrolled in cyberschools are not taking state-mandated proficiency tests, and online school enrollment declines at the beginning of March, when proficiency tests are administered. Doug Oplinger & Dennis J. Willard, *Online Students Missing Exams*, AKRON BEACON JOURNAL, June 3, 2005, at A1. Even more ironically, the most recent studies do not indicate that charter schools are more successful, despite their competitive advantage. Ohio Department of Education 2004-2005 District Report Cards, available at <http://www.ode.state.oh.us/reportcard/archives/Default.asp>; Scott Stephens & Reginald Fields, *Ohio Charter Schools Struggling*, THE PLAIN DEALER, Aug. 18, 2005, at B1.

<sup>213</sup>For example, when Governor Taft was asked whether there is statistical evidence that school choice improves academic performance, Taft dodged the question and responded: "I have lost my patience with children trapped in failing schools." Dennis J. Willard & Doug Oplinger, *Private School Funds to Go Up*, AKRON BEACON JOURNAL, Feb. 20, 2005, at A1. See also Oplinger & Willard, *School Battle Eludes Voters*, *supra* note 75 (describing the players in the political battle over educational policy in Ohio); Warsmith & Byard, *supra* note 138. Warsmith & Byard note that school choice advocates are winning the battle of public perception, i.e., convincing the public that traditional public schools are miserable failures. "Urban school leaders said what they are battling is often "perceptions" rather than the reality of what's happening in their schools. [One administrator] said parents have told her the district needs to get computers – when they already have them in every classroom." *Id.*

<sup>214</sup>Oplinger & Willard, *supra* note 75. The Buckeye Institute "supports dramatic reduction in the role of government," receives contributions from EMO owner David Brennan, and publishes research supporting Brennan's privatized schools. *Id.* The Institute's research, however, has employed fuzzy math and been discredited in the past. *Id.* Furthermore, the Ohio Teacher's Union recently accused David Brennan of trading campaign donations for favorable treatment of Brennan's for-profit charter schools. See e.g., Jennifer Mrozowski, *Charter School Owner Accused*, CINCINNATI ENQUIRER, June 17, 2005, at 1B. As a result, Brennan was asked to explain to Ohio's legislative inspector general why he should not be considered a lobbyist. Dennis J. Willard & Doug Oplinger, *Brennan Faces Inquiry into Influence—Charter School Advocate to be Asked Why His Private Talks with Legislators*

The Buckeye Institute has been active in the privatization movement in Ohio, although in a clandestine manner because the Institute believes that “school choice” would fail if submitted directly to the voters. Instead, the Institute believes it can control educational policy in the state by controlling the Ohio General Assembly.<sup>215</sup>

Educational lobbyists Clint Satow and David Zanotti have also spoken out against public schools using the language of privatization. Satow has said that “community schools will eventually break [the] monopoly on public education . . . .”<sup>216</sup> Zanotti, who has significant personal and professional ties to former Governor Voinovich and David Brennan, is the head of the School Choice Committee and certain right-wing religious groups advocating for school choice in order to create schools in line with a more conservative Christian ideology.<sup>217</sup>

Finally, although it would seem that charter school proponents would want more funding to go toward public schools (because charter schools are supposedly public schools themselves, funded by tax dollars), Ohio charter school consultant Allison Perz encouraged charter school operators to vote against a ballot issue approving the sale of bonds to repair Ohio’s public school buildings because the issue does not directly benefit charter schools.<sup>218</sup> The initiator of Ohio charter school legislation, former state legislator and current White Hat lobbyist Sally Perz (Allison Perz’s mother), expresses the privatization ideology underlying her approach by saying that charter schools should never have been under the auspices of the State Board of Education. She said, “[i]t was a bad fit from the get go, having this entrepreneurial type of school housed in a big state bureaucracy.”<sup>219</sup> Sally Perz also advocates for school choice for parents “no matter what,” indicating that, for her, charter schools are not about innovation within the Common School framework but about privatization generally.<sup>220</sup>

This political atmosphere indicates that charter schools in Ohio are about the market ideology of privatization, and elevating factions—such as explicitly religious public schools—above the Common School ideology of an integrated democratic society. Ohio has come to embody the suggestion of one educational privatization study, which states that: “It is possible that some less-than-optimal charters have been ratified by expansive state laws in order to create a critical mass of charter schools that will rapidly inject market forces into public education.”<sup>221</sup> This approach underscores the view that charter schools in Ohio are “a great idea for

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*Don’t Make Him a Lobbyist Under Law*, July 10, 2005, at A1; but see Dennis J. Willard, *State Rules Brennan No Lobbyist*, AKRON BEACON JOURNAL, Aug. 5, 2005, at A1.

<sup>215</sup>Oplinger & Willard, *supra* note 75.

<sup>216</sup>*Id.*

<sup>217</sup>*Id.*; see also Doug Oplinger & Dennis J. Willard, *Campaign Organizer Pushes Hard for Changes: David Zanotti Exercises Influence Over Officials While Leading the Attack on Public School System*, AKRON BEACON JOURNAL, Dec. 15, 1999, at A7.

<sup>218</sup>Oplinger & Willard, *supra* note 75.

<sup>219</sup>Russo, *supra* note 79, at 8.

<sup>220</sup>*Id.* at 9.

<sup>221</sup>KANE & LAURICELLA, *supra* note 80, at 212.

smaller more autonomous schools that has been hijacked by people whose idea is to privatize public education.”<sup>222</sup>

## 2. Diverting Funds from Local School Districts and Putting Public Dollars in Private Pockets

The claims in *State ex rel. Ohio Congress of Parents and Teachers* that Ohio’s method of funding community schools channels state dollars away from local school districts and into private hands also implicates the prevalence of EMOs in the state. Essentially, the plaintiffs claim that the state actually gives locally raised tax dollars to charter schools without local voter approval.<sup>223</sup> This claim is based on the fact that the state gives each school district a set per-pupil “foundation” amount multiplied by the number of pupils in the district.<sup>224</sup> That number is then reduced by the amount of locally raised tax dollars up to a certain ceiling.<sup>225</sup> This is known as a “charge-off.” However, for each pupil in a community school within a school district, the state deducts from that local district’s funds the full foundation amount prior to the local tax charge-off per student.<sup>226</sup> Thus, local school districts can claim that either (1) local funds are supporting charter schools without local control of those schools; or, (2) the state is providing less funds because of the presence of charter schools in the district.<sup>227</sup> If those funds are going to legitimately public schools within the state system of Common Schools, it may not matter that the school district is losing funds because the legislature has simply decided to reallocate the way it provides for a

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<sup>222</sup>Russo, *supra* note 79, at 29.

<sup>223</sup>*State ex rel. Ohio Congress of Parents and Teachers*, 2004 Ohio App. LEXIS 4009, at \*22.

<sup>224</sup>FY 2004 – FY 2005 Operating Budget Analysis, *supra* note 76, at 112. The state uses a foundation formula to calculate state aid to public school districts. *Quality Counts 2005: No Small Change: Targeting Money Toward Student Performance*, EDUCATION WEEK, Jan. 6, 2005, Vol. 24, Issue 17, at 70. “Foundation formulas” use a multi-step process to determine the amount necessary to provide school districts with a base level of funding necessary to provide an adequate education. *Id.* For the 2004-2005 school year, the foundation level in Ohio is \$5,169. FY 2004 – FY 2005 Operating Budget Analysis, *supra* note 76, at 111-12. In order to calculate the total amount of cost for a district, the \$5,169 is multiplied by the number of students in the district and the cost of doing business in the district. *Id.*

<sup>225</sup>FY 2004 – FY 2005 Operating Budget Analysis, *supra* note 76, at 111-12.

<sup>226</sup>OHIO REV. CODE ANN. § 3314.08 (LexisNexis 2004).

<sup>227</sup>For example: Assume that the state gives funds in the amount of \$100 per student and there are ten students in District A. District A is thus entitled to \$1000 of state aid before the local tax charge-off. Assume that District A raises \$600 in local property tax revenue. The state then will subtract that \$600 from the \$1000 total, and give District A \$400. However, if one of District A’s students transfers to a community school within the district, the state will give \$100 to the community school and deduct \$100 from the amount they give to the local school district. Thus, District A now has \$900 to educate nine students. But whereas before the student transferred to the community school forty percent of the total amount (\$400/1000) came from the state, now only thirty-three percent (\$300/900) comes from the state. It is difficult to deny that the local school district has suffered a loss here, whether one characterizes it as local funds going to charter schools or a reduction in state aid due to charter schools. Phillis, *supra* note 115.

system of Common Schools.<sup>228</sup> However, the privatization aspects of charter schools discussed above, particularly in for-profit charter schools, seriously challenge the characterization of charter schools as public within the Constitutional Common School model.

Not only are the democratic citizenship goals of Constitutional Common Schools fundamentally undermined by EMOs' profit motive, but some of the tax dollars from the state education budget are not being spent on schools at all—they are used to enrich private entities. If these EMOs were providing the same service as public schools—a free and adequate education for everyone and anyone in the district—this would be economically harmless privatization. Just as a public school district that pays a private independent electrician to update the schools' wiring considers the electrician's profit part of the legitimate cost of procuring the service, the EMOs' profit would be a legitimate cost of the EMO taking on the state's responsibility for providing a system of Common Schools. However, the charter school EMOs are not providing an education consistent with the Constitutional Common School. The most recent Ohio academic achievement data shows that charter schools are doing no better, and in some cases worse, than comparable traditional public schools.<sup>229</sup> EMOs are finding ways to spend less on education—a worthy goal if possible—but without the innovation and statewide improvement via competition promised by market theory privatization adherents.<sup>230</sup> For example, cyberschools, which provide few of the democratic goals of public schools, are a goldmine for private EMOs.<sup>231</sup> A computer costs less than a teacher. The flood of for-profit cyberschools in Ohio is a result of their economic viability, not their educational quality within the Common School ideal. If EMOs are not improving educational outputs, then the argument that they are simply using education as a way of moving money from government to private pockets is even more compelling.

### C. Predicted Outcome

The plaintiffs in the *Ohio Parents & Teachers* case are unlikely to prevail before the Ohio Supreme Court. The general idea that privatization itself is fundamentally inconsistent with the Ohio Constitution has only recent history as a legal theory, and no winning precedent.<sup>232</sup> Furthermore, the Court in *DeRolph IV* and *Lewis* indicated

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<sup>228</sup>But see Russo, *supra* note 79, at 23 (stating that reallocation to charter schools of public funds for education is an issue).

<sup>229</sup>*Id.*

<sup>230</sup>See generally LOEO Final Report, *supra* note 178. Commentators also note that charter schools have not led to dramatic curricular innovations. See, e.g., O'Brien, *supra* note 51, at 158.

<sup>231</sup>See Stephens, *Ohio Virtually Booming With Cyber Schools*, *supra* note 5 (noting that Akron Digital Academy, a cyberschool operated by a public school district, gave \$500,000 of state aid that would have been pure profit to a private company back to the district's general fund).

<sup>232</sup>But see O'Brien & Woodrum, *supra* note 12, at 636-42. O'Brien & Woodrum's thorough analysis of the development of the education clause in the Ohio Constitution of 1851 concludes that school choice is incompatible with the values of the constitutional common school. "The constitutional framers . . . rejected the idea of competition among school

an intention to leave the specifics of the system of Common Schools in Ohio to the General Assembly.<sup>233</sup> Subsequent changes in the make-up of the Ohio Supreme Court only strengthen this position.<sup>234</sup> Likewise, in the aftermath of *DeRolph IV* it is particularly unlikely that the Court will embroil itself in the funding debate at the heart of the plaintiffs' diversion of funds claims. The Court has already said that the system is over-reliant on local property taxes, and it will not enter into the details of that issue again.

Precedent from other states also favors the defendants. Courts in Michigan, Pennsylvania and a few other states have rejected similar claims regarding delegating authority outside of local control and contracting out as an invalid method of assuring a thorough and efficient state system.<sup>235</sup> Although funding concerns remain the most significant and unresolved legal issue for charter schools, courts tend to avoid these issues, preferring to leave them to legislative determination.<sup>236</sup> A recent commentator analyzing state claims against charter schools with a view toward national trends concluded that after a decade of state constitutional challenges to charter school laws such challenges have not been a significant obstacle to charter school expansion nationally.<sup>237</sup>

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districts and a variety of sectarian schools, viewing competition as inefficient, divisive, and ineffective." *Id.* at 640.

<sup>233</sup>*DeRolph IV*, 780 N.E.2d at 533-34 (Resnick, J., concurring); *Lewis*, 789 N.E.2d at 202 (stating that "because it is beyond a doubt that Judge Lewis and common pleas court patently and unambiguously lack jurisdiction over any post-*DeRolph IV* proceedings, we now grant a peremptory writ and end any further litigation in *DeRolph v. State*").

<sup>234</sup>Justice Sweeney and Justice Douglas, who were in the majority that declared the state system unconstitutional in *DeRolph I*, are no longer on the Court. The dissenters, Justice Moyer and Justice Stratton have been joined by Justice Maureen O'Connor, Justice Terrence O'Donnell, and Justice Judith Ann Lanzinger, who are more ideologically aligned with Moyer's nonjusticiability principle. Sweeney and Douglas were accused of judicial activism in their approach to the *DeRolph* case by supporters of O'Donnell and Lanzinger. *See For Ohio Supreme Court*, TOLEDO BLADE, Oct. 21, 2004, at A10.

<sup>235</sup>Martin, *supra* note 183, at 68-74 (analyzing a series of state constitutional challenges to charter school laws). Martin first analyzes the Michigan case, *Council of Orgs. and Others for Educ. About Parochial v. Governor*, 566 N.W.2d 208 (Mich. 1997), and notes that the Michigan Supreme Court rejected claims that charter schools were not within state control, inappropriately managed by un-elected entities, and channeled funds to religious schools. *Id.* at 68; *see also* KEMERER, *supra* note 108, at 41-42 (discussing the same case as well as the Pennsylvania case, *School Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n*, 667 A.2d 5 (Pa. 1995)).

<sup>236</sup>Martin, *supra* note 183, at 102 (noting, however, that despite the fact that state courts have demonstrated a tendency to avoid funding issues, funding concerns remain the most significant and unresolved legal issue for charter schools). In fact, Martin notes that in a New Jersey case, *In re Englewood*, 727 A.2d 15 (N.J. Super. Ct. App. Div. 1999), *aff'd as modified* by 753 A.2d 687 (N.J. 2000), the appellate court held that the "thorough and efficient clause" in the New Jersey constitution had not been violated by funding charter schools, but noted in dicta that the clause might be violated if a district could show that it was harmed by having to fund a charter school. *Id.* at 70-71.

<sup>237</sup>Martin, *supra* note 183, at 91.

*D. Proposed Outcome*

The Ohio Supreme Court should invalidate the privatization aspects of the Ohio community school laws. Ohio's constitution guarantees a system of public education in the Common School tradition of "universal, free, non-sectarian education for self-government, enlightenment, and economic advancement."<sup>238</sup> Privatizing education is fundamentally inconsistent with the Constitutional Common School. Therefore, to the extent that community schools privatize education they are unconstitutional. Ohio's community schools show privatization characteristics in that they deregulate public schools by permitting (and perhaps encouraging via market incentives) charter schools to abandon the notion of education for democratic self-government in favor of a market-based private benefits approach.

## VII. CONCLUSION

Constitutional "community" schools may be possible. The initial idea of a neighborhood school that reflects the character of the community, is free and open to the public, and uses innovative and effective pedagogy is not inconsistent with the Constitutional Common School. It is the infusion of market theory privatization that contradicts the Constitutional Common School ideal. Therefore, Ohio's community school laws should be revised to prohibit for-profit EMOs from operating community schools. Cyberschools, which take the community right out of community schools by their very nature, should be eliminated or at least treated entirely independently of community schools.<sup>239</sup> In addition, and as proposed by the Legislative Office of Educational Oversight, supervision of charter schools should be re-aligned with the original intention to trade autonomy for accountability. Not only should the schools be accountable for academics, but they should also be accountable for fostering and maintaining the Common School purpose of their community school. Therefore, the exemptions from promoting democratic citizenship under § 3313.602(B) and (C) should be repealed.

Education in the state of Ohio is in turmoil and traditional public schools, which often resort to the "factory model" of education, are not delivering on many of the promises of the Constitutional Common School either.<sup>240</sup> Community schools still

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<sup>238</sup>O'Brien & Woodrum, *supra* note 12, at 616.

<sup>239</sup>The Ohio General Assembly took a step in this direction in the June, 2005 budget bill by placing a moratorium on new cyberschools until state officials can determine more effective standards and regulations for the online schools. Scott Stephens, *Measures Put Charter Schools on Notice: Sharper Eyes Watching for Successes or Failures*, THE PLAIN DEALER, June 26, 2005, at B1.

<sup>240</sup>The "factory model" of education is the dominant public school model. Children have little autonomy within a patriarchal and hierarchal school structure. Students are divided into age groups and spend a lot of their time working individually listening to lectures or doing worksheets. O'Brien, *supra* note 51, at 146-48. In their classic work on education in America, Bowles and Gintis argue that the traditional public school model of education – the "factory model" – does not foster the independent thinking crucial to democratic citizenship but instead teaches children to be conformist and docile. SAMUEL BOWLES AND HERBERT GINTIS, *SCHOOLING IN CAPITALIST AMERICA* 93 in *EDUCATION, INC.: TURNING LEARNING INTO A BUSINESS* 131, 137 (Alfie Kohn & Patrick Shannon eds., 2002). For a more recent discussion of the "factory model of education" idea, see O'Brien, *supra* note 51, at 146-56.

have a role to play. They still represent an opportunity to improve upon a factory model of education with a more democratically charged approach that assists all of Ohio's children in becoming good, productive citizens. The "small school" movement seems to be moving in that direction.<sup>241</sup> Community schools could find new relevance by divorcing themselves from EMOs and exploring the possibilities of neighborhood "small schools."<sup>242</sup> By focusing charter school initiatives on small, community-created and community-focused schools sponsored by local school districts but within the context of the state Constitutional Common School ideology, community schools could truly become innovative public schools. Although such a regulated approach to charter schools would allow for less freedom from state curricular standards, it would still allow for significant improvements in the "hidden curriculum" of the school and offer a promising alternative to the factory model of education.<sup>243</sup> As O'Brien writes:

The freedom to decide obvious structural issues – such as the size of the school, the length of class periods, the length and timing of holidays, the responsibilities of teachers and administrators, the role of students in the classroom, and the less obvious atmosphere issues (such as whether students may sit on the floor or wear hats indoors) – is the freedom to change the messages that are implicit in the structure, power relationships, and atmosphere of the school. Personal autonomy and institutional flexibility, even within constraints placed on the charter school structure, may provide some room within the hidden curriculum for teaching liberty.<sup>244</sup>

With this in mind, instead of undermining the democratic citizenship goals of the Constitutional Common School, charter schools could better promote those goals.

Unfortunately, the privatization aspects of community schools will be difficult to eliminate so long as the state does not allocate sufficient funds per child to provide a

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<sup>241</sup>*Small Schools*, THE PLAIN DEALER, Dec. 31, 2004, at B4; Angela Townsend, 'Small Schools' Test Area Districts, THE PLAIN DEALER, Aug. 22, 2004, at B1; Chris Sheridan, *Cutting High Schools Down to Size*, THE PLAIN DEALER, July 25, 2004, at H4.

<sup>242</sup>Russo, *supra* note 79, at 30-31 (recommending more support and encouragement for small, community-created and focused charter schools as well as local district sponsorship of charter schools). In fact, there is a recent trend toward district sponsorship of charter schools. See, e.g., Ebony Reed, *District Considers Giving Charter Schools Another Try*, THE PLAIN DEALER, Mar. 19, 2005, at B3.

<sup>243</sup>O'Brien describes the "hidden curriculum" as consist[ing] of the implicit messages we give to students about differential power and social evaluation when students learn how schools actually work, what kinds of knowledge there are, which kind of knowledge is valued, and how students are viewed in relation to school. These are the things that are learned informally and are sometimes, but not always, unintentional outcomes of the formal structure and curricular content of schooling. O'Brien, *supra* note 51, at 150-51 (quoting KATHLEEN P. BENNETT & MARGARET D. LECOMPTE, *THE WAY SCHOOLS WORK: A SOCIOLOGICAL ANALYSIS OF EDUCATION* 245-46 (Naomi Silverman & Judith Harlan eds., 1990)).

<sup>244</sup>*Id.* at 174-75.

constitutionally adequate public education. Until the state addresses this issue, charter schools will compete with traditional public schools for scarce funds and deregulation will justify claims that charter schools are thwarting the constitutional requirement of a single system of Common Schools. The market ideology underlying privatization welcomes competition for scarce resources. So long as privatization is the guiding philosophy of state policymakers, it is less likely that sufficient funding per child will be allocated.

By invalidating the privatization aspects of Ohio community school laws, the judicial branch could help re-direct the course of the charter school movement in Ohio. Unlike the level of state funding necessary to adequately educate a child in Ohio, this is a justiciable issue.<sup>245</sup> Chapter 3314 of the Ohio Revised Code sets forth the laws related to community schools.<sup>246</sup> These laws may be constitutional or not. If the court decides that privatization is unconstitutional, it can then invalidate community school laws that show sufficient privatization characteristics. Then it will once again be up to the General Assembly to legislate toward a constitutional community school.

NATHANIEL J. McDONALD

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<sup>245</sup>*State ex rel. Ohio Congress of Parents and Teachers*, 2004 Ohio App. LEXIS 4009, at \*18.

<sup>246</sup>OHIO REV. CODE ANN. § 3314 (LexisNexis 2004).