

# Saint Louis University Public Law Review

---

Volume 17  
Number 1 *Reading, Writing, and Reform the  
Roles of State and Federal Government in  
Education (Vol. XVII, No. 1)*

Article 10

---

1997

## Brown v. Board of Education: More Than Forty Years of Asking the Wrong Question & the Case for Privatization of Education

Robert W. McGee

Follow this and additional works at: <https://scholarship.law.slu.edu/plr>



Part of the [Law Commons](#)

---

### Recommended Citation

McGee, Robert W. (1997) "Brown v. Board of Education: More Than Forty Years of Asking the Wrong Question & the Case for Privatization of Education," *Saint Louis University Public Law Review*. Vol. 17 : No. 1 , Article 10.

Available at: <https://scholarship.law.slu.edu/plr/vol17/iss1/10>

This Article is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Public Law Review by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

**BROWN V. BOARD OF EDUCATION: MORE THAN FORTY YEARS  
OF ASKING THE WRONG QUESTION & THE CASE FOR  
PRIVATIZATION OF EDUCATION**

ROBERT W. MCGEE\*

I. INTRODUCTION

The Supreme Court decided *Brown v. Board of Education*<sup>1</sup> in 1954. In *Brown*, the Court held that segregation of children in public schools on the basis of race deprives them of equal educational opportunities.<sup>2</sup> While this landmark case set a precedent in favor of equal educational opportunity, it really asked the wrong question. Rather than asking if separate education can be equal education, the real question is whether government should be involved in education in the first place. Part II of this paper reviews the *Brown* decision. Part III presents the case that, from a utilitarian perspective, the public would be better off if all education were private because the private sector can provide a higher quality education at a lower cost, without depriving children from poor families from receiving an education that is at least as good as what they are presently receiving from government schools. Part IV makes the argument that, regardless of the relative quality or cost of government versus private education, providing education is not a legitimate function of government because it violates the rights to property. Part V discusses educational voucher plans, and concludes that government support for education should be abolished as soon as possible.

II. THE *BROWN* DECISION

The *Brown* Court held that separate but equal in the field of public education has no place.<sup>3</sup> Segregation in public education violates the equal protec-

---

\* Robert W. McGee is president of the Dumont Institute for Public Policy Research and a Professor at Seton Hall University. He has authored or edited more than 40 books and monographs and has written more than 300 articles and reviews for various scholarly and professional journals. The author would like to thank John Tortora, who helped gather research material for this article.

1. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

2. *Id.* at 493.

3. This view has not been consistently followed in practice. For example, all-black fraternities are acceptable but all-white fraternities are not. All-black colleges are acceptable but all-

tion of the laws.<sup>4</sup> This case has had far-reaching implications and has influenced the content of numerous civil rights acts.<sup>5</sup>

The *Brown* case consolidated several cases from Kansas, South Carolina, Virginia and Delaware that dealt with the same issue.<sup>6</sup> In the Kansas case, the plaintiffs were elementary school age negro<sup>7</sup> children who resided in Topeka, Kansas. They brought suit to enjoin enforcement of a law that permitted, but did not require, cities with more than 15,000 people to maintain separate school facilities for negro and white students.<sup>8</sup>

The Topeka Board of Education established segregated elementary schools pursuant to that statute. The District Court held that segregation in public schools has a detrimental effect on negro children, but denied relief because the facilities, quality of teachers, and so forth furnished to the colored students was comparable to the facilities enjoyed by the white students.<sup>9</sup> It held that due process of law was not violated unless there was discrimination in the maintenance of the segregated schools.<sup>10</sup> The Court, thus, upheld the “separate but equal” doctrine of *Plessy v. Ferguson*,<sup>11</sup> which held that segregation was constitutional as long as both groups enjoyed substantially equal facilities. While *Plessy* involved equality in transportation facilities, the separate but equal doctrine has since been applied in a number of other areas, including public education.

---

white colleges are not. Scholarship funds that are set aside just for blacks are acceptable, but scholarship funds for whites only are not. For more on the controversy regarding minority scholarships, see Rachel Spector, *Minority Scholarships: A New Battle in the War on Affirmative Action*, 77 IOWA L. REV. 307 (1991).

4. 347 U.S. at 495.

5. See Noel Myricks, *Brown Revisited: Twenty-Five Years Later*, 7 BLACK L.J. 296 (1981).

6. *Brown v. Board of Educ.*, 98 F. Supp. 797 (Kan. 1951); *Briggs v. Elliot*, 103 F. Supp. 920 (S.C. 1952); *Davis v. County School Board*, 103 F. Supp. 337 (Va. 1952); *Gebhart v. Belton*, 91 A.2d 137 (Del. 1952).

7. The courts use the words “negro” and “colored” to describe the plaintiffs in this case. Some present-day individuals would be offended by the use of these words, and would prefer to use “African-American” instead. The author has refrained from the use of “African-American” for several reasons. For one thing, it is too long. It is also historically inaccurate because the court did not use this term when referring to plaintiffs. Also, African-American refers to geography rather than race or skin color. To be consistent, one would have to refer to whites as Irish-Americans, German-Americans, and so forth, which is burdensome and unnecessary. African-American is also insufficiently precise because the cultures of Sub-Saharan Africa are much different than the cultures of North Africa. A more precise but still suboptimal term to use for the plaintiffs in this case would be Sub-Saharan Americans, which more closely pinpoints the geographic location from which their ancestors came.

8. See *Brown*, 98 F. Supp. at 797.

9. *Id.* at 800.

10. *Id.* at 797.

11. 163 U.S. 537 (1896).

The Supreme Court in *Brown* overturned that doctrine and held that separate cannot be equal even if the facilities are comparable.

Does segregation of children in public schools solely on the basis of race even though the physical facilities and other “tangible” factors may be equal, deprive the children of the minority group of equal educational opportunity? We believe that it does.<sup>12</sup>

Numerous articles have been written about this case in the last 40 years, and no attempt will be made here to duplicate or summarize those efforts.<sup>13</sup> But one aspect of this case has been sorely neglected – whether government should be involved in education in the first place. It is this question that this article will address.

### III. A UTILITARIAN ANALYSIS OF GOVERNMENT SCHOOLS

#### A. *Some Economics*

Government has a monopoly in education, at least as far as poor children are concerned.<sup>14</sup> A monopolist, by definition, is the sole provider of a product or service.<sup>15</sup> Since poor children cannot afford to go to a non-government school, they are stuck doing business with the sole provider of education that they can afford, the government. Even middle-income parents often do not have a choice because they have limited funds available for the education of their children. Only the wealthy have a choice because they can afford to send their children to the school of their choice, even if they are also forced to pay for a school system that they do not use.<sup>16</sup>

12. 347 U.S. at 493.

13. See, e.g., Myricks, *supra* note 5; Bayard Rustin, *Integration and Education: 25 Years After Brown*, 23 HOWARD L.J. 89 (1980); Donald E. Lively, *Separate But Equal: The Low Road Reconsidered*, 14 HASTINGS CONST. L.Q. 43 (1986); Kenneth F. Ripple, *Thurgood Marshall and the Forgotten Legacy of Brown v. Board of Education*, 55 NOTRE DAME LAW. 471 (1980); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

14. State regulation of primary and secondary schooling, and the restrictions on educational practice that result from it, is detrimental to the general public, minorities and the disadvantaged. See THE PUBLIC SCHOOL MONOPOLY: A CRITICAL ANALYSIS OF EDUCATION AND THE STATE IN AMERICAN SOCIETY (Robert B. Everhart ed., 1982).

15. The standard definition of a monopolist is someone who is the sole provider of a product or service for which there is no close substitute. McConnell and Brue give a somewhat different definition. They define monopoly as “the situation wherein the number of sellers becomes small enough for each seller to influence total supply and therefore the price of the commodity being sold.” CAMPBELL R. MCCONNELL & STANLEY L. BRUE, ECONOMICS 87-88 (11<sup>th</sup> ed. 1990). Other economists would argue that this definition better describes oligopoly.

16. Forcing people to pay for something they do not use violates fundamental fairness. Much can be said about this point, but it is not discussed here.

### B. Cost

There is much empirical evidence to suggest that the market can do almost anything cheaper than the government.<sup>17</sup> The worldwide movement toward privatization of government services provides numerous examples of this phenomenon.<sup>18</sup> Municipal solid waste disposal costs 61% to 71% more when done by government.<sup>19</sup> It takes 68% more federal government employees to remove 21% as much railroad track as private sector employees over the same period of time and under similar conditions.<sup>20</sup> Private companies can build prisons for 25% less than government, and they can do it in less than one year, compared to as much as five years for government.<sup>21</sup> A study of 121 cities in the Los Angeles County area found that contracting out street cleaning to the private sector saves an average of 43%.<sup>22</sup> The savings in other areas are also substantial: 73% for janitorial services, 42% for refuse collection, 56% for traffic signal maintenance, 96% for asphalt overlay construction, 40% for grass maintenance and 37% for street maintenance.<sup>23</sup> Private fire companies have a faster response time and cost about half as much as government fire departments.<sup>24</sup> Numerous other examples could be given to support the position that the private sector can do any number of things much cheaper than government, from police protection<sup>25</sup> and the criminal justice system<sup>26</sup> to emergency ambulance service,<sup>27</sup> leisure and recreational services,<sup>28</sup> transit systems,<sup>29</sup> social ser-

---

17. For case studies to support this view, contact the Local Government Center, c/o Reason Foundation, 3415 South Sepulveda Boulevard, Suite 400, Los Angeles, CA 90034.

18. See OLIVER LETWIN, *PRIVATISING THE WORLD: A STUDY OF INTERNATIONAL PRIVATISATION IN THEORY AND PRACTICE* (1988)(giving examples of privatization in countries other than the United States).

19. EMANUEL S. SAVAS, *PRIVATIZING THE PUBLIC SECTOR* 93 (1982). Other studies arrive at different percentages, although they all seem to conclude that the private sector can provide the service at substantially less cost than government. Contracting out waste collection to the private sector saves between 22% and 30%, according to another study. Barbara J. Stevens, *Solid Waste Management*, in *PRIVATIZATION FOR NEW YORK: COMPETING FOR A BETTER FUTURE* 215-53 (1992)(A report of the New York State Senate Advisory Commission on Privatization).

20. See RANDALL FITZGERALD, *WHEN GOVERNMENT GOES PRIVATE: SUCCESSFUL ALTERNATIVES TO PUBLIC SERVICES* 17 (1988). In Fitzgerald's example, it took 129 Amtrak employees to remove 71.8 miles of track in the same time it took 77 private railroad employees to remove 344 miles of track. *Id.*

21. *Id.* Private companies can also operate prisons cheaper and provide a higher quality product. See CHARLES H. LOGAN, *PRIVATE PRISONS* (1990).

22. JOHN C. GOODMAN, *PRIVATIZATION* 119 (1985).

23. *Id.*

24. *Id.* at 122. See also FITZGERALD, *supra* note 20, at 72, 75-79.

25. ROBERT W. POOLE, JR., *CUTTING BACK CITY HALL* 37-50 (1980).

26. *Id.* at 51-61.

27. *Id.* at 79-87.

28. *Id.* at 99-109.

29. POOLE, *supra* note 25, at 110-125.

vices and health care,<sup>30</sup> planning and zoning,<sup>31</sup> public works,<sup>32</sup> and city management.<sup>33</sup> Why should the private provision of education be any different? In fact, numerous studies show that privatizing education will result in cost savings and quality improvement. One New York State study reached the following conclusion:

Although the goal of educational choice is to give our children a better education, it would also eliminate stultifying and expensive educational bureaucracies and may yield significant savings. While these are very difficult to estimate, some proponents reason as follows: Superior education is achieved in private schools where the per-pupil cost is less than half the cost in public schools. New York spent \$7,338 per pupil in 1989. Therefore, if the national experience can be replicated in New York, per-pupil expenditures could be less than \$3,700. Even if one inflates this figure by fifty percent, it still amounts to saving of \$1,834 per student. For New York City alone, the savings could be \$1.7 billion. For the entire state, with 2.57 million students, the savings could amount to as much as \$4.7 billion.<sup>34</sup>

The studies that have been done comparing the cost of private to public education all point to the same conclusion: the private sector can provide education at a lower cost. There are a number of reasons for this, but it all boils down to just one thing – different structures produce different results. The government school system has a near monopoly, so it behaves like a monopoly, providing less than excellent service at a cost that is higher than could exist under competitive conditions. Monopolies have less pressure to cut costs than do competitive firms, so prices tend to be higher. Furthermore, there is less incentive to improve quality under a monopoly regime because customers have nowhere else to go.

Costs of providing a public education have gone up at a much faster rate than inflation,<sup>35</sup> yet student scores on standardized tests have declined.<sup>36</sup> Between 1970 and 1990, the cost per pupil increased by 489%, while inflation was 213%—a real increase of 88%.<sup>37</sup> In some school districts, less than half of the people on the payroll actually do any teaching.<sup>38</sup> Yet at many private schools, more than 90% of the people on the payroll are teachers.<sup>39</sup>

---

30. *Id.* at 126-135.

31. POOLE, *supra* note 25, at 136-146.

32. *Id.* at 147-157.

33. *Id.* at 158-171.

34. John E. Chubb & Terry M. Moe, *Education, in* PRIVATIZATION FOR NEW YORK: COMPETING FOR A BETTER FUTURE 106-153 (1992).

35. POOLE, *supra* note 25, at 173.

36. GOODMAN, *supra* note 22, at 123. *See also* Chubb & Moe, *supra* note 34, at 109, 115-119.

37. Chubb & Moe, *supra* note 34, at 111.

38. GOODMAN, *supra* note 22, at 123.

39. POOLE, *supra* note 25, at 179.

A study by New York City's Comptroller found that it cost \$6,196 to educate one severely handicapped student in a government school, but private schools under contract with the city government could do the job for \$4,730, a savings of \$1,466, or 24%, if one uses the government schools cost as the base.<sup>40</sup> A study by the New York State Senate determined that the total cost per pupil in a public school in 1990 was \$4,929, which is about twice as much as the cost of educating a student in a Catholic school.<sup>41</sup> The cost of educating a student in Boston rose from a little over \$1,000 in 1971 to \$4,000 in 1981, making it the second most expensive large school system in the country.<sup>42</sup> By 1985, the per pupil cost had risen to about \$5,400.<sup>43</sup> Yet its high school seniors were scoring more than 200 points below average on the scholastic aptitude test,<sup>44</sup> which shows that throwing money at the problem will not solve it. The problem is not with insufficient funds. The problem is structural.

Lower cost structures prevail in the private sector at all levels of education. A New York State Department of Education study found that disadvantaged students in educational opportunity programs could be graduated from private universities at much lower cost (\$18,570) than students at government-run universities (\$103,061), although public funds were used for both types of programs.<sup>45</sup> In other words, private universities could do the job for 18% of the cost it would take to have it done by a government-run university.

### C. Quality

Quality cannot be measured, although it can be ranked.<sup>46</sup> For example, Jane may prefer Pizza Hut pizza to the pizza that comes from the corner pizza parlor, but she cannot say that Pizza Hut pizza is 12% better than corner pizza. The perception of quality is also subjective. Paul, and many others, probably prefer the pizza on the corner to Pizza Hut pizza. If they did not, then it would not be long before the corner pizza parlor would go bankrupt for lack of busi-

---

40. SAVAS, *supra* note 19, at 102. This study was published in 1978. The prices in both cases would likely be much higher today. If one had to guess at the relative cost in current prices, it would not be unreasonable to expect that the private sector could save even more money, in percentage terms, since New York's schools have become less efficient since 1978. Office of the Comptroller, POLICY ANALYSES OF THE COST AND FINANCING OF SPECIAL EDUCATION TO HANDICAPPED CHILDREN IN NEW YORK CITY (1978), *cited in* SAVAS, *supra* note 19, at 115, n. 44.

41. Chubb & Moe, *supra* note 34, at 111.

42. FITZGERALD, *supra* note 20, at 139.

43. *Id.*

44. FITZGERALD, *supra* note 20, at 139.

45. SAVAS, *supra* note 19, at 103.

46. One way to approximate the differences in quality between schools is to compare test grades that students at different schools earn on standardized exams. This is only an approximation, since tests do not measure or test everything. It is generally conceded that private schools provide a better education than public school. See JAMES S. COLEMAN & THOMAS HOFFER, PUBLIC AND PRIVATE HIGH SCHOOLS 59-79 (1987).

ness, and Pizza Hut would have a monopoly. Some people prefer one thing, and other people prefer another.

The same is true of education. Some people prefer one school or kind of education and some prefer another. Some people would rather attend (or send their children to) a school that supports a multicultural approach to education and some prefer a straight Western civilization approach. Some prefer a John Dewey approach<sup>47</sup> and some prefer a fact-cramming approach. Some prefer to have their children attend a school that is all white (or black) or all male (or female), and some would prefer a school that has a more diverse student body. Some parents would like to see the time spent in school expanded to ten hours a day or twelve months a year, and others prefer the status quo. Some parents want their children to learn foreign languages, math, science, or whatever, and some would prefer a different curriculum that they think is more relevant. Some parents would prefer to send their children to a school that teaches religion and/or moral values, while others think that such things should be taught at home, or not at all. Some parents would prefer to send their children to schools with cafeteria policies that meet certain religious requirements, but others do not see this as an issue of concern.<sup>48</sup> There is no such thing as one best pizza, and there is no such thing as one best school.,

Forcing a standard curriculum and set of rules down everyone's throats is bound to reduce the quality of the educational product, since quality is subjective and standardization requires compromise, yet that is exactly what happens in a government school system. In some cases, standardization is required by law, i.e. no segregation, no religion. In other cases, standardization is required so that the school can provide an educational product that most people will accept, even if it is suboptimum. If Johnnie's parents were to list twenty things that they wanted their child's school to have, they might find that the local public school had only eight or nine of the items. If Jane's parents did the same thing, they might be able to check off seven things, or perhaps fifteen, depending on their own subjective values and requirements. The local public school probably provides a number of things that either set of parents does not find of any value to their child, yet they must pay for these things even if they derive no benefit from their presence and availability.

With a private system, schools will be able to offer diversified curricula and programs that will better satisfy the needs of educational consumers. Some schools will invest their limited resources in providing one basket of educational products and some will choose a different basket of products. Schools that offer Latin and Greek will attract certain parents. Schools that offer a strong math or science program will attract another set of consumers.

---

47. JOHN DEWEY, ON EDUCATION, 3 (Reginald B. Archambault ed., 1964).

48. In Bradford, England, for example, which has a high Moslem population, some parents insisted that the local schools prepare food based on Islamic rules.



Under a private, diverse system, consumers will be able to choose the school that supplies a basket of products that most closely approximates their needs. Johnnie's and Jane's parents may each be able to find a school that provides eighteen or nineteen of the things on their list if they take the time to shop around. In this respect, shopping around for a school is no different than shopping around for a car. You choose the one that best meets your needs within a certain price range. Where there is choice, there is diversity because different people prefer different things.

*D. The Effect of Minorities and the Poor*

One argument that has been raised against private education is that minorities and the poor get left behind. They cannot participate in the private system because they cannot afford it. But such is not the case. In California, there are more minorities in private schools than in the government schools.<sup>49</sup> Private schools that provide high quality education can thrive in the inner city. Gertrude Wilks proved it with her Nairobi Day School in East Palo Alto, California, a poor black neighborhood.<sup>50</sup> Marva Collins proved it in inner-city Chicago.<sup>51</sup> Private schools that provide a high-quality, low-cost education have done well in numerous other places as well.<sup>52</sup> So the argument that the poor and minorities would be abandoned under a private system does not hold up under analysis.

Before the advent of public education, education was provided privately, Joseph Lancaster, a private schoolmaster in England, developed a system – the Lancaster system – which was a phenomenal success.<sup>53</sup> His system enabled a vast number of students to receive personalized instruction at very low cost. He established a tutor system, by which some students would spend time tutoring other students.<sup>54</sup> The teacher would provide additional instruction as well as supervise the tutoring activity. Using this method, one teacher would be able to educate a large number of students at a very low per pupil cost. Those being tutored benefited because they received personalized instruction.<sup>55</sup> The tutors also benefited because tutoring gave them some responsibility and reinforced what they already knew. Lancaster established more than 100 schools

---

49. SAVAS, *supra* note 19, at 103, 138.

50. POOLE, *supra* note 25, at 185.

51. Marva Collins became disgusted with the public school system in Chicago, where she taught, so she started her own private school. Students who could not afford the very low tuition were admitted for free. Her students' performance compare favorably to that of students in other schools, although they came from disadvantaged backgrounds. MARVA COLLINS & CIVIA TAMARKIN, *MARVA COLLINS' WAY* 17 (1982).

52. Chubb & Moe, *supra* note 34, at 145-146.

53. POOLE, *supra* note 25, at 177.

54. *Id.*

55. *Id.*

in England and America between 1818 and 1850.<sup>56</sup> He could educate so many students at such a low cost that he was able to admit the poorest children without charging them any tuition.<sup>57</sup> But public school bureaucracies did not like the Lancaster system, and a number of them banned the method.<sup>58</sup>

The Lancaster system, or variations of it, has been making a comeback. The Loma Vista Elementary School in Palo Alto, California started using a variation of the Lancaster method in 1974 and improved third grade reading achievement from the 70<sup>th</sup> percentile to the 99<sup>th</sup> percentile.<sup>59</sup>

Extensive use of the Lancaster method would reduce the need for teachers, since teachers could effectively teach a larger number of students. This possibility probably does not come as good news to the teacher unions. But it is good news for taxpayers, who must pay the cost of a bloated public school system.<sup>60</sup>

#### *E. Weaknesses of the Utilitarian Approach*

The utilitarian approach suffers from several structural weaknesses. Perhaps the major weakness, from an economic point of view, is that it is impossible to measure utility. Relative utilities can be ranked but not quantified. Economic textbooks ignore this fact because it complicates their model-building, but it is a very real weakness nonetheless. For example, let's say that Ken has the option of buying a hamburger or a hot dog for \$1. Eating the hamburger would increase his "utils"<sup>61</sup> by eight. Eating the hot dog would increase his utils by six. Parting with the dollar would decrease his utils by three. Since he stands to gain by buying either the hamburger or hot dog – his positive utils exceed his negative utils – he will make a purchase. Since his positive utility increases more by purchasing the hamburger, he will buy the hamburger and not the hot dog.

---

56. *Id.*

57. *Id.*

58. POOLE, *supra* note 25, at 177 (The New York City Education Department banned it in 1846).

59. *Id.* at 178.

60. There are a number of ways that government schools can cut their costs. Poole discusses some of these ways. *See id.* at 176-183. But the real problem is not that government schools are run inefficiently but that they are locked into a structure that they cannot replace. As long as government schools hold a monopoly position, they will behave like monopolies. It is inherent in the structure. *See also*, Jack D. Douglas, *Only Freedom of Education Can Solve America's Bureaucratic Crises of Education*, 155 CATO INST. 1 (1991).

61. "Utils" is the measure of utility that economists use to illustrate the theory of marginal utility. A util is the measure of benefit that someone derives from entering into a transaction. For more on this point, *see* MURRAY N. ROTHBARD, *MAN, ECONOMY, AND STATE* 260-268 (1970). Rothbard also discusses the weaknesses of the use of utils in economic analysis.

It should also be noted that marginal utility decreases with each additional purchase.<sup>62</sup> After Ken eats a few hamburgers, you may have to pay him to eat one more because he would experience discomfort in doing so. The point is, utility is not constant. It shifts.

It is not the same for every individual. A vegetarian would experience negative utility from eating the first hamburger. The main weakness from such analysis is that there is no way to measure the degree of utility. We may be able to determine that Ken would prefer a hamburger to a hot dog, but we cannot really say that he gains two additional utils by buying a hamburger because “utils” are imaginary units that economists use to make a point. They do not exist in reality.

How does all this relate to *Brown v. Board of Education*? The analysis given above shows that providing education privately is cheaper and more cost effective than having government provide it. Most economists would end the discussion at this point. If private education increases utility more than tax-supported education, then society benefits more by scrapping government schools and replacing them with private schools. The argument is decided based on what is in the “public interest,” or which option is more beneficial to “society.”

It is at this point that another weakness of the utilitarian approach – the greatest good for the greatest number —should be pointed out. A “rights” theorist would be quick to point out that it is impossible to determine with any degree of confidence whether a particular policy is in the public interest. We cannot measure positive and negative utils, so we cannot subtract the negative utils from the positive utils to determine whether the net result is positive or negative. But more importantly, there is no such thing as a public interest; there are only private interests. Any public interest, if there is one, is merely the sum of all the individual interests. People have different values and interests, so we cannot really add and subtract them. There is no such thing as the common good because individuals have different values.<sup>63</sup> Therefore, the only proper function of government is to create a system of rules that allows individuals to pursue their own happiness, provided that their pursuit does not violate the rights of others.

In the field of education, we cannot say that it is the public interest to have free public education because society benefits. Those who receive the free education benefit, but at the expense of those who must pay. A rights advocate

---

62. This phenomenon is called the law of decreasing marginal utility, or the law of marginal utility. *Id.*

63. MICHAEL NOVAK, *FREE PERSONS AND THE COMMON GOOD* 41 (1989).

would argue that no action is justified if one party to the transaction acts as a parasite by forcing someone else to pay for his benefit.<sup>64</sup>

Utilitarians would argue that a policy should be undertaken if the good exceeds the bad; if the positive benefits exceed the cost or detriments, the greatest good for the greatest number. It is acceptable to violate some people's rights as long as "society" benefits overall. It is at this point that the weakness of the utilitarian approach becomes most clear.

Let's say that Mike has recently been released from prison after ten years incarceration. He has not had any sex during that time and he has been oversexed ever since he was ten years old. He comes upon a prostitute who is in a drunken stupor. He rapes her. She is barely able to perceive what is going on, but experiences slight disutility. Mike, on the other hand, benefits greatly by the experience. A utilitarian would say that the rape is in the public interest because society benefits. Mike benefits a lot and the prostitute gives up practically nothing. A rights advocate would say that rape is always wrong because someone's rights are violated. The fact that someone gains much and another loses little is completely irrelevant. Gain and loss are not legitimate questions. Only rights matter. A rights advocate would argue that actions should be permitted if no one's rights are violated and not permitted if someone's rights are violated.

#### IV. A RIGHTS APPROACH TO THE GOVERNMENT PROVISION OF EDUCATION

##### *The "Right" to an Education*

Where the government is responsible for providing its citizens with education, it seems only fair that the service should be equally available to all. It is this issue that the *Brown* case addressed, more or less, in holding that separate education could not be equal education. But a threshold question needs to be asked first: Is there a "right" to an education in the first place? The answer to this question depends on which view of rights one subscribes to – positive rights or negative rights. Those who advocate positive rights (those granted by government), would argue that individuals have the right to a free education, adequate medical care, a job, decent housing, and so forth.<sup>65</sup> The list goes on and on. Those who espouse the negative rights view would argue that individuals have the right to life (the right not to be killed), liberty (the right not to be confined) and property (the right not to have the fruits of their labor confiscated, either by an individual or by a majority). Any other "rights" are not rights

---

64. Public Choice School economists have labeled this phenomenon "rent-seeking." See GORDON TULLOCK, *THE ECONOMICS OF SPECIAL PRIVILEGE AND RENT-SEEKING* (1989); *THE POLITICAL ECONOMY OF RENT-SEEKING* (Charles K. Rowley et al. eds., 1988); *TOWARD A THEORY OF THE RENT-SEEKING SOCIETY* (James M. Buchanan et al. eds., 1980).

65. See JOHN RAWLS, *A THEORY OF JUSTICE* 3 (1971).

at all, since granting a positive right to one individual requires violating the right of some other individual.<sup>66</sup>

Negative rights are rights that come before government. Governments are formed to protect these pre-existing rights. Under a positive rights regime, governments are formed first, and then granted certain positive rights. The fatal flaw in the positive rights position is that, in order for one individual to have a positive right, the negative rights of another individual must be violated. One person gains at the expense of another. For example, if someone has the “right” to an education, someone else must provide it – the taxpayer. If someone has the right to a job, someone must provide it – some employer. The same with health care or any other so-called right. But under a negative rights regime, no one’s rights are violated. No one gains at the expense of another. I have the right to life, and so do you. I have the right to liberty and so do you. I have the right to property and so do you.<sup>67</sup> Under a positive rights regime, my right to property is disparaged because I am forced to pay for the education of your children, for your health care, and so forth. A positive rights regime necessarily involves a win-lose, parasitical relationship, whereas a negative rights regime is always win-win. Rights never conflict in a negative rights regime, whereas there are frequent conflicts in a positive rights regime.

The negative rights regime and positive rights regime are incompatible. You either have one or the other. One person either gains at the expense of someone else or not. The paradigm is either win-win or win-lose. The negative rights regime is superior to the positive rights regime because win-win situations are to be preferred to win-lose situations. It is better that no one’s rights be violated than that rights are violated 50% of the time, which is the case in a positive rights regime.

There is no right to an education, health care, a job, decent housing, or anything else except life, liberty and property. Therefore, speaking about the right to education is gibberish.

## V. DISMANTLING THE GOVERNMENT MONOPOLY IN EDUCATION: THE CASE FOR FREEDOM

### A. *The Voucher Solution*

Educational vouchers shift the emphasis on education away from the state and toward the individual, away from central planning to a consumer-driven,

---

66. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 88-119, 178-179 (1974)(exposition of the negative rights thesis). In the author’s opinion, the negative rights thesis demolishes the positive rights view.

67. An early proponent of negative rights, also referred to as natural rights, was John Locke. See JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 4-5, 54 (1952).

market approach.<sup>68</sup> In a traditional educational system, the government provides the schools and the children attend. Usually, they attend the school that is closest to their home. They have no choice in the matter. In a voucher system, each child receives a ticket or voucher equal to a certain cash equivalent that allows children to exchange the voucher for admission to the school of their (parents') choice. For example, if it costs a certain school district \$5,000 to educate each of the high school students in its district, a district on the voucher system would give each student of high school age a voucher entitling the child's parents to purchase \$5,000 worth of education at the school of their choice. The school accepting the voucher could turn it into the school district in exchange for a \$5,000 check. If the parents want to send their child to a private school that cost \$6,000, they could turn over the voucher and write out a check for the other \$1,000. If they can find a school that charges only \$4,500, they could turn over the voucher and receive a \$500 rebate, if the rules permitted it.

A major advantage of a voucher system is that it immediately breaks the government school monopoly because it allows educational consumers to have a choice. They can send their children to the school nearest to them, but they do not have to. If they can find a better school that is willing to admit their son or daughter, the parents can abandon the school that they deem to be of inferior quality, thus upgrading the quality of their childrens' education at no cost to them. Schools would be forced to compete for students or face the possibility of closing. Schools that do a better job of providing the education that parents want would increase enrollment.<sup>69</sup>

Injecting market forces into education would have several other beneficial effects. For one, schools would be more cost conscious. There would be added incentive to cut costs and to spend money more efficiently, just like any other business. The privatization literature points out numerous examples where the shift from governmentally provided services to the private sector can reduce costs by 20% to 50% or more, so it is not unreasonable to expect that the cost of providing education could drop drastically in a short period of

---

68. Numerous books and articles have been written about the various voucher systems that have been proposed and tried. *See, e.g.*, MILTON AND ROSE FRIEDMAN, FREE TO CHOOSE 158-175 (1980); DAVID W. KIRKPATRICK, CHOICE IN SCHOOLING: A CASE FOR TUITION VOUCHERS (1990); ALAN MAYNARD, EXPERIMENT WITH CHOICE IN EDUCATION (1975); ARTHUR SELDON, THE RIDDLE OF THE VOUCHER (1986). *See also* MILTON FRIEDMAN, CAPITALISM & FREEDOM 85-107 (1962)(one of the first suggestions of vouchers as a solution to the state's education monopoly).

69. Vermont has been using a voucher system for years and the idea is gaining support. As of 1984, 95 of Vermont's 246 towns did not have a public school and did not belong to any of the state's high school districts. The government used vouchers to contract out the service to private schools. GOODMAN, *supra* note 22, at 124, *citing* John McClaughry, *Who Says Vouchers Won't Work?*, REASON 24-32 (January 1984).

time.<sup>70</sup> If privatization of education causes costs to decline by 30%, then the local government would have to provide just \$3,500 per student instead of \$5,000, making the option of reducing taxes a real possibility.

### *B. Vouchers Are a Half-Way Measure*

Vouchers are only a half-way solution, a form of market socialism.<sup>71</sup> While educational vouchers would break the government monopoly on education and enhance the quality of education while reducing its cost, vouchers are only a half-way measure. The basic issue still remains – by what right does government force some people to pay for the education of other people’s children? Property rights are still being violated because the money that is used to provide vouchers comes from taxes – the forcible taking of property without the owner’s consent.<sup>72</sup> With a voucher system, the government would still be involved in education. There is always the possibility that, in order to be eligible to receive vouchers, a school would have to comply with certain government requirements, which would defeat the whole purpose of vouchers.

Another question is logically raised at this point. Should we go to a totally private, non-tax-supported educational system immediately, or should a voucher system be instituted as an intermediate step, to be used until the government monopoly is broken? Pragmatically, the voucher system seems to be the way to go. Vouchers would allow private schools to replace government schools with a minimum of disruption. But a voucher system would not solve the rights problem, because individuals are still being forced to pay for the education of other people’s children. The pragmatic approach is utilitarian-based because it allows rights to be violated.

From a rights perspective, there is only one correct answer. Government schools should be abolished immediately and individuals should not be made to pay for the education of other people’s children for even one more day. Government must stop violating taxpayers’ rights to property immediately, not over some phase-in period.

A similar argument was made against slavery in the mid-nineteenth century. Abolitionists argued that slavery should be abolished immediately regardless of consequences because individuals have the right to be free. The argument that slaveowners might go out of business is irrelevant. President Lincoln suggested that, as a compromise, slavery be abolished gradually, over

---

70. FITZGERALD, *supra* note 20, at 17. See also GOODMAN, *supra* note 22, at 119.

71. The two basic economic systems are socialism and capitalism. Socialism exists when the means of production (schools in this case) are owned by the government. Under capitalism, the means of production are privately owned. Under fascism, the means of production are privately owned but heavily regulated, as was the case in Nazi Germany and Fascist Italy.

72. Philosophically, all taxation is theft, since it involves the taking of property without the owner’s consent. The author will not delve into that issue here. For a number of treatises on the ethics of tax evasion, see THE ETHICS OF TAX EVASION (Robert W. McGee ed. 1998).

a period of time. But such compromise positions would allow rights to continue to be violated just because it is inconvenient or impractical to stop a rights-violating practice overnight. Many slaves would disagree with the position. And so would many taxpayers, who are being forced to pay for something that does not benefit them.

The Supreme Court, in the *Brown* decision, addressed an important question: whether separate government schools can be equal. But it missed the main point, which is whether some individuals should be forced to pay for the education of someone else's children. Maybe, after more than forty years, it is time to examine this question.