

EQUALIZING THE “GREAT EQUALIZER”\*: THE ALABAMA  
ACCOUNTABILITY ACT AND THE QUEST TO FIND A MODEL  
FOR EDUCATION IMPROVEMENT THROUGH CHOICE

I. INTRODUCTION ..... 1169

II. THE ALABAMA ACCOUNTABILITY ACT ..... 1170

A. *Background, Passage, and Immediate Controversy*..... 1170

B. *The Law’s Provisions* ..... 1172

C. *The Fight Continues* ..... 1176

D. *Benefits and Problems with the Law* ..... 1180

III. AN OVERVIEW OF MODERN SCHOOL CHOICE PROGRAMS ..... 1182

A. *Common Arguments in Favor of School Choice Programs* .. 1183

B. *Common Arguments Against School Choice Programs* ..... 1185

IV. AN IDEAL ALABAMA SCHOOL CHOICE PROGRAM AND  
IMPLICATIONS FOR A BETTER GENERAL MODEL ..... 1188

A. *Systemic Problems in Alabama and in General That  
Hinder Educational Gains*..... 1188

B. *An Ideal Approach*..... 1192

C. *How does the Alabama Accountability Act Stack up?* ..... 1196

V. CONCLUSION ..... 1197

I. INTRODUCTION

Today “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”<sup>1</sup> Indeed, attained education level is a remarkable predictor of one’s future health, employment, earnings, reliance on the welfare state, and involvement in

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\* Horace Mann, *Twelfth Annual Report of the Secretary of the Board of Education*, in ANNUAL REPORT OF THE BOARD OF EDUCATION TOGETHER WITH THE REPORT OF THE SECRETARY OF THE BOARD 15, 59–60 (Mass. Bd. of Educ. 1849) (“Education, then, beyond all other devices of human origin, is the great equalizer of the conditions of men—the balance-wheel of the social machinery. . . . [I]f this education should be universal and complete, it would do more than all things else to obliterate factitious distinctions in society.”).

1. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

criminal activity, among other things.<sup>2</sup> Hence, “education is perhaps the most important function of state and local governments.”<sup>3</sup>

By nearly all accounts, the state of Alabama has been failing in its obligation for decades, but has been making progress as of late.<sup>4</sup> March 14, 2013, marked a new day for education in Alabama when Governor Robert Bentley signed the Alabama Accountability Act into law.<sup>5</sup> The law, which was surrounded by controversy prior to and after passage, essentially created Alabama’s first school choice program. This Note seeks to evaluate the content and effect of this major new law and use it as background for discussion of school choice laws in general and a possible model approach for such laws. The Note will begin by providing an overview of the Alabama Accountability Act itself along with the immediate controversy over its passage and the expected benefits of and problems with its provisions. Next, the Note will discuss school choice programs in general and the arguments on both sides of the issue. Then, the Note will seek to define an ideal school choice model for states like Alabama, which face unique socioeconomic problems that date back to the nineteenth century. Finally, it will analyze the Alabama Accountability Act in light of these “ideal” approach proposals and discuss how the law does or does not help to address these systemic problems.

## II. THE ALABAMA ACCOUNTABILITY ACT

### A. *Background, Passage, and Immediate Controversy*

In January 2013, Representative Chad Fincher of Alabama’s 102nd House District introduced House Bill 84—what became known as the Alabama Accountability Act.<sup>6</sup> The bill began innocently enough as the Local Control School Flexibility Act of 2013<sup>7</sup> and contained provisions to give local school systems the flexibility to apply for waivers from some

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2. Clive Belfield & Henry M. Levin, *The Cumulative Costs of the Opportunity Gap*, in CLOSING THE OPPORTUNITY GAP: WHAT AMERICA MUST DO TO GIVE EVERY CHILD AN EVEN CHANCE 195, 198–201 (Prudence L. Carter & Kevin G. Welner eds., 2013).

3. *Brown*, 347 U.S. at 493.

4. PUB. AFFAIRS RESEARCH COUNCIL OF ALA., REPORTS CONFIRM EVIDENCE OF PROGRESS IN K-12 EDUCATION BUT HARD WORK REMAINS 2–3 (2012), available at <http://parca.samford.edu/parca2/perspective/November%20SREB%20Piece.pdf>, but see Evan Belanger, *Alabama Eighth Graders Ranked Dead last in National Math Scores as Common Core Fight Fades*, AL.COM (Mar. 13, 2014, 1:53 PM), [http://blog.al.com/wire/2014/03/alabama\\_eighth\\_graders\\_ranked.html](http://blog.al.com/wire/2014/03/alabama_eighth_graders_ranked.html).

5. History, H.B. 84, 2013 Reg. Sess. (Ala. 2013), available at [http://alisondb.legislature.al.us/Alison/SESSBillResult.aspx?BILL=HB84&WIN\\_TYPE=SELECTED\\_STATUS](http://alisondb.legislature.al.us/Alison/SESSBillResult.aspx?BILL=HB84&WIN_TYPE=SELECTED_STATUS).

6. H.B. 84, 2013 Reg. Sess. (Ala. 2013).

7. *Id.*

state regulations and policies “in exchange for academic and associated goals for students that focus on college and career readiness.”<sup>8</sup> Within a few weeks of the bill’s proposal, both the House and the Senate passed different versions, creating the need for reconciliation by a conference committee.<sup>9</sup> The two different bills that entered the Committee on Conference each consisted of approximately nine pages.<sup>10</sup> On the same day that the two different bills were submitted to the Committee, “in a stunning move [that] caught Democrats and the Alabama Education Association by complete surprise,”<sup>11</sup> the Committee’s Republican majority composed and approved the “reconciled” bill, which consisted of now twenty-seven pages and contained various provisions not in the original House or Senate bills.<sup>12</sup>

Using a Republican super majority in each house, both the House and Senate quickly passed the Committee’s bill.<sup>13</sup> Immediately, Democrats cried foul regarding the bill and the process used to pass it. Within a few days of the bill’s passage, Lynn Pettway, an Alabama Education Association<sup>14</sup> employee, filed a complaint seeking an injunction along with various other forms of relief.<sup>15</sup> Pettway’s complaint alleged that the Republican legislative majority violated the Open Meetings Act<sup>16</sup> by

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8. *Id.*; Max Reiss, *School Flexibility Clears Senate, More Work Ahead*, FOX 6 WBRC BIRMINGHAM (Feb. 28, 2013, 3:00 PM), <http://www.myfoxal.com/story/21428342/school-flexibility-clears-senate-more-work-ahead>.

9. History, H.B. 84, 2013 Reg. Sess. (Ala. 2013), available at [http://alisondb.legislature.al.us/Alison/SESSBillResult.aspx?BILL=HB84&WIN\\_TYPE=SELECTED\\_STATUS](http://alisondb.legislature.al.us/Alison/SESSBillResult.aspx?BILL=HB84&WIN_TYPE=SELECTED_STATUS); WSFA 12 News Staff, *Amid Screaming, Ala. Legislature Passes Controversial School Flex Bill*, WSFA 12 MONTGOMERY (Feb. 28, 2013, 6:08 PM), <http://www.myfoxal.com/story/21430532/amid-screaming-ala-legislature-passes-controversial-school-flex-bill>.

10. See WSFA 12 News Staff, *supra* note 9.

11. Charles J. Dean, *Alabama Accountability Act: Lots of Concerns and Not Much Chance it Will Make a Difference Soon*, AL.COM (July 24, 2013, 8:15 PM), [http://blog.al.com/wire/2013/07/alabama\\_accountability\\_act\\_lots.html](http://blog.al.com/wire/2013/07/alabama_accountability_act_lots.html).

12. Complaint for Injunctive Relief, Writ of Mandamus, Temporary Restraining Order, Declaratory Judgment, and Other Equitable Relief at ¶ 22, *Pettway v. Marsh*, No. 2013-900397, 2013 WL 800205 (Ala. Cir. Ct. 2013).

13. See WSFA 12 News Staff, *supra* note 9.

14. The Alabama Education Association is “a professional organization representing teachers and other employees of school systems in Alabama.” *United States v. Alabama*, No. 2:12cv179-MHT, 2014 WL 200668, at \*2 (M.D. Ala. Jan. 17, 2014). It has over 100,000 members. *Karns v. Disability Reinsurance Mgmt. Servs.*, 879 F. Supp. 2d 1298, 1307 (N.D. Ala. 2012). The organization’s opponents often describe the organization as a (liberal) teacher’s union. See, e.g., Cliff Sims, *Is Alabama’s Most Powerful Liberal Political Organization in Trouble?*, YELLOWHAMMERNEWS.COM, (Feb. 6, 2014, 2:48 PM), <http://yellowhammernews.com/statepolitics/alabamas-powerful-liberal-political-organization-in-trouble/>.

15. Complaint for Injunctive Relief, Writ of Mandamus, Temporary Restraining Order, Declaratory Judgment, and Other Equitable Relief, *supra* note 12.

16. See ALA. CODE § 36-25A-1 (2005) (“Except for executive sessions permitted in Section 36-25A-7(a) or as otherwise expressly provided by other federal or state statutes, all meetings of a governmental body shall be open to the public and no meetings of a governmental body may be held without providing notice pursuant to the requirements of Section 36-25A-3.”).

having a secret meeting of a quorum outside the presence of the rest of the Committee on Conference in which they added various contested sections that did not exist in the House or Senate versions.<sup>17</sup> Additionally, the complaint alleged that the majority violated Legislative Rule 21<sup>18</sup> because the substituted bill created a tuition tax credit for parents to send their children to non-failing schools, which did not exist in the originally passed House or Senate versions.<sup>19</sup>

Though Judge Charles Price granted a temporary restraining order preventing the Governor from signing the bill into law,<sup>20</sup> the Alabama Supreme Court overturned his ruling just a week later.<sup>21</sup> Chief Justice Moore, concurring specially and finding that no justiciable claim existed, stated that “[n]ot only does the judiciary, under the doctrine of separation of powers, lack authority to interfere with the legislative process, but the legislators are also clothed by the Alabama Constitution with a cloak of immunity that shields them from judicial usurpation.”<sup>22</sup> Governor Robert Bentley signed the Alabama Accountability Act into law the day after the court’s decision.<sup>23</sup>

In September 2013, the court issued a writ of mandamus ordering that Pettway’s entire underlying suit be dismissed because her “complaint involve[d] nonjusticiable claims that would lead to judicial second-guessing of the legislature’s internal actions, motivations, and procedural decisions regarding its actions.”<sup>24</sup> With the Alabama Supreme Court clearing the way, the Alabama Accountability Act became effective in the 2013–2014 school year.

### B. *The Law’s Provisions*

The Alabama Accountability Act is made up of eleven sections—six of which contain substantive provisions—that are now codified in Chapter 6D

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17. Complaint for Injunctive Relief, Writ of Mandamus, Temporary Restraining Order, Declaratory Judgment, and Other Equitable Relief, *supra* note 12.

18. Rule 21 states, “[t]he Committee on Conference shall not introduce a new appropriation item, earmark funds for any item that did not appear in either the House-passed or Senate-passed version, or propose new language that did not appear in either the House-passed or Senate-passed version.” Joint Rules of the Ala. Legislature: Rules Relating to Comms., at 30.

19. Complaint for Injunctive Relief, Writ of Mandamus, Temporary Restraining Order, Declaratory Judgment, and Other Equitable Relief, *supra* note 12.

20. Temporary Restraining Order, *Pettway v. Gov. Robert Bentley*, No. 2013-900397-CNP, 2013 WL 839827 (Ala. Cir. Ct. Mar. 6, 2013).

21. *Marsh v. Pettway*, 109 So. 3d 1118, 1120 (Ala. 2013).

22. *Id.* at 1123 (Moore, C.J., concurring specially).

23. History, H.B. 84, 2013 Reg. Sess. (Ala. 2013), available at [http://alisondb.legislature.al.us/Alison/SESSBillResult.aspx?BILL=HB84&WIN\\_TYPE=SELECTED\\_STATUS](http://alisondb.legislature.al.us/Alison/SESSBillResult.aspx?BILL=HB84&WIN_TYPE=SELECTED_STATUS).

24. *Ex parte Marsh*, 145 So. 3d 744, 751 (Ala. 2013).

of the Alabama Code’s Education Title.<sup>25</sup> Though the law contains various provisions, four areas are of particular note and will be discussed in detail below: the definitions,<sup>26</sup> the rules regarding “innovative” school systems,<sup>27</sup> the much-debated educational tax credit program,<sup>28</sup> and the creation, regulation, and effect of educational scholarship granting organizations.<sup>29</sup> These sections provide the substance with which the Legislature is hoping to help schools “[i]mprove educational performance” through innovation, flexibility, and parent choice.<sup>30</sup>

There are five definitions the law provides that are of fundamental importance: “educational scholarships,” “eligible student,” “failing school,” “flexibility contract” and “qualifying school.” An “educational scholarship” is a grant “made by a scholarship granting organization to cover all or part of the tuition and mandatory fees charged by a qualifying school to an eligible student.”<sup>31</sup>

An “eligible student” is one who (1) is a member of a household whose prior year’s annual income does not exceed 150% of the state median household income, (2) was eligible to attend public school the previous semester or is starting school in Alabama for the first time, and (3) resides in Alabama during receipt of an educational scholarship.<sup>32</sup> A “[l]ow-income eligible student” is one of a family with income less than two times the federal poverty level.<sup>33</sup>

Next, a “failing school” is defined as (1) any public K-12 school that is labeled by the State Department of Education (ALSDE) as “persistently low-performing,” (2) designated as a failing school by the State Superintendent of Education,<sup>34</sup> or (3) has been listed three or more times during the most recent six years in the lowest 6% of state public K-12 schools on state standardized tests in reading and math and does not exclusively serve a special population of students.<sup>35</sup>

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25. Alabama Accountability Act, H.B. 84, Act 2013-64, 2013 Leg. Sess. (Ala. 2013) (as adopted March 14, 2013) as amended by Alabama Accountability Act, H.B. 658, Act 2013-265 (Ala. 2013) (as adopted May 20, 2013).

26. ALA. CODE § 16-6D-4 (2013).

27. *Id.* §§ 16-6D-5 to -6.

28. *Id.* § 16-6D-8.

29. *Id.* § 16-6D-9.

30. *Id.* § 16-6D-3(b)(2).

31. *Id.* § 16-6D-4(1).

32. *Id.* § 16-6D-4(2). A student who initially meets these criteria remains eligible until graduation or age 19. *Id.*

33. *Id.* § 16-6D-4(8).

34. The ALSDE defined seventy-eight schools as failing in 2013 and seventy-six schools as failing in 2014. See Alabama State Department of Education, *Alabama Accountability Act Information*, <http://web.alsde.edu/Home/General/AAA2013.aspx>.

35. ALA. CODE § 16-6D-4(3). On June 1, 2017, the third definition of a failing school will change. Then, a failing school is also one that has, “during the then-most recent three years, earned at

The law defines a “flexibility contract” as a contract between a local school system and the State Board of Education through which the system can apply for “programmatically flexibility or budgetary flexibility, or both, from state [education] laws, regulations, and policies.”<sup>36</sup> Relatedly, an “innovation plan” is the school’s request for flexibility<sup>37</sup> and the system’s “plan for annual accountability measures and five-year targets for all participating schools.”<sup>38</sup>

Finally, the law defines a “qualifying school.” Essentially, such a school is one that is a non-failing public school, or any nonpublic school that meets the State’s compulsory attendance requirements,<sup>39</sup> and is either accredited by one of the six regional accrediting agencies or meets ten conditions relating to the school’s characteristics, curriculum, and operating procedures.<sup>40</sup>

Armed with these definitions, the law sets forth provisions implementing principles of flexibility to (hopefully) lead to innovation and school improvement.<sup>41</sup> The law provides that for a school system to be defined as “innovative,”<sup>42</sup> it must provide the ALSDE—and the ALSDE

least one grade of ‘F’ or, during the then-most recent four years, earned at least three grades of ‘D’ on the school grading system [in] Section 16-6C-2.” *Id.*

36. *Id.* § 16-6D-4(4).

37. This overlap between the two terms—a flexibility contract is how schools apply for flexibility, yet an innovation plan contains a request for flexibility—is confusing. It appears that the flexibility contract is the initial means through which the school seeks regulatory flexibility, and the innovation plan is the means by which the school shows the ALSDE what effect it anticipates this regulatory flexibility to have on educational achievement.

38. ALA. CODE § 16-6D-4(5).

39. *See id.* § 16-28-7.

40. *Id.* § 16-6D-4(11). These conditions include requiring that the school (1) be at least three years old, (2) have at least 85% attendance, (3) operate a minimum 180-day schedule made up of school days of at least six and one-half hours, (4) require students to take the Stanford Achievement Test and the American College Test before graduation, (5) require high school students to earn a minimum of twenty-four “Carnegie credits,” (6) make certain accommodations for special education students, (7) maintain a website describing the school, and (8) annually affirm its financial status. *Id.*

41. *See id.* § 16-6D-3(b)(3). Flexibility for local school boards was the initial goal of the Local Control School Flexibility Act, which morphed into the Alabama Accountability Act. *See* Crystal Bonvillian, *Proposed Bills Would Allow Alabama Schools Flexibility on Calendars, Some Policies*, AL.COM (Jan. 28, 2013, 10:07 AM), [http://blog.al.com/breaking/2013/01/proposed\\_bills\\_would\\_allow\\_ala.html](http://blog.al.com/breaking/2013/01/proposed_bills_would_allow_ala.html). Indeed, the flexibility provisions that appear in each bill are very similar. *Compare* Alabama Accountability Act, H.B. 84, Act 2013-64, 2013 Leg. Sess. (Ala. 2013) (as adopted March 14, 2013) as amended by Alabama Accountability Act, H.B. 658, Act 2013-265 (Ala. 2013) (as adopted May 20, 2013) with Local Control School Flexibility Act, H.B. 84, 2013 Leg. Sess. (Ala. 2013) (as introduced February 19, 2013).

42. Though it appears that when the ALSDE approves a school’s flexibility contract and innovation plan the school will be labeled as “innovative,” the statute is vague as to any additional general effects of a school being labeled as such. The label appears to be a shorthand way of indicating that the ALSDE has approved the school’s implementation of its innovation plan, but it never mentions what an innovative school may do differently from a non-innovative school except implement an innovation plan.

must approve—a “flexibility contract” and “innovation plan.”<sup>43</sup> A valid flexibility contract must include a “document of assurance stating that the local board of education shall provide consistency in leadership and a commitment to state standards, assessments, and academic rigor,” documents that illustrate the local board’s support of pursuing a flexibility contract, and other materials.<sup>44</sup> A valid innovation plan must include the anticipated start date of the school system’s flexibility contract; the list of state laws, regulations and policies that the board is seeking to waive in its flexibility contract; and a list of schools included in the innovation plan.<sup>45</sup> Notably, the law expressly states that its provisions do not authorize the formation of charter schools as part of the “innovative” school framework,<sup>46</sup> but that school systems may include in their flexibility contracts provisions that provide employees in failing schools an option to waive tenure benefits.<sup>47</sup>

After laying out how schools may use “flexibility” to help improve, the law defines the framework for its second major approach to improving educational performance: individual choice. This is perhaps the most contentious section of the law. Under this section, parents of students enrolled in or assigned to attend a failing school can claim a tax credit to help offset the cost of transferring the student to a school of the parent’s choice.<sup>48</sup> The law defines the amount of this credit to be 80% of the “average annual state cost of attendance for a public K–12 student during the applicable tax year or the actual cost of attending a nonfailing public school or nonpublic school, whichever is less.”<sup>49</sup> Payment for these credits is to be drawn from the law’s newly-created Failing Schools Income Tax Credit Account.<sup>50</sup>

Finally, the law sets up a new educational scholarship system in which private persons or corporations can contribute to state-approved scholarship granting organizations that will provide scholarships to “qualifying

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43. See ALA. CODE §§ 16-6D-5 to -6.

44. *Id.* § 16-6D-5(a)(3).

45. *Id.* § 16-6D-6(a).

46. *Id.* § 16-6D-6(d). Former Governor Bob Riley pushed for authorization of charter schools in Alabama in order to qualify for President Obama’s “Race to the Top” funds. Rena Havner Philips, *Gov. Bob Riley to Push for Establishment of Charter Schools in Alabama*, AL.COM (Nov. 18, 2009, 10:05 AM), [http://blog.al.com/live/2009/11/gov\\_bob\\_riley\\_to\\_push\\_for\\_esta.html](http://blog.al.com/live/2009/11/gov_bob_riley_to_push_for_esta.html). However, the proposal was firmly opposed by the AEA, and the Legislature declined to authorize their use. George Altman, *Alabama Charter School Proposal Dead for the Session*, AL.COM (May 11, 2012, 10:11 AM), [http://blog.al.com/live/2012/05/charter\\_proposal\\_dead\\_for\\_the.html](http://blog.al.com/live/2012/05/charter_proposal_dead_for_the.html).

47. ALA. CODE § 16-6D-6(e).

48. *Id.* § 16-6D-8(a)(1). This tax credit is available to parents who transferred their children after they attended a failing school the previous year, or because they were assigned to a failing school the next year. *Id.* § 16-6D-8(b)(1).

49. *Id.* § 16-6D-8(a)(1).

50. *Id.* § 16-6D-8(c).

students” at “qualifying schools.”<sup>51</sup> To incentivize the growth and availability of scholarship funds, the law allows private persons and corporations to claim a tax credit for contributions to approved scholarship granting organizations.<sup>52</sup> Individuals are allowed to claim a credit for all of their contributions up to 50% of their tax liability, not to exceed \$7,500.<sup>53</sup> Corporations are also allowed to claim a tax credit for all of their contributions up to 50% of their total tax liability, the cumulative amount of individual and tax credits issued not to exceed \$25,000,000 annually.<sup>54</sup> To be state-approved, scholarship-granting organizations must meet various conditions that ensure donated scholarship money is actually going to eligible and accountable schools.<sup>55</sup> For example, they must spend at least 95% of donation revenue on educational scholarships,<sup>56</sup> must provide educational scholarships for “low-income eligible students equal to the percentage of low-income eligible students in the county where the scholarship granting organization expends the majority of its educational scholarships,”<sup>57</sup> and ensure that nonpublic schools that are accepting educational scholarship students meet certain health, safety, and academic accountability standards.<sup>58</sup>

After being implemented in the fall semester of the 2013–2014 school year, the law allowed 719 students across the State to leave a “failing school”; just fifty-two transferred to a private school.<sup>59</sup> Data on how many schools or school systems have been deemed “innovative” and how many students have received educational scholarships is not yet available.

### C. *The Fight Continues*

The law’s signing and subsequent implementation has not deterred other groups from attempting to challenge its passage and provisions. On August 19, 2013, the Southern Poverty Law Center (SPLC) filed suit, *C.M. v. Bentley*, in federal court.<sup>60</sup> It brought the suit on behalf of eight children

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51. *See id.* §§ 16-6D-4(1), -4(12), -9(b).

52. *Id.* § 16-6D-9(a).

53. *Id.* § 16-6D-9(a)(2).

54. *Id.* § 16-6D-9(a)(3).

55. *See generally id.* §§ 16-6D-9(b) to -(9)(c).

56. *Id.* § 16-6D-9(b)(1)(e).

57. *Id.* § 16-6D-9(b)(1)(f).

58. *Id.* § 16-6D-9(c).

59. Challen Stephens, *719 Students Transfer Under Accountability Act, but Just 52 go to Private School*, AL.COM (Sept. 3, 2013, 3:38 PM), [http://blog.al.com/wire/2013/09/hundreds\\_of\\_students\\_transfer.html](http://blog.al.com/wire/2013/09/hundreds_of_students_transfer.html) (citing tallies provided by the Alabama State Department of Education, available at <http://media.al.com/wire/other/Accountability%20Transfers.pdf>).

60. *See* Complaint for Declaratory and Injunctive Relief, *C.M. v. Bentley*, No. 2:13CV00591, 2013 WL 4441987 (M.D. Ala. 2013).

in Wilcox, Russell, Barbour, and Marengo Counties against Alabama’s Governor, Superintendent of Education, Revenue Commissioner, and Comptroller.<sup>61</sup>

The complaint in *C.M. v. Bentley* set forth a claim under the Equal Protection Clause of the Fourteenth Amendment.<sup>62</sup> It stated that, although the stated intention of the Act is to “benefit students and families across Alabama regardless of their income and regardless of where they live,”<sup>63</sup> the Act actually “creates two classes of students assigned to failing schools—those who can escape them because of their parents’ income or where they live and those, like the Plaintiffs . . . , who cannot.”<sup>64</sup> Essentially the suit, in a very detailed way, claimed that because of the high concentration in the Black Belt region of failing schools—nearly 40% of the ALSDE-designated “failing schools” are located in this region—the Act leaves many students in this region with “few or no nonfailing school options nearby and few financial resources with which to access those nonfailing options.”<sup>65</sup> Students assigned to failing schools in this region, the suit alleged, have “fewer nonfailing public options than their counterparts have in other areas of the state”;<sup>66</sup> accordingly, the plaintiff-students are being denied equal protection of the law.<sup>67</sup> As a result of the Act’s treatment, the suit claimed, “[t]he schools in which [the] Plaintiffs are trapped are likely to deteriorate further as their funding is continually diminished over time.”<sup>68</sup>

On April 8, 2014, Judge Keith Watkins dismissed the case “[b]ecause Plaintiffs [could not] properly identify themselves as discrete victims of unconstitutional treatment, and because [they did] not allege[] facts sufficient to overcome the presumption that any distinction or classification created by the AAA is rationally related to legitimate state interests.”<sup>69</sup> The SPLC is currently appealing the ruling.<sup>70</sup>

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61. *Id.* ¶¶ 8–19. All of the listed counties are located in an area commonly referred to as Alabama’s “Black Belt” region. See *Lynch v. Alabama*, No. 08-S-450-NE, at 44–45 (N.D. Ala. Oct. 21, 2011), available at [http://www.gpo.gov/fdsys/pkg/USCOURTS-alnd-5\\_08-cv-00450/pdf/USCOURTS-alnd-5\\_08-cv-00450-2.pdf](http://www.gpo.gov/fdsys/pkg/USCOURTS-alnd-5_08-cv-00450/pdf/USCOURTS-alnd-5_08-cv-00450-2.pdf). The “Black Belt” is “a poor, largely agricultural region with a significant African-American population.” *I.L. v. Alabama*, 739 F. 3d 1273, 1277 (11th Cir. 2014).

62. Complaint for Declaratory and Injunctive Relief, *supra* note 60, ¶ 4.

63. *Id.* ¶ 2 (quoting Alabama Governor Robert Bentley).

64. *Id.* ¶ 3.

65. *Id.* ¶¶ 39, 41.

66. *Id.* ¶ 40.

67. *Id.* ¶ 4.

68. *Id.* ¶ 3.

69. *C.M. ex rel. Marshall v. Bentley*, 13 F. Supp. 3d 1188, 1216 (M.D. Ala. 2014).

70. Associated Press, *Southern Poverty Law Center Appeals its Case Against Alabama Accountability Act*, AL.COM (June 18, 2014, 8:11 AM), [http://www.al.com/news/index.ssf/2014/06/southern\\_poverty\\_law\\_center\\_ap.html](http://www.al.com/news/index.ssf/2014/06/southern_poverty_law_center_ap.html).

On August 26, 2013, Lowndes County<sup>71</sup> Schools Superintendent Dr. Daniel Boyd, AEA President Anita Gibson, and State Senator Quinton T. Ross, Jr. filed suit, *Boyd v. Magee*, in state court against Alabama's Revenue Commissioner and Comptroller.<sup>72</sup> The plaintiffs in that case alleged that the law violates Alabama's Constitution in seven ways.<sup>73</sup> First, because the bill was "substantively altered" in conference committee such that its original purpose was changed, the Act violated Article IV, § 61 of the Alabama Constitution.<sup>74</sup> Second, because the bill was not read on three different days in each house, the Act violated Article IV, § 63.<sup>75</sup> Third, because the bill contained more than one subject, it violated Article IV, §§ 45 and 71.<sup>76</sup> Fourth, because the bill was not approved by a vote of two-thirds of all the members elected to each house, it violated Article IV, § 73.<sup>77</sup> Fifth, because the Act effectively redirects income tax revenue that is required to be used for the payment of public school teacher salaries only, the Act violates Amendment 61.<sup>78</sup> Sixth, because the Act creates a new debt of the State, the Act violates Article XI, § 213 as amended by Amendment 26.<sup>79</sup> Finally, the suit alleged that, because the tax credits provided under the Act would redirect state revenues from the "public fisc" to pay for private school education for Alabama children, which would sometimes occur at religious schools, the Act violates Article XIV, § 263,<sup>80</sup> and Article I, § 3.<sup>81</sup>

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71. Lowndes County is also frequently considered a part of the "Black Belt." See Lynch v. Alabama, No. 08-S-450-NE, at 44-45 (N.D. Ala. Oct. 21, 2011), available at [http://www.gpo.gov/fdsys/pkg/USCOURTS-alnd-5\\_08-cv-00450/pdf/USCOURTS-alnd-5\\_08-cv-00450-2.pdf](http://www.gpo.gov/fdsys/pkg/USCOURTS-alnd-5_08-cv-00450/pdf/USCOURTS-alnd-5_08-cv-00450-2.pdf).

72. Complaint for Declaratory and Injunctive Relief ¶¶ 8-12, *Boyd v. Magee*, No. CV-2013-901470, 2013 WL 4548373 (Ala. Cir. Ct. 2013).

73. See *id.* ¶¶ 3-4.

74. *Id.* ¶ 3. Article IV, Section 61 states, "[n]o law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either house as to change its original purpose." ALA. CONST. art. IV, § 61.

75. Complaint for Declaratory and Injunctive Relief, *supra* note 72, ¶ 3.

76. *Id.*

77. *Id.* Article IV, Section 73 requires that any appropriations made to "any charitable or educational institution not under the absolute control of the state" must be approved by a vote of two-thirds of all the members elected to each house. ALA. CONST. art. IV, § 73.

78. Complaint for Declaratory and Injunctive Relief, *supra* note 72, ¶ 3. Amendment 61 expressly sets aside certain tax revenues for payment of public school salaries only. ALA. CONST. amend. 61.

79. Complaint for Declaratory and Injunctive Relief, *supra* note 72, ¶ 3.

80. *Id.* ¶ 4. Use of any money raised for the support of public schools for the support of any sectarian or denominational school is prohibited. ALA. CONST. art. XIV, § 263.

81. Complaint for Declaratory and Injunctive Relief, *supra* note 72, ¶ 4. The collection of taxes for "building or repairing any place of worship, or for maintaining any minister or ministry" is prohibited. ALA. CONST. art. I, § 3.

On May 28, 2014, Judge Eugene W. Reese ruled in favor of the plaintiffs and granted their motion for judgment on the pleadings.<sup>82</sup> Judge Reese found that not only was the law unconstitutionally enacted, but its substance also violated the Alabama Constitution just as the plaintiffs had alleged.<sup>83</sup> The judge ruled the law was unconstitutional and thus “null and void” without reaching the plaintiffs’ religion clause violation allegations.<sup>84</sup> He then enjoined all persons and entities from implementing it.<sup>85</sup>

The Alabama Supreme Court reversed.<sup>86</sup> Though the court had previously refused to insert itself into claims of illegality in the legislative process associated with the law,<sup>87</sup> it found the plaintiff’s legislative procedural challenges justiciable and proceeded to the merits.<sup>88</sup> The court then found that none of the law’s procedural defects were substantial enough to render it unconstitutional.<sup>89</sup> Additionally, though the lower court had not addressed the plaintiffs’ substantive claims regarding the law’s potential allocation of public funds for use in religious schools, the court proceeded to find those claims also lacked merit. The court cited *Zelman v. Simmons-Harris*<sup>90</sup> to uphold the Act’s tax credit structure for private school tuition reimbursement, even when those private schools are religious schools.<sup>91</sup> Then, it found that the Act’s tax credit structure for contributions to scholarship granting organizations did not amount to a “government expenditure” such that Establishment Clause concerns were at issue.<sup>92</sup> Accordingly, the court dismissed all of the plaintiffs’ claims.

The court’s decision was not unexpected, especially given its prior reluctance to involve itself in legislative matters and the Supreme Court’s decision in *Zelman*. And other challenges to the law are similarly unlikely to be successful. For example, public-education-related Supreme Court precedent makes it difficult for any court to strike down the law based on

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82. Order, *Boyd v. Magee*, No. 03-CV-2013-901470, 2014 WL 2404288, at \*6 (Ala. Cir. Ct. May 28, 2014).

83. *Id.* at \*2–6.

84. *Id.* at \*2, \*6.

85. *Id.* at \*6.

86. *Magee v. Boyd*, Nos. 1130987, 1131020, & 1131021, 2015 WL 867926 (Ala. Mar. 2, 2015).

87. See *supra* Part II(a) for a discussion of cases challenging the Act that the Alabama Supreme Court has already dismissed. Judge Reese noted the Alabama Supreme Court’s ruling in *Ex parte Marsh* “ha[d] no application here.” *Boyd, supra* note 82, at \*6. In *Marsh*, he noted, the court found only that “it is not the function of the judiciary to require the legislature to follow its own rules.” *Id.* However, he found, “it is indeed ‘the function of the judiciary to require the legislature to follow’ the Constitution when it enacts legislation.” *Id.* (emphasis added).

88. *Magee*, 2015 WL 867926, at \*18.

89. *Id.* at \*23, \*26, \*30, \*38, \*39, \*41.

90. 536 U.S. 639 (2002) (finding that “[t]he constitutionality of a neutral educational aid program” does not fail because aid recipients choose to use the aid at a religious school if the program “offer[s] aid directly to a broad class of individual recipients defined without regard to religion”).

91. *Magee*, 2015 WL 867926, at \*46, \*49.

92. *Id.* at \*48 (citing *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1448 (2011)).

Equal Protection.<sup>93</sup> But even though the law will likely remain for years to come, the education policy contained within it is bound to also remain. This debate stems from the various expected benefits and problems with the law.

#### *D. Benefits and Problems with the Law*

The anticipated benefits of the Alabama Accountability Act are numerous. Even the provisions that survived from the original bill presented to the legislature are beneficial. First, the numerous “flexibility” provisions give local school systems more control over their programs to meet the specific needs of their students, allowing new ideas to be implemented and tested for success instead of being trapped with whatever policies and programs the State thinks are best.<sup>94</sup> Second, the ability to transfer from a poorly performing school to a better school and recover the costs associated with the transfer provides more opportunities to public school students to attend a good school and, theoretically, get a better education. In fact, allowing such widespread student transfer is a somewhat novel idea in itself—prior to this law, inter-district and even intra-district transfers were unlikely if not impossible.<sup>95</sup> Finally, the educational opportunity scholarship allows private persons or corporations to get involved in improving vast numbers of students’ educational options in a way that was previously unavailable.

Though various benefits of the law exist, the Alabama Accountability Act may fall short in many respects. First, the law’s tax credit structure likely fails to benefit very low-income students. Because the law requires parents’ up-front payment of costs associated with a transfer from a failing school and then allows the parents to claim a tax credit,<sup>96</sup> the law essentially helps those who already have some means to fund their child’s

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93. Education is not a fundamental right protected by the Constitution; “a State need not justify by compelling necessity every variation in the manner in which education is provided to its population.” *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28–29 (1973)). However, the Court has struck down state education legislation under Equal Protection by applying heightened or intermediate scrutiny when it involves complete denial of a basic education to a discrete class. *Id.* In his ruling, Judge Watkins found “[t]he facts here, while lamentable, are not so extreme as to extend the heightened scrutiny applied in *Plyler*.” *C.M. ex rel. Marshall v. Bentley*, 13 F. Supp. 3d 1188, 1211 (M.D. Ala. 2014).

94. See generally ALA. CODE §§ 16-6D-5 to -6. (2013); see also Phil Johnson, *The Alabama Accountability Act of 2013—The Devil is in the Details*, ATMORENEWS.COM (last updated Apr. 3, 2013, 10:11 AM), <http://www.atmorenews.com/2013/04/03/the-alabama-accountability-act-of-2013-the-devil-is-in-the-details/>.

95. See, e.g., Tuscaloosa County School System, *Enrolling in a Tuscaloosa County School*, available at <http://www.tcss.net/Page/9714> (“A student *must* attend the school(s) with[in] the school zone in which his/her parent(s) or guardian(s) has established legal residence . . . .”) (emphasis added).

96. See *supra* notes 48–50 and accompanying text.

education. A tax credit obtained after a large financial burden is required will not help the very poor. Second, the law’s minimal funding is troublesome. While the law contains a formula with which to determine the value of the tax credit available under the program, the first determined value was \$3,500 per year.<sup>97</sup> Although this amount might be sufficient to offset costs of sending a child to another public school, it is likely not sufficient to offset the costs of sending a child to a private school.<sup>98</sup> In some areas, like the Black Belt region, failing schools are the rule, not the exception.<sup>99</sup> These counties may contain few or no nonfailing public schools, leaving students in these areas with the “option” of staying in a failing public school or moving to a private school that they cannot afford. Though the Act provides for the operation of scholarship granting organizations, there are currently only nine that have been approved by the Alabama Department of Revenue.<sup>100</sup> Initially it was very questionable as to whether scholarship funding would be adequate to support the amount of support that is needed.<sup>101</sup> Fears of this concern have waned, however, given a January 2014 report that found that \$25 million had been donated to scholarship granting organizations by the end of 2013.<sup>102</sup>

The third problem with the Act, that neither public nor private schools are under an obligation to take a student from a failing school,<sup>103</sup> however, could limit the amount of scholarship money that is even capable of being

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97. Debbie Elliott, *Suit in Alabama Seeks to Stop School Choice Law*, NPR NEWS (Aug. 19, 2013, 5:13 PM), <http://www.npr.org/2013/08/19/213510484/suit-in-alabama-seeks-to-stop-school-choice-law>.

98. See *Average Private School Tuition Cost (2014-2015)*, Private School Review, <http://www.privateschoolreview.com/tuition-stats/private-school-cost-by-state> (stating that the average private school tuition in Alabama is \$6,900).

99. See *supra* notes 63–68 and accompanying text. Assistant State Schools Superintendent Craig Pouncey has used Dallas County—one of the Black Belt counties—as an example of “where the law can be frustrating.” Five of the initial seventy-six state “failing schools” are in Dallas County. “There really are no other public schools that are real options for the children in those five failing schools to attend, and the two private schools (almost all white) in the county were created to get away from Dallas County public school kids anyway.” Dean, *supra* note 11.

100. Alabama Department of Revenue, *Alabama Education Scholarship Program Scholarship Granting Organizations as of April 10, 2015*, available at [http://revenue.alabama.gov/accountability/documents/Qualified\\_Scholarship\\_Granting\\_Organizations.pdf](http://revenue.alabama.gov/accountability/documents/Qualified_Scholarship_Granting_Organizations.pdf).

101. Dean, *supra* note 11 (quoting Assistant State Superintendent Pouncey: “it’s likely every student in Dallas County will need scholarship help—and we don’t have enough scholarship granting entities—well, I hope you see the problems out there”).

102. Brendan Kirby, *Scholarships Could be Biggest Impact of Alabama Accountability Act: Almost \$25 Million Given*, AL.COM (Jan. 12, 2014, 8:00 AM), [http://blog.al.com/wire/2014/01/alabama\\_residents\\_business\\_don.html](http://blog.al.com/wire/2014/01/alabama_residents_business_don.html).

103. ALA. CODE § 16-6D-8(b)(5) (“A local school system may accept [a qualifying] student on whatever terms and conditions the system establishes . . . .”); *id.* § 16-6D-8(d)(1) (“Nothing in this section or chapter shall be construed to force any public school, school system, or school district or any nonpublic school, school system, or school district to enroll any student.”); *id.* § 16-6D-9(g)(1) (same); Dean, *supra* note 11.

distributed.<sup>104</sup> Early on in the program's existence, few private schools expressed interest in participating or applied and were approved to participate.<sup>105</sup> This number, however, has encouragingly increased.<sup>106</sup> Finally, the Act's tax credit program, by design, redirects funding, which would normally go to public schools, possibly to private schools.<sup>107</sup> Thus, reduction in school funding could lead to further deterioration of existing "failing" public schools.<sup>108</sup>

### III. AN OVERVIEW OF MODERN SCHOOL CHOICE PROGRAMS

Milton Friedman first proposed what has become the modern school choice model: supplementing public schooling with state-subsidized private schooling.<sup>109</sup> Alabama is far from being the first state to implement a school choice program. According to the Friedman Foundation for Educational Choice, twenty-four states currently have some type of school choice program.<sup>110</sup> Further, numerous other countries have implemented school choice programs.<sup>111</sup> These programs vary in type from individual tax

104. If schools tightly restrict whom they accept, few students will be able to attain the status of a "qualifying student" attending a "qualifying school" such that he is eligible to receive an educational scholarship. Indeed, the initial private school interest in accepting qualifying students was low. See Mike Cason, *Twenty-nine Private Schools now Signed up to Take Alabama Accountability Act Transfers*, AL.COM (Aug. 5, 2013, 12:12 PM), [http://blog.al.com/wire/2013/08/twenty-nine\\_private\\_schools\\_no.html](http://blog.al.com/wire/2013/08/twenty-nine_private_schools_no.html).

105. See *id.* As of the 2014–2015 school year, there were an estimated 301 private schools in Alabama. Alabama Private Schools, PRIVATE SCHOOL UNIVERSE SURVEY, U.S. DEPARTMENT OF EDUCATION INSTITUTE OF EDUCATION SCIENCES NATIONAL CENTER FOR EDUCATION STATISTICS, <http://nces.ed.gov/surveys/pss/privateschoolsearch/> (search "State" for "Alabama").

106. As of March 13, 2015, the Department of Revenue had approved 175 private schools for participation in the Accountability Act. Alabama Educational Scholarship Program, *Participating Non-Public Schools as of March 13, 2015*, [http://revenue.alabama.gov/accountability/documents/Participating\\_Non-Public\\_Schools.pdf](http://revenue.alabama.gov/accountability/documents/Participating_Non-Public_Schools.pdf).

107. See *infra* notes 145–147 and accompanying text.

108. Complaint for Declaratory and Injunctive Relief at ¶ 3, *C.M. v. Bentley*, 13 F. Supp. 3d 1188 (M.D. Ala. 2013) (No. 2:13CV00591), 2013 WL 4441987.

109. See Leonard Ross & Richard Zeckhauser, *Education Vouchers*, 80 YALE L.J. 451, 451 (1970); MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 85–98 (3d ed. 2002).

110. Friedman Foundation for Educational Choice, *School Choice Programs*, <http://www.edchoice.org/School-Choice/School-Choice-Programs.aspx>.

111. EDWARD B. FISKE & HELEN F. LADD, *WHEN SCHOOLS COMPETE: A CAUTIONARY TALE* xiii (2000) (noting that England, Australia, New Zealand, and Chile have all experimented with "[s]elf-governing schools, parental choice, [and] market competition"). "In 1989 New Zealand embarked on what is arguably the most thorough and dramatic transformation of a state system of compulsory education ever undertaken by an industrialized country" when it implemented its "Tomorrow's Schools" program. *Id.* at 3. New Zealand's program "abolished its national Department of Education, . . . turned control of its nearly 2,700 primary and secondary schools over to locally elected boards of trustees," and "gave parents the right to choose which school their child would attend." *Id.* at 3–4.

credits and deductions to tax-credit scholarships, true voucher programs,<sup>112</sup> and educational savings accounts.<sup>113</sup> Moreover, seven other southern states currently operate some type of school choice program.<sup>114</sup>

### A. Common Arguments in Favor of School Choice Programs

When states implement school choice programs, it is not without valid reasons. Though there have been many arguments and justifications in favor of school choice programs, in this day of a poorly performing U.S. educational system,<sup>115</sup> the prevailing argument appears to be that educational opportunity is essentially a civil right which must be provided equally to all.<sup>116</sup> This argument is based on the premise that children who attend failing schools are those who live in inner-city districts and other poor areas. Their parents cannot afford to move to a better school district or send the student to a better performing private school.<sup>117</sup> On the other hand, children of wealthy parents are more likely to attend a better performing school because they either live in a well-performing public school district,

112. True school voucher programs consist of state-funded scholarships generally expended by a school district that are allocated to a participating family to pay part or all of a private school tuition. They are different from tax credit and deductions programs because in these tax-based programs, parents can receive tax relief for “educational expenses” that are generally associated with either public or private schools. See Friedman Foundation for Educational Choice, *The ABCs of School Choice* (2015), <http://www.edchoice.org/School-Choice/The-ABCs-of-School-Choice/2015-ABCs-of-School-Choice-WEB>. Additionally, “[f]ull voucher systems allow parents to take their state funding to any school, public or private, while partial voucher systems either limit parental choice to public schools or provide lesser amounts of funding for students who opt for a private school.” FISKE & LADD, *supra* note 111, at 300.

113. See Friedman Foundation for Educational Choice, *supra* note 112.

114. See FLA. STAT. §§ 1002.39, 1002.395, 1002.421 (1998) (voucher and tax-credit scholarship program); GA. CODE ANN. §§ 20-2-2110 to -2118, 20-2A, 48-7-29.16 (2012) (voucher and tax-credit scholarship program); LA. REV. STAT. ANN. §§ 17:4011 to :4025, :4031, 47:293(9)(a)(xiv), 47:6301, 297.10 (2011) (voucher, tax deduction, and tax-credit scholarship program); MISS. CODE ANN. §§ 37-173-1 to -31, 37-175-1 to -29 (2014) (voucher program designed for students with disabilities); N.C. GEN. STAT. §§ 112.2–5, 115C-562.1 to .7 (2013) (voucher program); S.C. State Budget Proviso 1.85 (2013) *supra* (tax-credit scholarship program designed for students with disabilities); VA. CODE ANN. §§ 58.1–439.25 to .28 (2009) (tax-credit scholarship program).

115. Julia Ryan, *American Schools vs. the World: Expensive, Unequal, Bad at Math*, THE ATLANTIC (Dec. 3, 2013, 7:32 AM), <http://www.theatlantic.com/education/archive/2013/12/american-schools-vs-the-world-expensive-unequal-bad-at-math/281983/> (reporting that in the latest rankings from the Organization for Economic Co-operation and Development (OECD), the U.S. scored below average in math; it ranked 17th in math, 21st in science, and 17th in reading among the thirty-four OECD countries).

116. David M. Powers, *The Political Intersection of School Choice, Race, and Values*, 60 ALA. L. REV. 1051, 1064–65 (2009).

117. See *id.* at 1064–65; FRIEDMAN, *supra* note 109, at 92 (noting that unlike other aspects of life, like the purchase of an automobile, in which a low income individual may attain the same product as a more wealthy individual by simply saving and attaining an amount of money equal to the purchase price that both groups must pay, attaining the same educational opportunities as the wealthier individual requires the lower income individual to move to a new school district, something that is likely completely out of reach financially).

or the parents have the means to move to a better performing district or send the child to a good private school.<sup>118</sup> Given that this disparity exists solely because of the circumstances of the child's birth,<sup>119</sup> proponents of this argument contend that these poor children should be given the same opportunity to a quality education as children from wealthy families.<sup>120</sup>

Indeed, this civil-rights-based educational opportunity narrative remains pervasive in the debate over the Alabama Accountability Act. Governor Robert Bentley, in his support of the law, stated that “[a]ll children deserve a quality education, no matter where they’re from and no matter how much money their parents make. I believe this is something on which we can all agree.”<sup>121</sup> Though this pro-school-choice argument language is admirable, advocates of school choice programs who use this argument often still face staunch opposition from various interests.

Another common argument in favor of school choice programs is grounded on market-based principles. Generally, this argument is centered on the premise that “traditional public schools have no direct incentive to strive to satisfy their students.”<sup>122</sup> Thus, if they are “forced to compete, they will improve.”<sup>123</sup> This is because, advocates argue, when competition is injected into the school “market” such that schools are competing for funding that is attached to the student, schools will strive to improve for fear of losing that funding if they do not.<sup>124</sup> Accordingly, under ideal school choice models, not only are students and parents empowered and provided incentives to choose a better school than the one that might serve their district, but these “failing” schools are also incentivized to improve. This is, in a Capitalist society like the United States, a very persuasive reason for the implementation of school choice programs. Though whether the

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118. Powers, *supra* note 116, at 1065; *see also* FRIEDMAN, *supra* note 109, at 92–93 (“Our present school system, far from equalizing opportunity, . . . makes it all the harder for the exceptional few—and it is those who are the hope of the future—to rise above the poverty of their initial state.”).

119. Gary Orfield, *Housing Segregation Produces Unequal Schools: Causes and Solutions*, in CLOSING THE OPPORTUNITY GAP: WHAT AMERICA MUST DO TO GIVE EVERY CHILD AN EVEN CHANCE, *supra* note 2, at 40, 41 (“Where a family lives generally determines the quality of the schools its children attend.”).

120. Powers, *supra* note 116, at 1064.

121. Robert Bentley, Governor of Alabama, *Gov. Bentley: Executive Amendment Will Improve Accountability Act*, THE GADSDEN TIMES (May 17, 2013, 6:01 AM), <http://www.gadsdentimes.com/article/20130517/NEWS/130519856#gsc.tab=0>.

122. Dan Goldhaber et. al, *How School Choice Affects Students Who Do Not Choose*, in GETTING CHOICE RIGHT: ENSURING EQUITY AND EFFICIENCY IN EDUCATION POLICY 101, 103–04 (Julian R. Betts & Tom Loveless eds. 2005) (“As public monopolies with revenues guaranteed through taxes, public schools [can] afford to be indifferent to the possibility that families [could] take their business elsewhere.”).

123. Sharon K. Russo, *Vouchers for Religious Schools: The Death of Public Education?*, 13 S. CAL. INTERDISC. L.J. 49, 61 (2003); FRIEDMAN, *supra* note 109, at 93 (noting that competition stimulates “[t]he development and improvement of all schools”).

124. Goldhaber et al., *supra* note 122, at 102.

premise of the argument is actually true might be in question,<sup>125</sup> it remains a common argument in favor of implementation of these programs.

### B. Common Arguments Against School Choice Programs

While pro-school-choice arguments remain viable for some advocates, many anti-school-choice arguments continue to gain traction. First and fundamentally, school choice opponents argue that analogizing the education system to a market is inappropriate given the vast, yet necessary, differences between the two.<sup>126</sup>

Second, school choice opponents argue that school choice programs do not actually improve public education as market-based advocates believe.<sup>127</sup> This argument is not without merit; in fact, studies on two major U.S. school choice programs have led to its growth.<sup>128</sup> A study on Florida’s A-Plus voucher program found that the program led to improved achievement in public schools. The program, however, has been criticized in the research community. When replications of the study were performed in non-voucher states, it became apparent that the voucher program might not necessarily be the cause of the study’s observed gains in Florida.<sup>129</sup> Additionally, Washington D.C.’s much debated school voucher program was the subject of a report commissioned by the U.S. Department of Education.<sup>130</sup> This report found that there was “no clear evidence of a longer term effect on achievement for students overall . . . .”<sup>131</sup> These reports have added credence to the argument that voucher programs do not improve public education.

A third major argument that school choice opponents present is that private schools to which public funding is flowing are not held publicly

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125. See Russo, *supra* note 123, at 61–64.

126. Goldhaber et al., *supra* note 122, at 101; Janelle Scott & Amy Stuart Wells, *A More Perfect Union: Reconciling School Choice Policy With Equality of Opportunity Goals*, in CLOSING THE OPPORTUNITY GAP: WHAT AMERICA MUST DO TO GIVE EVERY CHILD AN EVEN CHANCE, *supra* note 2, at 123, 128 (noting that market-based education that allows schools to choose who they accept does not improve education generally because “[p]erversely, schools are given incentives to accept and retain only the highest-scoring students if they wish to remain viable in a market environment”); JAMES G. DWYER, VOUCHERS WITHIN REASON 213 (2002) (“[I]n the market for schools, there is . . . the problem that the good being purchased is a very complex one that few purchasers know much about.”).

127. Russo, *supra* note 123, at 61.

128. See FISKE & LADD, *supra* note 111, at 306–07 (noting that New Zealand’s school choice reforms did not “produce[] a rising tide that raises all boats and increases the overall quality of the entire system”).

129. See American Federation of Teachers, *School Vouchers: Myths and Facts* 3 (2006), available at [http://pa.aft.org/files/article\\_assets/B1D0F9DF-980C-DA3C-0FFBCBC459E7E469.pdf](http://pa.aft.org/files/article_assets/B1D0F9DF-980C-DA3C-0FFBCBC459E7E469.pdf).

130. Institute of Education Sciences, National Center for Education Evaluation and Regional Assistance, *Evaluation of the DC Opportunity Scholarship Program: Final Report* (2010), available at <http://ies.ed.gov/ncee/pubs/20104018/pdf/20104018.pdf>.

131. *Id.* at 51.

accountable like public schools.<sup>132</sup> For this notion, critics cite various reports that show the problems associated with unaccountable schools—misappropriation of the government’s funds, minimal curriculum oversight, employment of under-qualified teachers, use of discriminatory admission standards, and other troubling acts.<sup>133</sup>

The fourth major anti-school-choice argument, and one that is especially relevant in southern states, is that school choice programs could potentially undermine the progress made after *Brown v. Board of Education* of public school integration.<sup>134</sup> Notably, states and local school boards used “choice” systems to dodge *Brown*’s mandate for many years after its issue.<sup>135</sup> However, due to continuing school integration efforts, desegregation of public schools increased continuously up to the late 1980s.<sup>136</sup> Unfortunately though, reports have shown that these desegregation rates have since receded significantly.<sup>137</sup> Opponents of school choice programs, relying on reports of school voucher programs in Milwaukee and Cleveland,<sup>138</sup> fear that voucher programs could discriminatorily admit an inordinate amount of white students into the programs—thereby allowing for a publicly financed desegregation of public schools.<sup>139</sup> Moreover, the Supreme Court’s decision in the landmark

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132. Russo, *supra* note 123, at 64.

133. *Id.* at 64–67.

134. *Id.* at 68. Studies show that there are numerous “academic and social benefits of attending racially diverse schools” including “improved academic outcomes” for students of color and “greater mobility for graduates of color” as well as “enhanced intergroup relations[,] cross-racial understanding . . . and comfort levels in racially diverse settings” for all students. Scott & Wells, *supra* note 126, at 135.

135. See *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218 (1964) (striking down a Virginia plan that closed integrated public schools and expended public funds for tuition grants for private schools that excluded students because of their race); *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430 (1968) (invalidating a Virginia county’s “freedom-of-choice” plan that allowed students to choose between the separate white and black schools, but assigned those who failed to choose to their previously attended school—not a single white child had chosen to attend the black school and 85% of the black children still attended the black school).

136. Russo, *supra* note 123, at 70 (citing Erica Frankenberg et al., Harvard University Civil Rights Project, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* (2003), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/a-multiracial-society-with-segregated-schools-are-we-losing-the-dream/frankenber-multiracial-society-losing-the-dream.pdf> (last visited Jan. 18, 2014)).

137. *Id.* The Report’s cited study found that more black students were attending 90%–100% minority schools in 2000 than in 1980. The exposure of black to white students in their schools has decreased across all regions from 1988–2000. In 1988, the average black student attended schools that were 36.2% white; in 2000, the typical black student attended a school that was 30.9% white. *Id.* at 70 n.231.

138. *Id.* at 68–71. The cited reports from 2000 found that in Cleveland, whites made up a higher percentage of the voucher program than they did in the public school system itself; as a result the population of white students in the public school system fell nearly 2% in just three years. *Id.* at 69. Similarly in Milwaukee, though minorities made up 96% of voucher students in 1994–1995, by 1998–1999 the number of minority voucher students had fallen to 79%. *Id.*

139. *Id.* at 68.

*Parents Involved* case limits a state’s ability to further racial diversity by using race as the deciding factor in public school assignments.<sup>140</sup>

Indeed, the concern over school resegregation has arisen in a very significant way with implementation of the Alabama Accountability Act. The city of Huntsville, Alabama still operates under a 1970 federal desegregation order that requires transfers based on student race.<sup>141</sup> Under the order, a black student cannot transfer from a majority black school that is listed as failing, to a majority black school that is not listed as failing. Nor may a white student transfer out of a majority black school and go to a majority white school because it might “impede disestablishing of a dual school system.”<sup>142</sup> As a result, Huntsville City Schools must first grant transfer requests from students seeking to transfer from a school, in which they are a racial majority, to a school in which they would be a racial minority.<sup>143</sup>

A final argument presented by school choice opponents, especially in Alabama where school funding is already scarce,<sup>144</sup> is that school choice programs—particularly school voucher programs—will strip funding from public schools.<sup>145</sup> In general, this issue arises because when students leave a school using a voucher, the school is not, of course, relieved of its duty to teach other students that remain at the school. Instead, schools must operate with reduced funding because the students who do elect to transfer out of the school do so with their state funds (which would normally go to the school, in hand and bound for a private school).<sup>146</sup> Reduced funding for

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140. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 725–33 (2007) (“Racial balancing is not transformed from ‘patently unconstitutional’ to a compelling state interest simply by relabeling it ‘racial diversity.’”).

141. Challen Stephens, *Feds Instruct Huntsville to Ignore Alabama Accountability Act*, AL.COM (Aug. 13, 2013, 1:56 PM), [http://blog.al.com/wire/2013/08/feds\\_order\\_huntsville\\_to\\_ignor.html](http://blog.al.com/wire/2013/08/feds_order_huntsville_to_ignor.html).

142. *Id.* (quoting a U.S. Department of Justice letter sent to Huntsville City Schools reminding them that the federal court order trumped the Alabama Accountability Act provisions).

143. A letter from the NAACP Legal Defense Fund, a party to the desegregation order, further clarifies that Huntsville “may not grant a transfer under the [Alabama Accountability Act] to any school at which there is no longer space available for qualifying majority-to-minority applicants.” *Id.* Notably, this type of restriction is similar to the procedures the Court struck down in *Parents Involved*. There, however, the school systems at issue never operated under a desegregation order (in the case of Seattle public schools) or were no longer subject to the order (in the case of Jefferson County, Kentucky public schools). *Parents Involved*, 551 U.S. at 732 (noting, however, that “[e]ven in the context of mandatory desegregation, . . . racial proportionality is not required”).

144. See Niraj Chokshi, *Per-student Spending Dropped by a Fifth in Oklahoma and Alabama in Just Six Years*, THE WASHINGTON POST (Sept. 12, 2013), <http://www.washingtonpost.com/blogs/govbeat/wp/2013/09/12/more-than-2-out-of-3-states-spend-less-per-student-now-than-six-years-ago/>.

145. Russo, *supra* note 123, at 72.

146. See *id.* at 74.

public schools could further undermine their ability to provide a quality education to students.<sup>147</sup>

#### IV. AN IDEAL ALABAMA SCHOOL CHOICE PROGRAM AND IMPLICATIONS FOR A BETTER GENERAL MODEL

##### A. *Systemic Problems in Alabama and in General That Hinder Educational Gains*

Many states continue to face multiple problems that hinder educational gains.<sup>148</sup> These problems also continuously loom in Alabama. First, long-standing education funding problems are a major limitation to education gains in Alabama and elsewhere.<sup>149</sup> Though fights about Alabama's school funding mechanism have likely gone on for as long as the system has been in place, legal challenges to the fairness of the system can be traced back at least thirty years to the decades long fight manifested in *Knight v. Alabama*.<sup>150</sup>

Alabama's property tax structure is the primary culprit behind inadequate public school funding.<sup>151</sup> The structure "substantially limits the ability of most local areas to adequately supplement the state's insufficient contributions and bring their individual school systems up to a minimum

147. *But see* FRIEDMAN, *supra* note 109, at 94 ("The problem is not primarily that we are spending too little money [on public education]—though we may be—but that we are getting so little per dollar spent.").

148. *See, e.g.,* Richard Rothstein, *Why Children From Lower Socioeconomic Classes, on Average, Have Lower Academic Achievement Than Middle-Class Children*, in CLOSING THE OPPORTUNITY GAP: WHAT AMERICA MUST DO TO GIVE EVERY CHILD AN EVEN CHANCE, *supra* note 2, at 61 (noting how effects of "low-income or minority status . . . create impediments to learning that result in average differences in achievement by social class").

149. In 2010, thirteen states had a pending lawsuit challenging the constitutionality of its K-12 funding mechanisms. National Education Access Network, *Litigations Challenging the Constitutionality of K-12 Funding in the 50 States*, [http://www.schoolfunding.info/litigation/New\\_Charts/06\\_2010\\_lit\\_chall\\_constitutionality.pdf](http://www.schoolfunding.info/litigation/New_Charts/06_2010_lit_chall_constitutionality.pdf). The issues surrounding Alabama's school funding mechanism, especially its property tax system, is a topic upon which one could write volumes. An in-depth discussion is beyond the scope of this note.

150. *See Knight v. Alabama*, 458 F. Supp. 2d 1273 (N.D. Ala. 2004). The initial suit was filed in 1981 "attacking vestiges of discrimination in the State of Alabama's public higher education system." *Id.* at 1277. The northern district rendered judgments after two bench trials in 1991, *Knight v. Alabama*, 787 F. Supp. 1030 (N.D. Ala. 1991), and 1995, *Knight v. Alabama*, 900 F. Supp. 272 (N.D. Ala. 1995). Finding that "vestiges of segregation remained within the Alabama system of public higher education, and that those vestiges violated Title VI of the Civil Rights Act of 1964 as well as the Federal Constitution," the court ordered various remedies. *Knight*, 458 F. Supp. 2d at 1277. The plaintiffs in the case then brought a "Motion for Additional Relief with Respect to State Funding of Public Higher Education" claiming that Alabama's education funding system jeopardized the Court's remedies. *See id.* at 1277–78.

151. Susan Pace Hamill, *An Argument for Tax Reform Based on Judeo-Christian Ethics*, 54 ALA. L. REV. 1, 42 (2002).

level of adequate funding.”<sup>152</sup> Property taxes from commercial property and personal residences account for approximately 85% of Alabama’s property taxes.<sup>153</sup> Very few areas in Alabama contain significant commercial and industrial development. Indeed, the vast majority of Alabama’s inadequately funded school systems are located in areas that contain no significant commercial or industrial activity and have a large number of low-income residents, leading to low local property tax collections.<sup>154</sup> Additionally, in these areas a significant part of the economy is timber, and timber companies own large numbers of acreage there.<sup>155</sup> Alabama’s tax structure, however, applies a “current use productivity formula” that results in timber acre property taxes that average less than one dollar per acre.<sup>156</sup> This structure, which focuses on taxes from commercial and residential property and places minimal focus on taxes from timber acreage, provides a double strike to poor rural areas of the state and significantly restricts these counties’ ability to supplement the State’s inadequate education funding.<sup>157</sup> Unfortunately, however, it appears that courts will not compel a change in Alabama’s tax policies anytime soon, in spite of multiple judges’ unspoken desires.<sup>158</sup>

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152. *Id.*

153. *Id.* at 44.

154. *Id.* at 42–44.

155. *Id.* at 44.

156. *Id.* at 30. Though timber acres account for approximately 70% of Alabama’s total landmass, property taxes from this extremely profitable industry accounts for less than 2% of total property taxes assessed. *Id.* at 31–33. Alabama law also limits local governments from imposing higher taxes on this property. *Id.*

157. *Id.* at 44–45. The Alabama Constitution expressly limits the amount of local property taxes that counties may impose and what proportion of those taxes may go to support public education. See Susan Pace Hamill, *Constitutional Reform in Alabama: A Necessary Step Towards Achieving a Fair and Efficient Tax Structure*, 33 CUMB. L. REV. 437, 441 (2003) (discussing that Article XI, sections 215 and 216 limit county and municipal local property tax rates; Article XIV, section 269, along with amendments 3, 202, and 382 cap the amount of property taxes these local entities can impose to support public schools).

158. In a lengthy opinion, Judge Lynwood Smith found that “Supreme Court precedent compels a conclusion that the property tax system in Alabama’s 1901 Constitution and subsequent amendments does not offend the . . . Equal Protection Clause.” *Lynch v. State*, No. 08-S-450 NE, 2011 U.S. Dist. LEXIS 155012, \*1194 (N.D. Ala. Nov. 7 2011). The court emphasized the “savagery of the language of intolerance and hatred that permeated almost every day of every debate” at the 1901 drafting of the Alabama Constitution, as well as the regressive, inelastic, bureaucratic, and overly earmarked tax system in Alabama. *Id.* at \*1190. In light of both of these issues, “rational persons might logically conclude that such facts should work a difference in the standards of judicial review to be applied to the provisions challenged by plaintiffs.” *Id.* at \*1911 (citing *City of Mobile v. Bolden*, 466 U.S. 55, 74 (1980) (finding that “past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful”). But Judge Smith concluded that “once more, rational persons would be disappointed.” *Id.* at \*1192 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1977) (upholding a purportedly egregiously unequal school funding system produced by the impact of disparate incomes and property values on local *ad valorem* tax revenues as not in violation of the Equal Protection Clause)); see also *I.L. v. Alabama*, 739 F.3d 1273, 1288 (11th Cir. 2014) (upholding Judge Smith’s ruling, the Eleventh Circuit “share[d] in the district court’s concern regarding Alabama’s public

Another structural problem that exists in Alabama and, indeed, the entire spectrum of American education, is *de facto* racial segregation in schools. In fact, “[a]t the turn of the twenty-first century, the level of segregation in U.S. schools stood almost exactly where it had been 30 years earlier.”<sup>159</sup> Data from UCLA’s Civil Rights Project in 2012 reveals that in southern schools, 33.4% of black students and 41.3% of Hispanic students attend 90%–100% minority schools.<sup>160</sup> Somewhat surprisingly, these rates fall slightly below the national average and far below the worst region: the Northeast.<sup>161</sup> Equally troubling is the fact that these percentages appear to be on the rise in southern schools and nationally.<sup>162</sup> Segregated schools made up solely of a single racial or ethnic group pose significant limitations to achieving educational gains. Today, these schools “account for most of the nation’s ‘dropout factory’ high schools, and most students who do graduate from schools segregated by race and poverty lack the skills needed for college success.”<sup>163</sup>

A final issue that (debatably) hinders educational gains in Alabama is the ability of counties *and* cities to form their own school systems.<sup>164</sup> Allowing the most local entity to have control over schools in the locality and thereby allowing parents more control over what happens in their child’s school is an attractive notion. But there is concern that allowing multiple municipalities to form their own systems and separate from the larger county systems will drain county systems of resources and lead to further school decline.<sup>165</sup> Additionally, allowing the formation of multiple school districts that serve exclusive student populations (like suburban

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education system . . . [c]ourts, however, are not always able to provide relief, no matter how noble the cause”).

159. Linda Darling-Hammond, *Inequality and School Resources: What it Will Take to Close the Opportunity Gap*, in *CLOSING THE OPPORTUNITY GAP: WHAT AMERICA MUST DO TO GIVE EVERY CHILD AN EVEN CHANCE*, *supra* note 2, at 82; see also Stan Diel, *Segregation Again? Racial Picture of Alabama Schools Changes 60 Years After Brown v. Board of Education*, AL.COM, (Apr. 16, 2014, 10:27 PM), [http://blog.al.com/wire/2014/04/segregation\\_still\\_racial\\_pictu.html#incart\\_2box](http://blog.al.com/wire/2014/04/segregation_still_racial_pictu.html#incart_2box).

160. GARY ORFIELD ET AL., *E Pluribus . . . Separation: Deepening Double Segregation for More Students* 34, THE CIVIL RIGHTS PROJECT (2012), available at [http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield\\_epluribus\\_revised\\_omplete\\_2012.pdf](http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf) The problem with highly segregated minority schools is that these schools almost always have high concentrations of poverty. Darling-Hammond, *supra* note 2, at 82.

161. Nationally, 38.1% of black students and 43.1% of Hispanic students attend 90%–100% minority schools; in the Northeast, 50.6% of black students and 43.9% of Hispanic students attend these homogeneous schools. ORFIELD ET AL., *supra* note 160, at 34.

162. *Id.*

163. *Id.* at xiv (internal footnotes omitted).

164. See ALA. CONST. art. XIV, § 256, as amended by ALA. CONST. amend. No. 111.

165. Cities separating and forming their own systems appears to be a current trend in Alabama. See Marissa Mitchell, *Growing Trend: Alabama Cities Forming own School Systems*, ABC33/40 BIRMINGHAM (June 3, 2013, 4:53 PM), <http://www.abc3340.com/story/22490294/growing-trend-alabama-cities-forming-own-school-systems>.

cities) can lead to the “good” schools separating from a larger school system, leaving only the “bad” schools behind. Thus, students left in the former school districts may have fewer choices of “good” schools.<sup>166</sup>

Perhaps the most troubling consequence of these systemic problems is achievement gaps between various groups.<sup>167</sup> Recent reports show that vast achievement gaps between racial and ethnic groups continue to pervade every age group in Alabama.<sup>168</sup> For example, in 2011, the fourth grade reading achievement gap, the difference between the percentage of the racial/ethnic group that scored at or above basic National Assessment of Educational Progress (NAEP) standards, was 31 percentage points between white and black students and 29 between white and Hispanic students.<sup>169</sup> The fourth grade math achievement gap was 32 percentage points between white and black students, 15 between white and Hispanic students.<sup>170</sup> Similarly, the eighth grade reading achievement gap was 29 points between white and black students, 24 between white and Hispanic students.<sup>171</sup> The eighth grade math achievement gap was 38 points between white and black and 34 between white and Hispanic.<sup>172</sup> Though the size of these gaps lessens regarding group graduation rates—13 points between white and black, 12 between white and Hispanic<sup>173</sup>—white students continue to hold a lead in nearly all educational achievement statistics in Alabama.

Achievement gaps in Alabama also exist between low-income students and other students. In 2011, the fourth grade reading and math achievement gaps were 29 and 23 points, respectively.<sup>174</sup> The eighth grade reading and math achievement gaps were 24 and 32 points, respectively.<sup>175</sup> The fact that Alabama has the fourth highest child poverty rate in the country, an

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166. See Eduardo Porter, *In Public Education, Edge Still Goes to Rich*, N.Y. TIMES, (Nov. 5, 2013), [http://www.nytimes.com/2013/11/06/business/a-rich-childs-edge-in-public-education.html?\\_r=0](http://www.nytimes.com/2013/11/06/business/a-rich-childs-edge-in-public-education.html?_r=0) (noting the ills of school “decentralization”). Notably, however, the existence of multiple school districts within a relatively small geographic area may be very conducive to the implementation of a systematic school choice program. See Goldhaber et al., *supra* note 122, at 115–16.

167. Kevin G. Welner & Prudence L. Carter, *Achievement Gaps Arise from Opportunity Gaps*, in CLOSING THE OPPORTUNITY GAP: WHAT AMERICA MUST DO TO GIVE EVERY CHILD AN EVEN CHANCE, *supra* note 2, at 9 (describing achievement gaps “as a predictable result of systemic causes—a representation of the disparities in opportunities available to children of different racial, ethnic, socioeconomic, and cultural backgrounds” and noting that “[w]here engaging, culturally relevant instruction is lacking, expectations minimal, and resources scarce, students from disadvantaged groups tend to be outperformed by their more privileged counterparts”).

168. Southern Regional Education Board, *Alabama: A Decade of Progress, 2012 Progress Report on the Challenge to Lead Goals for Education* (2012), available at [http://publications.sreb.org/2012/AL\\_progress\\_report.pdf](http://publications.sreb.org/2012/AL_progress_report.pdf).

169. *Id.* at 5.

170. *Id.* at 6.

171. *Id.* at 8.

172. *Id.* at 9.

173. *Id.* at 11.

174. *Id.* at 5–6.

175. *Id.* at 8–9.

astounding 27.7% in 2010, only exacerbates the pervasion of this problem.<sup>176</sup>

Improving school quality would obviously help close the opportunity gaps between groups in different socioeconomic situations. However, states must not forget that systemic out-of-school problems lead to a growing opportunity gap. Solutions to these systemic problems cannot be overlooked in a state's (admirable) attempt to improve its educational system.<sup>177</sup>

### B. *An Ideal Approach*

Even though success of school choice programs has been doubted,<sup>178</sup> states are constantly looking for ways to innovate education, especially through the implementation of these programs. In states like Alabama, where education has long been a source of embarrassment, education innovation plans in many forms are attractive, especially choice programs that rely on valued market principles. Though no school choice program is likely to be a silver bullet when it comes to improving educational outcomes in any state, in conservative states like Alabama, politicians who are already prone to attempt to solve every problem with a market-based solution will likely continue seeking to implement these programs. Such states should do so with thoughtfulness and with cognizance of the problems discussed above. School reformers should also keep in mind that "[t]here is always an easy solution to every human problem—neat, plausible, and wrong."<sup>179</sup>

First, states that attempt to implement a school choice program must actually provide choices to children. A school choice program that allows students to transfer to successful schools, but provides no contingency for systems in which there are few or no successful schools, creates little choice.<sup>180</sup> To combat this problem, legislators, in coordination with state

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176. Southern Regional Education Board, *Fact Book Bulletin, Growing Proportion of Children in Poverty Means More Education Challenges* (2012), available at [http://publications.sreb.org/2012/12E03\\_FBB\\_Apr.pdf](http://publications.sreb.org/2012/12E03_FBB_Apr.pdf) (finding that over 35,000 more children were in poverty in 2010 than in 2005). The United States has the highest child poverty rate among industrialized nations. Darling-Hammond, *supra* note 159, at 80.

177. Kevin G. Welner & Prudence L. Carter, *Achievement Gaps Arise from Opportunity Gaps*, in CLOSING THE OPPORTUNITY GAP: WHAT AMERICA MUST DO TO GIVE EVERY CHILD AN EVEN CHANCE, *supra* note 2, at 1, 3.

178. See *supra* notes 127–131 and accompanying text for a discussion about doubts by some that school choice programs actually help improve student achievement.

179. Barnett Berry, *Good Schools and Teachers for All Students*, in CLOSING THE OPPORTUNITY GAP: WHAT AMERICA MUST DO TO GIVE EVERY CHILD AN EVEN CHANCE, *supra* note 2, at 181, 183 (quoting H.L. Mencken).

180. See *supra* notes 99–100 and accompanying text for a discussion on how students in the black belt region have few choices to escape a failing school.

departments of education, should first look at each area of the state to determine where choice may not exist under a proposed school choice program. Then, these groups should *create a choice* or assist other entities in creating a choice for these children.

There are many possible ways to create a school to which parents would want to send their children: First, states could sanction the establishment of more small schools and provide more resources to transportation, thus providing more choices to children who are spread out over large geographic areas.<sup>181</sup> Second, states could better implement distance-learning programs from more successful schools and implement them in a school that could be the “choice” school.<sup>182</sup> States could tailor these programs to incentivize successful schools to teach students at these failing schools through video conferencing technology. Though this would put an additional burden on teachers at successful schools, it could help provide the equal opportunities that students at more successful schools enjoy.<sup>183</sup> Finally, if a distance learning system is not viable, state officials could select a “choice” private school and work with the school to make sure that it opens its enrollment and transportation practices to students who wish to transfer from failing schools and provides a suitable level of educational quality to these students. Additionally, states could empower private entities to provide new private options by reducing school start up costs, selling underutilized school space to private entities, and otherwise subsidizing, insuring, or encouraging private school investment.<sup>184</sup>

Staunch public school advocates would likely criticize the proposed private programs as “giving up” on public schools. Additionally, coordination between the state and the private school could be challenging because of likely restrictions on providing funding directly to private school providers. However, a thoughtfully crafted program could work to provide a real choice in areas where no public choice could exist. Any

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181. Goldhaber et al., *supra* note 122, at 121–22.

182. This idea would be most important in situations where the school choices are limited to small schools or schools with underprepared students. See Orfield, *supra* note 119, at 41 (“[S]chools where an insufficient number of students are prepared for advanced and honors classes either do not offer them or dilute the curriculum to increase the pool of students eligible for enrollment in those classes [thereby effecting] a profoundly unequal educational experience. . . .”). Alabama already has in place a distance learning system. ALABAMA CONNECTING CLASSROOMS, EDUCATORS, AND STUDENTS STATEWIDE (ACCESS) DISTANCE LEARNING, <http://accessdl.state.al.us/> (last visited Apr. 4, 2014). Concentrating students utilizing this system in the “choice” school, however, could foster a better learning environment because students could be concentrated in a typical classroom with other students but with online instruction, instead of being assigned to an individual computer.

183. Berry, *supra* note 179, at 181 (“Unfortunately, children in poverty and those of color are much less likely to be taught by qualified, experienced, effective teachers. . . . [C]ompared to their counterparts who teach in more affluent communities, teachers in high-poverty schools are far more likely to be paid less and to work under conditions that undermine their efforts to teach effectively.”).

184. See Goldhaber et al., *supra* note 122, at 113.

successful—in terms of student achievement—school choice program will, of course, depend on the existence of real choice.

Second, states must empower parents to make informed decisions regarding their children's education. Many state school choice plans have implemented some form of designation that distinguishes “good” schools from “bad” schools.<sup>185</sup> However, these binary labels likely do not fully embody each school's complex character.<sup>186</sup> Because parents are more likely to make better decisions about their child's education if those decisions are informed, states must incorporate a system to provide comprehensive information to parents regarding school choices. Such information should reflect various aspects of the school's educational approach to attaining student “learning growth.”<sup>187</sup> State school analyses methods will likely need reform so that they are sophisticated enough to detect seemingly small differences between school options that may be dispositive in parents' choice for their child.<sup>188</sup>

Third, states must have a mechanism to improve public schools generally along with giving students choice. States that divert funds out of the typical public school funding stream to school choice programs, but keep general public school funding constant, will reduce funding to already struggling public schools.<sup>189</sup> This could and likely will lead to a larger number of failing schools from which students will want to transfer. Because all students in unsuccessful schools may not be able to transfer out, or a parent may simply choose not to take advantage of her ability to select her child's school, there is a risk that the needs of students in unsuccessful schools will become a casualty to the state's promotion of school choice for others.<sup>190</sup> If the true goal of school choice programs is to improve an educational system as a whole,<sup>191</sup> states must be prepared to intervene and provide some form of a safety net to unsuccessful schools lest they all eventually shut down.<sup>192</sup> A state “safety net” could be as simple as giving an unsuccessful school a chance to improve by not reducing

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185. See, e.g., ALA. CODE §§ 16-6D-4(3), -4(11) (2012) (defining “failing school” and “qualifying school”).

186. See Goldhaber et al., *supra* note 122, at 121 (For example, some schools may “appear to be high performing by virtue of their selection of students,” but may not, in reality, provide a “better” education.).

187. *Id.*

188. *Id.*

189. *Id.* at 122 (This is, perhaps, one of the most perplexing issues regarding school choice programs because it presents a dilemma. “Providing schools with appropriate financial incentives to improve” by penalizing a school through loss of revenue associated with the loss of a student “undermines the capacity for school improvement” because reduced funding diminishes a school's ability to, among other things, “recruit [and] retain high-quality teachers.”).

190. FISKE & LADD, *supra* note 111, at 307.

191. See *supra* notes 123–124 and accompanying text.

192. See FISKE & LADD, *supra* note 111, at 307.

support to the school proportionally to its student loss, but rather by initially reducing support by an amount less than the marginal cost to educate that lost student.<sup>193</sup> Accordingly, schools would be left with more resources to utilize on remaining students.<sup>194</sup> However, over time if the school did not improve, and students continued to flee it, resource reduction would increase to exceed the marginal cost of educating the departed student.<sup>195</sup> This approach would give struggling schools a more reasonable chance to improve, yet still provide strong financial incentives for improvement.

Further, programs that ostensibly diminish funding to public schools are very unlikely to gain any support from groups like teacher’s unions, who sometimes hold significant power in state politics.<sup>196</sup> Though not politically attractive, states should seek to find additional funding sources—taxes, private donors, federal grants, etc.—to help fund their school choice programs and the financial incentive programs that accompany the programs. Although private funding is essential to an effective school choice system, it is difficult to imagine a future in which state revenues will be increased so that such a system could both protect students in unsuccessful schools and promote choice to all students.<sup>197</sup>

Finally, state leaders must recognize their state’s unique circumstances. For example, widespread poverty and racial disparities abound in many states.<sup>198</sup> State programs that provide assistance on the front-end of a school transfer will be much more likely to help the very poor than a program based on tax credits. Very few poor people can foot the bill for expenses associated with transferring from their child’s zoned school and wait to receive a tax credit when they complete their tax return *during the next year*. To combat this problem, state officials should work with successful schools to which students are transferring and supply the parents with costs associated with transferring *as the costs arise*. Such a system will give an opportunity to more low-income parents and children who have almost

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193. Goldhaber et al., *supra* note 122, at 123.

194. *Id.*

195. *Id.*

196. See, e.g., Jeff Poor, *How Alabama is on the Verge of Breaking One of the Nation’s Most Powerful Teachers’ Unions*, THE DAILY CALLER (Mar. 7, 2013, 11:54 AM), available at <http://dailycaller.com/2013/03/07/alabama-on-the-verge-of-breaking-powerful-teachers-union/> (“For much of the last four decades, the Alabama Education Association has risen to become one of the most powerful teachers’ unions in the country . . . long-time AEA executive director Paul Hubbert, [is] oftentimes described as the ‘shadow governor’ of Alabama . . .”).

197. See Goldhaber et al., *supra* note 122, at 109 (noting that “citizens with more education are more productive in the workplace”). The private sector has much to gain from a properly educated citizenry so an additional incentive for its intervention is not needed.

198. See *supra* notes 167–176 for a discussion of educational performance disparities between students from different racial and ethnic groups and disparities between low-income and higher income students in Alabama.

zero discretionary income. Additionally, states should provide some oversight of private school tuition so that this equal opportunity presented to low-income students is not yanked by capricious and possibly discriminatory increases in private school tuition. Also, states should always be cognizant about the racial composition of its schools.<sup>199</sup> They should seek to ensure that racial segregation is not being accomplished under the guise of education improvement through school choice.<sup>200</sup>

If states follow some of these suggestions, school choice programs could provide more of a choice than some now do. Additionally, the state could use these programs for what they are actually designed to accomplish—to improve public schools while giving students the choice in the meantime to avoid failing ones. State officials should always keep their end goal in mind: school choice should be a vehicle to help successfully perform “the most important function of state and local governments,”<sup>201</sup> and not to eliminate the state’s obligation of that function.

### C. *How does the Alabama Accountability Act Stack up?*

The Alabama Accountability Act does contain some of the “best practices” discussed above. First, even beyond the law’s provisions allowing students to choose the best school for their needs, the law does attempt in at least one way, to actually provide a *meaningful* choice to students. By providing schools systems a way to have flexibility with the ALSDE,<sup>202</sup> the law empowers schools to try new approaches that might better serve the needs of particular student populations than do universal state approaches. Thus, this “innovation” could lead to the creation of more “choice” schools.

Second, the law appears to fail to adequately provide comprehensive information to parents regarding their schooling options. Though the law requires a “qualifying school” to maintain a current website describing its instructional program<sup>203</sup> and requires school systems to notify parents of children in failing schools of their options,<sup>204</sup> it does not require any specific information be communicated to parents. More detailed guidance regarding school information disclosure would be beneficial.

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199. See *Lynch v. Alabama*, No. 08-S-450-NE, at 34 (N.D. Ala. Oct. 21, 2011), [http://www.gpo.gov/fdsys/pkg/USCOURTS-alnd-5\\_08-cv-00450/pdf/USCOURTS-alnd-5\\_08-cv-00450-2.pdf](http://www.gpo.gov/fdsys/pkg/USCOURTS-alnd-5_08-cv-00450/pdf/USCOURTS-alnd-5_08-cv-00450-2.pdf) (“The history, politics, and policies of all Southern states, but those of Alabama in particular, must take into account the centrality of race . . . .”); Scott & Wells, *supra* note 126, at 135.

200. See *supra* notes 134–135 and accompanying text.

201. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954).

202. See *supra* note 94 and accompanying text.

203. ALA. CODE § 16-6D-4(11)(i) (2012).

204. *Id.* § 16-6D-(8)(b)(4).

Third, the law does provide a form of a safety net to failing schools that might provide them a better chance to improve and attract more students. One way the law accomplishes this is to delay a harsher definition of what school is “failing” until 2017.<sup>205</sup> Thus, presumably fewer schools will be subject to the failing label now than might be subject to it later, when the harsher definition goes into place. Additionally, the law defines a system of sub-marginal cost funding reduction<sup>206</sup> where, if a student transfers from a failing school, the failing school’s funding is not reduced by the full amount that the state provides to the school for the education of that student. Instead, though the transferred student’s absence is factored into the per-pupil funding from the state (by reducing funding to the school), 20% of the average annual state cost of attendance for a public K-12 student is allocated to the failing school from which the student transferred.<sup>207</sup> Together, these provisions allow a failing or near-failing school an enhanced opportunity to improve.

Fourth, the law seems to only partly address Alabama’s structural problems and their interaction with the new education framework. It appears that the Legislature was cognizant of the state’s poverty problem and its effect on education. By enabling the creation of private scholarship funds that must spend a proportional amount of its funds on low-income student educational scholarships,<sup>208</sup> the law targets low-income students for assistance while hopefully helping to diminish growth of public financial obligation to the school choice program. However, the law does not appear to consider structural racial problems in any significant way.<sup>209</sup> Given the considerable problems Alabama has faced in this area, that is a mistake.

## V. CONCLUSION

School choice programs continue to gain widespread support and staunch opposition. The Alabama Accountability Act marks the beginning of a new approach to education reform in Alabama. It provides a means for public education to improve and for students to escape failing public

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205. *Id.* § 16-6D-4(3). (On June 1, 2017, schools will be deemed “failing” if they have, “during the then-most recent three years, earned at least one grade of ‘F’ or, during the then-most recent four years, earned at least three grades of ‘D’ on the school grading system [in] Section 16-6C-2,” or if that grading system has not been satisfactorily developed at that point, “then a failing school shall be a school that has been listed in the lowest 10 percent of public K-12 schools in the state standardized assessment in reading and math.”).

206. *See supra* notes 193–195 and accompanying text.

207. *Id.* § 16-6D-8(a)(1).

208. *Id.* § 16-6D-(9)(b)(1)(f).

209. *Id.* § 16-6D-7 (The law does contain an “equal opportunity” section that prohibits discriminatory practices regarding approval of school system flexibility applications.). § 16-6D-8(d)(3) (And expressly states that it is not superseding any federal court order regarding school desegregation.).

schools. Though the law is not perfect, and litigation continues regarding its validity, it will surely not be the last attempt at implementing a school choice program in Alabama regardless of the outcome of these suits. Additionally, considering the current conservative political make-up of many states, the possibility that other states will attempt to implement a school choice program is growing. These states must take a close look at the difficult structural problems that continue to abound in their states and tailor their plan accordingly. Though the Alabama Accountability Act presents an innovative attempt to improve education quality in the state, there is much work that remains in the continuing effort to improve education and ensure equal opportunity in Alabama. We must continuously seek to “cast aside arbitrary distinctions of birth, race, and place, and allow every American to harness the power provided by a quality education.”<sup>210</sup>

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210. *Lynch v. Alabama*, No. 08-S-450-NE, at 798 (N.D. Ala. Oct. 21, 2011), [http://www.gpo.gov/fdsys/pkg/USCOURTS-alnd-5\\_08-cv-00450/pdf/USCOURTS-alnd-5\\_08-cv-00450-2.pdf](http://www.gpo.gov/fdsys/pkg/USCOURTS-alnd-5_08-cv-00450/pdf/USCOURTS-alnd-5_08-cv-00450-2.pdf).

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