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GOVERNMENT AS ADMINISTRATOR VS. GOVERNMENT AS PURCHASER: DO RULES OR MARKETS CREATE GREATER ACCOUNTABILITY IN SERVING THE POOR?

*David R. Riemer**

INTRODUCTION: THE WONDERFUL WORLD OF ACCOUNTABILITY

We are immersed in a sea of accountability. The bed we crawl out of each morning (unless it was manufactured decades ago) meets the safety standards set by the U.S. Consumer Product Safety Commission. We brush our teeth with water that meets U.S. Environmental Protection Agency (“EPA”) standards; and as the wastewater flows down to the treatment plant, it must meet conveyance and treatment requirements of both the EPA and the state’s department of natural resources. Want eggs and a piece of toasted rye bread for breakfast? The U.S. Department of Agriculture regulates the practices of the farmer whose chickens laid the eggs and monitors the pesticides used on the wheat that the miller turned into the flour that the baker transformed into bread. The U.S. Food and Drug Administration, meanwhile, oversees the safety of the final food products. Teeth brushed and well fed, we find our way to the garage, climb into the family car, and head for work. City police officers—public employees trained to follow the protocols of their chief and comply with the rules of the police commission—keep an eye on us to make sure we do not exceed the speed limits or fail to signal when changing lanes. If we are typical of the American workforce, we likely will ride on a local street paid

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for by a municipal government but built by private contractors according to the terms of lengthy purchasing processes.¹

It is not even 9:00 a.m., and already we have swum through a sea of accountability: federal, state, and local accountability; regulatory accountability, administrative accountability, and procurement accountability. As the day proceeds, many of our daily activities bring into play one type of accountability or another. Switch on the computer? A state public utility commission regulates the price of the electricity we consume. Cross the street for a bite of lunch? The city traffic light, maintained by the municipal department of public works, ensures that the cars on Main Street do not run us over as we walk from curb to curb. Get stuck behind a school bus on the way home? The public school district has the bus company under contract to take kids home from afterschool basketball practice. Different levels and types of governmental accountability dog us every step of the way.

The thought of which model of accountability works best has never entered our minds. Most of us simply assume that, whichever level of government exercises whatever type of accountability, it is the appropriate level of government and the proper type of accountability. In the academic world, however, and even more in the day-to-day world of public administration, the question of what type of accountability works best for different forms of governmental activity is a hot topic.²

Much of the debate centers around so-called privatization. If government takes a classic government function (like sanitation, library operation, administration of welfare benefits, and most controversial of all, public education) and shifts responsibility for “delivering” the function from public employees to private firms under contract, is it possible to preserve accountability?

1. A typical government procurement involves the government's incorporation of pages of written specifications (increasingly, these days, simply listed on the government purchasing agency's Web site) into a request for bids, submission of competing bids by vendors, selection of the lowest “qualifying” bid by government bureaucrats, signing of a boilerplate contract by the vendor, and then ongoing performance monitoring by a different group of government bureaucrats until yet a third set of government bureaucrats authorizes release of the final payment upon completion of performance.

2. *E.g.*, DAVID OSBORNE & PETER PLASTRIK, *BANISHING BUREAUCRACY: THE FIVE STRATEGIES FOR REINVENTING GOVERNMENT* (1997); JOHN D. DONAHUE, *THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS* (1989).

PRIVATIZATION: LESS THAN MEETS THE EYE

The debate over privatization masks the fact that, whether government provides services with its own employees or buys the same services from private vendors, government remains in charge. In the case of delivery of services to the poor, be they service job placement or health care or education, the decisions about *whether* a particular service will be delivered in the first place, *when* the service will start (and end), *to whom* the service will be delivered, *how much* of the service will be delivered, and *what type* of service will be delivered are all made by government officials, whether the service is delivered by government employees or private companies.

The threshold decision is whether government should provide a service at all. For example, should government offer low-income adults the opportunity to work in community service jobs if they fail to obtain private-sector employment? Government clearly decides this question. There is no privatization issue at all.

Once government has decided whether to provide a service, the next question is when, i.e., under what circumstances, government should provide the service. For instance, should subsidized health insurance for poor, uninsured, working parents be offered as soon as they lose employer-sponsored coverage, or should coverage be delayed for a fixed waiting period (e.g., three months after the employer's coverage ceases) in order to discourage employers from canceling their health insurance? This is a classic policy question. On the one hand, government wants to meet the unmet public need. On the other hand, in situations in which private firms may voluntarily assume responsibility for employees' welfare, government does not want to give the private sector an incentive to shift costs to taxpayers. But notice who is making the "when" decision: government, through law or regulation, decides upon the point in time when it will start to insure the uninsured. There is no privatization issue.

Indeed, in carrying out public policy, government makes virtually all of the important decisions, without privatization even coming into play. After deciding whether and when government should provide a typical service, e.g., the provision of health care to the poor, government also decides what categories of poor will be entitled to coverage (the "who" question), what levels of health care will be provided (the "how much" question—in this example, determining whether the plan will cover not just hospitalization and medical care, but dental care or vision care as well), and what

degree of health care services will be provided (the “what type of service” question—in this context, resolving the matter of whether dental care, for instance, means only treatment of dental problems or also includes preventive check-ups and cleaning or orthodontia). However government answers these questions, only government is authorized and equipped to make the final decisions. The issue of privatization simply does not crop up.

So what is privatization about? After all the key decisions listed above have been made by government itself—whether to provide a service, when to provide it, whom to provide it to, how much to provide, and what type of service to provide—one narrow question remains: What kind of organization should provide (or, in the argot of public administration, “deliver”) the service? That is, should government utilize its own employees to deliver the service, or purchase it from private firms?

THE REAL ISSUE: CHOOSING BETWEEN TWO TYPES OF ACCOUNTABILITY

The decision whether to use a traditional administrative structure to deliver a service or instead purchase it from a private vendor—a choice that Professor John D. Donahue calls “the privatization decision”³—in fact raises two distinct issues. What type of organization should deliver the service? What kind of accountability structure is most effective in producing a successful program? That the privatization decision raises the question of who will deliver a service—government employees or private firms—is undisputed. But the proposition that a privatization decision also raises the issue of *what kind of accountability framework is most effective* is not self-evident.

It can be argued that privatization inherently destroys accountability by removing traditional administrative oversight of a public function. Once government strips away from its own organization and employees the power to operate a program and confers that power on private organizations and their employees, the argument goes, government loses the capacity to hold the program accountable for either process or outcome. Where government organizations generally can be trusted to weed out criminals, cheats, and others who cannot be trusted to conduct public business, private

3. See Remarks of John D. Donahue, in Panel Discussion, *Living with Privatization: At Work and in the Community*, in Symposium, *Redefining the Public Sector: Accountability and Democracy in the Era of Privatization*, 28 FORDHAM URB. L.J. 1397 (2001). See generally DONAHUE, *supra* note 2.

organizations are free to hire anybody regardless of qualification. Where government employees generally can be relied upon to refrain from discrimination based on race or ethnicity, private employees can easily get away with violating civil rights. Where government employees generally will not steal public funds, private employees will be so tempted to steal that theft is unavoidable. Where government employees generally can be counted on to get the job done because of their strong work ethic, as well as their knowledge that their careers as civil servants depend on solid performance, private employees will inevitably fail to deliver the goods because they are not invested in the success of the program and because their career tracks do not depend upon performance. In short, this viewpoint assumes that if government privatizes, the possibility of true accountability is eliminated. If we accept this claim, it is then ridiculous even to talk about the efficacy of the accountability structure that pertains to privatized services. There is no accountability structure at all.

The underpinning of the opposite claim, which I have heard often from the champions of school vouchers, is that reliance on a traditional administrative structure to deliver services creates a monopoly in which government's performance can never be compared to competitors within a market. Because there is no rational basis for comparing government's performance as administrator to competing alternatives, there can be no true accountability. When government creates huge bureaucracies and hires thousands of employees in even the most well-meaning effort to get a job done, the argument runs, how in the absence of visible competition can we measure whether the government has achieved its goals effectively?

A severe critique of the civil service system often reinforces this argument. The civil service system, it is asserted, lacks the tools to fire the corrupt and inept, motivate and retrain the mediocre, or reward the stars. As a result, the level of competence in any governmental structure is dismal. Government employees, protected from dismissal for all but heinous crimes, yet unable to translate their success into reward, hunker down for the duration, do the least necessary to avoid trouble, and soon start calculating their pensions to the penny. Only by liberating government programs from such lethargic bureaucracies and vesting responsibility in private organizations that are subject to performance-based constraints and incentives do we stand any chance of getting government's business done well and at a reasonable cost. In other

words, *only* if government privatizes its programs can it achieve accountability.

Both arguments have rhetorical power. Neither side wants to concede an inch to the other. It is tempting to throw up one's hands and give up. But because government programs are so vital, we have no choice but to think this matter through and try to achieve clarity of understanding, if not universal consensus.

COMMON (IF HIDDEN) GROUND

The starting point to answering the accountability question should be the acknowledgment that, however intensely the combatants from the opposing sides hold their competing views, they and everyone in between deeply believe in accountability. This may seem obvious, but the fact is that some combatants on both sides think their adversaries "just don't care" about accountability. Some advocates of the "government as administrator" model believe that their pro-privatization opponents "just don't care" about corruption, theft, and non-performance. Similarly, some champions of privatization believe that those who want government to administer all programs "just don't care" about governmental incompetence or lack of performance in the absence of competitive pressure. In fact, whether or not they acknowledge the power of their opponents' arguments, everybody engaged in this debate cares intensely about accountability. The dispute is truly not a dispute about the end—accountability—but about the means.

And in the final analysis, all embrace not just the same end but the same means. Every combatant in the privatization debate believes in a "mixed" system for achieving accountability in which governmental rules create the overarching framework and government employees enforce the framework, but individuals applying their private values and preferences exercise huge amounts of discretion. How can this be? How can those who champion government as administrator favor (whether they acknowledge it or not) private decision-making? How can the supporters of privatization embrace (whether they know it or not) the need for government control?

Obviously, the advocates of government as administrator believe in a system where government (both elected officials and the bureaucrats who carry out their statutes, ordinances, and resolutions) sets the framework, and government officials enforce the framework. But as any county district attorney will tell you, there is a lot of discretion in deciding how to enforce the law. In other words,

there is a mighty lot of private decision-making—which is really what *privatization* is all about—in deciding which suspects to prosecute, which plea bargains to accept, and which sentences to demand.

The recent debate over President George W. Bush's nomination of former U.S. Senator John Ashcroft as U.S. Attorney General centers on this very point. Both Ashcroft's foes and allies agreed that, were he to become the Attorney General, the constitutional and statutory framework within which he would function would allow him enormous room to insert into the decision-making process his personal beliefs about abortion, the death penalty, and other hot-button issues. Ashcroft's enemies opposed him precisely because, as Attorney General, he will have huge discretion to make what are essentially private decisions about the nation's laws. His allies want him there for exactly the same reason: he will allow his personal views, which they happen to like, to influence his official decisions.

But if the opponents of privatization ultimately believe in a *mixed* system under which, within the framework of government-set rules, officials enjoy enormous room for private decision-making, the advocates of privatization also believe in a *mixed* system that has the same core structure: a government framework, and within it ample room for private decision-making. Indeed, advocates of privatization believe in what might be considered a *dual mixed* system—one that has two governmental frameworks, within which two types of private decision-making occur.

THE DUAL FRAMEWORK OF PRIVATIZATION

Privatization advocates believe in the market. But the market is no private organism. Government created it; government oversees it. Government grants charters (in the form of corporate status) to virtually all the private actors in the market—the nonprofit and for-profit private organizations that conduct the market's business. Government may revoke the charter of any private corporation, at any time, if it violates the terms of its charter. Without this initial state grant of power and privilege to corporations, including the privilege of limited liability for profit-making corporations' shareholders, the private sector as we know it would not exist.

The two main marketplace powers that private firms exercise are the powers, in the firm's own right and in its own name (i.e., independent of the individuals who happen to serve on the firm's board of directors, or function as president or CEO), to (1) acquire, own,

sell, and lease property and (2) enter into binding contracts. But without government—without a vast web of statutory laws enacted by legislatures and common law created by judges, registration offices staffed by government employees, and courts, clerks, bailiffs, and police who enforce the law—property and contract rights would be meaningless. With all due respect to Locke, Jefferson, and the theorists who gave us the *inalienable* right to property, it is hard to imagine how, absent government's role, one could create a functioning system of property and contracts, at least one powerful enough to bridge a continent and span the globe. Perhaps such a construct can be achieved in the abstract. But in the real world—certainly in the United States of America—government creates the framework within which private firms make their deals and their money. Government makes the market.

As modern markets have evolved, government's role in shaping the markets has grown, too. The governmental framework within which private firms compete does not stop at governmentally-created, governmentally-enforced property rights and contracts. Government agencies protect the rights of workers in private firms. Private employees do not have civil service status to give them an extra measure of protection; but they have governmental agencies such as the National Labor Relations Board, the Equal Employment Opportunity Commission, and the Occupational Safety and Health Administration to protect them from different types of harm. These governmental oversight agencies impose a large measure of public discipline on the private labor market.

Government agencies similarly impose requirements on private firms that protect their shareholders (if they have any), their lenders, and their consumers. In sum, a vast web of governmental requirements relating to incorporation, property, contract, employees, investors, lenders, and consumers creates a sophisticated public framework within which all private firms must make their decisions.

FUNCTION-SPECIFIC MIXED SYSTEMS

The mixed system described so far—an elaborate blend of governmental structure and private activity—applies to all privatization. A second mixed system of governmental structure and private activity applies to the specific privatization contract that a given firm enters into in order to carry out a specific human service program. When government privatizes, it does not privatize in general; it privatizes a particular function for a particular length of

time. In the State of A, within the Department of B, Agency C enters into a specific contract for a defined term of years with either vendor X, Y, or Z (whichever submitted the best proposal) to perform delineated functions. Although the contract is governed by the general rules of the law of contracts, the specific rules of this contract create a second, case-specific mixed system—an individualized government framework within which the private firm must do what the government is paying the firm to do.

The request for proposals (“RFP”) and the contract itself are the main pillars of this second framework. Typically incorporated by reference into the government’s contract with the vendor, the RFP sets forth the government’s expectations, requirements, and conditions. The contract functions to augment those expectations, requirements, and conditions, as well as to spell out exactly what government will pay, set forth a payment schedule, and bind the vendor to the government’s preferences for resolving disputes about performance.

In the final analysis, the debate between opponents and proponents of privatization is neither a dispute about the need for accountability, nor a dispute about whether accountability will be achieved through a mixed system under which government imposes a framework but individuals exercise extensive discretion in making decisions. It is a dispute about *which* mixed system of accountability is best. Does the traditional administrative model—a system of government rules within which the state’s own employees exercise wide discretion—produce the best results? Or does the market model—which is merely a different system of government rules within which individuals exercise their discretion—produce the best results?

The answer is (and not because this article appears in a law journal): it depends.

WHEN TO TURN TO ACCOUNTABILITY VIA THE MARKET

In the workaday world of public administration, we heavily use both mixed systems of accountability. Each has been proven to yield good results. In the City of Milwaukee, for instance, city employees assess residential and commercial property values, and their decisions are widely accepted and often highly praised (even though most of us do not enjoy paying the higher taxes that, we imagine, result from higher assessments). In the area of human resources, Milwaukee County employees sign up the poor for Food Stamps and Medicaid; by all accounts, they are dedicated public

servants and do a decent job. But we hire private vendors to do most of our major street reconstruction, and their work is also highly regarded and complimented. In the Medicaid context, although government employees sign up the poor for this program, what the poor enroll in is a private, for-profit health maintenance organization (“HMO”). Each HMO in turn delivers health care through private doctors and private hospitals. Hardly anyone wants to require Medicaid participants to obtain their health care at government-owned and -operated hospitals and clinics, staffed 100% by government employees, however much HMOs are criticized.

In many areas, we take both approaches. City of Milwaukee employees develop some of the information systems we put in place, and we hire outside contractors to do the rest. In the human services area, the State of Wisconsin delivers primary and secondary education through both public school systems and voucher-funded private schools. Has providing services directly via government proven more cost-effective or less cost-effective than using outside vendors? As I noted before, it depends.

I have difficulty developing a formal theory that consistently explains the circumstances in which direct administration with its mixed system of accountability works better, or worse, than privatization with its mixed system of accountability. But over thirteen years of helping to establish or finance a range of programs that serve the poor and the communities they live in—ranging from the core municipal services of the City of Milwaukee (i.e., police, fire, emergency medical services, public health, water, sewer, and roads), to the work-based anti-poverty and health care programs of the State of Wisconsin (i.e., Wisconsin Works and BadgerCare, respectively the state’s welfare replacement program and health insurance program for low-income working families), to urban school reform (i.e., reform of Milwaukee’s public schools and the creation of public school choice, charter school options, and private school choice)—I have developed what might best be called a hunch about what system of accountability works best when.

THE ADMINISTRATIVE MODEL

My hunch is that the administrative model works best and yields a higher level of accountability when: (1) the task to be performed is simple, (2) the main object of the task is either a thing or a narrow dimension of a person, (3) the public accepts the effectiveness of a given technique in accomplishing the task, and (4) repetition

of this technique can be accomplished by a wide variety of individuals. Delivering potable water, sweeping streets, picking up garbage, and vaccinating children—all municipal functions that I have become familiar with in my work—each meet these four tests. Each task is relatively simple. Each task focuses on a single thing (water, the street system, garbage) or a narrow dimension of a person (an unvaccinated child's arm). The public strongly supports the concepts of piping treated water to homes, sweeping the litter and dirt off streets, picking up garbage, and inoculating children against polio, measles, and other crippling diseases. Finally, repetition gets the job done—good water is piped every minute to everyone's home, streets are swept on a regular cycle, garbage is picked up on a predictable schedule, and the process of immunizing one kid is the same as immunizing 20,000. It is no wonder that, on the whole, government does a good job through traditional administrative systems of using its own employees to run the water works, staff the sanitation department, and carry out certain public health functions like child immunization. One can conclude, as we have done in Milwaukee, that city government should not immunize children because Medicaid and employer-sponsored health plans separately fund immunizations and private doctors are willing to do it. But as to the question of whether city government has the capacity to carry out an efficient mass childhood immunization program, there is little dispute.

THE MARKET MODEL

In contrast, the market model seems to work best and yield a higher level of accountability, when: (1) the task to be performed is complex, (2) the main object of the task is a "complete" person, in all of her or his dimensions, (3) the public does not agree on the effectiveness of a given technique in accomplishing the task, and (4) whatever technique may work for some service providers, a different technique is more effective for other providers, and yet a different approach for others, so that repetition of a single technique is not an effective strategy. These criteria apply to almost the entire spectrum of human service activities: job training and placement, health care and mental health care, alcohol and drug abuse treatment, and education.

And not surprisingly, we do privatize to a high degree in all these areas but one. (The one area in which little privatization occurs, primary and secondary education, is the one around which the nation's most vociferous privatization debate now swirls. More on

this later.) In Milwaukee, all government-financed training and placement programs; most health, mental health, alcohol and drug abuse programs; and a significant part of higher education are not delivered by government employees but by private firms. Milwaukee's experience in these areas is not unique. From what I have seen of the delivery of these services throughout the U.S., government uses its own employees far less to deliver services than it contracts with private vendors to do so.

The great exception to the criteria for privatization spelled out above, of course, is K-12 education. Few tasks are as difficult to perform as the education of young children. To educate a child well, teachers must take the whole child into account—the child's physical maturation, psychological development, emotional growth, and moral evolution. There is widespread disagreement among the public—indeed, among educational professionals—as to which educational techniques (e.g., phonics versus whole language, direct instruction versus Montessori, etc.) are most effective. The one thing agreed upon is that, as children are so different, no single technique will succeed with all, nor will every technique be one that every teacher can master. Yet the U.S. government's approach to K-12 education since the triumph of the "Common School" in the 1840s has been to deliver the service through government employees, housed in government buildings, and generally using the same teaching method. The only large-scale exception to the exception has emerged in Milwaukee.

Since the mid-1980s, Milwaukee has served as the nation's experiment in the simultaneous and overlapping use, in K-12 education, of both mixed systems of accountability.⁴ I have had the privilege to observe and participate in the launching of this experiment. Most of the city's approximately 130,000 K-12 students attend traditional public schools—schools administered directly by the local Milwaukee Public School ("MPS") Board, but also under the influence of the significant operational discretion conferred on principals and teachers. As the result of the 1999 election of a reform-minded school board majority, which I actively participated in helping to elect, even more authority has been delegated to indi-

4. Milwaukee is frequently called "ground zero" in the debate about school choice. E.g., Alan J. Borsuk, *Eyes on Milwaukee for School Choice*, MILWAUKEE J. SENTINEL, Aug. 21, 2000, at 1A (listing the numerous reasons why Milwaukee is "ground zero" for school choice issues).

vidual schools, their principals, and their teachers.⁵ Under the public school umbrella, Milwaukee students enjoy a high degree of what is often called “public school choice.” They can attend MPS neighborhood schools, or MPS specialty schools (with specialties ranging from Spanish, German, or French immersion to “gifted and talented” programs, the arts, Montessori, Waldorf, technical, and many more). They also can opt to attend suburban public schools, and more than 2000 have done so. But unlike any other American city, Milwaukee also has partially privatized its education system, allowing more than 10,000 students at public expense to attend private schools that are accountable for meeting different types of standards.

Milwaukee actually has three distinct K-12 privatization programs. The first, MPS’ own charter school program, allows city students to attend private schools that have been granted a charter by MPS. The second is a charter school program that permits three local non-MPS but public authorities—the Common Council of the City of Milwaukee (“City”), the University of the Wisconsin-Milwaukee (“UWM”), and the Milwaukee Area Technical College (“MATC”)—to grant charters to non-sectarian and nonprofit or, in the case of UWM or MATC, either nonprofit or for-profit schools.⁶ The City has approved four charter schools, and UWM has approved two.⁷ The third and most well-known K-12 privatization program is the Milwaukee Parental Choice Program (“MPCP”) that allows up to 15,000 students from families below 175% of the poverty-line to attend private, nonprofit, and either non-sectarian or religious schools.⁸

Fierce political debate and repeated legal challenges have engulfed the MPCP since its inception. Twice, the program’s opponents have filed suits challenging its validity under the Wisconsin and U.S. Constitutions.⁹ Twice, the state’s highest court has de-

5. Reformers lost their majority on the Milwaukee Public School Board in 2001, but at this point it appears that their policy of decentralized “site-based management” at the school level will remain in place.

6. WISC. STAT. § 118.40(2r) (2001). This was enacted in 1997 as part of the biennial budget. 1997 Wis. Laws 27 § 2835.

7. I helped to write the City’s charter school ordinance and staff the Charter School Review Committee that oversees the City’s four charter schools.

8. WISC. STAT. § 119.23 (2001). This was enacted in 1995 as part of the biennial budget. 1995 Wis. Laws 27 §§ 4002-4009.

9. *Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992); *Jackson v. Benson*, 570 N.W. 2d 407, *rev’d* 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 525 U.S. 997 (1998).

clared the program valid.¹⁰ Opponents appealed the Wisconsin Supreme Court's most recent decision to the U.S. Supreme Court, which denied certiorari.¹¹

When viewed in the context of the many government-financed programs providing job training and placement, health care and mental health care, alcohol and drug abuse treatment, and higher education, *all* of which use private sector contractors to deliver services with minimal controversy about their policy of utilizing private vendors, the fierceness of the debate over private school choice is puzzling. Equally surprising, from this perspective, is the specific debate over vouchers. We provide health services to the poor through highly privatized programs (Medicaid, Healthy Start, and the State Children's Health Insurance Program ("SCHIP")) that do not require recipients to obtain health care in government-owned buildings or to be treated by government-hired doctors, but rather allow the poor to choose among the public and private hospitals, and among the public clinics and private doctors, they believe will best care for them. Medicaid, Healthy Start, and SCHIP amount to a health care voucher system. Why, then, do we object to allowing the poor to educate their children in exactly the same manner, i.e., by using public funds to choose the public or private schools they think will do the best job? If the voucher system is acceptable—indeed, preferable—when it comes to providing the poor with health care, why is it anathema for K-12 education?

The information problem is identical: most low-income people know as much about health care and the pros and cons of the specific hospitals and doctors they have to choose from as they do about education and the pros and cons of specific schools and

10. *Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992); *Jackson v. Benson*, 570 N.W. 2d 407, *rev'd* 578 N.W.2d 602 (Wisc. 1998), *cert. denied*, 525 U.S. 997 (1998) (upholding the validity of Wisconsin's school voucher law under the Wisconsin and U.S. Constitutions). I wrote an *amicus curiae* brief submitted in *Jackson* in support of the law's constitutionality on behalf of Howard L. Fuller (former Superintendent of Milwaukee Public Schools), John O. Norquist (Mayor of Milwaukee), Steven M. Foti (then Majority Leader of the Wisconsin Assembly), Alberta Darling (State Senator who chaired the Senate Committee on Education and Financial Institutions, which held hearings on the legislation in dispute), Margaret A. Farrow (State Senator who served as Assistant Majority Leader when the law was passed), Joseph Leean (former State Senator who co-chaired the Joint Committee on Finance when the law was passed), John S. Gardner (At-Large member of the Milwaukee School Board), Warren D. Braun (member of the Milwaukee School Board), Bruce R. Thompson (member of the Milwaukee School Board), and David Lucey (former member of the Milwaukee School Board).

11. *Jackson v. Benson*, 570 N.W. 2d 407, *rev'd* 578 N.W.2d 602 (Wisc. 1998), *cert. denied*, 525 U.S. 997 (1998).

teachers. The expertise problem is also identical: doctors' expertise is as great (some would say greater) than teachers' expertise. If, despite limited information on the part of the poor and the enormous expertise of medical professionals, we nonetheless let the poor pick their hospitals and doctors, why deprive them of the right to pick their schools and teachers? Yet many of the very people who most strongly support Medicaid, Healthy Start, and SCHIP—indeed, who criticize these programs any time they do not provide the poor with enough choices—are among the strongest critics of school choice.

I believe that there are many explanations for this inconsistency. One is legal—the First Amendment issue of whether government is *establishing* a state religion by letting school vouchers go to religious schools. The most significant factor, probably, is economic. Teachers, their unions, and the education bureaucracy—like the interest groups that form any organization that enjoys a monopoly—are loathe to give up their monopoly. But I think that the resistance to school choice also has a lot to do with the issue of cultural control.

Most human service programs raise few questions about who controls the nation's culture—its values—and thus, in large measure, its future. Job training and placement involve no significant cultural issues. Health care involves a few, centering on birth control, abortion, and death, but these issues are narrowly confined to a small percent of the patient population. Mental health care, as well as alcohol and drug abuse treatment, also involve a narrow set of cultural issues. But education raises cultural issues for every child on every school day.

One-sixth of the American population attends K-12 schools. What our children are taught and how they are taught has a profound effect on what kind of nation we become. And there is a great debate about the values taught, endorsed, or condoned in public schools. Some praise the dominant "value set" for its tolerance of diversity, recognition of the wrongs committed by America in the past, and open-mindedness in matters of behavior and ethics. Others criticize the dominant "value set" for what they view as its attack on country and parents, its failure to establish clear lines of right and wrong, and its disparagement of traditional moral values of self-discipline.

The debate over school choice, i.e., whether allowing children to use public dollars to attend their choice of public or private schools will produce honestly-run, well-managed schools that as a result of

competition will do a better job of teaching children reading, writing, and arithmetic, at best plays second fiddle to this cultural debate. Accountability is important. Reasonable people can debate whether the traditional administrative model for education yields greater accountability than the market model, although my hypothesis about which model works best in which areas suggests that the market model is ideally suited to education. But the defining issue in the choice debate is not accountability for outcome, but control over culture. Who will control the values of America's children? Will public funds be restricted to teaching the dominant "value set," or will the rules allow parents to use public funds to impress their own private values on the education of their children? In the end, I believe the decisive school choice battle will be fought on this cultural front.