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Foreword: The Questions and Challenges of the New Landscape in Public Education

Hillel Y. Levin & Jennifer Rippner*
Editors-in-Chief

What is “public” about “public school?” For many, the term “public school” no doubt conjures images of neighborhood schools or variations thereof. Children walk, ride bikes, or are bused to these schools, or their parents or caregivers drop them off. These schools reflect the communities they are in, with diverse communities having diverse schools, and *de facto* segregated communities having *de facto* segregated schools. These are the schools that are prescribed by state constitutions: organized by district, governed by local school boards, and subject to statutes, regulations, and policies developed at the district, state, and federal level. The great body of what we call “education law”—including funding mechanisms, constitutional and statutory guarantees and protections for students and teachers, curricular and testing obligations—is built around this model of public education.

Increasingly, due to what is sometimes called the school choice movement and sometimes the privatization of public education, traditional public schools find themselves operating alongside schools that enjoy freedom from many legislative and regulatory requirements. To be sure, alternative, non-traditional models for public education are nothing new. Magnet schools have existed since at least the 1970s; charter schools began to open in the early 1990s; and in their modern iteration, voucher programs also date to the 1990s. Today, though, there are more—and more *kinds* of—charter schools and voucher programs than ever before, and they are joined by newer mechanisms for sending taxpayer funds to schools operating outside of the traditional public school system: tax credit programs, online schools, statewide school districts, charter school districts, hybrid schools, and tax-advantaged private school savings accounts. Together, these programs serve ever more students. The latest survey from the National Center for Education Statistics shows that as of 2016, about 90 percent of all students in grades 1 through 12 were enrolled

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in public schools. The other 10 percent were in private religious and nonsectarian schools. Of the 90 percent of students attending a public school, 20 percent exercised choice in their school assignment.¹ From these statistics, we can surmise that roughly 30 percent of all U.S. schoolchildren and their families are exercising some type of choice in their schooling venue.

Some of these alternative models for delivering public education have received extensive scholarly treatment; others less so. As a whole, though, researchers and policy leaders rarely assess the impact of divergent models on the provision of public education as a whole. Given that the vast majority of our body of education law developed around the traditional public school model, it behooves us now to reassess that body of law within the context of a more pluralistic and diverse kind of public school. How does it apply? Where are there odd fits? How can the law adapt?

In thinking about these legal questions, it is also critical to consider how these new species of public schools challenge the values of public schooling. What is gained and lost? There have always been, of course, debates and political tension concerning the purpose and mission of publicly-funded education. Is the purpose to create an educated, skilled workforce that will help the statewide and national economy to prosper? Is it to empower students to reach their own autonomous potential? Perhaps it is to create and foster a shared civic identity? David Labaree, an education historian at Stanford University, finds that there has always been tension between three competing goals of American education including “*democratic equality*, which sees education as a mechanism for producing capable citizens . . . *social efficiency*, which sees education as a mechanism for developing productive workers . . . [and] *social mobility*, which sees education as a way for individuals to reinforce or improve their social position.”² These different goals have implications for public schools’ curricula and central legal and policy questions. Still, for the most part, the differences could be elided in the past, or at least put to the side, as public schools were tasked with doing all of these different things—driving economic success, empowering individuals, and creating citizens.

¹ See, National Center for Education Statistics, Table 206.30 (accessed Dec. 11, 2019), https://nces.ed.gov/programs/digest/d17/tables/dt17_206.30.asp (listing percentages of students enrolled in grades 1 through 12 by public school type and charter status, private school type, and selected child and household characteristics: 2016).

² David Labaree, *SOMEONE HAS TO FAIL: THE ZERO-SUM GAME OF PUBLIC SCHOOLING* (2010), at 16.

However, with the privatization of public education, the most basic questions about the purpose of public education cannot be avoided, especially with respect to the goal of creating citizens with a shared social identity. This goal, which was best articulated by the progressive education reformers Dewey and Mann, has always been contentious. In a country that values autonomy and individualism, and one in which states and local districts differ from one another in values and class, articulating shared values is inherently challenging. The rise of alternative models of public education make it even more so. Publicly-funded charter schools and private schools have control over their own curricula, represent the values of their creators and constituents, enjoy autonomy in their governance, and (in the case of private schools) may build a student body according to the mission and identity of the school. Under these conditions, what would it even mean for these schools to be in the business of developing citizens and shared civic identity? We do not mean to suggest that charter schools and private schools that receive public funding are not public-spirited, civic-minded, or capable of inculcating the shared values of American citizenship. But which values—and whose—are they instilling in students?

On top of these *legal* and *value-based* concerns is a question of identity and social cohesion. Traditional public schooling is the only experience shared by the vast majority of Americans. What happens when fewer and fewer Americans share that experience? There is strong evidence that charter schools often develop more homogenous student populations than do their neighboring public schools; and this is certainly true with respect to private schools. Ironically, the increased pluralism in models of public education may contribute to a decrease in the pluralism experienced by students within any individual school. Will this homogenization and cantonization contribute to the larger trend in American politics and society of increased polarization and the diminishment of civic engagement?

To be clear, these are only questions. Though we pose them as challenges and concerns, they are not meant to suggest that new alternatives to traditional public schooling are, on the whole, *bad*. Perhaps these alternatives do a *better* job of creating citizens than do traditional public schools; perhaps they do a worse job, but the tradeoff is nevertheless worth it because of the countervailing benefits they offer.

The authors contributing to this special issue valiantly explore these and other questions in their scholarly articles. Interestingly, the five articles comprising this special issue all focus on aspects of education *governance* reform. This is one of the toughest topics to tackle in a

scholarly way because, as noted above, these issues are fraught with political and value judgments about the role of education in America. We commend the authors for their efforts. Among the five articles chosen for this issue, readers will observe diversity of viewpoint and methodology. This was particularly important to the editors of the ELPR as we may only begin to meaningfully address education governance reform if we are open to understanding and responding to opposing viewpoints. Therefore, we encourage you to review all articles in this issue, even if it may not be something you would normally gravitate towards. Let this be the start of a conversation among our unique population of lawyers, researchers, scholars, and policymakers that draws people in rather than shutting alternative ideologies out.

Furthermore, we hope this issue stimulates education reformers to digest what *is* before they tackle what *could be*. Many times the glittering vision of a new model can appear as a panacea and the messy, complicated constellation of competing values, political compromise, and bureaucratic implementation issues that created the existing system is ignored. Reformers ignore the historical and existing legal and political structure at their peril as we are doomed to repeat “mistakes” without understanding them and the systems that created them. Stated another way, legal literacy is vital for education reformers. As the authors in this issue demonstrate, taking a look back at how we got where we are can help inform where we are going. Further, understanding how existing constitutional provisions, statutes, and regulations interplay at the state and federal levels is important to creating more effective structures.

Careful and thoughtful consideration of the “public” in public schools, legal literacy, and a willingness to move forward with humility and openness are crucial to meaningful debate on education reform. Perhaps then, we will have a chance at impactful and lasting reform that meets public schooling’s myriad goals.

Unbundling School

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Consider cable television. To subscribe to cable in the United States is to pay for either more or less TV than you actually want. Cable companies offer customers a relatively small menu of choices. You can have the basic package, or the standard, or the luxe; in some markets you can get a sports package, or one targeted at kids. Each of these packages offers access to a subset, selected by the cable company, of the universe of channels available. If you want some particular channel, you have to subscribe to a package that contains it. That package likely also contains many channels in which you have no interest. But cable packages are, not only by definition but by design, package deals. Customers must take the bitter with the sweet.¹

Traditional schooling is likewise a package.² A child attends “a” school. That single institution provides instruction across a range of subjects, along with facilities, classmates, discipline, and extracurricular activities. If you would rather do without some of its offerings, you may

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¹ See Jade Brewster, *Cracking the Cable Conundrum: Government Regulation of à la Carte Models in the Cable Industry*, 62 UCLA L. REV. DISCOURSE 20, 23 (2014); Adam D. Rennhoff & Konstantinos Serfes, *The Role of Upstream-Downstream Competition on Bundling Decisions: Should Regulators Force Firms to Unbundle?*, 18 J. ECON. & MGMT. STRATEGY 547, 549 (2009). Many providers also bundle cable, phone, and internet service into a single, indivisible package. See Note, *Enabling Television Competition in A Converged Market*, 126 HARV. L. REV. 2083, 2088, 2093 (2013).

² Bundling and unbundling in the television industry have recently become popular analogies for problems in, and reform of, higher education. See, e.g., Megan M. Carpenter, *Legal Education Unbundled (and Rebundled)*, 50 U. TOLEDO L. REV. 265, 266–67 (2019) (analogizing TV unbundling to the reform of legal education); Mark Garrett Cooper & John Marx, *Why We Love to Hate English Professors*, CHRON. HIGHER EDUC., Nov. 30, 2018, at B4 (describing the “handful of majors ... that one could find at pretty much any postsecondary institution” as “basic cable channels”); Karen Sloane, *Ahead of the Curve: Law School Unbundled*, LAW.COM, March 26, 2019, <https://www.law.com/2019/03/26/ahead-of-the-curve-law-school-unbundled/> (analogizing an executive education program to Netflix, and noting that in comparison “traditional legal education is a lot like a Direct TV package”).

abstain only at the school's grace, and subject to its often constraining rules. If you want some class or activity the school does not offer, you are stuck—unless you live in a jurisdiction with school choice, or have the means to pay for services on the private market. In those latter cases, you can seek out a school that offers a particular educational good. Likewise, a student looking to avoid a particular kind of thing tries to find a school whose program does not require it. Even then, however, the choosing student gets the chosen school's whole program, which likely includes many *other* things that she might have preferred in a different form, or even preferred not to have had at all.

Cable TV need not be provided under a package-deal model. Quite the contrary: cable companies deployed it in response to particular market, economic, business, and regulatory conditions.³ Lately, though, those same forces—markets and regulators—have dragged the industry some considerable distance away from its preferences for bundling.⁴ Customers are less willing than ever to buy what they don't want in order to get what they do want, living as they do in a world where streaming technology makes it possible and practical to pick and choose.⁵ For-pay streaming services are also, of course, bundles of a sort; you can only stream the shows they offer, and each service offers a different set. But one is often able to pay *à la carte*.⁶ Free streaming is entirely unbundled. Overall,

³ See Brewster, *supra* note 1, at 26–27; Keith Brown & Peter J. Alexander, *Bundling in Cable Television: A Pedagogical Note with a Policy Option*, 6 INT'L J. MEDIA MGMT. 162, 163 (2004) (some types of bundling act “as a monopolist's mechanism for extracting surplus from consumers”); Gregory S. Crawford, *The Discriminatory Incentives to Bundle in the Cable Television Industry*, 6 QUANTITATIVE MARKETING ECON. 41, 50–51 (2008); Gregory S. Crawford & Joseph Cullen, *Bundling, Product Choice, and Efficiency: Should Cable Television Networks be Offered à la Carte?*, 19 INFO. ECON. & POL'Y 379, 380 (2007) (“bundling can be used by firms to price discriminate among consumers or to extend market power into related product markets”); U.S. GEN. ACCOUNTING OFFICE, GAO-04-8, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry* i (2003) (“technological, economic, and contractual factors explain the practice of grouping networks into tiers, thereby limiting the flexibility that subscribers have to choose only the networks that they want to receive”); David Waterman, Ryland Sherman, & Sung Wook Ji, *The Economics of Online Television: Industry Development, Aggregation, and “TV Everywhere,”* 37 TELECOMMS. POL'Y 725, 728 (2013) (suggesting that brand development is an important motive for bundling).

⁴ See Brewster, *supra* note 1, at 23–24.

⁵ See Christopher T. Buckley, Note, *À La Carte v. Channel Bundling: The Debate over Video Programming Distribution*, 20 LOY. CONSUMER L. REV. 413, 414 (2008).

⁶ See Brewster, *supra* note 1, at 35–36; Waterman et al., *supra* note 3, at 727 & fig.2 (2013) (noting services that offer disaggregated content on a subscription and advertising business model). Some services, like the Amazon Prime video service, combine a

consumers are much closer to paying only for TV that they want than they have been since cable began to compete with free broadcast television. Schooling also need not work on a bundled model. Students, especially older students, could secure different services from different providers: math from one, literature from another, football coaching from a third.

This kind of “unbundling,” which has long existed at the margins of schooling, is poised to enter the mainstream. Although not as straightforwardly as in the television industry, unbundling will be dramatically facilitated by the infrastructure of information technology. Online education, as its technological sophistication increases, makes it increasingly possible and practical to pick and choose.⁷ As it did for television, this portends drastic changes in the educational marketplace. New kinds of service providers, both governmental and private, will arise. Established players will face new kinds of competition.

It is natural to object that, from the point of view both of law and policy, TV and school are completely different. Television and school are both culturally very important and we, as a nation, spend a lot of time with both. Nevertheless, the state doesn’t care enormously much what kind of TV you watch, or even whether you watch at all. Its regulation of the television market focuses primarily on pricing and access.⁸ In contrast, the state compels children to go to school, and pervasively regulates what they learn and experience there. Government, in closely regulating schools, seeks to advance all sorts of goals.⁹ Schools ensure the continuity

packaged set of free shows for a flat fee plus *à la carte* access to a much wider variety of products. See Michael L. Wayne, *Netflix, Amazon, and Branded Television Content in Subscription Video On-Demand Portals*, 40 MEDIA, CULTURE & SOC. 725, 731 (2018).

⁷ See Heather Staker & Michael B. Horn, *Blended Learning in the K–12 Education Sector*, in 2 BLENDED LEARNING: RESEARCH PERSPECTIVES 287, 294–95 (Anthony G. Picciano, Charles D. Dziuban & Charles R. Graham eds., 2014).

⁸ See Nodir Adilov, *Bundling Information Goods Under Endogenous Quality Choice*, 24 J. MEDIA ECON. 6, 7 (2011).

⁹ See William A. Galston, *The Politics of Polarization: Education Debates in the United States*, in THE PUBLIC SCHOOLS 57, 59 (Susan Fuhrman & Marvin Lazerson eds., 2005) (claiming that there is “agreement at the most general level about the purposes of K–12 education” and listing them as the transmission of “basic knowledge and skills” and preparing children for further education, “social life,” and “democratic citizenship,” and “imparting to students a love of knowledge, learning, and artistic excellence.”); AMY GUTMANN, DEMOCRATIC EDUCATION 49 (1987) (emphasizing the formation of “the moral character of citizens” as a key goal of schooling); TRACY L. STEFFES, SCHOOL, SOCIETY, AND STATE: A NEW EDUCATION TO GOVERN MODERN AMERICA, 1890–1940, at 4–5, 11 (arguing that public schools were the preeminent public institution of social policy in the early twentieth century, and further describing the public school as “an important site of state formation ... where public power and individual rights were

of our political, economic, and social systems. They train the labor force. They prepare children to be effective citizens. They express our civic ideals, and provide a site where we as a polity work out many of our most basic civic conflicts. They are the preeminent institution implementing social policy regarding children. They lay the groundwork for lifelong learning. And, for very large numbers of children and their families, they provide a crucial social community, as well as an academic one.¹⁰

None of that, though, obviates pressure from the consuming public to unbundle. Schools in this respect are very much like cable companies. They might prefer to hold onto the bundled model; they might even have good reasons.¹¹ Nevertheless they will increasingly feel the need to let go of that preference as a sufficient number of consumers recognize that technology makes it possible for them no longer to buy things they don't want.¹² In the case of cable, that pressure was exerted substantially through market signals, as many customers cut the cable cord (or chose not to tie it to begin with). In the case of schools, which are primarily provided by governments, the ratio of regulatory and political pressures to market ones will likely be larger, even much larger. Nonetheless, the school system is likely to feel with increasing urgency the need to serve customers who are looking to cut the metaphorical, educational cord.

Families operating in an unbundled educational marketplace are, by definition, engaging in educational “choice.” The essence of unbundling is to facilitate consumer choice among discrete elements, rather than having pre-set packages of services handed to them. But unbundling is a genus of choice different from the classic choice among schools. It casts families, at least potentially, as the *assemblers* of bespoke educational packages for their children, responsive at once to their own particular needs and desires, to what is available in the marketplace, and to the regulatory environment. Such choice has the potential to be more efficient, more broad-based, more diverse, more destructive to a common

negotiated”).

¹⁰ See PETER BLATCHFORD, ANTHONY D. PELLEGRINI, & ED BAINES, *THE CHILD AT SCHOOL: INTERACTIONS WITH PEERS AND TEACHERS* 18 (2d ed. 2016) (“[S]chool is where children in the industrialized world learn to interact and form relationships with others.”); Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495, 519, 526 (2010).

¹¹ See *supra* note 3 and accompanying text.

¹² See Michael A. Salinger, *A Graphical Analysis of Bundling*, 68 J. BUS. 85, 86 (1995) (bundling “is only practical if there is some way to prevent people from buying both components separately”).

civic culture, and more transformative of the education sector than school choice as currently understood.¹³

For the state, the question will be how best to adapt law and regulation to the unbundled context while preserving its policy and regulatory goals with respect to schooling—and, it is to be hoped, while still realizing some of the welfare improvements that unbundling offers. The purpose of this brief, exploratory Essay is to begin to imagine the scope of such a project and some of the directions states might take in enacting it. The Essay argues for two primary propositions. First, state regulation of schools consistently intertwines the regulation of delivery of educational goods and the regulation of their assembly. Unbundling requires regulators to disaggregate these enterprises. Second, unbundling will change the role of existing institutions and give birth to new varieties of players in the schooling marketplace. Regulation needs to account for these changed and new institutions' likely forms, capacities, and incentives.

Dimensions of Educational Bundling and Unbundling

Educational unbundling remains a nascent trend, and one being shaped by technology that is changing very quickly. It is therefore impossible to specify exactly what an unbundled educational system might look like or how it might operate. But some critical, if preliminary, observations are possible.

¹³ Considered from the perspective of consumers, the straightforward economic intuition is that bundling will increase the distributive efficiency of the market for education. The argument tracks that for traditional school choice. Allowing parents to choose schools increases the total consumer utility in the system, restoring to consumers the surplus otherwise lost to monopolist, government providers. See Julian R. Betts, *The Economic Theory of School Choice*, in GETTING CHOICE RIGHT: ENSURING EQUITY AND EFFICIENCY IN EDUCATION POLICY 14, 16–22 (Julian R. Betts & Tom Loveless eds., 2005). Likewise, unbundled assembly would improve upon traditional choice at the school level, by restoring to consumers the surplus otherwise lost to the school-level bundler when the consumer pays for educational components (even at her optimal school) that she does not want. Put differently, bundling makes practical the creation of many more assemblages of educational goods (“schools”) than traditional school choice. Bundling thus more closely approaches the welfare effects of perfect competition than ordinary school choice. At the same time, however, under some circumstances bundling permits the production of more, more diverse, and higher quality goods than those that would be produced in a fully unbundled marketplace. See generally Brown & Alexander, *supra* note 3. The net effects of bundling on efficiency therefore require empirical inquiry. They are unknowable at a moment when unbundling is only beginning to penetrate the education sector. See *id.*

One might productively distinguish between a *bundle*—a group of items which must be consumed (or at least purchased) together—and a *menu*, a set of items from which a consumer may choose. Like bundles, menus restrict choice; most things are, so to speak, not on the menu. And the restrictions imposed by a menu, like those of a bundle, are decided by suppliers, rather than customers—although in both cases consumer demand is a factor in suppliers’ decisions. But menus are decidedly more friendly to demand-side preferences than bundles. If a menu item has no takers, it will not be purchased or consumed. In the educational context, when a set of goods is unbundled, it is often transformed into a menu. The unbundling trend I describe moves schooling away from bundles and towards menus.

Today, primary and secondary schools remain more bundle than menu. Indeed, schools are ubiquitous bundlers. Schools determine that certain courses or subjects will be taken together, and that other subjects will be taught in a particular sequence.¹⁴ Schools choose teachers from a universe of teachers available, but generally tell students which subset of teachers they will get. Likewise, schools select curricula from a wide variety of those available, or create their own—and again impose their selections upon students. And schools make the plethora of educational decisions involved in combining such elements, everything from scheduling to the availability of materials. These are bundling decisions.

Individual teachers also ubiquitously bundle. They develop their lessons by relying on a variety of materials available to them. On any given day and at any given lesson, a teacher deploys some of his knowledge, experiences, and techniques, but not others.¹⁵

Schools also set some menus. Middle and high schools have elective classes and permit students to choose among them.¹⁶ The school

¹⁴ See WILLIAM J. REESE, *THE ORIGINS OF THE AMERICAN HIGH SCHOOL* 105 (1995) (“The earliest high school advocates had championed a sequenced, textbook-oriented course of study.”); ARTHUR G. POWELL, ELEANOR FARRAR, & DAVID K. COHEN, *THE SHOPPING MALL HIGH SCHOOL: WINNERS AND LOSERS IN THE EDUCATIONAL MARKETPLACE* (1985) (referring to such bundling as the “vertical curriculum”).

¹⁵ See D. Jean Clandinin & F. Michael Connelly, *Teacher as Curriculum Maker*, in *HANDBOOK OF RESEARCH ON CURRICULUM* 363, 385ff. (Philip W. Jackson ed., 1992).

¹⁶ POWELL, FARRAR, & COHEN, *supra* note 14, at 12–13 (describing “shopping-mall,” “consumption oriented” middle and high schools where “the wish to maximize variety is clear”). The contemporary period has seen substantial variability in the views of education policymakers regarding how to balance sequential, vertical curricula in required subjects with menus of elective offerings. See RICHARD NEUMANN, *SIXTIES LEGACY: A HISTORY OF THE PUBLIC ALTERNATIVE SCHOOLS MOVEMENT, 1967–2001*, at 197 (2003); Richard Elmore & Gary Sykes, *Curriculum Policy*, in *HANDBOOK OF*

extracurriculum is menu, not bundle.¹⁷ Tracking is sometimes a form of educational menu to the extent that children and their families control their placement.¹⁸ Even then, however, once a track is chosen it operates as a bundle of educational experiences that students must consume as a set.

Looking upward from the school, educational authorities at the district and state levels do several things that clearly constitute menu setting. For example, they stock school libraries.¹⁹ State chartering authorities also create a menu when they permit, facilitate, or fund some charter schools but not others.²⁰

More generally, the ways in which district and state level educational governments group schools together creates both bundles and menus. The chartering of charter schools is menu-creation in its purest form. Policies that define sets of schools as portfolios among which parents may choose, such as intra-district school choice, are also menus.²¹ Sometimes such menus are created by recasting existing bundles as portfolios of choice.²²

Other groupings of schools, especially at the district level, are not menus but bundles. The traditional school district practice of maintaining separate elementary, middle, and high schools creates a bundle of schools through which students are expected to pass sequentially. In larger districts, which have multiple elementary, middle, and high schools, the

RESEARCH ON CURRICULUM, *supra* note 15, at 185, 202.

¹⁷ See Laura Berk, *The Extracurriculum*, in HANDBOOK OF RESEARCH ON CURRICULUM, *supra* note 15, at 1002, 1002. (“[P]articipation is voluntary rather than required, leading the extracurricular program to be a domain of schooling that is especially responsive to individual differences in student interests and abilities”).

¹⁸ Choices among tracks preceded discrete course electives in American secondary schooling. See DIANE RAVITCH, *LEFT BACK: A CENTURY OF FAILED SCHOOL REFORMS* 55 (2000).

¹⁹ See Bd. of Educ., *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 862, 870 (1982) (“library books ... by their nature are optional rather than required reading”) (emphasis omitted).

²⁰ See Stephen D. Sugarman & Emlei M. Kuboyama, *Approving Charter Schools: The Gate-Keeper Function*, 53 ADMIN. L. REV. 869, 893–95 (2001).

²¹ See Atila Abdulkadiroğlu, Parag A. Pathak, & Alvin E. Roth, *The New York City High School Match*, 95 AMER. ECON. REV. 364, 364–65 (2005) (citywide high school choice in New York City); Dana Goldstein, *In San Francisco, A Hard Lesson on Integration*, N.Y. TIMES, Apr. 26, 2019, at A1 (discussing implementation of district-wide choice in San Francisco); Kevin Hesla, *Unified Enrollment: Lessons Learned from Across the Country* 2 (Nat’l Alliance for Public Charter Schools 2018) (describing six cities that offer parents “unified enrollment system[s]” that “have a common website, a common application, and a common deadline for all public school options within the system”).

²² See sources cited *supra* note 21.

practice of distributing students among these schools using attendance zones or some other non-choice-based admissions policy is bundling.²³

Perhaps most importantly, every state maintains a system of school districts. The set of districts is a menu, but each individual district is a bundle. A school district is chosen by families, albeit most often through the operation of the peculiar American institution, mediating choice of school by choice of residence.²⁴ Although many families do not experience the set of school districts as a menu, it is one. The chosen district, however, is in most cases a bundle, unless it permits itself to function as a menu.

There are also cases that resist categorization. Whether textbooks²⁵ are more bundle or more menu depends upon the regime in which they are produced and used. Textbook authors clearly choose what to put in and what to leave out.²⁶ But if jurisdictions permit teachers to choose which parts of textbooks to assign, omit, and emphasize, then teachers create bundles from the menus that textbook authors define.²⁷ If jurisdictions require teachers to follow the textbook with minimal deviation, however, then the books are themselves bundles.²⁸

Some textbooks and other learning materials are designed explicitly as “modular,” anticipating teacher and student choice within the menu they set out.²⁹ In other cases, even when teachers are formally permitted discretion regarding whether to use or omit sections of books, rules regarding what teachers must cover interact with given textbooks to render

²³ See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 8 (1971) (describing the manipulation of attendance zones based upon residence to achieve racial balance in student populations).

²⁴ See Saiger, *supra* note 10, at 500. Cf. *Freeman v. Pitts*, 503 U.S. 467, 495 (1992) (“Residential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies”).

²⁵ “Textbooks” in this context include all sorts of commercial and noncommercial instructional materials, on paper and online.

²⁶ See, e.g., *Smith v. Bd. of Sch. Comm’rs of Mobile Cty.*, 827 F.2d 684, 693 (11th Cir. 1987) (noting that history textbooks perforce involve the “omission of certain historical facts”); Jay D. Wexler, *Darwin, Design, and Disestablishment: Teaching the Evolution Controversy in Public Schools*, 56 VAND. L. REV. 751, 752 (2003) (collecting cases and legislation involving textbooks’ presentation of evolutionary and theistic approaches to the origin of human beings).

²⁷ See Krishna Kumar, *Textbooks and Educational Culture*, 21 ECON. & POL. WKLY. 1309, 1309, 1311 (1986).

²⁸ See *id.*

²⁹ See Barbara Goldschmid & Marcel L. Goldschmid, *Modular Instruction in Higher Education: A Review*, 2 HIGHER EDUC. 15, 16 (1973).

teacher choice largely illusory.³⁰ This is mitigated in states that set limited menus of textbooks from which schools and teachers can choose.³¹ Again, however, such menus may ultimately offer minimal substantive choice.³² At the same time, regardless of formal policy concerning textbooks, all teachers enjoy some level of residual discretion when using textbooks; some bundling decisions are theirs alone.³³

Bundling, menu-setting, and unbundling, in short, are all ubiquitous at every level of schooling. Nevertheless, bundling at the level of the individual school is a uniquely important phenomenon. A school bundle defines the educational experience of any given student at any given time.

All the other aggregative and disaggregative activity in the educational system is secondary to the assignment of a student to a school. The bundle that is a school is, in our system, the primary, discrete unit of educational provision. We (often) give schools proper names.³⁴ Nosy grandparents or new neighbors ask kids where they go to school, whether they like a new school, when they might change schools. The school is

³⁰ See Nicholas C. Polos, *Textbooks: What's Wrong with Them?*, 38 CLEARING HOUSE: J. EDUC. STRATEGIES, ISSUES AND IDEAS 451, 451 (1964) (“For many years ... [t]he textbook was ‘king,’ and, with its tyrannical narrowness, was too often the procrustean grave of learning.”).

³¹ See M. David Bieber, Comment, *Textbook Adoption Laws, Precensorship, and the First Amendment: The Case Against Statewide Selection of Classroom Materials*, 17 J. MARSHALL L. REV. 167, 168 & nn.9–10 (1984) (cataloguing rules for textbook adoption by state); Rebecca Tanglen, Comment, *Local Decisions, National Impact: Why the Public School Textbook Selection Process Should Be Viewpoint Neutral*, 78 U. COLO. L. REV. 1017, 1019–20 (2007). Even if textbook choice is formally available, moreover, school budgets often have no room for new book purchases.

³² See, e.g., Stephen P. Ruis, *Something's Wrong with Chemistry Textbooks*, 65 J. CHEMICAL EDUC. 720, 721 (1988) (“narrowness” in curricular preferences results in there being “little if any difference between textbooks for a given course”).

³³ See *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971) (“[T]eachers have a substantially different ideological character from books [and] in terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not”).

³⁴ See, e.g., SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 24 (2018); Derek H. Alderman, *School Names as Cultural Arenas: The Naming of US Public Schools after Martin Luther King, Jr.*, 23 URB. GEOGRAPHY 60, 605–06 (2002); Peter W. Moran, *What's in a Name: Issues of Race, Gender, Culture, and Power in the Naming of Public School Buildings in Kansas City, Missouri, 1940–1995*, 35 PLANNING AND CHANGING 129 (2004). Cf. Joseph Blocher, *School Naming Rights and the First Amendment's Perfect Storm*, 96 GEO. L.J. 1, 7–9 (2007) (cataloguing instances of the sale of naming rights to facilities within public schools, especially athletic facilities, to private parties).

the child's most important social world.³⁵ It is for this reason that the primary arena for school choice is choice among schools. Approaches to unbundling that undermine the school as the central bundled unit of educational provision, and instead permit the assembly of educational components from menus, therefore deserve particular attention.

Bundling, unbundling, and the setting of menus also look very different depending on the developmental stage of pupils, the subject matter at issue, and various species of communities. The age of students is obviously quite important. Middle and high schools where students move from course to course are more straightforwardly unbundled than primary school classrooms whose single teacher who moves seamlessly from subject to subject. Children with the ability to engage in self-direction and to move from task to task independently or with minimal supervision—generally older children—can consume unbundled education more easily than those who cannot. Students whose learning emphasizes informal education through play, social interaction, and similar modalities are less easy subjects for unbundling than those whose instruction is formal and discrete. This group primarily consists of younger children, but also includes many special education students. The special education sector's focus upon the mainstreaming of students, which is demanded by the Individuals with Disabilities Education Act,³⁶ poses particular challenges to unbundling, because unbundling challenges the premise that there exists a primary “stream” into which special education students can and should be integrated.

The feasibility of unbundling also depends on the content being taught. Under current and immediately foreseeable technological conditions, where one imagines that the market for unbundled services will be substantially online, unbundling appears likely to be much more straightforward for some curricular areas than others. At least until virtual reality technology matures, subjects where instruction is accomplished almost exclusively through seeing, hearing, talking, and writing will adapt to an unbundled marketplace much more readily than those that require hands-on activities, in-person interaction, or substantial capital expenditure. The former can aggregate students regardless of residence, and the students can do a substantial part of their work asynchronously. The latter require students to be in the same place at the same time and therefore to live near one another.

³⁵ See sources cited *supra* note 10.

³⁶ 20 U.S.C. § 1412(a)(5) (2012).

In the first category are mathematics, literature, and history. In the second are the arts (visual, musical, and dramatic). Laboratory sciences are also in the second category to the extent that they are in fact taught using hands-on exercises, in labs with special equipment; such practices in many schools are more aspirational than real, however. Team sports also belong in this second category. Physical education, however, has been very successful as an unbundled, online academic offering as exercise can be a solitary pursuit and does not necessarily require specialized equipment.³⁷ Unbundling also applies more easily to the extracurriculum and the academic curriculum than to the social services that today's schools provide, and to moral and ethical education that is conveyed more by example and atmosphere than by direct instruction. This issue will be developed *infra*.

Population density is also a critical feature that shapes the nature of unbundling. The denser the immediate area, the more choice a marketplace can generate. Density makes it possible for a market to develop with respect to educational activities that require colocation, synchronicity, and physical capital; and it enriches the market for all activities by allowing variations that include these features. Geographic density, however, is relevant only insofar as the services in question are live. For online menus, density becomes irrelevant, except to the extent that areas with cheap and ubiquitous broadband can unbundle more easily than those that lack these features.

Legislation and Litigation Regarding Bundling and Unbundling

The unbundling of school is not unknown to American law. The concept has cropped up over time in various ways. In the case reports and the statute books, the clearest cases are those involving families that seek to opt in to, or opt out of, portions of a full public school program. A child who is home schooled or attends a private school might seek to participate in some part of the public school's curriculum, or its extracurricular activities. These are opt-in requests. Conversely, public-school parents sometimes seek to withdraw their children from portions of school programs without withdrawing them entirely from school. These are opt-out requests. Public authorities often resist both kinds of requests, on the grounds that public school is a package deal, not a cafeteria where one

³⁷ Sarah Gonzalez, *How Students Take Physical Education Online*, STATEIMPACT FLORIDA (Aug. 28, 2012, 1:07 PM), <http://stateimpact.npr.org/florida/2012/08/28/how-students-take-physical-education-online>.

may pick and choose. When officials make such arguments, they are claiming that public school is a bundle, not a menu.

These disputes have generated not only case law and state legislation but also a secondary literature that is both positive and normative.³⁸ I will not recapitulate that literature here. The upshot of the positive research is that courts are quite unfriendly to selective enrollment, often taking the view that that public school is an all-or-nothing proposition.³⁹ Legislatures and educational regulators have been substantially less negative.⁴⁰ Regardless, for my purposes here what is important is the arguments of the parties and the different ways those arguments frame unbundling.

Recall some paradigmatic opt-in situations. Children who wish to pursue the bulk of their education at home, or at least outside of the public schools, nevertheless seek to participate in components of the local public school's curriculum or extracurriculum. They do so usually because these endeavors require specialized equipment, specialized pedagogical

³⁸ See, e.g., Joshua Roberts, *Dispelling the Rational Basis for Homeschooler Exclusion from High School Interscholastic Athletics*, 38 J.L. & EDUC. 195 (2009); John T. Plecnik, *Equal Access to Public Education: An Examination of the State Constitutional & Statutory Rights of Nonpublic Students to Participate in Public School Programs on A Part-Time Basis in North Carolina & Across the Nation*, 13 TEX. J. C.L. & C.R. 1, 3 (2007) (focusing on North Carolina law); William Grob, *Access Denied: Prohibiting Homeschooled Students from Participating in Public-School Athletics and Activities*, 16 GA. ST. U. L. REV. 823 (2000); Jeff Prather, *Part-Time Public School Attendance and the Freedom of Religion: Yoder's Impact Upon Swanson*, 29 J.L. & EDUC. 553 (2000); David W. Fuller, *Public School Access: The Constitutional Right of Home-Schoolers to "Opt In" to Public Education on a Part-Time Basis*, 82 MINN. L. REV. 1599 (1998); Eugene C. Bjorklun, *Home Schooled Students: Access to Public School Extracurricular Activities*, 109 EDUC. L. REP. 1 (1996); Lisa M. Lukasik, Comment, *The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools*, 74 N.C. L. REV. 1913 (1996).

³⁹ See Kevin Rogers & Richard Fossey, *Same-Sex Marriage and the Public School Curriculum: Can Parents Opt Their Children out of Curriculum Discussions about Sexual Orientation and Same-Sex Marriage?*, BYU EDUC. & L.J. 423, 425–37 (2011) (reviewing caselaw across subjects that have stimulated opt-out requests).

⁴⁰ See *id.* at 438–59; Matthew Lashof-Sullivan, *Sex Education in Schools*, 16 GEO. J. GENDER & L. 263, 266 (2015) (nearly all states permit parents to withdraw students from sex education in public schools); Christina Sim Keddle, *Homeschoolers and Public School Facilities: Proposals for Providing Fairer Access*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 603, 617–19 & nn.72–97 (2007) (cataloguing state statutes, which “ru[n] the gamut from merely allowing homeschooler participation in interscholastic sports, to mandating access to classes, school facilities, and extracurricular and interscholastic activities”).

expertise, and/or a large group of participants.⁴¹ Families' arguments that public schools must accede to such requests are straightforward. They begin with their uncontested legal right to enjoy the entirety of a public school program. Therefore, they argue, they are surely entitled to avail themselves of *only some* of the public school curriculum. This argument seems uncontroversial when translated to other public services.⁴² In a jurisdiction that provides public garbage pickup, a resident who withholds some of her garbage for a backyard compost heap does not lose the right to have the city pick up the rest.⁴³ Public parks are open to all, including patrons of private gymnasias or health clubs—even though one might engage in identical activities in the private gym as in the public park.⁴⁴

In the case of education services, the argument, in some respects, is especially compelling. Families that seek opt-out remind us that the choice to forgo public schooling in favor of private instruction is a constitutional right, one that reflects the nation's "fundamental theory of liberty" that "excludes any general power of the state to standardize its children."⁴⁵ Homeschooling in particular is a choice that most states protect by statute.⁴⁶ To deny students access to services to which they would otherwise be entitled on account of a choice that is legally and constitutionally protected is not only perverse but, in the latter case, an unconstitutional condition.

Families seeking to opt in also have strong policy arguments. They pay their taxes and their children are residents like any other. States,

⁴¹ See, e.g., *Bradstreet v. Sobol*, 225 A.D.2d 175 (N.Y. App. Div. 1996) (home-schooled student seeks to participate in interscholastic sports; school rejects eligibility; court affirms). The case in this and the subsequent note are collected and analyzed in Ralph D. Mawdsley, *Parental Rights and Home Schooling: Current Home School Litigation*, 135 WEST EDUC. REPT. 313, 317–19 (1999).

⁴² See Clayton P. Gillette, *Opting Out of Public Provision*, 73 DENV. U.L. REV. 1185, 1214–15 (1996) (private purchase of additional quanta of services provided at a baseline level by government is compatible with legal requirements that government provide equal services to all).

⁴³ Cf. Alexandra I. Evans & Robin M. Nagele, *A Lot to Digest: Advancing Food Waste Policy in the United States*, 58 NAT. RESOURCES J. 177, 194 (2018) (noting policy in some jurisdictions of subsidizing residents who engage in private composting).

⁴⁴ See Gillette, *supra* note 42, at 1995, 1209–10. Cf. Lauren C. Abercrombie, et al., *Income and Racial Disparities in Access to Public Parks and Private Recreation Facilities*, 34 AM. J. PREVENTIVE MED. 9, 10 (2008) (distinguishing between "access to free-for-use facilities, such as public parks," and "pay-for-use facilities such as health clubs and dance studios").

⁴⁵ *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

⁴⁶ See Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CAL. L. REV. 123, 124 (2008).

moreover, offer free public schooling to all children for many reasons: to ensure an educated populace, to train good citizens, to be confident that future voters will competently exercise their right to vote and future jurors their duty to serve, to promote equity, fairness, and diversity.⁴⁷ All of these goals are furthered when more children participate in some fashion in public school programs, and are compromised by a policy that entirely excludes children willing to participate in part.

While families seek to opt in to public schools for all sorts of reasons, families who want to withdraw their children piecemeal from the public school program are less varied. Requests to opt out are typically motivated by religious objections to sex education, to teaching about evolution, and to curriculum regarding sexual preference, gender identity, and nontraditional family structures.⁴⁸ The more overt religious cast of exemption requests has resulted in somewhat different, and less friendly, judicial treatment than opt-in cases.

Conceptually, however, opt-in and opt-out cases pose the same problem. They differ only in the magnitude of the fraction of the public school program that parents seek for their children. For this reason, the arguments of opt-out families very closely track those of families who wish to opt in. Why should a family's constitutional right to public education for their children be subject to their waiver of their constitutional right to withdraw from education that standardizes their children? And doesn't a no opt-out policy seek unconstitutionally to "standardize" children? Furthermore, why would the government want to force objectors from public school altogether, depriving them and society of the many benefits that come with participation in public schools that is as wide and diverse as possible?

Opponents of both opt-in and opt-out are committed to the view that public school programs are unseverable. Although treating schools as bundles will lead some families to opt out entirely, it will leave others, and perhaps many more, who choose to accept the whole of the package offered. This advances whatever policy motivated the creation of the

⁴⁷ See *supra* note 9 and accompanying text.

⁴⁸ See, e.g., *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008) (parents sue for right to prior notice and opportunity to withdraw their children from public-school lessons involving "books that portray diverse families, including families in which both parents are of the same gender" until the seventh grade; court denies relief); *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003) (parents seek to exempt child from "family life education program"); Mary-Michelle Upson Hirschhoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Objectionable Instruction?*, 50 S. CAL. L. REV. 871, 873–74 & nn.3–7 (1977) (collecting incidents from the mid-1970s).

package in the first instance. Selective enrollment and disenrollment also undermines schools' efforts to create coherent instructional programs and learning communities that have disciplinary, pedagogic, and democratic coherence. Students opting in and out make it impossible to develop and enforce school rules fairly and easily. They undermine the desirable interrelatedness and interdependence of curriculum. And civically, public schools are meant to be educational *communities*, little democracies that teach children by example and through participation what it means to live in community.⁴⁹ This has been a basic tenet of the hegemonic, Deweyian Progressivism of American education for many decades.⁵⁰ But communities are the opposite of cafeterias. To be in community *means* to accept compromises and package deals.

These objections are simultaneously logistical and ideological. Consider, for example, the way a home-schooler's request to opt-in to the varsity football squad might interact with a school policy requiring athletes to maintain some minimum academic average.⁵¹ Or consider how both opting in and opting out might interfere with efforts to teach children relationships between mathematics and the sciences through course sequencing and coordinated instruction.⁵² These are quite practical problems.

But they are not exclusively practical. Granting such requests disrupts the nature of the community within the public school in its educational, civic, and social dimensions. If one finds a way to accommodate the home schooled athlete on a public school football team, that player will be subject to different rules than his teammates who are enrolled in the full curricular and co-curricular program of the public school. How would such students react, and how would they be entitled to react, to such disparities? To what extent is the opting-in student *part* of the team?

Likewise, physics classes designed to interlock with a parallel math class would need to change in practical ways if some students could enroll in one without the other. But such changes would also signal a change in the community of learners that the developers of an interlocking STEM program might have sought to create. *A fortiori*, opting out of

⁴⁹ Cf. Gillette, *supra* note 42, at 1213–16 (elaborating this argument with respect to public goods generally, including but not limited to schooling).

⁵⁰ See Saiger, *supra* note 10, at 522.

⁵¹ See Roberts, *supra* note 38, at 198–199.

⁵² See, e.g., Douglas B. Larkin, *Putting Physics First: Three Case Studies of High School Science Department and Course Sequence Reorganization*, 116 SCH. SCI. & MATHEMATICS 225, 232–33 (2016).

controversial pedagogy, especially with respect to sex and to diversity on any number of dimensions, could very substantially undermine community-building efforts designed for a school community whose membership is full-time and stable.

Unbundling is Pervasive

These arguments, on both sides of the selective enrollment debate, appear in an entirely different light when one leaves the frame of “school.” Once one considers the informal education sector, educational unbundling reveals itself to be everywhere. In its ubiquity, it is largely uncontroversial.

Public-school parents unbundle every time they supplement their child’s schooling with after-school “lessons” in things like karate, ballet, or piano. It seems entirely normal, in middle- and upper-class communities, to buy these services on private markets and consume them during non-school time.⁵³ Such behavior might be seen as a symptom or even a cause of systematic social and economic inequity in society, but as a matter of day-to-day practice it raises few objections.⁵⁴ Parents unbundle services like these, moreover, notwithstanding that physical education and fine arts are part of the academic program of many schools.⁵⁵ The level and intensity of such programs are insufficient to meet many families’ desires. Therefore, such families supplement, even as they continue to get most of their educational services from their school.

⁵³ See Douglas Kleiber & Gwynn M. Powell, *Historical Change in Leisure Activities During After-School Hours*, in ORGANIZED ACTIVITIES AS CONTEXTS OF DEVELOPMENT: EXTRACURRICULAR ACTIVITIES, AFTER-SCHOOL AND COMMUNITY PROGRAMS 23, 36 (Joseph L. Mahoney, Reed W. Larson, & Jacquelynne S. Eccles eds., 2005).

⁵⁴ In order to mitigate this problem, many advocate for public agencies other than schools to fund after-school programming for youth. Karen Pittman, Joel Tolman, & Nicole Yohalem, *Developing a Comprehensive Agenda for Out-of-School Hours: Lessons and Challenges Across Cities*, in ORGANIZED ACTIVITIES AS CONTEXTS OF DEVELOPMENT, *supra* note 53, at 375, 377. This is a public form of unbundling.

⁵⁵ See National Endowment for the Arts, *A Decade of Arts Engagement: Findings from the Survey of Public Participation in the Arts, 2002–2012*, at 64 (2015) (reporting that, with the exception of dance, most arts instruction occurs inside of school, but that a substantial amount of arts instruction is informal; however, these data do not differentiate programs for school-aged children and informal arts education that targets adults), <https://www.arts.gov/publications/decade-arts-engagement-findings-survey-public-participation-arts-2002-2012>.

Somewhat more controversy arises with respect to privately obtained enrichment and drill in those academic subjects that our culture views as the core subjects of school curricula. In many places, there is a robust private market for such supplementation, primarily serving middle- and upper-income households but also including not insubstantial numbers of less privileged families. The most pervasive is private preparation services for college entrance exams.⁵⁶ Parallel industries prepare younger students for high-school entrance exams in jurisdictions that use them.⁵⁷ There are also extracurricular academies, modeled upon Japanese and Korean “cram schools” or similar to them, that provide academic supplementation without targeting a particular standardized test.⁵⁸

Providers of these services find customers for the same reason that piano teachers and karate schools do: Although the subjects are taught in school, for some families they are not taught well enough, intensely enough, or in the appropriate fashion. The result is a so-called “shadow education system,” targeted at public school students but independent of public schools and run in parallel to them.⁵⁹

The shadow system finds many critics, who view it as an engine of educational inequality.⁶⁰ These concerns are serious. Only families able and willing to pay can avail themselves of such instruction. But it is impossible to imagine a legal argument to support prohibiting the purchase of such supplementary, unbundled services. The Supreme Court has specifically voided state restrictions on parental efforts to secure

⁵⁶ See Alice Yin, *Asian Test-Prep Centers Offer Parents Exactly What They Want: ‘Results,’* N.Y. TIMES, Oct. 25, 2017, <https://www.nytimes.com/2017/10/25/magazine/asian-test-prep-centers-offer-parents-exactly-what-they-want-results.html>.

⁵⁷ See *id.*

⁵⁸ Jean Park, *From Culturally-Driven to Market-Driven Academic Success: Korean “Cram Schools” in the New York Metropolitan Area*, GOTHAM CENTER FOR NEW YORK CITY HISTORY BLOG (Aug. 6, 2016), <https://www.gothamcenter.org/blog/from-culturally-driven-to-market-driven-academic-success-korean-cram-schools-in-the-new-york-metropolitan-area>; Kyle Spencer, *Centers See New Faces Seeking Test Prep*, N.Y. TIMES, April 2, 2013, <https://cn.nytimes.com/education/20130404/c04cram/en-us/>. On cram schools in Asia, and their distributional effects, see Nancy Ukai Russell, *Lessons from Japanese Cram Schools*, in *THE CHALLENGE OF EASTERN ASIAN EDUCATION: IMPLICATIONS FOR AMERICA* 153, 153–54, 168–70 (William K. Cummings & Philip G. Altbach eds., 1997).

⁵⁹ See Claudia Buchmann, Dennis J. Condrón, & Vincent J. Roscigno, *Shadow Education, American Style: Test Preparation, the SAT and College Enrollment*, 89 SOCIAL FORCES 435, 438–39 (2010).

⁶⁰ See *id.* at 455.

extracurricular instruction for students, holding that the right “to acquire useful knowledge” is a liberty interest protected by substantive due process.⁶¹ Although the state may set a floor for private as well as public education, it may not interfere in parental efforts to supplement above that floor, outside of the school day. This seems to be an obviously correct application of the principle that states may not “standardize” children.⁶² The First Amendment also independently protects the provision of such supplementary schooling.

Unbundling is also institutionalized in pockets of the formal education sector. Higher education, for example, is unbundled to a much greater extent than primary and secondary schooling. The higher-education sector is of course in a category of its own for many important reasons. Although it includes many public schools, colleges and universities serve adults and attendance is voluntary. Therefore, less social expectation and fewer diverse policy goals attach to their activities. But it is important nevertheless to acknowledge that the standard college and graduate school model is an unbundled educational menu, at least regarding academics. The college or university has a provider role, making available a universe of courses. The student, not the school, selects those courses.⁶³ The college or university also fulfills a regulatory role, requiring that all courses take certain forms and that the assembly of courses conform to particular rules.⁶⁴ The government in turn relies upon private accreditors who regulate the schools’ regulations.⁶⁵

Primary and secondary schools themselves have also adopted a more unbundled self-conception. The Individuals with Disabilities Education

⁶¹ Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

⁶² Pierce v. Soc’y of Sisters, 268 U.S. 510, 535 (1925).

⁶³ This ubiquitous practice was catalyzed by Harvard President Charles W. Eliot, who upon assuming the presidency of the College dismantled its standardized, one-size-fits-all undergraduate curriculum in favor of a system of electives. See Hazen C. Carpenter, *Emerson, Eliot, and the Elective System*, 24 NEW ENGLAND Q. 13, 25–26 (1951).

⁶⁴ See Darrell B. Warner & Katie Koeppel, *General Education Requirements: A Comparative Analysis*, 58 J. GENERAL EDUC. 241, 243 (2009). Unbundling has been much less prevalent with respect to the nonacademic functions of colleges and universities, especially in upmarket institutions that also house and care for students. See, e.g., Robert D. Reason & Ellen M. Broido, *Philosophies and Values*, in STUDENT SERVICES: A HANDBOOK FOR THE PROFESSION 39, 46–47, 49–51 (John H. Schuh, Susan R. Jones, & Vasti Torres eds., 6th ed. 2016).

⁶⁵ See generally JUDITH S. EATON, COUNCIL FOR HIGHER EDUCATION ACCREDITATION, AN OVERVIEW OF US ACCREDITATION (rev. ed. 2015) <https://www.chea.org/sites/default/files/other-content/Overview%20of%20US%20Accreditation%202015.pdf>.

Act (IDEA) has been a critical force moving them in this direction. One of the IDEA's primary requirements is that schools prepare an "individualized education program" (IEP) for each student with a disability.⁶⁶ The IEP sets out how the school will marshal resources to meet the individual educational needs of each particular student.⁶⁷ This means that each student has their own program particularized by the school (or, in many cases, negotiated between school officials and the particular family).⁶⁸ To require states to provide this sort of bespoke educational program is to require schools to provide special education in an unbundled form.

Although the legal obligation to provide "individualized education" applies only to students with disabilities, the institutionalization of unbundling in the special education context demonstrates its broader feasibility. "Differentiated instruction," the idea that schools should tailor educational experiences to every student's particular needs,⁶⁹ has become an important pedagogical reform in general as well as special educational contexts.⁷⁰ Numerous teachers' guides both emphasize the desirability of differentiation and presents strategies for its implementation.⁷¹

"Differentiated instruction" is the general-education analogue of the "individualized education" to which students with disabilities are entitled under the IDEA. Like the development of IEPs, differentiation is a species of unbundling. It involves assembling various components particularistically and differently for each individual.⁷²

⁶⁶ 20 U.S.C. §§ 1401(18) (2012 & Supp. 2018), 1415(b)(2) (2012).

⁶⁷ See *id.* §§ 1412(a)(4) (2012), 1414(d) (2012); Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1421 (2011).

⁶⁸ See Pasachoff, *supra* note 67, at 1424.

⁶⁹ See Pearl Subban, *Differentiated Instruction: A Research Basis*, 7 INT'L EDUC. J. 935, 940–41 (2006).

⁷⁰ See, e.g., Timothy J. Landrum & Kimberly A. McDuffie, *Learning Styles in the Age of Differentiated Instruction*, 18 EXCEPTIONALITY 6, 14 (2010) (listing, in a special-education journal, children with disabilities as one student population among many that can benefit from differentiated instruction); Subban, *supra* note 69, at 938 (listing the "inclusion of students with disabilities" among factors that have given rise to differentiation in instruction).

⁷¹ See, e.g., CAROL ANN TOMLINSON, *THE DIFFERENTIATED CLASSROOM: RESPONDING TO THE NEEDS OF ALL LEARNERS* (2d ed. 2014); AMY BENJAMIN, *DIFFERENTIATED INSTRUCTION A GUIDE FOR ELEMENTARY SCHOOL TEACHERS* (2003).

⁷² There are pedagogical as well as legal differences. Many supporters of differentiation support it precisely because they see it as a way to preserve the common nature of the public school program, by insisting that diverse learners can be accommodated in the context of a single, public school.

Another important sector is religious schooling. To freely purchase supplementary religious schooling is a component of the constitutionally guaranteed free exercise of religion.⁷³ It is also a due process right, just as the purchase of any other supplementary schooling would be.⁷⁴ The Supreme Court has also established that parents for whom supplemental religious instruction is insufficient have the right to choose to exit the free public schools and enroll children in religious private schools.⁷⁵ These principles were established early in the twentieth century. Since then, most of the legal controversy over extracurricular religious training has been the extent to which public funds may be used for religious instruction or by religious educational institutions.

Two observations about bundling emerge from the religious instruction cases. One is that the Court continues to analyze the Establishment Clause implications of religious instruction in public schools based upon the extent to which that instruction is discretely provided, apart from the regular services of the school. The greater the extent to which some kind of secular instruction is impermeable to religious concerns, the more courts are willing to tolerate public funding of such instruction.⁷⁶

Regardless whether this concern is expressed in terms of “entanglement,” as it was for many decades in cases where funding is fungible or the programmatic boundaries between religious and secular elements are fluid, public funding in such cases is thought to be more constitutionally problematic. One might restate this principle as one of greater reluctance to permit public funding of the secular portion of

⁷³ See *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927) (holding that the right of a parent “to direct the education of his own child without unreasonable restrictions” prohibits intrusive regulation of supplementary schools that conduct their activities after the regular school day).

⁷⁴ See *id.* at 298–99.

⁷⁵ See *Meyer v. Nebraska*, 262 U. S. 390, 400 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

⁷⁶ See *Roemer v. Bd. of Pub. Works of Maryland*, 426 U.S. 736, 749 (1976); see also *Agostini v. Felton*, 521 U.S. 203, 226 (1997) (overruling past precedent and permitting publicly funded secular teachers to provide discrete services in public schools because “there is no reason to presume that” such a teacher “will depart from her assigned duties and instructions and embark on religious indoctrination”); *Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 248 (1968) (permitting provision of secular textbooks to religious schools because it is implausible that such books are “intertwined” with “the teaching of religion”); *Lemon v. Kurtzman*, 403 U.S. 602, 616–617 (distinguishing, for Establishment Clause purposes, books with fixed content from teachers whose inclination to mix religious and secular instruction is difficult to police).

bundles that combine religious and secular instruction than to fund the secular portion of menus that do the same.

More important is the regime that has emerged from the cases to govern private, religious schools. Governing law understands religious private schools themselves to be bundles. The religious purpose and content of the bundle is assumed to reach all of its contents. Religious schools, therefore, must use their own private resources to teach secular and state-mandated topics like mathematics and chemistry, as well as to provide religious instruction.⁷⁷

Treating private religious schools as bundles makes sense if the components of religious education are unseverable.⁷⁸ In an unbundled marketplace, however, it does not make sense. If schooling is an assemblage of discrete components, there is no reason to exclude those who purchase religious components (or those to whom they are provided philanthropically) from also taking advantage of publicly provided secular components. To restrict enrollment in a state-supported online mathematics course to those not also enrolled in a religious private school is clearly unlawful. It is flat-out unconstitutional, just as it would be to restrict public school enrollment to students who do not attend supplementary Sunday schools.⁷⁹

Some educational actors, religious, antireligious, and disinterested, feel that religious and secular training are and should be interwoven in religious schools.⁸⁰ The religious actors in this group include both religious providers of education and its consumers. Other actors would gladly disentangle the secular and religious components of religious schools' programs in return for public funding of the former,⁸¹ and plenty of religious parents would accept such segregation in exchange for the

⁷⁷ See Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1017 (1991) (“[I]f a family chooses to integrate a religious element into primary or secondary schooling, not only must they bear the costs of the religious education, but they also forfeit all public subsidy for education, including secular subjects.”); Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151, 167 (2003).

⁷⁸ See *Lemon v. Kurtzman*, 403 U.S. 602, 641 (1971) (Douglas, J., concurring) (“The school is an organism living on one budget.”).

⁷⁹ See McConnell, *supra* note 77, at 1017 (“It is as if those who get an abortion were thereby excluded from Medicaid”).

⁸⁰ See *id.* at 1019–20.

⁸¹ See *Roemer*, 426 U.S. at 759 (recognizing that some religious schools are organized not to be “so permeated by religion that the secular side cannot be separated from the sectarian”).

savings.⁸² The unbundling of the educational marketplace leaves room for both types of religious enterprises. Some religious educators will provide at private expense, and find customers for, secular training that is religiously infused. But others will build programs of study that bundle strictly secular components, which can receive public subsidy, along with religious ones.

Finally: The quintessential unbundlers of the contemporary educational scene are the home schoolers, both religious and secular.⁸³ Home schooling families *assemble* an educational program for each of their children, using materials available to them. They are generally Catholic with respect with respect to modality, pedagogy, and provider.⁸⁴ Thus, they may choose to teach some of their children some subjects at home. For other subjects—or for the same subject, but other children — home schooling families band together, instructing children in small groups.⁸⁵ Students may move from house to house (more precisely, venue to venue) as they secure instruction in various subjects; group membership can be fluid across these many transitions. In both direct and group instruction, home schoolers access or purchase curricula and materials feeling no duty or expectation that they will purchase all their materials from the same supplier. Likewise, they may acquire specialized instruction from one of their number or from outsiders, again with no expectation that all outside provision will come from the same individual or firm.⁸⁶ In still other cases, they deploy online courses and curricula, again without any expectation that they will have only one provider.⁸⁷

Home schoolers are *unbundlers* in the sense that they reject existing schools' packages of services. Instead they go onto the open market to secure the services they want, *à la carte*. They are also unbundlers because they often deploy a set of providers unconnected one to another. This is the reason that home schooling is generally treated as a species of

⁸² See, e.g., Yigal M. Gross, *The Yeshiva Day School System — Costs and Considerations*, TIMES OF ISRAEL: THE BLOGS (June 24, 2016, 10:44 AM), <https://blogs.timesofisrael.com/the-yeshiva-day-school-system-costs-and-considerations/>.

⁸³ See Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?*, 54 S.C. L. REV. 75, 77–78 (2002) (discussing varied estimates of how many homeschoolers are religiously motivated).

⁸⁴ See Aislin Davis, *Evolution of Homeschooling*, 8 DISTANCE LEARNING 29, 32 (2011).

⁸⁵ See *id.* at 34.

⁸⁶ See, e.g., Eric Wearne, *A Descriptive Survey of Why Parents Choose Hybrid Homeschools*, 10 J. SCH. CHOICE 364 (2016).

⁸⁷ See Davis, *supra* note 84, at 33–34.

school choice.⁸⁸ Its practitioners choose it and then choose, cafeteria-style, the services that they think are best for their children. This is similar to the way those who choose schools, private or public, select the school that they believe best suits them from among the available options.

At the same time, home schoolers are *bundlers*, in the sense that they stand in the place of schools. In this they resemble schools and school systems, which bundle educational goods from a variety of sources. Schools and home schoolers both choose sets of teachers, develop sets of curricula, and select sets of textbooks and materials. Unbundled education moves the assembly function, or at least the right and duty to assemble, from schools to families.

Limning the Unbundled Education Space: Deconstructing “School”

Identifying home schooling as the fullest contemporary expression of unbundling signals the basic regulatory move that governments must make as unbundling becomes more pervasive. Today, the state regulates “schools,” both public and private.⁸⁹ The schools that are the objects of that regulation do two things: they *provide* educational services and they *assemble* them. Current law and policy assumes that these two functions will be performed by the same institution, the school. In an unbundled world, this assumption is unsustainable. The state will face the job of disentangling these two arenas of regulation.

The first challenge, and arguably the most jarring, will be to find a paradigm for the regulation of educational content. The state may (and should) continue to demand that whatever set of educational components is chosen for any given student meets certain requirements. Such regulation is justified by the state’s interest in an educated public. But to do so will require a regulatory approach to curriculum entirely different from the school-based approach of today. It will require the coordinated regulation of families, who bear the duty of assembly in an unbundled regime, and of producers of the educational content that those families will assemble. It will also require more use of regulatory authority over the public relative to supervisory authority over state employees.

⁸⁸ *E.g.*, Clive R. Belfield, *Perspectives on Homeschooling*, in HANDBOOK OF RESEARCH ON SCHOOL CHOICE 521, 521 (Mark Berends ed., 2009) (“Homeschooling ... is possibly the most revolutionary form of school choice available within the U.S. educational system.”)

⁸⁹ *See, e.g.*, *Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 245 (1968) (noting the scope of permissible regulation of private schools by public authorities).

And content regulation will need to be pedagogically and socially sound, administrable, and constitutional—three criteria that will often push against one another. Regulation of unbundled curriculum will constantly butt up against the expressive and religious rights both of families and of providers. While the state has the ability to compel speech in the context of schools, this power is limited.⁹⁰ And the state may interfere neither with the publication of materials aimed at schoolchildren—no matter what their content—nor with children’s ability to access them.

Beyond the regulation of curriculum, the state will also need to regulate the educational institutions of an unbundled world. First among these will be providers of educational services, who will create both materials required to meet curriculum regulations and other materials that are discretionary with families. Such institutions already exist, but their numbers will grow and their forms will proliferate. In addition, many new institutions will surely arise that will offer to help families with their duties of educational assembly. Both these kinds of institutions will likely range across the for-profit, not-for-profit, religious, governmental, and unincorporated sectors. One important question is whether these various sectors should be regulated differently.

In short, unbundling will require fundamental reconceptualization of how education is regulated. Current regulatory approaches will not translate easily or directly to a new unbundled reality.

Regulation of Curriculum

When school is unbundled, every family will bear a legal duty to assemble an educational program for each child that meets the requirements of the state. It is in this sense that the unbundled marketplace makes home schoolers of everyone. The basic question that drives the regulation of home schooling (and of private schooling too) thus becomes a basic problem for all of schooling: How directive can the government be?

One has the sense that the relatively loose regulation of the content of private school education by most American jurisdictions today,⁹¹ and the

⁹⁰ Saiger, *Deconstitutionalizing Dewey*, 13 FLA. INT’L U. L. REV. 765, 771–72 (2018) (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

⁹¹ See generally U.S. DEP’T OF EDUC., OFFICE OF INNOVATION AND IMPROVEMENT, STATE REGULATION OF PRIVATE SCHOOLS (2009), www.ed.gov/admins/comm/choice/regprivschl/index.html (providing a 50-state survey of

even more *laissez-faire* regulation of home schooling,⁹² is in part a consequence of the fact that these methods of schooling are dear to consumers. Private school tuition is often high, and home schooling requires a substantial expenditure of time as well as treasure. This means that the home schooling sector is small, and is dominated by highly motivated families.⁹³ The private school sector is larger, but remains limited, which is unsurprising since private school is an expensive substitute for a good universally available free of charge.⁹⁴ Under current conditions, therefore, government can meet most of its regulatory goals for education by pervasively regulating public schools, which are cheap and popular. It can afford to regulate costly private schools less rigorously, and treat home schoolers with benign neglect.

That will not be so if everyone unbundles. Government will therefore be inclined to demand more of assemblers than it does of home schoolers today. Some new equilibrium will need to be achieved between legitimate exercise of the police power to further states' interest in an educated populace, and the freedom of individuals and families.⁹⁵

At the constitutional level, the resulting disputes are likely to look like those from the 1920s over the scope of state regulation of private schools. The three key cases from that era in the United States Supreme Court — *Meyer v. Nebraska*,⁹⁶ *Pierce v. Society of Sisters*,⁹⁷ and *Farrington v. Tokushige*⁹⁸ jointly establish that compulsory education is constitutional;⁹⁹ that parents have a right to refuse public education and secure private education instead; that the state may regulate private schools for public

public regulation of private schools); EdChoice, *Private Schools and School Choice Programs Are Regulated, Too*, <https://www.edchoice.org/school-choice/regulations/> (visited May 8, 2019).

⁹² See Yuracko, *supra* note 46, at 129.

⁹³ Home schoolers enrolled 3.4% of all children enrolled in school in 2012. JEREMY REDFORD ET AL., U.S. DEP'T OF EDUC., NCES 2016-096.REV, HOMESCHOOLING IN THE UNITED STATES: 2012, at 5 (2017), <https://nces.ed.gov/pubs2016/2016096rev.pdf> at page 5.

⁹⁴ Private schools enrolled 10.3% of all children enrolled in school in 2015. NATIONAL CENTER FOR EDUCATION STATISTICS, 2016 NCES DIG. EDUC. STAT., at tbl.205.10, https://nces.ed.gov/programs/digest/d16/tables/dt16_205.10.asp?current=yes

⁹⁵ See E. Vance Randall, *Private Schools and State Regulation*, 24 Urb. Law. 341, 341–42 (1992) (describing this as the essential dilemma of private school regulation).

⁹⁶ 262 U.S. 390 (1923).

⁹⁷ 268 U.S. 510 (1925).

⁹⁸ 273 U.S. 284 (1927).

⁹⁹ The Court subsequently recognized a right to religious exemption from compulsory schooling, but severely limited its scope. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

purposes; and that regulation of private education may not be so intrusive that it renders a private school unable to carry out its particular educational mission.¹⁰⁰ On this round, perhaps the outcome will also be the same, yielding a rule that states can regulate assembly they quite substantially, as long as they leave room for families to pursue their own idiosyncratic educational goals.¹⁰¹ But the particular metes and bounds of this rule will need to be re-litigated.

At the legislative and bureaucratic level, regulation of assembly will require a thorough reconsideration of how curriculum regulation should be specified. Today's regulation of curriculum is somewhat scattershot. State legislators often pass general delegations to state departments of education, and then supplement them with specifications of particular subjects or activities that may or must be included in curricula.¹⁰² State departments in turn promulgate a bewildering variety of documents of varying specificity—frameworks, guidelines, implementation manuals—that offer little clarity regarding whether or how much legal force they express.¹⁰³ A great deal of discretion is left with local districts, school principals, and individual teachers. This approach can be effective in a system where the bulk of education occurs in publicly managed schools, where conflict can be dealt with pursuant to organization charts under which supervisory authority over teachers lies with the government.¹⁰⁴

¹⁰⁰ Although the 1920s private-school cases were decided under a pre-*West Coast Hotel* understanding of the substantive due process of commercial enterprises, the cases are universally regarded as still good law. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 393 (1937).

¹⁰¹ See *Farrington*, 273 U.S. at 298.

¹⁰² See STATE REGULATION OF PRIVATE SCHOOLS, *supra* note 91; EdChoice, *supra* note 91; Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461, 1466 (2017).

¹⁰³ Consider, as an example, the regulation of the teaching of social studies in New York State. The New York State Board of Regents formally convened and adopted a document entitled “New York State K–12 Social Studies Framework,” at a regular meeting. New York State Educ. Dept., K–12 Social Studies Framework, <http://www.nysed.gov/curriculum-instruction/k-12-social-studies-framework>. The Framework document itself is not stated as a series of legal requirements. Rather, it “is anchored in the New York State Common Core Standards for Literacy and Writing and New York State Learning Standards for Social Studies,” and that it should “serve as a consistent set of expectations for what students should learn and be able to do.” Framework at 2 (rev. Nov. 2014).

¹⁰⁴ For example, a school that wishes to substitute a different social studies course for the standard prescribed course may do so if the new course is “equivalent” to the standard. “Equivalency is approved by the local public school superintendent or his or her designee or by the chief administrative officer of a registered nonpublic high school.” New York State Educ. Dept., *K–12 Social Studies Frequently Asked Questions*,

The professional socialization and mores of teachers also constrain curricular decisions in public schools. The curriculum of private schools is then regulated, again haphazardly and with great variation across the states, in terms of the unclear curricular requirements of the public schools.¹⁰⁵

Reliance upon public schools as institutions whose internal working will yield acceptable curricula will not be possible when regulating unbundled producers generally. There will be no organization charts, no constraining professional mores, and no room for vagueness about the difference between a legal requirement and a statement of pedagogical preference. Regulations will have to be more specific, less fuzzy, and of a different character than they are now. In particular, rules that now require, for example, that students in a given grade have x hours of instruction in mathematics will need to shift, instead setting out requirements for what particular subjects must be taught and, perhaps, what kinds of mathematics instruction needed to be given.¹⁰⁶ This shift will surely accelerate a critique, already ongoing, of the use of input rather than outcome measures to describe education.¹⁰⁷

What can the state require of *producers* of education in the unbundled marketplace? Such requirements will be substantially constrained by the First Amendment. Education and expression are inextricably intertwined. Both individuals and firms have the right to speak to and in front of children however they like. A publisher can publish a children's book or a textbook that says the Earth is flat, or that it is only six thousand years old.¹⁰⁸ A preacher can tell children that they are saved—or that their neighbors are damned—even if his message is inimical to the values of tolerance and community the state wishes to promote. And parents have both First Amendment and liberty rights to buy the flat-earth book for

<http://www.nysed.gov/curriculum-instruction/frequently-asked-questions>.

¹⁰⁵ See STATE REGULATION OF PRIVATE SCHOOLS, *supra* note 91; EdChoice, *supra* note 91.

¹⁰⁶ See Randall, *supra* note 95, at 370 (“Private school regulations are ... primarily programmatic in character and focus on the ingredients that conventional wisdom says must be present to ensure quality education—items such as instructional time, teacher certification, teacher/pupil ratio, class size, curriculum, adequate physical facilities, etc.”).

¹⁰⁷ See *id.* (“Empirical research, however, reveals that there is little if any correlation, let alone causal connection, between these specific types of educational “inputs” and academic achievement or other educational outcomes”); Jessica M. Shedd, *The History of the Student Credit Hour*, 122 NEW DIRECTIONS FOR HIGHER EDUC. 5, 11 (2003).

¹⁰⁸ E.g., EDWARD HENDRIE, *THE GREATEST LIE ON EARTH: PROOF THAT OUR WORLD IS NOT A MOVING GLOBE* (2016).

their children, and take them to hear the preacher. The state cannot interfere with their doing so.

There remains, however, a regulatory role for the state in helping consumers understand whether and to what extent given educational services will help them to satisfy the requirements placed upon assembly. Consider again the example of a provider who wishes to provide a mathematics module for use by, say, fifth and sixth grade students. Anyone can say anything they like about mathematics, and package those statements for sale. But the government can insist that assemblers find and use instructional materials that meet state requirements (although they cannot insist that they use such materials *exclusively*). The state can therefore also require providers to state truthfully whether their packages meet state requirements. A demand that merchants engage in accurate self-description in an area where such accuracy furthers a crucial state interest does not violate the First Amendment.¹⁰⁹

The primary regulatory challenge in this sphere will be to ensure that the government does not tread upon free expression in certifying some kinds of instruction as adequate. In the current system, the government's right to speak on its own behalf allows it to determine what public schools say.¹¹⁰ But in the new system, the government will not be able to discriminate based upon viewpoint, though it will still be able to require generally that certain content be taught. The paradigm for regulating all content providers will therefore be contemporary private school regulation, which will need to become more rigorous and less vague.

Private schools can be required to meet state-defined subject-matter requirements with respect to their secular curriculum. They cannot be required not to provide other lessons. Certification of materials as compliant with state assembly standards must reflect these principles.

This approach to regulation of production will surely generate daunting controversies. It would clearly be constitutional to require providers to disclose whether a state had certified particular materials as meeting curricular requirements.¹¹¹ Such a case is one where "the possibility of deception is ... self-evident," which permits the government to regulate

¹⁰⁹ See Lars Noah & Barbara A. Noah, *Liberating Commercial Speech: Product Labeling Controls and the First Amendment*, 47 FLA. L. REV. 63, 76–82 (1995).

¹¹⁰ See Saiger, *supra* note 90, at 771–72; Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 2–4 (2000).

¹¹¹ See *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

speech in order to protect consumers from false claims.¹¹² Much more difficult, however, would be the regulation of claims that some set of educational materials would be found to, or ought to be found to, meet assembly requirements. Such assertions might well mix commercial statements whose truth or falsity should be uncontroversial with other claims that elicit enormous controversy in areas that are of core public concern. For example, producers of a flat-earth instructional package, or a homophobic one, might advertise that it was consistent with an assembly requirement demanding that students receive instruction regarding certain topics relating to earth-science and social studies, as defined by some set of state-approved standards. Governments and other private parties might vociferously insist that the assertions in such packages, or their general pedagogic approach, is inconsistent with such standards. Such claims would present enormously difficult questions regarding whether the speech involved is commercial or political, what levels of scrutiny are appropriate, and how such scrutiny should be applied.

Moreover, decisions will need to be made regarding whether certification rules should apply equally to all providers, or whether for-profit providers should be expected to meet requirements that are not incumbent upon nonprofits, churches, and families. Current private school regulation in many states not only treats them differently from public schools, but treats church schools differently from nonreligious private schools.¹¹³ The political pressure to distinguish these categories with respect to certification will be considerable.

Regulation of Public Institutions

Although families individually will bear the duty to assemble educational services for their children, few will have the resources or the inclination to do so on their own. Most parents, especially those who are not home schoolers or educators, will look to *hire* someone to curate the components. They will be the general contractors of the education sector, in charge of making sure all of the necessary elements for the project are in place, subcontracted out, and interacting properly.

The premier third-party bundlers—at least at first—will almost certainly be public school districts. Perhaps sets of districts, or individual schools, or states themselves, will fill this role. These institutions will

¹¹² *Id.* at 652.

¹¹³ See STATE REGULATION OF PRIVATE SCHOOLS, *supra* note 91; EdChoice, *supra* note 91.

enjoy several advantages. They will be first to the market. They will engage in both provision and bundling, and therefore will be able to offer families a ready-made package guaranteed to meet government requirements. They will also offer the advantages of institutional schooling, which many families will find congenial: a single community, a structured day, a place for children to go, a neighborhood-based student body, teachers and students who are likely to be present for more than a few months at a time, and so on. The evidence on school choice suggests that many families are satisfied with their current public schools, and would therefore be likely to keep them even if alternatives were made available.¹¹⁴

At the same time, it seems almost certain that government will begin to act itself as a provider within the *unbundled* marketplace: not only will it provide ready-made assemblies, but it will offer unbundled goods to other assemblers. This will be especially true of services that are not delivered in person on school sites. The prototypes for such institutions will be the state-funded online school districts already operating in several states.¹¹⁵ These not only educate students in-state as part of the public school system, but offer à la carte services in a nationwide market.

With respect to à la carte provision, government authority will have to determine what sorts of services it will offer to families, how those services will be divided into discrete products, and what each product will contain. This will require many more decisions than those codified by the state legislature or by the state education department. Such decisions include those routinely made today by principals, departments, and individual teachers. These decisions will need to be responsive to market forces, but government providers will still make them. Such decisions will be of considerable moment, and it will be necessary to determine whether and to what extent they will subject to regulation or be left to institutional discretion. Current statutes governing curriculum¹¹⁶ might also apply to what states may or may not include in products they offer in the marketplace.

One of the most concerning of issues with respect to production is how governments will supply the social services that are now incidental to

¹¹⁴ See Albert Cheng & Paul E. Peterson, *How Satisfied Are Parents with Their Children's Schools?*, 17 EDUC. NEXT 21, 24 (Spring 2017).

¹¹⁵ E.g., OR. REV. STAT. §§329.840, 338.005 (2012) (creating the Oregon Virtual School District).

¹¹⁶ See STATE REGULATION OF PRIVATE SCHOOLS, *supra* note 91; EdChoice, *supra* note 91.

many public schools' programs but that are still vital.¹¹⁷ These depend upon most students being at a particular public school site on a regular basis. School lunches and breakfasts feed students who are hungry;¹¹⁸ how will children be fed, or food insecurity be identified, in an unbundled system? Teachers and other adults in the school system are mandatory reporters for child abuse and neglect;¹¹⁹ who must report in an unbundled world, and how? Public schools conduct health screenings and watch for drug abuse;¹²⁰ can unbundled providers do that? Schools operate libraries for their students; can public libraries take over this function?¹²¹ Schools provide an opportunity for mainstreamed disabled students to interact with non-disabled peers, and for mixing of other kinds; how can that be accomplished?

These problems represent the coming home to roost of the American decision to put such a large proportion of its social and family services under the umbrella of the school system. An institutional school could handle such tasks (though not always easily). If the pressure on schools to unbundle curriculum crashes that arrangement, substantial investment in social services outside of school will have to be considered (in the alternative, one might conclude that the loss of a central venue for providing these services ought to doom the unbundling project.)

One other service that shares many characteristics with social services but is distinct from it is discipline. The school that is a miniature society has what amounts to a miniature law enforcement system. For serious crimes, it calls in the police and engages societal law enforcement; at the margins, there are disputes.¹²² But schools routinely deal with disciplinary infractions far short of crimes: rudeness, absence, failure to heed authority, bullying of others. In doing so, they utilize carrots and sticks far

¹¹⁷ See McMullen, *supra* note 83, at 86 (noting these problems with respect to homeschooling).

¹¹⁸ See Anna Karnaze, *You Are Where You Eat: Discrimination in the National School Lunch Program*, 113 Nw. U. L. REV. 629, 630–31 (2018).

¹¹⁹ See Jason P. Nance & Philip T.K. Daniel, *Protecting Students from Abuse: Public School District Liability for Student Sexual Abuse Under State Child Abuse Reporting Laws*, 36 J.L. & EDUC. 33, 35–36 (2007).

¹²⁰ See Delaney Gracy et al., *Missed Opportunities: Do States Require Screening of Children for Health Conditions that Interfere with Learning?* 13 PLOS ONE (2018), available at <https://doi.org/10.1371/journal.pone.0190254>.

¹²¹ See Bd. of Educ., *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 868 (1982) (“A school library, no less than any other public library, is a place dedicated to quiet, to knowledge, and to beauty”) (citation omitted).

¹²² See Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 878 (2012).

short of criminal punishment: a stern word from a teacher, a trip to the principal's office, a bad or lukewarm recommendation letter for higher education, withdrawal of privileges, detention, suspension.¹²³ In the Progressive mindset, this system epitomizes why we set up schools as miniature communities: it teaches children how to follow the law and negotiate a justice system in a system that is both low-stakes but also has more aspirational standards for behavior than the criminal law (respect for adults, for example).¹²⁴ Who can provide this service in an atomized marketplace? And is there a way that families could be required to obtain it?

Regulation of Third Party Assemblers

Public schools and districts will likely be the first institutions to offer to act as educational general contractors; but they will not be the only ones. It is almost certain that persons, firms, and other institutions will enter the marketplace as agents for assembly.

Unbundling will therefore immediately demand very different state school finance systems. The obvious conceptual framing for such funding, already associated with voucher and charter schools, is to give each student a budget that the student's family could then use to assemble an educational program. Presumably, these grants would not be in cash but in scrip, redeemable only by suppliers who meet government requirements, and parents could not cash any balance remaining.

Government would have to assure that the budget was sufficient to assemble a package that met the legal requirements of the education codes. This goal could be met by some combination of ensuring that allocations are sufficient, and price controls upon producers. Allocations could also be made to vary by student. Today, some states use student-based funding allocations that varies the per-pupil allocation to public schools based upon whether students are disabled, live in poverty, or are English-language learners.¹²⁵ Similar things could be done with allocations to families. Voucher programs for the disabled provide an additional model.¹²⁶

¹²³ See *id.* at 865–67.

¹²⁴ See Saiger, *supra* note 90, at 780, 787.

¹²⁵ See Lauren A. Webb, Note, *Educational Opportunity for All: Reducing Intradistrict Funding Disparities*, 92 N.Y.U. L. REV. 2169, 2197–2200 (2017) (gathering research and practitioner literature on weighted student funding).

¹²⁶ See Wendy F. Hensel, *Recent Developments in Voucher Programs for Students with*

Government will very likely interact with private bundlers beyond paying for their services. And these institutions will likely be very diverse. Some will be for-profit, offering their services to curate packages ideal for particular children or particular types of children. One would expect such services to seek market niches, much as charter and traditional private schools do today: some will pitch to rich overachievers, some to poor urban residents, some to rural students, some to the intellectually gifted. It is also possible that non-religious ideological communities of various kinds—socialists, separatists, populists, vegans?—will go into the bundling business. But, almost surely, some private bundlers will be churches and other religious entities, who will bundle for children in ways that they promise will meet both state requirements and that will further their doctrines and beliefs. Most of these bundles will contain religious training that must be privately paid for or funded.

Religious bundlers will raise special, but familiar, issues. Can religious bundlers incorporate into their bundles services paid for with public money? Almost surely; the reasoning of *Zelman v. Simmons-Harris*, the Cleveland voucher case, applies fairly directly.¹²⁷ Any bundle they created would receive public funds only because of parents' "true private choice."¹²⁸ Must they be allowed to do so? This is more debatable. The better argument is that *Locke v. Davey*¹²⁹ does not apply, and that to prevent religiously affiliate bundlers from using publicly funded resources would impermissibly discriminate against them.¹³⁰ This is especially true because concerns about entanglement and endorsement are mitigated in the unbundled context. If it becomes a basic organizing principle of education that assembly and production are distinct, no reasonable observer would infer state endorsement of religion from the inclusion of both religious and secular components in a particular student's bundle of

Disabilities, 59 LOY. L. REV. 323, 325–39 (2013) (cataloguing such programs).

¹²⁷ 536 U.S. 639, 653 (2002) (state funds flowing via voucher to religious schooling is permissible so long as parents exercise "true private choice").

¹²⁸ *Id.*

¹²⁹ 540 U.S. 712 (2004).

¹³⁰ See, e.g., Stephen D. Sugarman, *Is It Unconstitutional to Prohibit Faith-Based Schools from Becoming Charter Schools?*, 32 J.L. & RELIGION 227, 228 (2017); Aaron J. Saiger, *Charter Schools, the Establishment Clause and the Neoliberal Turn in Public Education*, 34 CARDOZO L. REV. 1163 (2013); Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155 (2004).

educational services.¹³¹ And, because each component could be produced discretely, entanglement would not be a concern either.

In short, religious bundlers will be able to offer in the marketplace packages that include both publicly funded secular components and other components that are explicitly religious. To do so is at the core of the right to free exercise, no different than the establishment of a religious private school. The effect, however, is to encourage the creation of institutions that look like religious schools but that receive public funding—and this has long been a red line in Establishment Clause jurisprudence. Does unbundling make that red line untenable? I think it does.

Both churches and non-religious ideologues might offer their services for free or for cut rates; because they have nonpecuniary missions, they might look to maximize their market penetration even if doing so meant taking an economic loss. One would then become concerned that the state-funded system of education systematically biases consumers in favor of selecting religious “assemblers.”¹³² This, of course, would be the converse of the current system, in which the system biases consumers against religious education by making religious schools pay for secular training without public support.¹³³

Third-party bundlers who arise to respond to an unbundled regime may, if they are successful, ultimately come to play many of the same roles today played by the institutions we know today as “schools.” Almost everyone will use some bundler, religious or secular. The bundler will make the major educational decisions under regulatory constraints; parents will choose the bundler whose choices they prefer. Perhaps this will bring us around full circle, to focusing regulation primarily upon that single, assembling institution. We probably will not call these assembling institutions “schools.” But we will ask: How can such bundlers be regulated, to what ends, and subject to what First-Amendment limits?

¹³¹ *Zelman*, 536 U.S. at 655 (a “‘reasonable observer in the endorsement inquiry must be deemed aware’ of the ‘history and context’ underlying a challenged program”) (quoting *Good News Club v. Milford Central School*, 533 U. S. 98, 119 (2001)).

¹³² *But see id.* at 653–54 (displaying an unwillingness to recognize this sort of systemic bias).

¹³³ *Cf. id.* at 654 (noting financial disincentives affecting parents who opt for religious schooling in the Cleveland voucher program, but noting that the program would be constitutional even absent such disincentives).

A Case for Educational Pluralism

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In January 2018, the Roman Catholic Bishop of Memphis, Tennessee, Martin Holley, announced his decision to close all of the diocese's Jubilee Schools — a network of Catholic schools serving primarily disadvantaged urban children — at the end of the 2018-19 school year.¹ The decision, which affects nearly 1,500 students, rocked the Catholic school world. For decades, the Jubilee network — often dubbed the “Miracle in Memphis” — had been a counterfactual bright spot set apart from the otherwise bleak reality of decline facing urban Catholic schools. While nearly 3,000 Catholic schools, most of them located in urban centers, have closed since 1990, Bishop Holley's predecessor, Bishop Terry Steib, made the decision in 1999 to reopen nine previously closed Catholic schools in the city center in order to provide poor children in Memphis the option of a Catholic education. Steib subsequently added several additional schools to the Jubilee network, including the only Catholic high school in Memphis's urban core.² Almost all of the children attending the Jubilee schools are poor, and the overwhelming majority of them are African American and Hispanic.³

Holley made clear that his decision was primarily a financial one, motivated by the depletion of the private philanthropic funds supporting the Jubilee schools. But he and other diocesan officials emphasized that the human costs of the school closures would be mitigated by their plans to enlist a charter management organization to operate the Jubilee schools going forward. Former diocesan superintendent Mary McDonald, the architect of the Jubilee network, likened their transition from Catholic

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¹ Jennifer Pignolet, *Memphis Jubilee Catholic Schools to Close after 2018-19 School Year*, MEMPHIS COMMERCIAL APPEAL, January 23, 2018, <https://www.commercialappeal.com/story/news/education/2018/01/23/memphis-jubilee-catholic-schools-close-after-2018-19-school-year/1059023001/>

² Michael Humphrey, *Miracle in Memphis: Reopen Catholic Schools Bring Life Back to Inner-City Neighborhoods*, NAT'L CATHOLIC REPORTER, April 4, 2008, http://natcath.org/NCR_Online/archives2/2008b/040408/ss040408a.htm.

³ *Nothing to Celebrate with this Jubilee*, CATHOLIC SCHOOL MATTERS, May 13, 2018, <https://www.smcore.com/5gj9t-catholic-school-matters>.

schools to charter schools to a parent watching a child graduate from college. She argued that the growth of charter schools in Memphis had obviated the need for the educational opportunities provided by the Jubilee schools. “Now it’s time for the child to move on and do what is the next best thing in that child’s life . . . I think the bottom line is how can we assure that the children are receiving the education they need to give Memphis an educated workforce and lift people out of poverty.”⁴

Within a month of the decision to close the Jubilee schools, New Day Schools—a new charter operator affiliated with the Christian Brothers University, a private Roman Catholic College in Memphis—filed a letter of intent to open a network of nine new charter schools in some of the former Jubilee locations. These schools would be known as the Compass Community Schools.⁵ In June 2018, however, the Shelby County School Board voted to reject all pending charter school applications, including the proposal by New Days Schools for the Jubilee School sites.⁶ Two months later, the Board partially reversed course and approved, by a vote of five to three, six of the nine charter schools proposed for the Jubilee locations. Board members and district administrators, however, expressed trepidation that Memphis might be overly saturated with schools. One board member demanded a “charter compact” agreement between the district and charter operations to address the “saturation of neighborhoods” with new schools. Another complained that the charter schools were drawing children out of their neighborhoods to the detriment of community life. And, Superintendent Dorsey Hopkins worried, “we have way too many schools . . . Right now, we are just spreading ourselves even more thin.”⁷

These recent events in Memphis are in many ways emblematic of deep fissures in American education policy. Father Andrew Greeley, a noted sociologist, famously quipped that the first school voucher would arrive

⁴ Pignolet, *supra* note 1.

⁵ Jennifer Pignolet, *Growth, Partnerships with CBU Part of the Plan to Replace Jubilee Schools*, MEMPHIS COMMERCIAL APPEAL, Feb. 4, 2018; Michelle Corbet, *Plans to Turn Jubilee Schools into Charters Moves Forward*, MEMPHIS BUSINESS JOURNAL, April 2, 2018.

⁶ Jennifer Pignolet, *SCS Board Rejects All Charter School Applications*, MEMPHIS COMMERCIAL APPEAL, June 26, 2018.

⁷ Bill Dries, *SCS Board Approves 9 New Charter Schools with Concerns about Saturation*, MEMPHIS DAILY NEWS, Aug. 22, 2018.

the day that the last Catholic school closed.⁸ Greeley's prediction echoed true in the decision to close Memphis's Jubilee schools. Since Minnesota enacted the first charter school law in 1991, charter schools have dramatically eclipsed the private-school choice movement. While private-school choice has a much older intellectual pedigree, charter schools quickly moved into the education policy mainstream, in large part because they were perceived—at least until recently—to be a less extreme, public education-reform device.⁹ A variety of private-school programs, including vouchers, tax-credit scholarship programs, and education savings accounts, are now available to parents in more than half of the states and the District of Columbia. But, many of these programs are extremely limited in scope and provide only a fraction of the resources available on a per-pupil basis to charter schools, and charter schools enroll nearly ten times the number of children participating in a private school program (~3.2 million *versus* ~450,000).¹⁰

This reality has had profound implications for the faith-based schools like the Jubilee schools, which, unlike charter schools, have no access to public funds unless they opt to secularize and “convert” to charter schools. Tennessee is a case in point. The state has one modest parental-choice program for special needs students.¹¹ Efforts to enact a broader program that would have benefitted the disadvantaged children like those attending the Jubilee schools have fallen short in recent years.¹²

⁸ MARGARET F. BRINIG & NICOLE S. GARNETT, *LOST CLASSROOM, LOST COMMUNITY: CATHOLIC SCHOOLS' IMPORTANCE IN URBAN AMERICA*, 156 (2014).

⁹ Nicole Stelle Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 VAND. L. REV. 1, 13-16 (2017) [hereinafter Garnett, *Sector Agnosticism*].

¹⁰ National Alliance for Public Charter Schools, *National Charter School Facts*, <https://data.publiccharters.org/>; AMERICAN FEDERATION FOR CHILDREN, 2016-17 SCHOOL CHOICE YEARBOOK 14-15 (2017) (listing total enrollment, by program, in private-school choice), <https://afcgrowthfund.org/wp-content/uploads/2018/06/AFC-2016-17-Yearbook-FINAL.pdf>.

¹¹ School Choice: Tennessee—Individual Education Account Program, <https://www.edchoice.org/school-choice/programs/tennessee-individualized-education-account-program/>.

¹² William Hughes, *The Next 200 Years: A Post Mortem of the Once Promising Jubilee Catholic Schools*, EDCHOICE BLOG, April 20, 2018, <https://www.edchoice.org/blog/the-next-200-years-a-post-mortem-of-the-once-promising-jubilee-catholic-schools/>; Laura Faith Kebede, *With the Defeat of Vouchers, Memphis Catholic Leaders Seek Charter Conversion*, CHALKBEAT, Jan. 24, 2018, <https://ny.chalkbeat.org/posts/tn/2018/01/24/with-the-defeat-of-vouchers-memphis-catholic-leaders-seek-charter-conversion/>.

The Shelby County School Board's resistance to the plan to "convert" the Jubilee Schools into charter schools also reflects current trends in education policy. Charter schools have historically enjoyed broad bipartisan support — and have been promoted as a "safer," "public," and more "democratic" alternative to private school choice programs. This "charter compromise" on parental choice policy has unraveled in recent years, and charter schools have come under increasing fire, as increasing number of students exit traditional public schools for charter schools. Forty-three states now have laws authorizing charter schools, and approximately six percent of public school students in the United States attend one. However, the charter-school market share is much higher in some urban districts. In the 2016-17 school year, a majority of students were enrolled in charter schools in three school districts, and thirty percent or more were in nineteen districts. In Memphis, seventeen percent of students enrolled in charter schools during that school year.¹³ This trend has consequences for both public and private schools. There is little question that charter school growth is one factor precipitating the closure trends in the faith-based school sector, but it is also a factor precipitating public school closures as well.¹⁴

This essay makes a case for expanding parental choice policies to include private and faith-based schools in order to preserve and enhance authentic pluralism in the K-12 educational sector. The stark reality is that the future of faith-based schools serving disadvantaged children likely depends, as Greeley predicted, on the continued expansion of private-school choice. Some — perhaps many — might argue that the case for private school choice has been rendered obsolete by the expansion of choices with the public sector. But, like traditional public schools, faith-based schools have both educational and communal attributes that are distinctive from charter schools. The "charters are enough choice" compromise is, in my view, a mistaken one, and the continued constriction of the faith-based school sector ought to reignite debates about the appropriate scope of parental choice policies.

¹³ NAT'L ALLIANCE FOR PUBLIC CHARTER SCHOOLS, A GROWING MOVEMENT: AMERICA'S LARGEST CHARTER PUBLIC SCHOOL COMMUNITIES AND THEIR IMPACT ON STUDENTS (11TH Ed. 2016), <https://www.publiccharters.org/sites/default/files/migrated/wp-content/uploads/2016/11/enrollment-share-web1128.pdf> [hereinafter A GROWING MOVEMENT].

¹⁴ See BRINIG & GARNETT, *supra* note 8, ch. 2; Nicole Stelle Garnett, *Disparate Impact, School Closures, and Parental Choice*, 2014 U. CHICAGO LEGAL FORUM 289, 299-307 [hereinafter Garnett, *Disparate Impact*].

The footprint of educational choice in the U.S. has expanded dramatically in recent years, and not only in the charter sector. In fact, a narrow majority of states have at least one program that extends financial support to some students attending private schools, although most private-school-choice programs are modest and provide only a fraction of the resources available to students attending charter schools.¹⁵ That should change. But the change will carry consequences for participating schools. In particular, faith-based schools' continued and deepening participation in parental choice programs requires both wise policy design and adaptation by the schools themselves: Schools and school systems must prepare to respond to demands for greater transparency and accountability for results; regulators should also consider designing more-flexible academic accountability regulations that permit a range of assessment options and that incorporate non-cognitive outcomes, such as attainment, that have long been a particular strength of faith-based schools serving disadvantaged children.¹⁶

The Rise, Consequences (and Demise) of the Charter-School Compromise

Today, while attendance at the traditional public schools assigned to them by geographical boundaries remains the norm for most children, many American parents also can choose from an array of educational options, ranging from choices among traditional public schools and public magnet schools, to charter schools, and, in limited circumstances, the use of public funds at private and faith-based schools. Yet, it is important to recall how recent the parental choice revolution generating these choices actually is. The idea of publicly funded school choice is a deeply contested one in American history, dating at least to the mid-nineteenth century battles over the public funding of Catholic schools.¹⁷ But, although parents with the financial means to do so have long chosen their children's schools, either by moving to districts with high-performing schools or by financing private education, education policies that funded parents'

¹⁵ See *infra* notes 86-87 and text accompanying notes.

¹⁶ See *infra* Section IV.

¹⁷ See, e.g., BRINIG & GARNETT, *supra* note 8, at 16–18 (discussing “the funding question” in Catholic schools); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 221–29 (2002) (documenting the conflict between those desiring an alliance between church and state and those desiring separation); JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM 111–21 (2003) (discussing the controversy surrounding the state's power over education).

decisions to select *any* school other than the public school assigned to them by either geography or — in the post-desegregation world — federal court order were rare until recent decades.¹⁸ The nation’s first modern private school choice law — a modest voucher program enabling a few hundred Milwaukee children to use public funds to attend a secular private school — was enacted less than thirty years ago, in 1990.¹⁹ The following year, in 1991, Minnesota enacted the first charter school law.²⁰

The fact that charter schools, rather than school vouchers, would fuel the parental-choice revolution was far from immediately apparent. Indeed, the charter school ascendancy arguably is one of the most unexpected domestic policy developments in recent history. Until 1991, not a single charter school existed in the United States; they were basically an amorphous idea that required the establishment of new schools. Private school choice, on the other hand, had a long and more refined intellectual pedigree²¹ and promised to enlist existing schools with a proven track

¹⁸ See Nicole Stelle Garnett, *Affordable Private Education and the Middle Class City*, 77 U. CHI. L. REV. 201, 212–14 (2010) (reviewing data on private school enrollment and moving to opt into public school systems). In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Supreme Court held that parents had a constitutional right to send their children to private school, invalidating an Oregon law that mandated public school attendance.

¹⁹ See *Jackson v. Benson*, 578 N.W.2d 602, 607–10 (Wis. 1998) (summarizing history of Milwaukee Parental Choice Program). Since the mid-nineteenth century, Maine and Vermont both have maintained “town tuitioning” programs, which permit students in towns without public high schools to use public dollars to attend other public or private, secular schools. Illinois and Minnesota have very modest non-refundable parental tax credit programs. See ABCs OF SCHOOL CHOICE: *The Comprehensive Guide to Every Private School Choice Program in America*, FRIEDMAN FOUND. FOR EDUC. CHOICE 33–34, 55–60, 95–97 (2015), <https://www.edchoice.org/wp-content/uploads/2015/09/The-ABCs-of-School-Choice-2015.pdf> [hereinafter “ABCs OF SCHOOL CHOICE”].

²⁰ See Richard D. Kahlenberg, *The Charter School Idea Turns 20*, EDUC. WK. (Mar. 25, 2008), http://www.edweek.org/ew/articles/2008/03/26/29kahlenberg_ep.h27.html (discussing the origin of the idea for charter schools and the first charter school legislation).

²¹ The argument that parents should be given the option of spending public education funds to enroll their children in private schools usually is attributed to Nobel Laureate economist Milton Friedman. In a 1955 article, Friedman argued that the injection of competition into the market for K12 education enabled by what he called “vouchers” would improve overall academic performance across educational sectors. See Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* 123, 127, 132 (Robert A. Solo ed., 1955); EdChoice, *What is School Choice?*, <https://www.edchoice.org/school-choice/what-is-school-choice/> (“In 1955, Dr. Milton Friedman proposed the idea of school vouchers, which would separate the financing and

record of educating disadvantaged kids, especially urban Catholic schools.²² At their inception, charter schools were hardly intended to fuel a revolution. The term “charter school” is attributed to the late Albert Shanker, the long-time president of the American Federation of Teachers, the nation’s second-largest teachers’ union. In a 1988 speech, Shanker urged America to develop a “fundamentally different model of schooling” that would “enable any school or any group of teachers . . . within a school to develop a proposal for how they could better educate youngsters and then give them a ‘charter’ to implement that proposal.”²³ In 1991, Minnesota charter school law, however, fundamentally altered Shanker’s proposal. The Minnesota legislation envisioned charter schools authorized by agencies independent from local education authorities, operated by private entrepreneurs, and staffed with non-unionized teachers. These changes led Shanker to reject the charter schools as a “gimmick” and later to condemn the charter movement for “corporatizing” public education and embracing “quick fixes that won’t fix anything.”²⁴ But the Minnesota model, characterized by private operators and independence from local school authorities, rather than the Shanker model, which envisioned experimentation within the traditional public school sector, led the expansion of charter schools to other states over time.

Charter schools expanded rapidly.²⁵ By 1995, less than five years after Minnesota’s groundbreaking legislation, nineteen states had enacted

administration of schools, effectively jumpstarting the modern school choice movement.”). The case for private school choice, however, predates Friedman. During the nineteenth century, Catholic bishops vigorously but unsuccessfully demanded public funds for students enrolled in Catholic schools on equality grounds, arguing that the public schools of the time were effectively Protestant schools that were either unwelcoming of Catholic students, determined to evangelize them, or both. BRINIG & GARNETT, *supra* note 8, at 15–17.

²² See *infra* note 73.

²³ Albert Shanker, *Restructuring Our Schools*, 65 PEABODY J. EDUC. 88, 97–98 (1988). Ray Budde, an Education Professor at the University of Massachusetts, apparently suggested the concept—and used the term—over a decade earlier. Susan Saulny, *Ray Budde, 82, First to Propose Charter Schools, Dies*, N.Y. TIMES (June 21, 2005), <http://www.nytimes.com/2005/06/21/us/ray-budde-82-first-to-propose-charter-schools-dies.html>.

²⁴ DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* 122–24 (2010); Paul E. Peterson, *No, Al Shanker Did Not Invent the Charter School*, EDUCATION NEXT (July 21, 2010), <http://educationnext.org/no-al-shanker-did-not-invent-the-charter-school/>.

²⁵ *Charter School Timeline: Twenty-five Years Later* (Oct. 19, 2016), <https://edexcellence.net/articles/charter-school-timeline-twenty-five-years-later>.

charter school statutes.²⁶ Today, charter schools are authorized in forty-four states and the District of Columbia. In the first decade of their existence, nearly 1,300 charter schools opened. In the 2016-17 school year, there were 7,000 charter schools serving approximately 3 million students.²⁷ Charter school enrollment continues to grow exponentially: in the past decade, the number of students enrolled in charter schools has increased by 255 percent. Between 2010 and 2018, over 1,700 charter schools opened, and an additional 1.2 million students enrolled in charter schools—a nearly 250 percent increase. A majority of charter schools are located in urban areas, and a majority of charter school students are poor students and racial minorities.²⁸

As discussed previously, the overall statistics on the nationwide charter share (six percent of public school students) masks the reality that substantially higher percentages of students in many urban school districts are enrolled in charter schools. During the 2015-16 school year, charter schools enrolled more than fifty percent of public schools students in three districts, more than forty percent in six districts, and more than thirty percent in 17 districts.²⁹

The private-school-choice movement did not enjoy anywhere near this momentum. In the later decades of the last century, Republicans, importantly including Ronald Reagan, began to make vouchers a centerpiece of education reform proposals.³⁰ The idea languished, however, until two events in 1990 ignited the modern parental choice movement. The first was the publication of John Chubb and Terry Moe's

²⁶ See *Charter School FAQ*, PBS: CLOSING THE ACHIEVEMENT GAP (2004), <http://www.pbs.org/closingtheachievementgap/faq.html> (stating when and where the first charter school opened).

²⁷ National Alliance for Public Charter Schools, *The Public Charter Schools Dashboard*, <http://dashboard.publiccharters.org> [hereinafter "*Dashboard*"]. Two states, Washington and Alabama, have enacted charter school legislation since 2014. See, National Alliance for Public Charter Schools, *Alabama Enacts a Public Charter School Law; Joins 42 States and D.C.*, (Mar. 18, 2015), <https://www.publiccharters.org/press/al-legislature-passes-bill>; Donna Gordon Blankinship, *Washington High Court to Hear Charter-Schools Case*, SEATTLE TIMES (Oct. 26, 2014), <http://www.seattletimes.com/seattle-news/washington-high-court-to-hear-charter-schools-case/> (stating that Washington's first charter school opened in fall 2014).

²⁸ See, *id.*, *Dashboard*.

²⁹ See A GROWING MOVEMENT, *supra* note 13.

³⁰ Robert Pear, *Reagan Proposes Vouchers to Give Poor a Choice of Schools*, N.Y. TIMES (Nov. 14, 1985), <http://www.nytimes.com/1985/11/14/us/reagan-proposes-vouchers-to-give-poor-a-choice-of-schools.html>.

enormously influential book, *Politics, Markets and American Schools*. Chubb and Moe, like Friedman, saw parental choice in education as a means of igniting competition with public schools. “Choice,” they asserted, “has the capacity *all by itself* to bring about the kind of transformation that, for years, reformers have been seeking to engineer in myriad other ways.”³¹ The second was the emergence of a successful if unusual political coalition in Wisconsin. African American activists in Milwaukee — led by former Milwaukee school superintendent Howard Fuller and a state legislator named Polly Williams — combined forces with Republican Governor Tommy Thompson to secure the passage of the nation’s first modern school voucher program.³² Initially, the Milwaukee Parental Choice Program entitled poorer public school children in the city of Milwaukee to spend a portion of their public education funds at secular private schools. The program was expanded to include religious schools in 1995.³³ Ohio followed suit in 1995, enacting a private school choice program for disadvantaged children in Cleveland, most of whom opted to attend religious schools. The U.S. Supreme Court rejected an Establishment Clause challenge to the Cleveland program in the 2002 *Zelman v. Simmons-Harris* decision, thus clearing the federal constitutional path for the expansion of private school choice.³⁴

Private-school-choice proponents faced major legal and political obstacles. Legally, even after the U.S. Supreme Court settled the federal constitutional question in *Zelman*,³⁵ significant state constitutional hurdles to parental choice remained. Thirty-seven state constitutions contain provisions, commonly known as “Blaine Amendments,” that prohibit the public funding of private and/or “sectarian” schools.³⁶ Following *Zelman*,

³¹ JOHN E. CHUBB & TERRY MOE, *POLITICS, MARKETS, AND AMERICAN SCHOOLS* 217 (1990).

³² Since the mid-nineteenth century, Maine and Vermont both have maintained “town tuitioning” programs, which permit students in towns without public high schools to use public dollars to attend other public or private, secular schools. Illinois and Minnesota have very modest non-refundable parental tax credit programs. See ABCs OF SCHOOL CHOICE, *supra* note 19, 33–34, 55–60, 95–97.

³³ See *Jackson v. Benson*, 578 N.W.2d 602, 607–10 (Wis. 1998) (summarizing history of Milwaukee Parental Choice Program).

³⁴ 536 U.S. 639, 643–62 (2002).

³⁵ *Zelman v. Simons-Harris*, 536 U.S. 639 (2002).

³⁶ These provisions, called “Blaine Amendments” for Senator James Blaine of Maine, who attempted as Speaker of the House in 1875 to amend the federal constitution to prohibit the public funding of sectarian schools, reflect a lingering legacy of America’s historical anti-Catholic bias. See AMERICAN LEGISLATIVE EXCHANGE COUNCIL, *SCHOOL*

many commentators predicted that these provisions represented major impediments to the expansion of private-school choice.³⁷ The political hurdles to private-school choice have proven even more substantial than the legal ones. For a variety of reasons, including but not limited to political power and the opposition of teacher unions, private-school choice has proven the proverbial “third rail” of education policy.³⁸ Indeed, opposition to voucher proposals arguably fueled the movement to enact charter laws, which in turn took the wind out of the sails of the private-school-choice movement. Charter schools were promoted as a “safer” and more “constrained” version of parental choice — one that is both “public” and “secular.” Within debates about educational finance, many moderate reformers traditionally advocated for charter schools as an alternative to private-school-choice programs such as tax credits or vouchers.³⁹ For example, the 2004 Democratic Party platform provided: “Instead of pushing private school vouchers that funnel scarce dollars away from the public schools, we will support public school choice, including charter schools.”⁴⁰ Michael Heise has demonstrated the likelihood that a state enacted or expanded charter program increased along with the “threat” of publicly funded private-school choice.⁴¹

In recent years, proponents of private-school choice have begun to overcome these political barriers. Since the enactment of the first private-school-choice legislation in Wisconsin in 1990, more than half of the states have created at least one program that provides some public

CHOICE AND STATE CONSTITUTIONS: A GUIDE TO DESIGNING SCHOOL CHOICE PROGRAMS 4 (2007), <http://www.alec.org/docs/IJ-ALEC-school-choice.pdf>; Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 FIRST AMEND. L. REV. 45 (2003).

³⁷ See, e.g., Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917 (2003); Thomas C. Berg, *Vouchers and Religious Schools, The New Constitutional Questions*, 72 U. CINN. L. REV. 151 (2003).

³⁸ See, e.g., TERRY M. MOE, SPECIAL INTEREST: TEACHERS UNIONS AND AMERICAN'S PUBLIC SCHOOLS 327-29 (2011) (discussing teacher-union opposition to private-school choice); Michael Heise, *Law and Policy Entrepreneurs: Empirical Evidence on the Expansion of School Choice Policy*, 87 NOTRE DAME L. REV. 1917, 1932 (2012) (“Understandably, and with considerable justification, school choice supporters reflexively blamed teachers unions for school voucher initiative losses”).

³⁹ JACK BUCKLEY & MARK SCHNEIDER, CHARTER SCHOOLS: HOPE OR HYPE 3 115–70 (2007).

⁴⁰ BRINIG & GARNETT, *supra* note 8, at 37.

⁴¹ Michael Heise, *Law and Policy Entrepreneurs: Empirical Evidence on the Expansion of School Choice Policy*, 87 NOTRE DAME L. REV. 1917, 1929–30 (2012).

subsidies for children attending private school. Today, half of the states and the District of Columbia have at least one publicly funded private-school-choice programs, and participation in private-school-choice programs has more than tripled in the last decade.⁴² All told, in 2017, there were 52 private-school-choice programs in the United States, with the largest programs located in Florida, Indiana, Louisiana, and Ohio.⁴³

A confluence of factors has fueled the increased momentum behind parental choice. First, and somewhat, ironically, charter schools, which initially were promoted as an alternative to vouchers, may have undermined the argument that private-school-choice is “radical” by normalizing the idea of parental choice, and exponential growth of charter schools has resulted in millions of children moving from publicly to privately operated schools.⁴⁴ Second, and relatedly, opponents of private-school choice today have had bigger battles to fight, including battles with charter schools, which historically enjoyed broad bi-partisan support but which today pose a serious competitive threat to urban school districts.⁴⁵ Third, over the past two decades, the menu of private-choice options has expanded to encompass policy devices other than vouchers.⁴⁶ Beginning with Arizona in 1997, more than a dozen states have adopted a new private-school-choice device, the “scholarship tax credit,” which does not directly fund private-school scholarships, but rather incentivizes donations

⁴² See ABCS OF SCHOOL CHOICE, *supra* note 19, at 33, 55, 57-59, 95.

⁴³ *Id.* at 14-15.

⁴⁴ Jack Buckley & Mark Schneider, CHARTER SCHOOLS: HOPE OR HYPE 3 (2007).

⁴⁵ In recent years, the truce between charter schools and public schools has unraveled as charter market share has grown, and public schools have faced enrollment declines as a result. See, e.g., Richard D. Kahlenberg & Halley Potter, *Restoring Shanker's Vision for Charter Schools*, AMERICAN EDUCATOR, Winter 2014-15, at 4, 5 (“Proposed to empower teachers, desegregate students, and allow innovation from which the traditional public schools could learn, many charter schools instead prized management control, reduced teacher voice, further segregated students, and became competitors, rather than allies, of regular public schools.”); Richard Whitmire, *Charter School War could go National: Governor Andrew Cuomo is Winning the Battle in New York, but what about your state?* USA TODAY (Apr. 1, 2014), <http://www.usatoday.com/story/opinion/2014/04/01/bill-de-blasio-cuomo-charter-schools-new-york-column/7158071/>.

⁴⁶ A 2014 Poll conducted by *Education Next* found that support for supporting school choice through tax credits was actually higher than support for charter schools, with 60 percent of respondents supporting tax credit policies but only 54 percent supporting charter schools. Michael B. Henderson, Paul E. Peterson & Martin R. West, *No Common Opinion on the Common Core*, EDUCATION NEXT (2014), <http://educationnext.org/2014-ednext-poll-no-common-opinion-on-the-common-core/>.

to private scholarship organizations.⁴⁷ Additionally, six states—Arizona, Florida, Mississippi, North Carolina, Nevada, and Tennessee—have adopted “education savings account” programs that empower parents to spend state education funds on a range of educational expenses, including private-school tuition.⁴⁸ And, most recently, several states have adopted “course choice” programs, which allow students to customize their education by purchasing individual courses across multiple sectors (public, private, and charter).⁴⁹

Moreover, state constitutional establishment clauses (often referred to a “Blaine Amendments”) have not proven to be insurmountable hurdles to the expansion of parental choice, as predicted by commentators in the wake of *Zelman*.⁵⁰ Although a state constitutional challenge inevitably follows the enactment of a new private-school-choice program, only two state’s supreme courts (Arizona and Colorado) have invalidated voucher programs on anti-establishment grounds and a third (Florida) on other state constitutional grounds.⁵¹ Blaine Amendment challenges to private-school-choice programs have been rejected by the highest courts in Indiana, Wisconsin, Ohio, Alabama and, most recently, North Carolina.⁵²

In states with strong Blaine Amendments scholarship tax credits offer a way around the state constitutional restrictions on the public funding of private schools since state supreme courts appear inclined to follow the U.S. Supreme Court’s holding in *Arizona Christian School Tuition Organization v. Winn* that taxpayers lack standing to challenge these

⁴⁷ The nation’s three largest private-school-choice programs (in terms of enrollment)—in Arizona, Florida, and Pennsylvania—are all scholarship tax credit programs. SCHOOL CHOICE YEARBOOK, *supra* note 10.

⁴⁸ See EDCHOICE, *What is an Education Savings Account?*, <https://www.edchoice.org/school-choice/types-of-school-choice/education-savings-account/>.

⁴⁹ See SCHOOL CHOICE YEARBOOK *supra* note 10, at 8.

⁵⁰ See Ira C. Lupu & Robert W. Tuttle, *Zelman’s Future: Vouchers, Sectarian Providers and the Next Round of Constitutional Battles*, 78 N.D. L. REV. 917 (2003); Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 FIRST. AMD. L. REV. 45 (2003).

⁵¹ *Cain v. Horne*, 202 P.3d 1178, 1184 (Ariz. 2009); *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461, 471 (Colo. 2015); *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006).

⁵² *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 525 U.S. 997 (1998); *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999); *Magee v. Boyd*, 175 So.3d 79 (Ala. 2015); *Hart v. State of North Carolina*, 368 N.C. 122 (N.C. 2015).

programs because scholarship funds raised through tax credit programs are not public dollars.⁵³

Importantly, in 2017, in *Trinity Lutheran Church v. Comer*, the U.S. Supreme Court ruled that Missouri's effort to rely on its state establishment clause to exclude a faith-based preschool from a program providing recycled tires for playground resurfacing violated the First Amendment's Free Exercise Clause. While the Court left to one side whether this ruling applied to monetary benefits, a subsequent ruling might further limit states' ability to rely on Blaine Amendments to restrict parental choice.⁵⁴

Finally, and perhaps most importantly, the political coalition supporting private-school choice has expanded and diversified, and the arguments offered in favor of it have shifted from free-market to social-justice rhetoric.⁵⁵ Two decades after parental choice was first introduced into the American educational landscape, the political coalition supporting private school choice has expanded and diversified. Although public opinion polls suggest that support for parental choice is today highest among disadvantaged and minority parents, the primary political proponents have traditionally been white and conservative.⁵⁶ In recent years, fueled in part by a shift in messaging, away from a discussion of "markets" and toward the imperative of giving poor parents options for their children, support among elected leaders for private school choice has begun to cross party and demographic lines.⁵⁷ As Terry Moe observed:

The modern arguments for vouchers have less to do with free markets than with social equity. They also have less to do with theory than with the commonsense notion that disadvantaged kids should never be forced

⁵³ 563 U.S. 125 (2011). See also, e.g., Travis Pillow, *Judge Dismisses Lawsuit Challenging Florida Tax Credit Scholarships*, REDEFINED, May 18, 2015, <https://www.redefinedonline.org/2015/05/judge-plaintiffs-lack-standing-to-challenge-florida-tax-credit-scholarships/>.

⁵⁴ Joshua Dunn, *Narrow Opening for School Choice: But Blaine Amendments Stand, for Now*, EDUCATION NEXT, WINTER 2018, no. 1.

⁵⁵ See, e.g., TERRY M. MOE, SPECIAL INTEREST: TEACHERS UNIONS AND AMERICA'S PUBLIC SCHOOLS 329 (2011) 329.

⁵⁶ See, e.g., Katie Ash, *Black Parents in South Favor Increased School Choice, Says New Survey*, EDUC. WK. (July 24, 2013), http://blogs.edweek.org/edweek/charterschoice/2013/07/black_parents_want_more_school_choices_says_new_survey.html [<https://perma.cc/RL7T-KCS4>]; Diana Jean Schemo, *Program on Vouchers Draws Minority Support*, N.Y. TIMES (Apr. 6, 2006),

⁵⁷ See MOE, *supra*, note 55, at 329.

to attend failing schools and that they should be given as many attractive options as possible.⁵⁸

At the same time that vouchers, scholarship tax credits, and other private-school-choice devices have been gaining steam, the “charter school compromise” on parental choice has begun to unravel. During their first two decades, charter schools enjoyed broad, bipartisan support. During the 2008 presidential election cycle, both John McCain and Barack Obama expressed strong support for charter schools. President Obama made charter schools a centerpiece of his education policy, as had both President George W. Bush and President Bill Clinton before him. Even the two major teachers unions cautiously endorsed charter schools until recently.⁵⁹

But, as the footprint of charter schools has expanded, the truce between charter school proponents and supporters of traditional public schools has evaporated. In July 2017, for example, the NEA amended its policy on charter schools. The new policy characterizes charter schools as largely a “failed experiment” and demands that they be placed under the control of local school districts, which should authorize new charter schools only when they do not have an adverse impact on local public schools.⁶⁰ That same month, the NAACP issued a report calling for a national moratorium on all charter schools and emphasizing their negative effects on traditional public schools, especially those in urban areas.⁶¹

The debate over charter schools has become so intense that commentators frequently refer to the “charter school wars.”⁶² As in the

⁵⁸ *Id.*

⁵⁹ BRINIG & GARNETT, *supra* note 8, at 37.

⁶⁰ NEA Policy Statement on Charter Schools (July 4, 2017), <https://ra.nea.org/nea-policy-statement-charter-schools/>.

⁶¹ NAACP TASK FORCE ON QUALITY EDUCATION, QUALITY EDUCATION FOR ALL...ONE SCHOOL AT A TIME, July 2017, https://www.naacp.org/wp-content/uploads/2017/07/Task_ForceReport_final2.pdf.

⁶² See, e.g., Gail Robinson, *From Charters to Common Core, There is a Ceasefire in NY's School Wars* (Sept. 19, 2018), <https://networkforpubliceducation.org/charters-common-core-theres-ceasefire-nys-school-wars>, Don Shalvey, *Declaring a Truce in the Charter Versus District School Wars*, EDSource (Nov. 26, 2017), <https://edsource.org/2017/declaring-a-truce-in-the-charter-versus-district-school-wars/590613>; Editorial, *Chicago's Charter School Wars*, CHICAGO TRIBUNE (June 1, 2015), <https://www.chicagotribune.com/opinion/editorials/ct-success-charter-school-union-teachers-chicago-edit-0601-bd-20150529-story.html>; Richard Kahlenberg & Halley Potter, *End the Charter School Wars* (Sept. 28, 2014),

Memphis story described previously, charter operators seeking to open new schools face increasing regulatory scrutiny from authorizers

It is important to acknowledge that the factors leading to the disintegration of the charter school compromise are directly linked to those factors that led public school proponents initially to support charter schools and shun vouchers. By making charter schools a politically palatable “safe” alternative to vouchers, public-school proponents opened the door to make charter schools as a politically palatable, “safe” alternative to traditional public schools. As a result, the charter school ascendancy has affected negatively both private schools (especially the urban faith-based schools that represented, in the not-so-distant past, the only affordable and viable alternative to students of modest means) and traditional public schools. In other words, the growing footprint of charter schools, combined with a decline in school-age population in most urban centers, has led to—and will continue to fuel—school closures in both the private and public sectors.⁶³

Not only do charter schools compete for students with other schools in both sectors, but in the both sectors, system leaders have come to view the “conversion” of their schools into charter schools as a school-reform device. In the public sector, enlisting a charter management organization to operate failing schools is attractive to public officials as a means of addressing a dysfunctional institutional culture. When a school is closed and converted to a charter school, the leadership and teaching staff are generally dismissed and offered the opportunity to reapply—but to the charter operator, rather than the school district. Charter school teachers are rarely unionized, and even where they are, charter schools are generally not bound by the requirements of collective bargaining agreements between the local teachers’ union and the public school district.⁶⁴

In the faith-based sector, “conversion” decisions usually result from fiscal realities, with faith-based schools closed and reopened as charter schools in order to secure public funding.⁶⁵ In some districts, charter school conversions have become the ultimate accountability device: rather

<https://www.nydailynews.com/opinion/kahlenberg-potter-charter-school-wars-article-1.1954490>.

⁶³ BRINIG & GARNETT, *supra* note 8, chs. 1 & 2; Garnett, *Disparate Impact*, *supra* note 14, at 298-307.

⁶⁴ *Sector Agnosticism*, *supra* note 9, at 39-40.

⁶⁵ BRINIG & GARNETT, *supra* note 8, at 45-47.

than attempting to fix public schools, public education officials are opting to close and convert them to charter schools.⁶⁶

A Case for Expanding Choice to Preserve Pluralism

These observations are not intended to disparage charter schools. Charter schools, to be sure, have disrupted the educational status quo, and no disruption is costless. But the educational status quo was not and is not working well for many American children—especially those of modest means. As a proponent of giving parents options for their children, my view is that the rise of charter schools has been—by and large—a positive development, especially for disadvantaged urban students.

The most recent reports on the performance of urban charter schools, which suggest that charter schools are—on the whole—helping disadvantaged urban kids close the achievement gap, are heartening (although the results are by no means uniformly positive).⁶⁷ Even if I

⁶⁶ *State Legislation: Accountability—Sanctions/Interventions*, EDUC. COMM. OF THE STATES (May 23, 2016), <http://www.ecs.org/ecs/ecscat.nsf/WebTopicView?OpenView&count=-1&RestrictToCategory=Accountability--Sanctions/Interventions> [https://perma.cc/L4NX-K87D] (compiling state laws that give states the ability to close failing schools and turn them over to charter organizations); *see also, e.g.*, FLA. STAT. § 1008.33(4)(b)(1)–(5) (2012), (allowing a school district to either take over the school, “[r]eassign students to another school,” close and reopen the school as a charter school, contract with a private management company, or any other model “that [has] a demonstrated record of effectiveness”); ILL. ADMIN. CODE tit. 23, § 1.85(e)(1)–(4) (2012) (“Each school restructuring plan shall indicate that the district is undertaking one or more of the following actions in the affected school . . . reopening the school as a public charter school . . .”); MASS. GEN. LAWS ch. 69, § 1J(o) (2012) (listing 16 possible actions that a superintendent may take with respect to a persistently low performing school); MICH. COMP. LAWS § 380.1280c(2) (2011) (“[T]he redesign plan shall require implementation of [one] of the [four] school intervention models that are provided for the lowest achieving schools under the federal incentive grant program . . . known as the ‘race to the top’ grant program.”); N.C. GEN. STAT. § 115C-105.37B(a) (2012) (stating that “the State Board of Education may authorize [a] local board of education to adopt” the transformation, restart, turnaround, or closure model).

⁶⁷ *See National Charter School Study 2013*, CTR. FOR RES. ON EDUC. OUTCOMES (2013), <http://credo.stanford.edu/documents/NCSS%202013%20Final%20Draft.pdf> (studying 26 states and the District of Columbia and finding that, on the whole, urban charter students were now outperforming public school students in reading (gaining an additional eight days of learning each year), were on par with public school students in terms of math gains, and that students in poverty, minority students, and English language learners gain significantly more days of learning each year in both reading and math compared to their

thought otherwise, the reality is that charter schools likely have become a permanent fixture in the American educational landscape.

Despite opponents' best efforts, charter schools' footprint and market-share probably will continue to expand—perhaps exponentially in some places—in coming years.⁶⁸ The same cannot be said of faith-based schools, which are rapidly disappearing from America's urban neighborhoods for a variety of reasons, including but not limited to charter schools.⁶⁹ Not only have charter schools fueled enrollment declines in faith-based urban schools, but, as noted previously, some faith-based schools operators, like the Diocese of Memphis, opting to “convert” their schools to charter schools—a move which requires the operators to close their schools, relinquish operational control and secularize the curriculum.⁷⁰

Why Faith-Based Schools Matter

Assuming that faith-based schools indeed add unique and valuable pluralism to the educational landscape, with particular benefits for disadvantaged children, the question remains how to ensure that they remain a viable option in the future. Those satisfied that the choices within the public sector—including magnet schools, public-school choice, and charter schools—are sufficient perhaps will not be troubled to consider the answer to this question. But there are a number of reasons why the question is an important one, and why I believe that faith-based schools contribute valuable pluralism to the K12 educational landscape in the United States. These include:

First, faith-based schools, and especially urban Catholic schools, have a long and demonstrated record of lifting students out of poverty. Decades of social science research has demonstrated a “Catholic school effect” on

traditional public school peers).

⁶⁸ For example, a 2012 report commissioned from the Boston Consulting Group by the Philadelphia School Reform Commission (the entity that has operated the Philadelphia public school system since the Commonwealth of Pennsylvania assumed control of the district over a decade ago) predicted that, in the next five years, total charter school enrollment in Philadelphia would grow from roughly a quarter to 40 percent of all public school students. See *Transforming Philadelphia's Public Schools*, BOSTON CONSULTING GROUP 6–9 (2012),

⁶⁹ BRINIG & GARNETT, *supra* note 8, ch. 1.

⁷⁰ *Id.* at 42–47. ANDY SMARICK, SETON EDUC. PARTNERS, CATHOLIC SCHOOLS BECOME CHARTER SCHOOLS 11, available at https://www.setonpartners.org/assets/PDFs/Seton_DC_Case_Study_FINAL_r.pdf.

student performance. Beginning with the groundbreaking research of James Coleman and Andrew Greeley, numerous scholars have found that Catholic school students—especially poor, minority, students—tend to outperform their public school counterparts. Greeley found, for example, that the achievement of minority students in Catholic schools not only surpassed that of those in public schools but, moreover, that the differences were the greatest for the poorest, most disadvantaged, students.⁷¹ More recently, Derek Neal confirmed Greeley’s “Catholic school effect” in research demonstrating that Catholic school attendance increased the likelihood that a minority student would graduate from high school from 62 percent to 88 percent and more than doubled the likelihood that a similar student would graduate from college.⁷² Catholic schools, in other words, close the achievement gap. As Nicholas Lehmann observed in a 1986 *Atlantic Monthly* article: “In the . . . ghetto today, the only institutions with a record of consistently getting people out of the underclass are the parochial schools.”⁷³ Catholic school students, controlling for a range of predictive demographic factors, also are more likely to graduate from high school, to attend and complete college, to maintain steady employment and earn higher wages than similar students attending other types of schools.⁷⁴

Second, faith-based schools appear to be particular good at the critical task of forming citizens. A common argument against private-school choice—identified most prominently with Amy Gutman—is that public education is necessary to inculcate democratic values and tolerance of diversity. School choice is dangerous, Gutmann asserts, because most parents are “unwilling to resist a strong human impulse: the desire to pass some of their particular prejudices onto their children.”⁷⁵ The available empirical evidence, however, tends to rebut this concern. A number of social scientists have sought to measure the how well private schools in general, and private schools participating in school choice programs in

⁷¹ ANDREW GREELEY, CATHOLIC HIGH SCHOOLS AND MINORITY STUDENTS 108 (1982); JAMES COLEMAN, ET AL., HIGH SCHOOL ACHIEVEMENT (1982).

⁷² Derek Neal, *The Effect of Catholic Secondary Schooling on Educational Attainment*, 15 J. LABOR ECON. 98 (1997).

⁷³ Nicholas Lehman, *The Origins of the Underclass*, ATLANTIC MONTHLY (July 1986).

⁷⁴ Erich Lauff, Steven J. Ingels & Elise M. Christopher, *Education Longitudinal Study of 2002*, NATIONAL CENTER FOR EDUCATION STATISTICS (2002), <https://nces.ed.gov/surveys/els2002/>; *A First Look at 2002 High School Sophomores 10 Years Later*, NATIONAL CENTER FOR EDUCATION STATISTICS (2014), <https://nces.ed.gov/pubs2014/2014363.pdf>.

⁷⁵ Amy Gutmann, DEMOCRATIC EDUCATION 34 (1987).

particular, perform as civic educators. Most of these studies find that private schools—and especially Catholic schools—appear to do an excellent job at preparing students to be engaged members of a diverse, democratic society.⁷⁶ For example, using data from the 1996 National Household Education Survey (NHES), David Campbell compared student enrolled in public and private schools along four variables—community service, “civic skills” or the ability of students to engage in political activities, political knowledge, and political tolerance. Campbell found that private school students were significantly more likely to engage in community service than public school students; more likely to learn civic skills in school; better informed about the political process; and generally more politically tolerant than students in public schools. Interestingly, however, Campbell also found that the distinction between public and private schools disappeared when Catholic schools were excluded from the analysis, leading him to conclude that “students in Catholic schools drive the private school effect.”⁷⁷

These results mirror other studies comparing public and private school students. In 2007, Patrick Wolf examined 21 quantitative studies of the effects of school choice on civic values, and found that the effect of private schooling and school choice was almost always neutral or positive. While not all of these studies control for selection bias, many do, leading Wolf to conclude: “The statistical record shows that private schooling and school choice often enhances the realization of the civic values that are

⁷⁶ See, e.g., TERRY M. MOE, *SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC* (2001) (arguing that private schools are, because of their independence from bureaucracy, better suited to serve as models for democratic education than public schools); Patrick J. Wolf et al., *Private Schooling and Political Tolerance*, in *CHARTERS, VOUCHERS, AND PUBLIC EDUCATION* (Paul E. Peterson & David E. Campbell eds., 2001) (finding that college students who attended private schools score more highly on measures of political tolerance); Jay P. Greene, *Civic Values in Public and Private Schools*, in *LEARNING FROM SCHOOL CHOICE* (Paul E. Peterson, ed., 1998) (finding that students in private schools are more likely to participate in public service than public school students); Richard G. Niemi, *Community Service by High School Students: A Cure for Civic Ills?* 22 *POLITICAL BEHAVIOR* 45 (2000) (same for religiously affiliated schools); Kenneth R. Godwin, *Teaching Tolerance in Public and Private Schools*, 82 *PHI DELTA KAPPAN* 524 (2001) (finding that private schools do a slightly better job than public schools of encouraging interethnic friendships and developing support for democratic norms).

⁷⁷ See David E. Campbell, *The Civic Side of School Choice: An Empirical Analysis of Civic Education in Public and Private Schools*, 2008 *B.Y.U. LAW REV.* 487, 501-10 (2008). See also David E. Campbell, *Bowling Together: Private Schools, Public Ends*, *EDUCATION NEXT* (Fall 2001).

central to a well-functioning democracy. This seems to be the case particularly . . . when Catholic schools are the schools of choice.”⁷⁸

Third, faith-based schools—again especially urban Catholic schools—are stabilizing community institutions. In my work with Margaret Brinig, we measured the effects of Catholic school closures on perceived disorder, perceived social cohesion, and crime in Chicago, Philadelphia, and Los Angeles neighborhoods. Our findings, which are reported in detail in our 2014 book, *Lost Classroom, Lost Community: Catholic Schools Importance in Urban Neighborhoods*, can be briefly summarized as follows: A Catholic school closure triggered a decrease in social capital and an increase in serious crime in urban neighborhoods in Chicago and Philadelphia.⁷⁹ And, in Chicago, that an open Catholic school appeared to suppress crime in a police beat. In fact, our regression analysis suggested that crime in police beats with open Catholic schools was, on average, at least 33 percent lower than police beats without them. In contrast, open charter schools appeared to have no statistically significant effect on overall crime rates in a police beat.⁸⁰

In the analysis of school closures, we incorporated a variable to disaggregate school-closure decisions from neighborhood demographics, enabling us to demonstrate causation.⁸¹ In our analysis of the effects of open charter and Catholic schools, however, we were unfortunately unable to demonstrate causation since we could not identify a variable predicting the locations of charter schools, as we could for Catholic schools. We therefore were unable to disentangle the locations of charter schools from neighborhood demographic factors that might predict more crime, although we did control for these factors in our analysis⁸² (curiously, we found that Catholic schools appeared to have no effects on either social capital or crime in Los Angeles, leaving us with a puzzle that we have yet to solve).⁸³

School Choice and the Future of Educational Pluralism

A world without private-school choice, or with the extremely constrained menu of choices available today, likely will increasingly

⁷⁸ Patrick J. Wolf, *Civics Exam*, EDUCATION NEXT (Summer 2007).

⁷⁹ BRINIG & GARNETT, *supra* note 8, at 64-70, 100-105.

⁸⁰ *Id.* at 94-97.

⁸¹ *Id.* at 59-64.

⁸² *Id.* at 97-98.

⁸³ *Id.* at 106-11.

become a world without faith-based schools. Some faith-based schools will, as in Memphis, become charter schools. They will, in so doing, cease to be faith-based schools (the questions of whether a secularized version of a formerly faith-based school can continue to capture the positive effects reviewed above is beyond the scope of this article). Some elite faith-based schools serving wealthier children will continue to thrive, and some serving lower-income students will survive on philanthropic support. But most of the latter will gradually continue to disappear from the American educational landscape.

Private-school choice matters to faith-based schools for a number of related reasons. The first, and perhaps most obvious reason is the rise of charter schools. Faith-based and other private schools, which must charge tuition, compete with charter schools, which are free to students. The competition is particularly intense in many urban centers, where the charter school enrollment share increases each year. Nationwide, private schools continue to enroll approximately twice as many students (5.7 million in 2015) than charter schools (3.1 million in 2015), but charter school enrollment is growing exponentially while private school enrollment is stagnant.⁸⁴ Moreover, as discussed previously, the growth of charter schools is even more staggering in urban centers, where private and faith-based school closures (as well as public school closures) are being experienced most intensely.⁸⁵ And, it is worth noting that while the private schools' enrollment share has held steady at about ten percent, the percentage of students enrolled in faith-based schools (which tend to be more affordable) has decreased and the enrollment share of non-sectarian private schools (almost all of which are beyond the financial reach of families of modest means) increased over the past few decades.⁸⁶

The second reason why expansion of parental choice is important to the long-term viability of faith-based schools is that rising operational costs have driven tuition increases, reducing affordability. This is especially true in the Catholic sector, where a dramatic decline in the number of women religious (i.e., nuns) has left schools without a stable supply of low-cost teachers and leaders.⁸⁷ Cross-subsidies between churches, synagogues and

⁸⁴ Council for American Private Education, *Facts and Studies*, <http://www.capenet.org/facts.html>.

⁸⁵ Garnett, *Disparate Impact*, *supra* note 14, at 290-93.

⁸⁶ In 2011-12, the average non-sectarian private school charged \$21,510 in tuition compared to \$6,890 for Catholic schools and \$8,690 for other religious schools. Council for American Private Education, *Facts and Studies*, <http://www.capenet.org/facts.html>.

⁸⁷ In 1950, 90 percent of teachers in Catholic schools were nuns. In 2016, 2.8 percent were nuns. See MARGARET F. BRINIG & NICOLE STELLE GARNETT, *LOST CLASSROOM*,

mosques and schools, which historically kept tuition relatively low, also has declined substantially (again, especially in—but not limited to—the Catholic sector), particularly in urban areas where demographic shifts have left pews and collection plates empty. One reason why there are so few low-cost secular private school options is that religious congregations have historically subsidized faith-based schools. A second reason is that low-cost secular schools have migrated to the charter sector in order to access public funds.⁸⁸

Of course, the fact that private-school choice has enjoyed an unexpected ascendancy in recent years is good news for faith-based schools. It is hardly surprising that faith-based schools compete more effectively with charter schools—and are less likely to close—when private-school choice becomes available.⁸⁹ That said, many private-school choice programs are poorly designed, and all of the programs more limited in scope than charter-school programs. Almost all of them are limited in eligibility, compared to the universal access guaranteed by charter-school laws.⁹⁰

The largest programs are either means-tested or means-tested and limited to students exiting failing schools or students residing in a particular city or school district. Other programs are limited to students with specific characteristics, such as foster children or children with specific disabilities (e.g., autism, dyslexia). Approximate half of all programs are scholarship tax credit programs, which incentivize donations to scholarship funds but do not directly provide public funding for students to attend private schools.

Many scholarship tax credit programs generate very little choice: For example, in 2016, 178 and 188 students participated in New Hampshire's and Kansas's scholarship tax programs, respectfully. The per-pupil scholarships amount provided in scholarship tax credit programs tend to be, on average, less than half of those provided in voucher programs (in

LOST COMMUNITY: CATHOLIC SCHOOLS' IMPORTANCE IN URBAN AMERICA 26 (2014); U.S. Conference of Catholic Bishops, "2016 Catholic School Fact Sheet," <http://www.usccb.org/beliefs-and-teachings/how-we-teach/catholic-education/upload/Catholic-Schools-FACT-Sheet-2016.pdf>.

⁸⁸ BRINIG & GARNETT, *supra* note 8, at 25-28.

⁸⁹ See Adam B. Schaeffer, *The Charter School Paradox: How Public-Sector-Only Choice Can Increase Costs, Reduce Educational Diversity and Undermine Competition, and How Those Unintended Consequences can be Avoided*, CATO INSTITUTE (Aug. 28, 2012), <https://object.cato.org/sites/cato.org/files/pubs/pdf/charter-school-paradox.pdf>.

⁹⁰ See SCHOOL CHOICE YEARBOOK, *supra* note 10, at 14-15.

2016, \$2,937 and \$6,319, respectively).⁹¹ Even when voucher programs are included in the calculus, however, scholarships provided by private-school choice tend to be significantly lower than the per-pupil allocation provided to charter schools (which in turn tend to receive less money than traditional public schools).

A recent study by Patrick Wolf and his colleagues at the School Choice Demonstration Project found that charter schools receive, on average, \$5,721 (or 28 percent) less than traditional public schools. Still, the 2014 weighted average for charter-school per student revenue was \$14,200, nearly \$10,000 less than the average scholarship amount in a private-school-choice program in 2016. It is not surprising, therefore, that nearly ten times as many students currently attend charter schools (3.2 million) than participate in a private-school-choice program (442,000).⁹² Not surprisingly, the number of students enrolled in private schools through one of these programs (approximately 300,000) remains only about a tenth of total charter-school enrollment.⁹³

The Path Forward

That said, significant hurdles—mostly political, not legal—to the expansion of private-school choice remain. The rest of this article addresses responses to those hurdles on both the part of the faith-based schools and regulators. While fierce political opposition to private-school choice persists, many impediments to expanding parental choice to include faith based schools (and increasing the scope of, and funding levels in, existing programs) arguably are self-imposed from within the faith-based school sector. In order to overcome these hurdles, faith-based schools need to do the following:

Attend to results

Most studies of private-school-choice programs find modest positive effects on academic performance over time (following, in some cases, early losses) as well as more-significant longer-term effects on non-cognitive variables, including high school graduation rates, college

⁹¹ *Id.*

⁹² PATRICK WOLF, ET AL., CHARTER SCHOOL FUNDING: INEQUITY IN THE CITY 4, 11 (May 2017), <http://www.uaedreform.org/downloads/2017/05/inequity-in-the-city.pdf>; SCHOOL CHOICE YEARBOOK, *supra* note 10, at 9, 17; Nat'l Alliance for Public Charter Schools, *National Charter School Facts*, <https://data.publiccharters.org/>.

⁹³ See SCHOOL CHOICE YEARBOOK, *supra* note 10, at 14-15.

matriculation and persistence, and reduced likelihood of involvement in the criminal justice system.⁹⁴ Eighteen random-assignment studies have evaluated the academic effects of participating in publicly and privately funded school voucher programs. Of these, fourteen have found some positive effects on student achievement, most of them modest. Six of the studies found positive effects on all participating students and eight found benefits for some group of students (e.g., racial minorities, extremely disadvantaged students, and students exiting poorly performing public schools) and no visible effects on others. For example, the final review of the D.C. Opportunity Scholarship project found no overall effects on student achievement, but positive effects on certain subgroups in reading.⁹⁵

More recent studies have found that negative effects on student achievement in the first few years that students participate in choice programs eventually mitigated. For example, a study of the early results of Indiana's statewide voucher program found no effect in reading and negative effects in math, but a recent a follow-up study by the same researchers found that students caught up and began to improve if they remained in their chosen school for four years.⁹⁶ Recent studies of student performance in Louisiana's voucher program similarly found that students lost ground in the early years of participation, but caught up and in some cases surpassed their public school peers after three years in the program.⁹⁷

Research on non-cognitive outcomes tend to find much larger and more positive effects. For example, a 2010 evaluation of the Milwaukee Parental Choice Program found that participating students scored higher than similar public school students in reading but not in math.⁹⁸ However, program participation increased the likelihood that a student would graduate from high schools and enroll in college by approximately 20

⁹⁴ See, e.g., Celia Elena Rouse & Lisa Barrow, *School Vouchers and Student Achievement: Recent Evidence, Remaining Questions*. 1 ANN. REV. ECON. 17 (2008)

⁹⁵ PATRICK WOLF, ET AL., EVALUATION OF THE D.C. OPPORTUNITY SCHOLARSHIP PROGRAM, FINAL REPORT, (June 2010).

⁹⁶ Mark Berends, et al., *Lessons Learned from Indiana*, EDUCATION NEXT (Spring 2018).

⁹⁷ Cory Turner & Anya Kamenetz, *School Vouchers Get Two New Report Cards*, NPR ED, June 26, 2017, <https://www.npr.org/sections/ed/2017/06/26/533192616/school-vouchers-get-a-new-report-card>.

⁹⁸ JOHN WITTE, ET AL., MPCP LONGITUDINAL EDUCATIONAL GROWTH STUDY FIFTH YEAR REPORT (2012).

percent.⁹⁹ The latter finding was in keeping with the random-assignment study of the D.C. Opportunity Scholarship Program, which found that participation increased students' probability of completing high school from 70 to 82 percent.¹⁰⁰ Scholars conducting random-assignment studies of voucher programs also have documented positive effects on students' "civic values," including political knowledge, tolerance, volunteerism, and respect for diversity, especially among students moving from traditional public to Catholic schools.¹⁰¹

These "non-cognitive" outcomes are important, perhaps more important to long-term flourishing and success than a few points on a standardized academic achievement exam. Indeed, in education reform debates, all agree that far more is at stake than can be measured by standardized tests. It is also possible that, over time, private schools participating in choice programs will produce stronger results—in the same way that urban charter schools have begun to outperform traditional public schools after a relatively unimpressive start.¹⁰² But the reality remains that when it comes to debates about parental choice, bad news is bad news: Opponents are prepared to use any study reporting that private-school choice does not "work" as ammunition to defeat new programs and block the expansion of existing ones.¹⁰³ And, proponents need to come to terms with the fact that these programs have not—at least as measured by test scores—delivered the results long promised. Choice is not, as Terry Moe and John Chubb memorably predicted in 1990, "a panacea."¹⁰⁴ Choice is hard work. And, if faith-based schools want to see it expanded,

⁹⁹ PATRICK J. WOLF, THE COMPREHENSIVE LONGITUDINAL EVALUATION OF THE MILWAUKEE PARENTAL CHOICE PROGRAM (Feb. 2012). More recently, researchers from the School Choice Demonstration Project found that participating in the MPCP was associated with a significant decrease in later criminal behavior, with even stronger effects for students the longer that they persisted in the program. Corey A. DeAngelis & Patrick Wolf, *The School Choice Voucher: A "Get Out of Jail" Card?* (2016), <http://www.uaedreform.org/the-school-choice-voucher-a-get-out-of-jail-card-2/>.

¹⁰⁰ Patrick J. Wolf, *et al.*, *School Vouchers and Student Outcomes*, 32 J. POL'Y ANALYSIS & MGMT 247, 252 (2013).

¹⁰¹ See, e.g., Margaret F. Brinig & Nicole Stelle Garnett, *Catholic Schools, Urban Neighborhoods, and Education Reform*, 85 N.D. L. REV. 887, 942-43 (2010) (summarizing research).

¹⁰² CENTER FOR RESEARCH OF EDUCATIONAL OUTCOMES, URBAN CHARTER SCHOOL STUDY REPORT ON 41 REGIONS (2015), <https://urbancharters.stanford.edu>

¹⁰³ See, e.g., Jonah Edelman & Randi Weingarten, *School Vouchers Don't Just Undermine Public Schools, They Undermine Our Democracy*, L.A. TIMES, May 31, 2017.

¹⁰⁴ JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS AND AMERICA'S SCHOOLS 217 (1990).

then they must attend to results and prove that they can take advantage of public resources to turn around the academic prospects of disadvantaged children.

A related goal on the part of regulators should be to focus on developing ways to measure school quality other than student test scores—and incentivizing chosen schools to report their performance based on these factors. The federal education legislation in 2015, the Every Student Succeeds Act (ESSA), requires states to employ at least one non-test-score-based method of school quality, which hopefully will incentivize experimentation along these lines. States have opted for a range of measures including, *inter alia*, chronic absenteeism; access to a diverse curriculum; rigor of high school curriculum; post-secondary enrollment and persistence; and, in a handful of states, measures of school climate and parental satisfaction.¹⁰⁵

The development of alternative measures of school quality is particularly important in the parental-choice context for three related reasons. First, while parents clearly value school quality, it is not always the most important factor influencing school choice decisions. Parents value a range of factors, and they make tradeoffs between their preferences when selecting schools; most studies find that only a minority of parents rank test scores as the most important predictor of school quality.¹⁰⁶ Second, and importantly, the research discussed previously suggests that standardized test scores alone may underestimate the benefits of parental choice, since the biggest payoffs of giving parents options for their children tended to be reflected in longer-term effects on things like high school graduation and college enrollment and persistence. Third, incorporating non-test-score measures of school quality may also reduce the resistance of private-school operators to transparency, as discussed below.

Embrace and encourage transparency

For a variety of reasons, including legitimate concerns about regulatory overreach and—in the case of faith-based school—worries about threats to autonomy and religious liberty—private schools have not typically

¹⁰⁵ See Nicole Stelle Garnett, *Post-Accountability Accountability*, 53 U. MICH. J. L. REFORM. 157 (2018).

¹⁰⁶ See Heidi Holmes Erickson, *How Do Parents Choose Schools, and What Schools Do they Choose? A Literature Review of Private School Choice Programs in the United States*, 11 J. OF SCHOOL CHOICE 491, 501-503 (Nov. 2017).

participated in state accountability programs. This remains the case in most states with private-school choice, with the exception of the voucher programs in four states: In Indiana, all participating schools must comply with the state's report-card requirements, and in Louisiana, Ohio, and Wisconsin, participating schools must administer the state assessment and report results publicly. In two of these states—Indiana and Louisiana—schools that fail to reach a certain achievement threshold on the assessment are excluded from future participation in the program. In the rest of the states with parental choice, schools are not required to provide information about student performance publicly (although some must report this information to parents). And, unfortunately, most private and private and faith-based schools are not transparent about student achievement, at least at the school level, although most Catholic dioceses do provide achievement data at the system level.

This resistance to transparency likely is unsustainable and is a major impediment to the expansion of private-school choice. To begin, opacity runs contrary to both of the animating goals of parental choice policy: to increase the number of high-quality schools available to disadvantaged children and to empower parents to make informed decisions about their children's education. Moreover, ESSA requires charter schools to participate fully in state academic accountability regimes and mandates that states issue the same report card for both traditional public and charter schools. This relatively new requirement places private-schools' resistance to transparency even more out of step with both trends in education policy and parents' expectations.

To encourage transparency, regulators would be well-advised to permit private schools to choose among a range of assessment options. While ESSA gives states the autonomy to select the criteria that they will use to assess school quality, it also requires that states use the same assessment criteria for both public and charter schools and mandates transparent reporting of the results of school assessments. Neither requirement, however, applies to private schools, including schools participating in parental-choice programs. As a result, states are free to give private schools flexibility in selecting their own assessment measures, and most do so. With the four exceptions discussed above, all states allow private schools participating in choice programs to choose between administering state assessments or a nationally normed test. Several parental-choice

states do not require participating private schools to administer standardized tests.¹⁰⁷

The goal of promoting transparency among private schools is linked to the willingness to permit a range of assessments. Many private schools object to state testing mandates. They assert that state testing mandates will force them to align with state exams, which may unduly constrain their ability to innovate and differentiate themselves from other schools. Moreover, since private schools do not always adhere to state curricular requirements, student performance on state exams is not necessarily an accurate reflection of student achievement and progress.¹⁰⁸ While state testing mandates enable apples-to-apples comparisons of school quality, there are significant tradeoffs, including the risk that requiring the administration of state-mandated exams may deter participation in parental-choice programs.¹⁰⁹

A compromise position would be to permit private schools to choose the researched-based testing regime of their choice but require the public reporting of results, ideally for all children enrolled in a school (not just those participating in the program). While multiple testing regimes complicates comparisons across sectors (and even between private schools administering different tests), a transparency requirement will empower parents with far more information than is currently available publicly while preserving schools' curricular autonomy. Moreover, over time, the "apples to oranges" challenges may diminish as more states opt for national rather than state tests, as many states have following the enactment of ESSA.¹¹⁰

¹⁰⁷ See David Stuit & Sy Doan, *School Choice Regulations: Red Tape or Red Herring?* (Jan. 2013), <https://edexcellence.net/publications/red-tape-or-red-herring.html>.

¹⁰⁸ NATIONAL CONFERENCE OF STATE LEGISLATURES, ACCOUNTABILITY IN PRIVATE SCHOOL CHOICE PROGRAMS (Dec. 2014), <http://www.ncsl.org/documents/educ/AccountabilityInPrivateSchoolChoice.pdf>.

¹⁰⁹ See Thomas B. Fordham Institute, PUBLIC ACCOUNTABILITY AND PRIVATE SCHOOL CHOICE 9 (Jan. 2014), <https://edexcellence.net/publications/public-accountability-private-school-choice>.

¹¹⁰ Twenty-one states have opted to use one of two tests based upon the Common Core Standards (the Partnership for Assessment of Readiness for College and Careers (PARCC) test or the Smarter Balanced Assessment Consortium (SBAC); 14 states plan to use the National Assessment of Educational Progress (NAEP) at least for some grades; and 22 states will administer the ACT or SAT to assess high schools' performance. See U.S. Dep't of Ed., *ESSA State Plan Submission*, <https://www2.ed.gov/admins/lead/account/stateplan17/statesubmission.html>.

Prepare to Address Other Accountability Concerns

The concerns discussed above focus primarily on academic outcomes of chosen schools. These concerns ought to take center stage in debates about accountability in parental choice programs. But, there are numerous other accountability concerns that have been raised in parental-choice debates, which this article leaves to another day and other scholars the treatment of other contested “accountability” questions—including governance, financial transparency, teacher qualifications, terms of service and retention, admission criteria, retention and expulsion rates, racial demographics, special education and inclusion, and nondiscrimination requirements that may conflict with the core beliefs of certain faith-based institutions.¹¹¹ I leave these issues to the side not because they are unimportant, but rather that they are important enough to deserve their own treatment. The scope of the regulations addressing these issues may well shape the pluralistic landscape of private school choice as much or more than the funds made available to students attending private schools since regulatory anxieties and concerns about religious liberty and institutional autonomy may deter the participation of some schools in parental choice programs.¹¹²

¹¹¹ For some useful sources covering these issues, see ANNEBERG INSTITUTE FOR SCHOOL REFORM, PUBLIC ACCOUNTABILITY FOR CHARTER SCHOOLS: STANDARDS AND POLICY RECOMMENDATIONS FOR EFFECTIVE OVERSIGHT (Brown Univ. 2014), <http://www.annenberginstitute.org/sites/default/files/CharterAccountabilityStds.pdf>; Marcus A. Winters, *What Underlies the So-Called Charter School ‘Special Education Gap’*, REALCLEAR EDUCATION (June 20, 2014), http://www.realcleareducation.com/articles/2014/06/20/charter_school_special_education_gap_1025.html; ERICA FRANKENBERG ET AL., CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS (Jan. 2012), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report>; GROVER J. WHITEHURST ET AL., CENTER ON CHILDREN AND FAMILIES, SEGREGATION, RACE AND CHARTER SCHOOLS: WHAT DO WE KNOW? (Oct. 2016), https://www.brookings.edu/wp-content/uploads/2016/10/ccf_20161021segregation_version-10_211.pdf; LINDA DARLING-HAMMOND ET AL., LEARNING POLICY INSTITUTE, PATHWAYS TO NEW ACCOUNTABILITY THROUGH THE EVERY STUDENT SUCCEEDS ACT (Apr. 2016), <https://learningpolicyinstitute.org/product/pathways-new-accountability-through-every-student-succeeds-act>.

¹¹² Garnett, *Post-Accountability*, *supra* note 105.

Conclusion

Nearly thirty years have passed since the Minnesota legislature struck the “charter compromise” on parental choice. In the intervening years, the once modest reform proposal has expanded beyond anyone’s wildest expectations, and the American education landscape has become populated by schools in three sectors rather than the two that existed in 1990. The charter school compromise has had repercussions for both public and private (especially faith-based schools). This article has explored the repercussions in the faith-based sector, arguing that it is time to reconsider the exclusion of these schools from the menu of publicly funded options in order to preserve educational pluralism, especially in America’s urban centers.

Will Universal Choice Cause More Sorting by Race and Income Across Schools?

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This paper provides an analysis of the question whether giving all families greater taxpayer funded choice over where to send their children to school, including choice to private schools, will lead to more, less, or about the same sorting by race and family income across K-12 schools. As is the case with a change in anything, asking whether a change to the K-12 education would be better or worse in some respect begs the question—as compared to what? The question of the sorting of children across schools that would prevail under a universal system of school choice is considered relative to the amount of sorting present in the K-12 public education system, where students are typically assigned to schools based on their residential location. Further, this paper considers a second, but related, question—whether trends in the public education system and the design of universal choice programs may have important impacts on sorting by race and class across schools.

These are important questions as states are increasingly adopting and expanding choice programs that allow families to choose among public and private schools for the education of their children. As of June 2018, 30 states had a grand total of 64 taxpayer funded choice programs that allow families to choose private schools.¹ While most of these state choice programs are small relative to school-aged populations, in a handful of states programs are growing somewhat large. For example, as reported in Scafidi (2018), in 2015, only 79 percent of Arizona K-12 students who received taxpayer subsidies for their education attended a traditional public school. About 15 percent attended a charter public school—which are public schools of choice, and the remaining 6 percent used a taxpayer funded scholarship to attend a private school or to

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¹ *School Choice in America*, EDCHOICE, (June 26, 2018), <http://www.edchoice.org/school-choice/school-choice-in-america>.

purchase non-school educational services from private providers. Florida and Indiana, among other states, also have relatively large proportions of school-aged children accessing educational choice programs. In Georgia, about 5 percent of students receiving taxpayer funded subsidies for their K-12 education attend either a charter public school (4 percent) or a private school (1 percent).²

Although the debate over the merits of giving parents enhanced choice in K-12 education is concerned with many legal and policy issues, an important one is whether school choice will lead to more or less racial and economic integration across schools relative to the public education system in the United States.³ The sorting of students across schools is an important policy issue given the substantial evidence regarding peer effects. That is, there is a large body of research that finds that academic and other outcomes for students are better when they are surrounded by higher achieving peers—even after controlling for a large number of other variables known to impact student outcomes.⁴ More sorting of students across schools by race and income will harm students when this sorting lowers the achievement levels of their peers. Alternatively, students from higher income backgrounds, for example, would benefit from this sorting if the achievement of their peers increased—and exacerbate achievement gaps. Given the evidence on peer effects, families of all income levels and all racial and ethnic groups have an incentive to sort their children into schools and classrooms with higher achieving peers—at least at the margin, and this incentive is present in any conceivable K-12 education system. Thus, voters, policymakers, and researchers concerned about academic and other outcomes for students, especially students in families less able to surround them with high achieving peers in a given education system, should seek education systems that give families other reasons to choose schools—other than peer quality.

Other than peer effects, there is an additional—albeit related—channel from which students concentrated in schools serving mostly disadvantaged students may face harm to their educations due to sorting—teachers. There is evidence from several states, including Georgia, that public

² Benjamin Scafidi, *Georgia 2020: Educational Opportunity for All Students*, GEORGIA PUBLIC POLICY FOUNDATION (January 2018), http://www.georgiapolicy.org/ftp_files/IAEDChoicefinal180121.pdf.

³ Literally, this issue is one of racial and ethnic integration or sorting. For ease of exposition, I will refer to racial integration or racial sorting.

⁴ A review of the literature on peer effects is found in Christopher Clark, Benjamin Scafidi, & John R. Swinton, *Do Peers Influence Achievement in High School Economics? Evidence from Georgia's Economics End of Course Test*, 42(1) J. ECON. EDUC. 3 (2011).

school teachers gain valuable teaching experience at the start of their teaching careers and then move to teach in public schools with more advantaged students.⁵ Thus, disadvantaged students are more likely to have novice teachers who are less effective, on average, than teachers with a couple or more years of experience.

Racial integration of schools is important for at least two additional reasons. First, interracial contact in schools may promote better understanding and appreciation of those who are of a different race or ethnicity than oneself.⁶ Second, there is strong evidence that African American students experienced worse academic outcomes in legally and forcibly segregated public schools, all else equal.⁷ To summarize:

- Two large empirical literatures suggest that increased race and income sorting may lead to lower peer quality and teacher effectiveness for disadvantaged students and thereby harm academic outcomes.
- More sorting of students across schools can also lead to decreases in racial understanding between groups, as individuals from different backgrounds have less contact with each other.

⁵ Benjamin Scafidi, David L. Sjoquist, & Todd R. Stinebrickner, *Race, Poverty, and Teacher Mobility*, 26(2) ECON. EDUC. REV. 145 (2007).

⁶ For evidence that interracial contact can promote more respectful attitudes toward those of other races, see Keith R. Ihlanfeldt & Benjamin P. Scafidi, *The Neighbourhood Contact Hypothesis: Evidence from the Multicity Study of Urban Inequality*, 39(4) URB. STUD. 619 (2002).

⁷ Sarah J. Reber, *School Segregation and Educational Attainment for Blacks*, 45(4) J. HUM. RESOURCES 893 (2010). This study finds that the mechanism for the increase in educational attainment for African American students as a result of federal desegregation efforts was not contact with white students per se, but the levelling up of school resources for African American students who no longer received dramatically lower levels of spending per student. Also see Rucker C. Johnson, *Long-Run Impacts of School Desegregation and School Quality on Adult Attainments (NBER Working Paper o. w16664)*, NATIONAL BUREAU OF ECONOMIC RESEARCH (2011), <http://www.nber.org/papers/w16664.pdf>. Johnson also finds that the significant increase in school resources experienced by African American students after federal desegregation efforts led to big improvements in several adult outcomes for African Americans. However, some research on academic outcomes in recent years suggests that contemporary racial sorting may not have important effects on academic outcomes for African American students—for example, see David Card & Jesse Rothstein, *Racial Segregation and the Black-White Test Score Gap*, 91(11-12) J. PUB. ECON. 2158 (2007).

The relationship between choice and the sorting of children across schools by race and income is an important legal issue as well, evidenced by the following two examples of somewhat recent legal actions.

The first legal action concerned a choice program allowing low-income Louisiana students who attended failing public schools to be offered vouchers to attend private schools. The Civil Rights Division of the U.S. Justice Department, believing that this choice program would increase racial sorting across schools, sued to stop the Louisiana Scholarship Program (LSP) in August 2013 “unless and until the State receives authorization from the appropriate federal court overseeing the applicable desegregation case.”⁸ Essentially, the federal government wished to require that federal judges approve all vouchers issued under the LSP—to ensure that vouchers supported court-mandated desegregation efforts that began in the 1970s to stop forcible racial segregation across public schools. The federal government withdrew its request to stop the program, but the U.S. Justice Department was to receive timely data that allowed it to monitor the impact of the LSP on school integration.⁹

A second legal action concerned desegregation litigation in New Jersey. A coalition of civil rights groups including the NAACP New Jersey State Conference, the Latino Action Network, and the Urban League of Essex County sued the state of New Jersey asking the courts to mandate that the state enact specific legal changes and devise a plan to promote an increase in racial and economic integration of New Jersey public schools.¹⁰ The plaintiffs reported that in the 2016-17 academic year, over 50,000 African-American students attended public schools that were over 99 percent nonwhite.¹¹ Overall, 61.7 percent of African American students in New Jersey attend public schools that are over 80 percent nonwhite, even though only 54.7 percent of all New Jersey public school students were nonwhite.¹² The plaintiffs also cited data that Latino students were concentrated in schools with large proportions of nonwhite

⁸ Elizabeth Harrington, *Holder Claims DOJ Never Sought to End Louisiana Voucher Program*, WASHINGTON FREE BEACON (2014), <http://freebeacon.com/issues/holder-claims-doj-never-sought-to-end-louisiana-voucher-program>.

⁹ See Harrington, *supra* note 8.

¹⁰ Nicholas Pugliese, *Segregated schools? Group challenges where NJ kids go to school, arguing system is biased*, NORTHJERSEY.COM (2018), <https://www.northjersey.com/story/news/new-jersey/2018/05/17/lawsuit-claims-nj-schools-racially-segregated/618308002/>.

¹¹ See Pugliese, *supra* note 10.

¹² *Id.*

students, and that this racial and ethnic sorting across New Jersey public schools has increased in recent years.¹³ Some of the remedies requested by this legal challenge included:

- Eliminating the legal requirement that students may access only public schools in their residential school districts. Thus, the plaintiffs wish the court to require that students be allowed to choose public schools across district lines—under a regulated choice system that permits student transfers that lead to less sorting by race and/or income.
- Invalidating the state law that requires charter public schools to give preference to children who reside in the school’s home public school district. Charter schools are public schools of choice that receive some level of autonomy from state and local education laws and regulations.
- Creating themed magnet schools of choice, where enrollment would be open to students from multiple school districts.¹⁴

While choice to private schools was not a desegregation remedy suggested by the plaintiffs, it is noteworthy that the plaintiffs asked that students be given greater choice to a wider array of schools in the public sector, including charter public schools—with the goal of choice leading to greater integration of schools by race and income. To be clear, the plaintiffs were not asking for unfettered choice in most cases; they were asking for various systems of choice, where choice to given schools is granted to families by a central authority only in cases that lead to increases in racial or economic integration. These types of choice programs are termed either “controlled choice” or “mechanism design” approaches.

The rest of this paper is organized as follows. The next section describes trends in sorting by race and income in the American public school system and prospects for increases in school integration in the public education sector. What follows is an overview of the idea for a universal choice system in K-12 education, a brief summary of the evidence to date on the effects of choice programs on integration, and

¹³ *Id.*

¹⁴ *Id.*

lessons learned from experiences with school choice about how the design of choice programs could promote integration by race and income.

Sorting by Race and Income in Public Schools

Given the traditional organization and governance of public schools in America, racial and economic sorting across public schools has been closely related to sorting across neighborhoods—historically. With localized attendance zones, individual public schools have typically drawn students from the neighborhoods that physically surround their schools. As noted by Clotfelter (2004), “patterns of residential segregation powerfully shape patterns of school segregation.”¹⁵

There have been increases in sorting by race and, especially, family income across American public schools in recent decades. That is, students in public schools today often experience more separation from students who are of a different racial group or from different income backgrounds than themselves, when compared to the amount of racial and income sorting across public schools in decades past. Given the relatively large amount of historical prejudice and discrimination against African Americans, most research and policy concerns the sorting of white and African-American students. With respect to income, data availability has led researchers to analyze the sorting of students who are eligible for a free lunch—a measure of being from a low income household—and students who are not eligible for a free lunch.¹⁶

¹⁵ CHARLES CLOTFELTER, *THE RISE AND RETREAT OF SCHOOL DESEGREGATION* 95 (2004). Clotfelter also notes that whites trying to avoid having many African American students in their children’s classrooms and schools may sort in whiter neighborhoods in order to enroll their children in whiter public schools. Thus, a desire for school segregation may cause residential segregation. The direction of causality is unclear.

¹⁶ In the United States, African Americans have historically faced the most restrictions on their free choices with respect to voting, where to work, where to eat, where to live—and where to send their children to school as well. The sources of those restrictions on the liberty of African Americans include prejudice and violence from whites, the institutions of slavery and segregation, and from other explicit government-enforced violations of their liberty. With respect to public schools, it was not until the unanimous U.S. Supreme Court decision in *Brown v. Board of Education*, 347 U.S. 482 (1954) that governments were prevented from enacting laws and policies that required that African American children attend separate public schools from other children. Even after the *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*) decision that required states to integrate their public schools “with all deliberate speed” efforts such as massive resistance and more subtle policies delayed school integration efforts in many states for another decade or more (Clotfelter, 2004). Given this history, its legacy, and

Sorting by Race in the Public Education System

After the Civil War and the freeing of American slaves, came the 1865-1877 “Reconstruction Era”, where serious attempts were made to permit the freed slaves to enjoy the civil and political rights that other Americans enjoyed—including access to taxpayer funded public schools. Nevertheless, after the Reconstruction Era ended, states in the old Confederacy and in the Midwestern United States passed what came to be known as “Jim Crow” laws that restricted the civil and political rights of African Americans, including the provision of separate public schools for African American students, with these separate public schools receiving significantly or even dramatically less taxpayer funding per student than public schools reserved for white students. To be clear, this segregation of students into separate public schools based on race was *de jure*. Although it became commonplace in much of the United States during the post-1877 Jim Crow Era, this segregation of public school students based on their race did not begin after 1877. For example, in the late 1700s Prince Hall and other African Americans in Boston protested that their taxes supported public schools for white students, while there were no taxpayer supported public schools for their children.¹⁷ In 1849, the Massachusetts Supreme Court ruled that segregation of public schools by race was permissible under the state’s constitution.¹⁸

In 1896, the U.S. Supreme Court—citing the Massachusetts case from 1849—ruled that separate but equal accommodations were allowed under the U.S. Constitution, including separate public schools for whites and African Americans.

It was not until the 1954 *Brown v. Board of Education* case, where the U.S. Supreme Court ruled that separate schools for African Americans and

discrimination and prejudice that exists today, researchers and policymakers have been interested in measuring the degree of separation of African Americans and whites away from each other and its consequences. That said, researchers in recent years are increasingly interested in analyzing sorting by ethnicity as well, especially the degree of separation among African Americans, whites, Latino and Hispanic Americans, and Asian Americans. With respect to measuring income sorting across public schools, the best measure that is widely available is typically whether students are eligible for a free or reduced price lunch—an indicator of economic disadvantage. While this measure is admittedly crude, it is typically the best one available.

¹⁷ William A. Muraskin, *MIDDLE-CLASS BLACKS IN A WHITE SOCIETY: PRINCE HALL FREEMASONRY IN AMERICA* (1975).

¹⁸ Stephen Kendrick & Paul Kendrick, *SARAH’S LONG WALK: THE FREE BLACKS OF BOSTON AND HOW THEIR STRUGGLE FOR EQUALITY CHANGED AMERICA* (2006).

whites were unconstitutional and inherently unequal.¹⁹ After that ruling, states that had segregation in their public schools by race slowly began to allow African Americans to attend their neighborhood public schools. And many states took affirmative steps—often imposed by state and federal courts—to integrate schools by race. Actions taken to promote school integration included pairing nearby white and African American public schools into a single and integrated school and requiring that students were bused away from their neighborhood public schools so that they could increase racial integration in the sending and receiving schools. That is, some African American students were required to be bused to formerly white public schools, while some white students were required to be bused to formerly African American public schools. By the late 1960s, allowing students to attend their neighborhood public schools and taking affirmative steps to integrate schools began to show significant progress toward the promotion of the racial integration of public schools.

From the late 1960s to the early 1980s—or thereabout, depending on the study methods, there was a sharp decline in racial sorting across American public schools. As an example, research published in 2012 by Gary Orfield and colleagues for the UCLA Civil Rights Project shows that racial isolation for African American public school students fell significantly between 1969 and 1980.²⁰ They reported that the percentage of African American students who were enrolled in public schools that enrolled at least 90 percent minority students fell by almost half—from 64.3 percent in 1968–69 to 33.2 percent in 1980–81. The percentage of African American students in majority-minority public schools—where more than 50 percent of students were minorities—also fell from 76.6 percent to 62.9 percent over this time period.²¹ During this time period American neighborhoods also become more integrated by race.²² Given the predominance of neighborhood school assignment policies in the conventional public school system, especially during this time period, a

¹⁹ 347 U.S. 483 (1954).

²⁰ Gary Orfield, John Kucsera, & Genevieve Siegel-Hawley, *E Pluribus . . . Separation: Deepening Double Segregation for More Students*, THE CIVIL RIGHTS PROJECT 5 (Sept. 2012), 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.

²¹ *Id.*

²² Edward Gleaser & Jacob Vigdor *The End of the Segregated Century: Racial Separation in America's Neighborhoods, 1890-2010*, THE MANHATTAN INSTITUTE (January 2012), https://www.manhattan-institute.org/pdf/cr_66.pdf.

relationship between school and neighborhood integration is to be expected.

While American neighborhoods continued to become more integrated by race after the early 1980s, American public schools did not. Orfield, et al. (2012) and two additional studies found that segregation across public schools increased after the early 1980s. Clotfelter analyzed changes in school segregation for 238 metropolitan areas between 1987 and 1996.²³ He found a modest increase school segregation over that time period. This evidence is consistent with the findings in Orfield, et al. (2012). Reardon and Yun (2003), found that black-white school segregation increased modestly in the southeastern U.S. between 1990 and 2000, and during the same time period neighborhoods in this region became more racially integrated.²⁴

Two additional studies found that the link between neighborhood and public school integration appeared to break down after the early or mid-1980s. Specifically, neighborhoods continued to become more racially integrated between 1980 and 2000, but public schools became more racially segregated. Between 2000 and 2010, American neighborhoods became more integrated by race, but American public schools generally experienced increases in racial and ethnic sorting or their increases in integration lagged behind increases in integration by neighborhood.²⁵ For example, Scafidi reports that between 2000 and 2010, American neighborhoods in almost all large metropolitan areas became more racially integrated between 2000 and 2010.²⁶ Also, about two-thirds of metropolitan areas had public schools that became more racially integrated during this time period, but these increases in public school integration often lagged increases in integration across neighborhoods. The

²³ Charles T. Clotfelter, *Are Whites Still 'Fleeing'? Racial Patterns and Enrollment Shifts in Urban Public Schools, 1987-1996*, 20(1) J. POL'Y ANALYSIS & MGMT. 199 (2001).

²⁴ Sean F. Reardon & John T. Yun, *Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South, 1990-2000*, 81 N.C. L. REV. 1563 (2003).

²⁵ Kori J. Stroub & Meredith P. Richards, *From Resegregation to Reintegration: Trends in Racial/Ethnic Segregation of Metropolitan Public Schools, 1993-2009*, 50(3) AM. EDUC. RES. J. 497 (2013). Benjamin Scafidi, *The Integration Anomaly: Comparing the Effects of K-12 Delivery Models on Segregation in Schools*, EDCHOICE, (2015), <http://www.edchoice.org/wp-content/uploads/2015/10/2015-10-The-Integration-Anomaly-WEB.pdf>.

²⁶ Benjamin Scafidi, *The Integration Anomaly: Comparing the Effects of K-12 Delivery Models on Segregation in Schools*, EDCHOICE, (2015), <http://www.edchoice.org/wp-content/uploads/2015/10/2015-10-The-Integration-Anomaly-WEB.pdf>.

remaining one-third had public schools that became moderately or significantly more racially segregated.²⁷

While not as stark as the 1980 to 2000 divergence between neighborhood and school integration, the 2000 to 2010 trends in neighborhood and school sorting do not move together as closely as one would expect given the preeminence of neighborhood public schooling.

While researchers do not tend to dispute the trends in racial sorting across neighborhoods and public schools, there has long been a raging debate about the causes.²⁸ With respect to sorting across schools, some researchers believe the end of busing and court-ordered desegregation efforts were major causes of the increase in public school sorting after the early 1980s. Beginning in the 1970s, hundreds of public school districts were placed under court supervision because they had been running “dual” education systems—one for white students and another for black students. These districts had to move to neighborhood schooling—instead of sending African American students to black-only schools. Importantly, as stated above, districts also often had to take affirmative steps to integrate schools racially even beyond neighborhood schooling. After achieving court-approved racial integration in their schools, the districts needed court permission for changes in attendance zones and other policies that may impact the level of integration among their schools.²⁹ After 1990, school districts began to be released from court supervision if the courts deemed their school districts to be running a “unitary” system of education for all races.³⁰

Increasingly ending court-ordered desegregation efforts after 1990 appears to have contributed to increasing public school segregation within the impacted public school districts. Lutz compares changes in racial segregation within school districts that were no longer under court-supervised desegregation orders to segregation within school districts that

²⁷ *Id.*

²⁸ For a synopsis of the debate over the causes of neighborhood racial segregation, see Keith R. Ihlanfeldt & Benjamin Scafidi, *Black Self-Segregation as a Cause of Housing Segregation: Evidence from the Multi-City Study of Urban Inequality*, 51(2) J. URB. ECON. 366 (2002). See also Keith R. Ihlanfeldt and Benjamin Scafidi, *Whites' Neighbourhood Racial Preferences and Neighbourhood Racial Composition in the United States: Evidence from the Multi-City Study of Urban Inequality*, 19(3) HOUSING STUD. 325 (2004).

²⁹ Finis Welch & Audrey Light, *New Evidence on School Desegregation*, US COMMISSION ON CIVIL RIGHTS (1987), <http://files.eric.ed.gov/fulltext/ED293936.pdf>.

³⁰ See, *Board of Education v. Dowell*, 498 U.S. 237 (1991); *Freeman v. Pitts*, 503 U.S. 467 (1992).

remained under such court supervision.³¹ His research indicates that ten years after release from court supervision within-district segregation was about 10 points higher as measured by the dissimilarity index (DI)—the DI measures the percent of groups that would have to move to achieve racial balance. His research methodology suggests that this 10-point increase in the DI was caused by the end of court supervision. Similar research published in 2012 by Sean F. Reardon and colleagues and research published in 2006 by Charles Clotfelter and colleagues find similar results—the end of court-ordered desegregation increases racial segregation *within* the impacted school districts.³² At their time of their writing, Reardon and colleagues report that almost half of 483 medium and large public school districts that were under court ordered supervision in 1990 had been released from these court-supervised desegregation orders.³³

Sorting across public schools in a given metropolitan area results from racial sorting among schools within the same school district *and* from racial sorting between school districts. Although the end of court-ordered supervision appears to have led to increases in racial sorting *within* public school districts, a large majority of public school racial sorting is *between* school districts.

For example, using data from the 1999–00 school year, Charles Clotfelter calculates that just over 69 percent of racial segregation across schools is due to segregation between public school districts. Almost 7 percent is due to differential enrollment rates in private schools, while the remaining 24 percent is due to within-district segregation.³⁴ Thus, efforts to integrate schools within districts will only increase integration to a small degree.

³¹ Byron Lutz, *The End of Court-Ordered Desegregation*, 3(2) AM. ECON. J.: ECON. POL'Y 130 (2011).

³² Sean F. Reardon, Elena Grewal, Demetra Kalogrides, & Erica Greenberg, *Brown Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*, 31(4) J. POL'Y ANALYSIS & MGMT. 876 (2012). Reardon, et al, report that in 1990 there were 483 public school districts in the United States that were under court supervision regarding desegregation. Reardon, et al., only considered districts with at least 2,000 students. Charles T. Clotfelter, Jacob L. Vigdor, & Helen F. Ladd, *Federal Oversight, Local Control, and the Specter of 'Resegregation' in Southern Schools*, 8(2) AM. LAW & ECON. REV. 347 (2006).

³³ *Id.*

³⁴ See Clotfelter, *supra* note 15. These figures are calculations from the third panel of Clotfelter (2004), table A2.3, p. 73.

While a full discussion of these debates is beyond the scope of this paper, the best evidence to date suggests:

- The end of court-ordered desegregation efforts has led to more racial segregation across public schools *within* the impacted public school districts.
- The large majority of racial segregation within metropolitan areas is *between* public school districts—and this segregation was not directly impacted by the change in jurisprudence.

After World War II, the U.S. federal government began to take affirmative steps to compel integration by race in many walks of American life. The next subsection provides some further discussion of these efforts as they pertain to integrating public schools.

Increasing Integration by Government Compulsion

A long, noble, and courageous legal challenge against governments forcibly separating students into racially separate public schools resulted in a unanimous decision by the U.S. Supreme Court in *Brown v Board of Education* declaring that “separate educational facilities are inherently unequal”. In this 1954 ruling, the court held that *de jure* separation of students by race was a violation of the equal protection clause of the 14th Amendment to the U.S. Constitution. In a companion case, *Brown v Board of Education II* in 1955, the U.S. Supreme Court that government enforced segregation in public schools by race must end “with all deliberate speed.” That said, public schools in many parts of the nation, especially in the southeast, refused to follow the Court’s order to integrate. Through a series of U.S. Supreme Court decisions beginning in the late 1960s, there were more direct and proscribed efforts by the courts to affirmatively integrate American public schools.³⁵ In those decisions, the Supreme Court ordered that school districts take affirmative steps like busing students, pairing and clustering formerly black and white schools, and the redrawing of school attendance zones to achieve more equal distributions of black and white students across public schools.

The evidence suggests that those affirmative steps did lead to large increases in interracial contact in public schools—for a short time. In a 1987 report for the U.S. Commission on Civil Rights, Finis Welch and

³⁵ See Clotfelter, *supra* note 15. Pages 25-30 provide a concise description of these court decisions requiring affirmative steps to integrate public schools by race.

Audrey Light find that there were large decreases in racial sorting between 1967 and 1985 in 117 of 125 large school districts under study.³⁶ They found that, on average, the dissimilarity index (DI) declined by 21.7 percent within these individual school districts during the time period of implementation of desegregation efforts.

However, those school districts tended to experience “white-flight” immediately before, during, and after the implementation of desegregation programs. The best evidence on the magnitude of white flight that was caused by desegregation efforts comes from a 2005 study by Sarah Reber and a 2011 study by Nathaniel Baum-Snow and Byron Lutz. Those studies find desegregation efforts decreased white enrollments in central city districts by 6 percent to 12 percent.³⁷ Thus, as public school districts experienced more racial integration due to affirmative desegregation efforts, the percentage of white students in these districts declined rather dramatically over time. A large majority of this white-flight was due to families moving to new public school districts rather than paying for private schools.³⁸ However, a study by Steven Rivkin indicates that by analyzing a longer period of time it appears the suburbanization of whites was occurring independent of school desegregation efforts—that is,

³⁶ See Welch & Light, *supra* note 29. The 125 school districts analyzed by Welch and Light contained about 20 percent of all American public school students and about 50 percent of minority public school students.

³⁷ Sarah Reber, *Court-Ordered Desegregation: Successes and Failures Integrating American Schools since Brown Versus Board of Education*, 40(3) J. HUM. RESOURCES 559 (2005). Nathaniel Baum-Snow & Byron F. Lutz, *School Desegregation, School Choice, and Changes in Residential Location Patterns by Race*, 101(7) AM. ECON. REV. 3019 (2011).

³⁸ Steven Rivkin & Finis Welch, *Has School Desegregation Improved Academic and Economic Outcomes for Blacks?*, in HANDBOOK OF THE ECONOMICS OF EDUCATION, VOL. 2, 1019-49 (Eric A. Hanushek & Finis Welch eds., 2006). On page 1033, Rivkin and Welch report that the percent of Black students enrolled in private schools more than doubled from 1960 to 2000, from 2.9 percent to 6.3 percent. During that time, the percent of white students in private schools declined from 16.4 percent to 13.4 percent. However, in the southern region of the United States, private school enrollment among whites bucked these trends and increased from 7.5 to 10.5 percent between 1970 and 1980—the time period with the most active public school desegregation efforts. While some of this increase was due to the migration of Roman Catholics to the south, surely much of this 3-percentage point increase was due to white flight from newly integrated public schools. That said, the declines in white enrollments in large public school districts reported in Welch and Light (1987) are far greater than 3 percentage points. These facts have led Rivkin and Welch, and other researchers, to conclude that white flight to other public school districts was a much bigger cause of white enrollment declines in newly integrated public schools as opposed to movement to private schools.

perhaps school desegregation efforts merely hastened the suburbanization of whites that would have eventually occurred—albeit more gradually.³⁹

Sorting by Family Income Across American Neighborhoods and Public Schools

Neighborhood, and perhaps concomitantly public school, sorting by income have increased in recent decades as well. Bischoff and Reardon (2013) show that in 1970 only 7 percent of American families lived in “affluent” neighborhoods. They deem neighborhoods as “affluent” when the median income in the neighborhood was more than 50 percent higher than the median income of the metropolitan area as a whole. By 2009, 14 percent of families lived in such affluent neighborhoods. While higher income households became more isolated from others, low income households did so as well. From 1970 to 2009, the percentage of families living in neighborhoods with median incomes below 67 percent of the median income for the entire metropolitan area increased from 8 percent to 17 percent. Thus, over a 40-year period, American neighborhoods became much more separated by income and these trends have accelerated since 2001.⁴⁰

Owens, et al. (2016) reports that income sorting across public schools increased during this time period as well.⁴¹ From 1990 to 2010, the sorting by income across public school districts increased by 15 percent. And, within-district sorting by income increased by more than 40 percent from 1991 to 2012, where income is proxied by student eligibility for a free lunch—an indicator of living in a low income household. Again, as American neighborhoods are becoming more separated by income, it is not surprising that American public schools are also experiencing more

³⁹ Steven Rivkin, *Residential Segregation and School Integration*, 67(4) SOC. EDUC. 279 (1994). A later study also finds that school desegregation efforts were not a large cause of long-term white-flight from urban school districts: Baum-Snow and Lutz (*supra* note 37) report that between 1960 and 1990 there was a 26 percent increase in the white population in the U.S., and at the same time the white population in central cities declined by 13 percent. Based on their analysis, Baum-Snow and Lutz conclude that the white population of central cities would have declined by 10 percent, even without school desegregation efforts.

⁴⁰ Kendra Bischoff & Sean F. Reardon, *Residential Segregation by Income, 1970-2009* US2010, DISCOVER AMERICA IN A NEW CENTURY (2013), <http://www.s4.brown.edu/us2010/Data/Report/report10162013.pdf>.

⁴¹ Ann Owens, Sean F. Reardon, & Christopher Jencks, *Income Segregation Between Schools and School Districts* 53(4) AM. EDUC. RES. J. 1159 (2016).

sorting by income—given the predominance of student assignment to public schools based on residential location.

Researchers tend to agree on levels and patterns of sorting by race and income across schools and neighborhoods, as they typically have used publicly available data on the entire populations of neighborhoods and public schools provided by the decennial census conducted by the US Census Bureau and demographic data on all public schools reported by states to the U.S. Department of Education. Thus, the following findings are not generally in dispute: that American neighborhoods became more integrated by race in each decade from 1970 to 2010, American public schools become more racially integrated between the late 1960s and early 1980s, American public schools saw more sorting by race between the early 1980s and 2000, and that public school integration lagged neighborhood integration between 2000 and 2010.

Prospects for Increasing Integration in the Public School System

Three factors in and external to the public education system—one legal, one practical, and one due to a series of policy choices—make it highly unlikely that government compulsion or other legal or policy efforts will play a significant role in integrating American schools now and in the foreseeable future. First a legal factor, in the 1974 case *Milliken v. Bradley*, the U.S. Supreme Court decided that there was no legal requirement for states and public schools to take affirmative steps to integrate students across public school district lines, unless the district lines were drawn with the intent to segregate students by race.⁴² And, most sorting in the public education system occurs between districts.

Second, a practical issue: suppose jurisprudence changed. Suppose the U.S. Supreme Court, or state supreme courts as contemplated in the New Jersey litigation described above, required states to take affirmative steps to integrate schools across district lines. Integration through these means would be difficult from a practical standpoint as public school districts have become dramatically larger in geographic size over the past 75 years and in recent decades as well. From 1940 to 1970, there was a very large consolidation of public school districts with the number of districts declining by 85 percent. There were further, but more modest, declines after 1970. For example, from 1987 to 2013, there was an additional 16

⁴² See Clotfelter, *supra* note 15. Pages 30-33 in Clotfelter (2004) provide a concise discussion of the 1974 *Milliken v. Bradley* decision and its implications.

percent decrease in the number of public school districts.⁴³ Physically moving students from far distances to attend schools in other districts for the purpose of integrating schools by race or income is costly in terms of money, students' time, and in the loss of family and community life. Thus, any benefits that accrue from any increased integration should be weighed against these tremendous costs. In addition, the historical evidence cited above suggests government attempts to force integration across district lines could cause suburbanization to move even further away from cities—for families that can afford the extra costs commuting to their jobs. Increasing suburbanization has been a persistent feature of American life since World War II—before the War, only 13 percent of Americans lived in suburbs, but by 2010 over 50 percent of Americans lived in suburbs.⁴⁴ Even if federal jurisprudence changed, it is highly unlikely that any government attempts to integrate schools across district lines would overcome these practical barriers of fewer school districts and increasing suburbanization.

The third factor that limits the prospects for promoting integration across public schools is a series of changes to the system itself that have homogenized the public education sector. School finance policies of states, often mandated by state courts, have equalized funding across school districts within states. Policy centralization—through requirements by the federal and state governments and through collective bargaining outcomes between districts, states, and public school employee unions and organizations—have led to additional homogenization via common national and state content standards, common assessments, common employee salary, benefit, and working condition policies, etc.⁴⁵ Under the current system, where public schools are fairly homogenous in terms of offerings and are becoming increasingly so via school finance and policy centralization, the race and income makeup of their schools are, oddly enough, some of the only school characteristics that families may choose. Logically, even if all families were indifferent as to the racial and income

⁴³ Data on the historical number of public school districts in the United States can be found in Table 214.10 of the 2014 Digest of Education Statistics, https://nces.ed.gov/programs/digest/d14/tables/dt14_214.10.asp.

⁴⁴ Becky Nicolaides & Andrew Wiese, *Suburbanization in the United States after 1945* OXFORD RESEARCH ENCYCLOPEDIAS (April 2017), <http://americanhistory.oxfordre.com/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-64>.

⁴⁵ Benjamin Scafidi, *Reasons Why the Education System Has Become Increasingly Centralized* EdCHOICE (December 2013), <http://www.edchoice.org/Blog/December-2013/Reasons-the-Public-Education-System-Has-Become-Inc>.

composition of the students in their children's schools, as long as there are peer effects in the production of schooling, then the homogenization of the public education system itself would be the cause of greater sorting of students across schools by race and income—because, unfortunately, student outcomes vary by race and class. That is, assuming parents value educational and other outcomes for their children. Given the significant evidence that children benefit from being surrounded by higher achieving peers, then caring parents will rationally choose to sort their children into schools with higher achieving peers. And given the achievement gaps by race and income that have been stubbornly persistent over decades, the homogenization of the public education sector (perhaps well-intentioned) will necessarily lead to more sorting by race and incomes. The question is: Can a change to a choice system give families other reasons to select schools for their children—other than peers?

Taxpayer Funded Choice in K-12 Education

Americans have always had a modicum of taxpayer funded choice in the public education system—by choosing where to live. That said, African Americans have historically had less residential choice due to government policy and animosity by whites. In addition, families with lower incomes also have less choice among public schools, as one must be able to afford to live within a given school's attendance zone, or close by to practically access it through some public school choice opportunity. Families have also always had the opportunity to pay tuition to send their children to private schools or to home school their children, but family income and family structure obviously limit the opportunity to access these choices for many families.

To significantly expand the ability of families to choose schools for their children, in 1955 Milton Friedman made a then radical proposal to separate the financing and provision of K-12 education in America. Friedman wrote these ideas in a short chapter in a book honoring one of his undergraduate economics professors. His chapter was entitled, "The Role of Government in Education."⁴⁶ While Friedman supported taxpayer support for the education of youth in his 1955 piece, he did not want those taxpayer funds paid directly to public schools that were owned and operated by local governments. Instead, he wanted those taxpayer funds to be given directly to families in the form of vouchers, and then families

⁴⁶ Milton Friedman *The Role of Government in Education* in *ECONOMICS IN THE PUBLIC INTEREST*, 123-144 (Robert Solo, ed., 1955).

decided what schools would educate their children—and consequently which schools would receive those taxpayer funds.

Since Friedman's 1955 call for taxpayer funded school vouchers to be distributed to all American families—in lieu of those taxpayer funds being distributed directly to public schools—there have been proponents of giving parents more taxpayer funded choice in the arena of K-12 education. Proponents of a choice system suggest, among other things, that giving families greater choice would promote competition that engenders all schools to use these resources in ways more beneficial for students and would permit schools to differentiate their educational offerings allowing families to choose the school settings that are the best matches given the interests and needs of their children.

In his original 1955 call for greater choice for families in K-12 education, Friedman suggested that choice would lead to less sorting by race across schools:

Another special case of the argument that governmentally conducted schools are necessary to keep education a unifying force is that private schools would tend to exacerbate class distinctions. Given greater freedom about where to send their children, parents of a kind would flock together and so prevent a healthy intermingling of children from decidedly different backgrounds. Again, whether or not this argument is valid in principle, it is not at all clear that the stated results would follow. Under present arrangements, particular schools tend to be peopled by children with similar backgrounds thanks to the stratification of residential areas. In addition, parents are not now prevented from sending their children to private schools. Only a highly limited class can or does do so, parochial schools aside, in the process producing further stratification. The widening of the range of choice under a private system would operate to reduce both kinds of stratification.⁴⁷

Thus, in his original call for changing America's K-12 education system from one based on taxpayer funded public schools with school assignment based on residential location to a choice system where the families of each school-aged child would be provided with vouchers to offset tuition payments at the schools of their choice, Friedman was

⁴⁷ *Id.*

suggesting that the conventional public school system with its policy of assigning students to schools based on residential location was itself an important cause of the significant amount of sorting of students by race and income across schools.

In 1980, Friedman—along with his wife, Rose—proffered an additional rationale as to why a choice system would lead to less stratification than the conventional public school system: “Let schools specialize, as private schools would, and common interest would overcome bias of color and lead to more integration than now occurs.”⁴⁸ Thus, Friedman and Friedman suggested that by allowing schools to be different from one another in terms of curricular and non-curricular offerings that students would sort across schools in terms of common interests and needs, as opposed to sorting by race (and perhaps income) as was the case in the conventional public school system.

On the other hand, one strong argument against a program of universal school choice as suggested by Friedman is that it would further exacerbate sorting across schools by race and class—relative to the current public education system. As an example, Ford et al. (2017) suggested: “No matter how well intentioned, widespread voucher programs risk exacerbating segregation in schools and leaving the most vulnerable students and the public schools they attend behind.”⁴⁹ If a significant number of families have preferences that their children attend schools with children of the same race and/or similar income backgrounds—or if parents of means desire higher achieving peers for their children, then giving parents more taxpayer funded choice may increase the sorting of children across schools by race and income.

If a choice system led to more sorting across schools by race and income relative to the sorting in the conventional public school system, the educations of some students may be harmed, as discussed previously, via peer effects in the production of education and lower teacher effectiveness. And all children may be harmed due to a decline in understanding between students with differing backgrounds.

Of course, there are other important moral, policy, and legal arguments for and against a system of universal choice based on the voucher idea outlined by Friedman, but a discussion of these claims is beyond the scope

⁴⁸ Milton Friedman and Rose Friedman, *FREE TO CHOOSE* (1980).

⁴⁹ Chris Ford, Stephenie Johnson, & Lisette Partelow, *The Racist Origins of Private School Vouchers*, CENTER FOR AMERICAN PROGRESS (July 2017), <https://www.americanprogress.org/issues/education-k-12/reports/2017/07/12/435629/racist-origins-private-school-vouchers/>.

of this paper. This paper is focused on whether a choice system would increase racial and economic sorting across schools relative to the sorting present in the conventional public school system and whether policy design would impact any changes in sorting under a choice system. While these issues are important with respect to the question of the desirability of a choice system in general or a specific choice system, the impact of choice on sorting is not the only relevant issue. That is, any increases or decreases in sorting by race and income that would result from choice would have to be considered along with changes in academic and non-academic outcomes for students—both positive and negative.

Educational Choice and Prospects for Integration

Even before Milton Friedman published his 1955 short book chapter calling for universal school choice in K-12 education, white segregationists in the South plotted to maintain separate schools for African Americans and white children by giving taxpayer funded scholarships that could be used to offset tuition payments at private schools—only for white students. Their plan for these scholarships was in response to the 1954 *Brown* decision which required public schools to allow children of all races to attend. Friedman became aware of these plans by segregationists to offer scholarships only to white students just as he was finishing his chapter “The Role of Government in Education.”⁵⁰

Friedman found these plans deplorable and added a long footnote to his piece. In short, Friedman pointed out that public schools had been historically used to segregate students by race—as noted above, even at their origin in the United States. He further noted that a choice system could be used to segregate students by race, if one race was given taxpayer subsidies to offset tuition payments at private schools, while another race was given taxpayer subsidies to attend public schools, for example. Friedman rejected both government segregation under a public school system and government segregation under a choice system. As mentioned previously, Friedman stated in his 1955 chapter and in later writings that he believed that a choice system would promote more integration by race and by income than a public school system.

Subsequent to the publication of “The Role of Government in Education” white segregationists did implement schemes to give scholarships only to white students to maintain a system of separate

⁵⁰ Milton Friedman, *The Role of Government in Education, in Economics and the Public Interest* (Robert A. Solo, ed., 1955).

schools for white and African American students. Perhaps the most infamous case was in Prince Edward County, Virginia. In 1959 the Board of Supervisors of Prince Edward County voted to close the county's public schools, which remained closed for five years. Using a mix of taxpayer funded and privately-funded scholarships, white students attended Prince Edward Academy, a private school open to only white students. During this time period, schools like Prince Edward Academy opened throughout the southeastern United States and came to be known as "segregation academies".⁵¹

Less well known is that some segregationists came to oppose these schemes for fear that they would lead to school integration. For example, the segregationist attorneys for the Charlottesville, Virginia public school board opposed giving scholarships to white students to attend private schools for fear that as some white students left it would open up seats in the Charlottesville public schools—leading the public schools to become populated by both African American and white students.⁵² Further, they argued that private schools that accept scholarship students may be later "forced to accept Negro applicants."⁵³ Essentially, the attorneys for the Charlottesville public schools wanted all white students to remain in public schools and support neighborhood assignment to public schools because it would keep racial integration to a "bare minimum."⁵⁴ Thus, for mostly different reasons, the attorneys for the Charlottesville public schools who wanted to maintain racial segregation agreed with Friedman that giving vouchers or scholarships for parents to attend private schools would ultimately promote integration by race.

In the next few subsections, I discuss in greater detail the issue of whether giving parents greater opportunities for school choice will or will not lead to greater integration across schools. Specifically, the next two subsections list the claims that increased parental choice in education (a) would and (b) would not improve racial integration across schools. The third subsection that follows presents a very brief discussion of the voluminous body of empirical evidence that relates to this issue.

⁵¹ *The Closing of Prince Edward County's Schools*, VIRGINIA MUSEUM OF HISTORY AND CULTURE, <https://www.virginiahistory.org/collections-and-resources/virginia-history-explorer/civil-rights-movement-virginia/closing-prince>.

⁵² Phillip W. Magness, *Did School Vouchers threaten Segregation in 1959 Charlottesville?*, <http://philmagness.com/?p=2229>.

⁵³ *Id.*

⁵⁴ *Id.*

Choice proponents claim increased school choice would increase school integration

This claim is that the current public school system leads to more racial segregation across schools because it ties schools to residential location. As long as neighborhoods are segregated by race and income—regardless of the reasons—the claim is that public schools also will be segregated by race and income.

Greater school choice, however, lowers the cost to parents of changing schools for their children. That is, it allows parents to live in one public school attendance zone, but send their children to another school, public or private, located anywhere convenient to their residence or their place of employment. School choice supporters claim that school integration would be less directly tied to neighborhood integration, as parents could use school choice opportunities to access a wider variety of schools, not just the single public school for which their residence is zoned.

Another argument for this claim is that under a system of universal school choice, individual schools would be more likely to specialize than occurs in public schools today. Under a system of greater parental choice, individual schools would have a powerful financial incentive to serve specific niches of students such as children with special needs or children with strong aptitude or interest in math and science, the arts, bilingual education, Montessori education, Waldorf education, religious education, vocational education, etc. Under a taxpayer funded school choice system, even if some parents have school diversity preferences, it is more likely parents would sort their children into schools to meet the specific interests and needs of their children. This heterogeneity of offerings across schools would be in sharp contrast to the increasing homogeneity in the public education sector.

Suppose parents do not have a preference for same-race or similar-income classmates for their children. Rather, suppose parents desire the best possible education for their children. If public schools are homogenous in terms of offerings, then parents with means will sort into expensive neighborhoods in order to garner a higher-achieving peer group for their children. There is strong evidence that students benefit from being surrounded by higher-achieving peers.⁵⁵ Such a system leaves families of lesser means unable to make that same choice.

⁵⁵ C. Kirabo Jackson, *Can higher-achieving peers explain the benefits to attending selective schools*, 108 J. PUB. ECON. 63 (2013).

Opponents of school choice claim increased choice would increase the sorting of students across schools by race, ethnicity, and income

The claim by some school choice skeptics is that more choice over where to send their children to school would allow families more ability to satisfy their preference for same-race or similar income classmates for their children. If families want to send their children to school with same-race or similar income classmates under the current public school system, they must move to a school attendance zone that has residents who are primarily the same race or income as themselves. If members from another group move in, it is costly to move to a new school attendance zone—moving expenses, home sales expenses if you are a homeowner, social costs on children that result from moving schools (in terms of lower academic achievement, leaving friends), etc. Alternatively, the children could be sent to a private school, but the family would incur the full tuition costs at the private school. Given those probable expenses, it is costly to move children away from a neighborhood public school under a public education system without taxpayer funded school choice options. Thus, school choice skeptics say the current public education system is better because it reduces the incentive to self-segregate by making it expensive for families to do so. Alternatively, greater school choice lowers the cost to finding a new school for families, as they do not necessarily have to change their place of residence.

So the claim of school choice skeptics is that families may remain in their present neighborhood—avoiding moving costs—and enroll their children in a public or private school of choice that has more same-race/income students than the neighborhood public school. In other words, all else equal, they believe that giving families the means to choose where to send their children to school will lead to more racial and income sorting across schools as long as families have any preference that their children have classmates of the same race or income level. Again, the same argument holds even if families of means merely prefer their children have peers with relative high achievement levels—but no direct preference for race or income.

Evidence

As presented in the previous two subsections, there are differing expectations about the impact of greater taxpayer funded school choice on sorting across schools. While there is a large body of research from different areas of study that can be used to shed light on this issue, it is not

feasible to discuss in detail each of the literally hundreds of studies that can inform us.⁵⁶ In this section I endeavor to briefly summarize empirical research findings that are representative of the varied findings and thinking in these large literatures that cover different areas of study.

In addition, some studies of the effects of school choice on the sorting of children among schools have fatal data or methodological defects.⁵⁷ I do not refer to such flawed studies here, as their results are not meaningful. For example, it is not accurate to consider increases in the exposure of African Americans to all nonwhites as evidence of increases in sorting. Why? Given the large population increase of Latinos and Asians in the United States, both whites and African Americans were bound to experience more exposure to nonwhites. As another example, the mass suburbanization of African Americans in some metropolitan areas does not necessarily imply increasing sorting in the receiving communities, which may be a false inference if one studied only a single school district or county. To gauge whether sorting is increasing, one must analyze changes in sorting in metropolitan areas as a whole.

A final example of fatally flawed analysis involves comparing the racial composition of one school—perhaps a charter school located in a neighborhood with a large percentage of African Americans to the racial composition of an entire school district or metropolitan area. Such a comparison does not offer evidence on the issue of whether that individual charter school led to more or less racial sorting. While all empirical studies have limitations, as discussed below, the studies summarized here do not have fatal flaws that render their findings meaningless in terms of usable inferences.

Next, I discuss a brief summary of the credible research from several areas of study and what that evidence means for the relationship between school choice and integration. I categorize the findings from several areas of study and discuss each category in turn: Charter schools; sorting within schools; international school choice; U.S. school choice; and simulation studies.⁵⁸

⁵⁶ I am not aware of any comprehensive literature review that considers all of the strains of research summarized here.

⁵⁷ Jay P. Greene, CHOOSING INTEGRATION, IN SCHOOL CHOICE AND DIVERSITY: WHAT THE EVIDENCE SAYS 27-41 (J.T. Scott ed., 2005). See Scafidi, *supra* note 26.

⁵⁸ Each category of evidence has limitations, and those limitations are mentioned in each subsection. I am not impugning any of the research discussed below. Most, if not all of it, is excellent from a data and methodological point of view. That said, voters and policymakers should be careful when translating any research into policy design and into expectations about the likely effects of new policy—because all research has limitations

Charter Schools⁵⁹

Supporters of the claim that giving families more school choice would lead to more racial sorting across schools often cite evidence from charter schools. Charter schools are public schools of choice that are not governed by local public school boards. All students in the catchment area of the charter school—typically, but not always, the entire school district—have the option of attending a neighborhood public school or the charter school. Thus, the presence of a charter school in a district provides enhanced school choice for families—choice above and beyond moving to a new residence or paying the full tuition costs at a private school.

There are several studies that compare the percent of African American students in individual charter schools to the percent of African American students in the public school districts where the charter schools are located. These studies tend to find that African American students are more racially isolated in the charter schools than their parents chose for them, as compared to the public school district where they reside.⁶⁰ Such evidence may not shed light on actual changes in interracial contact because district-level data may not paint an accurate portrait of the racial composition of the specific public schools that African American students actually left. Those African American students, in some or many cases, may have left more racially identifiable neighborhood public schools for less racially identifiable charter schools—and studies that use data aggregated to the district level are not able to ascertain whether the percentage of African American students in the charter schools are lower

and all research needs to be put in context when translating results into policy. When others have done comprehensive literature reviews on any one of the five areas listed above, I refer to their summaries of the literature. To my knowledge, no prior study has reviewed in one document all of the studies in each of these five strains of research.

⁵⁹ There is a large number of poorly done studies on the impact of charter schools on school segregation. For a discussion of some of these studies and their flaws, see Gary Ritter, Nathan Jensen, Brian Kisida, and Josh B. McGee, *A Closer Look at Charter Schools and Segregation: Flawed Comparisons Lead to Overstated Conclusions*, 10(3) EDUC. NEXT, 69 (2010).

⁶⁰ For one summary of these findings, see Gary Miron, Jessica L. Urschel, William J. Mathis, and Elana Tornquist, *Schools without Diversity: Education Management Organizations, Charter Schools and the Demographic Stratification of the American School System* EDUCATION AND THE PUBLIC INTEREST CENTER (2010), <http://epicpolicy.org/publication/schools-without-diversity>.

or higher than the percentage of African American students in the specific schools that students actually left.

Therefore, the best evidence on the impact of charter schools on racial sorting across schools comes from longitudinal data on individual students where the researchers know the racial composition of neighborhood public schools and charter schools for sector “switchers.” When researchers know the racial composition of a given student’s neighborhood public school in one year and the racial composition of that student’s charter school the next year, after the sector switch is made, then researchers may accurately compare racial isolation in neighborhood public schools and charter schools—for those switchers. For kindergarten students enrolling in school for the first time and students switching from private schools, these data do not allow an analysis of the change in racial isolation across schools.

A 2016 review of the evidence summarized the longitudinal research of the effect on charter schools on sorting by race as: “Overall, then, longitudinal studies suggest charter schools may be slightly more segregated than TPS (traditional public schools). Importantly, this often seems to be the result of black students moving to predominantly black charter schools, especially in particular cities.”⁶¹

Whitehurst et al. listed longitudinal studies that indicated that charter schools increase sorting in some states and metropolitan areas, and they list other longitudinal studies that indicate that charter schools in other states and metropolitan areas decrease sorting.⁶²

Whitehurst et al. also reviewed the evidence of the effectiveness of charter schools relation to traditional public schools, and considered this evidence along with the evidence of the effects of charter schools on sorting. With respect to charter schools in urban areas, their review of the evidence suggested that high quality schools tailored to racial minorities may be academically beneficial:

The takeaway from the charter studies, when combined with the research previously reviewed, is that school quality is the primary determinant of student achievement. Race matters primarily through its association with poverty, and poverty matters primarily

⁶¹ Grover J. “Russ” Whitehurst, Richard V. Reeves, & Edward Rodrigue, *Segregation, Race, And Charter Schools: What Do We Know?*, BROOKINGS INSTITUTION CENTER ON CHILDREN AND FAMILIES 31 (2016), https://www.brookings.edu/wp-content/uploads/2016/10/ccf_20161021segregation_version-10_211.pdf.

⁶² *Id.*

through its association with school quality. As seen in the charter studies, high-quality schools can exist and thrive with little racial or economic diversity. In fact, some of the high-performing charters have a curriculum and approach that is tailored to the unique needs of a relatively culturally, racially, and economically homogenous student body. Note in this regard that white students see limited or no academic gains in the very same Boston charter schools in which gains for black students are impressively large. These findings and conclusions do not, of course, support an argument for more racially and economically segregated schools. They do, however, provide evidence that supports a focus on quality schools for students and suggest that economic and racial integration of schools is an indirect route to that goal, and not necessarily essential to its achievement.”⁶³

Charter Schools in Context: Evidence of the impact of charter schools on sorting is not necessarily transferable to what would happen under a broader school choice program. New charter schools are costly to start in terms of the time and effort required to garner approval by a charter authorizer. This costly process could disproportionately limit the opening of charter schools in disadvantaged communities. Under a program that allows choice to private schools, such as a voucher program, new private schools could open without going through a costly approval process. Also, charter authorizers may have a bias toward or bias against authorizing charter schools in disadvantaged communities, which would limit their generalizability to broader school choice programs. Finally, charter schools tend to receive significantly less in taxpayer funding than traditional public schools. A choice system with funding parity between charter public and traditional public schools may have a different impact on sorting than the experience to date.

Sorting within Schools

The ideal analysis with regards to school sorting would also analyze sorting within schools. Since there are, to my knowledge, only three empirical studies on this topic, each is briefly summarized here.

Charles Clotfelter, Helen Ladd, and Jacob Vigdor showed that in North Carolina public schools, there was substantial sorting between

⁶³ *Id.*, at 53. Note that Whitehurst, et al. also listed longitudinal studies that find and studies that do not find increased sorting of white students due to charter schools.

classrooms—even within the same school.⁶⁴ Also, African American students were more likely to be assigned novice teachers relative to white students, and a significant amount of that disparity was due to the assignment of teachers within individual public schools.⁶⁵ Perhaps sorting across classrooms and disparate assignment of novice and veteran teachers is one reason why African American students in North Carolina (and perhaps elsewhere) are willing to leave neighborhood public schools for more segregated charter schools.⁶⁶ Given this evidence, researchers and policymakers should seek to understand why African American parents are choosing to move to schools with higher proportions of African American students. Perhaps African American families are exercising this choice because their children are better off academically or in some other respects in their new schools of choice.⁶⁷

Two studies have compared within-school sorting between public and private schools. Both find private schools are more integrated within the school walls as compared to public schools. First, Greene analyzed a national sample of 12th grade classrooms and found that 54 percent of public school classrooms were racially homogenous, while only 41 percent of private school classrooms were racially homogenous.⁶⁸ Further, private school students were more likely to be in classrooms with a racial composition similar to the national average—37 percent of private school students were in classrooms that “looked like America,” while only 18 percent of public school classrooms “looked like America.”⁶⁹

The second study comes from Greene and Mellow.⁷⁰ They visited a random sample of public and Catholic school lunchrooms in Austin, TX and San Antonio, TX, noting to what extent students ate lunch in racially

⁶⁴ Charles T. Clotfelter, Helen F. Ladd, and Jacob L. Vigdor, *Who Teaches Whom? Race and the Distribution of Novice Teachers*, 24 ECON. EDUC. REV. 377 (2005).

⁶⁵ *Id.*

⁶⁶ Robert Bifulco and Helen F. Ladd, *School Choice, Racial Segregation, and Test-Score Gaps: Evidence from North Carolina's Charter School Program*, 26(1) J. POL'Y ANALYSIS & MGMT. 31 (2007).

⁶⁷ There is substantial evidence that low-income parents, including low income African American parents, have important reasons for exercising school choice when given the opportunity. For a review of this evidence, see James P. Kelly III and Benjamin Scafidi, *More than Scores: An Analysis of Why and How Parents Choose Private Schools* EDCHOICE (2013), <http://www.edchoice.org/MoreThanScores>.

⁶⁸ Jay P. Greene, *Civic Values in Public and Private Schools*, in LEARNING FROM SCHOOL CHOICE, 83-106 (Paul E. Peterson and Bryan C. Hassel eds., 1998).

⁶⁹ *Id.*

⁷⁰ Jay P. Greene and Nicole Mellow, *Integration where it Counts: A Study of Racial Integration in Public and Private School Lunchrooms*, 1(1) TEX. EDUC. REV. 15 (2000).

mixed groups. They reported that 64 percent of private school students ate lunch with at least one student of a different race. The corresponding figure for public school students was 50 percent.

Sorting within Schools in Context: More evidence on within-school sorting needs to be compiled—both within public and private schools—and how within-school sorting changes after the creation of school choice programs.

International School Choice

The international evidence shows that, under certain rules and regulations, school choice can increase racial (and economic) sorting across schools. Importantly, this international experience points to some do's and don'ts in terms of designing school choice programs in terms of promoting integration.

In 1989, New Zealand abruptly changed its centralized education system to one that allowed universal school choice. Fiske and Ladd showed that this school choice program led to significant increases in sorting by race and income across New Zealand schools—for a few likely reasons.⁷¹ Although parents were allowed to choose schools, significant government regulation of individual schools remained. In addition, individual schools were categorized into deciles by the government to prioritize the needs of schools for the purposes of obtaining extra resources. The deciles were based on the race, ethnicity, and income of their student populations, and decile rankings of schools were publicized. Not surprisingly, parents endeavored to move their children from lower decile schools to higher decile schools—where lower decile schools had more minority and low-income students. Individual schools were not required to admit students by lottery when they were oversubscribed. Based on this evidence, Fiske and Ladd make a compelling case that school choice programs should learn from the New Zealand experience and adopt program features that will not necessarily exacerbate racial and income sorting across schools.⁷²

Since 1992 Sweden has permitted school choice to public schools outside of one's school attendance zone and to independent (i.e. private) schools.⁷³ Prior to the creation of vouchers to private schools, less than 1

⁷¹ Edward B. Fiske and Helen F. Ladd, *WHEN SCHOOLS COMPETE: A CAUTIONARY TALE* (2000).

⁷² *Id.*

⁷³ Anders Björklund, Melissa A. Clark, Per-Anders Edin, Peter Fredriksson, and Alan B.

percent of Swedish students attended a private school. Evidence from Sweden shows that private schools are more likely to have foreign-born students and students with more educated mothers than public schools. However, Anders Björklund, et al. (2005) also find that the likelihood of attending a private school with a “general pedagogical profile” does not appear to be related to family background.⁷⁴ This category of schools represents the majority of private schools in Sweden. Thus, the sorting of foreign-born and highly-educated families appears to be concentrated in specialized schools, which may be due to a better matching of student needs and interests to particular schools. Björklund and colleagues also report that upper secondary schools in Stockholm experienced an increase in sorting by family income immediately after a government policy change to require school admissions based on student grade point averages. The dissimilarity index increased from 23 immediately before the policy change to 32 immediately after. As family income is positively correlated with student achievement, then that government mandated admissions requirement would necessarily increase segregation across schools by income—even if private schools or a choice system did not exist.⁷⁵

In 1979, 12 percent of Chilean students received some government subsidy to attend private schools, while an additional 7 percent attended private schools and received no subsidy.⁷⁶ However, there was a large education policy change that began in 1981. Since 1981, all Chilean parents have been offered vouchers to send their children to private schools. By 2009, 55 percent of students in Chile attended a private school, with 48 percent receiving a taxpayer funded voucher. Valenzuela, et al. (2014) report that socio-economic (SES) sorting across schools, as measured by the dissimilarity index, increased by 4 points between 1999 and 2006. In a prior paper, Elacqua noted that student sorting among schools in many dimensions appeared to be lower in Chile than in many countries, including England, Bolivia, the United States, and the Netherlands.⁷⁷ Of course, myriad factors, other than greater school choice,

Krueger, *The Market Comes to Education in Sweden: An Evaluation of Sweden's Surprising School Reforms*, RUSSELL SAGE FOUNDATION (2005), <https://www.russellsage.org/publications/market-comes-to-education-sweden>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Gregory Elacqua, Dante Contreras, Felipe Salazar, and Humberto Santos, *Private School Chains in Chile: Do Better Schools Scale Up?* CATO INSTITUTE (2011), <https://www.cato.org/publications/policy-analysis/private-school-chains-chile-do-better-schools-scale>.

⁷⁷ Gregory Elacqua, *The Impact of School Choice and Public Policy on Segregation:*

may have caused the lower levels of socioeconomic sorting across schools in Chile. Elacqua also reported that socioeconomic sorting decreased in 2008, the year after the government began giving voucher enhancements to low-income students of 50 percent above the base voucher.⁷⁸

A 2015 study found that in 2010 Chilean students from families with higher socioeconomic status were more likely to choose high-performing schools outside of their neighborhood relative to other families.⁷⁹ Private schools in Chile are allowed to charge fees above voucher amounts. In addition, choice schools face accountability pressures which “likely drive schools to select their students by academic ability in order to improve their chances of achieving higher results on the national standardized exams and school rankings.”⁸⁰

International School Choice in Context : Unfortunately, none of these studies on New Zealand, Sweden, or Chile has access to what most would consider ideal data—measures of sorting between schools for several years *before* the implementation of enhanced school choice programs along with the data several years after enhanced parental choice was permitted. Such pre-program data would allow for before and after analyses and a look at whether the timing of the creation of the school choice programs led to different trajectories in sorting relative to the years leading up to the creation of the programs.

Even with ideal data, it would be difficult to ascertain the counterfactual—what the trend of sorting between schools would have been if these school choice programs had never been created. As discussed above, public school sorting by race and income in the United States has increased even without the creation of large-scale school choice programs.

Different countries have different cultures, income distributions, and different histories as well as current patterns of racial, ethnic, and religious comity or animosity. Thus, the effects of school choice in one national context, may not apply to another.

Evidence from Chile, 32(3) INT’L J. EDUC. DEV. 444 (2012), pp. 444-53.

⁷⁸ *Id.*

⁷⁹ Fatima Alves, Elecqua, Mariane Koslinki, Matias Martinez, Humberto Santos, and Daniela Urbina, *Winners and Losers of School Choice: Evidence from Rio de Janeiro, Brazil and Santiago, Chile*, 41 INT’L J. EDUC. DEV. (2015), They also study public school choice in Brazil and find similar results.

⁸⁰ *Id.*

U.S. School Choice

Swanson reviewed the evidence about the effect of private school choice programs in Milwaukee, Cleveland, Washington, D.C., and Louisiana on racial integration.⁸¹ Each of those three programs were means-tested voucher programs, where only low-income parents were offered taxpayer funded vouchers to attend private schools. Each of the eight studies reviewed by Swanson considered the effects of the voucher programs on the racial composition of schools faced by switchers—students who moved from a public school to a private school using a voucher. Swanson concluded:

Seven of the eight studies examining the impacts of vouchers on racial integration found that vouchers increased racial integration for participating students. The only study (Egalite & Mills, 2014) to examine the impact of student moves on TPSs (traditional public schools) also found that students leaving TPSs using a voucher increased the integration of the sending school.⁸²

No studies of American voucher programs that allow taxpayer funded choice to private schools have found that this enhanced choice increases sorting by race.

The one study reviewed that found no impact of vouchers on sorting used longitudinal student data from Milwaukee beginning in 1994.⁸³ Because the Milwaukee school voucher program began in 1990, the researchers could not determine how vouchers had an impact on sorting in the earliest years of the program. After 1994, the researchers could not detect significant effects of the Milwaukee voucher program on sorting across Milwaukee schools. However, the Milwaukee voucher program had a very large impact on the distribution of students across sectors. In 1994, 75 percent of Milwaukee private school students were white, and in 2008 only 35 percent of Milwaukee private school students were white. Of

⁸¹ Elise Swanson, *Can we have it all? A review of the impacts of school choice on racial integration*, 11(4) J. SCH. CHOICE, 507 (2017).

⁸² *Id.*

⁸³ Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice*, EDCHOICE, (2013), <https://www.edchoice.org/wp-content/uploads/2015/07/2013-4-A-Win-Win-Solution-WEB.pdf>.

this evidence, Forster (2013) concluded, “This seismic shift was the result of the voucher program.”⁸⁴

Research of the early impact of the more recently created Louisiana Scholarship Program (LSP) finds that it has resulted in decreased racial sorting in public schools where students leave with scholarships.⁸⁵ However, this study also find there has been no overall effect on sorting in receiving schools.⁸⁶ For Louisiana public school districts that remain under desegregation orders, the LSP has had a larger effect on desegregating schools—public schools that experienced an exit of students via scholarships became more racially integrated as did the receiving schools. Given data limitations, the authors are not able to analyze the changes in the racial composition of schools experienced by all students who received scholarships—they are only able to analyze changes in segregation for about 17 percent of voucher recipients.⁸⁷

In 2016 Forster reviewed studies of the impact of voucher programs on civic practices and political tolerance.⁸⁸ Seven studies found students who were offered vouchers tended to be more civically oriented with time or money or express more tolerant views toward their “least favorite” groups—relative to public school students who were not offered vouchers in a randomized lottery.⁸⁹ These students who won the lottery and were offered a voucher tended to be more tolerant of the rights of those they considered undesirable. Three studies found no effect of voucher programs on civic practices or political tolerance.⁹⁰ No studies have found a negative effect of choice on civic practices or tolerance.

U.S. School Choice in Context : Research from existing U.S. school choice programs is perhaps the most relevant for predicting the likely effects of new U.S. school choice programs on sorting. However, new school choice programs in the U.S., like the ones in Indiana and especially the unfunded one in Nevada, provide more generous scholarship amounts and will be offered to a larger proportion of students than the school

⁸⁴ *Id.*

⁸⁵ Anna J. Egalite and Jonathan N. Mills, *The Louisiana Scholarship Program: Contrary to Justice Department Claims Student Transfers Increase Integration*, 14(1) EDUC. NEXT 66 (2014).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice*, EDCHOICE, (2016), <http://www.edchoice.org/wp-content/uploads/2016/05/A-Win-Win-Solution-The-Empirical-Evidence-on-School-Choice.pdf>.

⁸⁹ *Id.*

⁹⁰ *Id.*

choice programs analyzed in the studies mentioned above. Future research should analyze these more comprehensive school choice programs. Further, only one of the studies to date—Egalite’ and Mills’ 2014 study of the Louisiana voucher program had longitudinal student-level data that allowed researchers to directly compare the racial composition of sending and receiving schools.⁹¹ Future research should seek these better data and analyze the effect of these programs in income sorting.

Simulation Studies

The final evidence to summarize comes from a long literature that uses simulation models of location and school choice. Such studies create theoretical models of how households choose communities where they live and where they send their children to school. These models are then “calibrated” to real data to generate parameters that allow the model to explain the real-world data. The parameters indicate to what extent factors in the model explain household decisions about where to live and where to send their children to school. For example, if in a given theoretical model, real-world data suggest that a neighborhood public school with test scores of one standard deviation above average result in housing prices that are 20 percent above average, then the model is calibrated to produce such a result. These calibrated models are used to simulate changes in policies to make predictions, in this case, of where families will live and send their children to school.⁹²

Although important early research on these simulation models was conducted by a variety of authors, the most recent and largest amount of simulation model research, which builds on that early work, comes in a series of papers by Thomas Nechyba, who surveys the prior literature as well.⁹³ Like the early research implies, Nechyba points out that the

⁹¹ Anna J. Egalite and Jonathan N. Mills, *The Louisiana Scholarship Program: Contrary to Justice Department Claims Student Transfers Increase Integration*, 14(1) EDUC. NEXT 66 (2014).

⁹² For a technical description of simulation models and their utility, see Thomas J. Nechyba, *Income and Peer Quality Sorting in Public and Private Schools* in HANDBOOK OF THE ECONOMICS OF EDUCATION VOL. 2, 1327-68 (Eric A. Hanushek and Finis Welch, eds., 2011). Lay readers may prefer the extensive discussion of this simulation research found in Thomas J. Nechyba, *The Social Context of Vouchers*, in HANDBOOK OF RESEARCH ON SCHOOL CHOICE, 289-308 (Mark Berends, Matthew G. Springer, Dale Ballou, & Herbert J. Walberg, eds., 2009).

⁹³ See *id.*, Nechyba (2009).

American public education system is in actuality “quasi-public,” to use his term. Specifically, he points out that to attend a given traditional public school, children’s families must be able to afford to live in that public school’s attendance zone. That is, under the traditional American education system, private school attendance was rationed by tuition prices. To attend a given private school, one must be willing and able to pay the tuition price.

Slots in public schools have been rationed as well—by housing prices. To attend a given public school, one must be willing and able to pay the housing price in the school attendance zone. Nechyba writes, “Residence-based admission to publicly-funded schools therefore creates an *actual* public school system that, while nominally offering free public education to all, restricts access to high-quality schools to higher-income households . . . public school rationing mechanisms lead to relatively high levels of residential and school segregation.”⁹⁴ While tuition is the price of attending a private school, housing costs are the price of attending a public school. This understanding of the traditional education system in America forms the basis of his simulation models of the location and school choices of families with children.

In his simulation models, Nechyba analyzes five channels for competition that would arise under a system of parental choice. The first three channels are beneficial for student outcomes, but the latter two likely benefit some students at the expense of others or are harmful altogether. The channels for competition among schools are:

- 1) Schools may compete “*vertically*” to use their financial resources more efficiently. Families will be drawn to these more efficiently-managed schools because their students will get more benefits per dollar spent on their educations.
- 2) Schools may compete “*locationally*” by locating in areas with “low-performing” schools giving students better school options in their communities.
- 3) Schools may compete “*horizontally*” by offering specific programs that benefit specific populations of students whose needs are not being met in relatively homogenous traditional public schools. These schools may not be better for all students, but may be better for some student populations.

⁹⁴ *Id.*

- 4) Schools may compete by offering an educational program targeted to “*pernicious*” groups.
- 5) Schools may compete by “*cream-skimming*” the best students in order to attract other good students and to attract more effective teachers who may prefer such students.⁹⁵

I offer a sixth channel of how schools would compete under a school choice program:

- 6) *Altruistic schools.* Billionaires who have collectively given hundreds of millions of dollars to public schools or to public school reform efforts would have an additional way to improve education under school choice—they could provide seed money to multiethnic groups of individuals to start excellent and integrated schools, where the students’ tuition would largely be financed by taxpayer funded vouchers, tax-credit scholarships, or education savings accounts.⁹⁶ This altruism would be a form of funding “social entrepreneurship,” where donors seek to fund private individuals and groups to solve complex social problems. Social entrepreneurship is common in many realms outside of K–12 education.⁹⁷ School choice would permit a dramatically greater scope for social entrepreneurship in K–12 education.

An historical example of altruistic schools was analyzed by Aaronson and Mazumunder, which presents the history and effects on student outcomes of “Rosenwald Schools”.⁹⁸ A collaboration between Booker T. Washington and philanthropist Julius Rosenwald led to the creation of

⁹⁵ See Nechyba (2009), *supra* note 92.

⁹⁶ It is likely impossible to include this channel of competition into a simulation model. However, several billionaires have demonstrated their altruism in recent years by donating hundreds of million dollars to public schools and public school reform efforts. School choice programs merely give them another avenue to invest their donations on behalf of students and at least some would use their resources to seed new schools of choice that seek to promote equity. Evidence that these billionaires are proponents of equity include the fact that they did not use their millions to purchase another yacht or island. Of course, wealthy individuals and foundations are already providing seed grants for new charter schools.

⁹⁷ For examples of social entrepreneurship, see <https://www.ashoka.org>.

⁹⁸ Daniel Aaronson and Bhashkar Mazumder, *The Impact of Rosenwald Schools on Black Achievement*, 119(5) J. POL. ECON. 821 (2011).

about 5,000 “Rosenwald Schools” in the rural southeastern United States between 1914 and 1931. These schools were created to serve African American students who were segregated into poorly funded public schools, separate from better-funded public schools for white students. These Rosenwald schools led to tremendous gains in outcomes for their students. According to the National Trust for Historic Preservation, by 1928 about one-third of rural African American children in the southeastern United States attended a Rosenwald School.⁹⁹ As forcible segregation of public schools by race came to end beginning with the *Brown v Board of Education* decision by the U.S. Supreme Court, Rosenwald schools were closed.¹⁰⁰

Although these schools did not increase or decrease sorting, as African American students transferred from their segregated public schools to these altruistic schools, in the current era an altruistic schools model could be used to create high quality and integrated schools under a school choice program. Of course, the presence of taxpayer funded school choice programs would make it more likely that latter day “Rosenwald Schools” would be created, as philanthropists and families would no longer have to bear the burden of the full operating costs of operating these altruistic schools.

Per the entire list of six ways that schools may compete for students under a choice program, private schools under the current education system likely compete via one or more of these channels as well. Under a choice system, any autonomous schools—public or private schools that were free of government regulation of their admissions and educational programs—would also likely compete via one or more of those channels.

Each of the first three channels of competition listed above and the sixth channel are beneficial for students. However, it is possible that under a school choice program schools may compete by offering “pernicious” offerings such as pro-Ku Klux Klan instruction or instructional programs that ignore mathematics, or schools may cream-skim the best students in order to reap the benefits of positive peer effects and to attract more effective teachers. Under a choice system, for those concerned about the disadvantaged, the goal should be to maximize the benefits of competition and choice from the four beneficial channels listed above and seek program design features that avoid the two negative channels.

⁹⁹ *Rosenwald Schools*, NATIONAL TRUST FOR HISTORIC PRESERVATION, https://savingplaces.org/places/rosenwald-schools#.W0Jx_dUzoqM.

¹⁰⁰ *Id.*

Using his simulation models, Nechyba shows the extent to which different designs of school choice programs promote—or retard—each of the first five channels of competition and the effects on students and the sorting of students among schools. Nechyba and the prior literature that employs these simulation models do not consider altruistic schools—in fact, there may be no way to do so in such models. Importantly, Nechyba compares outcomes for students and the sorting of students under various school choice programs to outcomes and sorting under the current public education system.

This comparison is often ignored in studies and in debates about the merits of school choice. For example, school choice opponents may be quick to point out that a given private school cream-skims top students via high standards for admissions. But they may ignore that a given public school cream-skims top students via expensive owner-occupied housing and zoning that excludes multi-family housing from being constructed in their communities. Properly understood, the issue is: what is the level of integration under one education delivery model relative to the level of integration under another?

According to Nechyba’s review of this simulation literature, there are three broad implications drawn from the research on housing and school choice using simulation models:

- 1) “[P]ublic and private school choice plans may lead to greater competition with more or less segregation of different types depending on how such plans are implemented.”¹⁰¹
- 2) School choice programs will lead to a “migration of households from relatively higher-income communities to relatively lower-income communities”¹⁰²
- 3) A school choice proposal that “adds a new channel through which private schools can compete must necessarily reduce the importance of the other channels.”¹⁰³

The first implication suggests that school choice proponents and anyone worried about the sorting of students across schools should pay close attention to the design of school choice programs.

¹⁰¹ See Nechyba (2009), *supra* note 92.

¹⁰² *Id.*

¹⁰³ *Id.*

The second implication suggests that school choice has great potential to offset at least some of the growing income sorting that has occurred across American neighborhoods and schools in recent decades.

The third implication suggests that specific school choice programs should seek to promote the channels of competition that are beneficial for students—allowing schools to have maximum flexibility over their resources, their locations, and their educational and other programs. Such freedoms will limit any negative channels of competition, as Milton and Rose D. Friedman suggested in 1980 (and as noted previously in this paper): “Let schools specialize, as private schools would, and common interest would overcome bias of color and lead to more integration than now occurs.”¹⁰⁴

Thus, the increases in sorting by race and class across American public schools may be due to the growing programmatic homogenization of the public education sector. For example, implications (2) and (3) from the simulation model approach are consistent with a 2005 study by Miguel Uriquola that finds metropolitan areas with more public school choices—both more districts and more schools within districts—have more sorting of children across schools by race and class. They are also consistent and with the evidence from Bischoff and Reardon that income class segregation across neighborhoods and with the evidence from Owens that income sorting across public schools have increased to a large degree over several decades, especially in recent years.¹⁰⁵ These empirical findings are just the converse of implications (2) and (3). That is, the simulation models imply that when public schools do not compete horizontally because they are becoming more homogenous, there will be more sorting by student types across public schools and neighborhoods. And this implication is consistent with the increase in sorting among public schools seen in recent decades in the United States—less horizontal and vertical competition among public schools may be leading to the increased cream-skimming in the public education sector.

Simulation Studies in Context: The implications from these simulation studies comport with logic. However, the simulation models were created to explain retrospective patterns of neighborhood location and school choice. Important factors that help determine neighborhood location and

¹⁰⁴ See Friedman & Friedman, *supra* note 48.

¹⁰⁵ Miguel Uriquola, *Does School Choice Lead to Sorting? Evidence from Tiebout Variation* 95(4) AMER. ECON. REV. 1310 (2005). Interestingly, Uriquola finds that more public school choices leads to less private school enrollment.

school choice decisions may be omitted from these models, and these omitted factors could change in the future in ways that lead to future school choice decisions to be different than what is predicted by these simulation models. For example, if altruistic schools were more likely to be formed under a school choice program, then integration would be actually higher than predicted under a simulation model that does not allow for the creation of altruistic schools.

The next section draws on the evidence from each of these five strains of literature and from the historical experiences in the public education system to make recommendations for school choice program design with the goal of increasing school integration and promoting any positive aspects of choice for students.

Recommendations for School Choice Program Design

Many of us share the goal of greater racial and income integration in schools—for both educational and social reasons as described previously. Unfortunately, the current trends are going largely away from this goal in the current American education system, especially with regards to integration by income. We can learn from prior experience and research about how to design school choice programs in ways that promote integration. To that end, this section offers specific policy recommendations with respect to the design of school choice programs in order to promote school integration by race, ethnicity, and income—and to promote any other educational or social benefits that may accrue from greater choice in K-12 education. Each of these recommendations for choice policy design is based on the historical evidence on sorting by race, ethnicity, and income across schools and the findings of the empirical and simulation literatures on choice.

Given the historical evidence on housing and school segregation and the evidence from choice programs in the U.S. and internationally, the following school choice program design features endeavor to maximize benefits to students and take to heart the equity concerns of those worried about the increase in race and income sorting that has been present in the American public education system over the past four decades.

- *Universal scholarships.* Offer scholarships to all families regardless of income. Scholarships to higher- and middle-income families will give them more incentive to live closer to employment centers in what we now know as lower-income communities—where scholarship programs will allow new,

high-quality school options to open to serve existing and new residents. Universal school choice would also empower low-income families to send their children to schools located in neighborhoods only higher-income families may currently access. Universal scholarships will also maximize the amount of competition in the school marketplace and build political support for more generous scholarship amounts—and both will enhance student outcomes.

- *Progressive scholarships.* Provide larger scholarships to students from lower-income families and students with special needs. Larger scholarships give schools more of an incentive to enroll students who may be more expensive to teach or who come from limited means. It also gives those families more power and influence within their schools by giving them more opportunities for “exit”—thereby lowering the likelihood of any disparate treatment against them within schools. Finally, progressive scholarships give disadvantaged students an opportunity to attend schools their families currently cannot afford.
- *External accreditation and civil rights protections.* Require that public and private schools that admit students with taxpayer funded scholarships to be accredited by an external and independent accrediting body—or to immediately pursue accreditation in the case of new schools. Along with the enforcement of anti-discrimination laws, including the revoking of the tax-exempt status of schools that violated students’ civil rights, accreditation will limit entry and persistence of any schools with “pernicious” intents, which is a fear of school choice skeptics. While accreditation raises operating costs, limits entry, and has other ill effects, it may be an unfortunate, yet politically necessary, compromise.¹⁰⁶

¹⁰⁶ I am normally leery of accreditation of K–12 schools and colleges, as it can require input-based policies that lead to excessive employment and spending in schools in order for schools to obtain and maintain accreditation. However, given that some small number of individuals would want to start schools that most would consider “pernicious”, such as Ku Klux Klan schools, requiring accreditation of schools may be the best way to prevent entry of these schools into the K–12 marketplace. With regards to practical politics, it may take only one such school in a given state to lead to a significant weakening or even an end to a school choice program. That said, supporters of educational excellence and the efficient use of taxpayer resources should be vigilant to prevent accreditation bodies from imposing costly input-based policies on schools.

- *Aid parents in choosing.* Civil society can create on-line platforms, like GreatSchools.org, and organizations to help parents maximize the benefits of choice by finding the schools that are best for the specific interests and needs of their children.

School Choice Program Design Features to Avoid

Given the previous points raised in this paper, I propose that school choice program designs do not contain the following provisions. By avoiding these provisions, school choice programs will maximize the benefits to students and take to heart the equity concerns of those worried about the increase in race and income sorting that has been present in the American public education system since 1980. School choice program “Don’ts”:

- *Centralized accountability via standardized testing.* In a group of case studies, Wells and Holme (2005) found that using student test score results to grade schools has been shown to decrease integration in public schools, as white and higher-income parents avoid integrated schools with lower average achievement scores.¹⁰⁷ In addition, under a choice system, this centralized accountability will give public and private schools an incentive to not admit “low-performing” students, in order to boost their accountability rankings—which may have occurred under the current public school system through school rezoning policies and in Chile’s school choice program.¹⁰⁸
- *Requirements on schools of choice.* Curricular requirements, restrictions on who may teach, and any other government requirements on public and private schools under a choice system limit horizontal competition and will lead to more

Policymakers should also seek better ideas with regards of how to prevent schools with pernicious intent from forming.

¹⁰⁷ Amy Stuart Wells and Jennifer Jellison Holme, *No Accountability for Diversity: Standardized Tests and the Demise of Racially Mixed Schools*, in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 187-211 (John Charles Boger and Gary Orfield, eds., 2005).

¹⁰⁸ For an example of public school zoning in America being impacted by accountability rankings, see Kate Taylor, *Race and Class Collide in a Plan for Two Brooklyn Schools*, *NEW YORK TIMES* (Sept. 22, 2015), <http://www.nytimes.com/2015/09/23/nyregion/race-and-class-collide-in-a-plan-for-two-brooklyn-schools.html>.

sorting across schools as school offerings become homogenous. That is, if schools are largely the same, families of means will sort into schools with the highest peer quality, and high housing costs will screen out lower-income families—which appears to have been occurring for decades under the current public education system.

- *Mandate equality.* Capping private school tuition to scholarship amounts, requiring schools to admit students via lottery, and other program features that sound like they will promote equity and integration will have unintended consequences and likely increase sorting by race, ethnicity, and income. These so-called “equality” provisions will limit the channel of competition where schools compete horizontally and give wealthier households more of an incentive to live in higher-income communities—so most or all students in the school admissions lottery will be from higher-income households or so they can go to exclusive public schools and avoid low-cost private ones
- *Controlled choice or mechanism design approaches.* Public school districts like New York City have endeavored to provide more diverse school offerings and public school choice through controlled choice or mechanism design approaches. Controlled choice programs—“choice” programs that limit parental choices in the interest of promoting school integration necessarily limit horizontal, vertical, and locational competition.¹⁰⁹ Schools that are undersubscribed may or may not be closed by central authorities—even if schools are closed, are the employees out of a job or merely transferred to another school? Entry of private schools is limited or nonexistent. And, if schools know they will be filled with students, they have little incentive to use their resources more efficiently. Mechanism design approaches have been used to match the school preferences of families with available slots in schools. Interesting and exciting work has been done to improve matching algorithms to give more families their most preferred choices and to limit strategic gaming by more sophisticated

¹⁰⁹ Vigorous defenses of controlled public school choice approaches to integrating schools—as opposed to school choice proposals such as vouchers—are found in Richard D. Kahlenberg, ed., *PUBLIC SCHOOL CHOICE VS. PRIVATE SCHOOL VOUCHERS* (2003).

choosers.¹¹⁰ That said, mechanism design approaches have the same pitfalls as controlled choice—relative to a true school choice program, there is less incentive for schools to diversify their offerings through horizontal completion, less incentive for schools to be more efficient with their resources through vertical competition, and hard or soft limits on the entry of new schools which limits locational competition. To conclude, controlled choice and mechanism design approaches do not permit any or very much of the four virtuous channels of competition that would be present under a pure school choice program. Under a controlled choice program, school integration may be improved or not made worse, but there are little or no benefits to students from competition. Mechanism design approaches may allow more families into their most preferred schools relative to controlled choice, but appear to be leading to small increases in sorting.¹¹¹ Both controlled choice and mechanism design approaches limit any benefits of competition.

As discussed above, the design of school choice programs will have an impact on the resulting levels of school integration. For example, if—like New Zealand—a school choice program requires public reporting of only data on the poverty levels and racial composition of schools and limits the differences between and among public and private schools via regulation—it is likely that school choice will lead to more racial and income sorting. If the main differences between schools are the demographics of the students, then parents will sort based on student demographics—and this claim is supported by the New Zealand evidence.

This claim is also consistent with the evidence of increased race and income sorting across public schools and neighborhoods in recent decades

¹¹⁰ E.g, see Atila Abdulkadiroglu, Parag A. Pathak, and Alvin E. Roth, *Strategy-Proofness versus Efficiency in Matching with Indifferences: Redesigning the NYC High School Match*, 99(5) AMERICAN ECONOMIC REVIEW 99, 1954 (2009).

¹¹¹ Lori Nathanson, Sean Corcoran, and Christine Baker-Smith, *High School Choice in New York City: A Report on the School Choices and Placements of Low Achieving Students*, RESEARCH ALLIANCE FOR N.Y. CITY SCHOOLS; N.Y. UNIV., STEINHARDT SCHOOL OF EDUCATION, INSTITUTE FOR EDUCATION AND SOCIAL POLICY (2013), <https://steinhardt.nyu.edu/scmsAdmin/media/users/ggg5/HSChoiceReport-April2013.pdf>. It is not clear from this study or other existing research if segregation would have increased even if New York City or other school systems did not implement public school choice with mechanism design.

as public schools have become more homogenized in terms of offerings. Requirements of standardized testing, Common Core State Standards, input regulations, etc. for private schools who accept taxpayer funded vouchers, for example, likely will lead to more sorting across schools relative to a voucher program with few requirements for private schools.

That said, overall racial and income *integration* may or may not be higher in voucher programs, but not as high as it could be, with lots of government-imposed requirements on private schools as the neighborhood location and school choice decisions are separated. Restrictions on private school autonomy limit the diversity of school offerings which limits opportunities for families to sort themselves among schools based on their curricular and extracurricular needs; therefore, families are more likely to sort themselves based on race and income—because that would be the only parameters they would be allowed to choose.

Conclusion

For almost two decades, the early 1980s to 2000, public schools became more isolated by race even though neighborhoods became more racially integrated. From 2000 to 2010, public school integration tended to lag improvements in neighborhood integration. For decades public schools have become significantly more isolated by income class, especially in recent years.

If we maintain the status quo, these negative trends are likely to continue, given the historical experience with the public education system, including the increasing homogenization of offerings in the public education system, and because of the evidence from simulation models of housing and school choice discussed in Nechyba.¹¹² Further, while I support proposals to integrate schools within individual school districts, those efforts will not promote much integration by race and income because the vast majority of sorting is across districts. While not currently required by law, any efforts to promote integration across public school district lines are doomed because districts have become very large geographically over time through school district consolidations and because mass suburbanization and metropolitan sprawl have given families with means a much geographically larger array of places to live and send their children to public schools.

¹¹² See Nechyba (2009), *supra* note 92.

Perhaps enhanced taxpayer funded school choice—of the kind that allows schools to offer diverse educational offerings—can ameliorate sorting. I agree with Nechyba, who said: “The policy decision is considerably more nuanced than the caricature of ‘vouchers’ or ‘no vouchers.’ The real question lies in how vouchers and general choice proposals can be structured to best address educational concerns while paying attention to important social considerations.”¹¹³

Those who care deeply about the fortunes of disadvantaged students and about racial and income sorting across schools should seek to influence the design of school choice programs in order to maximize the forms of competition that are beneficial for students and to promote integration via progressive scholarships and external accreditation of schools of choice. And, they should avoid “equality” proposals that “sound good”, but will likely have the unintended consequence of increasing racial and income sorting in the American K–12 education system. Finally, advocates for the disadvantaged should remember they have two goals—promoting integration and promoting other good outcomes for students. If a given education policy—school choice or otherwise—leads to modest increases in sorting, that negative outcome should be weighed against other outcomes when judging whether one supports the given policy. Again, Whitehurst et al. reported in 2016 that some urban charter schools are associated with African American students moving from traditional public schools that have large proportions of African American students to charter public schools that are even more racially identifiable—and that their outcomes are significantly higher in these charter schools. Voters, policymakers, and researchers need to ask themselves--is that tradeoff good public policy? Further—can choice programs be devised in a manner where both integration and student outcomes increase?

Along with neighborhoods, other walks of American life have become more racially integrated in recent decades as well. The rate of interracial marriages more than doubled between 1980 and 2010, according to statistics compiled by demographer William H. Frey. In 2010, 15 percent of all marriages were between individuals of different races or ethnicities. Currently about 40 percent of all adoptions involve parents of one race or ethnicity and adopted children of a different race or ethnicity. In the 1950s, only 37 percent of Americans said they were willing to vote for an African American presidential candidate, but by the 1990s the

¹¹³ *Id.*

corresponding percentage was 95 percent.¹¹⁴ Thus, when making free choices, Americans are voluntarily choosing more racial integration. Of course, the positive trend in voluntary integration is different than earlier periods in American history. Michael Alves, an education consultant and proponent of public school desegregation, has said, “We have diversity everywhere, except in schools.”¹¹⁵

I am not suggesting that America is perfectly racially integrated—nor is Frey. I am merely suggesting that there is ample evidence that the trend lines are heading in the direction of more integration and that this increase in integration is occurring via the free choices of Americans.

A flat voucher or scholarship amounts across all students coupled with homogenization in both the public and private education sectors would almost certainly lead to more sorting of students by type across schools. However, thoughtful policy design can lead to increases in school integration under a program of universal school choice.

To be sure, it is likely the case that a given school choice program would have had a very different impact on sorting across schools in 1970 or in years prior to 1970, given the large improvement in the racial attitudes of whites since that time period. However, the issue analyzed here is whether thoughtful policy design can lead to increases in school integration under a program of universal school choice—circa 2019.

Future research on school segregation should continue to gain evidence or consider several open questions, including:

- More research into the causes of the increase in income sorting across neighborhoods over the past 40 years—in particular, any contribution of the public education system to this increase in sorting by income.
- More research into measuring and analyzing changes in sorting experienced by Latinos and Asians.¹¹⁶

¹¹⁴ These statistics and others regarding Americans’ increasing embraces of racial and ethnic diversity come from William H. Frey, *DIVERSITY EXPLOSION: HOW NEW RACIAL DEMOGRAPHICS ARE REMAKING AMERICA* (2014).

¹¹⁵ Michael Alves, quoted in, Sam Chaltain, *60 Years After Brown, A Way for Schools to Fulfill Its Promise*, EDUC. WEEK (May 14, 2014), http://blogs.edweek.org/edweek/civic_mission/2014/05/60_years_after_brown_v_board_a_way_for_schools_to_fulfill_its_promise.html.

¹¹⁶ While there has been some work measuring segregation levels experienced by Latinos and Asians from others, more work needs to be done in this area, including trends in neighborhood segregation compared to trends in school segregation. See Stroub & Richards, *supra* note 25.

- Creating consistent historical measures of school sorting, reaching as far back into the 20th Century as possible.
- More evidence on within-school sorting—both within public and private schools—and how within-school sorting changes after the creation of school choice programs.
- Analyzing school sorting in new large scale school choice programs as states are now beginning to implement larger programs.

Disaster for the Disadvantaged A Rhetorical Analysis of School Choice, Education Vouchers, and Charter Schools

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This research briefly reviews the origins of school choice through education vouchers and charter schools. Much of the support for these free market innovations was based on economic reasoning. More specifically, vouchers and charters, thanks to free market competition, were to increase school quality and decrease school costs. Statewide charter school data from Ohio are used to test whether school quality increased and school costs decreased. In the short run, it appears that charter schools increased quality and decreased costs. In the long run, however, quality in traditional schools will likely decrease and societal costs are bound to increase. These problems stem from the ways in which charter schools are funded. Charter schools are funded by taking money away from traditional public school districts. For some school districts, the amount of money lost devastates their budgets. For example, six school districts from the statewide sample lost more than 17 percent of their budgets to charter schools. One of them lost 24.4 percent of its budget. Across all six school districts, approximately 85,000 students were affected. Among them were disproportionately high numbers of children living in poverty (89%). Racial representation included Black (68%), Hispanic (7%), and Multiracial (5%). Children with disabilities (15%) and Limited English Proficient children (3%) were also disproportionately represented. While the major findings of this study are financial and educational, they are also ethical. Charter school finance policies most disadvantage school districts that serve disadvantaged students. Longstanding federal and state

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school funding policies were established to assist these students and school districts. The way charter schools are funded compromises these policies. New laws are required that restore and enhance federal and state school finance policies that benefit disadvantaged students. Meanwhile, at bare minimum, policies for funding charter schools should *do no harm* to disadvantaged students and the school districts that serve them.

The universe of school choice research is well-traveled. For good reason, perspectives from multiple disciplines have been brought to bear on the meaning and importance of school choice in America. In education circles, these perspectives are centering on academic achievement.¹ This makes sense because academic achievement is of paramount importance to educators and society. Economics is also of paramount importance to educators and society. The economics of school choice is particularly intriguing because economics-based predictions justified the establishment and expansion of school choice alternatives. The most fundamental economics-based prediction was that market competition would lead to school improvement. More specifically, school quality would increase and school costs would decrease as more school choices were introduced to the schooling marketplace. As we end this third decade of expanding school choices in the marketplace, little evidence has emerged to suggest that schools improved because of school choice. Moreover, what began as careful school choice experimentation, spread broadly across the nation even though economic predictions did not come true.

This research continues a long line of investigative inquiry into the economics of school choice.² At this juncture, a critical position is taken.

¹ See Stanford University Center for Research on Education Outcomes, *Multiple Choice: Charter School Performance in 16 States* (Stanford, CA: Stanford University, 2009), <https://ies.ed.gov/ncee/wwc/Study/67286>.

² See generally, Richard A. King, Austin D. Swanson & Scott R. Sweetland, SCHOOL FINANCE: ACHIEVING HIGH STANDARDS WITH EQUITY AND EFFICIENCY (3rd Ed.) (New York: Allyn and Bacon, 2003); Scott R. Sweetland, *Education Vouchers: Deliverance or Disaster?*, UNIV. COUN. EDUC. ADMIN. REV. 4, no. 1 (2000), 1-2, 9-11; *Theory Into Practice: Free Markets and Public Schooling*, CLEARING HOUSE 76, no. 1 (2002), 8-12; *A Tale of Two Fiscal Policies: Entrepreneurial and Entropic*, EDUC. CONSIDERATIONS 39, no. 2 (2012), 61-5; *Revisiting the Role of Vouchers and Charter Schools in the Educational Market Place*, EDUC. CONSIDERATIONS 41, no 1 (2014), 46-50; *Does Law Matter? Charter Schools and Constitutional Duties for Common School Sustainability* (on file with author; manuscript under review).

This research asserts that economics-based predictions that supported school choice through education vouchers and charter schools were narrow and shortsighted. The assertion is supported by historical understandings of economics, school finance policy, and contemporary data analysis. As a starting point, early research on social and political economy timelessly predicted that market competition was good for the economy and citizenry.³ This early economic research also revealed that education was important to economic growth and, thus, indirectly supported the evolution of school finance research and policy. Early research on school finance called for increased governmental funding for schools, fiscal equalization across public school districts, and pupil weightings that distributed funds variably for different types of pupils and programs.⁴ These histories of economics and school finance were mainly separated, each predominantly attached to private sector or public sector ethos.⁵ Despite these often-conflicting sectoral orientations, early economic and school finance theories shared one important attribute: accountability. Economics was accountable to the marketplace and school finance was accountable to multiple levels of government, constitutions, and the citizenry.

This research traverses private sector and public sector orientations to examine the conceptual foundations of school choice through education vouchers and charter schools. First, the historical development of education vouchers is punctuated to emphasize the economics-based framework that was used to justify market-based school choices. Afterwards, the history of school choice is extended beyond that of education vouchers to reveal critical inconsistencies as charter schools took center stage of the school choice movement. These critical inconsistencies are both conceptual and financial. For example, charter schools were originally conceptualized as school choices within traditional public school districts. Soon after the first charter school was established, charter schools became direct competitors with traditional public school

³ Accord Alfred Marshall, *PRINCIPLES OF ECONOMICS* (1891); John Stuart Mill, *PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY* (1869); Adam Smith, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1776).

⁴ See Ellwood P. Cubberley, *SCHOOL FUNDS AND THEIR APPORTIONMENT* (1906); Henry C. Morrison, *SCHOOL REVENUE* (1930); Paul R. Mort, *THE MEASUREMENT OF EDUCATIONAL NEED: A BASIS FOR DISTRIBUTING STATE AID* (1924); George D. Strayer and Robert M. Haig, *THE FINANCING OF EDUCATION IN THE STATE OF NEW YORK* (1923).

⁵ Austin D. Swanson and Richard A. King, *SCHOOL FINANCE: ITS ECONOMICS AND Politics* (1991).

districts. Despite this competitive stance, charter school funding was not competitive. Charter school funding did not depend on satisfactory academic performance. This facet of charter school finance renders unaccountable the promises made by charter school advocates and defeats the major benefits economists associated with free market competition.

The methodological approach of this research is expository. The research reveals conceptual traditions that lie at the foundation of education voucher programs that were later applied to charter schools. The methodological approach then compares economics-based predictions about charter schools with contemporary charter school data to answer the underlying research questions:

1. Do charter schools increase school quality?
2. Do charter schools decrease school costs?

Data-based answers to these questions are insightful and provide the means to making policy recommendations and encouraging further research. The overriding policy recommendation is an ethical one. As a matter of upholding fiscal ethics, policy makers must ensure that charter school policies *do no harm* to traditional public schools and the children they serve.

School Choice Advocacy and the Transition from Education Vouchers to Charter Schools

The Beginning of Education Vouchers

In different periods of economic history, education vouchers were conceptualized and selectively implemented. In the Eighteenth Century, Adam Smith envisioned the need for public education as a public good and he conceptualized government-financed vouchers that would be given to citizens for use at schools of their choosing.⁶ The Smithian perspective on government-financed vouchers was formulated when he postulated that underinvestment in education adversely impacted *The Wealth of Nations*.⁷

⁶ Smith, *WEALTH OF NATIONS*, *supra* note 3.

⁷ Smith's observations of education as investment led to human capital theory. See, Gary S. Becker, *HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS WITH SPECIAL REFERENCE TO EDUCATION* (1993); Mark Blaug, *ECONOMICS OF EDUCATION: A SELECTED ANNOTATED BIBLIOGRAPHY* (1966); George Psacharopoulos, *Returns to Education: A Further International Update and Implications*, 20 J. HUM. RES. 20, no. 4

In the Nineteenth Century, the states of Maine and Vermont were using voucher programs in locations where it was economically unreasonable to build and fund public high schools.⁸ In the Twentieth Century, Wisconsin established an education voucher program where traditional public schools were not performing well.⁹ The *Milwaukee Parental Choice Program* was implemented in 1990¹⁰ and it was the first of three publicly-funded voucher programs that began a contemporary wave.¹¹

Across the three centuries, conceptualizations of school choice through education vouchers promoted legitimate public purpose through positive applications of economic reasoning to public schooling. To reiterate, through the first two centuries, education vouchers were conceptualized and selectively implemented to enable schooling for citizens. These actions were in response to shortages of public schools. In contrast, during the third century, education vouchers were conceptualized and selectively implemented to substitute high quality schooling for low quality schooling. These modern implementations of vouchers began in cities where public school performance was low. In these selected cities, school choice through education vouchers symbolized hope for increased educational opportunity. School choice through education vouchers also operationalized economics-based predictions about school choice, market competition, and school improvement.¹² Along this evolving path of school choice advocacy and implementation, political and intellectual positions for and against vouchers shifted back and forth. For example, principles of classical economics were employed by Milton Friedman in his plan for education vouchers.¹³ Consistent with market theory,

(1985): 583; T. W. Schultz, *Investment in Human Capital*, 51 AMER. ECON. REV. 1 (1961); Scott R. Sweetland, *Human Capital Theory: Foundations of a Field of Inquiry*, 66 REV. EDUC. RES. 341 (1996).

⁸ Lenford C. Sutton & Richard A. King, *School Vouchers in a Climate of Political Change*, 36 J. EDUC. FIN. 244 (2011).

⁹ John F. Witte, *First Year Report: Milwaukee Parental Choice Program* (1991), <https://www.disc.wisc.edu/archive/choice/FirstYear.pdf>.

¹⁰ *Id.*

¹¹ Sweetland, *Revisiting the Role of Vouchers*, *supra* note 2. The "wave" conceptualization was borrowed from William R. Thro, *The Third Wave: The Implications of the Montana, Kentucky, and Texas Decisions for the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219 (1990); William R. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C.L. REV. 597 (1994).

¹² Sweetland, *Education Vouchers; Theory into Practice*, *supra* note 2.

¹³ Milton Friedman, *The Role of Government in Education*, in ECONOMICS AND THE PUBLIC INTEREST (Robert A. Solo, ed., 1955); Milton Friedman, CAPITALISM AND

Friedman contended that competition for pupil enrollments would compel schools to improve. In other words, traditional schools and private schools would vie for pupil enrollment and, in efforts to win in competitive contest, each would strive to improve quality and reduce costs. This economics-based prediction appealed to the market mentality with which Americans were familiar. The economics-based prediction was also consistent with market theory and aligned with three centuries of economic philosophy.¹⁴

The Friedman education voucher plan was but one component of Friedman's enduring advocacy for free markets over government controls.¹⁵ The forcefulness of Friedman's libertarian philosophy invited criticism and strong ideological opposition. The weight of this criticism and opposition made it necessary for other political advocacies to advance vouchers. From a sociopolitical, meta-values orientation,¹⁶ voucher advocacy was first associated with financial liberty interests and came close to projecting social elitism. This status needed to be balanced or countered by equality interests before vouchers could be widely accepted.¹⁷ *Private Wealth and Public Education* provided a powerful association between education vouchers and equality interests.¹⁸ This treatise exposed educational inequalities and proposed new policies to improve educational opportunity. A few years later, Coons and Sugarman developed an education voucher plan that was specifically designed to help marginalized students.¹⁹

During the 1980s, Friedman's voucher plan continued to have conservative support and Coons and Sugarman's voucher plan gained liberal support. These bi-partisan supports paved the way for Chubb and

FREEDOM (1962).

¹⁴ See, Marshall, *Principles of Economics*; Mill, *Principles of Political Economy*; Smith, *Wealth of Nations*, *supra* note 3.

¹⁵ Accord Milton Friedman & Rose D. Friedman, *FREE TO CHOOSE: A PERSONAL STATEMENT* (1980).

¹⁶ The intersection of social and political values is discussed at length in Richard A. King, Austin D. Swanson & Scott R. Sweetland, *SCHOOL FINANCE: ACHIEVING HIGH STANDARDS WITH EQUITY AND EFFICIENCY* (2002). The importance of values is also discussed in James G. Ward, *Conflict and Consensus in the Historical Process: The Intellectual Foundations of the School Finance Reform Litigation Movement*, 24 J. EDUC. FIN. 1 (1998).

¹⁷ Sweetland, *Education Vouchers; Theory into Practice*, *supra* note 2.

¹⁸ John E. Coons, William H. Clune & Stephen D. Sugarman, *PRIVATE WEALTH AND PUBLIC EDUCATION* (1970).

¹⁹ John E. Coons & Stephen D. Sugarman, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* (1978).

Moe's education scholarships that were essentially vouchers. Chubb and Moe's research made appeals to both conservative and liberal interest groups.²⁰ *Politics, Markets, and America's Schools* was their most popularized book that claimed the centralized power structure of schooling was at the root of declining school quality.²¹ The authors also claimed this power structure prevented school personnel, parents, and pupils from exercising their best judgements in attempts to improve schools. The Chubb and Moe solution was market-based. Under their plan, government would issue education scholarships that parents would use at schools of their choice. Parental choice would drive a competitive marketplace wherein schools would improve to meet parental demands or wither away due to lack of enrollment and scholarship revenue. At about the same time that Chubb and Moe's book was released, the *Milwaukee Parental Choice Program* began.

This abridged history of education vouchers highlights shifting advocacy for school choice through education vouchers. From a sociopolitical, meta-values point of view, vouchers appealed to liberty interests and then equality interests. Eventually liberty and equality interests converged, making it possible for vouchers to sweep across the nation. Throughout this evolving school choice history, the economic justification for school choice through education vouchers remained intact. School quality would increase and school costs would decrease. With these political and economic supports behind them, the *Milwaukee Parental Choice Program* was implemented in 1990, the *Cleveland Scholarship and Tutoring Grant Program* was implemented in 1996, and the *Florida Opportunity Scholarship Program* was implemented in 1999.²²

Several modifications were made to these education voucher programs during the 1990s. In the beginning, The *Milwaukee Parental Choice Program* did not allow religiously-affiliated private school participation and the program was labelled an "experiment."²³ The *Cleveland*

²⁰ John E. Chubb, *The Political Economy of Federalism*, 79 AM. POL. SCI. REV. 994 (1985); John E. Chubb & Terry M. Moe, POLITICS, MARKETS, AND THE ORGANIZATION OF SCHOOLS (1985); Politics, Markets, and the Organization of Schools, 82 AM. POL. SCI. REV. 1065 (1988); Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739 (1984).

²¹ John E. Chubb & Terry M. Moe, POLITICS, MARKETS, AND AMERICA'S SCHOOLS (1990).

²² See Carolyn D. Herrington & Virginia Weider, *Equity, Adequacy and Vouchers: Past and Present School Finance Litigation in Florida*, 27 J. EDUC. FIN. 517 (2001).

²³ John F. Witte, *The Milwaukee Voucher Experiment*, 20 EDUC. EVAL. & POL'Y ANALYSIS 229 (1998).

Scholarship and Tutoring Grant Program allowed religiously-affiliated private school participation and was labelled a “pilot” program.²⁴ The temporary nature of these experimental and pilot programs seemed credible because they were also subjected to scholarly evaluation.²⁵ This perception changed when the Milwaukee and Cleveland programs continued indefinitely and Florida’s *Opportunity Scholarship Program* offered no pretense of limitation. Not only did the Florida program allow religiously-affiliated private school participation but it also allowed voucher use throughout the state. The fact that the Cleveland and Florida programs authorized religiously-affiliated private school participation was also a major market event. The inclusion of Catholic schools greatly increased the number of private schools that parents could choose from.²⁶ In addition to allowing religiously-affiliated private school participation and being statewide, the Florida program also pushed the boundaries of voucher dollar amounts. The original voucher dollar amount in Milwaukee was \$2,446; in Cleveland it was \$2,500. The Florida voucher dollar amount was \$4,200. In 2018 dollars these amounts were equivalent to \$4,754 in Milwaukee, \$4,007 in Cleveland, and \$6,331 in Florida. Table 1 illustrates these dollar values as well as several other attributes of the original Milwaukee, Cleveland, and Florida education voucher programs.

²⁴ For more than a decade, Ohio’s education voucher programs were referred to as pilot programs. See Ohio Department of Education, *EdChoice: Ohio’s Educational Choice Scholarship Pilot Program* (2006).

²⁵ Kim K. Metcalf, *Evaluation of the Cleveland Scholarship and Tutoring Grant Program 1996-1999* (Bloomington, IN: Indiana University Center for Evaluation, 1999); John F. Witte, *First Year Report*, *supra* note 9.

²⁶ The Milwaukee education voucher program eventually permitted religiously affiliated private school participation. See Charles J. Russo & Ralph D. Mawdsley, *The Supreme Court Upholds Vouchers*, 14 EDUC. & L. 275 (2002); Charles J. Russo & Ralph Mawdsley, *The Supreme Court and Vouchers: An Overview for Educators in Catholic Schools*, 6 CATH. EDUC. J. INQ. & PRAC. 318 (2003).

Table 1 Original Voucher Program Attributes in Milwaukee, Cleveland, and Florida

Program Attributes	Milwaukee	Cleveland	Florida
Year program implemented	1990	1996	1999
Program description	Experiment	Pilot	Not Limited
Geographical limitation	Milwaukee	Cleveland	Statewide
Religious school participation	No Allowed	Allowed	Allowed
Economically disadvantaged	Prioritized	Prioritized	Prioritized
Voucher dollar amount	\$2,446	\$2,500	\$4,200
2018 equivalent value	\$4,754	\$4,007	\$6,331

The Beginning of Charter Schools

As Henry Levin consistently remarked, choices among an array of voucher attributes would alter policy objectives and affect program outcomes.²⁷ His remarks played out during the 1990s which became a decade of voucher experimentation. At the end of the decade, the Florida voucher program foretold a conservative agenda that was seeking to privatize public schooling. This procession of vouchers marching toward public school privatization ran parallel with a path of charter schools that was also seeking to privatize public schooling. As different from vouchers, however, charters were conceptualized and first implemented as a means to improving public schools within the public school system. Charters were not conceptualized to be standalone, quasi-public schools that competed with traditional public schools. Understanding this historical facet of school choice is important to understanding charter school finance

²⁷ Henry M. Levin, *Educational Vouchers and Social Policy: Policy, Politics, and Social Science*, in CARE AND EDUCATION OF YOUNG CHILDREN IN AMERICA (Ron Haskins & James J. Gallagher, eds.1980); Henry M. Levin, *Educational Vouchers: Effectiveness, Choice and Costs*, 17 J. POL'Y ANALYSIS & MGMT. 373 (1998); Henry M. Levin, *A Comprehensive Framework for Evaluating Educational Vouchers*, 24 EDUC. EVAL. & POL'Y ANALYSIS 159 (2002).

and its relationship to economics-based reasoning.

Before becoming a dominant force in the privatization of public schooling, charter schools were meant to be public, serving public purpose, within the public schooling system. After they were initially implemented, charter schools became more like private enterprises than public institutions. What remained “public” was legislation and government reporting that stated charter schools were public.²⁸ What also remained public was the revenue that paid for charter schools. Prior to all of this, charters were introduced as contracts not schools.²⁹ In the 1970s, as contracts, charters were intended to be executed within traditional public schools and districts.³⁰ These charters were agreements between public school teachers and administrators through which teachers gained academic freedoms in exchange for promises to improve academic performance. In broad spectrum, charters were a reformative attempt to restructure traditional public schools from within.³¹ As the whole of organizational restructuring came into vogue in the 1980s,³² the original, very clear conceptualization of charters as contracts became muddled with other approaches to restructuring organizations and reforming education. Charter schools were swept into a wave of calls for and strategies to implement school-based management, site-based leadership, and decentralization.³³

From outside administrative circles, charter advocacy was embraced on

²⁸ State reports and federal laws specifically cite charter schools as “public.” *Accord* Ohio Department of Education, *2011-2012 Annual Report on Ohio Community Schools* (Columbus: 2012); An Act to Close the Achievement Gap with Accountability, Flexibility, and Choice, so that No Child is Left Behind, Public Law 107–110 (January 8, 2002).

²⁹ See Ray Budde, *The Evolution of the Charter Concept*, 78 PHI DELTA KAPPAN 72 (1996).

³⁰ Ray Budde, *EDUCATION BY CHARTER: RESTRUCTURING SCHOOL DISTRICTS* (1988); Ray Budde, *Education by Charter*, 70 PHI DELTA KAPPAN 518 (1989).

³¹ *Id.*

³² *Accord* Samuel B. Bacharach & Joseph B. Shedd, *Power and Empowerment: The Constraining Myths and Emerging Structures of Teacher Unionism*, in *THE POLITICS OF REFORMING SCHOOL ADMINISTRATION* (Jane Hannaway & Robert Crowson, eds., 1989); Roger Kaufman & Jerry Herman, *STRATEGIC PLANNING IN EDUCATION: RETHINKING, RESTRUCTURING, REVITALIZING* (1991); Linda M. McNeil, *CONTRADICTIONS OF CONTROL: SCHOOL STRUCTURE AND SCHOOL KNOWLEDGE* (1986); Thomas Timar, *The Politics of School Restructuring*, 71 PHI DELTA KAPPAN 265 (1989).

³³ *Accord* Daniel J. Brown, *DECENTRALIZATION AND SCHOOL-BASED MANAGEMENT* (1990); Jane L. David, *Synthesis of Research on School-Based Management*, 46 Educ. Lead. 45 (1989); Charles Mojkowski & Douglas Fleming, *SCHOOL-SITE MANAGEMENT: CONCEPTS AND APPROACHES* (1988).

behalf of teachers. Albert Shanker led the American Federation of Teachers³⁴ and promoted teacher-oriented charters.³⁵ Shanker's advocacy continued the original conceptualization that charters were contracts. In fact, Shanker made reference to Ray Budde's earlier work³⁶ and upscaled it from small groups of teachers negotiating with building and district administrators to teachers' unions negotiating with district administrators and boards of education. The negotiated contracts were to promote academic improvements while protecting and buttressing teachers' rights. Positive elements of these contractual arrangements included teacher autonomy, teacher empowerment, and granting teachers rights to exercising professional judgements. By allowing teaching professionals to take charge of the teaching and learning process, teacher-oriented charters were slated to overcome bureaucratic interference, allow teachers to teach, and result in higher academic performance.

The Budde strategy depended on administrators being open to change and trusting teachers. Shanker's approach counted on the strength of unions to negotiate for teachers. Whether initiated by administrators or unions, charters as contracts had three key elements: 1) Charter contracts were designed to overcome the trappings of bureaucracy in teaching and learning environments; 2) charter contracts were designed to promote academic improvements; and 3) charter contracts would exact these changes within traditional public schooling systems. When the first charter school opened in 1992,³⁷ it complied with the three key elements of charters. Perhaps this was why the first charter school was more celebrated than chastised. As might have been predicted, however, soon thereafter, the charter school conceptualization morphed into an overt tool of public school privatization. Charter school advocates absorbed the market metaphor and took full advantage of the competition-oriented logic that

³⁴ Albert Shanker, *National Press Club Speech: Restructuring Our Schools*, 65 PEABODY J. EDUC. 88 (1988).

³⁵ Richard D. Kahlenberg, *TOUGH LIBERAL: ALBERT SHANKER AND THE BATTLES OVER SCHOOLS, UNIONS, RACE, AND DEMOCRACY* (2007); Frances Karanovich, *The Evolution of Charter Schools: From Concept to Public Schools of Choice*, 59 J. PHIL. & HIST. EDUC. 203 (2009).

³⁶ Shanker, *National Press Club*, *supra* note 34.

³⁷ City Academy in St. Paul, Minnesota was the first publicly-funded charter school. See National Alliance for Public Charter Schools, *National Conference Celebrates 20th Anniversary of the Public Charter School Movement*, June 19, 2012, accessed June 10, 2018 from <https://www.publiccharters.org/press/national-conference-celebrates-20th-anniversary-public-charter-school-movement>; Sue Urahn and Dan Stewart, *Minnesota Charter Schools: A Research Report* (St. Paul: Minnesota House of Representatives Research Department, 1994).

was used to justify education vouchers.

Analysis of Contemporary Charter School Data

Research Hypotheses and the Statewide Dataset

The introduction to this research identified two underlying research questions. The questions are now hypothesized to test economics-based predictions that were used to justify school choice generally and, in this case, charter schools specifically:

- H₁ School quality will increase with the introduction of charter schools to the schooling marketplace.
- H₂ School costs will decrease with the introduction of charter schools to the schooling marketplace.

Although this research is expository and not of experimental design, the hypotheses pinpoint rational expectations that advocates established for charter schools theoretically and practically. As economic justifications for school choice, the hypotheses set minimum standards for charter school efficacy. Based on these minimum standards, the social value of charter schools is dependent upon their effects on school quality and school costs.

The primary data for this study are drawn from a statewide dataset. The dataset includes Ohio school finance variables that represent 97.9 percent of traditional public school districts that operated during fiscal year 2012. The dataset excludes only a few school districts. The excluded school districts are those that are customarily identified as outliers or missing data. Fiscal year 2012 is the year from which data are drawn because many more variables are available for fiscal year 2012 than for more recent years. Furthermore, the fiscal year 2012 dataset includes variables that match those used in three other published studies. Having variables that match across studies makes possible relevant and reliable comparisons and provides additional opportunities for further research.

Distribution of Data

Utilizing the statewide dataset, preliminary calculations were made to relate charter school expenditures to school district expenditures. State aid distributions were such that school districts were credited with the total

amount of their state aid entitlements before charter school expenditures were deducted from those entitlements. In other words, charter school expenditures were funded with payments from traditional public school districts. To get at the impact of these fiscal procedures on school districts, a proportional variable was calculated. The proportional variable was equal to total charter school payments divided by total school district expenditures. This proportion was 4.6 percent for the statewide dataset. After the statewide proportion was calculated, proportions for each school district were calculated. These proportions were variable and ranged from 0.1 percent to 24.4 percent.

The distribution of proportional variables was unevenly distributed. An indication of this was that 583 of 601 school districts, or 95 percent, paid for 38 percent of all charter school expenditures. This share was much smaller than that paid by the remainder of school districts. Beginning at the 96th percentile, the remaining 18 of 601 school districts or five percent paid for 62 percent of all charter school expenditures. The first group of school districts paid an average two percent of their total expenditures to fund charter schools. The second group of school districts paid an average 15 percent of their total expenditures to fund charter schools. Not only did these statistics speak to the unevenness of the distribution but they also indicated that larger rather than smaller school districts bore the brunt of charter school funding.

To gain a deeper understanding of the distribution of proportional variables, frequencies of occurrence within one-percentage increment ranges were classified. That is, all of the proportional variables that occurred within each one-percent stratum were counted and entered into a table that amounted to a frequency distribution. "Range 1" began at zero and included all school districts that paid less than one percent of their total expenditures to fund charter schools. Range 2 began at one percent and included all school districts that paid at least one percent but less than two percent of their total expenditures to fund charter schools. This method of organization continued up through Range 25 which included all school districts that paid at least 24 percent but less than 25 percent of their total expenditures to fund charter schools. Along this path of discovery, some ranges had zero occurrences. The first of these appeared in Range 10 and then sporadically repeated throughout Range 23. Table 2 illustrates these voids as well as the entire frequency distribution. The table has 25 ranges and includes the straight average of the proportional variables that occurred in each range. The table also includes the share of all charter school expenditures that occurred in each range.

Table 2 Frequency Distribution of Proportional Variable Measurements

Label	Proportional Variable Measurements*	School District Frequency Distribution	Within Range Average Proportion	Range Share of All Charter School Expenditures
Range 1	0% to less than 1%	115	0.6%	2.3%
Range 2	1% to less than 2%	255	1.4%	10.1%
Range 3	2% to less than 3%	125	2.5%	8.8%
Range 4	3% to less than 4%	51	3.3%	4.9%
Range 5	4% to less than 5%	13	4.2%	1.7%
Range 6	5% to less than 6%	13	5.4%	3.4%
Range 7	6% to less than 7%	6	6.5%	4.2%
Range 8	7% to less than 8%	5	7.5%	2.6%
Range 9	8% to less than 9%	6	8.5%	5.8%
Range 10	9% to less than 10%	0	0	0
Range 11	10% to less than 11%	0	0	0
Range 12	11% to less than 12%	0	0	0
Range 13	12% to less than 13%	3	12.2%	8.3%
Range 14	13% to less than 14%	2	13.6%	13.7%
Range 15	14% to less than 15%	1	14.7%	1.2%
Range 16	15% to less than 16%	0	0	0
Range 17	16% to less than 17%	0	0	0
Range 18	17% to less than 18%	1	17.2%	.06%
Range 19	18% to less than 19%	0	0	0
Range 20	19% to less than 20%	2	19.6%	15.3%
Range 21	20% to less than 21%	0	0	0
Range 22	21% to less than 22%	1	21.6%	5.59%
Range 23	22% to less than 23%	0	0	0
Range 24	23% to less than 24%	1	23.2%	2.81%
Range 25	24% to less than 25%	1	24.4%	8.50%
Total and Averages		601	4.6%	100%

* Proportional variable measurements are charter school expenditures deducted from school district budgets divided by total school district expenditures.

The preliminary calculations that Table 2 illustrates provide interesting findings in and of themselves. Although the 4.6 percent proportional variable for the statewide dataset may seem tolerable, several of the upper ranges of the frequency distribution are alarming. Ranges 13 through 25, for example, include 12 school districts that each lose 12 percent or more of their total expenditures to charter schools. As serious as this situation is,

6 of the 12 school districts lose 17 percent or more of their total expenditures to charter schools. Worse yet, three of these school districts lose 21 percent or more of their total expenditures to charter schools. Taken together, these 12 school districts paid for a total of 56 percent of all charter school expenditures.

Alternative Subsets of Data

Table 2 illustrates the proportional variable distribution. Most of the distribution is skewed toward ranges of very small proportional variables. At the upper limits of the distribution, however, the proportional variables are excessive. To study the upper limits of this distribution more intensively, several alternative subsets of school districts were reviewed and considered for further analysis. Among the alternatives, one subset was based on ranges 13 through 25. This subset included 12 school districts that lost double-digit proportions of their total expenditures to charter schools. An alternative subset was based on ranges 13, 14, 20, and 25. These ranges were those that accounted for the greatest shares of all charter school expenditures. These ranges altogether accounted for 46 percent of all charter school expenditures. A third alternative subset included ranges 18 through 25. School districts in these ranges represented several key points of interest. First, the six school districts in these ranges accounted for 33 percent of all charter school expenditures. Second, the subset included three relatively large school districts and three relatively small school districts. Third, the subset included three different types of school districts. Fourth, each of the subset school districts had a proportional variable that exceeded 15 percent. Table 3 identifies these six school districts and key points of interest. The table also identifies the year end enrollments and state-assigned typologies of the six school districts.

Table 3 Subset of Six School Districts that Lose the Most to Charter Schools

Traditional Public School District	Proportional Variable Measurement	Share of All Charter School Expenditures	Year End Enrollment	State Typology *
Toledo City	24.4%	8.50%	21,645	8
Youngstown City	23.2%	2.81%	5,561	8
Dayton City	21.6%	5.59%	13,934	8
Cleveland Municipal	19.7%	15.16%	40,871	8
Jefferson Township Local	19.4%	.15%	411	4
Trotwood-Madison City	17.2%	0.65%	2,615	7

* State-defined typologies are as follows:

4 = Small Town, High Poverty, Average Population

7 = Urban, High Poverty, Average Population

8 = Urban, Very High Poverty, Very Large Population

Similar to Table 2, interesting findings are provided by Table 3. For example, the defining characteristic of proportional variables exceeding 15 percent is important. According to a budgeting guide by the American Association of School Administrators (AASA), school districts expend 85 percent of their budgets on personnel.³⁸ This means that when budgets are cut by 15 percent or more, school administrators and boards of education likely cut personnel. Another interesting finding involves the contrast between the subset's size and its share of all charter school expenditures. The subset includes only 1 percent of the state's school districts yet it accounts for 33 percent of all charter school expenditures.

Secondary and Tertiary Data

As the data were selected and analyzed throughout the execution of the methodology, secondary and tertiary data were collected. Secondary data were those that could be aligned directly with the research hypotheses. Therefore, by initial design, the first set of secondary data that were collected measured charter school performance. The performance data were state-assigned performance designations for each charter school.

³⁸ Personnel cuts can begin before the 15 percent hurdle rate is reached but, according to the budgeting report, 85 percent of school district budgets are expended on personnel. See Noelle Ellerson, *AASA White Paper: School Budgets 101* (Alexandria, VA: American Association of School Administrators, 2010).

Secondary data were also pursued that would measure charter school costs. Obtaining these data that were both credible and comparable to traditional public school districts proved infeasible. Therefore, this portion of the analysis relied on indirect observations preliminarily and then moved to making aggregated, societal, cost-effectiveness assessments.

Tertiary data were also collected at opportune times throughout the data analysis. Tertiary data enriched or extended what was found by analyzing primary and secondary data. For example, when it appeared as though larger rather than smaller school districts were most impacted by charter school finance, school district type and enrollment data were added to the analysis and Table 3.

Revisiting the Research Hypotheses

Do Charter Schools Increase School Quality?

One of the controversies in the charter school literature has been questioning whether charter schools increase school quality.³⁹ Conventional approaches to studying this question encounter difficulties from the start. Scientific reasoning calls for direct demographic comparability of students who are enrolled in charter schools and traditional public schools, paired student-level test scores, and stable control measures.⁴⁰ Another approach to studying the question involves reviewing charter school and school district performance measures. That is, emphasizing organizational-level achievement measures rather than student-level achievement measures. This approach is followed in this analysis because the research questions address charter school organizations and their relationships to public schools and the schooling marketplace.

The organizational-level measures were state-assigned performance designations. These designations were drawn from Ohio's publicly available *Report Card* accountability system.⁴¹ The full array of

³⁹ See Stanford University Center for Research on Education Outcomes, *Multiple Choice*.

⁴⁰ Accord the discussion on methodological choices in Kim K. Metcalf & Natalie A. Legan, *Interpreting Voucher Research: The Influence of Multiple Comparison Groups and Types*, 1 J. SCHOOL CHOICE 47 (2006).

⁴¹ The Report Card is one version or aspect of the state accountability system that comprehensively includes proportions of students passing standardized tests, numbers of uniform standards met, and an accumulative performance point system. For the history and background of the Report Card and performance designations see: Ohio Department of Education, *Guide for Ohio's Report Card System, 2006-2007* (Columbus: 2007).

performance designations that were observed in the subset included:

1. Excellent
2. Effective
3. Continuous Improvement
4. Academic Watch
5. Academic Emergency

This group of designations was truncated for purposes of analysis. Only two designations were retained and one new designation was created. The three designations were labelled: *Excellent*, *Effective*, and *Not “Effective.”* The *Not “Effective”* designation included charter schools that the state designated as *Continuous Improvement*, *Academic Watch*, or *Academic Emergency*. The *Not “Effective”* designation also included charter schools that changed names or closed during the school year.

The charter schools that were accounted for were only those that directly competed with each of the subset school districts. These charter schools were identified from accounting records that listed payments from each of the subset school districts to specific charter schools. Across the entire subset, charter school performance varied widely. Within the competitive jurisdictions of three school districts, for example, some of the charter schools were designated as *Excellent*. All six of the competitive jurisdictions included some charter schools that were designated as *Effective*. Overall, across the six jurisdictions, 24 percent of the charter schools were designated as *Excellent* or *Effective* while 76 percent of the charter schools were designated as *Not “Effective.”* These findings are further illustrated by Table 4.

Table 4 Charter School Performance

School District Jurisdictions	Charter School Performance Designations		
	<i>Excellent</i>	<i>Effective</i>	<i>Not "Effective"</i>
Toledo City	12%	19%	69%
Youngstown City	7%	15%	78%
Dayton City	zero	15%	85%
Cleveland Municipal	16%	14%	70%
Jefferson Township Local	zero	26%	74%
Trotwood-Madison City	zero	22%	78%
Average Proportion	5.8%	18.5%	75.7%

As a matter of comparison, the six subset school districts were assigned the following performance designations by state officials: *Continuous Improvement* (one school district), *Academic Watch* (four school districts), and *Academic Emergency* (one school district). Based on these school district designations it can be said that charter schools increased school quality in at least 24 percent of the cases.

Do Charter Schools Decrease School Costs?

There is less controversy in the literature about charter schools decreasing school costs. Perhaps by design, and aligned with school choice rhetoric, policymakers ensure this outcome by allocating fewer dollars to charter schools than traditional public schools. When other researchers have considered charter school costs they have reported that charter schools cost less money than traditional public schools.⁴² For these

⁴² Accord Barbara M. De Luca & R. Craig Wood studied Ohio charter schools and their

reasons, this study does not contest claims that charter schools cost less money. Therefore, both of the research hypotheses are supported: Charter schools decrease school costs and some increase school quality.

A larger societal question remains that reaches beyond conventional comparisons of charter school costs and performance. The larger question asks more broadly what is the total cost of charter schools? Beginning to answer this question requires knowing where the money comes from to fund charter schools. Furthermore, where the money comes from to fund charter schools may have consequences of its own. In Ohio, the money comes from traditional public school districts. Consequently, school districts suffer opportunity costs. Opportunity costs in this application are the costs of lost opportunities to purchase educational programming and staffing. Moreover, as these opportunity costs escalate to higher proportions of school district total expenditures, administrators must cancel programs, layoff instructional staff, and close facilities.

For society, any immediate cost savings offered by charter schools will not be sustainable if school administrators are forced to cut important programs and staffing. These cuts impede school district performance improvements and deep cuts likely cause declines in school district performance. Taxpayers and governments are not getting their money's worth if the way charter schools are funded leads to these detriments. To the extent that these detriments disrupt teaching and learning, especially in low-wealth school districts, the way charter schools are funded violates the long term trend of progressive school finance policy and invokes long term societal costs.⁴³

Who Are the Affected Children?

There can be no doubt that large deductions from school district budgets diminish the abilities of school districts to deliver high quality education. This means that children in the six subset school districts are suffering diminished educational opportunities. To make matters worse,

overall finding was that charter schools performed about the same as traditional public school districts but were less expensive. See, Barbara M. De Luca & R. Craig Wood, *The Charter School Movement in the United States: Financial and Achievement Evidence from Ohio*, 41 J. EDUC. FIN. 438 (2016). See also Stephen B. Lawton, *Effective Charter Schools and Charter School Systems*, 40 PLAN. & CHANGING 35 (2009).

⁴³ For examples of long term societal costs in relationship to school funding and taxation see Sweetland, *What the Public Should Know*, *supra* note 2. See also, Clive R. Belfield & Henry M. Levin, *THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION* (2007).

these children are predominantly economically or educationally disadvantaged. Based on federal government guidelines,⁴⁴ the six subset school districts serve several groups of at-risk students. The most telling demographic is that 89 percent of the children who attend the six subset school districts are living in poverty. Furthermore, 68 percent of the children who attend the six subset school districts are Black. Moreover, the combination of Black, Hispanic, and Multiracial children who attend the six subset school districts is 80 percent. These demographic data are illustrated by Table 5 which also includes data for children with disabilities and those who are identified as Limited English Proficient.

Table 5 Subset School District Student Group Demographics

School District	Poverty	Black	Hispanic	Multiracial	Disability	LEP
Toledo City	77%	42%	9%	7%	15%	2%
Youngstown City	93%	67%	11%	5%	17%	4%
Dayton City	94%	66%	3%	6%	14%	4%
Cleveland Municipal	100%	68%	14%	3%	18%	7%
Jefferson Township Local	93%	76%	4%	4%	15%	0%
Trotwood-Madison City	78%	89%	1%	3%	13%	0%
Subset Average	89%	68%	7%	5%	15%	3%
Statewide Average	41%	6%	3%	3%	13%	1%

As compared to the statewide average proportions, the figures for children with disabilities and those children who are identified as Limited English Proficient are not as variant as those associated with race and poverty. The figures for these groups are nonetheless substantial. For example, even though the proportion of children with disabilities is only two percent more for the subset than for the statewide sample, two percent in this instance is 15.4 percent over and above the statewide average proportion. In the case of children who are identified as Limited English Proficient, two percent more for the subset than for the statewide sample is 300 percent of the statewide average proportion.

⁴⁴ See, e.g., Laura Lippman, *URBAN SCHOOLS: THE CHALLENGE OF LOCATION AND POVERTY* (1996).

Data-Based Summary and Theoretical Inconsistencies

Summary of Findings

At the onset, the purpose of this research was twofold: 1) To understand the economics-based reasoning behind school choice through education vouchers and charter schools; and 2) to reconcile contemporary data with the economics-based reasons that supported charter schools. For education vouchers, economics-based reasoning was steeped in history. The conceptualization of education vouchers and their basis in economics, free markets, and competition dated back 240 years. Completely different, charter schools were not born of economics, free markets, and competition. Charter schools were conceptualized as a means to organizational restructuring within traditional public schools. Whether by coincidence, serendipitous timing, or astute opportunism the charter school conceptualization transformed into a means of privatizing public schools. Through this transformation, classical economics-based reasoning was heralded to support the spread of charter schools.

In this study, the reconciliation of economics-based reasoning with contemporary charter school data yielded mixed results. To the benefit of charter school advocates, the reconciliation supported two economics-based research hypotheses. Evidence was found that charter schools increased school quality and decreased school costs. To the benefit of traditional public school advocates, the reconciliation went beyond the research hypotheses to examine opportunity costs, long term trends, and broad societal issues. For example, several school districts suffered high opportunity costs and many at-risk students were marginalized by charter school finance. A few of these data-based findings are summarized below:

1. Ohio school districts lost more than \$773 million of funding to charter schools.
2. The average proportion of funding lost to charter schools was 4.6 percent.
3. Twelve school districts lost more than 12 percent of funding to charter schools; six lost more than 17 percent; three lost more than 21 percent.
4. Among the six school districts that lost more than 17 percent of funding, the student populations they served were 68 percent Black, seven percent Hispanic, five percent Multiracial, and three percent Limited English Proficient. The overall percentage of students living in poverty was 89 percent.

Upon further examination, the highest point of impact of charter school finance occurred in large urban school districts that served populations of high-incidence, economically and educationally disadvantaged students. In terms of school finance policy, this highest point of impact undermines the very essence of school finance policies dating back over 100 years.⁴⁵ The long term policy trend has been to equalize school funding within states and aid special populations of students and programs across states.⁴⁶ These state and federal school finance policies have persistently emphasized the importance of school finance equity and adequacy. Charter school finance policies that compromise the effects of these state and federal policies are at odds with the history of school finance and school finance policy.

Theoretical Questions

What of market competition? The endgame of competition is to win. In business, winning is profiting. One surefire way to increase profit is to cut expenditures. Otherwise, the best way to increase profit is to raise prices. Charter schools are trapped because they cannot raise prices. As wards of state funding, charter schools receive revenues that are fixed in place. This leaves only one recourse for charter school owners and administrators to increase profitability—cut expenditures. At what point are these expenditure cuts levied against instructional staffing and programming? In search of profit, the temptation must be great to cut these largest of all schooling expenditures.

As a matter of classical economic theory, in a truly competitive market environment, charter schools would be forced to strike a balance between instructional expenditures and prices charged in the marketplace. Cutting instructional expenditures too far would lead to low performance and consequential revenue declines. High performing charter schools could charge higher prices in the marketplace while low performing charter schools would risk losing everything. These market theory dynamics are out of sorts when charter schools operate in an environment of fixed pricing that does not change with high and low performance. High performance is not incentivized. Therefore, a major benefit of free market competition is lost by the way charter schools are funded.

What of equal opportunities? A delimiting factor of equal opportunity is unequal school funding. Early school finance theorists recognized this

⁴⁵ See, Cubberley, *School Funds*; Morrison, *School Revenue*; Mort, *Measurement of Educational Need*; Strayer & Haig, *Financing of Education*, *supra* note 4.

⁴⁶ *Elementary and Secondary Education Act of 1965*, Public Law 89-10 (April 11, 1965).

and argued for equalizing school funding to advance educational opportunity. These goals were accepted by early policy makers who engaged school finance experts to create school funding equalization programs. In 1932, for example, *Equalizing Educational Opportunity in Ohio* was a government-sponsored report that led to the establishment of Ohio's school foundation program.⁴⁷ The foundation program distributed state aid in proportions that related inversely to local property valuations.⁴⁸

At the federal level, the Elementary and Secondary Education Act of 1965 (ESEA)⁴⁹ brought to the forefront school finance as necessary to realizing President Lyndon B. Johnson's *Great Society*.⁵⁰ More specifically, following President Johnson's *War on Poverty*, ESEA's Title I funding was designed to assist in the provision of educational services for economically disadvantaged students.⁵¹ Today, not only do Title I funds pay for teachers and programming but some schools would not exist without Title I funding. Students who are eligible for Title I funding and who transfer out of traditional public school districts take money with them that is needed for Title I programming. This violates the entire purpose of Title I funding and supplants money from truly public institutions to quasi-public enterprises.

What of ethics? The notion of fairness bears down upon the ethics of charter school finance. Given that they are expected to compete in the free market arena against each other, why do the rules and regulations differ for charter schools and school districts?⁵² From the beginning, charter schools have been granted freedoms that school districts do not have. In some instances, these freedoms include freedom from accountability. For example, some charter schools have closed after receiving government funds and then the funds were never returned to public coffers.⁵³ Children

⁴⁷ See Ohio School Survey Commission, *Equalizing Educational Opportunity in Ohio: Report of a Survey of State and Local Support of Public Schools*, Directed by Paul R. Mort (Columbus, OH: 1932). This report formed the basis for Ohio's first school finance foundation program.

⁴⁸ See Franklin B. Walter & Scott R. Sweetland, *School Finance Reform: An Unresolved Issue Across the Nation*, 124 EDUC. 143 (2003). The authors briefly review the foundation program in Ohio and state aid distribution programs used in other states.

⁴⁹ *Elementary and Secondary Education Act of 1965*, *supra* note 46.

⁵⁰ Charles Peters, LYNDON B. JOHNSON (2010).

⁵¹ James T. Patterson, *THE EVE OF DESTRUCTION: HOW 1965 TRANSFORMED AMERICA* (2012).

⁵² Sweetland, *A Tale of Two Fiscal Policies*, *supra* note 2.

⁵³ See, e.g., Hannah Sparling, *ECOT: Cincinnati Schools Sent \$15M to Now-Defunct Charter*, CINCINNATI ENQUIRER (June 7, 2018), <https://www.cincinnati.com/story/news/education/2018/06/07/ecot-how-much-money->

can return to school districts after enrolling in charter schools where they learned less than their peers who remained in public school districts.⁵⁴ Furthermore, as this study demonstrates, a large proportion of charter schools perform at levels far below the theoretical and practical expectations that were set for them.

Economic accountability requires that all charter schools increase school quality and decrease school costs. This study provides evidence that not all charter schools increase school quality. Some charter schools close. Many charter schools provide lackluster services. Furthermore, while charter school costs are less than traditional public school district costs, the cost savings are limited and short term. From a broader, long term perspective, societal costs of charter schools mount as funding that is taken away from school districts diminishes their instructional capacities. Even with this study's limited sample size of six school districts, over 85,000 students who remained in public school districts lost access to resources because of the way charter schools are funded. This cannot be ethical.

The ethics of sustainability are also at play. Most apparent is sustainability of the public school system. Most poignant is sustainability of hard-won school finance equity and adequacy laws and policies. The clear majority of statewide school funding programs have instituted fiscal equity provisions. Federal funding categorically benefits economically and educationally disadvantaged students. These state and federal equalization measures also promote school finance adequacy. The system of funding schools equitably and adequately is complicated and in multiple respects delicate. Piecemeal deductions from state and federal aid marginalize equity and adequacy provisions that are in place. As ethical imperatives, equity and adequacy must be sustained, pursued further, and expanded indefinitely.

Recommendations for Policy and Further Research

Although the data for this study were drawn from Ohio, the conceptual dilemmas and policy considerations Ohioans face can be applied to other states. In considering applications to other states, researchers and policy makers should bear in mind that substantial differences exist among the states. For example, school funding must be adequate in Ohio according to

[cincinnati-ohio-area-schools-lost-charter/682045002](https://www.cincinnati-ohio-area-schools-lost-charter/682045002).

⁵⁴ Confidential interviews with a school district treasurer and several school building and district administrators throughout 2016-2018.

the Ohio Constitution⁵⁵ and Ohio Supreme Court.⁵⁶ This adequacy requirement is not mandated in all states and its absence may alter the degree to which policy makers adopt the forthcoming recommendations. Conceptually and ethically, however, public policies should pursue adequate school funding even if it is not constitutionally mandated or court ordered. This statement recalls both the simplest and greatest dilemma of financing schools in the United States. Schools cost money. High quality schools cost lots of money. Americans want high quality schools but they cannot agree on who should bear the costs of these schools. Nevertheless, by fiscal necessity, the following recommendations begin and end with the persistent need for more school funding.

Increasing Public School Revenues

Charter school finance disrupts traditional public school districts when its basis is the transfer of funds out of school district budgets. As this study demonstrates, large dollar amounts and proportions of funds are transferred from Ohio school district budgets to charter school budgets. Knowing that these transfers are disruptive and force last-minute budget cuts to instructional programming and staffing should be enough for policy makers to act. The simplest of policy actions would be to fund charter schools with a separate line item in the state budget. This option would suffice to the extent that line item funding was not simply a higher level transfer from the education general fund to the charter school line item. Another option would be replenishing school district budgets with all or a substantial portion of their funds that were transferred to charter schools. More consistent with other Ohio school funding policies, hold harmless guarantees for school districts that lose funds to charter schools could be implemented.⁵⁷ These guarantees would delay the effects of sudden or sizable migrations of students and funding to charter schools.

It must be remembered that traditional public school districts were not

⁵⁵ OHIO CONST. of 1851, Art. VI, § 2.

⁵⁶ The most recent Ohio Supreme Court ruling was *State ex rel. State v. Lewis*, 99 Oh. 3d 97 (2003). The pivotal Ohio Supreme Court ruling that declared the school funding system unconstitutional was *DeRolph v. State*, 78 Oh. 3d 193 (1997).

⁵⁷ Among several predominant Ohio school finance policies and laws are hold harmless guarantees. The guarantees are typically granted to school districts that would otherwise receive less school funding in upcoming years than previous years. The rationale for guarantees is that they stabilize school district budgets and operations. See Richard E. Maxwell & Scott R. Sweetland, OHIO SCHOOL FINANCE: A PRACTITIONER'S GUIDE (2013).

designed to be free market competitors. Traditional public school districts were the answer to voids in a free market system that did not provide enough schooling for the masses. In contrast, publicly funded charter schools were designed to be free market competitors. As relatively new entrants to the schooling marketplace, charter schools were rightfully expected to perform far better than traditional public school districts. As theoretically optimistic extensions of free market reforms, charter schools should be compelled to perform far better than traditional public school districts. If this is to be accomplished, however, charter schools must be financed in ways that simulate private sector rewards and punishments. Rather than funding charter schools with fixed amounts of funding that are independent of performance gains or losses, a sliding scale of charter school funding should be adopted that correlates funding with performance. A correlative sliding scale would simulate more market-like conditions. Such a scale would systematically reward high performing charter schools and punish low performing charter schools.

Another market-like option would be to directly incentivize charter school performance. Direct incentivization could include merit-based awards to successful charter schools, refundment fees assessed against unsuccessful charter schools, or the implementation of both merit-based awards and refundment fees. With the exception of refundment fees, all of these options require more funding.

Rebalancing Equity-Based Programs

As related earlier, the history of school finance is marked by persistent attempts to increase equity and ensure adequacy. State school finance programs evolved to increase equity and adequacy generally and categorically. Federal school finance programs increased equity and adequacy by funding categories of specific programs and groups of students. As these state and federal school finance interventions were developed, implemented, and expanded, a modicum of school finance equity was achieved. Now, every time school funds are cut, equity-based funding is compromised. School funding adequacy is compromised too. Depending on the severity of school funding cuts, equitable and adequate funding can be removed from the very school districts or groups of students that these government interventions are designated to help.

The charter schools that perform highly increase opportunities for equitable and adequate education. If charter schools perform ineffectively, however, these opportunities are limited or become void. As measured across a subset of six school districts, the data-based portion of this study

found that three-quarters of charter schools were *Not “Effective.”* Therefore, the price of success was high for only one-quarter of charter schools to be effective. Nevertheless, no matter how well charter schools perform, the way that they are funded imposes opportunity costs on traditional public school districts. These opportunity costs diminish equity-based funding as well as adequacy and eventually force decreases in instructional programming and staffing. To make matters worse, these diminishment and decreases take place in school districts that serve high proportions of economically and educationally disadvantaged students. Under these circumstances, the only recommendation can be to increase state and federal aids to schools. More specifically, states should provide replenishment funds to school districts that lose funding to charter schools and federal lawmakers should institute replacement aids for student-centered entitlements that are transferred to charter schools.

Imposing Ethical Policy Safeguards

What is legal is not necessarily ethical. A long record of litigation suggests that schools need more funding.⁵⁸ Even when courts deny plaintiff claims for more school funding, the situation can be one in which justices recognize more school funding is needed. For example, the *Board of Education of the City School District of the City of Cincinnati v. Walter* decision denied plaintiff claims for equitable school funding but also implied that a better school funding system could be devised.⁵⁹ Whether by court decision or political legislation, the long term school finance trend has been to increase equity. Equity is among the most important standards of fairness and it is both an imperative and ethical concern. School finance gains that have been made to date—those that increase equity generally and specifically for special groups of students and programs—must be safeguarded and sustained indefinitely.

Fairness to taxpayers is also an important consideration. Judging from the results of studying six school district jurisdictions, taxpayer funds in one-quarter of charter schools are spent effectively. Do taxpayers know

⁵⁸ In Ohio, for example, the most recent series of litigation spanned 1991-2003. See Bricker & Eckler Attorneys at Law, *Chronology of the DeRolph v. Ohio School Funding Litigation* (retrieved June 10, 2018), <http://www.bricker.com/resource-center/derolph/key-resources/resource/chronology-of-the-derolph-v-ohio-school-funding-litigation-412>.

⁵⁹ Bd. of Educ. of the City School Dist. of the City of Cincinnati v. Walter, 58 Oh. 2d 368 (1979).

that three-quarters of charter schools in these political subdivisions are *Not “Effective?”* Do taxpayers know that the way charter schools are funded devastates the budgets and operations of at least six school districts? There must be standards of fairness that apply to taxpayers. Taxpayers deserve to know that their tax dollars are safeguarded against waste, well-spent, and dedicated to their intended purposes.

By far, the most important policy redress and ethical research must focus on the needs of disadvantaged students. Economically and educationally disadvantaged students lose the most when the public school system is underfunded. These students also lose the most from the way charter schools are funded. That is, the charter school finance policies that impact underfunded school districts in ways that make them more underfunded. Charter school finance policies should not take away funds from school districts that serve large numbers of students to fund charter schools that serve relatively few students. While it can be assumed that select members of disadvantaged student groups benefit from their respective charter school experiences, the sheer volume of disadvantaged students who are left behind severely diminishes equity aims. Based on the subset of six school districts in this study alone, the futures of 85,037 students are at stake.⁶⁰

Conclusion

This research tested economics-based reasoning for the development, implementation, and expansion of charter schools. The test involved two hypotheses:

- H₁ School quality will increase with the introduction of charter schools to the schooling marketplace.
- H₂ School costs will decrease with the introduction of charter schools to the schooling marketplace.

The hypotheses were supported initially, but a broader and longer view of charter school costs took support away from the hypotheses. Performance data from the subset of six school districts illustrates that not all charter schools are the same. Some perform with excellence while others fall short of effectiveness. Financial data from the subset of six

⁶⁰ This figure is based on year end enrollments reported in Table 3.

school districts illustrate that they are harmed substantially by the way charter schools are funded. This means that the price of charter schools is high for relatively low levels of performance. The situation is worse when it is realized that the student populations of the subset school districts are 80 percent minority and 89 percent living in poverty. As observed earlier, the way charter schools are financed reverses decades of progress that was made through progressive school finance policies and government aids.

Under these circumstances, this research makes several policy recommendations that are intended to sustain traditional public schools and improve charter schools. First and foremost, separate line item funding for charter schools should be established to prevent traditional public school districts from losing funds to charter schools. While this line item would be very expensive, policy makers should have anticipated this funding need when they created a second, redundant system of public schooling. Second, policy makers should incentivize charter schools in ways that are consistent with free market operations. This recommendation brings with it a wide range of opportunities for further research. For example, if a sliding scale of charter school funding correlated to student achievement is adopted, at what rate should the sliding scale move with increases and decreases in student achievement? What is the likelihood that bonuses paid to high performing charter schools will incentivize other charter schools to perform highly? Would the threat of charter school funding refundment fees prevent charter schools from performing at low levels?

Additionally, hold harmless guarantees, replenishment funds, and replacement aid alternatives should be legislated to stabilize school district funding and operations.

Very little research has been conducted on these school district funding alternatives or the overall impact that charter school finance has on traditional public school districts. What is known is that the way charter schools are financed leads to school district budgets cuts. These cuts eventually reduce instructional programming and staffing.⁶¹ To what extent do these budget cuts impact other organizational variables? A few of the variables to consider include pupil-teacher ratios, course offerings in the arts and advanced placement subjects, average teachers' salaries, and years of teachers' experience. How do these budget cuts impact student learning and standardized test scores? As national attention

⁶¹ Scott R. Sweetland, *Budgetary Analysis of Charter School Impacts on Traditional Public School Districts and Pupil-Centered Expenditures*, paper presented at the annual meeting of the National Education Finance Academy, Cincinnati, OH, February 2017.

continues to focus on the achievement gap, these research questions will become ever more important.

Whichever policy recommendations are adapted to fit contemporary circumstances, fiscal ethics must be adhered to. Ethical standards include resourcing economically and educationally disadvantaged students equitably and adequately. Prior research has shown that school districts with low property valuations and incomes encounter high odds against raising additional tax revenues.⁶² Oftentimes these local tax revenues are needed to support equal educational opportunities and bare minimum standards of adequacy. While state and federal interventions were established to relieve these conditions, the way charter schools are funded cuts into these progressive interventions. What is needed now are new public policies that restore and improve state and federal school aid mechanisms. Every new school finance policy should be rationally analyzed and politically vetted to do nothing that disrupts achieving the ethical imperatives of school finance equity and adequacy. At minimum, policy makers should adhere to a strict *do no harm* philosophy that preserves school finance equity and adequacy gains to date.

⁶² A calculative example of this is illustrated in Sweetland, *What the Public Should Know*, *supra* note 2. The point is also articulated in several school finance textbooks, *see, e.g.*: Kern Alexander, Richard G. Salmon & F. King Alexander, *FINANCING PUBLIC SCHOOLS: THEORY, POLICY, AND PRACTICE* (2015); Vern Brimley Jr., Deborah A. Versteegen & Rulon R. Garfield, *FINANCING EDUCATION IN A CLIMATE OF CHANGE* (2016); Faith E. Crampton, R. Craig Wood & David C. Thompson, *MONEY AND SCHOOLS* (2016); Allan R. Odden & Lawrence O. Picus, *SCHOOL FINANCE: A POLICY PERSPECTIVE* (2014); William A. Owings & Leslie S. Kaplan, *AMERICAN PUBLIC SCHOOL FINANCE* (2013). *See also*: R. Craig Wood, David C. Thompson, John Dayton, & Christine Kiracofe, *EDUCATION FINANCE LAW: CONSTITUTIONAL CHALLENGES TO STATE AID PLANS—AN ANALYSIS OF STRATEGIES* (2015).

The Path to Prosperity? Exploring the Educational Governance and Equity Implications of Alternative Models of Public Education

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The traditional model of public education, in which schools are operated by locally elected school boards (LESBs) and students are assigned to a neighborhood school based on their residence, is under serious examination due to performance and equity concerns. This article explores the educational governance and equity implications of emergent models of school reform. Specifically, this article focuses on five emerging school reforms including: 1) vouchers; 2) magnet schools; 3) charter schools; 4) state-run turnaround districts; and 5) the portfolio management model. This article highlights three important considerations as alternative models of public education proliferate: 1) fragmentation in educational governance; 2) the relationship between autonomy and innovation; and 3) democracy in K-12 public education. I discuss two major equity considerations accompanying the emerging models of reform: 1) addressing the barriers to choice in educational marketplaces, and 2) accountability and enforcing equity.

Education has long occupied a hopeful place in the minds and hearts of society. It is widely considered an equalizer of opportunity, a ladder of social and economic mobility, and the antidote to poverty. Notwithstanding, differences in the educational opportunities and outcomes of low-income and minority students have preoccupied policymakers, researchers, and educators, and have placed a microscope on equity in K-12 education.¹ Myriad educational equity concerns

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¹ P.L. Carter et al., *You Can't Fix What You Don't Look At: Acknowledging Race in Addressing Racial Discipline Disparities*, 52 URBAN EDUC. 1 (2016); Rebecca Gordon et al., *FACING THE CONSEQUENCES: AN EXAMINATION OF RACIAL DISCRIMINATION IN U.S. PUBLIC SCHOOLS* (2000); Russell J. Skiba, *Interventions to Address Racial/Ethnic Disparities in School Discipline: Can Systems Reform Be Race-Neutral?*, in RACE AND

including disparities in exclusionary discipline (such as suspensions and expulsions), chronic absenteeism, racial and income achievement gaps have garnered increasing attention in recent years.² These persistent disparities raise serious questions about the viability of current school assignment policies and the provision of schooling. In essence, the traditional model of public education in which schools are operated by locally elected school boards (LESBs) and students are assigned to a neighborhood school based on their residence is under serious examination due to performance and equity concerns. As such, there is an urgent need for school improvement and new models of K-12 education.

A critical challenge facing states and districts in the United States (U.S.) is how to turnaround consistently low-performing schools.³ Schools and districts are expected to implement reforms that dramatically improve student achievement in a speedy and sustainable manner,⁴ yet there is little empirical evidence of the transitive process from low-performing to high-performing schools.⁵ Although there is widespread agreement about the urgency and the need to improve schools, there is divergence of the path to improvement and the appropriate model of public education. Dissatisfaction with stagnant educational gains among educational stakeholders led to several policies in recent decades aimed at tweaking or overhauling the extant model of public education. Various school turnaround strategies have been pursued at the federal- (e.g., Student Improvement Grant (SIG) program), state- (e.g., state-run turnaround districts), district- (e.g., portfolio management model (PMM)) and school- (e.g., charter schools) level to improve low-performing schools.

Educational governance encompasses the institutions, organizations and individuals involved in the educational decision making and delivery

SOCIAL PROBLEMS: RESTRUCTURING INEQUALITY 107 (R. Bangs & L.E. Davis eds., 2015).

² Richard O. Welsh, *Recovery, Achievement and Opportunity: A Comparative Analysis of State Takeover Districts in Louisiana, Tennessee and Georgia*, 54 URB. EDUC. 311 (2018); see also Richard O. Welsh & Shafiqua Little, *The School Discipline Dilemma: A Comprehensive Review of Disparities and Alternative Approaches*, 88 REV. EDUC. RES. 752 (2018).

³ Paul T. Hill et al., *STRIKE AND PROGRESS: PORTFOLIO STRATEGIES FOR MANAGING URBAN SCHOOLS* (2013); Joseph Murphy & Coby V. Meyers, *TURNING AROUND FAILING SCHOOLS: LEADERSHIP LESSONS FROM THE ORGANIZATIONAL SCIENCES* (2008).

⁴ Adriana Villavicencio & Justina K. Grayman, *LEARNING FROM "TURNAROUND" MIDDLE SCHOOLS: STRATEGIES FOR SUCCESS* (2012).

⁵ Murphy & Meyers, *supra* note 4; Maria Nicolaidou & Mel Ainscow, *Understanding Failing Schools: Perspectives from the Inside*, 16 INT'L J. RES. POL'Y & PRAC. 229 (2005).

system.⁶ It refers to the interplay between schools and the political system.⁷ Within the U.S., educational governance is complex, and consists of schools, districts, county-, state-, and federal- agencies as well as teachers, principals, and superintendents.⁸ Although governance is a critical determinant of an educational system's efficacy and efficiency, there is no preferred set of governance arrangements.⁹ Even though educational governance does not produce student outcomes, governance structures can be an important contribution to a school system's overall effectiveness.¹⁰ When evaluating a system's overall effectiveness, Brewer and Smith posited that governance evaluations should include the following considerations: (a) stability; (b) accountability; (c) innovation, flexibility and innovation; (d) transparency and openness; and (e) simplicity and efficiency.¹¹

The relationship between governance failure and market failure in public education is at the heart of the debate regarding the emerging models of education. The role of markets in public education is a complicated and controversial affair. Traditionally, K-12 schooling in the U.S. was allocated at the government level and government participation in education has been primarily motivated because of the social benefits of education.¹² Concerns regarding inefficient use of public resources and the ineffectiveness of governments' provision of schooling have led to changes in educational governance. In recent decades, market-based reforms have gained considerable momentum and acquired prominence in K-12 school reforms. Although the rationale for the incorporation of markets in the production of schooling rely on the theory of markets, a precise definition of market-based reforms is elusive as many of the market-based reforms in education do not rely exclusively on the theory of

⁶ Richard O. Welsh & Dominic J. Brewer, *Recent Developments in California's Educational Governance: 2007-2011*, 6 POL'Y ANALYSIS CAL. EDUC. (2012).

⁷ Dominic J. Brewer & Joanna Smith, *A Framework for Understanding Educational Governance: The Case of California*, 3 EDUC. FIN. & POL'Y 20 (2008).

⁸ *Id.*; Welsh & Brewer, *supra* note 7.

⁹ Brewer & Smith, *supra* note 8.

¹⁰ Jacqueline P. Danzberger et al., GOVERNING PUBLIC SCHOOLS: NEW TIMES, NEW REQUIREMENTS (1992); NATIONAL ASSOCIATION OF STATE BOARDS OF EDUCATION STUDY GROUP ON EDUCATION GOVERNANCE, A MOTION TO RECONSIDER: EDUCATION GOVERNANCE AT A CROSSROADS (1996); Thomas B. Timar, *You Can't Always Get What You Want: School Governance in California* (UCLA's Institute for Democracy, Education, and Access 2002).

¹¹ Brewer & Smith, *supra* note 8.

¹² Dominic J. Brewer & Richard O. Welsh, *Theory of Markets*, ENCYCLOPEDIA OF EDUCATION ECONOMICS AND FINANCE 453 (2014).

markets in their rationale and are only partially market-oriented.¹³ Proponents of the educational marketplace insist that competition for students will make schools more productive overall and increase students average achievement outcomes.¹⁴ All of the market-based approaches incorporate some form of competition but the level of competition varies. These emerging models of public education have reshaped the politics of education and raise numerous questions about their educational governance and equity implications.¹⁵ Market-based reforms have becoming more prevalent in K-12 public education. It is important to consider the various models of education as these approaches will shape (a) the day to day experiences of students, (b) long term outcomes for both students and the society, and (c) the engagement of educational stakeholders (e.g., parents, students, educators).

This article explores the educational governance and equity implications of emergent models of school reform. Specifically, this article focuses on five prominent market-based reforms: (a) vouchers, (b) magnet schools, (c) charter schools, (d) state-run turnaround districts, and (e) PMM. I draw on the experiences of California and Georgia to better understand the governance and equity implications of models of school reform. This study explicates the complexities and plausible implications of emerging models of public education, hence the findings are insightful for scholars, practitioners and policymakers.

The Search for Alternatives: Emerging Market-based Reforms

Table 1 summarizes the variations in the characteristics of each school reform. In the 1950s, Milton Friedman introduced the idea of educational vouchers as a means to spur competition and dismantle educational monopolies,¹⁶ however, the idea of educational free markets would not gain leverage until the 1980s.¹⁷ In 1991, Milwaukee created the first

¹³ *Id.*

¹⁴ Helen F. Ladd, *MARKET-BASED REFORMS IN URBAN EDUCATION* (2002).

¹⁵ Richard O. Welsh et al., *Right Cause, Wrong Method? Examining the Politics of State Takeover in Georgia*, 55 URB. AFF. REV. 703 (2017); Richard Welsh & Michelle Hall, *The Point of No Return? Interest Groups, School Board Elections and the Sustainment of the Portfolio Management Model in Post-Katrina New Orleans*, 120 TCHR. C. REC. n7 (2018).

¹⁶ Micah Ann Wixom, *Voucher Programs* (Education Commission of the States 2017); see also Priscilla Wohlstetter et al., *CHOICES AND CHALLENGES: CHARTER SCHOOL PERFORMANCE IN PERSPECTIVE* (2013).

¹⁷ Brewer & Welsh, *supra* note 13; see also Henry M. Levin, *Educational Vouchers*,

voucher program to provide low income families with higher quality schooling options.¹⁸ The funding tied to educational vouchers follows the student, targets recipients, and is based on design.¹⁹ Funding for vouchers tend to vary and be differentiated but are usually based on a state's per pupil amount.²⁰ Vouchers can be funded publicly (e.g., Florida) or privately funded (e.g., New York and Washington, D.C), and they can be allocated via basic size or differentiated for student need.²¹

Table 1

Governance and Equity Considerations of Emerging Models of Public Education

	Vouchers	Magnet Schools	Charter Schools	PMM	State takeover
Origin and popularity	1950s; 25 programs in 14 states and DC serves 179k students	1970s; 4340 schools serving 3.5 million students	1990s; approximately 7000 charter schools serving 2.7 million students	2000s; 35 cities serving 4 million students	1990s;
Educational Governance Changes	school-level	school-level	school-level	district and/or school-level	district- and/or school-level
Competition	Yes, but to a small degree as private schools determine participation	Yes, but to a small extent	Yes, to a large extent as schools respond to market pressures to attract and retain students.	Yes, to a large extent given that charter schools are a main intervention strategy	Yes, to a large extent given that charter schools are a main intervention strategy
Funding	Money follows students ; more targeted to recipients based on design	Stays in district	Tied to enrollment; money follows student	Money follows student	Money follows student
Operators	Varies; can be private, religious or public	Typically locally elected school boards	Charter management organizations (CMO), education management organizations, and independent	Multiple providers including LESBs and charter school operators	State-run districts and/or charter school operators

ENCYCLOPEDIA OF EDUCATION ECONOMICS AND FINANCE 292 (2014); Wixom, *supra* note 17; Wohlstetter et al., *supra* note 17.

¹⁸ Becky Vevea, *What is a School Voucher?*, GreatSchools (Mar. 7, 2016), <https://www.greatschools.org/gk/articles/school-vouchers/>.

¹⁹ Levin, *supra* note 18; Wixom, *supra* note 17.

²⁰ Micah Ann Wixom, *50-State Comparison: Vouchers*, Education Commission of the States, <https://www.ecs.org/50-state-comparison-vouchers/>.

²¹ Levin, *supra* note 18.

Accountability	Low; test-based accountability but participation and rules vary	Same as traditional public schools (TPS); test-based accountability; low threat of closure	High; test-based accountability and high threat of closure/non-renewal	High; Performance-based accountability and high threat of closure	High; test-based accountability and high threat of closure
Variation	Yes- design details matter	Yes; themes and specialty areas; structure-stand alone vs. school within school	Yes; authorizers, education approaches and aims	Yes; authorizers, education approaches and aims	Yes: takeover criteria, degree of centrality, and school choice vs. attendance zones
Choice	Parents choose regardless of address	Enroll within district boundaries unless <u>interdistrict</u> program	Parents choose but there may be restrictions (for e.g., priority zones)	Depends: school choice vs. attendance zones	Depends: school choice vs. attendance zones
Access to information	High concern; need knowledge of program requirement to make informed choice	Varies; moderate concern	High concern	High concern	High concern
Admission criteria (for e.g., selective vs. open enrollment)	High concern; selective depending on private school and voucher design	Moderate concern; selective	Low concern; open enrollment (lottery)	High concern; need all students on the same criteria	High concern; need all students on the same criteria
Segregation	Differs between sending/receiving schools; unknown and context dependent	No integration tool	Differs between sending school (most concern)/receiving school (less concern); unknown and context dependent	unknown and context dependent	unknown and context dependent
Transportation	The transportation costs associated with voucher programs would be higher than traditional systems	unknown and context dependent	limits school choice options	unknown and context dependent	unknown and context dependent

Magnet schools are the largest form of public school choice educating over 3.5 million students across more than 600 districts in 34 cities.²² The origin of magnet schools in 1968 and their popularity is directly linked to the 1960s protests that addressed educational inequality and emphasized the need for public school choice.²³ What began as a means to desegregate public schools evolved into a fix for low performance, and a place of high standards, rigorous curriculum, and predominantly White honors students.²⁴ Unlike voucher and charter school funding, magnet school funding stays in the school district. Magnet schools receive more funding than TPS which enables them to spend more money on students, supplies,

²² Magnet Schools of America, *What are Magnet Schools*, Magnet Schools of America, <http://magnet.edu/about/what-are-magnet-schools>.

²³ Douglas A. Archbald, *School Choice, Magnet Schools, and the Liberation Model: An Empirical Study*, 77 SOC. EDUC. 283 (2004); Ellen Goldring & Claire Smrekar, *Magnet Schools and the Pursuit of Racial Balance*, 33 EDUC. & URB. SOC'Y 17 (2000); Magnet Schools of America, *supra* note 23.

²⁴ Goldring & Smrekar, *supra* note 24.

teachers and educational programs.²⁵ In 2013, the federal government earmarked \$90 million in special grants via the Magnet Schools Assistance Program (MSAP) to enable magnet schools to increase access to local families.²⁶

More than two million of the country's 55 million students are enrolled in charter schools.²⁷ Since their inception in the early 1990s, charter schools have experienced rapid growth,²⁸ however, in recent years, charter school growth (the approval of new charter schools) has slowed due to facilities issues, political opposition, and increased competition for resources.²⁹ Charter schools are self-governing schools that receive increased autonomy (for e.g., authority to hire and fire principals, teachers, and other school staff; authority to set the curriculum; and authority to raise revenue from parents, foundations and businesses) from state laws and regulations in exchange for test-based accountability.³⁰ Charter school funding formulas may differ across localities.³¹ Similar to voucher funding, charter school funding also follows the student.³² In many states, charter schools receive less funding than TPS and the funding is tied to student enrollment.³³

State takeover encompasses the transfer of struggling schools and entire districts from the jurisdiction of a locally-elected school board to a general-purpose governing authority such as a governor, or state agency.³⁴ In recent decades, school takeover using state-run turnaround district is a prominent school improvement policy that typically incorporates school

²⁵ Grace Chen, *What is a Magnet School*, PUBLIC SCHOOL REVIEW (Apr. 18, 2019), <https://www.publicschoolreview.com/blog/what-is-a-magnet-school>.

²⁶ *Id.*

²⁷ Brian Gill & Ira Nichols-Barrer, *Charter Schools*, ENCYCLOPEDIA OF EDUCATION ECONOMICS AND FINANCE 123 (2014).

²⁸ *Id.*; Wohlstetter et al., *supra* note 17.

²⁹ Wohlstetter et al., *supra* note 17.

³⁰ Gill & Nichols-Barrer, *supra* note 28; Micah Ann Wixom, *School Choice Glossary* (Education Commission of the States 2017).

³¹ Gill & Nichols-Barrer, *supra* note 28.

³² *Id.*

³³ *Id.*

³⁴ Jeffrey Henig, *THE END OF EXCEPTIONALISM IN AMERICAN EDUCATION: THE CHANGING POLITICS OF SCHOOL REFORM* (2013); *see also* Kenneth K. Wong & Francis X. Shen, *Measuring the Effectiveness of City and State Takeover as a School Reform Strategy*, 78 PEABODY J. EDUC. 89 (2003); Kenneth K. Wong & Francis X. Shen, *Mayoral Leadership Matters: Lessons Learned from Mayoral Control of Large Urban School Systems*, 82 PEABODY J. EDUC. 737 (2007).

choice and charter schools.³⁵ Currently, more than 30 states have endorsed or are deliberating legislative provisions that factor whether states have the authority to target individual schools, districts, or both and the parameters for school takeover.³⁶ Since 2010, states such as Louisiana, Michigan, and Tennessee have established state-run turnaround districts to improve consistently low-performing schools. Following these examples, others states, such as North Carolina, Pennsylvania, Arkansas, Missouri, South Carolina, Texas, Utah, Indiana, Ohio, Wisconsin, and Nevada, are in the process of creating a statewide turnaround district or are in the preparatory stages of state takeover. State-run turnaround districts represent a novel approach in a long history of intervention by states to remedy the fiscal and academic woes of local districts and schools. During the early 1990s, school takeovers were employed to disrupt inefficient financial systems, and repeated cases of financial crisis. In the late 1990s school takeovers was rationalized by concerns about academic achievement. State takeover and PMM funding links money to students as opposed to schools.³⁷

In the PMM, school districts manage a diverse portfolio of schools but individual schools are directly responsible for instruction.³⁸ By 2014, roughly 40 cities were actively considering a portfolio strategy.³⁹ The PMM has emerged as a strategic approach to improve chronically low-performing schools and districts.⁴⁰ Similar to a financial portfolio, the underlying mantra of the PMM is continuous improvement.⁴¹ Different localities have adopted portfolio policies to varying degrees. Thus, there will be some variation in the governance structures in each district, the nature and extent of school choice, teacher evaluation policies, teacher recruiting mechanisms etc. New Orleans is a prominent example of a portfolio district. Prior to Hurricane Katrina in August 2005, almost all of the public schools in New Orleans were controlled by the LESB, Orleans

³⁵ Welsh et al., *supra* note 16; Richard O. Welsh & Sheneka M. Williams, *Incentivizing Improvement or Imposition? An Examination of the Response to Gubernatorial School Takeover and Statewide Turnaround Districts*, 26 EDUC. POL'Y ANALYSIS ARCHIVES 124 (2018).

³⁶ Joseph O. Oluwole & Preston C. Green III, *State Takeovers of School Districts: Race and the Equal Protection Clause*, 42 IND. L. REV. 343 (2009).

³⁷ Center for Reinventing Public Education, *Seven Components of a Portfolio Strategy*, https://www.crpe.org/sites/default/files/Brief_PSDP_Strategy.pdf.

³⁸ Paul Hill et al., *Portfolio School Districts for Big Cities: An Interim Report* (Center on Reinventing Public Education 2009).

³⁹ *Id.*; Robin Lake & Christine Campbell, *Portfolio Districts*, ENCYCLOPEDIA OF EDUCATION ECONOMICS AND FINANCE 537 (2014).

⁴⁰ Hill et al., *supra* note 42; Lake & Campbell, *supra* note 43.

⁴¹ *Id.*

Parish School Board (OPSB). After the storm, the state-run Recovery School District (RSD) took control of the majority of public schools.

Differences in Reform Models

It is important to note that there are wide variations among states in how these models of reform are designed and implemented. The first difference among the models is whether they target school- or district-level educational governance. Some of the reforms such as charter schools target the school-level whereas other reforms such as PMM target the district-level.

A key source of variation across models is who operates schools. Prior to the emergence of alternative models of public education, LESBs served as the exclusive decision makers for public school operations.⁴² The operators of voucher programs vary and can include private, public, or religious entities.⁴³ Magnet schools are operated by the same district administration and school board as traditional public schools (TPS), a group of districts or the state (basic program decisions are determined by higher-level (usually the district) policymakers than by the actual schools).⁴⁴ Charter school operators also vary and can include independent or networked schools.

Another important difference among the models of education are accountability structures or who regulates and oversees the operators of schools. Standards-based accountability posits that holding schools and districts responsible for outcomes with a set of rewards and sanctions will incentivize stakeholders to concentrate on higher levels of achievement. Most models are subjected to test-based accountability but there are variations in the enforcement of regulations. In the U.S., the rules and regulations governing voucher participation often varies according to program design.⁴⁵ Most states require voucher schools to comply with test-based accountability and state curriculum standards but allow for more variability among state and local governments with respect to staff requirements.⁴⁶ Magnet schools have the same level of test-based accountability as TPS but a low threat of closure. In many cases, charters are charged with achieving specific student outcomes within a five year

⁴² Wohlstetter et al., *supra* note 17.

⁴³ Levin, *supra* note 18.

⁴⁴ Magnet Schools of America, *supra* note 23; Wixom, *supra* note 31.

⁴⁵ Levin, *supra* note 18.

⁴⁶ *Id.*; Wixom, *supra* note 17.

period.⁴⁷ Charter schools that are unable to achieve the established student outcomes are subject to closure and/or non-renewal. State takeover and PMM are both tied to heightened test accountability and a high threat of closure.⁴⁸ PMM schools do however have autonomy with respect to curriculum and instruction decisions.⁴⁹

The Costs of Innovation? Educational Governance Implications of Market-based Reforms

The exact nature of the policy, practice and scholarly implications wrought by these school reforms is still unfolding. Notwithstanding, I posit four important considerations as alternative models of public education proliferate: (a) fragmentation in educational governance, (b) the relationship between autonomy and innovation, (c) democracy in K-12 public education, and (d) the relationship between school improvement and school finance.

Fragmentation

Fragmentation in educational governance is likely a byproduct of the search for an effective model of public education. As policymakers and practitioners experiment with different models at the school-, district- and state-level, it is plausible that there will be increasingly fragmented governance structures in K-12 education. For example, in the post-Katrina era (from August 2005 until July 2018), the governance of K-12 public education has been split among the RSD, the locally elected school board, Orleans Parish School Board (OPSB), and a small number of charter school operators with agreements with the state school board. The duplication of services and roles as well as the efficient use of resources are pertinent considerations as these emergent models of public education evolve. Fragmentation also provides fertile grounds for inequities to thrive in response to accountability and competitive pressures. Fragmentation may also adversely affect the collaboration between K-12 and higher education. Fragmentation weakens the system's overall effectiveness and affects stability, accountability, transparency and openness, and simplicity and efficiency, all key elements of an effective governance structure.

⁴⁷ Gill & Nichols-Barrer, *supra* note 28.

⁴⁸ Stephanie Aragon & Emily Workman, *Emerging State Turnaround Strategies* (2015), <https://www.ecs.org/wp-content/uploads/12139.pdf>.

⁴⁹ Hill et al., *supra* note 42.

California experience with educational governance in recent decades offers some lessons for emerging models of education. In prior decades, the system was characterized by many organizational entities (schools, districts, county, state and federal agencies) that have overlapping responsibilities across multiple jurisdictions (executive, legislative, judicial). This setup was developed in an ad hoc manner, resulting in complicated interrelationships, with the considerable power centered at the state level. The Getting Down to Facts (GDTF) analysis concluded that California's governance system offers multiple opportunities to impede change, and few opportunities to lead and implement change.

Autonomy, Innovation and School Improvement

The success of many of the emerging models of education is predicated on converting autonomy into innovation and improved student outcomes. As models of reform mature, it is important to revisit the presumed relationship between autonomy and innovation in public education. Where does continuous improvement and innovation at-scale come from? At the LESB or charter school-board level? At the school leadership level? At the classroom level? The answers to these questions on the sources of innovation in these emerging models have substantial implications. For instance, if innovation comes from school leadership, then there ought to be a premium on recruiting, retaining and developing high quality principals (whether in charter, community or traditional public schools).

Although the majority of charter schools nationwide are independent (non-networked), about a quarter of all charters are part of a charter management organization. As charter networks grow, it is plausible that there will be some degree of consolidation. For instance, four regional KIPP networks in Texas have merged to form KIPP Texas Public Schools that serves 25% of KIPP's national student population. While consolidation among charter school networks may provide economies of scale and successes can be shared, there are also concerns about innovation as these networks increasingly resemble large school districts.

Democracy and Public Education

The democratic implications of the shifts in educational governance and the politics of education are another critical consideration. It is important to consider whether emergent models of school reform have weakened or amplified the democratic nature in K-12 public education. Some scholars have argued that market-based reforms undermine local,

democratic control.⁵⁰ There are concerns regarding that the democratic implications of emerging models of education, specifically that these models are a threat to democracy and decreases democracy in public education. Proximity to decision makers is a cornerstone of public education. Those closest to the learning environment know what's best for children. This has been the underlying mantra of local control. Yet, local communities lacking expertise may be confined to malaise in student outcomes. Civic capacity and the genuine engagement of broad range of educational stakeholders is a necessary ingredient for lasting and productive school-community bonds which in turn have sustainability and implementation implications.⁵¹ It is imperative to bring traditional and nontraditional actors to the public education table.

The Georgia case highlights the complexities of democratic implications of emerging governance structures. There has been a robust debate on school improvement in recent years in Georgia. Georgia highlights the increase in civic capacity regarding education policymaking. There are a host of new actors and interest groups in the policy landscape including philanthropies, intermediary organizations, and non-traditional stakeholders. Generally, these interest groups are either vociferous opponents or proponents of each of the aforementioned models – a microcosm of the polarization in education reform conversations nationwide.

In the past decade, there have been two key constitutional amendments in public education in Georgia. In 2012, Governor Deal signed the State Charter Schools Bill which allowed for increased charter school expansion and the creation of the State Charter School Commission (SCSC) - a state-level entity that has the power to authorize charter schools.⁵² In 2015, the state legislature passed Governor Deal's plan (Senate Bill [SB] 133) to create the Opportunity School District (OSD), a state-run district that would take over persistently underperforming schools and in November 2016, the constitutional amendment to create the state-run turnaround district was rejected by voters.⁵³ Although referendum on school reforms may not be common, it shows the possibility of the role of democracy in school improvement policymaking. It is an encouraging sign for

⁵⁰ Jeffrey R. Henig, *THE END OF EXCEPTIONALISM IN AMERICAN EDUCATION: THE CHANGING POLITICS OF SCHOOL REFORM* (2013).

⁵¹ Welsh & Williams, *supra* note 36.

⁵² The Associated Press, *Attention Shifts to New Charter School Commission* (Nov. 11, 2012), <https://accesswdun.com/print/2012/11/255093>; Welsh et al., *supra* note 16.

⁵³ Welsh et al., *supra* note 16.

democracy in public education that voters in Georgia had a voice in these important decisions regarding educational governance.

School Improvement and School Finance

Finance and the allocation of resources is an important component of educational governance. In recent years, the weighted student funding has emerged as a funding structure to that facilitates the emerging models of public education. The difference in resources among schools and districts is an important yet contentious issue in the education reform debate. For example, in Georgia, the average district spends \$9,288 per student, more than \$2,000 less than the national average. There is substantial variation in what districts in Georgia spends per student ranging from \$15,571 per student in Taliaferro County to \$6, 964 in Bryan County.

In some cases, school improvement may be a higher legislative and education policy priority than the school funding formula. For example, in Georgia, more attention was placed on how to improve consistently low-performing schools whereas in Nevada and Pennsylvania formulating the funding formula was addressed before school improvement policy.

Helping or Hurting Traditionally Marginalized Students? The Equity Implications of Market-Based Reforms

Educational equity is one of the most important concerns accompanying the emergent models of education. There are significant looming questions on the implications of educational governance changes on educational equity. Indeed, equity and school improvement are salient issues at the nexus of education research and policy. It is pivotal that emerging models of education address educational equity concerns, especially given the changing nature of the demographic composition of public schools to an increasingly minority student population. Emerging models ought to confront key issues afflicting traditionally marginalized students. Skeptics question whether the new systems promote achievement over equity and whether there conflicting goals in new models of education. Equity and student achievement cannot be seen as mutually exclusive. There are several issues concerning the treatment and outcomes for certain student populations including but not limited to: (a) accommodation of students with disabilities, (b) privacy of students, (c) physically restraining students without cause, (d) access to rigorous and quality programs across and within schools, (e) disproportionalities in

disciplinary outcomes, (f) achievement gaps or disparities in student outcomes, (g) pedagogy, and (h) discrimination.

Empirical evidence raises questions about whether emerging models are providing equitable opportunities, experiences and outcomes. Sorting within and between districts catalyzed by school reforms may maintain or worsen existing inequities. For instance, vouchers have been linked to increased segregation by race, religion and social class,⁵⁴ and generating a hierarchy of schools.⁵⁵ Potter argued that voucher programs often fail to target low income students.⁵⁶ Critics of magnet programs highlight that students from low socioeconomic status (SES), ELL, and SWD are often underrepresented in magnet schools.⁵⁷ The NAACP recently requested a moratorium on charter school expansion citing issues with the decline of Black teachers, funding, increased segregation, deceptive marketing strategies and student push out practices.⁵⁸ School takeovers have overwhelming become an urban school problem, most often and disproportionately targeting schools comprised of low-income, minority students.⁵⁹ The majority of schools eligible for takeover are concentrated in large urban districts and comprised of mostly low-income and African American students.⁶⁰ Although there are numerous concerns, in this essay, I discuss two major equity considerations accompanying the emerging models of reform: (a) addressing the barriers to choice in educational marketplaces, and (b) accountability and enforcing equity.

⁵⁴ Aria Bendix, *Do Private-School Vouchers Promote Segregation?*, THE ATLANTIC, Mar. 22, 2017, <https://www.theatlantic.com/education/archive/2017/03/do-private-school-vouchers-promote-segregation/520392/>; James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. 95 (1988); Halley Potter, *Do Private School Vouchers Pose a Threat to Integration?* (2017), <https://tcf.org/content/report/private-school-vouchers-pose-threat-integration/?session=1>.

⁵⁵ Gregory Elacqua, *The Impact of School Choice and Public Policy on Segregation*, 32 INT'L J. EDUC. DEV. 444 (2012); Levin, *supra* note 18.

⁵⁶ Potter, *supra* note 55.

⁵⁷ Chen, *supra* note 26.

⁵⁸ Valerie Strauss, *NAACP Sticks by Its Call for Charter School Moratorium, Says They Are "not a Substitute" for Traditional Public Schools*, Jul. 26, 2017, <https://www.washingtonpost.com/news/answer-sheet/wp/2017/07/26/naacp-report-charter-schools-not-a-substitute-for-traditional-public-schools-and-many-need-reform/>.

⁵⁹ Oluwole & Green III, *supra* note 37; Maiyoua Vang, *Racial Composition of School District on School Leaders' Responses to State Takeover: A Field Experiment on the Application of Michigan's Emergency Manager Law*, 7 J. EDUC. & SOC. RES. 31 (2017).

⁶⁰ Welsh & Williams, *supra* note 36.

Addressing Barriers to Choice in Educational Marketplaces

An important area of concern is whether the injection of choice and the theory of markets in K-12 public education is accompanied by appropriate safeguards to ensure that the educational marketplace works for all and not only some students. In general, many of the market-based alternative models of education are predicated on school choice. Voucher programs expand schooling options irrespective of a families' address and in some instances, U.S. voucher programs will employ a lottery system when applications surpass enrollment.⁶¹ Magnet school programs allow students to enroll in schools based on their interests and in many cases, enrollment is not based on where a family lives.⁶² Charter schools have open enrollment but there may be restrictions (e.g., priority zones).⁶³ Choice options for both state takeover and PMM vary across localities. For instance, school choice was an element of the RSD in post-Katrina New Orleans but not the proposed OSD. Scholars have highlighted several barriers to exercising choice that ought to be addressed in policy formulation and design. These include but are not limited to: (a) access to information on schools, (b) admissions processes and criteria, (c) transportation and (d) priority attendance zones. Overcoming or being hamstrung these barriers is typically correlated with socioeconomic status.

Access to information is a salient concern for vouchers, charter schools, state takeover and PMM. This access to information is an essential step toward achieving equity of choice. For example, with regards to vouchers, parents need to have knowledge of program requirements in order to make informed choices.⁶⁴ Charters schools have also been charged with disproportionately benefiting both educated and motivated parents who have knowledge about schools and admission requirements.⁶⁵ The Department of Education highlighted that parents' ability to access information is a critical component for achieving diversity in and across magnet schools.⁶⁶ In many cases, well-to-do families are

⁶¹ Levin, *supra* note 18.

⁶² Chen, *supra* note 26.

⁶³ Elena Andreyeva & Carlianne Patrick, *Paying for Priority in School Choice: Capitalization Effects of Charter School Admission Zones* (Andrew Young Sch. of Policy Studies Research Paper Series, Working Paper No. 16-09, 2016).

⁶⁴ Henry M. Levin, *Educational Vouchers: Effectiveness, Choice, and Costs*, 17 J. POL'Y ANALYSIS & MGMT. 373 (1998).

⁶⁵ Gill & Nichols-Barrer, *supra* note 28.

⁶⁶ U.S. DEP'T OF EDUC. OFFICE OF INNOVATION AND IMPROVEMENT, *Innovations in Education: Creating Successful Magnet School Programs* (2004).

more likely to take advantage of choice options because they have better access to information.⁶⁷ The existing evidence highlights that in many cases, parents with higher income and higher levels of education are able to rely on larger social networks for information than parents with lower income and lower levels of education.⁶⁸

The admissions criteria employed by some schools of choice also has significant educational equity implications. The admissions criteria for vouchers may be selective depending on program design.⁶⁹ Magnet schools implement selective admissions criteria and the selective criteria employed by magnets often act as a barrier for students with records of low achievement, poor behavior, or poor attendance.⁷⁰ Although most charter schools employ open enrollment that may be lottery-based if there is oversubscription,⁷¹ critics highlight that charter schools often employ loopholes in admissions in order to select desired students.⁷² In many states, charter schools have adopted complex application processes that create barriers for students with disability, English language learners (ELL), and students with low prior achievement to get into the lottery.⁷³ Some states also allow charter schools to stipulate priority enrollment and attendance zones.⁷⁴ There are similar concerns regarding the admission criteria for state takeover and PMMs given that chartering is a prominent intervention strategy of these models.

Transportation to choice schools may be a significant issue for working class families but less of an issue for upper middle class and elite families. Levin argued that the transportation costs associated with voucher programs would be higher than traditional systems.⁷⁵ Levin attributed the increased costs to (a) choice options encouraging more students to attend school outside of their neighborhood and (b) the lower density and regularity of bus routes.⁷⁶ If families cannot provide transportation to and

⁶⁷ Levin, *supra* note 86.

⁶⁸ MARK SCHNEIDER ET AL., CHOOSING SCHOOLS: CONSUMER CHOICE AND THE QUALITY OF AMERICAN SCHOOLS (2002).

⁶⁹ Levin, *supra* note 18.

⁷⁰ Chen, *supra* note 26.

⁷¹ Wixom, *supra* note 31.

⁷² Stephanie Simon, *Special Report: Class Struggle - How Charter Schools Get Students...*, REUTERS (Feb. 15, 2013), <https://www.reuters.com/article/us-usa-charters-admissions-idUSBRE91E0HF20130215>.

⁷³ *Id.*

⁷⁴ Andreyeva & Patrick, *supra* note 63.

⁷⁵ Levin, *supra* note 86.

⁷⁶ *Id.*

from school, it limits school choice options.⁷⁷ Often times, disadvantaged families must settle for charter schools within reach rather than charter schools of their choosing.⁷⁸ A 2011 RAND study of school choice in post-Katrina New Orleans found that the reasons parents gave for their choice of schools differed significantly between charter and traditional (non-charter) schools. The most common reasons given by charter school respondents were the school's academic curriculum, its record of student achievement and its attendance and discipline policies. In contrast, the most common reasons cited by parents of traditional school students included the school's provision of transportation, the proximity of the school to the family's residence or availability of public transportation, and the parents' lack of awareness of choice options.

Accountability and Enforcement of Educational Equity

There is a growing fear that the some of the emerging models of public education reform lack accountability with regards to educational equity. Stated differently, there is not enough policing of how schools behave in response to market and accountability pressures. There are growing concerns that the autonomy afforded to charter schools may be abused without sufficient accountability.

Accountability and enforcement of educational equity safeguards is necessary regardless of the model of public education. It is a reflection of larger issues of how schools are operated and overseen. For instance, enforcing the charter contract and closing under-performing charter schools has been a point of contention among charter school proponents and opponents. This depends on the quality of charter authorizers. The costs and benefits of school closures is another important consideration accompanying the models of education.⁷⁹ Closing underperforming schools may be necessary but should be approached with caution. It is equally important that there is an intense focus on innovations in accountability rather than deregulation of enforcement.

⁷⁷ Jon Valent & Jane Arnold Lincove, *The barriers that make charter schools inaccessible to disadvantaged families*, Brookings (Mar. 16, 2018), <https://www.brookings.edu/blog/brown-center-chalkboard/2018/03/16/the-barriers-that-make-charter-schools-inaccessible-to-disadvantaged-families/>.

⁷⁸ *Id.*

⁷⁹ Welsh & Little, *supra* note 3.

Conclusion

We are engaged in the long march towards a transformative model of K-12 public education. A model of public education that embraces history and propels cultural and economic liberation. A model that erodes rather than buttresses forms of inequality. A model that incentivizes engaging curriculum and nurturing environments that not only produces achievement growth but also productive citizens. The operative concern is how to best expand the supply of high quality schools and ensure there is equitable access to these learning environments. It may be necessary to entertain the thought that there may not be one model and elements of several models may be molded to fit local contexts. There is no panacea for the woes afflicting K-12 public education. There is no singular response or path to school improvement. Moreover, the models are not as mutually exclusive as one may imagine. For example, in Kansas City, a community organization, SchoolSmart, supports community schools and the PMM.

School reforms in the past two decades occurred in the context of two larger national trends: (a) the federalization of accountability requirements for public schools through NCLB; and, (b) federal and state laws allowing charter schools to become alternatives to failing traditional public schools. Additionally, by requiring various alternatives for students in failing schools, the No Child Left Behind Act (NCLB) in 2003 marked the first time that significant federal funds were used to promote school choice among public schools. Consequently, federal demands for school improvement have prompted states to identify chronically low-performing schools. The passage of the Every Student Succeeds Act (ESSA) in 2015 ushers in a new era filled with unknowns. Under ESSA, states are flexible in determining and pursuing how to improve schools that fall in the bottom 5 % of schools unlike under NCLB that mandated school improvement strategies. States are mandated to identify the lowest performing 5% of schools every three years. The identification is based on each individual state accountability system. The decision of what intervention to pursue to improve these schools is left entirely up to states. ESSA does not require states to execute the previous required interventions of the SIG program under NCLB such as closing schools, conversion to charters or other interventions under SIG. Several educational stakeholders have pointed to what appears to be a retreat from civil rights protection by the Trump administration. In particular, some interpret the decision to rescind the Obama's administration guidance on transgender students and bathrooms, the new process for civil rights

complaints, positions on campus rape, the hiring of former for-profit education executives to oversee the student loan program as mounting evidence that federal protection for at-risk students is declining. It is conceivable that the onus on protecting and furthering educational equity will increasingly fall to states and districts. The vacuum in equity oversight will be partially filled by education research.

ESSA also provides fuel for some of the models of reform. ESSA could provide billions of dollars in resources but scholars have raised questions about inequities in accessing these funds.⁸⁰ New funding for charter schools and school choice policies (e.g., funding for transportation to magnet schools) under ESSA is a continuation of federal support of market-based reforms. The increased funding for charter schools signals that the expansion of this type of school reform is a federal priority. Under ESSA, funding for the federal charter schools program will increase over time from \$231 million in 2015 to \$270 million in 2017 to \$300 million in 2019 and 2020.⁸¹ This program provides funding for the start-up and expansion of charter schools and charter management organizations. In addition to the increase in dollars, changes in the program under ESSA allow for funds to be allocated to independent state charter boards, private charter school support organization and governors instead of only state departments of education.⁸² ESSA also empowers states with the responsibility to monitor charter school authorizers.⁸³

The call for more money for a myriad of purposes (e.g., more money for raises in teacher pay or funding for pre-K programs) is often at the core of school improvement debates. The recent wave of teacher strikes in 2018 highlights the need to boost education funding. Indeed, many states are only now returning to the pre-recession funding levels. Though more money is needed to improve education, increased funding without a sustained effort to improve governance is unlikely to lead to substantial improvement in student learning. There is a need for better funding regardless of the model of public education. Regardless of the reform model, public schools are in dire need of infrastructural upgrades and better facilities such as building and textbooks etc. Students in traditional public schools or charter schools need the amenities to provide an

⁸⁰ Sheneka M. Williams & Richard O. Welsh, *ESSA and School Improvement: Leader Preparation and Professional Development in a New Era of Education Policy*, 27 JOURNAL OF SCHOOL LEADERSHIP 701 (2017).

⁸¹ Every Student Succeeds Act, Pub. L. No. 114-95, 114 Stat. 1177 (2015).

⁸² *Id.*

⁸³ *Id.*

enriching and engaging experience so that all children have equal opportunity to learn and grow regardless of their parents' race and socioeconomic status. Reforms should be fully funded mandates rather than new ideas without requisite resources. Equity-minded reforms can benefit from additional resources. Additional resources accompanying the emerging models may be used for a host of purposes including but not limited to training to implement school discipline reform, and expanding access to and bolstering the quality of counseling and mental health services. The other operative question is the source of the additional resources that are necessary but not sufficient to improve schools. The emerging models increasingly rely on funds from non-profit and philanthropic sectors for growth and sustenance. Some criticize these efforts as an overreach by private actors in a public system while others argue that these efforts are helping to create a higher quality education system.

If markets are intended to correct government failures in education, then how can likely failures by the markets in education be addressed? In its simplest terms, a market is a meeting of buyers and sellers or alternately demand and supply. Price is the central unifying mechanism. The operations of the market are not guided by a central authority but by the "invisible hand." Applying this model to public education is riddled with limitations and challenges. There are instances where markets do not function as intended or theorized (market failures) and markets cannot effectively function without the protection of private property rights typically enforced by governments (in the case of public education, are students' rights analogous to property rights?). Given the popularity of market-based reforms, it is important to consider the shortcomings and benefits of the theory of markets when applied to K-12 public education.

Finally, the journey on the path to school improvement should be guided by the light of thoughtful research. Research needs to keep pace with the expansion of emerging models. There is a risk that models may proliferate without empirical evidence of their effectiveness and a granular understanding of key mechanisms. The ongoing research on "the why" or the underlying mechanisms will complement the working knowledge of "what works." Indeed, the only guideline for interventions provided by the ESSA is that school improvement strategy must be evidence based.

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