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Derek W. Black

University of South Carolina - Columbia

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CHARTER SCHOOLS, VOUCHERS, AND THE PUBLIC GOOD

*Derek W. Black**

INTRODUCTION

The number of charter schools has exploded over the past two decades. The first charter school was opened in 1992, and, at the time, only two states in the country authorized their creation.¹ Within five years, over half of the states authorized charter schools, and the number in operation grew exponentially.² Today, all but ten states authorize charter schools, over five thousand charter schools are in operation,³ and nearly two million children attend them.⁴ Both state and federal programs have strongly encouraged this growth.⁵ Due to initial concerns over their constitutionality, vouchers have not yet experienced the same level of ascendancy, but with legal uncertainties more recently resolved,⁶ calls to expand vouchers are becoming frequent.⁷

In the rush to expand charters, and now vouchers, surprisingly scant attention has been paid to issues of educational mission and

* Professor of Law, University of South Carolina School of Law. I would like to thank Omari Simmons for thinking of me when he began planning this symposium and for delivering an excellent event. I would also like to thank Dean Blake Morant and all the members of the *Wake Forest Law Review* for all the resources and support they put behind the symposium. I was impressed at every turn. Finally, I owe thanks to Zoe Miller for her invaluable comments on the prior draft of this Essay and to Tommy Croker and Danielle Holley-Walker for their help in constructing my initial working thesis.

1. U.S. DEP'T. OF EDUC., EVALUATION OF THE PUBLIC CHARTER SCHOOLS PROGRAM: YEAR ONE EVALUATION REPORT 3-4 (2000).

2. *Id.* at iii.

3. NAT'L ALLIANCE FOR PUB. CHARTER SCH., BACK TO SCHOOL TALLIES: ESTIMATED NUMBER OF PUBLIC CHARTER SCHOOLS & STUDENTS, 2011-2012, at 1-2 (2011), available at http://www.publiccharters.org/data/files/Publication_docs/NAPCS%202011-12%20New%20and%20Closed%20Charter%20Schools_20111206T125251.pdf.

4. *Id.*

5. See, e.g., Press Release, U.S. Dep't. of Educ., States Open to Charters Start Fast in 'Race to Top': Education Secretary Seeking Autonomy with Real Accountability for School Innovators (June 8, 2009), available at <http://www2.ed.gov/news/pressreleases/2009/06/06082009a.html>.

6. See generally *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

7. See Sean Cavanagh, *For Democrats, Some Nuance on Vouchers*, 32 EDUC. WK., Sept. 19, 2012, at 1.

values. The dominant conversation has been whether charters and vouchers can provide better educational outcomes,⁸ but “better” is largely conceptualized as higher test scores. Putting aside the contentious issue of whether charters or vouchers actually improve student achievement, “better” means better for students who take part in those options, not better for the overall education system. Glossing over these types of questions is glossing over fundamental questions of the public good in education. In effect, proposals to expand charters or vouchers tend to assume, without examination, that they will promote the public good. But a key, if not the primary, question in any structural change to education must be whether it serves the public good.

The “public good” in education is, of course, susceptible to varying interpretation, and the concept has been undergoing change in recent years as a result of cultural and legal shifts. The public’s concept of a good education is seemingly devolving toward education as a service or commodity, indistinct from any other service or commodity that the government or private industry might provide. Much of the commodification of education is spurred by the federal focus on standardized scores.⁹ By reducing education policy to test scores, federal legislation suggests that little other than the end result is relevant.¹⁰ Social science, albeit often innocently, intensifies this phenomenon, as it uses ample government data on test scores to compare schools and program alternatives.

Reducing education to test scores, however, is only part of the story. The commodification of education also corresponds with our overall cultural shift toward individualized, rather than common, experiences.¹¹ In a society where one can consume any type of entertainment and information one desires at any time of the day, it should come as little surprise that parents and students increasingly crave an education that caters directly to them. Today, almost nothing is more popular in primary and secondary education than “choice” programs that offer parents the ability to select their

8. See, generally, e.g., RON ZIMMER ET AL., RAND CORP., CHARTER SCHOOLS IN EIGHT STATES: EFFECTS ON ACHIEVEMENT, ATTAINMENT, INTEGRATION, AND COMPETITION (2009), available at http://www.rand.org/content/dam/rand/pubs/monographs/2009/RAND_MG869.sum.pdf.

9. See, e.g., No Child Left Behind Act, 20 U.S.C. §§ 6301–7941 (2006).

10. See generally Jennifer Mueller, *Facing the Unhappy Day: Three Aspects of the High Stakes Testing Movement*, 11 KAN. J.L. & PUB. POL’Y 201, 201–02 (2002) (outlining the focus on high-stakes testing in the No Child Left Behind Act).

11. See, e.g., John A. Powell, *The Tensions Between Integration and School Reform*, 28 HASTINGS CONST. L.Q. 655, 679 (“The way that we discuss choice assumes educational resources are commodities. As a commodity, education can be bought; this is manifested in the choice paradigm . . .”).

child's school.¹² The desire for these programs often drives education policy as much as sound pedagogy.

Increasingly forgotten in these conversations is that the purpose of receiving an education, at least a public education, goes far beyond the teaching of information and skills and the interests of individual students. Public education includes the transmission of social values that lead to social cohesion and the overall betterment of society.¹³ Test scores tell us nothing of these values, and private markets are ill suited to deliver them.¹⁴ Whereas private markets respond to consumer preferences, public education seeks to create public preferences. Additionally, given the nature of the democratic values our public education seeks to promote, individually responsive education makes little sense. Public education entails the provision of common experiences under conditions consistent with equal protection, due process, free speech, and religious neutrality. A consumer-based system allows for too much educational variation and opens the door to individual biases that are contrary to public education.¹⁵

Based on their track record thus far, charters and vouchers, on the whole, are not operating in furtherance of the public good. Rather than promote the public good, they tend to promote the individual good and operate in ways that actively undermine the public good.¹⁶ This Essay's purpose, however, is not to throw charters or vouchers under the bus. Charters, in particular, are not inherently antithetical to the public good. With sufficient oversight and value-based limits, charters can carry out the public mission in much the same way as traditional public schools but with the added benefit of pedagogical, curricular, and other legitimate alternatives to traditional public schools. For instance, charters may have the capacity to produce integration in places where it is otherwise impracticable. Vouchers may do the same. Yet, the possibility of achieving the public good is insufficient. If charters and vouchers are to be part of the public education system, we must require that they operate consistently with the public good.

12. See generally Jeffrey R. Henig & Stephen D. Sugarman, *The Nature and Extent of School Choice*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW* 13 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999).

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

14. See, e.g., 20 U.S.C. § 6311(b)(1)(C) (requiring assessments only in mathematics, language arts, and science); see also Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1246–48 (2003) (questioning the private sector's willingness to abide by constitutional norms).

15. See, e.g., *infra* notes 58–59 and accompanying text.

16. See *infra* notes 170–74 and accompanying text.

This Essay begins with a discussion of the competing theoretical conceptions of the public good in education: maximization of individual good—which in sum produces a group good—versus collective good—which requires group goals. While these concepts of the public good compete, they are not mutually exclusive in all respects. Relying on practical examples and social science, Part II explores both the practical tensions and the overlap between these concepts, suggesting that the public good in today's public school system is the group good. Part III further examines what it means to be a public school promoting the public good and whether charters are consistent with this public good. Finding that, as currently implemented, they are inconsistent with the public good, the Essay closes with a discussion of how charters could be modified to serve the public good.

I. COMPETING DEFINITIONS OF THE PUBLIC GOOD IN EDUCATION

The current debate in education over privatization, choice, charters, and vouchers is more appropriately understood as a normative battle over the meaning of the public good in the context of schools. On the one hand, the public good can be understood as the collective good,¹⁷ which we maximize by pursuing collective-based policies and goals.¹⁸ Individuals undoubtedly benefit from the pursuit of the collective good, and individual fulfillment is an important goal, but the collective good is not subordinate to the individual good and thus may not always maximize individual good.¹⁹ In some instances, the collective good may require that we

17. This Essay uses "collective" and "public" good in the general sense, rather than in the economic sense. Extensive literature is devoted to what a "public good" is in economic terms. To be a public good in economic terms, most scholars would require that the good be "nonrivalrous" and "nonexcludable," respectively meaning that one person's use of one unit of the good does not reduce the amount of the resource available to others and that individuals cannot be excluded from using the good. See RICHARD CORNES & TODD SANDLER, *THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS* 6–7 (1986); Jeffrey A. Hart & Peter F. Cowhey, *Theories of Collective Goods Reexamined*, 30 W. POL. Q. 351, 351 (1977). Because certain aspects of education do not meet these criteria, some would argue it is not a public good in the economic sense.

18. See Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 126 (2011) ("Republicanism asserts that all governments bear a basic obligation to advance the good of their people as a whole—*res publica*—rather than their own self-interest or the factional interests of particular groups or individuals."); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1530 (1992); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 63 (1985). However, there could be a pluralist form of government that pursues work toward the small group goods.

19. See Lee Anne Fennell, *Beyond Exit and Voice: User Participation in the Production of Local Public Goods*, 80 TEX. L. REV. 1, 4–5 (2001) (discussing the

limit individual freedom and autonomy.²⁰ On the other hand, some argue that the greatest public good occurs when everyone is pursuing individual good because maximizing individual good accrues to the benefit of the whole.²¹ Per this concept, the individual good does not sacrifice the public good but actually serves it.

Both concepts of the public good are theoretically valid. In a world of infinite or, at least, sufficient resources, society could maximize the potential of and cater to the desires of each and every individual. If each person reaches his or her potential, then society presumably would reach its maximum potential as well.²² But in a world of limited resources, pursuing the public good in schools requires pursuing the collective good to some extent. Likewise, in a society premised on the notion that the public good entails the promotion of common values, collective norms and interests must take primacy when those interests conflict with individual interests.

As a practical matter, neither our educational goals nor our resources fit perfectly in either of these paradigms. Common sense and experience tell us that that our education system is not one of infinite resources.²³ And, while many of our schools need far more

dual nature of education in that it produces both public and individual benefits).

20. The most obvious examples relate to limits on students' free speech and behavior. The courts have recognized schools' authority to prohibit students from engaging in certain types of speech and to exclude students from school altogether because doing so may be necessary to maintain the overall order and good of the school. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (limiting student speech to achieve the school's curricular goals); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685–86 (1986) (punishing student speech because it was inconsistent with school values); *Goss v. Lopez*, 419 U.S. 565, 582 (1975) (recognizing schools' authority to exclude students).

21. See, e.g., JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 215–19 (1990) (arguing that individual consumer choices will lead to better overall schools and results).

22. Maximizing the individual and collective good under this model assumes that the individual is a rational actor capable of making result-maximizing decisions. Several scholars cite this as a major flaw in market and choice-based systems because many actors, due to lack of information or other factors, do not make optimal choices. See, e.g., Amy Stuart Wells et al., *Charter Schools and Racial and Social Class Segregation: Yet Another Sorting Machine?*, in *PUBLIC SCHOOL CHOICE VS. PRIVATE SCHOOL VOUCHERS* 81, 86 (Richard D. Kahlenberg ed., 2003) (discussing targeted marketing and word-of-mouth recruitment that privileged some subgroups in charter school enrollment).

23. See ROSS WIENER & ELI PRISTOOP, *HOW STATES SHORTCHANGE THE DISTRICTS THAT NEED THE MOST HELP* 5 (The Educ. Trust ed., 2006), available at <http://www.edtrust.org/sites/edtrust.org/files/publications/files/FundingGap2006.pdf> (documenting the fact that poorer school districts within states receive less education funding and, in turn, poorer schools within districts are underfunded).

resources than they currently have,²⁴ it would not be fair to say that schools are generally so starved of resources that they lack all capacity to respond to individual needs.²⁵ Regardless of the resources available to schools, the two concepts of the public good in education may compete with one another, but education does not require an all-or-nothing approach to either concept.

For instance, in *Pierce v. Society of Sisters*,²⁶ the Supreme Court struck down a state statute that would have required all students to attend public school and effectively put private schools out of business.²⁷ The Court recognized that parents have a liberty interest in controlling the upbringing of their children and pursuing their individual interests in private school.²⁸ So long as those private interests are not inimical to the public good, the state lacks a legitimate basis in interfering.²⁹ The Court, however, in striking what has come to be known as the "Pierce Compromise,"³⁰ implicitly recognized that the state has a legitimate interest in the education of all children and thus has the authority both to compel students to attend some school and to reasonably regulate private schools.³¹ In

24. See generally BRUCE D. BAKER ET AL., IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD 26 (2010), available at http://www.schoolfundingfairness.org/National_Report_Card_2010.pdf; WIENER & PRISTOOP, *supra* note 23, at 6.

25. In fact, federal law specifically requires schools to develop individual education plans for students with disabilities and deliver special education services where necessary. 20 U.S.C. §§ 1401, 1414 (2006); *Burilovich v. Bd. of Educ.*, 208 F.3d 560, 568–71 (6th Cir. 2000); 34 C.F.R. §§ 300.321–24 (2012).

26. 268 U.S. 510 (1925).

27. *Id.* at 530–35.

28. *Id.* at 534–35 ("The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

29. *Id.*; see also *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (striking down a state statute prohibiting the teaching of German in school because "there seems [to be] no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities").

30. MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 15 (4th ed. 2002); William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-Examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1198 n.47 (2003); James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1391 (2000).

31. *Pierce*, 268 U.S. at 534 ("No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."); see also *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927) (striking down extensive regulation of Japanese schools because the regulation, as a whole, was "a deliberate plan to bring foreign language schools under a strict governmental control for which the record discloses no adequate reason").

short, the pursuit of the private interests and public good could coexist (although sometimes one or the other wins out).³²

Coexistence, however, is a far cry from complementary. Serious theoretical tensions exist between the paradigmatic individual and collective good in education. In fact, at the theoretical or abstract level, the collective and individual concepts of educational public good are, in some important respects, diametrically opposed. Most notably, each seeks substantively different educational goals, which leads to different educational structures and systems, methods of delivery, outcomes, benefits, and tolerances. The following Subparts flesh out the most salient of these differences.

A. Goals

While both have common interests in delivering quality education and graduating students, collective- and individual-based concepts of the public good have different underlying animating values and goals. First, as their categories obviously indicate, the two are aimed at and benefit different constituencies: individuals versus society as a whole. The primary purpose of the individualized concept of education is to benefit the individual.³³ Society may receive a benefit as well, but that benefit is indirect and not a driving motivation. Under a collective concept, both the individual and society are beneficiaries of education, and both benefits are motivations.³⁴ But a strong argument can be made that the primary justification for public education is the societal interest.³⁵ Society accrues significant economic, cultural, and democratic benefits from an educated citizenry and suffers enormous costs if the general population is educationally deficient.³⁶ If society did not benefit, the rationale for public funding of education would fall apart.³⁷ If education only benefits the individual or serves individual interests over collective interests, there is little reason why society, rather

32. The coexistence, however, allowed for the possibility that, under certain circumstances, one of the interests would trump the other entirely. The Court's opinion in *Wisconsin v. Yoder* is a prime example of this incompatible tension and led to the Court entirely exempting Amish children from compulsory education beyond middle school. 406 U.S. 205, 207, 213–14 (1972).

33. See CHRISTOPHER WINCH & JOHN GINGELL, *PHILOSOPHY OF EDUCATION: THE KEY CONCEPTS* 126 (2d ed. 2008).

34. See EDUC. POLICIES COMM'N, *THE CENTRAL PURPOSE OF AMERICAN EDUCATION* 1–2 (1961).

35. See Fred Inglis, *Education and the Good Society* (2), in *EDUCATION AND THE GOOD SOCIETY* 23, 23 (Fred Inglis ed., 2004).

36. *Plyler v. Doe*, 457 U.S. 202, 221–22 (1982).

37. Amy Gutmann, *Can Publicly Funded Schools Legitimately Teach Values in a Constitutional Democracy?*, in *MORAL AND POLITICAL EDUCATION* 170, 175 (Stephen Macedo & Yael Tamir eds., 2002).

than the individual, should be responsible for ensuring education.³⁸ Similarly, if education is primarily a self-serving endeavor for individuals, the inability of disadvantaged individuals to obtain education is theoretically of no more concern to society than the inability of disadvantaged individuals to procure cable television or drive nice cars. In short, collective-based education is motivated by the fact that educational successes and failures pose serious societal losses and gains, whereas an individual-based education treats those societal effects as ancillary to the individual effects.³⁹

Inherent in each of these differing motivations is a distinct conceptualization of public education. With collective motivations, the provision of education itself serves a public interest. The state provides education not only because individuals want or need it but because an educated citizenry is needed for society to function in the ways it desires.⁴⁰ Thus, public education is a public good, the provision of which is among the primary reasons for the creation of government.⁴¹ Moreover, because education is a public good, the state retains a significant interest in regulating and shaping it in all respects.⁴² This interest is obvious and explicit in publicly operated schools, but as a public good, the state even retains an interest in exercising some level of oversight of individuals who opt out of the public system.⁴³ This interest leads the state to mandate that individuals obtain a certain level of education, regardless of the

38. BURTON A. WEISBROD, EXTERNAL BENEFITS OF PUBLIC EDUCATION 3 (1964) ("There seems to be a presumption that such external benefits do exist in some form. For if they do not, then education is merely another private consumption or investment good; and in that case why is it provided publicly?"); Gutmann, *supra* note 37.

39. See EDUC. POLICIES COMM'N, *supra* note 34, at 1-4; WEISBROD, *supra* note 38, at 1-2; WINCH & GINGELL, *supra* note 33.

40. *Ambach v. Norwick*, 441 U.S. 68, 77 (1979); AMY GUTMANN, DEMOCRATIC EDUCATION 49 (1987); John A. Powell & Stephen Menendian, Parents Involved: *The Mantle of Brown*, *The Shadow of Plessy*, 46 U. LOUISVILLE L. REV. 631, 697-99 (2008).

41. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.").

42. *Id.*

43. Compulsory education is the ultimate expression of this interest, as the state is saying that under no circumstances will it permit someone to entirely opt out of education. Few object to the idea of compulsory education and thus do not see it in those terms. Instead, they focus more on the other expressions of the state's interest in those who opt out manifested through regulation of private and home schools.

setting in which they receive it.⁴⁴ And, if society desires the widespread provision of this public good, the government may be the only realistic entity that can consistently deliver it. The relative lack of resources of many members of society and the benefit of economies of scale make private markets unlikely candidates for the general maintenance of education.⁴⁵

An individual-based education system conceptualizes education and its role in society far differently. Under the individual concept, education is a commodity—albeit an extremely valuable one—to be consumed by individuals.⁴⁶ Its value, however, does not distinguish it from any other commodity. At best, the individual may find it convenient for the government to regulate or support education, but this does not render it a governmental responsibility.⁴⁷ In fact, an individualized concept of education might allow for some citizens to choose not to consume education or to consume less than other citizens. From an individualized standpoint, this is not necessarily problematic.⁴⁸ The ultimate decision as to the quality, quantity, and substance of education is left to the individual.

B. Values

The nature and importance of the values that individualized and collective-based education systems disseminate are also strikingly different. One of the main objectives of collective-based education is to disseminate particular group values.⁴⁹ In fact, democratic and collective good theorists have emphasized that the

44. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (wanting to ensure that Amish children become productive members of society, the state sought to force Amish children to attend high school against their wishes).

45. Some scholars note that certain communities and states, even when banded together, lack the capacity to provide for an adequate education, and, thus, only the larger group—the federal government—can ensure the proper provision of education for all. See, e.g., Kimberly Jenkins Robinson, *The Past, Present, and Future of Equal Educational Opportunity: A Call for a New Theory of Education Federalism*, 79 U. CHI. L. REV. 427, 456–57 (2012); see also KARL E. CASE & RAY C. FAIR, *PRINCIPLES OF ECONOMICS* 330 (6th ed. 2003) (“When members of society get together to form a government, they do so to provide themselves with goods and services that will not be provided if they act separately.”).

46. See Fennell, *supra* note 19, at 6–7 (discussing the consumption aspect of education).

47. RICHARD A. MUSGRAVE, *THE THEORY OF PUBLIC FINANCE* 13–15 (1959) (formulating the theory of merit goods, which are commodities that are good for individuals but would be underconsumed if left to the market, and including education as a merit good).

48. See, e.g., *Yoder*, 406 U.S. at 210–11 (involving Amish students who did not want to consume public education beyond middle school).

49. Kevin D. Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1, 7 (1992).

goal of common schools is as much to inspire social values as it is academic achievement.⁵⁰ As Professor Kevin Brown explains:

Public schools are social institutions that cultivate America's youth. They inculcate cultural values, including political and social attitudes, opinions and beliefs. For example, schools foster such values as respect for our country, tolerance for political and religious diversity, commitment to self-sufficiency, and commitment to discharge faithfully the duties imposed by citizenship. Schools teach these values by selecting and excluding the materials that teachers present to students. They also instill values through a myriad of administrative rules and regulations governing student and teacher conduct.⁵¹

In *Brown v. Board of Education*,⁵² the Supreme Court similarly recognized that, in addition to preparing students for later professional training, education "is a principal instrument in awakening the child to cultural values, . . . and in helping him to adjust normally to his environment."⁵³ As such, "education is perhaps the most important function of state and local governments."⁵⁴

Of course, succeeding in life necessarily requires some level of adaptation to society, and thus collective- and individual-based educations share some common ground. But the two concepts of education diverge in the priority that they ascribe to societal values and norms. Individual-based education is premised on freeing individuals to seek their own good and values rather than those of the group.⁵⁵ To be clear, this does not entail individual values that are inherently hostile to the group, but the sense of "we," which is integral to collective values, can be diminished or lost in the individual focus because the individual comes before the group. Also, elevating individual interests and goals concedes the validity of individual values, even when they significantly diverge from society's values.⁵⁶ On matters of opinion and critical analysis, this may not be normatively problematic. Even the collective concept of education would encourage free thought and individuality on

50. See, e.g., Amy Gutmann, *Civic Minimalism, Cosmopolitanism, and Patriotism: Where Does Democratic Education Stand in Relation to Each?*, in MORAL AND POLITICAL EDUCATION, *supra* note 37, at 23, 42.

51. Brown, *supra* note 49, at 7-8.

52. 347 U.S. 483 (1954).

53. *Id.* at 493.

54. *Id.*

55. MERLE CURTI, THE SOCIAL IDEAS OF AMERICAN EDUCATORS 584 (1959).

56. *Id.* at 586-87.

numerous topics.⁵⁷ But an entirely individualized concept of education would allow students the freedom to adopt and later act upon antisocial values, such as racial bias, gender bias, or religious intolerance.⁵⁸

Consider, for instance, an individual-orientated education system that includes elements of school choice. Such a system potentially caters to antisocial behaviors by permitting students with shared antisocial values to choose to coalesce in particular schools or programs.⁵⁹ Over the long term, this type of system would undermine social cohesion and counteract the effect of social pressures that might otherwise produce common values.⁶⁰

In contrast, many of the specific values a collective-based concept of education seeks to facilitate are those that mitigate and limit individuals' tendency to adopt antisocial or group mindsets and act on them. For instance, collective-based education promotes the individual's commitment to enhancing the public sphere and common good. Because individuals tend toward self-interest, collective-based education seeks to counteract the tendency toward self-serving interests and affirmatively promote the opposite.⁶¹ Unsurprisingly, collective-based education can generate significant controversy in promoting these values, as doing so only highlights the tension between competing concepts of the public good. Some theorists define the common good not as a society with an expansive public sphere but one with unfettered individual liberty.⁶² Collective-based education generally agrees that a core set of individual liberties must be protected, but collective education limits individualism at the point that it seriously threatens group interests.

This is not to say that collective-based education would deny individuals the freedom to adopt antisocial values. If our First Amendment jurisprudence teaches anything, it is that arriving at collective wisdom requires us to protect all individual's ideas, regardless of how repugnant we might find those ideas.⁶³ And the

57. Gutmann, *supra* note 50, at 25–26 (describing democratic education as designed to deliver the skill of deliberation).

58. Gutmann, *supra* note 37, at 172.

59. See, e.g., Michael W. McConnell, *Education Disestablishment: Why Democratic Values Are Ill-Served by Democratic Control of Schooling*, in MORAL AND POLITICAL EDUCATION, *supra* note 37, at 87, 104–06 (arguing against state domination of common values in favor of pluralistic values whereby religious dissenters, for instance, could control their own education).

60. *Id.*

61. CURTI, *supra* note 55, at 589.

62. RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY 2–3 (1998).

63. See generally *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50–52 (1988) (summarizing Supreme Court precedent on the robust exchange of ideas).

Court has held that the same principles extend to public schools.⁶⁴ Protecting individual freedom, however, is far different from requiring the state to adopt policies and structures that might facilitate and support antisocial values and behavior.⁶⁵ At most, the state is obligated to allow individuals to opt out of the public system when their individual values are at odds with public values, but, even then, the state can place limits on the private pursuit of individual values when the private pursuits pose a significant threat to societal well being.⁶⁶

C. *Social Cohesion*

Closely related to collective education's promotion of group values is its delivery of a common experience to all students (which can easily go missing from an individual-based educational experience).⁶⁷ The purpose of a common experience is to foster substantive commonality and social cohesion based on whatever underlying values and goals society chooses to promote.⁶⁸ Schools, of course, are far from the only purveyors of values; societal influences will inevitably cause most students to adopt national core values.⁶⁹ Thus, attending a collective-based versus an individual-based school will not necessarily be determinative in the values a student ultimately adopts,⁷⁰ but collective-based education does deliver a different message and experience that are relevant.

The hope in collective-based education is that these common experiences and values will result in the long-term perpetuation and continuation of the group. Individualized education, in contrast,

64. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

65. Christopher L. Eisgruber, *How Do Liberal Democracies Teach Values?*, in *MORAL AND POLITICAL EDUCATION*, *supra* note 37, at 58, 72, 77.

66. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 533-34 (1925) (arguing that parents have a strong liberty interest in directing their children's education, especially in light of the fact that nonpublic schools do not harm the public).

67. See, e.g., *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 597 (1940); see also *CURTI*, *supra* note 55, at 484; *Minow*, *supra* note 14, at 1253.

68. *Minow*, *supra* note 14, at 1253-54.

69. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 245-46 nn.2-3 (1972) (Douglas, J., dissenting) (discussing evidence that even Amish students are susceptible to the same social ills as the non-Amish); see also Nancy L. Rosenblum, *Pluralism and Democratic Education: Stopping Short by Stopping with Schools*, in *MORAL AND POLITICAL EDUCATION*, *supra* note 37, at 147, 163-64 (discussing the limits of schools' socializing power and the role of other institutions and forces).

70. Some data suggest that there is little, if any, difference between the attitudes of public and private students, and, in fact, private schools may foster slightly better civic attitudes. David E. Campbell, *The Civic Side of School Choice: An Empirical Analysis of Civic Education in Public and Private Schools*, 2008 BYU L. REV. 487, 509 (2008).

does not necessarily project an end result other than self-actualization.⁷¹ The key to group perpetuation, however, is not the promotion of just any set of common values. Rather, group perpetuation requires the adoption of specific group-enhancing values, among the most notable of which are equality, inclusion, and religious tolerance.⁷²

In practice, these values amount to processes that allow individuals to fully and freely participate in education and later democracy, both of which are necessary if collective-based education is to maintain its desired robust public domain rather than the mere dominance of majorities and pluralities. To be clear, these same values and processes are important to individualized education as well because they protect individuals' rights and serve as a check on majorities imposing themselves. The difference is that the individual's primary interest in these processes is to protect the individual, while collective-based education's interest in these processes is to perpetuate itself and ensure the group's full participation in democracy and education.⁷³

The Court summarized the rationale of a perpetuating or self-preserving system of education in *Plyler v. Doe*,⁷⁴ writing:

The "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance." We have recognized "the public schools as a most vital civic institution for the preservation of a democratic system of government," and as the primary vehicle for transmitting "the values on which our society rests." "[A]s . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." And these historic "perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists." In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups

71. Harry Brighouse, *School Vouchers, Separation of Church and State, and Personal Autonomy*, in MORAL AND POLITICAL EDUCATION, *supra* note 37, at 244, 255.

72. John Tomasi, *Civic Education and Ethical Subservience: From Mozart to Santa Fe and Beyond*, in MORAL AND POLITICAL EDUCATION, *supra* note 37, at 193, 200–01.

73. CURTI, *supra* note 55, at 584–85.

74. 457 U.S. 202 (1982).

are denied the means to absorb the values and skills upon which our social order rests.⁷⁵

While individually motivated education ascribes to many of these same collective values, as discussed above, individual-based education's continued existence is not dependent on these values, whereas the continued existence of collective-based education largely is. Group perpetuation requires future adherence to collective values by a substantial portion of society. If only a random swath of students adheres to collective values, the values will have no operative effect.⁷⁶ By the same token, if collective values take root as dominant social values, the basic existence of individualized education and potentially antisocial values will not pose a per se threat to collective-based education. In these respects, the perpetuation of collective-based education and values requires substantial collective action, whereas individualized education does not.⁷⁷ In addition, the dominance of collective-based education, so long as it does not prohibit individualized education, does not threaten the mission of individualized education in the way that the dominance of individualized education threatens the mission of collective-based education.

D. Competition

Competition is to individualized education what social cohesion and group values are to collective-based education. Those favoring an individualized concept of education argue that the absence of competition in the traditional public school system is the weakness that stymies its progress.⁷⁸ For them, it is the marketplace and the competition it brings that would force schools to be responsive to individuals.⁷⁹ In contrast, supporters of collective-based education, even if they conceded some weakness in the current system, would resist the notion that competition is the cure. Rather, competition, in several respects, is antithetical to the core premises of collective-based public education.⁸⁰

75. *Id.* at 221 (citations omitted) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923)).

76. See MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 64 (2002).

77. See *id.*

78. CAROL ASCHER ET AL., HARD LESSONS: PUBLIC SCHOOLS AND PRIVATIZATION 14–15 (1996).

79. *Id.*

80. See Daphna Lewinsohn-Zamir, *Consumer Preferences, Citizen Preferences, and the Provision of Public Goods*, 108 YALE L.J. 377, 399–400 (1998) (reasoning that public goods are antithetical to competition).

Competition inevitably results in winners and losers. An individualized concept of education can tolerate these results because, after all, individuals have chosen their school or educational program and are thus culpable in their success or failure.⁸¹ Moreover, in a market, individuals will soon enough have the opportunity to make better choices and effectively punish those schools that deliver subpar experiences. But it is hard to justify losers under a group concept of public education—even if losers in the short term will somehow produce a larger number of winners in the long term.⁸² First, collective-based education relies on mutually reinforcing systems, not mutually undermining systems.⁸³ Second, collective-based education is premised on roughly equal opportunities across the group.⁸⁴ Uneven results pose any number of threats to the group, including inequality, lowered social benefits, and fissures in social cohesion.⁸⁵

Most striking in the individualized concept of education is its seeming lack of concern for equality. On some fundamental level, inequality is a necessary ingredient to competition.⁸⁶ Unequal choices are what allow individuals to identify better education, choose that education, and leverage those choices for the overall improvement in the marketplace.⁸⁷ The fact that some will make bad choices and have access to diminished education is simply the cost of having a system that can respond to individuals.⁸⁸

Given individualized education's preference for competition, one might assume that as soon as competition enters the overall

81. Steven K. Green, *The Illusionary Aspect of "Private Choice" for Constitutional Analysis*, 38 WILLAMETTE L. REV. 549, 552–60 (2002); Note, *The Limits of Choice: School Choice Reform and State Constitutional Guarantees of Educational Quality*, 109 HARV. L. REV. 2002, 2002 (1996).

82. See, e.g., Note, *supra* note 81, at 2010–13 (arguing that state constitutional rights to education would not tolerate educational failures, even in a voucher program).

83. See *id.*

84. Gutmann, *supra* note 50, at 25.

85. See *id.* at 25–26.

86. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 89–91 (1962) (noting that competition requires the threat of failure and unequal results); MILTON FRIEDMAN & ROSE D. FRIEDMAN, FREE TO CHOOSE 148 (1980) (“A society that puts equality—in the sense of equality of outcome—ahead of freedom will end up with neither equality nor freedom. . . . On the other hand, a society that puts freedom first will, as a happy by-product, end up with both greater freedom and greater equality.”).

87. FRIEDMAN, *supra* note 86, at 91; see FRIEDMAN & FRIEDMAN, *supra* note 86, at 170 (noting that unequal choices would raise the quality of even the worst school in absolute, if not relative, terms).

88. See Derek W. Black, *Civil Rights, Charter Schools, and Lessons to be Learned*, 64 FLA. L. REV. 1723, 1729 (2012) (explaining that for some parents a qualitatively worse education that they choose is superior to a program outside their regulatory power).

education market it is to the benefit of individualized education. While this is generally true, it is worth recognizing that a mixed system of individual- and collective-based public education potentially creates problems for both. A system of education whereby individualized education is primarily delivered through private options and only a limited number of publicly financed individual options are available means that individualized education is limited primarily to the affluent.⁸⁹ Thus, in the short term, the dominant paradigm is likely to continue to be collective-based education. Even in the long term, individualized education will be marginalized until public policy shifts. With that said, the long-term trajectory of education shifts heavily toward individualized education once competition enters the system.

A mixed system, even one in which collective-based education is currently the primary participant, draws collective-based education into a competitive marketplace that is incompatible with certain aspects of its mission.⁹⁰ Consider, for instance, those who prefer the collective system. Once the individualized system is able to seriously compete with the collective system, those who otherwise prefer the collective system face a dilemma: tolerate the negative effects that individual choices may have on the group system⁹¹ or reconsider the decision to remain in the group system.⁹² In the context of a public school system that uses public dollars to facilitate individuals' choice to opt out of the group system, opting out is overincentivized.⁹³ Once a certain number of students opt out, the rational decision, even for those who otherwise want to stay in the group public school, may be to opt out before they feel any significant negative effects from the competition. The only

89. See generally Catharine V. Ewing, *Constitutional Law: Vouchers, Sectarian Schools, and Constitutional Uncertainty: Choices for the United States Supreme Court and the States*, 53 OKLA. L. REV. 437, 439–41, 469 (2000) (discussing vouchers as a means to give the poor the same options as others).

90. See Joe Nagel, Note, *Agostini v. Felton: Separating from Separation of Church and State to Allow School Choice*, 29 U. TOL. L. REV. 581, 608 (1998) (“[S]chool choice programs pit public schools against private schools in a competition for tax dollars.”).

91. *State Constitutional Law – Education Clause – Florida Supreme Court Declares State’s School Voucher Program Unconstitutional*. – Bush v. Holmes, 919 So. 2d 392 (Fla. 2006), 120 HARV. L. REV. 1097, 1103 (2007) (discussing how vouchers can diminish educational quality in the schools students leave).

92. See *Choice*, EDUC. WK., Aug. 3, 2004, at 1 (explaining that when parents are faced with individualized school options, they can either take advantage of school choice or risk leaving their children in an underperforming public school).

93. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 703–04 (2002) (Souter, J., dissenting) (emphasizing that the voucher system in Cleveland incentivized students to attend religious schools that did not even correlate with their own religious views).

countervailing force would be the person's commitment to collective values, but at some point self-interest will overwhelm that commitment for most. In effect, a mixed system can create a prisoner's dilemma that inevitably undermines collective-based public schools.⁹⁴

E. Dissent

Competition and opt outs also raise the related problem of empowering dissenters. Dissent, in and of itself, is not problematic. Our democratic process thrives upon public debate and the protection of intellectual space for dissenters.⁹⁵ But protecting space for dissenters does not necessitate empowering the dissenter.⁹⁶ Rather than strengthening democratic processes and results, empowering the dissenter can undermine them. A democratic process and the public policy it generates rest on the will and wisdom of the majority (within constitutional bounds).⁹⁷ Even in the face of virulent dissent, the majority sets policy for the whole. While some policies can tolerate exceptions for dissenters, most policies require compliance by both the majority and dissent if they are to be effective.⁹⁸ Consider a duly enacted tax policy that allows dissenters to opt out to some extent and the effect it would have on the overall budget that is allocated for the benefit of all.⁹⁹ For collective-based policy to work, the absolute right of the dissenter can only be to voice his dissent, not to act upon it.¹⁰⁰ Even when the group has consented to dissenting action, as with free exercise of religion, our courts have demonstrated the infeasibility of broad action-based

94. See Gutmann, *supra* note 50, at 43 (noting that when children can opt out of the public school system, the public schools are not improved but rather the entire school system deteriorates for the students who cannot afford to opt out).

95. See generally *id.* at 25–26 (discussing education as preparation for the deliberative process of democracy).

96. See *id.* at 26 (indicating that democracy involves debate over mutually binding matters).

97. Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1438–39 (1991).

98. See Gutmann, *supra* note 50, at 29 (“Parents do not have a general right to override otherwise legitimate democratic decisions concerning the schooling of their children.”); Rosenblum, *supra* note 69, at 148–49.

99. One could argue that our tax system, with its extensive deductions that disproportionately favor certain groups, allows for this exact sort of dissent. At the very least, deductions effectively allow “dispersed donors to determine which agents, projects, or causes the government will finance.” Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387, 388 (1998).

100. “In a democracy, no one person can or should define public values.” MINOW, *supra* note 76, at 144; see also Rosenblum, *supra* note 69, at 148.

exemptions for dissenters and have placed significant limitations on them.¹⁰¹

Collective-based public education holds fast to these democratic principles. The nature of its values and goals generally requires collective rather than individual action.¹⁰² An individual concept of education, however, need not even recognize the legitimacy of collective democratic educational judgments that conflict with individual educational interests.¹⁰³ To counteract the potential oppression of the majority, an individual-based education would demand that individuals have the right not only to voice dissent but to act upon it by opting out of the public system. To be fair, not all dissent is equal in terms of its effect on the group. Dissent that does not have a financial, demographic, or value effect on the group is not necessarily problematic.¹⁰⁴ But as the next Part reveals, a significant number of dissenters do so for reasons that are problematic for the group.

II. REAL WORLD TENSIONS IN ACHIEVING THE PUBLIC GOOD

Part I paints with an admittedly broad brush and is surely open to theoretical caveats and retorts. But, as a practical matter, these theoretical tensions play out in the real world of education and with high stakes. The prevalence of individualized concepts of education in public policy is on the rise and has led to new policies that, consistent with the above-discussed theoretical positions, threaten to undermine group values in education. The most notable examples are in regard to charters and vouchers. As currently implemented, public policy places relatively few limits on charters' and vouchers' ability to undermine the mission and viability of traditional public schools and, likewise, fails to ensure educational

101. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877–88 (1990), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* *Sossamon v. Texas*, 131 S. Ct. 1651 (2011). As the Court reasoned, “a system in which each conscience is a law unto itself” is anarchy. *Id.* at 890.

102. MINOW, *supra* note 76.

103. See generally Gutmann, *supra* note 50, at 29–30 (noting civic minimalists' desire to limit the values taught in school so as to not invade on the province of the family); McConnell, *supra* note 59, at 104–06 (rejecting majority imposition of values on smaller groups).

104. See generally Gutmann, *supra* note 50, at 26–27, 36–37, 40 (discussing the benefits of reasonable dissent and disagreement); McConnell, *supra* note 59, at 106 (“The real issue is the inculcation of values . . . where they *conflict* with the values that would be taught [in other schools].”).

quality and fairness for those students attending charter schools or private schools through vouchers.¹⁰⁵

A. *Demographic Inclusion*

Various charter school and voucher programs—but not all—have worked at odds with public values related to demographic inclusion and integration based on race, ethnicity, disability and language status. From the outset, many voucher and charter advocates understandably object to the charge in regard to race. They emphasize that mandatory desegregation has largely ended,¹⁰⁶ and racial integration is rarely discussed as a major policy agenda in traditional public schools.¹⁰⁷ Thus, it is hypocritical to attack charters and vouchers for a weakness that traditional public schools also have.¹⁰⁸

While voucher and charter advocates are correct that integration no longer occupies the same priority as it once did, to suggest that it is irrelevant to traditional public schools would be a gross overstatement. The Supreme Court recently recognized that schools have a compelling interest in voluntarily pursuing racial integration and diversity.¹⁰⁹ Social-science research continually reaffirms the positive educational outcomes of integration for all students.¹¹⁰ Relying in part on this research, one state supreme

105. Cf. Suzanne Hansen, *School Vouchers: The Answer to a Failing Public Schools System*, 23 HAMLINE J. PUB. L. & POL'Y 73, 103 (2001) (noting that the goal of school vouchers is to force failing schools to adapt and improve).

106. Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1159–60 (2000) (arguing that, although desegregation litigation was not dead in 2000, most surviving cases suffered from severe neglect). *But see* Dennis D. Parker, *Are Reports of Brown's Demise Exaggerated? Perspectives of a School Desegregation Litigator*, 49 N.Y.L. SCH. L. REV. 1069, 1069–70 (2005) (concluding that desegregation litigation is not dead and maintains its importance).

107. See Janet Ward Schofield & Leslie R.M. Hausmann, *The Conundrum of School Desegregation: Positive Student Outcomes and Waning Support*, 66 U. PITT. L. REV. 83, 100 (“After decades of progress in desegregating America’s schools, we as a society are turning our backs on the policy of school desegregation despite both the academic, economic, and social benefits of attending desegregated schools . . .”).

108. See McConnell, *supra* note 59, at 129–30 (offering this criticism of public schools and defending school choice on this front).

109. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797–98 (2007) (Kennedy, J., concurring) (recognizing that school districts have a compelling interest in avoiding racial isolation and achieving a diverse student population). Of course, preventing intentional segregation has been and always will be a constitutional mandate.

110. Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 403–09 (2012); Robert A. Garda, Jr., *The White Interest in School Integration*, 63 FLA. L. REV. 599, 620–21 (2011).

court has mandated the integration of schools, even in the absence of evidence of intentional segregation.¹¹¹ In addition, over forty school districts affirmatively use race or socioeconomic status to achieve integration in their public schools.¹¹² A far larger number of districts, although refraining from taking affirmative steps to increase integration, consciously maintain whatever level of integration they currently have and lament the possibility of resegregation.

Integration gains have always been hard fought and subject to reversal. But so long as the courts or the local majority remained committed to integration, integration was not subject to direct subversion.¹¹³ Parents could always move away or enroll their children in private schools, and many did,¹¹⁴ but those who remained in the system would be compelled to participate in integration. Most important, the state was prohibited from directly facilitating the segregative acts of private actors.

Publicly financed support of individualized concepts of education represents a retreat from these constitutional and collective-based principles. Without clear limits and enforcement of them, charter school and voucher programs facilitate parents' ability to dissent not just in word but in action against integration. Cumulative dissents of this nature threaten, and potentially render

111. *Sheff v. O'Neill*, 678 A.2d 1267, 1271, 1290–91 (Conn. 1996) (noting that most of the plaintiffs' actions were premised on de facto segregation and holding that a declaratory judgment would be entered for the plaintiffs and directing "the legislature and the executive branch to put the search for appropriate remedial measures at the top of their respective agendas"); *see also* *Paynter v. State*, 797 N.E.2d 1225, 1226–27 (N.Y. 2003) (dismissing the complaint for failing to state a claim under the education article of the state constitution despite allegations of state practices and policies resulting in high concentrations of minority students in the school district); *Class Action Complaint* at ¶¶ 22–25, *NAACP v. Minnesota*, No. 27-CV-95-014800 (Minn. Dist. Ct. Sept. 19, 1995) (arguing that the state allowed segregated schools to continue to exist); *Second Amended Complaint* at ¶¶ 26–34, *Hoke Cnty. v. Charlotte-Mecklenburg Bd. of Educ.*, No. 95 CVS 1158 (Wake Cnty. Sup. Ct. Sept. 30, 2005), *available at* <http://www.law.unc.edu/documents/civilrights/briefs/2ndamendedcomplaint.pdf> (arguing that the state adopted a plan that would perpetuate racial and socioeconomic status segregation).

112. RICHARD D. KAHLENBERG, *THE CENTURY FOUND., RESCUING BROWN V. BOARD OF EDUCATION: PROFILES OF TWELVE SCHOOL DISTRICTS PURSUING SOCIOECONOMIC SCHOOL INTEGRATION* 41 (2007), *available at* <http://tcf.org/assets/downloads/tcf-districtprofiles.pdf>.

113. *See* *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 460–67, 487 (1982) (striking down legislative efforts to prevent local districts from desegregating).

114. GARY ORFIELD ET AL., *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 314–15 (Gary Orfield & Susan E. Eaton eds., 1996); *see also* *Milliken v. Bradley*, 418 U.S. 717, 752–53 (1974) (limiting a desegregation order that attempted to address white flight).

infeasible, publicly enacted integration policy. Consider Wake County, North Carolina, which has run one of the most effective voluntary desegregation plans in the country,¹¹⁵ and Mecklenburg County, North Carolina, which until the late 1990s ran one of the most effective mandatory desegregation plans in history and followed it with some modest voluntary efforts.¹¹⁶

Both districts now confront circumstances where charter schools may undermine the integration the districts currently maintain or seek to create. North Carolina historically limited the number of charter schools in the state to one hundred (approximately one per school district),¹¹⁷ which afforded school districts significant control over the demographics of their schools. With such control, the voluntary integration plan in Wake County and the remnants of mandatory and voluntary desegregation in Charlotte-Mecklenburg bore a high likelihood of effectiveness.¹¹⁸ In response to federal incentives, however, North Carolina recently lifted its cap on charter schools.¹¹⁹ Removing the cap on charters drastically increases the opportunity for integration dissenters to create their own schools or fill seats in otherwise legitimately motivated charter schools.¹²⁰

Understanding the threat that publicly financed or sanctioned dissent options present, courts barred analogous actions in mandatory desegregation proceedings, even if such actions were not clearly racially motivated. For instance, courts blocked neighboring school districts from accepting student transfers when the effect was to impede integration in the desegregating district.¹²¹ Federal and

115. See KAHLENBERG, *supra* note 112, at 4.

116. *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 311 (4th Cir. 2001) (ending mandatory desegregation).

117. Meghan Knight, Comment, *Cyber Charter Schools: An Analysis of North Carolina's Current Charter School Legislation*, 6 N.C. J.L. & TECH. 395, 398 (2005).

118. Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513, 1546 (2003) (finding that students from integrated elementary schools in the Charlotte-Mecklenburg area performed better on standardized tests in middle and high school).

119. Rob Christensen, *Perdue Signs Law Lifting Cap on Charter Schools*, NEWS & OBSERVER (June 17, 2011, 6:08 P.M.), <http://www.newsobserver.com/2011/06/17/1281607/perdue-signs-law-lifting-cap-on.html> (discussing North Carolina's elimination of its cap on charter schools).

120. *Cf. id.* ("This bill will allow for more choices in our education system . . ." (internal quotation marks omitted)); see also Leland Ware & Cara Robinson, *Charters, Choice, and Resegregation*, 11 DEL. L. REV. 1, 5 (2009) (finding that charter schools are often more segregated than public schools).

121. See, e.g., *Lee v. Eufaula City Bd. of Educ.*, 573 F.2d 229, 235 (5th Cir. 1978) (directing the district court to determine whether "the acceptance of any transfers from Barbour County has the cumulative effect of reducing desegregation or reinforcing the dual school system" and thus should be enjoined).

state charter policies, however, do very little, if anything, to guard against these problems. Instead, by lifting caps on charters and removing other restrictions, federal and state policy incentivize charter schools and permit them to have the exact same negative effects on duly enacted integration policies that desegregation sought to prevent.¹²²

With the caps on charters lifted, civil rights advocates in North Carolina charge that charter schools are one of the biggest threats to ongoing integration efforts in the state.¹²³ Over the past decade, Charlotte-Mecklenburg has become the most segregated district in the state, while also amassing the largest charter school population in the state in terms of raw numbers and one of the largest in terms of percentage.¹²⁴ To be fair, the termination of court-ordered desegregation is the primary cause of segregation in Charlotte-Mecklenburg, but charter schools exacerbate the problem and serve as a significant block on attempts to remedy the problem.¹²⁵ In fact, charter applications show no abatement in Charlotte-Mecklenburg. In 2012, sixteen percent of the state's charter school applications were from Charlotte-Mecklenburg even though less than ten percent of the state's students live there.¹²⁶ Wake County has the second-highest number of students in charter schools in terms of raw numbers and is slightly above the state average in terms of percentage.¹²⁷ Its moderate percentage is likely a reflection of the district's longstanding high academic quality,¹²⁸ but the ongoing

122. Mark Dorosin & Benita N. Jones, *Charters' Uneven Racial Makeup*, NEWS & OBSERVER (Apr. 27, 2010), <http://www.newsobserver.com/2010/04/27/455015/charters-uneven-racial-makeup.html>; see also Jamie Gullen, *Colorblind Education Reform: How Race-Neutral Policies Perpetuate Segregation and Why Voluntary Integration Should Be Put Back on the Reform Agenda*, 15 U. PA. J.L. & SOC. CHANGE 251, 266–68 (2012).

123. Dorosin & Jones, *supra* note 122 (explaining the extent to which charter schools in North Carolina have begun to evidence racial isolationism).

124. N.C. DEPT OF PUB. INSTRUCTION, CHARTER SCHOOL MEMBERSHIP BY LOCAL EDUCATION AGENCY BY PERCENTAGE IN CHARTER SCHOOL MEMBERSHIP SCHOOL MONTH 1, 2011–12 (2012), available at <http://www.ncpublicschools.org/docs/charterschools/membershippercentage11-12.pdf>.

125. Genevieve Siegel-Hawley & Erica Frankenberg, *Does Law Influence Charter School Diversity? An Analysis of Federal and State Legislation*, 16 MICH. J. RACE & L. 321, 356–58 (2011) (examining the failure of North Carolina legislative efforts to ensure diversity among charter schools).

126. See N.C. DEPT OF PUB. INSTRUCTION, *supra* note 124; 2013–2014 Applications, OFF. CHARTER SCHOOLS, <http://www.ncpublicschools.org/charterschools/applications/2013-14/> (last visited Apr. 8, 2013).

127. N.C. DEPT OF PUB. INSTRUCTION, *supra* note 124.

128. See generally RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 252–54 (Brooking Inst. Press ed., 2001) (discussing the educational effectiveness of Wake County schools).

debates over integration show signs of driving more charter school interest and enrollment.¹²⁹

Vouchers have not received as much attention on this front because voucher programs are few in number and generally limited in effect. More importantly, some older voucher programs have an integrative purpose.¹³⁰ Recent evidence, however, suggests a resurgence of voucher interest with different motivations.¹³¹ Without value-based controls to check these motivations, vouchers, like charters, can undermine racial equity and increase segregation. The Supreme Court's opinion in *Zelman v. Simmons-Harris*,¹³² approving Cleveland's voucher program, offers an instructive example.¹³³ Because the legal issues before the Court in *Zelman* related primarily to religion,¹³⁴ no serious attention was given to integration. But in justifying the program, the Court emphasized that the motivation for the voucher program was to provide better education options for poor and predominantly minority students in Cleveland's school district.¹³⁵ Therein lies the tragic irony that was lost on the Court: the program did nothing to address the source of the problem.

First, as in many other struggling inner-city school districts, vouchers for Cleveland's students cannot be fairly characterized as gratuitous offers from the state or as accommodations for parents with leanings toward individual-based education.¹³⁶ Rather, vouchers were the state's sad substitute for remedying what was likely a constitutionally inadequate education.¹³⁷ The Supreme Court of Ohio had already recognized five years prior to *Zelman* in *DeRolph v. State*¹³⁸ that students have a right to an adequate education under the state constitution and that the state's education system was failing to deliver it.¹³⁹ While vouchers may have freed

129. See Dorosin & Jones, *supra* note 122.

130. Robert Holland & Don Soifer, *How School Choice Benefits the Urban Poor*, 45 HOW. L.J. 337, 362–65 (2002) (asserting that research indicates that allowing parents to choose children's schools has increased racial integration).

131. See Cavanagh, *supra* note 7.

132. 536 U.S. 639 (2002).

133. Klint Alexander & Kern Alexander, *Vouchers and Privatization of American Education: Justifying Racial Resegregation from Brown to Zelman*, 2004 U. ILL. L. REV. 1131, 1149 (2004).

134. See *Zelman*, 536 U.S. at 648–49.

135. *Id.* at 644.

136. See *id.* at 684 (Stevens, J., dissenting) (explaining that the voucher program only provided relief for fewer than five percent of the students in the Cleveland City School District).

137. *Id.* at 684–85.

138. 677 N.E.2d 733 (Ohio 1997).

139. *Id.* at 747 ("We therefore hold that Ohio's elementary and secondary public school financing system violates . . . the Ohio Constitution, which mandates a thorough and efficient system of common schools throughout the

some students from unconstitutional conditions, they did nothing for the students left behind. Recognizing this in advance, many minority parents choose vouchers not because they want to but because they are justifiably skeptical of the state's willingness to fix the underlying problem; they feel they have no choice other than to accept the state's half-measures.¹⁴⁰

Second, vouchers did nothing to alleviate Cleveland's segregation problem. Instead, vouchers reinforced segregation by disproportionately helping advantaged students leave an overwhelmingly disadvantaged school district: while only twenty-three percent of students in Cleveland's schools were middle income, forty percent of the students who received vouchers were middle income.¹⁴¹ In other words, middle-income students were more than twice as likely to receive a voucher as low-income students.¹⁴² Thus, vouchers increased rather than decreased poverty concentration in Cleveland's public schools.

National studies suggest that the experiences of Wake County, Charlotte-Mecklenburg, and Cleveland are prime examples of a disturbing trend rather than exceptions. At the school-district level,

state."); see also *DeRolph v. State*, 780 N.E.2d 529, 530 (Ohio 2002) ("[T]he General Assembly has not focused on the core constitutional directive of . . . 'a complete systematic overhaul' of the school-funding system."); *DeRolph v. State*, 678 N.E.2d 886, 888 (Ohio 1997) ("The creating of a constitutional system for financing elementary and secondary public education in Ohio is not only a proper function of the General Assembly, it is also expressly mandated by the Ohio Constitution.").

140. See generally James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 54 UCLA L. REV. 547, 567-73 (2007) (discussing the repackaging of the voucher agenda to appeal to African Americans).

141. Compare *Zelman*, 536 U.S. at 647 (indicating that sixty percent of the students using vouchers were low income), with *Common Core of Data (CCD)*, NAT'L CENTER FOR EDUC. STAT., <http://nces.ed.gov/ccd/> (last visited Mar. 28, 2013) (choose "Build a Table" hyperlink; select "District" as the row variable; choose "2001-2002" as the school year; select "Basic Information (X): Agency Name - By Survey Year (District)," "Total Enrollment: Total Students (School)" and "Students in Special Programs: Total Free and Reduced Lunch Students (School)" as the columns; choose "Ohio" as the filter; click the "View Table" hyperlink; click the "7" hyperlink to reach page seven of the table) (showing that in the 2001 to 2002 academic year, 55,333 students out of 72,080 total students were on free or reduced lunch). The number of children on free or reduced lunch is the most commonly used indicator of student poverty and is currently the only way to measure the percentage of low-income students in school. See Siegel-Hawley & Frankenberg, *supra* note 125, at 362-63.

142. $(40/23) / (60/77) = 2.2$ (This multiplier was calculated by taking the percentage of students that were not listed as low income in *Zelman* and dividing it by the percentage of students not receiving free or reduced lunch in Cleveland schools. The result was then divided by the result of the percentage of students listed as low income in *Zelman* divided by the percentage of students that were receiving free or reduced lunch in Cleveland schools.).

data indicate that the more African American students that are enrolled in a school district, the more students enroll in charter schools.¹⁴³ This basic point, however, can be misleading, as a substantial number of charter schools open in minority neighborhoods and disproportionately enroll minorities.¹⁴⁴ These students are seemingly fleeing from failing schools rather than integration. Thus, large-scale studies that do not account for this sort of local variation overstate the notion that charter schools are universally driving or catering to segregative impulses.

More nuanced studies, however, still find a troubling connection between race, illicit motivations, and charter schools. For instance, a detailed study of Michigan charter schools took multiple local variables into account and found that districts with greater racial heterogeneity, more private schools, and higher spending on special education tend to have more charter schools.¹⁴⁵ In other words, integrated districts, or those with the capacity to integrate, along with those districts attempting to meet their obligations to special needs students, are the very places where charters are more likely to spring up.¹⁴⁶ A 2002 study of Texas charter schools similarly found that a student's race is a partial predictor of whether and where a student enrolls in a charter school, with students skewing toward schools that reflect the students' own race.¹⁴⁷ In this respect, charter schools strongly resemble private schools, which studies have shown tend to be a response to racial heterogeneity and a precipitant of decreased financial support for public schools.¹⁴⁸ In short, these studies suggest that a large percentage of charters are a response to collective values of racial and special needs inclusion, and consistent with low commitments to public education in general.

B. Competition: Finances, Students, and Facilities

While the potential racial impacts of charters on public schools are serious, the fiercest battles have arisen over competition for scarce resources. At the macro level, the overall pot of funds devoted to elementary and secondary schools has not significantly

143. Christiana Stoddard & Sean P. Corcoran, *The Political Economy of School Choice: Support for Charter Schools Across States and School Districts*, 62 J. URB. ECON. 27, 47 (2007).

144. *Id.* at 40–41.

145. Linda Renzulli, *Organizational Environments and the Emergence of Charter Schools in the United States*, 78 SOC. EDUC. 1, 16, 19 (2005).

146. *Cf. id.*

147. Gregory R. Weiher & Kent L. Tedin, *Does Choice Lead to Racially Distinctive Schools? Charter Schools and Household Preferences*, 21 J. POL'Y ANALYSIS & MGMT. 79, 88, 91 (2002).

148. Sean Corcoran & William N. Evans, *Income Inequality, the Median Voter, and the Support for Public Education* 33 (Nat'l Bureau of Econ. Research, Working Paper No. 16097, 2010).

increased in recent years and, in some places, has actually shrunk as a result of the 2008 recession.¹⁴⁹ In contrast, the public funds available for charters, at both the federal and state level, have drastically increased in recent years.¹⁵⁰ No complicated formulas are required to see that funds are shifting from traditional public schools to charters. If one believes that public schools tend to be flush with resources or waste whatever resources they have, this shift is not necessarily problematic. But research and litigation suggest that neither is true. Rather, a significant portion of traditional public schools has been underfunded for some time.¹⁵¹

Charter proponents argue the foregoing misframes funding trends. They argue that charters themselves are not reducing the funding available for public schools. Rather, funding has just shifted from one public school sector to another.¹⁵² Moreover, because education funding does not belong to traditional public schools, education funds should follow students to the public schools that serve them best.¹⁵³ Charters may have a point as a general matter, but this response obscures the fact that many charters operate on an individual-based concept of education rather than a collective-based one.¹⁵⁴ Thus, even if it were fair to say money is only moving from one public school to another, public money is being diverted away from collective-based education to individual-based education. To the extent the public sees charters as something other

149. Nicholas Johnson et al., *An Update on State Budget Cuts*, CENTER ON BUDGET & POL'Y PRIORITIES (Feb. 9, 2011), <http://www.cbpp.org/cms/?fa=view&id=1214>.

150. Erica Frankenberg & Genevieve Siegel-Hawley, *Choosing Diversity: School Choice and Racial Integration in the Age of Obama*, 6 STAN. J. C.R. & C.L. 219, 244 (2010) (discussing specific federal budget increases for charter schools and their comparison to other programs). In 2009, the Obama Administration used a \$4.3 billion competitive grant program ("Race to the Top") to leverage changes in state policies. Sam Dillon, *Administration Takes Aim at State Laws on Teachers*, N.Y. TIMES, July 24, 2009, at A15 (noting that one of the most notable demands was eliminating caps on charters); Sam Dillon, *After Criticism, the Administration Is Praised for Final Rules on Education Grants*, N.Y. TIMES, Nov. 12, 2009, at A20 (stating that substantial increases in state funding will necessarily follow).

151. See, e.g., BAKER ET AL., *supra* note 24, at 5, 7, 14–19; Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1500 (2007) (explaining that school finance litigation reveals inequity and inadequacy).

152. THOMAS B. FORDHAM INST., *FUND THE CHILD: TACKLING INEQUITY & ANTIQUITY IN SCHOOL FINANCE* 14 (2006), available at <http://www.edexcellence.net/publications/fundthechild.html>.

153. *Id.* at 13–14.

154. *Id.* at 21.

than pure public schools, this diversion may also erode support for public schools in general.¹⁵⁵

The battle between charter schools and traditional public schools over resources at the local level is even more obvious, particularly in regard to facilities and student enrollments, the latter of which correspond with money.¹⁵⁶ Unsurprisingly, New York City rests at the epicenter of facility tensions. There, both traditional public schools and charter schools argue that they lack adequate facilities, and both are seemingly correct.¹⁵⁷ But rather than lifting the tide for both camps, reports suggest that the school district is facilitating a “crabs in a barrel” syndrome by transferring significant space to charter schools from public schools.¹⁵⁸ In fact, tensions were so high recently that the NAACP brought suit against the school district on behalf of students in traditional public schools.¹⁵⁹ The NAACP argued that the district was forcing traditional public school students to eat lunch two hours early, limiting their use of the library, and was moving them to undesirable locations within the building, all so that charter school students could have additional and preferable access to those same facilities.¹⁶⁰ Although not as dramatic, analogous facility struggles are occurring across the country, so much so that Congress has even sought to address the issue.¹⁶¹ Competition for students is equally

155. Gutmann, *supra* note 37, at 178–79; see also MINOW, *supra* note 76, at 22 (discussing “disillusionment with government solutions and faith in private approaches”).

156. See generally Lisa Lukasik, *Deconstructing a Decade of Charter School Funding Litigation: An Argument for Reform*, 90 N.C. L. REV. 1885, 1897–918 (2012) (discussing the battles in North Carolina); Jeanette M. Curtis, Note, *A Fighting Chance: Inequities in Charter School Funding and Strategies for Achieving Equal Access to Public School Funds*, 55 HOW. L.J. 1057, 1067–95 (2012) (arguing that charter schools and public schools should be funded equally by the state).

157. Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, 53 (N.Y. Ct. App. 2006) (discussing the history of school finance litigation in New York City and its relationship to facilities); N.Y.C. CHARTER SCH. CTR., UNEQUAL SHARES: THE SURPRISING FACTS ABOUT CHARTER SCHOOLS AND OVERCROWDING 1 (2011), available at http://www.nyccharterschools.org/sites/default/files/resources/unequal_shares.pdf.

158. See, e.g., Juan Gonzalez, *Eva Moskowitz Has Special Access to Schools Chancellor Klein—And Support Others Can Only Dream of*, N.Y. DAILY NEWS, Feb. 25, 2010, at 10; Juan Gonzalez, *Students at PS 123 in Harlem Are Pushed Aside for Charter School Expansion*, N.Y. DAILY NEWS, June 3, 2009, at 10. But see N.Y.C. CHARTER SCH. CTR., *supra* note 157, at 7–8.

159. Benjamin Todd Jealous, Op-Ed, *Why the NAACP Is Suing New York*, WASH. POST, June 5, 2011, at A15.

160. *Id.*

161. Empowering Parents Through Quality Charter Schools Act, H.R. 2218, 112th Cong. (2011) (stating one of its purposes as extending equitable resources for charter school facilities); see also Alyson Klein, *House Gives Bipartisan*

fierce because of the serious financial consequences that follow. In some states, when a student transfers to a charter school, the local school district must fund his or her education out of the school district's budget, which can include local and state funds.¹⁶² In other states, local districts only lose the per-pupil allotment from the state.¹⁶³ Either way, whoever wins the competition for students ultimately wins the battle over money.¹⁶⁴ From the charter school theorists' perspective, this is the whole point and will drive school improvement in both sectors.¹⁶⁵ But, as discussed earlier, serious questions remain as to whether public schools can effectively function as a market. And, regardless of the effectiveness of the market, charters are better positioned to exploit it than traditional schools.¹⁶⁶

First, while charters may compete amongst themselves—which will work to the detriment of some—charter schools on the whole have little to lose from competition and public schools nothing to gain. This is not to say charters do not face numerous start-up challenges and costs they stand to forfeit; they do.¹⁶⁷ But the movement of students is, by default, movement to charter schools and hence to their benefit.¹⁶⁸ Moreover, in general, the movement of a student to a charter school is not an economically neutral transfer

Stamp of Approval to Charter Bill, EDUC. WK. (Sept. 13, 2011, 2:57 PM), http://blogs.edweek.org/edweek/campaign-k-12/2011/09/but_behind_the_scenes_some.html.

162. Curtis, *supra* note 156, at 1079.

163. *Id.* at 1080.

164. See Note, *supra* note 81, at 2006 (noting that money “follows the student”); *Closing the Achievement Gap, Charter School FAQ*, PBS (Jan. 17, 2013, 12:19 PM), <http://www.pbs.org/closingtheachievementgap/faq.html#q8>.

165. Kevin S. Huffman, *Charter Schools, Equal Protection Litigation, and the New School Reform Movement*, 73 N.Y.U. L. REV. 1290, 1301 (1998); Curtis, *supra* note 156, at 1085.

166. Huffman, *supra* note 165, at 1308.

167. See, e.g., R. David Walk, Jr., *How Educational Management Companies Serve Charter Schools and Their Students*, 32 J.L. & EDUC. 241, 251–52 (2003) (discussing the advantages of management companies and their impact on the problem of start-up funds); Curtis, *supra* note 156, at 1061. In fact, challenges regarding funding, student turnover, scaling-up, and management are so great that studies routinely evaluate charter schools. NAT'L ALLIANCE FOR PUB. CHARTER SCH., CHARTER SCHOOL ACHIEVEMENT: WHAT WE KNOW 2 (2009) available at http://www.publiccharters.org/data/files/Publication_docs/Summary_of_Achievement_Studies_Fifth_Edition_2009_Final_20110402T222331.pdf (noting that there are currently over two hundred studies examining charter school achievement).

168. See generally NAT'L ALLIANCE FOR PUB. CHARTER SCH., A GROWING MOVEMENT: AMERICA'S LARGEST CHARTER SCHOOL COMMUNITIES 2 (2012), available at http://publiccharters.org/data/files/Publication_docs/NAPCS%202012%20Market%20Share%20Report_20121113T125312.pdf.

of money.¹⁶⁹ Consider, for instance, that traditional public schools have a relatively static set of fixed costs, largely because, by design, they serve communities in their entirety. In a county school district that has one middle school that serves 750 students, a loss of fifty students, spread across three grade levels, to a charter school is unlikely to change the public schools' operating costs. The loss is just small enough that the district cannot downsize its teaching staff without also downsizing its curriculum. If the curriculum is mandated by the state, the middle school may have no choice but to continue operating with the same staff as before. And, in any event, the school will still have the same costs in terms of facilities, buses, and principals. If the per-pupil funding that went to the charter schools was \$7000, the traditional public school must provide the same services as before but with \$350,000 less. Thus, when enough costs are fixed and monetary losses are too great, charter school growth can threaten the financial viability of a public school.¹⁷⁰ The threat can also create the aforementioned vicious cycle whereby rational actors are incentivized to preemptively exit, which only further exacerbates decline and rationalizes exit.¹⁷¹

Second, charters can exercise an unfair advantage over traditional public schools by competing for only a subset of students. In particular, charter schools can target those students whom charters perceive to be the most attractive, whereas public schools do not actively target students but rather enroll, and are required to enroll, all eligible students.¹⁷² These dissimilar principles of enrollment can unfairly undermine the attractiveness of public schools.

A good deal of research has gone into the extent to which charters "cream" the most motivated students from the overall pool

169. Although discussing interdistrict transfer programs, one author notes this problem when students leave a struggling school district for another. Note, *supra* note 81, at 2004–06 (discussing the danger of school failure that transfers can pose).

170. *Id.* at 2004–05 & n.8.

171. In the context of vouchers, Justice Souter emphasized that the voucher system in Cleveland incentivized students to attend religious schools that did not even correlate with their own religious views. *Zelman v. Simmons-Harris*, 536 U.S. 639, 703–04 (2002) (Souter, J., dissenting).

172. See generally Kevin Booker et al., *The Effect of Charter Schools on School Peer Composition* 1–2 (RAND Corp., Working Paper WR-306-EDU, 2005), available at http://www.ncspe.org/publications_files/RAND_WR306.pdf (discussing the fears the possibility of creaming creates). The most egregious example of charter creaming is the growing trend of charter schools designed specifically for gifted and talented students. Janet R. Decker et al., *Charter Schools Designed for Gifted and Talented Students: Legal and Policy Issues and Considerations*, 259 EDUC. LAW REP. 1, 1–2 (2010).

of local students or exclude high-need students.¹⁷³ Studies that reliably measure whether charters cream motivated students are in relatively short supply due to problems with fairly indentifying and comparing student motivation.¹⁷⁴ But on the question of “cropping” or discouraging the enrollment of high need students, the data tend to show that charters do, in fact, enroll significantly smaller percentages of high-need students—particularly disabled and English Language Learner (“ELL”) students—than traditional public schools.¹⁷⁵ Thus, charter schools indirectly increase the percentage of high-need students and the cost of educating them in traditional public schools, both of which place traditional public schools at a competitive disadvantage in retaining other students.¹⁷⁶ In effect, in a system whereby charter schools play by different rules, public schools are punished for being open to all.

Finally, profit motives can incentivize actions that are contrary to the good of students (whether from a collective or individual standpoint).¹⁷⁷ Cognizant of this risk, federal and most state laws place limits on who can receive a charter to operate a charter school.¹⁷⁸ In particular, they prohibit for-profit entities from starting charters.¹⁷⁹ This prohibition, however, is more symbolic than substantive, as it does not stop the charter school from

173. For an overview of the debate and some of the literature, see generally RON ZIMMER ET AL., DO CHARTER SCHOOLS “CREAM SKIM” STUDENTS AND INCREASE RACIAL-ETHNIC SEGREGATION? (2009), *available at* http://www.vanderbilt.edu/schoolchoice/conference/papers/Zimmer_COMPLETE.pdf.

174. More recently, studies have attempted to isolate this problem by looking at charter schools with lottery enrollments and comparing those who won the lottery to those who did not, as they were similarly situated groups prior to the lottery. *Do Charters ‘Cream’ the Best?: A New Study Finds Breakthrough Evidence*, WALL ST. J. (Sept. 24, 2009), <http://online.wsj.com/article/SB10001424052970204488304574429203296812582.html>.

175. ERICA FRANKENBERG ET AL., CIVIL RIGHTS PROJECT, CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS 12–13 (2010) (indicating the underenrollment of disabled and ELL students); Robert A. Garda, Jr., *Culture Clash: Special Education in Charter Schools*, 90 N.C. L. REV. 655, 681–84 (2012). One study indicates that charters are not necessarily creaming off the highest ability students from public schools, but they are “cropping” off students who require the most services. Natalie Lacireno-Paquet et al., *Creaming Versus Cropping: Charter School Enrollment Practices in Response to Market Incentives*, 24 EDUC. EVALUATION & POL’Y ANALYSIS 145, 150 (2002).

176. Lacireno-Paquet, *supra* note 175, at 155.

177. See generally MINOW, *supra* note 76, at 41–42, 62 (discussing the conflicts of interest that arise when for-profit entities engage in public or nonprofit activities).

178. Julie F. Mead, *Devilish Details: Exploring Features of Charter School Statutes that Blur the Public/Private Distinction*, 40 HARV. J. ON LEGIS. 349, 362 (2003).

179. *Id.*

subcontracting for various educational services, if not all of them, with whomever it wishes. Thus, a routine practice is for a nonprofit to obtain a charter and then transfer all operational responsibility and financing to a private for-profit entity.¹⁸⁰ Under these circumstances, the charter school is nonprofit in name only.¹⁸¹ Through these and other types of arrangements, several egregious cases of profit maximization in charter schools, which operate to the detriment of students, have come to light in recent years.¹⁸² While these cases are likely exceptions to the rule in terms of their severity, and traditional schools are not free from corruption themselves, it is hard to discount the likelihood that, at the margins, profit motives exert corrupting incentives beyond those that would otherwise exist in traditional public schools.¹⁸³

Yet, notwithstanding the various foregoing practical critiques, charter schools and vouchers are neither inherently good nor bad. Rather, the absence of clear standards aligned with the public good, along with implementation oversight, permits charter schools and vouchers to serve the ends that are inconsistent with the public good. Thus, the next Part cautions against polemic discussions and instead focuses on how to bring alternatives to traditional public schools more squarely within the ambit of the public good.

III. FRAMING A NEW CONVERSATION ABOUT CHARTERS, VOUCHERS, PRIVATIZATION, AND THE PUBLIC GOOD

The foregoing discussion of charter and voucher programs does not paint a very favorable picture. The point is not to condemn charters and vouchers per se but to point out the weaknesses in current charter and voucher policies. The weaknesses stem not from charters or vouchers themselves but from overly

180. *Id.* In 2005, for-profit management companies ran over four hundred charter schools. Fiona Greaves & Preston Green, *The Legal Issues Surrounding Partnerships Between Charter Schools and For-Profit Management Companies*, 206 EDUC. L. REP. 27, 27–29 (2006). The number of charter schools, in general, has grown drastically since then. The number of charter schools run by for-profit companies may have as well.

181. See Mead, *supra* note 178, at 362–65 (discussing litigation challenging the grant of charters on this basis, but indicating courts' rejection of the claim).

182. See, e.g., Susan L. DeJarnatt, *Follow the Money: Charter Schools and Financial Accountability*, 44 URB. LAW. 37, 39, 49–51, 72, 73 (2012); Sean Cavanagh, *Philadelphia Founder Charged with Fraud*, EDUC. WK. (July 29, 2012, 3:19 PM), http://blogs.edweek.org/edweek/charterschoice/2012/07/philadelphia_charter_founder_charged_with_fraud.html; Lauren Roth, *NorthStar Charter's \$519,000 Payout to Principal of Failed Florida School*, HUFFINGTON POST (Oct. 26, 2012, 12:21 PM), http://www.huffingtonpost.com/2012/10/26/charter-school-spent-more_n_2021140.html?ref=topbar.

183. See DeJarnatt, *supra* note 182, at 39 (arguing for greater oversight of charters for this reason).

imbuing current policies with individual-based concepts and underemphasizing the collective good. Charter schools, and to some extent vouchers, are pedagogically empty vessels. The beauty in them is that they can be formed to meet any number of agendas. The problem is that they have been hijacked by or, less malevolently, appropriated for the ends of questionable agendas.

The task now for those committed to school improvement and equal opportunity is to clearly articulate the public good in education and redirect charter, voucher, and privatization policy toward it. From the perspective of the group, the question cannot simply be whether voucher and charter programs improve educational outcomes for the students enrolled in them but whether and how the programs serve the public good.¹⁸⁴ Improving student achievement is certainly an important factor in assessing whether a program serves the public good, but it is not the only, or necessarily the primary, question.¹⁸⁵ By relying on student achievement as the only, or dominant, factor in charter and voucher policies, public policy implicitly cedes to an individual concept of the public good in education.

Commitment to education as a public good and for the benefit of the group would require that we go behind student achievement and ask questions about the value-based ends charters and vouchers might serve: the extent to which charters fundamentally operate like public schools, the extent to which charters and vouchers are constrained by public values, and the extent to which charters and vouchers represent dissent from public values. Because these questions are matters of degree rather than absolutes, future policy changes could push charters and vouchers along a spectrum, regardless of where they stand now. Thus, the goal need not be to end or condemn charters and vouchers but to soberly examine whether they further the collective good and how they can evolve.

A. *What Makes a School Public?*

In its critiques and defenses, this Essay has strongly implied a definition of the public good in education, but up until this point it has resisted offering a conclusive definition. The Essay has instead focused on the theoretical and practical tensions between the competing concepts of the public good and allowed that both could

184. See STACY SMITH, *THE DEMOCRATIC POTENTIAL OF CHARTER SCHOOLS* (2001) (focusing on how charters might serve democracy); Rosenblum, *supra* note 69, at 151 (arguing that it would be a betrayal of public institutions to say that it does not matter whether children attend public or private schools so long as they have access to education).

185. With all its focus on standardized test scores, even No Child Left Behind evaluated school characteristics beyond achievement. See, e.g., 20 U.S.C. § 6319(a)(2) (2006) (measuring teacher quality).

lay claim on the public good under the certain circumstances. But when one goes one step further and seriously considers what makes a school public in our current democratic constitutional system, the answer to the meaning of the public good in education emerges: it is the collective good.

1. *Being Labeled Public?*

Given that a full discussion of what makes a school "public" could consume an entire essay, this Essay only outlines the key aspects of a public school. As an initial matter, the act of statutorily affixing the label "public" to a school does not automatically make a school "public" in any real, substantive sense.¹⁸⁶ Consider that our military constructs its planes, warships, and facilities through private contractors in private spaces. Tomorrow, Congress could pass legislation defining these private contractors and spaces as public, but would doing so transform their work sites and employees into public places and employees? Not without violating a host of constitutional prohibitions.¹⁸⁷ Would merely attaching the label "public" to these contractors create any substantive change, or would it merely change the public's perception of them? Being public requires substantive characteristics, not just a label. Thus, labeling charter schools—or any other school for that matter—public does not resolve the question of whether they are really public.

2. *Free Access*

One of the most tangible aspects of being public is public financial support and the provision of services free, or nearly free, of charge.¹⁸⁸ In these respects, charter schools are as public as any other school.¹⁸⁹ Being free of charge, however, does not alone render a service or entity substantively public. For instance, some cities have government employees who collect the trash, while others have contractors.¹⁹⁰ While both accomplish the same task free of charge to citizens, the former is most likely "public" trash collection,

186. Because these legislative labels do not actually answer the question, scholars and commentators have varied in how they characterize charters. Mead, *supra* note 178, at 352 (noting that charter schools have been called "quasi-public," "other nonpublic," and "hybrid public schools").

187. Without just compensation, such an act would present problems under the Takings Clause. It would likely present Fifth Amendment problems in any event.

188. HUGH STRETTON & LIONEL ORCHARD, PUBLIC GOODS, PUBLIC ENTERPRISE, PUBLIC CHOICE: THEORETICAL FOUNDATIONS OF THE CONTEMPORARY ATTACK ON GOVERNMENT 54 (1994).

189. *But see* Mead, *supra* note 178, at 367–68 (indicating that some states have left open the possibility that charter schools could charge tuition).

190. *See id.* at 351, 362–64.

whereas the latter is “publicly funded” trash collection.¹⁹¹ This distinction bears little practical relevance in the context of trash collection because, once the city decides to have trash collection, very few, if any, value or mission judgments arise. Thus, anyone can carry out the task, but this would not be true if trash collectors had discretion as to what items they would collect in the trash.¹⁹² One would likely see an immediate difference between public and publicly financed trash collection if this were the case.

3. *Equal Access*

Education, unlike trash collection, involves myriad value and mission-based judgments, and, thus, the distinction between public education and publicly funded education is crucial.¹⁹³ The mission of a public school is to serve its community and all of the students within it without making distinctions of any sort between them.¹⁹⁴ Federal statutes specifically prohibit discrimination on various grounds and require public schools to go out of their way, if necessary, to serve certain disadvantaged groups of students.¹⁹⁵ The Supreme Court went one step further in *Plyler v. Doe* and held that public schools are obligated to serve even those students who are illegally in the country because those students, nonetheless, reside within our jurisdictions and are part of our communities.¹⁹⁶ In short, public elementary and secondary schools do not pick or differentiate among their students.¹⁹⁷ In contrast, nonpublic schools do. In fact, differentiating among students based on merit, wealth, ability, and other factors is a major premise of many nonpublic

191. See *id.* at 351–52.

192. See MINOW, *supra* note 76, at 32–33 (discussing the distinction between what is public and private and noting the problems that arise when the government is both the purchaser and guarantor of public values).

193. See Minow, *supra* note 14, at 1229–32.

194. See, e.g., *Mission Statement*, PUB. SCHOOLS N.C., <http://www.ncpublicschools.org/organization/mission/> (last visited Mar. 26, 2013).

195. See, e.g., Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400–1450 (2006) (requiring special education services for students with disabilities); *id.* §§ 1681–1683 (prohibiting gender discrimination); Equal Educational Opportunities Act of 1974, *id.* § 1703 (requiring equal educational opportunity and affirmative action to assist ELL); 42 U.S.C. § 2000d (prohibiting recipients of federal financial aid from discriminating on the grounds of race, color, or national origin; *id.* §§ 11431–11435 (requiring assistance for homeless students and prohibiting discrimination)).

196. *Plyler v. Doe*, 457 U.S. 202, 210–30 (1982).

197. Of course, there is no absolute bar to public schools selecting students, but it runs counter to their nature. See generally Fennell, *supra* note 19, at 76–78.

schools.¹⁹⁸ And, to the extent that they do not receive federal funds, private schools remain free to discriminate on any number of bases that would be prohibited in public schools.¹⁹⁹ Even to the extent federal statutes might constrain private schools' ability to discriminate against students based on race, gender, or disability, private schools still remain free to pick those students they deem worthier than others based on merit and other factors.²⁰⁰

4. *Constitutional and Democratic Accountability*

Public schools' mission also extends to fostering the earlier discussed values once students are enrolled, including democracy, equality, and tolerance. Public schools pursue these ends not only because they are public values but also because the Constitution mandates as much.²⁰¹ This is no small distinction. As state actors, public schools are bound to treat students (and teachers) fairly, which entails, among other things, equality, rationality, and viewpoint neutrality.²⁰² Moreover, these obligations extend not only to individual students but to groups of students, schools, and districts.²⁰³ Equality offers a touchstone example. From its decision

198. See, e.g., *Mission & Vision*, OUR LADY MERCY SCH. FOR YOUNG WOMEN, <http://www.mercyhs.com/about-mercy/mission-and-vision> (last visited Mar. 26, 2013) (applying an all-girls admission policy).

199. The constitutional prohibitions against discrimination do not apply to private actors. *Civil Rights Cases*, 109 U.S. 3, 11 (1883). Further, the provisions noted in note 195 do not apply unless a private school is receiving federal funds. See 42 U.S.C. § 2000d. There is one statutory exception to this general rule. See *id.* § 1981 (prohibiting racial discrimination in private contracts); see also *Runyon v. McCrary*, 427 U.S. 160, 173 (1976) (holding that § 1981's prohibition extends to admissions decisions of private schools).

200. See, e.g., *Academy Mission Statement*, PHILLIPS EXETER ACAD., http://www.exeter.edu/about_us/171_9259.aspx (last visited Mar. 26, 2013) (noting the school's express desire for students "who combine proven academic ability, intellectual curiosity, and tenacity with decency and good character").

201. See, e.g., *United States v. Virginia*, 518 U.S. 515, 531–34 (1996) (holding that women receive intermediate scrutiny under Equal Protection Clause analysis); *Plyler*, 457 U.S. at 230 (holding that the children of illegal aliens receive intermediate scrutiny under the Equal Protection Clause); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513–14 (1969) (holding that the speech of teachers and students at public schools is protected unless the school believes it will lead to a "substantial disruption"); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that "separate but equal" public school segregation violates the Equal Protection Clause of the Fourteenth Amendment); *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 875 (D.D.C. 1972) (holding that the constitutional protections found in *Brown v. Board of Education* extended to students with special needs and behavioral problems).

202. See statutes and accompanying text cited *supra* note 195.

203. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54–55 (1973) (holding that unequal state expenditures between school districts must rationally further a legitimate state purpose to be constitutional). State courts

of whether to assign a student to special education classes to its decision of how to fund schools and districts, the state and all its subsidiary public schools must ensure equal treatment of and opportunity for all students.²⁰⁴

Any number of private schools might hold these same values, as they are not inherently unique to public schools. But private schools are free to bend, ignore, and modify these values.²⁰⁵ Likewise, statutes might impose equality obligations on nonpublic schools that receive federal funds or fall within some other statutory classification,²⁰⁶ but private schools are free to decline federal money or alter their status to avoid falling within the ambit of other statutes.²⁰⁷ For that matter, legislators can exempt private schools from statutory prohibitions at any time and, in fact, have done so on occasion.²⁰⁸ In short, those values that make schools public create inviolable rights in public schools, in contrast to nonpublic schools, where those values are gratuitous, to the extent they even exist.

Constitutions and statutes, however, are but one piece of the public schools' accountability structure. Perhaps more important than legal accountability is their political accountability. From the governor and department of education officials to the school board, superintendent, and principals, public education is democratically accountable.²⁰⁹ To state it another way, people collectively set the rules for public schools.

Nonpublic schools, in contrast, lack democratic accountability.²¹⁰ Many argue that consumer accountability is more

have been far more exacting in this regard. *See generally* Rebell, *supra* note 151, at 1500–04.

204. *See supra* notes 195, 199, 201–03 and accompanying text.

205. Minow, *supra* note 14, at 1230 (questioning the private sector's willingness to abide by constitutional norms).

206. The Americans with Disabilities Act, for instance, would apply to schools falling within the definition of a public accommodation or employer, even if the school did not receive federal funds. *See* 42 U.S.C. §§ 12111(5)(A), 12181(7)(J) (2006).

207. For instance, Bob Jones University famously forewent federal funding so that it could continue discriminating based on race. *See* *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1982) (holding that the IRS revoking the university's tax exempt status was constitutional due to the university's ban on interracial dating).

208. *See, e.g.*, 20 U.S.C. § 1681(a) (creating various institutional exemptions from the general prohibition on sex discrimination).

209. *See generally* Natalie Gomez-Velez, *Public School Governance and Democracy: Does Public Participation Matter?*, 53 VILL. L. REV. 297 (2008) (explaining that the ability for electoral participation at all levels allows for democratic accountability in education). *But see id.* at 348 (finding that mayoral takeover of schools undermines the democratic functioning and accountability of schools).

210. PEOPLE FOR THE AM. WAY, *THE FACTS ABOUT VOUCHERS 1* (2002), available at http://www.pfaw.org/sites/default/files/file_137.pdf.

effective than democratic accountability,²¹¹ and often they are correct. For instance, consumers of education, as a practical matter, are more likely to affect immediate change in nonpublic schools.²¹² But there are important limits and caveats to consumer influence. First, the larger community has little influence on nonpublic schools, whereas everyone has the capacity to influence public schools.²¹³ Second, even those consumers who can exert influence on private schools may find that it is only as to microlevel issues or those issues that the school is willing to negotiate. The educational direction of nonpublic schools ultimately rests solely in the hands of the private school's leadership and is not subject to formal checks.²¹⁴ Unlike in public schools, consumers cannot unelect the boss or bosses in private schools. Their only option is to go elsewhere.

5. *Consensus Rule*

Finally, schools are public because they represent the democratic will of the people. Schools that represent something other than the will of the people are not public in a substantive sense. While these points might seem obvious, they bear noting because, as suggested previously, they mark the outer limits of the role that dissent can play in public schools. Because public schools operate based on democratic consensus, both the dissenter and consenter must abide by the consensus rules.²¹⁵ While nonpublic schools can tolerate relatively high levels of individual action and dissent—as individuals can sort themselves into varying nonpublic schools—a system of public schools risks falling apart because it is predicated on collective action.²¹⁶ Thus, a hallmark of public schools, for better or worse, is to compel conformity and limit dissenters' capacity to overrule the majority.

211. ASCHER ET AL., *supra* note 78.

212. *See id.* at 16–17 (noting that parents in the nonpublic school realm can create change by leaving a school they are unhappy with instead of having to attend “unproductive PTA and school board meetings”).

213. The Court in *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925), recognized that the state has the authority to reasonably regulate private schools; however, that authority has proven relatively limited. The state could entice private schools to consent to more regulation by offering them more funds or vouchers, but the idea of outside accountability is sufficiently antithetical to their mission that many may be willing to forego the carrot. At the very least, they are vigorously resisting accountability measures in current voucher programs. *See* PEOPLE FOR THE AM. WAY, *supra* note 210, at 1, 3–4.

214. *See* Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753, 764–66 (2000) (discussing the freedom charter school founders and administrators have from local educational bureaucracies in developing educational policies).

215. GUTMANN, *supra* note 40, at 39.

216. MINOW, *supra* note 76.

B. Are Charter Schools Substantively Public Schools?

With these broad outlines, the question is whether charter schools are substantively public schools and, if not, what steps are necessary to make them public. Of course, state statutes label them as such, but if labels do not confer substantive status, something more must be said of charters. Implicitly recognizing the distinction between labels and substance, commentators and scholars have struggled with how to characterize charter schools. Although some assert charters are public with no explanation beyond the fact that statutes label them as such,²¹⁷ more often scholars characterize them as “quasi-public”²¹⁸ or hybrid-public schools.²¹⁹ These latter characterizations implicitly acknowledge that important aspects of charter schools distinguish them from public schools. Yet, the fact that they are publicly funded and offer free education cautions against eschewing the public characterization altogether.

At some point, however, variations between charter schools and the essential meaning of public schools are too significant, and a school is either public or not. If the label quasi-public is accurate, a strong case can be made that charters are not public schools. To call a school quasi-public may be to say it looks and acts like a public school in various respects, but it is not really a public school. For instance, courts label some agreements or understandings between people as “quasi-contracts” and, in doing so, impose contractual responsibilities on the parties, but a “quasi-contract” is a quasi-contract and not an actual contract because it lacks some crucial element of a contract.²²⁰

In practice, charter schools, like quasi-contracts, lack crucial elements of the label to which they aspire. In particular, charters diverge from the public school concept in terms of their student enrollment, oversight, and potentially insular missions.²²¹ This divergence, in all fairness, is not likely true of all charters, as

217. See generally Mead, *supra* note 178 (noting that state legislatures have expanded the definition of public school to include charter school, but acknowledging the differences between charter schools and traditional public schools).

218. James G. Dwyer, *The Parental Choice Fallacy in Education Reform Debates*, 87 NOTRE DAME L. REV. 1837, 1843 (2012).

219. Mead, *supra* note 178, at 352.

220. 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 1:6 (4th ed. 2007).

221. See Brown-Nagin, *supra* note 214, at 765–66, 768–69 (discussing the lack of regulation imposed on charter schools and the lack of oversight for admissions procedures in charter schools); Jay P. Heubert, *Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation*, 32 HARV. C.R.-C.L. L. REV. 301, 307 n.27, 308 (1997) (noting that charter school missions differ from public school missions and the lack of oversight of charter schools).

charters operate in diverse ways,²²² but few states sufficiently regulate charters in the manner necessary to ensure that they, as a group, adhere to key public school characteristics.²²³ In effect, those charters that act consistent with public values are effectively doing so on a voluntary basis, just as a private school could.

Whether charter schools actually set out to attract particular types of students or incidentally happen to is of little import. Unlike traditional public schools, they neither serve the community as a whole nor a representative sample of the community.²²⁴ These enrollment variations can be overcome if policy makers will devote attention to the students who attend charters rather than just how many attend them. If policy makers want charters to reflect the demographics of the communities in which they reside, they need only mandate and enforce as much. After enrollments became extremely skewed in some high-profile charters, New York reacted to the problem by enacting rules that place limits on demographic variances.²²⁵ If the state finds the political will to enforce the rule, the rule has the capacity to prevent illegitimate flight and creaming, and ensure that its charter schools are more accessible to the broader community.²²⁶

Charter enrollment rules, however, ought not be so strict that they limit the possibility of creating integrated schools. In a district that is overwhelmingly comprised of minorities and the poor, racial and poverty isolation are major causes of educational inadequacy and inequality.²²⁷ Starting charters that replicate this isolation will not offer realistic solutions to the underlying problems these students face.²²⁸ A rule flatly mandating that charter enrollments

222. SUSAN DYNARSKI ET AL., CHARTER SCHOOLS: A REPORT ON RETHINKING THE FEDERAL ROLE IN EDUCATION 2 (2010), available at http://www.brookings.edu/~media/research/files/reports/2010/12/16%20charter%20schools/1216_charter_schools.

223. See Brown-Nagin, *supra* note 214, at 764–65 (discussing the nonpublic aspects of charter school operation).

224. See Ware & Robinson, *supra* note 120, at 2–3.

225. N.Y. EDUC. LAW §§ 2851(4)(e), 2852(9-a)(b)(i) (McKinney Supp. 2013).

226. North Carolina has a charter rule regulating its demographics, but the state has failed to enforce it, leaving its charters no more reflective of underlying demographics than any other state. See ERICA FRANKENBERG ET AL., CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS 31 (2010), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/frankenberg-choices-without-equity-2010.pdf>.

227. Derek W. Black, *In Defense of Voluntary Desegregation: All Things Are Not Equal*, 44 WAKE FOREST L. REV. 107, 116–22 (2009).

228. One of the most consistent findings in educational social science literature is the negative effect high-poverty schools have on achievement. See *id.* at 118–19 (reviewing social science literature on this subject). There is little reason to believe charters have the capacity to break this rule.

reflect the community in which they reside would mean that a charter school in a high-poverty, predominantly minority district could not be diverse. To avoid this problem, enrollment rules should create exceptions for charters that are affirmatively integrating. Schools of these sorts, moreover, are not pipe dreams. Although they are exceptions to the general rule, several high-performing, highly diverse charters exist.²²⁹ Equally important, they are often in demand.²³⁰ More schools of these sorts will be established if states and the federal government weigh diversity as an important factor in the application process and pay close attention to where new charters are sited.²³¹ It also bears emphasizing that charters actually have the potential to be more integrated than regular public schools because charter schools do not have to restrict their enrollment to neighborhoods where they are located and they have far more flexibility than traditional public schools to draw students from outside their district.²³²

In all fairness, if charters were filling a service gap for students, improving achievement, facilitating pedagogical experimentation that would be used to benefit the larger system, or offering more integration, skewed enrollment numbers might be tolerable under some circumstances. Recognizing as much, charter proponents often assert that they are, in fact, filling service gaps, improving

229. See Derek W. Black, *Education's Elusive Future, Storied Past, and the Fundamental Inequities Between*, 46 GA. L. REV. 557, 602 (2012).

230. See RICHARD D. KAHLENBERG & HALLEY POTTER, DIVERSE CHARTER SCHOOLS: CAN RACIAL AND SOCIOECONOMIC INTEGRATION PROMOTE BETTER OUTCOMES FOR STUDENTS? 18–19 (2012), available at <http://www.prrac.org/pdf/DiverseCharterSchoolsReport.pdf>.

231. See NAT'L COAL. FOR SCH. DIVERSITY, ISSUE BRIEF #2: FEDERALLY FUNDED CHARTER SCHOOLS SHOULD FOSTER DIVERSITY 1–2 (2010), available at <http://www.school-diversity.org/pdf/DiversityIssueBriefNo2.pdf>; Siegel-Hawley & Frankenberg, *supra* note 125, at 348–50.

232. Studies show that there is more segregation between districts than within them. CHARLES T. CLOTFELTER, AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 71 (2004) (estimating that sixty-nine percent of segregation in metropolitan areas is due to segregation between districts); 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, 1575–81 (2003) (discussing the gravity of interdistrict school segregation and its relationship to housing segregation). Effective desegregation in metropolitan areas, in particular, would require students to attend schools across district boundaries. Charters can more easily achieve this result than traditional public schools. See generally JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATION OPPORTUNITY IN MODERN AMERICA 287–90 (2010) (discussing the effectiveness of intra- and interdistrict school choice plans). But see Wendy Parker, *The Failings of Education Reform and the Promise of Integration*, 90 TEX. L. REV. 395, 412–13 (2011) (reviewing RYAN, *supra*).

outcomes, and offering innovation.²³³ But a combination of common sense and evidence suggest charters overstate their case. First, national data on charter school performance indicate that all but a small percentage are doing no better educating students than regular public schools.²³⁴ Often charters are doing worse.²³⁵ Thus, charters on the whole are not bringing services, much less better services, to students who did not already have them. Second, while some individual charters may be innovative, they are not offering the system innovation they promised. As Danielle Holley-Walker argues, charters tend to operate in silos rather than as part of the education system.²³⁶ Thus, most successful charters are successful for their own sake, without playing a role in overall educational improvement.

Yet, like their skewed enrollment numbers, these problems can be fixed. A major step toward addressing quality failures in charters is to be far more deliberate in granting charters, as opposed to rushing to authorize as many as possible as quick as possible.²³⁷ Building quality schools is far more complicated than building quality cars, and a failure in either is equally dangerous. Yet, the past few years have been characterized by a potential willingness to allow consumer and political demand for charters outpace quality controls.²³⁸ Quite simply, we must do the opposite; standards for receiving a charter must be high and demand a strong basis in evidence.

233. See Cindy Hunt, *Senate Bill 100: Creating Public School Choice Through Charter Schools*, 36 WILLAMETTE L. REV. 265, 266 (2000).

234. CTR. FOR RESEARCH ON EDUC. OUTCOMES, *MULTIPLE CHOICE: CHARTER SCHOOL PERFORMANCE IN 16 STATES* 45 (2009), available at http://credo.stanford.edu/reports/MULTIPLE_CHOICE_CREDO.pdf; U.S. DEPT OF EDUC., *EVALUATION OF THE PUBLIC CHARTER SCHOOLS PROGRAM: FINAL REPORT* 53–57 (2004), available at <http://www2.ed.gov/rschstat/eval/choice/pcsp-final/finalreport.pdf>; Erik W. Robelen, *NAEP Gap Continuing for Charters: Sector's Scores Lag in Three Out of Four Main Categories*, EDUC. WK., May 21, 2008, at 1, 14. See generally DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* 138–44 (2010).

235. RAVITCH, *supra* note 234.

236. See Danielle Holley-Walker, *Accountability Charter Schools*, in *OUR PROMISE: ACHIEVING EDUCATIONAL QUALITY FOR AMERICA'S CHILDREN* 255, 260 (Maurice R. Dyson & Daniel B. Weddle eds., 2009).

237. See generally David Nagel, *Charter School Support Is a Prerequisite for Race to the Top Funds*, JOURNAL (June 9, 2009), <http://thejournal.com/articles/2009/06/09/charter-school-support-is-a-prerequisite-for-race-to-the-top-funds.aspx> (quoting the Secretary of Education as stating that states that do not “put artificial caps on the growth of charter schools will jeopardize their applications under the [\$4.35 billion] Race to the Top Fund”).

238. See, e.g., *id.*

Of course, a high basis in evidence has the propensity to strangle innovation, but charters, as a group, have not really proven innovation in any event.²³⁹ To the extent charters are to expand based on the theory of innovation, standards must likewise require real innovation and that the innovation feed back into the overall public school system.²⁴⁰ Moving forward, public policy must be clear as to whether the point of charter schools is more quality schools, more innovation, or both, as each requires different specific standards.

The next step in addressing quality and innovation is to terminate or refuse to renew charters that are not living up to their promises.²⁴¹ Data suggest this simply has not been the case. Of all the charter schools created thus far, about fifteen percent have closed,²⁴² but most of those closures are not a result of state's holding charters to high standards. Rather, many of those closures are a result of insufficient funding and mismanagement.²⁴³ Moreover, the rate of charter school closure has been falling in recent years.²⁴⁴ Now, less than two percent of charters are closed each year, and less than one percent are closed for academic reasons.²⁴⁵ If the front-end standards for charter authorization are strengthened these rates might be appropriate, but in their absence, more back-end accountability is necessary.

The final major step in making charter schools fully public is related to setting quality and innovations standards. All charter schools, including those that are apparently successful, need improved oversight. While charters are premised on more flexibility than traditional schools,²⁴⁶ flexibility cannot be the equivalent of complete autonomy. The foregoing discussion focuses on the need to ensure equity and inclusion in enrollment, but these failures are

239. Holley-Walker, *supra* note 236.

240. *Id.*

241. See generally NAT'L RES. CTR. ON CHARTER SCH. FIN. & GOVERNANCE, INCREASING CHARTER SCHOOL ACCOUNTABILITY THROUGH INTERVENTIONS AND CLOSURES (2010), available at www.financeproject.org/Publications/IncreasingAccountability.pdf.

242. THE CTR. FOR EDUC. REFORM, THE STATE OF CHARTER SCHOOLS: WHAT WE KNOW—AND WHAT WE DO NOT—ABOUT PERFORMANCE AND ACCOUNTABILITY 6 (2011), available at http://www.edreform.com/wp-content/uploads/2011/12/StateOfCharterSchools_CER_Dec2011-Web-1.pdf (detailing the closure of charter schools).

243. *Id.* at 8.

244. Joy Resmovits, *Charter Schools Rarely Closed for Academic Performance: Report*, HUFFINGTON POST (Dec. 21, 2011, 8:18 PM), http://www.huffingtonpost.com/2011/12/21/charter-schools-closure_n_1164104.html.

245. *Id.*

246. James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2074 (2002).

oversight and process failures as much as mission failures. If charter schools are to be public schools, they must operate like them, which means acting in accordance with the host of constitutional requirements and principles discussed earlier.²⁴⁷ The level of autonomy given to most charters suggests that they are not accountable for anything other than the end result.²⁴⁸ Due process, equal protection, the Fourth Amendment, and the First Amendment all dictate that the process by which public schools teach students is as important as anything else; how public schools treat students is just as much a substantive lesson as is math.²⁴⁹ Traditional public schools are not perfect in all these respects, but they know they are expected to be. Charters need sufficient oversight so that they receive the same message.

If the foregoing issues are addressed, the possibility that charters are perceived as, or can become, havens of flight from public schools will be drastically diminished. Charters will not be "opt outs" from the public school system. Rather, they will be legitimate options that are fully within the public school system and add to the collective good.

CONCLUSION

The goal of public policy in regard to charters, vouchers, and any other type of privatization should be to shape these educational options in ways that make it fair to call them public. Currently, the accountability, mission, enrollment, and dissenting aspects of charter schools call their public status into question and raise the greatest concern given their rapid expansion. This need not be the case. All of the nonpublic aspects of charters can easily be reined in. The question is whether they can be reined in without also sacrificing the unique aspects of charters that make them desirable in the first place. The answer is yes, but it will take statutory reforms, the likes of which proponents of the marketplace will staunchly resist.

While the marketplace should not be the determinate factor of the public good in education, in reality the marketplace has become a major player. In this respect, our education system is truly at a crossroads. The crossroads is not charters and vouchers versus public schools but rather a fundamental crossroads of turning the public good into a private good. Currently, public education still

247. See *supra* notes 62–69 and accompanying text.

248. See U.S. DEP'T OF EDUC., *supra* note 234, at 30–33.

249. For discussion about the lessons that students are taught in school that are not purely academic, see *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985); *Goss v. Lopez*, 419 U.S. 565, 592–93 (1975) (Powell, J., dissenting); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511–12 (1969).

rests somewhere between these two poles, but it is drifting toward the private good without specific recognition of this reality. Vouchers and charters, as currently implemented, are symptoms of this drift rather than the problem themselves.

Charters and vouchers are largely pedagogically empty vessels. If appropriately structured, they can serve any end we wish. Hence, their current flaws are practical ones. These flaws, however, are not accidental. They are born out of the insistence that vouchers and charters should be free from oversight or limitations, the implicit message being that we should publicly fund individual market ventures.

An understanding of education as a public good, however, dictates that the public, not just the individual, receives a return on educational investments. And, while some students may understandably be willing to gamble given the poor and unequal opportunities we currently afford them, the public's future is not one on which we can afford to gamble. We should redouble our commitment to fully public schools, not run from them. Moreover, it is only our gross failure in this commitment that makes nonpublic options appear to be viable policy options.