

Opt-Out Education: School Choice as Racial Subordination

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ABSTRACT: Despite failure to improve academic outcomes or close the achievement gap, school-choice policies, advanced by education legislation and doctrine, have come to dominate public discourse on public education reform in the United States, with students of color disproportionately enrolling in voucher programs and charter schools. This Article moves past the typical market-based critiques of school choice to analyze the particularly racialized constraints on choice for marginalized students and their families in the public school system. The Article unpacks the blame-placing that occurs when the individualism and independence that school choice and choice rhetoric promote fail to improve academic outcomes, and the ways in which choice merely masks racial subordination and the abdication of democratic values in the school system. Students of color and their families may be opting out, but their decisions to do so neither improve public education nor reflect genuine choice. This Article ultimately argues that the values underlining school choice and choice rhetoric—like privacy, competition, independence, and liberty—are inherently incompatible with the public school system. The Article concludes by suggesting an alternate legal and rhetorical framework acknowledging the vulnerability of minority students, as well as the interdependence between white students and non-white students in the system, and it advances strict limitations on school choice, even, if necessary, in the form of compulsory universal public school education.

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INTRODUCTION

In her 2003 *New York Times Magazine* article, “The Opt-Out Revolution,” Lisa Belkin attributed the absence of women from the workplace, in part, to choice.¹ American women, she said, were increasingly “opting out” of the workforce and choosing to return home.² Ironically, in an article written to highlight the voluntary choices women made regarding their professional lives, the subjects relayed stories about how balancing their professional and childcare obligations was impossible and forced them to quit their jobs.³ Belkin’s narrative of choice endures, however, because of the way in which choice rhetoric enables society to ignore the pervasive structural obstacles to professional success for many women.⁴

The resonance of choice rhetoric, however, is not limited to gender equality issues. In education, racial discrimination and structural inequality are increasingly ignored as the education system gives broadened “options” to those it underserves, in the form of private schools, charter schools, and voucher programs. Author Paula Penn-Nabrit’s decision to homeschool her African-American sons after their racially charged expulsion from school is illustrative. She explained, “[a]s much as we work at being free and conscious people of color, independent actors rather than reactors, the truth is we began home schooling as a reaction to something some white people did to us.”⁵ Ultimately, the circumstances under which she made educational decisions for her children undermined the agency and autonomy of her “choice.”

In 2012, the State of Louisiana gave parents similar false choices. The State passed the most expansive school voucher program in the country, making the state’s 400,000 students enrolled in low-performing schools eligible to take their share of state funding to any accredited private or religious school in the state.⁶ Faced with no alternative options for a quality

1. See Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG. (Oct. 26, 2003), <http://www.nytimes.com/2003/10/26/magazine/26WOMEN.html>.

2. *Id.*

3. See *infra* note 141.

4. See, for example, continued assertions by policymakers and pundits that an income glass ceiling does not exist because women are paid comparably once accounting for their “voluntary” absences from the job market for childcare. See, e.g., Hanna Rosin, *The Gender Wage Gap Lie*, SLATE (Aug. 30, 2013, 12:49 PM), http://www.slate.com/articles/double_x/doublex/2013/08/gender_pay_gap_the_familiar_line_that_women_make_77_cents_to_every_man_s.html (although purporting to acknowledge the impact of systematic discrimination, ultimately concluding that women’s “choice” not to “work the same way men do” is important to any discussion regarding the income gap between men and women).

5. PAULA PENN-NABRIT, MORNING BY MORNING: HOW WE HOME-SCHOOLED OUR AFRICAN-AMERICAN SONS TO THE IVY LEAGUE 3 (2003).

6. Stephanie Simon, *Louisiana Sets Rules for Landmark School Voucher Program*, CHI. TRIB. (July 23, 2012), http://articles.chicagotribune.com/2012-07-23/news/sns-rt-us-usa-education-louisiana-bre86nooj-20120723_1_voucher-program-voucher-students-voucher-advocates; see Julianne Hing,

education in their neighborhood schools, the decisions of these students and their families to “opt-out” of public education—and into school-choice programs that will likely perform even worse than their neighborhood schools⁷—are coerced decisions. As in the workplace, the autonomy-enhancing value of opting out of public education is largely a myth.

Even as the charter school movement gains traction in the United States, comprehensive studies reveal that up to one-third of charter schools perform worse than traditional public schools,⁸ and that voucher programs have failed to discernibly impact the achievement gap.⁹ Nevertheless, education-reform legislation, like No Child Left Behind (“NCLB”) and Race to the Top, as well as education doctrine, such as *Pierce v. Society of Sisters*, *Milliken v. Bradley*, and *Parents Involved in Community Schools v. Seattle School District No. 1*, encourage students and their families “to choose” to leave traditional public school education for charter schools, private schools, voucher programs, or homeschooling experiences.¹⁰ Not all choices, however, are good ones.

Choice rhetoric problematically idealizes competition, privacy, independence, and individualism, while overshadowing interdependence and vulnerability in public education, and outsources conversations that belong in the public sphere to families and individuals. Yet choice rhetoric has endured, due to its sanitizing effect on inequality and vulnerability. Given enough options, the argument goes, if the result of one’s selection is problematic, it was only his or her fault. Having provided myriad options, the state is absolved of responsibility for underperformance in any one school district.

Indeed, the turn to school choice as the primary method of public school reform has only accelerated a legal and political trend of ignoring the structural factors that undermine successful public education and maintaining an achievement gap in the public school system. In the meantime, very little has been said about racial and economic isolation.

Schools for the Corporate Era, SALON (Apr. 24, 2012, 3:00 AM), http://www.salon.com/2012/04/24/school_reform_for_the_corporate_era/.

7. See *infra* notes 105–07 and accompanying text; see also Diane Ravitch, *How, and How Not, to Improve the Schools*, N.Y. REV. BOOKS (Mar. 22, 2012), <http://www.nybooks.com/articles/archives/2012/mar/22/how-and-how-not-improve-schools/> (noting that “79 percent of the charter schools formed by the state [in 2012] received a grade of D or F”).

8. See *infra* notes 105–07 and accompanying text.

9. In fact, scholars note that vouchers have only increased the segregation of diverse learners by empowering schools to “cream skim” (choosing to enroll the best and least costly students) and “crop” (denying services and enrollment to diverse learners on the basis of their disability, socioeconomic status, and language learner status). Julian Vasquez Heilig, *Fi’ni’to: Vouchers and Educational Equity*, CLOAKING INEQUITY (Jan. 8, 2013), <http://cloakinginequity.com/2013/01/08/fi%C2%B7ni%C2%B7to-vouchers-and-educational-equity/> (summarizing research on “cream skimming” and “cropping”).

10. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Milliken v. Bradley*, 418 U.S. 717 (1974); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

Such isolation motivates people such as Kelley Williams-Bolar to “choose” to illegally use her father’s residential address to enroll her African-American daughters in a safer, higher performing neighborhood school than the one to which her Ohio city assigned them.¹¹

Given the role of choice as a foundation of American liberal thought, its dominance in public school reform is no surprise, nor is its presentation as the answer for poor, working class, and minority students novel. What policymakers have insufficiently explored, however, is the particularly racialized constraints under which people of color exercise choice in the education system. Encouraged by pundits and policymakers to demand choice, and ever mindful of the cultural-deficit models that will place blame for failure squarely at their feet if they do not leave the traditional public school system, minority students increasingly enroll in the programs. But as students and parents demand more options, school-choice policies undermine the coalitions that stakeholders could otherwise form to address the real obstacles to academic achievement—segregation by race and class, food and housing insecurity, and inadequate school financing. Ultimately, choice does not provide the promised liberation.

Opting out of the public school system is by no means a phenomenon limited to minorities, a reality to which wealthy Whites at private schools across the country can attest. My focus in this Article, however, is on the increasing frequency with which people of color attempt to opt-out of the public school system in response to racial and economic isolation that leads to lowered academic performance in their traditional neighborhood schools. In order to provide a richer and more substantive accounting of the impact of school choice and choice rhetoric on marginalized people in the education system, this Article moves past typical market-informed critiques of choice. I analyze the particularly racialized constraints on choice for marginalized students and their families in the public school system and the blame-placing that occurs when the individualism and independence that school choice and choice rhetoric promote fail to improve academic outcomes. Students of color and their families may indeed be “opting out” of traditional public education, but those decisions neither improve their educational outcomes nor represent manifestations of genuine choice. This Article also argues that the values underlining school choice and choice

11. Williams-Bolar paid dearly, however, for the residency fraud. Ultimately convicted of two felony crimes, she served nine days in jail, performed eighty hours of community service, incurred two years’ probation, and paid \$800 restitution in addition to the cost of her prosecution. Julianne Hing, *Kelley Williams-Bolar’s Long, Winding Fight to Educate Her Daughters*, COLORLINES (May 16, 2012, 9:30 AM), http://colorlines.com/archives/2012/05/kelley_williams_bolar_school_choice.html (chronicling Williams-Bolar’s legal case); *Kelley Williams-Bolar, Ohio Mother, Convicted of Felony for Lying to Get Kids into Better School*, HUFFINGTON POST, http://www.huffingtonpost.com/2011/01/27/kelley-williams-bolar-schools_n_814857.html (last updated May 25, 2011, 7:30 PM) (chronicling Williams-Bolar’s conviction).

rhetoric, like privacy, competition, independence, and liberty, are inherently incompatible with the public school system.

Part I traces the path of school choice in public education, from its origins in *Pierce v. Society of Sisters* to its mainstream manifestations as voucher programs and charter schools. Part II examines the impact of race on the school choice market before presenting critical examinations of school choice and choice rhetoric that the literature has not fully developed. Even assuming broadened options, the actual choices of people of color in an education market are constrained by the absence of viable alternatives, the impact of cultural-deficit models in education policy, and the trauma of racialized schooling experiences. Part II also presents school choice as inherently incompatible with the democratic values that should undergird public education, particularly to the extent that it sanitizes unequal access to the societal good of education. Part III advances discourse about effective school reform by suggesting a drastic limit to school choice through compulsory, universal public education if necessary. Part III also suggests a more appropriate rhetorical framework for structuring school reform in public education and responds to potential concerns regarding paternalism.

I. THE RISE OF “OPTING OUT”: SCHOOL CHOICE IN EDUCATION REFORM

Calls for public education reform are not new. Predating the 1983 declaration by the Department of Education Commission describing a “rising tide of mediocrity” in U.S. public schools, politicians and concerned citizens alike have long expressed concerns regarding a “crisis” in public education.¹² Whether or not a crisis exists, there are certainly a number of critical issues to address. The black–white achievement gap, in particular, mirrors a multitude of other academic gaps between America’s privileged and marginalized student groups. In addition to testing disparities, American public schools are more segregated by race than they were at the time of *Brown v. Board of Education*, with Blacks and Latinos increasingly attending schools in hypersegregated areas.¹³ The racially identifiable minority schools created by hypersegregation not only result in schools with

12. See Diane Ravitch, *School Reform: A Failing Grade*, N.Y. REV. BOOKS (Sept. 29, 2011), <http://www.nybooks.com/articles/archives/2011/sep/29/school-reform-failing-grade/> (chronicling concerns over a “crisis” a century ago, during a period of intense immigration to the United States from Eastern and Southern Europe; during the 1950s, when Soviets launched a satellite; during the 1960s, when public schools were said to represent institutionalized racism; during the 1970s, when schools were said to suffer from “mindlessness”; and in 1983, when *A Nation at Risk* was published).

13. Hypersegregation is the term used to refer to the “extreme spatial and social segregation” experienced by racial minorities. Gregory Squires, *Overcoming Discrimination in Housing, Credit, and Urban Policy*, Remarks at University of Buffalo Law School Baldy Center on Law and Social Policy Conference (April 7, 2006), in 25 BUFF. PUB. INT. L.J. 77, 84 n.9 (2007); see also DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 118–30 (1993).

higher rates of students living in poverty,¹⁴ but they are also subject to racist attitudes, behaviors, and policy—all of which negatively impact student achievement.¹⁵

Other concerns regarding public education include: the rise of standardized testing,¹⁶ said to narrow curriculums and encourage cheating, particularly in those underperforming schools that “teach to the test” in an attempt to improve performance and thus avoid sanctions for low scores;¹⁷

14. Due to a systematic link between racial segregation and segregation by socioeconomic status, the percentage of poor students in a school generally increases as the percentage of minority students increases. GARY ORFIELD & CHUNGMEI LEE, HARVARD UNIV.: CIVIL RIGHTS PROJECT, WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY 16 (2005); James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2094–95 (2002).

15. Lower socioeconomic status has been understood to have a negative impact on student achievement, an unsurprising relationship given the issues with which low-income families struggle, including inadequate health care, housing, early childhood education, and food insecurity. RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 25–26 (2001). Moreover, as a result of racial bias, majority-minority schools often have limited access to educational resources and materials including money, experienced and credentialed teachers, media centers, and new technology. The schools, for example, are disproportionately assigned novice teachers with fewer credentials. C.E. ESCH ET AL., THE CTR. FOR THE FUTURE OF TEACHING AND LEARNING, THE STATUS OF THE TEACHING PROFESSION 2005, at 70 (2005) (finding that in the 2004–2005 school year, 20% of California’s teachers serving in schools with minority populations between 91% and 100% were underprepared or novice, compared to only 11% of California’s teachers serving schools with few or no minority students); JOHN WIRT ET AL., U.S. DEP’T OF EDUC., THE CONDITION OF EDUCATION 2004, at 73 (2004) (finding that high schools with at least 75% low-income students employed at least three times as many uncertified or out-of-field teachers in both English and science than schools with lower poverty rates); Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513, 1547 (2003) (finding that in the Charlotte-Mecklenburg school system, the higher the percentage of black students in a school, the less likely that those schools employed teachers with teaching experience or teachers with master’s degrees).

16. See DIANE RAVITCH, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION 149–67 (2010) (chronicling the rise of standardized testing as part of the “accountability” movement in the United States); Diane Ravitch, *Schools We Can Envy*, N.Y. REV. BOOKS (Mar. 8, 2012), <http://www.nybooks.com/articles/archives/2012/mar/08/schools-we-can-envy/> (chronicling the rise of standardized testing in public education and its negative effects on the school system).

17. See, e.g., Emma Brown, *Probe Finds Test Cheating at Several D.C. Schools*, WASH. POST (June 22, 2012), http://www.washingtonpost.com/local/education/probe-finds-test-cheating-at-several-dc-schools/2012/06/22/gJQAD4UXvV_story.html (summarizing the findings of an investigation into cheating on high-stakes standardized tests in Washington, D.C. public schools); Anna M. Phillips, *Cheating Inquiry Under Way at 2 Top-Rated City Schools*, N.Y. TIMES (May 22, 2012), http://www.nytimes.com/2012/05/23/nyregion/cheating-inquiry-at-2-top-ranked-brooklyn-schools.html?_r=1& (reporting that “two of the highest-ranking public elementary schools in New York City [were] under investigation” for cheating on standardized tests after administrators noticed sharp drops in test performance); Kim Severson, *Systematic Cheating Is Found in Atlanta’s School System*, N.Y. TIMES (July 5, 2011), <http://www.nytimes.com/2011/07/06/education/%2006atlanta.html> (reporting that cheating on standardized tests

the development of a school-to-prison pipeline, as students increasingly encounter the criminal justice system for the first time on school campuses;¹⁸ outdated curriculum and teaching pedagogy;¹⁹ and hostile politics regarding labor conditions for teachers.²⁰ Despite research suggesting that most Americans believe their local schools to be doing a good job (in contrast to those “other” schools that are failing),²¹ there is, indeed, much to reform in American public education.

In recent years, lawmakers have proffered legislative frameworks like NCLB and Race to the Top as responses to perceived and actual failures in the system. Race to the Top, in particular, has helped usher in a particular type of education reform strategy: school choice. Welcomed by both conservatives and liberals alike, policymakers have presented school-choice programs as a solution for the many ills of the system—mediocrity, the achievement gap, and disappointing standardized test performance in comparison to other developed countries.²² School choice has become mainstream, even as the marketplace in which education choices are said to be exercised is exposed as a myth and school choice fails to improve academic outcomes.

administered in 2009 occurred at 44 Atlanta schools and involved at least 178 teachers and principals).

18. For further discussion of the school-to-prison pipeline, see Deborah N. Archer, *Introduction: Challenging the School-to-Prison Pipeline*, 54 N.Y.L. SCH. L. REV. 867 (2009–2010) (describing the school-to-prison pipeline); Patrick S. Metze, *Plugging the School to Prison Pipeline by Addressing Cultural Racism in Public Education Discipline*, 16 U.C. DAVIS J. JUV. L. & POL’Y 203 (2012) (examining marginalization of students of color in the public school system that leads to interface with the criminal justice system); Tona M. Boyd, Note, *Confronting Racial Disparity: Legislative Responses to the School-to-Prison Pipeline*, 44 HARV. C.R.-C.L. L. REV. 571 (2009) (examining potential legislative responses to the school-to-prison pipeline).

19. Arne Duncan, *Through the Schoolhouse Gate: The Changing Role of Education in the 21st Century*, 24 NOTRE DAME J.L. ETHICS & PUB. POL’Y 293, 301 (2010) (noting that the decline of the American public school system is due, in part, to “outdated curricula, instructional practices rooted in the industrial age and a calendar instituted in the agrarian age”).

20. *Wisconsin Teachers Union Protests Gov. Scott Walker’s Bill; Idaho, Florida Follow*, HUFFINGTON POST (last updated May 25, 2011, 7:35 PM), http://www.huffingtonpost.com/2011/02/17/teachers-union-wisconsin-scott-walker_n_824888.html (chronicling the backlash against teachers’ unions across the country).

21. See, e.g., Steve Berlin, *The U.S. Education System Is Not Failing*, EDUC. WK. (Nov. 1, 2012, 8:15 AM), http://blogs.edweek.org/edweek/transforming_learning/2012/11/the_us_education_system_is_not_failing.html.

22. Although “American students have never performed well on international [standardized] tests . . . the nation’s economy has [nevertheless] been robust for most of the past half-century.” Ravitch, *supra* note 12. Moreover, after controlling for poverty, American performance on the tests is competitive. See *id.*

A. THE ORIGINS OF SCHOOL CHOICE: PIERCE, MILLIKEN, AND MARKETS

Choice is deified in American culture; a central tenet of American liberal thought is the exaltation of liberty²³—“the freedom to choose one’s lifestyle, values, jobs, and relationships without government interference.”²⁴ Eschewing any commitment to particular outcomes, the ideology focuses on maximizing the opportunity of individuals to exercise rational²⁵ and unfettered choice. Maximized choice, as the idea goes, leads to genuine freedom and equality.

The centrality of choice is apparent in American social, political, and legal culture. President Obama’s focus during his first two years in office, for example, was on healthcare reform, shrouded in “rhetoric about choice, freedom, and personal responsibility.”²⁶ Debates about women’s reproductive rights focus only minimally on reproductive rights as a precursor to equal citizenship.²⁷ Instead, choice rhetoric pitting the freedom of women to exercise choice regarding their reproductive abilities, against the liberty, freedom, and even equality of her unborn child, dominates the debates.²⁸ In addition, choice features prominently in American legal doctrine. Choice is identified alternately as “assent, consent, [or] free will,” and it forms the basis for countless doctrines in contract law, criminal law, First Amendment law, and privacy jurisprudence.²⁹

In public education, school choice originated with *Pierce v. Society of Sisters*, a 1925 Supreme Court case in which the Court recognized both a state’s right to compel school attendance at some schools and parents’ rights

23. Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1562–63 (1991).

24. Lucinda M. Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice*, 96 YALE L.J. 914, 914–15 (1987) (book review).

25. The role of exercising “rational” choice is also central to economic analysis of law and is defined by law and economics scholars as “choosing the best means to the chooser’s ends.” Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1551 (1998).

26. KENT GREENFIELD, *THE MYTH OF CHOICE: PERSONAL RESPONSIBILITY IN A WORLD OF LIMITS* 31 (2011).

27. See, e.g., Erik Eckholm, *Push for ‘Personhood’ Amendment Represents New Tack in Abortion Fight*, N.Y. TIMES (Oct. 25, 2011), <http://www.nytimes.com/2011/10/26/us/politics/personhood-amendments-would-ban-nearly-all-abortion.html>; Martha Plimpton, *Stop Undermining Women’s Health with Personhood Amendments and Ultrasound Laws*, SLATE (Feb. 24, 2012, 10:12 AM), http://www.slate.com/blogs/xx_factor/2012/02/24/martha_plimpton_stop_undermining_women_s_health_with_personhood_amendments_and_ultrasound_laws.html.

28. Williams, *supra* note 23, at 1559 (arguing that pro-choice “rhetoric taps Americans’ anti-government feelings . . . but also awakens gender fears of selfish mothers,” and concluding that choice rhetoric should be combined with reassuring messages about the reverence of motherhood).

29. GREENFIELD, *supra* note 26, at 35–44.

to choose between private and public schools.³⁰ Subsequent cases built on the principles of choice and parental control as articulated in *Pierce*. For example, even though the Court noted in *Wisconsin v. Yoder* that compelling state interests could overcome the individual interests of the Amish in controlling their children's education, the Court ultimately exempted the plaintiff-parents from Wisconsin's final two years of compulsory school attendance laws.³¹

Years later, in *Milliken v. Bradley*, the Supreme Court refused to impose an interdistrict integration order, even though such a plan was the only way to remedy the state-sanctioned segregation that had undermined Detroit city schools and encouraged white flight to the suburbs.³² Having earlier refused in *Keyes v. School District No. 1* to acknowledge that de facto segregation (perpetuated by white flight) resulted in the same equal protection harms caused by de jure segregation,³³ the Supreme Court in *Milliken* rationalized a segregated result where a constitutional violation in the form of state-sponsored segregation had occurred.³⁴ *Milliken* stands out as a notable example of choice in education, not because it affirmed an explicit school-choice policy, but because it further protected the choices of privileged parents to escape to the suburbs and ultimately avoid participation in state-ordered remedies to dismantle the segregated system that had conferred racial privilege on them.³⁵ While protecting those choices, the Court

30. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925). The case has since been interpreted to also affirm parental rights based on freedom of expression and religion, as well as parental rights based in due process. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

31. *Wisconsin v. Yoder*, 406 U.S. 205, 233-36 (1972). *Pierce* and *Yoder* have both spawned significant scholarship exploring the rights of parents to not only control their children's religious and secular education, but also to control the child herself. See, e.g., Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992).

32. *Milliken v. Bradley*, 418 U.S. 717, 745-47 (1974) (refusing to order an interdistrict integration order that would have compelled integration between majority-minority Detroit public schools and the surrounding majority-white suburban school districts).

33. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 193-95, 208-09 (1973). Rather than affirm the district court's finding that, despite the absence of evidence of intentionally discriminatory school board action, segregated core city schools were nevertheless inherently separate and unequal in violation of the Fourteenth Amendment and *Plessy v. Ferguson*, the Supreme Court instead concluded in *Keyes* that "intentionally segregative school board actions in a meaningful portion of a school system . . . creates a [rebuttable] presumption that other segregated schooling within the system is not adventitious." *Id.* at 208.

34. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-19 (2d ed. 1988).

35. Although there are civic and social costs for Whites who are racially isolated, school segregation concentrates poverty in minority communities, maintaining the achievement gap and perpetuating racial subordination of minorities. See *infra* Part II.C.3. For a detailed discussion of the political activities surrounding and opposing interdistrict busing, and the Court's decision in *Milliken*, see Ryan & Heise, *supra* note 14, at 2052-58, 2087-88.

ignored the absence of choice among poor parents and families within the city, who had little ability to move to the suburbs, and who were left with precious few options, given that both remediation of de facto segregation and interdistrict remedies were unavailable.

Scholars have since detailed various forms of school choice, breaking choice down, for example, into “market choice” and “public choice.” The former refers to the use of vouchers for private, charter, or alternative public schools in an attempt to manipulate the education marketplace; the latter refers to choice programs within the public school system only.³⁶ Less visibly, choice also manifests as patterns of residential housing segregation, which parental concerns regarding public schools often inform. Using the “constitutional values” articulated in *Pierce*, proponents of choice justify market and public choice as expressions of the moral and legal right of parents to leave the school system.³⁷

At the same time, market-economics principles are also used to justify vouchers, charters, and housing decisions. Based on the idea that a marketplace is the ideal way in which to allocate resources, market economics in education imagines the field as an arena in which “each individual . . . would be led as if by an Invisible Hand to the grand solution of the social maximum position.”³⁸ Economists admit that the gap between the ideal and the real world is wide, making it difficult to completely provide public education through a market structure. Nevertheless, free market economists maintain that public schools allocate education resources poorly due to several factors including a lack of information, an inability to know or calculate the benefits of potentially competing schools, and the “free-rider problem”—the tendency of individuals to understate their real preferences for public goods because the non-excludability of the goods incentivizes those individuals to enjoy the goods while avoiding the associated tax burdens.³⁹ In contrast, private schools and charters are arguably closer to the market ideal because parents who send their children to an alternative

36. Henry M. Levin, *The Theory of Choice Applied to Education*, in 1 CHOICE AND CONTROL IN AMERICAN EDUCATION 247, 255–66 (William H. Clune and John F. Witte eds., 1990). For a detailed description of the various forms of education policy in which “choice” has manifested itself, see Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814 (2011).

37. Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1353, 1385–86 (2005).

38. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 422 (1956) (internal quotation marks omitted).

39. *Id.* at 417 (“If all consumer-voters could somehow be forced to reveal their true preferences for public goods, then the amount of such goods to be produced and the appropriate benefits tax could be determined. As things now stand, there is no mechanism to force the consumer-voter to state his true preferences; in fact, the ‘rational’ consumer will understate his preferences and hope to enjoy the goods while avoiding the tax.” (footnote omitted)).

school face fewer barriers to collective action than parents of children in public schools.

In a foundational article, however, the economist Charles M. Tiebout theorized that, assuming specific conditions are met,⁴⁰ local government could represent “a sector where the allocation of public goods (as a reflection of the preferences of the population) need not take a back seat to the private sector”⁴¹ due, in large part, to the ability of citizens to vote with their feet by moving to a community that best suits them. Although all conditions are rarely met,⁴² the theory suggested that the closer society approaches all optimal market conditions, the more efficient the distribution of public resources will be.

In order to maximize efficiency in distribution of education, free-market theorists say the sector should be made more like an ideal market by maximizing individual parental choice in education. Interest in the idea intensified when political scientists John Chubb and Terry Moe published *Politics, Markets, and the Organization of Schools*.⁴³ Proceeding from the questionable⁴⁴ thesis that institutional structures or the environment dictate school effectiveness,⁴⁵ Chubb and Moe identified several characteristics of public schools that supposedly undermine their academic performance: (1) public schools are subject to a “huge and heterogeneous” constituency, of which students and parents are only a small part; (2) control of public schools is essentially a local monopoly; (3) democratic control in public schools serves to “impose higher-order values on schools,” limiting school autonomy and the ability of parents to exit; and (4) “[p]ublic schools are products of [collective] public policy,” subject to never-ending change.⁴⁶

40. *Id.* at 419 (“1. Consumer-voters are fully mobile and will move to that community where their preference patterns . . . are best satisfied[;] 2. Consumer-voters are assumed to have full knowledge of differences among revenue and expenditure patterns and to react to these differences[;] 3. There are a large number of communities in which the consumer-voters may choose to live[;] 4. Restrictions due to employment opportunities are not considered. It may be assumed that all persons are living on dividend income[;] 5. The public services supplied exhibit no external economics or diseconomies between communities[; and] . . . 6. For every pattern of community services set by . . . a city manager who follows the preferences of the older residents of the community, there is an optimal community size.”).

41. *Id.* at 424.

42. Mobility, for example, is affected by many things, including transaction costs or job opportunities, while the idea that there is at least one community that meets every individual's needs is unlikely to manifest in real life. As applied to education, parents may not accurately assess the preference patterns of their children, for whom they vote by proxy.

43. John E. Chubb & Terry M. Moe, *Politics, Markets, and the Organization of Schools*, 82 AM. POL. SCI. REV. 1065 (1988).

44. *See infra* note 91 and accompanying text.

45. JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 18–20 (1990); Chubb & Moe, *supra* note 43, at 1066.

46. Chubb & Moe, *supra* note 43, at 1067–70.

In contrast, private schools: (1) “determine their own goals, standards, and methods,” efficiently reflecting the values of owners and customers; (2) present exit options that allow parents to find schools with “offerings . . . more congruent with their needs,” forcing “strong bond[s] between consumer satisfaction and organizational well-being”; (3) present exit options that further promote harmony, responsiveness, and school autonomy; and (4) engage in reform when it is in a school’s best interest to do so.⁴⁷ Applying Tiebout’s theory to education, the authors concluded that a voucher system, “combining broad democratic guidance with a radical decentralization of resources and choice,” was a reasonable alternative that would make public schools more effective.⁴⁸ Although voucher programs did not gain widespread acceptance immediately, these theories effectively laid the groundwork for school-choice programs, spurring both further support⁴⁹ and sustained criticism⁵⁰ in the years since.

B. SCHOOL CHOICE BECOMES MAINSTREAM

In its current incarnation, school choice is manifested most typically as voucher programs and charter schools. The former provides students and their families with tuition “vouchers that can be used at private schools, including religious schools.”⁵¹ Although promoted as providing an opportunity for poorer students to escape failing schools, the “vouchers rarely meet the tuition of academically competitive private schools, religious or otherwise.”⁵² In contrast, charter schools are publicly funded,

47. *Id.*

48. *Id.* at 1085.

49. See, e.g., CHUBB & MOE, *supra* note 45 (presenting empirical evidence supporting their theory that institutional structure is the driver of superior efficiency in private schools); JOHN E. COONS & STEPHEN D. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* (1978) (advocating the redistribution of educational choice, such that a wider range of private choice is available); John E. Coons, *As Arrows in the Hand*, in 1 *CHOICE AND CONTROL IN AMERICAN EDUCATION*, *supra* note 36, at 319, 324 (defending private and public school choice and challenging the imposition of “a common curriculum and a common experience upon the non-rich in the name of tolerance and civic virtue”); Richard J. Murnane, *Family Choice*, in 1 *CHOICE AND CONTROL IN AMERICAN EDUCATION*, *supra* note 36, at 332, 335–36 (acknowledging that “no choice plan will further all legitimate goals of American education,” but encouraging policymakers to “get beyond rhetoric” and focus on operational details of the plans); Paul E. Peterson, *Monopoly and Competition in American Education*, in 1 *CHOICE AND CONTROL IN AMERICAN EDUCATION*, *supra* note 36, at 47 (supporting Chubb and Moe’s premise that American public schools are accurately described as public monopolies).

50. See, e.g., ALEX MOLNAR, *GIVING KIDS THE BUSINESS: THE COMMERCIALIZATION OF AMERICA’S SCHOOLS* (1996); RAVITCH, *supra* note 16; James S. Liebman, *Voice, Not Choice*, 101 *YALE L.J.* 259 (1991) (reviewing CHUBB & MOE, *supra* note 45).

51. Ryan & Heise, *supra* note 14, at 2078.

52. *Id.* at 2083. (“These programs are not designed to provide poor students the opportunity to attend elite private schools. The voucher amounts are fairly modest and enable students to enroll primarily in private, religious schools.”); Jeff Bryant, *Critical Questions Democrats Must Ask About School Choice*, CAMPAIGN FOR AMERICA’S FUTURE (July 12, 2012),

nonsectarian entities that operate pursuant to a contract between the school and the chartering agency, and they are freed from state regulation in exchange for performance accountability.⁵³ Although they can be operated by any entity, including teachers or parents, private corporations increasingly operate the schools.⁵⁴ To the extent that neither charters nor vouchers comport with the pattern of public school assignment and enrollment through which school districts assign students to a neighborhood school based on their address, they both deviate from traditional public school programs.

In the 2009 and 2010 school years, approximately 5,042 charter schools served 1.5 to 1.7 million students across the United States, while annual growth remained steady at about 9%.⁵⁵ Between 2005 and 2010, enrollment in traditional public schools declined by 5%, while enrollment in charter schools rose 60%.⁵⁶ Moreover, twenty-one states have independent or multiple authorizers that can approve and manage charter schools, often alongside school boards.⁵⁷ Unsurprisingly, states with multiple charter authorities have 78% of the nation's charter schools—almost three-and-a-half times more charter schools than states that allow only for local school board approval.⁵⁸

Legislatively, both NCLB and Race to the Top are key pieces of federal educational reform legislation that feature school-choice policies. NCLB not only sets guidelines and requirements regarding teacher qualification,⁵⁹

<http://ourfuture.org/20120712/critical-questions-democrats-must-ask-about-school-choice> (“[I]n a typical school choice program, the private school services that parents mostly desire . . . will still be out of reach for most parents.”).

53. See Ryan & Heise, *supra* note 14, at 2073–78.

54. See, for example, the case of Highland Park, Michigan, where the public school district has outsourced management of its three schools to a private, for-profit charter company. Stephanie Banchero & Matthew Dolan, *Michigan City Outsources All of Its Schools*, WALL ST. J. (Aug. 2, 2012, 7:57 PM), <http://online.wsj.com/article/SB10000872396390443545504577565363559208238.html>.

55. CTR. FOR EDUC. REFORM, ANNUAL SURVEY OF AMERICA'S CHARTER SCHOOLS 3 (2010) [hereinafter CTR. FOR EDUC. REFORM SURVEY], available at http://www.edreform.com/wp-content/uploads/2011/09/CER_Charter_Survey_2010.pdf; William G. Howell et al., *The Public Weighs In on School Reform*, EDUC. NEXT, Fall 2011, at 11, 17, available at <http://educationnext.org/the-public-weighs-in-on-school-reform/>.

56. Motoko Rich, *Enrollment Off in Big Districts, Forcing Layoffs*, N.Y. TIMES (July 23, 2012), <http://www.nytimes.com/2012/07/24/education/largest-school-districts-see-steady-drop-in-enrollment.html>.

57. CTR. FOR EDUC. REFORM SURVEY, *supra* note 55, at 3.

58. *Id.*

59. All Title I schools are required to hire “highly qualified” teachers for all subjects and veteran teachers are required to demonstrate that they are “highly qualified.” James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 939 (2004). Beyond Title I schools, all teachers of “core academic subjects” must be “highly qualified.” *Id.*

annual testing,⁶⁰ and annual yearly progress (“AYP”) goals for public schools,⁶¹ the Act also subjects Title I schools that fail to meet the AYP goals to a range of actions.⁶² After two consecutive years of failure, students in failing schools must be allowed to choose another public school, including charter schools, within the same district; after five consecutive years of failure, schools are forced to “surrender control” to the state, which can reopen the school as a charter company, turn it over to a private management company, or take over the school itself.⁶³

In 2009, the Department of Education launched Race to the Top, a federal competition that awards funding on the basis of the adoption of articulated guidelines. Although most of the guidelines were fairly broad, one guideline in particular awarded 40 out of a possible 500 points for states that “ensur[ed] successful conditions for high-performing charters and other innovative schools.”⁶⁴ The move encouraged several states to pass legislation making it easier to establish charter schools.⁶⁵ Although federal law has not explicitly encouraged vouchers, large voucher programs have been implemented in several states, including Wisconsin (Milwaukee), Florida, Ohio (Cleveland) and Louisiana, with Louisiana’s program described as the most widespread voucher program in U.S. history.⁶⁶

School choice even has support in popular culture. Movies like *Waiting for Superman* and *The Lottery* presented largely uncritical examinations of

60. NCLB requires annual testing, in grades 3 through 8, in reading and math, with at least one more test given in grades 10 through 12. Students were also required to be “tested in science at least three times between grades three through twelve.” *Id.* at 940.

61. Test scores from required testing are used to determine whether schools are making “adequate yearly progress”; 100% of students are supposed to be “proficient” by 2014. *Id.* To make AYP, the entire student population must achieve the absolute proficiency goal set by the state for that year, illustrating the Act’s focus on absolute achievement, rather than the rate of progress—a feature that disadvantages schools whose student population started off further behind at the time of the Act’s implementation. Doing so creates a series of perverse incentives, which include the lowering of academic standards, as well as marginalization and segregation of poor and minority students. *Id.* at 941, 944–52.

62. “Title I schools” are schools with “high numbers or high percentages of children from low-income families” that receive federal financial assistance “to help ensure that all children [are able to] meet challenging state academic standards.” *Improving Basic Programs Operated by Local Educational Agencies (Title I, Part A)*, U.S. DEP’T EDUC., <http://www2.ed.gov/programs/titleiparta/index.html> (last visited Jan. 10, 2014).

63. Ryan, *supra* note 59, at 942–43.

64. U.S. DEP’T OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY 3 (2009), available at <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>.

65. The Alabama State School Board approved a resolution supporting legislation to support charter schools; Iowa passed an education package repealing legislation restricting the number of charter schools permitted in the state; and Massachusetts passed legislation establishing “Innovation Schools”—in-district charter schools aimed at improving autonomy and flexibility in the school system. *States Change Laws in Hopes of Race to Top Edge*, EDUC. WK. (Jan. 20, 2010), <http://edweek.org/ew/articles/2010/01/20/1grtt-sidebar.h2g.html>.

66. Hing, *supra* note 6; Simon, *supra* note 6.

charter school programs, portraying them as the answer to failing schools and villainous teachers' unions. Celebrities and public figures, like Bill and Melinda Gates⁶⁷ and music star John Legend,⁶⁸ have also publicly supported charter school programs.

Scholars have either conceded to or outright embraced school choice, discussing ways to make its implementation most palatable rather than interrogating the fundamental premises on which school choice is based. Although acknowledging that each “seductive” wave of school choice has historically been characterized by elements that undermine both equality and democracy,⁶⁹ scholars nevertheless conclude that “school choice itself is not bad” and “can be a vehicle for valuable reform for parental and community engagement, and for educational innovation.”⁷⁰ Scholars make this claim despite the reality that many of the ideals school choice promotes—including individual liberty and market competition⁷¹—are arguably completely inappropriate in a public school setting.⁷²

Public education reform has historically been filtered through a social justice framework with a focus on equality and justice in the public school system, as well as a community and state commitment to quality education. Rhetoric concerning public school reform today, however, conveys themes

67. See Diane Ravitch, *The Myth of Charter Schools*, N.Y. REV. BOOKS (Nov. 11, 2010), <http://www.nybooks.com/articles/archives/2010/nov/11/myth-charter-schools/>; Bill Gates, Co-chair & Tr., Bill & Melinda Gates Found., Remarks at the National Charter Schools Conference (June 29, 2010), available at <http://www.gatesfoundation.org/Media-Center/Speeches/2010/06/National-Charter-Schools-Conference>.

68. See, e.g., John Legend, *Education Reform: The Civil Rights Issue of Our Time*, HUFFINGTON POST (Jan. 18, 2010, 3:59 PM), http://www.huffingtonpost.com/john-legend/education-reform-the-civi_b_426490.html (characterizing expanded access to charter schools as a civil rights issue); John Legend, *Wake Up! We Know How to Fix Our Schools*, HUFFINGTON POST (Oct. 4, 2010, 7:13 AM), http://www.huffingtonpost.com/john-legend/wake-up-we-know-how-to-fi_b_748608.html (concluding that the strategies employed in successful charter schools are the key to effective education reform).

69. See generally Minow, *supra* note 36, at 819–35 (characterizing choice as: (1) “individual religious and contractual liberty,” which ultimately “entrenched . . . a two-tiered system of schooling, which sanctions private opt-outs from publicly run schools”; (2) “resistance to racial desegregation,” which was used in the South as an anti-desegregation tactic; (3) “an instrument of racial desegregation,” which nevertheless “obscured . . . continuing patterns of unequal access to test preparation and information used in the school choice” programs; (4) “as an instrument of educational opportunity” in the form of vouchers, which nevertheless “risk perpetuating unequal educational opportunities for poor students of color”; and (5) “pluralism and school reform,” which nevertheless renews risks of “separate but equal schooling,” while “cordon[ing] off from public debate the very character of the kinds of choices—and the kinds of education— school systems are permitting”).

70. *Id.* at 848; see also Martha Minow, *Reforming School Reform*, 68 FORDHAM L. REV. 257, 283–84 (1999) (concluding that the promising features of school choice can be leveraged to provide more equal education opportunities when in the form of charter schools rather than vouchers for private schools).

71. Minow, *supra* note 36, at 814.

72. See *infra* Part II.C.

not only about choice among options, but also about independent and private family decisions, competition, and parental control. Indeed, some scholars now take it as a given that individual school choice is not only an integral part of education reform, but also an inherently equitable one, and these scholars make recommendations on how to implement school choice so that it is most successful.⁷³ Others investigate the practical realities of its implementation,⁷⁴ while still others conclude, after critique, that charter schools and voucher programs nevertheless have a place in the public school system.⁷⁵

The American public, like academia, has largely embraced school choice. In addition, school choice has dominated the agenda of some of the country's most visible advocacy groups. The civil rights agenda of the NAACP, for example, has been deeply invested in charter schools because they are promoted as a means of social and economic integration,⁷⁶ although the investment has, at times, put the organization on the defensive with its constituency.⁷⁷ Both white and non-white Americans have, by and large, embraced charter schools in their communities.⁷⁸ Survey companies

73. Ryan & Heise, *supra* note 14, at 2135–36 (concluding that efforts to expand school choice have failed because the most important stakeholders in the debate—suburbanites—have not been engaged and suggesting how to effectively engage this group while expanding school choice options). Ryan and Heise write, “The core principle of school choice is an equitable one, as school choice grants poorer students an opportunity—the chance to choose their own schools—that is now reserved for wealthier students.” *Id.* at 2051.

74. See James Forman, Jr., *Do Charter Schools Threaten Public Education? Emerging Evidence from Fifteen Years of a Quasi-Market for Schooling*, 2007 U. ILL. L. REV. 839, 879 (investigating the “cream-skimming” phenomenon at charter schools and concluding that although additional research is necessary to fully assess the impact of charter schools on the traditional public schools system, the current threat of “cream-skimming” appears unsubstantiated).

75. See, e.g., Verna L. Williams, *Private Choices, Public Consequences: Public Education Reform and Feminist Legal Theory*, 12 WM. & MARY J. WOMEN & L. 563 (2006) (using feminist legal theory concerning decisional autonomy to conclude that the Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), interfered with parents’ positive right to make meaningful choices regarding the education of their children, but failing to question whether choice has any place in public education).

76. Ramona McNeal & Lisa Dotterweich, *Legislative Activities on Charter Schools: The Beginning of Policy Change?* 13 (Nov. 2007) (unpublished manuscript), available at http://ncspe.org/publications_files/OP150.pdf.

77. Fernanda Santos, *N.A.A.C.P. on Defensive as Suit on Charter Schools Splits Group's Supporters*, N.Y. TIMES (June 10, 2011), <http://www.nytimes.com/2011/06/11/nyregion/naacp-on-defensive-for-suit-against-charter-schools.html>. The NAACP was forced to justify its decision to bring suit against New York City “to keep 20 charter schools from opening or expanding in buildings shared with traditional public schools.” *Id.*

78. See William J. Bushaw & Shane J. Lopez, *The 45th Annual PDK/Gallup Poll of the Public's Attitudes Toward the Public Schools: Which Way Do We Go?*, PHI DELTA KAPPAN, Sept. 2013, at 9, 16, available at http://pdkintl.org/noindex/2013_PDKGallup.pdf (“Americans’ support for public charter schools remains high at slightly less than 70% [However,] [s]eventy percent of Americans oppose private school vouchers—the highest level of opposition to vouchers ever recorded in [this] survey.”); see also Milton L. Flynt, Note, *The New Generation of Civil Rights Advocacy: The Charter School Movement in African American Communities in the South*, 4 S. REGION

characterized the years 2010 and 2011 as “among the very best years school choice has yet enjoyed.”⁷⁹

In 2011, a *Time* article asked: Are these the end of times for charter schools?⁸⁰ The growth in political strength and popular support for charter schools, however, suggests anything but. Indeed, contrary to predictions in the late 1990s that choice would “remain a marginal phenomenon in education,”⁸¹ the movement has gathered speed and become a central principle—if not *the* principle—of the education reform movement. The growing chorus of policymakers who have concluded that charter schools are the answer to failing educational systems illustrate adherence to this principle.⁸² For example, in addition to its expansive school voucher program, the Louisiana legislature successfully passed a series of reforms significantly broadening charter school authorization powers.⁸³ Under one law, students in low-performing schools are entitled to take their share of state funding to any accredited private or religious school in the state. Although 400,000 students are eligible for transfer, there are only 5,000 schools authorized to receive them⁸⁴—a reality that will almost certainly be used to justify the creation of additional school choices.

Yet, the rise of school-choice programs and policies is curious given its failure to actually improve academic outcomes. The most comprehensive

BLACK L. STUDENTS ASS'N L.J. 100, 106–08 (2010) (identifying the growing trend of black churches in the South expressing interest in “operating charter schools”).

79. Howell et al., *supra* note 55, at 17. The nature of the public's reception to voucher programs continues to be “mixed.” When the question was phrased as “voucher-friendly,” or emphasizing choice for parents, 47% of the responses were positive, whereas when the question was “voucher-unfriendly,” or emphasizing “students going to private school at public expense,” 39% of the responses were positive. *Id.* at 16–17.

80. Andrew J. Rotherham, *Backlash: Are These End Times for Charter Schools?*, TIME (June 9, 2011), <http://content.time.com/time/nation/article/0,8599,2076488,00.html>.

81. Robert C. Bulman & David L. Kirp, *The Shifting Politics of School Choice*, in SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW 36, 61 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999).

82. See, e.g., DEMOCRATIC NAT'L COMM., MOVING AMERICA FORWARD: 2012 DEMOCRATIC NATIONAL PLATFORM (2012), available at <http://assets.dstatic.org/dnc-platform/2012-National-Platform.pdf> (“The Democratic Party understands the importance of turning around struggling public schools. We will continue to strengthen all our schools and work to expand public school options for low-income youth, including magnet schools, charter schools, teacher-led schools, and career academies.”); NAT'L ALLIANCE FOR PUB. CHARTER SCHS., <http://www.publiccharters.org/> (last visited Jan. 10, 2014). The trend is not all that surprising, given general trends towards privatization and choice in broader society (e.g., the shift from pensions to 401Ks and the rise of for-profit higher education). For a more detailed critique of choice in society more generally, see Dorothy E. Roberts, *The Priority Paradigm: Private Choices and the Limits of Equality*, 57 U. PITT. L. REV. 363 (1996).

83. See generally *Charter Schools: What are Charter Schools?*, LA. ASS'N PUB. CHARTER SCHS., <http://lacharterschools.org/charter-schools> (last visited Jan. 10, 2014) (describing the legislative history of Louisiana charter schools).

84. Diane Ravitch, *In Mitt Romney's Schoolroom*, N.Y. REV. BOOKS (July 12, 2012), <http://www.nybooks.com/articles/archives/2012/jul/12/mitt-romneys-schoolroom/>.

study to date, conducted by the Center for Research on Education Outcomes (“CREDO”), drew on data from a longitudinal study of the impact of charter schools on over 70% of students enrolled in charter schools in the United States. The study concluded that although 17% of charters provide superior educational opportunities, almost half produce results that are no better than traditional public schools, and 37% deliver results that are *worse* than traditional public schools,⁸⁵ a conclusion that numerous other studies supported.⁸⁶ While the CREDO study found that the effectiveness of charter schools varied widely by state, other studies have found that choice policies can exacerbate existing problems of educational organizations.⁸⁷ The CREDO study also found that charter schools have different impacts on different groups of students; Blacks and Latinos, in particular, experienced significantly worse learning gains than their peers in traditional public schools experienced.⁸⁸

85. CTR. FOR RESEARCH ON EDUC. OUTCOMES (CREDO), *MULTIPLE CHOICE: CHARTER SCHOOL PERFORMANCE IN 16 STATES* 1, 45–47 (2009), *available at* http://credo.stanford.edu/reports/MULTIPLE_CHOICE_CREDO.pdf (concluding that even though “elementary and middle school charter students exhibited higher learning gains than equivalent students in the traditional public school system,” and that gains often increase the longer a student is enrolled, on average, charter school students experience lower academic growth than their peers at traditional public schools, with charter school efficiency varying widely by state); *see also* Trip Gabriel, *Despite Push, Success at Charter Schools Is Mixed*, N.Y. TIMES (May 1, 2010), <http://www.nytimes.com/2010/05/02/education/02charters.html?pagewanted=all>.

86. NAT’L ASSESSMENT OF EDUC. PROGRESS, U.S. DEP’T OF EDUC., *AMERICA’S CHARTER SCHOOLS: RESULTS FROM THE NAEP 2003 PILOT STUDY 1* (2004), *available at* <http://nces.ed.gov/nationsreportcard/pdf/studies/2005456.pdf> (using data obtained from a study of 2003 NAEP assessments in reading and math in the fourth grade to conclude that: “fourth-grade charter school students as a whole did not perform as well as their public school counterparts” in mathematics; that there was no measurable difference in performance in math between charter school students and their fourth-grade, public-school counterparts with similar racial/ethnic backgrounds; that “[i]n reading, there was no measurable difference in performance between charter school students in the fourth grade and their public school counterparts as a whole . . . even though, on average, charter schools have higher proportions of students from groups that typically perform lower on NAEP than other public schools have”; and that “among students eligible for free or reduced-price lunch, fourth-graders in charter schools did not score as high in reading or mathematics . . . [as their peers in] public schools”); Kathleen Sullivan Brown, *The Future of Vouchers as Educational Reform, Political Strategy, Economic Solution, and Public Policy in the United States*, F. ON PUB. POL’Y, Spring 2007, at 3–4, *available at* <http://forumonpublicpolicy.com/archivespring07/brown.pdf> (concluding that studies of voucher programs find no significant difference in student achievement over traditional schools); McNeal & Dotterweich, *supra* note 76, at 2, 5–7 (canvassing multiple studies that find little to no improvements in academic achievements at charter schools compared to traditional public schools).

87. David K. Cohen, *Governance and Instruction: The Promise of Decentralization and Choice*, in *1 CHOICE AND CONTROL IN AMERICAN EDUCATION*, *supra* note 36, at 337, 340–45.

88. CTR. FOR RESEARCH ON EDUC. OUTCOMES (CREDO), *supra* note 85, at 6, 26.

II. SCHOOL CHOICE AS RACIAL SUBORDINATION

Despite the absence of positive outcomes, particularly for students of color, the appeal of school-choice programs continues to broaden, as reflected in the expanding size and scope of voucher programs, charter schools,⁸⁹ and parental trigger laws.⁹⁰ Given the unexamined “benefits” of school choice, this Part presents less-explored critiques of the legal, moral, and pedagogical legitimacy of choice and choice rhetoric in education reform as advanced through charter schools and voucher programs. To be clear, choice in the abstract is not problematic. Quite the contrary, genuine choice—which entails realistic options and the preparation and opportunity to pursue those options—can be integral to self-actualization, dignity, and equality. What this Article seeks to critique, however, is the application of choice themes in public education, where race and identity will warp and ultimately impede a properly functioning education market where choices are presumably exercised.

In addition to the problematic impact of race on the education market, choice also masks racial subordination in public education in the form of unreasonable educational alternatives, education policy problematically informed by cultural-deficit models, and negative-racialized schooling experiences. Moreover, school choice forces parents and caregivers of color to bear the burden of reform, thus shifting responsibility from the state to individuals when choice fails to improve educational outcomes. Ultimately, the rhetoric of individualism, independence, and liberty that permeates school choice distracts stakeholders from addressing larger societal issues. Race, class, and identity will necessarily impede genuine choice in the

89. As noted, the Obama Administration’s Race to the Top Competition rewarded charter-friendly state regulation. The scoring rubric for the awards, for example, specifically directed reviewers to award high points if a state either had no cap on the number of charter schools, or it had a “high” cap. U.S. DEP’T OF EDUC., APPENDIX B. SCORING RUBRIC 14–15, available at <http://www2.ed.gov/programs/racetothetop/scoringrubric.pdf> (last visited Jan. 11, 2014). No points, however, were awarded if a state had no charter school law. *Id.*

90. Parental trigger laws are an increasingly popular legal tool allowing parents to force major changes at a public school if enough families support the change through a petition. Changes range from closing a school, to firing administration, to reopening the school as an independent charter. See, e.g., Lyndsey Layton, *Group Can Use ‘Parent Trigger’ Law to Take Over California School, Court Rules*, WASH. POST (July 23, 2012), http://articles.washingtonpost.com/2012-07-23/local/35488356_1_desert-trails-elementary-doreen-diaz-parent-revolution. Although seemingly encouraging parents to engage in the sort of collective action this Article promotes, the trigger laws typically result in takeover of the school by a private management company, converting the school to a privately operated charter, or implementing a voucher program to send children to private schools. Bryant, *supra* note 52. Moreover, the laws do not necessarily result in increased accountability. Many trigger laws, for example, provide parents with “no avenue for re-triggering” the converted charter school should it fail. Hing, *supra* note 6. Although outside of the scope of this Article, the homeschooling movement, magnet programs, and private schools implicate the same questions and warrant further consideration.

education system and undermine the democratic values of citizenship and equality that should inform public-education policy.

A. RACE AND THE SCHOOL-CHOICE MARKET

Choice rhetoric contemplates the sphere for reformed education as a market. The commodification of education in this way has prompted no shortage of critiques identifying the ways in which the conditions for a properly functioning education market are difficult—if not impossible—to dictate.⁹¹ Problems with an education market, however, go beyond the mere

91. Educational decisions are more complex than mere preference for a particular school that can be expressed in an education market. Distance from home and place of employment, access to public transportation, and sibling enrollment are just a few of the many factors considered in schooling choices that are less easily managed by minority, poor, or working-class families. As a result, the switching costs for parents are high, even when their children are stuck in underperforming schools. Moreover, maximizing rational consumer choice is difficult to do; parents may not know what they and their children actually need in terms of educational services, and it can be difficult to objectively assess quality among schools, particularly given widely accepted, but unproven, common beliefs. Although many people accept without question that the governing structure of private schools results in higher rates of educational efficiency or achievement, controlling for factors like socioeconomic status reveals that there is little to no correlation between private control and academic achievement. See Anthony S. Bryk et al., *High School Organization and Its Effects on Teachers and Students: An Interpretive Summary of the Research*, in 1 CHOICE AND CONTROL IN AMERICAN EDUCATION, *supra* note 36, at 135, 188 (“[T]here is virtually no evidence that directly links the ‘effective organizational practices’ thought to accrue through greater school autonomy to key outcomes such as students’ academic learning.”); Levin, *supra* note 36, at 247 (finding that although there are differences in achievement between market choice and public choice, the difference is slight); Liebman, *supra* note 50, at 265 (noting that although the authors do manage to discover that the private school sector is highly correlated with school autonomy, it is likely due to the fact that private schools are less unionized, have fewer administrators, and assign less responsibility to outsiders than do public schools). Finally, with market structures also come market-style abuses and irregularities, particularly when school-choice policies invite for-profit entities to participate. For-profit education management companies, for example, have come under scrutiny for marginalizing charter holders, dominating school decision making, and engaging in transactions that problematically place them on both sides of the bargaining table. When these abuses result in some form of market failure, the costs are high: students are injured when schools abruptly shut down, schools are left to spiral down in quality, or administrators cut and run with money. Nicholas Confessore & Jennifer Medina, *More Scrutiny for Charter Schools in Debate over Expansion*, N.Y. TIMES (May 25, 2010), <http://www.nytimes.com/2010/05/26/education/26charters.html> (chronicling Niagara Charter School, a charter that “spent thousands of dollars on plane tickets, restaurant meals and alcohol, and more than \$100,000 on no-bid consulting contracts,” despite having no money for playground equipment; finding that Niagara Charter School was reauthorized even after the State Education Department had concluded a report finding evidence of financial mismanagement; Family Life Charter School, which “pays \$400,000 annually to rent classroom space from the” school’s founder, Rev. Raymond Rivera; and the Oracle Charter School, in Buffalo, that “will make more than \$5 million in payments to” the KBSD real estate partnership, to own a building that sold for just \$875,000 where interest on the loan was 20%, and after the transaction was finalized, a KBSD partner joined the school board); Stephanie Strom, *For School Company, Issues of Money and Control*, N.Y. TIMES (Apr. 23, 2010), <http://www.nytimes.com/2010/04/24/education/24imagine.html> (chronicling a commercial charter school company, Imagine Schools, that has

absence of ideal market conditions. Rather, the problems extend to the ways in which race and racism warp the market, undermining the possibility that an education market could ever genuinely optimize educational outcomes for marginalized students and families in that market.

As an initial matter, the choices of poor, working class, and minority students and their families in the education market are severely limited.⁹² Community bias against these groups, for example, is often reflected in local policies like zoning for multi-family housing that can limit access to particular schools—charter and voucher schools included. Input and influence of marginalized communities regarding charter school policies (including school offerings, the number of schools, location, and themes) is subject to the same limitations that undermine these groups in any political process.

Information asymmetry and unequal bargaining power also undermine the market for parents of color. Marginalized minority parents, in particular, often do not have ready access to the data and information that would enable them to make good schooling decisions. Moreover, minority parents are often on unequal footing when they engage with school systems, given the pervasiveness of cultural-deficit theories that demean and devalue minority parental participation in their children's education.⁹³

The idea of the "rational parent" as an actor in the education marketplace, who is able to choose the best educational option for his or her child, is a myth—even if one assumes genuinely broadened options, better information, and increased bargaining power. Although parents assert that they care most about academics, studies suggest that even after controlling for educational programming and performance, parents use heuristics—namely race—when making school choices.⁹⁴ In one study, for example, an increase of more than two percent in the African-American student

come under scrutiny for dominating schooling decisions, but then engaging in business transactions with the very school board it dominates; entering into onerous and one-sided management with charter schools; and using debt and real-estate to bind charter schools to the management company).

92. The same can be said of women in the workforce, where conscious and unconscious bias against women creates unequal power dynamics that place women at a significant disadvantage. See Deborah L. Rhode, *Occupational Inequality*, 1988 DUKE L.J. 1207, 1217–22 (citing research finding that identical resumes, works of art, and scholarly works are rated lower if the applicant is a woman; that occupations are rated lower in terms of complexity of tasks, thus affecting compensation, when associated with a particular gender; and that bias not only affects evaluation of female performance, but also undermines performance itself). For literature on how sex-based segregation and appearance regulation used by employers forms the basis for continuing gender hierarchy on which sex-based pay scales are justified, see Jessica Knouse, *Restructuring the Labor Market to Democratize the Public Forum*, 39 STETSON L. REV. 715, 744–60 (2010).

93. See *infra* notes 123–27 and accompanying text.

94. Susan L. DeJarnatt, *School Choice and the (Ir)rational Parent*, 15 GEO. J. ON POVERTY L. & POL'Y 1, 17–19 (2008).

population correlated with a parental perception that school quality had declined, even when objective evidence contradicted that perception.⁹⁵ Allowing parents to self-segregate within schools in this way is a “successful,” but undesirable, optimization of parental preferences. Moreover, a market in which parents select schools based mostly on racial composition, instead of objective measures of academic excellence, is not really an *education* market, but rather a racialized *social* market playing out in the sphere of public education. The education market, legitimate or illegitimate, is not an arena in which rational decisions about education take place.

An education market also encourages “exit,” a pattern in American public education that is most problematic for vulnerable students and families of color. Although Chubb and Moe ignored this possibility, in addition to affecting firm behavior by exiting, consumers can affect firm behavior by staying put and voicing their complaints.⁹⁶ By enabling school exit through choice, however, school-choice policies encourage education connoisseurs—those parents who get the highest degree of return for each increment of quality—to rapidly leave a school or school system, thus accelerating decline as the parents and families lacking voice are left behind.⁹⁷ Absent choice models, underperforming schools may, indeed, lack the discipline of exit. An education market, however, also frees these schools from the discipline of voice. Losing the voices of education connoisseurs who could advocate for the improvement or maintenance of school quality harms poor and minority schools and school districts most in need of this economic and social capital.

Finally, there are questions about the impact on education of the market model itself. Michael Sandel argues that “[p]utting a price on the good things in life can corrupt them . . . because markets . . . express and promote certain attitudes toward the goods being exchanged.”⁹⁸ Although the market conception of education does not go so far as to charge for school enrollment, the so-called “education market” nevertheless imports the value of commercialization, thus changing the meaning of public education.⁹⁹

In an education market, administrators no longer consider students and families as community members. Competition for students turns them into mere customers to be captured along with their share of state funding.

95. *Id.* at 18 n.101.

96. Liebman, *supra* note 50, at 295.

97. *Id.* at 295–98. *But see* Forman, *supra* note 74, at 862–64 (concluding that although additional research is necessary to fully assess the impact of charter schools on the traditional public schools system, the current threat of “cream-skimming” appears unsubstantiated and that charter schools can become allies in efforts to increase educational funding for all schools).

98. MICHAEL J. SANDEL, WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS 9 (2012).

99. *See id.* at 201 (arguing that although “[c]ommercialism does not destroy everything it touches,” it does change its meaning).

Students and families also become distanced from teachers and administrators as members of a community, viewing them instead as salespersons trained to attract their business. A market mindset transforms education from a collaborative endeavor to one where students and parents only passively participate in their education as consumers who have made their choice and now wait to be served.¹⁰⁰ In the end, the commercialization of the education process alienates individuals from the community nature of public schooling.¹⁰¹ The process of exercising choice might make parents and students feel more autonomous, but it ultimately degrades the societal understanding of public schooling as an exercise in citizenship and democracy and erodes the sense of community obligation to others.¹⁰² Arguably, an abdication of obligation to community propelled the abandonment of urban schools that *Milliken* sanctioned and which continues today.¹⁰³

B. WHEN SUBORDINATION IS PRESENTED AS CHOICE

Problems with school choice, however, go deeper than a critique of market conditions. In addition to market circumstances that limit the decision making of minority groups in education, marginalized groups' schooling choices are also socially constrained and influenced in racially subordinating ways. School-choice policies mask this form of racial subordination.¹⁰⁴

100. See *infra* Part II.C.1.

101. See SANDEL, *supra* note 98, at 202–03 (suggesting that, like “[t]he disappearance of the class-mixing experience” at baseball games due to the availability of skyboxes for the wealthy, “the marketization of [American society] means that people of affluence and people of modest means lead increasingly separate lives”).

102. See *id.* at 9 (listing other contexts in which marketization corrupts: “[p]aying kids to read books might get them to read more, but [presents] reading as a chore”; “[h]iring foreign mercenaries to fight our wars might spare the lives of citizens but corrupt the meaning of citizenship”).

103. See *supra* notes 32–35 and accompanying text.

104. Again, one can easily make analogies to many of the choices women make, like taking a husband's name, withdrawing from the workforce to raise children, or assuming the role of primary caregiver. Scholars note that women are not only raised and socialized to believe “they are entitled to the pleasure of spending time with their [young] children,” but that the factors that would enable women to make genuinely unfettered decisions to withdraw from the workplace—the knowledge that fathers would be both willing to stay at home with children, and are *sued to do so*—simply do not exist. Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 823, 831 (1989). Moreover, among women who do choose to enter the workforce, their career decisions are affected not just by their socialization as children, but by employers who actively construct gendered job aspirations. Far from being solely dictated by early childhood socialization regarding “feminine” work, “women’s work preferences are formed, created, and recreated in response to changing work conditions.” Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1814–16 (1990).

1. The Absence of Reasonable Alternatives

American parents and caregivers have historically been consistent in their preference for public neighborhood schools.¹⁰⁵ Moreover, despite doomsday predictions regarding the system's demise, Americans are generally satisfied with their own neighborhood schools, believing that only other schools have the problems that plague the system more generally.¹⁰⁶ Given the failure of charter and voucher schools to educate students any better than traditional public schools, and the fact that in many instances they do a poorer job, it is surprising that policymakers adopt school-choice programs as often as they do. Consider further the deleterious consequences for communities and students when they are displaced by the closure of neighborhood schools in favor of charter and voucher expansion¹⁰⁷ and it is a wonder that poor and minority students so disproportionately select school-choice options at all.

One explanation is the lack of reasonable alternatives. For racial minorities, access to quality public schools is not nearly as assured as it is for many white students and their families. Take the case of, for example, special education, where minority schoolchildren in the public school system are overrepresented. Although intended to address learning difficulties, special education in public schools often isolates, stigmatizes, and widens the achievement gap,¹⁰⁸ making the over-identification of

105. See RAVITCH, *supra* note 16, at 100 (noting that transfer options under NCLB were undersubscribed because “many parents . . . did not want to leave their neighborhood school, even if the federal government offered them free transportation and the promise of a better school”).

106. See Bushaw & Lopez, *supra* note 78, at 20, 21. Although only 18% of those surveyed assigned a grade of A or B to the nation's schools generally, 53%—the highest percentage ever recorded—gave the schools in their community an A or B. *Id.* at 20 tbls.31 & 32. Of those surveyed, 71% assigned grades of A or B to the school their oldest child attends. *Id.* at 21 tbl.36.

107. See MARISA DE LA TORRE & JULIA GWYNNE, CONSORTIUM ON CHI. SCH. RESEARCH, WHEN SCHOOLS CLOSE: EFFECTS ON DISPLACED STUDENTS IN CHICAGO PUBLIC SCHOOL 5, 15–16, 18–19, 26 (2009) (citing Russell Rumberger, *The Causes and Consequences of Student Mobility*, 72 J. NEGRO EDUC. 6 (2003); Shana Pribesh & Douglas B. Downey, *Why Are Residential and School Moves Associated with Poor School Performance?*, 36 DEMOGRAPHY 521 (1999) (identifying many problems with school closings, including: (1) the association between student mobility and (i) lower subsequent achievement, (ii) higher retention rates (meaning more students are not promoted to the next grade), (iii) higher referrals to special education, and (iv) lower likelihood of graduation; (2) the disruption in terms of social capital formation; and (3) the impact that an influx of new students has on the receiving schools; and concluding that the effects of school closings in Chicago included: the reenrollment of students in schools that were academically weak, negative impacts on math and reading achievement in the year before closings due to anxiety and disruption, neither negative nor positive additional effects on learning once schools were closed, and a negative effect on summer school enrollment and on subsequent school mobility).

108. Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237, 1240 (noting that students placed in special education often suffer the negative consequences of (1) being labeled by “their teachers, peers, and themselves”; (2) having their learning difficulties portrayed as “reflecting innate limitations” rather than the product of

minority students for the programs particularly problematic.¹⁰⁹ Black schoolchildren are also underrepresented in “hard” disability categories like deafness or blindness—the least stigmatizing educational disabilities for which assessment is most objective.¹¹⁰ In almost every state, however, black schoolchildren are over-identified in the more stigmatized “soft” categories that are assessed more subjectively, like educationally mentally retarded (“EMR”) and emotionally disturbed (“ED”).¹¹¹ And poverty rates or exposure to environmental hazards do not explain the disparities.¹¹² Special education in public schools, then, is often used to segregate and degrade minority school children.¹¹³

In the same vein, Blacks are also overrepresented in public school suspensions and corporal punishment,¹¹⁴ with schools more likely to implement extremely punitive discipline and zero-tolerance policies, and less likely to use mild discipline and restorative techniques, as the percentage of black students enrolled increases.¹¹⁵ Not only do these relationships operate independent of economic status, gender, crime salience, urban residence, and teacher training, but the relationship is also stronger when school delinquency and disorder is lower.¹¹⁶

Majority-minority schools also face discrimination that operates independent of poverty levels among the schools. This discrimination includes the disproportionate assignment of novice teachers to the

unsuccessful education programs; and (3) being subject to diminished expectations by their teachers); Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407, 417–19 (2001) (noting that contrary to research confirming the benefit of mainstreaming special education students to the maximum extent practicable, children labeled “mentally retarded” are most likely to be segregated from regular education classrooms and regular education peers, and that educational benefits to minorities disproportionately represented in special education are “meager” at best).

109. Losen & Welner, *supra* note 108, at 415–16 (noting that minority schoolchildren are overidentified for special education independent of their disproportionate representation among the poor).

110. Glennon, *supra* note 108, at 1251–52, 1302; Losen & Welner, *supra* note 108, at 416.

111. See Losen & Welner, *supra* note 108, at 416–17.

112. Although the incidence of EMR classifications generally increase with poverty, black children are more likely to be identified as EMR in wealthier districts. Daniel J. Losen & Gary Orfield, *Introduction to RACIAL INEQUALITY IN SPECIAL EDUCATION* xv, xxii–xxiv (Daniel J. Losen & Gary Orfield eds., 2002). Moreover, exposure to poverty would plausibly result in increased identification among hard categories, but black schoolchildren are underrepresented there. Losen & Welner, *supra* note 108, at 416.

113. Losen & Welner, *supra* note 108, at 407 (“[S]pecial education is far too often a vehicle for the segregation and degradation of minority children.”).

114. Glennon, *supra* note 108, at 1255–56.

115. See Kelly Welch & Allison Ann Payne, *Racial Threat and Punitive School Discipline*, 57 SOC. PROBS. 25 (2010).

116. See *id.*

schools¹¹⁷ and higher rates of teacher exit even after controlling for poverty.¹¹⁸ Minorities in the school system also encounter racial and economic isolation that imparts a profoundly negative effect on academic achievement, increased violence and peer bullying, and inadequate school financing.¹¹⁹ Given the challenges that minorities face in public schools, it is not at all surprising that these parents, who are as attached to the idea of neighborhood schools as any other demographic group, would decide to utilize charter and voucher programs that nevertheless fail to improve academic outcomes. The failure of school-choice policies to address the issues that lead to the minority achievement gap in traditional public schools only serves to underscore the false choices presented to minority parents. These parents could only be said to have truly preferred a choice school if they had access to quality neighborhood schools to begin with and were relatively confident that their students would have positive, affirming experiences therein.

2. The Impact of Cultural-Deficit Models

Experiences within the school system itself also shape and influence the perspective that families of color have about the public school system, driving their desire to opt-out of traditional public education. Cultural-deficit theories, in particular, have significantly affected education policy and the interactions of students and families in the education system. Cultural-deficit theorists in education characterize a “child’s social, cultural or economic environment as being ‘depraved and deprived’ of the elements necessary to ‘achieve the behavior rules . . . needed to’ academically succeed” and advance “the idea that social and emotional deficiencies [negatively] affect student performance within the academic system.”¹²⁰ The

117. See, e.g., ESCH ET AL., *supra* note 15, at 70 (finding that 20% of teachers serving in California schools with minority populations between 91% and 100% were “underprepared . . . or novice teachers . . . [compared to only] [e]leven percent of teachers in schools serving few or no minority students”); Mickelson, *supra* note 15, at 1547 (finding that the higher the percentage of black students in a school, the less likely it is that those schools employ teachers with masters degrees).

118. See, e.g., Eric A. Hanushek et al., *Why Public Schools Lose Teachers*, 39 J. HUM. RESOURCES 326, 333–47 (2004) (presenting a study of Texas public school teachers which found that high teacher mobility is positively correlated with higher black or Latino school enrollment, even after controlling for salaries, student test scores, class size, and school poverty); Benjamin Scafidi et al., *Race, Poverty, and Teacher Mobility*, 26 ECON. EDUC. REV. 145, 147, 153–57 (2007) (finding that an increase in the proportion of black students in a school increases the probability that a Georgia elementary-school, non-black teacher will exit that school in a particular year and that changes in salary, poverty levels, and test scores exerted an insignificant effect on exit probability).

119. See James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 285–86 (1999).

120. Donna Bolima, *Contexts for Understanding: Educational Learning Theories*, http://staff.washington.edu/saki/strategies/101/new_page_5.htm (last visited Jan. 11, 2014); see also Augustine F. Romero & Marin Sean Arce, *Culture As a Resource: Critically Compassionate*

theory has received sustained criticism for catering to ethnocentric perspectives—Euro-American perspectives, in particular—and has been supplanted by subsequent theories that characterize academic underachievement not necessarily as the function of a cultural deficit on students' parts, but as the result of external interactions and structures that shape educational experience.¹²¹ Cultural-deficit theorists, for example, characterize academic underachievement as the result of “teachers and students playing into each other’s cultural blind spots,” while cultural-ecological theorists focus more on macro-ethnographic findings, which reveal that certain variables create barriers for some underachieving groups, keeping them in a position of subordination within the public school system and in society more generally.¹²²

Most notably, scholars have repeatedly discredited cultural-deficit models in education because the models perpetuate the proposition that poor and minority groups do not value education in the same way as middle- and upper-class people and/or Whites.¹²³ In addition, cultural-deficit models

Intellectualism and Its Struggle Against Racism, Fascism, and Intellectual Apartheid in Arizona, 31 HAMLINE J. PUB. L. & POL’Y 179, 183–84 (2009) (noting that “[t]he cultural determinist model argues that cultural values are the primary determinant of low academic achievement” and explaining that, according to theorists, the remedy within the cultural-deficit model is to have children assimilate “to the values and culture of the dominate group”); Veronica Nelly Velez, *Challenging Lies LatCrit Style: A Critical Race Reflection of an Ally to Latina/o Immigrant Parent Leaders*, 4 FLA INT’L U. L. REV. 119, 127 (2008) (“[C]ultural deficit or deprivation models ‘singled out the family unit as the transmitter of deficiencies The family unit—mother, father, home environment—[is] pegged as the carrier of the pathology.’ Logically then, if a child fails academically the ‘deficient’ home is to blame.” (alterations in original) (footnote omitted) (quoting Arthur Pearl Daniel, *Cultural and Accumulated Deficit Thinking*, in THE EVOLUTION OF DEFICIT THINKING: EDUCATIONAL THOUGHT AND PRACTICE 133 (Richard R. Valencia ed., 1997))).

121. Similar critiques have been leveled against “culture of poverty” theories, which problematize people in poverty, instead of problematizing the way in which societal structures create and perpetuate poverty. See, e.g., Paul C. Gorski, *Savage Unrealities: Uncovering Classism in Ruby Payne’s Framework* (Sept. 23, 2005) (unpublished manuscript), available at http://www.edchange.org/publications/Savage_Unrealities.pdf (critiquing Payne’s failure, in her *A Framework for Understanding Poverty*, to understand what causes poverty, how school and educators perpetuate it, or how the upper classes maintain class privilege through the education system; to perform systematic analysis regarding poverty, classism, and other systems of power and privilege; and for contributing to notions of cultural deficit among the poor).

122. Bolima, *supra* note 120 (internal quotation marks omitted).

123. Margaret Beale Spencer & Vinay Harpalani, *What Does “Acting White” Actually Mean?*, in MINORITY STATUS, OPPOSITIONAL CULTURE, AND SCHOOLING 222 (John U. Ogbu ed., 2008) (examining Ogbu’s “acting white” theory and concluding that the claim lacked empirical verification, was informed by a cultural-deficit model, and ignored the long history of African-American value of, and investment in, education); Gloria Ladson-Billings, *Toward a Theory of Culturally Relevant Pedagogy*, 32 AM. EDUC. RES. J. 465, 468 (1995) (citing to a “long history of African-American educational struggle and achievement,” which contradicts pronouncements that Blacks do not value education); Velez, *supra* note 120, at 127–29 (documenting qualitative and ethnographic research finding that even though “cognitive ‘spaces’ differ from mainstream dominant culture,” Latino/a parents continuously expressed a belief in the value of education,

fail to question how education policies—including tracking, high-stakes testing, inadequate school financing, and school segregation by race and class—contribute to the academic achievement gap.

And yet, cultural-deficit theories endure, informing educational policy, influencing jurisprudence regarding education, and animating education reform.¹²⁴ NCLB, with its focus on standardization and high-stakes testing, still focuses on the failures of students, while failing to address structural conditions and inequities that drive the achievement gap—poverty, funding and resource inequity, and racial, social, and economic isolation.¹²⁵ Similarly, the theories encourage teachers and administrators to exclude minority parents in decisions and planning, especially regarding early childhood education¹²⁶ and special education.¹²⁷

Several federal court decisions also illustrate the jurisprudential durability of the cultural-deficit model. By declining to hold the state accountable in *Milliken v. Bradley* for structural dynamics that allowed Whites to escape to the suburbs while trapping Blacks in an increasingly

were actively involved in affecting school policies and practices, navigated their children through poverty and racism in the school system, and joined advocacy efforts to improve education for their youth).

124. See Richard R. Valencia & Daniel G. Solórzano, *Contemporary Deficit Thinking*, in *THE EVOLUTION OF DEFICIT THINKING: EDUCATIONAL THOUGHT AND PRACTICE*, *supra* note 120, at 160 (noting that although scholars have debunked deficit theory it continues to manifest in contemporary educational thought and practice). Desegregation policies of the 1970s and 1980s, for example, were often informed by cultural-deficit theories, which assumed that white children could not be well-educated in black communities, leading to busing policies that required black children to leave their neighborhoods at younger ages, and to spend more time in buses to other neighborhoods than their white peers.

125. Charles R. Lawrence III, *Who Is the Child Left Behind?: The Racial Meaning of the New School Reform*, 39 SUFFOLK U. L. REV. 699, 716 (2006) (noting that the conversation about the racial achievement gap is still informed by cultural-deficit theories and “pessimism about the power of teachers, schools, and children” (quoting Asa Hilliard III, *No Mystery: Closing the Achievement Gap Between Africans and Excellence*, in *YOUNG, GIFTED, AND BLACK: PROMOTING HIGH ACHIEVEMENT AMONG AFRICAN-AMERICAN STUDENTS* 143 (2003)) (internal quotation marks omitted)).

126. For example, low-income parents were excluded in the development of early childhood programs like Head Start. See Richard C. Boldt, *A Study in Regulatory Method, Local Political Cultures, and Jurisprudential Voice: The Application of Federal Confidentiality Law to Project Head Start*, 93 MICH. L. REV. 2325, 2346–53 (1995) (documenting how, despite its ability to maintain some aspects of “participatory” community, Head Start did not turn into the “catalyst for broad social change” that it could have, due, in part, to the currency of the cultural-deficit model and the conceptualization of parents in the program as “learners” and as recipients of services . . . [rather than] as equal participants in a collaborative endeavor”).

127. Glennon, *supra* note 108, at 1326–27. Glennon noted that “African-American parents with children in special education have even less involvement and less influence than white parents . . . [due, in part, to findings] that school professionals initiated significantly fewer contacts with minority students parents, and offered a narrower range of services to . . . minority as compared to majority parents.” *Id.* These findings are said to be influenced by administrator and teacher beliefs in cultural-deficit theories that conclude that “African-American parents are . . . apathetic about their children’s education.” *Id.*

impoverished inner city, the Court failed to acknowledge how factors external to minority culture and values undermine academic achievement.¹²⁸ Rather than acknowledge the state's role in creating the isolation, the Court instead affirmed the remedy chosen to address lowered academic achievement among minority students caused by economic isolation and highlighted as exemplary parts of the remedy that responded to cultural deficits among black students.¹²⁹ Similarly, when lifting desegregation decrees in *Missouri v. Jenkins*,¹³⁰ the Court failed to even affirm a school's role in addressing the achievement gap, stating that the black academic achievement gap in Kansas City was more likely due to external factors beyond the control of schools and, as one commentator noted, "impliedly within control of students, their families, and cultural communities."¹³¹

Subsequent federal cases did not deviate from a pattern of ignoring structural reasons for the achievement gap.¹³² Having failed in *Parents Involved in Community Schools v. Seattle School District No. 1* to acknowledge equity as a compelling interest, the Court implicitly reaffirmed the centrality of cultural-deficit models in education by maintaining as actionable only the traditional justification for race-conscious remedies: intentional discrimination and the impact it has on the psychology of minority schoolchildren.¹³³ In doing so, the Court ignored structural constraints on minority schoolchildren that undermine academic achievement as much as, if not more than, internalized notions of inferiority.¹³⁴

128. *Milliken v. Bradley*, 433 U.S. 267, 287–88 (1977).

129. *Id.* ("On this record, however, we are bound to conclude that the decree before us was aptly tailored to remedy the consequences of the constitutional violation. Children who have been thus educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. They are likely to acquire speech habits, for example, which vary from the environment in which they must ultimately function and compete, if they are to enter and be a part of that community.").

130. *Missouri v. Jenkins*, 515 U.S. 70, 102 (1995).

131. Josie Foehrenbach Brown, *Escaping the Circle by Confronting Classroom Stereotyping: A Step Toward Equality in the Daily Educational Experience of Children of Color*, 19 BERKELEY WOMEN'S L.J. 335, 342 (2004).

132. *Id.* at 342 (citing *Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998), and *United States v. City of Yonkers*, 197 F.3d 41 (2d Cir. 1999), as two cases in which federal courts refused to accept teachers' low expectations regarding minority students as justification for race-conscious education policies).

133. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 732 (2007). The Court failed to recognize the attainment of educational equity as a compelling interest justifying the use of race-conscious school assignment plans in Seattle, Washington and Louisville, Kentucky, even though research showed that maintaining racial integration of the cities' public schools was integral for equally distributing educational resources, like qualified teachers, throughout the districts. See *id.* at 839–40 (Breyer, J., dissenting).

134. Moreover, researchers have too quickly concluded that children internalize notions of inferiority. The experiments on which the Supreme Court so heavily relied in *Brown v. Board of Education*, for example, were taken to mean that children internalize messages of inferiority

Legal decisions and educational policy do not occur in vacuums; rather, they influence the behavior of those about which the cases and policies are concerned. Moreover, there is no shortage of commentary that blames parents for problems created by structural issues beyond parental control.¹³⁵ Accordingly, cultural-deficit theories—close cousins of the “pull yourself up by your bootstraps” mantra—deeply impact minority parents¹³⁶ in the school system by placing responsibility for academic achievement exclusively at their feet.¹³⁷ At the same time, choice rhetoric in education suggests to parents that there are better and worse alternatives, that other parents are choosing, and that they had better be choosing as well, lest they be left behind. As the availability of choice policies validate parental suspicions regarding the quality of traditional public education, they also amplify cultural-deficit theories, which suggest that community schools in minority areas will never be capable of providing quality education. Given parental

conveyed by Whites at an early age. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 492–95 (1954). Given the psychological nature of the young age of the test participants, however, what the doll tests actually revealed is that the children had learned, and were able to parrot, the messages of racial subordination to which they were subject on a daily basis. They knew what the correct answer was, given their cultural context, but they did not necessarily internalize those notions themselves. See Vinay Harpalani, et al., *Doll Studies*, in 2 *ENCYCLOPEDIA OF RACE & RACISM* 67, 68 (Patrick L. Mason ed., 2d ed. 2013).

135. See, e.g., Richard Cohen, ‘Waiting for Superman’ Ignores the Real Problem with Schools, WASH. POST (Sept. 24, 2010, 10:15 AM), http://voices.washingtonpost.com/postpartisan/2010/09/waiting_for_superman_ignores_t.html (“[L]ack of money is not what ails this country’s schools, and neither is it the teachers’ unions. It is indifferent, lousy parents . . .”); *Only Moronic “Parents” Are “Waiting for Superman,”* DEBBIE SCHLUSSEL (Oct. 8, 2010, 3:03 PM), <http://www.debbieschlusssel.com/27645/only-moronic-parents-are-waiting-for-superman/> (“[I]f your kid’s whole future depends on winning the lottery, you’re incompetent—a bad parent and you made the wrong choices that got you to this point. You brought your kid to this brink, NOT the public schools.”).

136. Minority parents are not, by any means, the only parents impacted by cultural-deficit theories. The theories also affect the behavior of majority parents, who also buy into the notions of white superiority the theories perpetuate. See *supra* notes 91–93 and accompanying text.

137. Parental-trigger laws, for example, that allow parents to convert their neighborhood schools into charter schools convey the sense that parents have singular responsibility for education reform. See, e.g., Layton, *supra* note 90 (quoting a parent as saying, “Our children will now get the education they deserve We are on the way to making a quality school for them, and there’s no way we will back down,” and quoting a legal consultant to the parents as saying, “They are the first parents in America to win a parent trigger campaign, the first parents in America to take control of the educational destiny of their children.”). Similarly, parents of color featured in movies like *Waiting for Superman* and *The Lottery* presented a particularly impactful profile of parents convinced that responsibility for improved academic outcomes for their children was exclusively their own, and vowing to be relentless in their attempt to enroll their children in local charter schools. My claim, however, is simply that parents of color are impacted by and are aware of the extent to which they are made blameworthy by cultural-deficit theories. I do not attempt to distinguish between parents who tacitly accept the theories, and thus use school choice to “escape” their communities, and parents who are critical of the theories, but nevertheless use school choice in an attempt to minimize the negative influence of the model on their children’s educational experience.

preference for esteem among their peers,¹³⁸ minority parents are just as eager as any other group of parents for their peers to view them as valuing education and making the right educational decisions.

Choice-rhetoric and school-choice policies exploit the desire to maintain esteem by suggesting that academic achievement is strictly a product of educational decisions: if education is important to a parent, and that parent's child is enrolled in a failing school, that parent can and should opt-out. And, if that parent does not opt-out, that parent—and only that parent—has failed the child. The message encourages those with economic and social capital to remove their children from neighborhood schools—placing them in private schools, charter schools, or more privileged school districts—even if they would otherwise be inclined to remain in their neighborhood school and collaborate with district administrators to improve it. Those with social capital, but not necessarily the financial means to move to richer districts or enroll in private schools, leave for the charter, magnet, and other school-choice options offered within the district, even if the move within the district does not actually alleviate the racial and economic isolation to which their child is subject.¹³⁹ In both instances, students and parents with the most capital, and therefore the greatest ability to demand meaningful reform within their neighborhood schools, exit. This leaves behind children and families who have less power in the school system.

3. Running To—And From—Racialized Schooling Experiences

In describing her decision to homeschool her black sons after a series of negative racial incidents at her sons' school, author Paula Penn-Nabrit explained: "[T]he truth is we began home schooling as a reaction to something some white people did to us."¹⁴⁰ Penn-Nabrit's experience is not

138. Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 356 (1997) ("[P]eople incur material costs to cooperate in situations where their only reward is the respect and admiration of their peers, and . . . individuals conform their behavior or judgment to the unanimous view of those around them in order to avoid the disesteem accorded 'deviants.'" (footnotes omitted)).

139. With the exception of large school districts with large fluctuations in financial, racial, and economic compositions, school districts—particularly the failing urban school districts in which so many children of color are trapped—are fairly homogenous; that is, a change from a neighborhood school to a charter school will not necessarily result in the types of demographic and financial changes needed to close achievement gaps. See Ansley T. Erickson, *The Rhetoric of Choice: Segregation, Desegregation, and Charter Schools*, DISSENT, Fall 2011, at 41, 44 (2011). This reality, often reinforced by urban-suburban boundaries, has led to "an increasing identification between charter schools and poor, urban students." *Id.* This identification has even been enshrined in state laws—consider Tennessee, for example, that formerly restricted charter enrollment to students "whose home school[s] had failed to make adequate yearly progress under No Child Left Behind or who had failed to reach proficiency . . . or [who] were free-lunch eligible." *Id.*

140. PENN-NABRIT, *supra* note 5, at 3.

unique; minority students are often subject to highly racialized educational experiences that push them out of the public school system.¹⁴¹

Responding to the fallout from a failed integration model, minority parents increasingly, and understandably, turn to affinity charter schools organized around a commitment to celebrating a particular race or ethnicity. Scholars have long chronicled the high social costs of integration for black parents and their children, concluding that the elimination of black public schools, as a result of integration, “has had a devastating impact on African American children—their self-esteem, motivation to succeed, conceptions of heroes or role models, respect for adults, and academic performance.”¹⁴² Moreover, the failure of integration to close the achievement gap, the white flight that many desegregation plans prompted, and the negative racial incidents to which students of color are subjected in supposedly integrated school settings has prompted some to “reinterpret the constitutional imperative of *Brown* as requiring equal access to quality educational programs,” rather than requiring racial integration of public

141. Similarly, a lack of flexibility and hostile work environment force women out of the workplace. Belkin, *supra* note 1. Subject to the pull of childcare and domestic obligations (whether socially constructed or not), and lacking the power to consider work structures that allow women to fulfill obligations as both caregiver and “ideal worker,” many women often have little choice but to leave the workplace. *Id.* In support of the fantasy of choice on which *Opt-Out Revolution* was premised, the article itself profiled Sally Sears, a former full-time reporter and news anchor forced to quit her job. *Id.* Although profiled in a story about women “choosing” to leave the workforce, ironically, Sears is quoted as saying that after having a child, “[t]he station would not give her a part-time contract . . . [t]hey said it was all or nothing.” *Id.*; *The Harried Life of the Working Mother*, PEW RESEARCH CTR. (Oct. 1, 2009), <http://www.pewsocialtrends.org/2009/10/01/the-harried-life-of-the-working-mother/> (finding that “[r]oughly three-in-ten women who are not currently employed . . . say family duties keep them from working”); *see also* ELLEN GALINSKY ET AL., FAMILIES & WORK INST., TIMES ARE CHANGING: GENDER AND GENERATION AT WORK AND AT HOME 16–18 (2011), *available at* http://familiesandwork.org/site/research/reports/Times_Are_Changing.pdf (finding that although women and men report that men are taking more responsibility in 2008 than in 1992 for childcare and cooking, research nevertheless reveals that women still shoulder a greater proportion of the obligations; furthermore, women do not report any change for the same time period in the percentage of men taking on more responsibility for house-cleaning); Williams, *supra* note 23, at 1597 (describing the ideal worker as a worker “without primary responsibility for children: a worker absent from home a minimum of nine hours a day, five or six days a week, often with overtime at short notice and at the employer’s discretion”).

142. Robin D. Barnes, *Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375, 2386 (1997) (quoting Doris Y. Wilkinson, *Integration Dilemmas in a Racist Culture*, 33 SOCIETY 27, 27–28 (1996)). Wilkinson, a sociology professor, compared the education of black America during the Jim Crow era with that of the post-*Brown* era. Wilkinson, *supra*, at 27–28; *see also* Sarah Garland, *Was ‘Brown v. Board’ a Failure?*, ATLANTIC (Dec. 5, 2012, 12:42 PM), <http://www.theatlantic.com/national/archive/2012/12/was-brown-v-board-a-failure/265939/> (discussing how black communities abandoned support for desegregation when it resulted in costs to the black community in the form of lost jobs for teachers and principals, school closings, and the loss of power over their own schools).

schools.¹⁴³ Against this reinterpretation, charter schools have stood out not only as opportunities to provide more positive educational experiences for minority schoolchildren, but also as a way of maximizing minority parent involvement in response to cultural-deficit models that shut them out.¹⁴⁴

In accordance with the use of charter schools for these purposes, not only are the majority of charter schools found in inner-city areas disproportionately inhabited by families of color, but minority schoolchildren enroll and attend the schools at disproportionate rates compared to white children,¹⁴⁵ resulting in higher rates of segregation in charter schools compared to nearby public schools.¹⁴⁶ Moreover, the number of black church schools and academies has skyrocketed, with advocates calling on black educators and political leaders to “increase . . . the number and type of programs that are available.”¹⁴⁷ Scholars increasingly argue that pursuit of racial diversity in schools has come at the cost of equal educational opportunities for minority students,¹⁴⁸ while civil rights organizations have become so invested in the promise of charter schools that internal conflict has erupted over the future of the schools.¹⁴⁹

143. Barnes, *supra* note 142, at 2387. Of course, scholars have debated the meaning of *Brown* for decades, with some scholars arguing that the case was firmly about racial integration, other scholars arguing that it was about educational equity, and still others arguing that it was about political participation and anti-subordination.

144. *Id.* at 2403–04 (arguing that charter schools can help address diversity issues in public schools because they are “least likely to favor one group of students over another because diverse groups of parents and educators are often linked to, if not part of, the coalitions founding the schools”).

145. U.S. DEP’T OF EDUC., THE STATE OF CHARTER SCHOOLS: NATIONAL STUDY ON CHARTER SCHOOLS 30–33 (2000), available at <http://www2.ed.gov/PDFDocs/4yrrpt.pdf>.

146. Erickson, *supra* note 139, at 44.

147. Monique Langhorne, *The African American Community: Circumventing the Compulsory Education System*, BEVERLY HILLS B. ASS’N J., Summer/Fall 2000, at 12, 12–13 (noting that between 1985 and 1997, the number of black church schools and academies had increased to almost 400); see also Flynt, *supra* note 78, at 106–08 (cataloguing both prominent, “centric” charter schools, “whose purpose, mission, and curriculum are race specific,” as well as the trend of black churches in the South either expressing interest in or founding charter schools).

148. Eboni S. Nelson, *Examining the Costs of Diversity*, 63 U. MIAMI L. REV. 577, 602–18 (2009) (arguing that diversity has produced modest, at best, academic improvement for minority students, while acknowledging that the social and democratic benefits exist); see also Eleanor Brown, *Black Like Me? “Gangsta” Culture, Clarence Thomas, and Afrocentric Academies*, 75 N.Y.U. L. REV. 308 (2000) (suggesting that Afrocentric school curriculums promise to meet the intersubjective needs of black youth).

149. McNeal & Dotterweich, *supra* note 76, at 20 (explaining that civil rights groups will likely play an important role in placing charter school legislation on agenda, due to the promotion of the schools as a means of improving integration by both race and income); Santos, *supra* note 77 (chronicling the “war [that] has broken out within the civil rights community in New York and across the country over [a] lawsuit” brought by the NAACP and the United Federation of Teachers regarding the threat that twenty charter schools in the city posed to traditional public schools serving black and Latino students).

Indeed, affinity schools present a conundrum. Segregation in public schools resulted in racial and economic isolation that reinforced subordination. The experience for isolated minorities in integrated schools, however, has perpetuated the same. Accordingly, a turn to affinity charters or charter schools that are increasingly segregated may be the embrace of racial isolation as a virtue rather than a vice.¹⁵⁰ In this sense, it is the exercise of parental choice in pursuit of what some parents may believe is best for their children, and it is not necessarily different from those parents who choose religious or same-sex schools that align with personal values.

Even assuming, however, that the schools offer the parental involvement and cultural support that families and scholars envision, it comes at a high cost—likely even higher than the toll that the failures of integration may have taken on minority children. School-choice plans only compound the de facto school segregation that makes American public schools more segregated now than they were at the time of *Brown v. Board of Education*.¹⁵¹ If the point is merely to maximize parental involvement, then charters may, indeed, provide a service. But if we acknowledge, as we must, that the drivers of underachievement in schools are concentrated poverty and isolation of students by race and class, then charters do little more than give parents more say in socially, politically, and fiscally vulnerable¹⁵² schools, at the expense of the democratic and anti-subordination values that integrated schools impart.¹⁵³

150. Nancy Levit, *Embracing Segregation: The Jurisprudence of Choice and Diversity in Race and Sex Separatism in Schools*, 2005 U. ILL. L. REV. 455, 459–60 n.26 (citing Stacy Smith, *Voluntary Segregation: Gender and Race as Legitimate Grounds for Differential Treatment and Freedom of Association*, 1996 PHIL. EDUC. 48, as an example of scholarship that validates the stake that cultural groups may have in “perpetuating shared values among their members to ensure cultural survival”).

151. In particular, those school-choice programs that offer open enrollment without explicit integrative options, while failing to provide transportation, segregate students by race and ethnicity, student achievement, and parental status. Cory Koedel et al., *The Social Cost of Open Enrollment as a School Choice Policy* (Univ. of Mo.-Columbia Dep’t of Econ., Working Paper No. 09-10, 2010), available at http://economics.missouri.edu/working-papers/2009/WP0910_koedel.pdf.

152. See *infra* notes 178–85 and accompanying text; see also Erickson, *supra* note 139, at 45 (noting that fewer public dollars flow to charters, on a per-pupil basis, than district schools, for several reasons, including: the allocation, in some states, of fewer dollars per charter pupil, or the exclusion of charters from some forms of state aid; the requirement in some states that charters use per-pupil allocations to pay for services typically covered by the district; and the identification of charter schools with poor and minority students); Lawrence, *supra* note 37, at 1377 (“Schools must be integrated because segregated schools build a wall between poor black and brown children and those of us with privilege, influence, and power. The wall denies them access to the resources we command: social, political, and economic.”).

153. Lawrence, *supra* note 37, at 1375–78 (arguing that *Brown* is not about academic achievement, but about the message that segregation transmits: that the resources commanded by the privileged and powerful—social, political, and economic—are commanded by a legitimate monopoly, with no need for sharing, empathy, or care, and that children without these resources are not part of a democratic community).

Moreover, the failures of integration have had more to do with failures of implementation and the obstacle of problematic court decisions than with the inherent failures of the concept of integration itself. Second-generation segregation within integrated schools, for example, has been cited as a major reason why integration plans have not closed the achievement gap in ways that policymakers had hoped.¹⁵⁴ When integration plans are successfully implemented, the result is socially and academically beneficial for students of color as well as white students, who become more aware of, and thus more likely to affirmatively reject, social, cultural, and racial biases, thus preparing them to better participate in a democracy.¹⁵⁵ In contrast, charter schools have failed to produce the academic achievement promised, functioning no better, on average, than traditional public schools; affinity-based charter schools have been no exception.¹⁵⁶

Finally, the turn to affinity charter schools is not merely an abandonment of traditional public schools, but also a capitulation to the racism and classism that encourage minorities to choose the schools in the first place.¹⁵⁷ The separation of equals, even with the best of intentions, nevertheless suggests that mixing would contaminate someone, or something.¹⁵⁸ Indeed, scholars have noted that, given the historical—and enduring—meaning of racial segregation, government-sponsored separatism, even under conditions of relative equality, stigmatizes citizens.¹⁵⁹

154. Mickelson, *supra* note 15, at 1531, 1554, 1560–61.

155. See *infra* notes 186–93 and accompanying text.

156. See *supra* notes 85–86 and accompanying text.

157. See, e.g., PENN-NABRIT, *supra* note 5, at 3 (explaining that, although the author and her family wanted to be “free and conscious people of color, independent actors rather than reactors,” the truth was that they “began home schooling as a reaction to something some white people did to [them]”). But see John A. Powell, *The Tensions Between Integration and School Reform*, 28 HASTINGS CONST. L.Q. 655, 688 (2001) (“Self-renewal is critical to black progress. But so is a concerted, biracial attack on the social and economic causes of black disadvantages and alienation. The truth is that we cannot solve America’s racial problems separately, for at the root of those problems is separation itself.” (quoting Vernon E. Jordan, *Black America: Looking Inward or Outward?*, 33 SOCIETY 25 (1996) (internal quotation marks omitted))). Jordan supports this critique of black separatist schools as merely covering up historical and present-day causes of racial disparities. Jordan, *supra*, at 25.

158. Levit, *supra* note 150, at 500 (noting that in the same-sex context, the implicit message is that “some sort of contamination will occur through the intermingling of boys and girls,” and that in the desegregation context, the argument is presented more stealthily as a question of parents choosing neighborhood schools where their children can attend with other “like-minded” students).

159. Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 439–40 (“*Brown* held that segregated schools were unconstitutional primarily because of the message segregation conveys—the message that black children are an untouchable caste, unfit to be educated with white children. Segregation . . . stamps a badge of inferiority upon blacks, and this badge communicates a message to others in the community, as well as to blacks wearing the badge, that is injurious to blacks.” (footnote omitted)); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 351–52 (1987) (arguing, in the context of equal protection analysis, that stigma is

Internationally, segregation by race continues to “exist[] in an inverse relationship with emancipation.”¹⁶⁰ As last-resort responses to racism and classism, the turn to affinity charter schools can hardly be said to be genuine choice at all. Rather than represent genuine preference among parents and caregivers, school choice merely glorifies the limited and less desirable choices of people of color.

C. WHEN SUBORDINATION IS PRESENTED AS A DEMOCRATIC VALUE

Choice policies also undermine democracy. Public schools are about the public—a community invested in educational learning outcomes for children of that community. School-choice policies and rhetoric, however, promote competition, individualism, and subordination. Not only are these values inherently incompatible with a successful public school system, but their promotion also allows the state to abdicate responsibility for public education, while shifting blame for widespread structural problems to individuals. Although these choice values are promoted in furtherance of democracy, they actually undermine equality in a democratic project by rendering minority students and their families socially and politically vulnerable to racial subordination through the public school system.

1. Competition

The market model of education on which school choice is based encourages schools to ensure their success in the market by successfully competing for parent-consumers. Competition in education, however, produces neither growth nor accountability. Successful schools are notoriously difficult to grow or replicate, as public schools do not operate with the economies of scale that generate expansion in the private sector. Schools are unique social systems that cannot merely be imitated to achieve success; “[s]chooling is a retail, not wholesale business.”¹⁶¹ Moreover, in an attempt to dominate the market in which they are increasingly asked to compete, schools resort to a multitude of problematic behaviors, including: cream-skimming the best students for enrollment, “teaching to the test” at the expense of substantive education in an effort to produce high test scores,¹⁶² and investing in facilities and appearance instead of in quality

not “inherently pejorative”, but rather takes “its shameful meaning from the historical and cultural context in which it is used and, ultimately, from the way it is interpreted by those who witness it” and the “evil intent of their authors [to stigmatize], while perhaps sufficient, is not necessary to the infliction of injury”); *see also* Levit, *supra* note 150, at 501–03.

160. Levit, *supra* note 150, at 503–04 (considering South Africa, where separatist policies, although no longer officially employed, have lingering effects, visible in “persistently inhumane treatment, harassment, and discrimination”).

161. Minow, *supra* note 70, at 266.

162. *Id.* at 267 (noting that in a competitive environment, the value of standardized tests scores is elevated, even though these scores have less to do with quality instruction than with the socioeconomic status of students and their parents).

instruction. In addition, traditional public schools lose money when students enroll in charter schools, encouraging tactics that not only compromise the integrity of the schools but that also lead to layoffs and school closings in already destabilized neighborhoods.¹⁶³

Another negative effect of competition is the scapegoating that occurs as charter and public schools, refusing to work together, each blame the other for academic failure.¹⁶⁴ States get into the action by responding to competition from charter structures in neighboring states. States that neighbor other states with strong charter school regulation, for example, are more likely to pass weak charter regulation in order to secure a competitive advantage.¹⁶⁵

Schools that face charter competition frequently replace administrators and abruptly change curriculums,¹⁶⁶ which causes academic disruption and a loss of continuity. Although one might conclude that these replacements are reasonable if administrators cannot maintain competitiveness, the match-ups between traditional public schools and choice schools are not fair. Traditional public schools, for example, enroll a higher proportion of students with special-education needs than do charter schools that, although required to accept all students, are effectively absolved of their obligation to accept special-education students if they lack the resources to respond to special needs.¹⁶⁷

Ultimately, making school enrollment competitive, while casting parents as consumers on the competitive market in which some consumers have limited bargaining power, belies the nature of educational endeavors. Classrooms and schools should be interactive, cooperative institutions. Students are not blank slates or empty vessels to be filled up by their instructors with purchased information. Rather, learning is a collaborative endeavor, deeply affected by the back-and-forth interactions between teachers and students, as well as between students themselves. Conceptualizing parents as consumers ignores this reality while creating tensions in the system as teachers and administrators are asked to “compete” for business. Students and parents should not passively “pay for” their

163. Rich, *supra* note 56 (describing the public school exodus as due, in part, to increased charter-school enrollment); *see also supra* note 107 and accompanying text.

164. *See* McNeal & Dotterweich, *supra* note 76, at 8.

165. *See id.*

166. *Id.* at 7.

167. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-543, CHARTER SCHOOLS: ADDITIONAL FEDERAL ATTENTION NEEDED TO HELP PROTECT ACCESS FOR STUDENTS WITH DISABILITIES 6-7, 11-13 (2012), *available at* <http://www.gao.gov/assets/600/591435.pdf> (reporting that “[c]harter schools enrolled a lower percentage of students with disabilities than traditional public schools” in the 2008-2009 and 2009-2010 school years and finding that several factors explain the disparity, including charter schools administrators discouraging students with disabilities from enrolling and limited resources at the schools).

educational service in the form of school enrollment; rather, they can, and should be encouraged to, impact their learning experience directly.

2. Private Responsibility for Public Education

In addition to problematically fostering competition in a context that should be collaborative, school choice also privatizes responsibility for public education. “Privatize” does not necessarily mean that school choice results in the enrollment of students at private schools, although private school enrollment is one aspect of the opt-out revolution in public education.¹⁶⁸ Rather, here, the term “privatize” means the relegation of care, concern, and investment in public education to the private sphere—to individual parents and caregivers, rather than to the public. There is not a natural line of demarcation for decisions that should not be made privately because they impact the public; rather, society has to draw those lines independently. Given, however, the interdependent nature of education, and the extent to which access to quality education has largely been shaped by the economic and racial composition of classrooms,¹⁶⁹ public education is one area in which those lines must be drawn more carefully, and with less opportunity for privatization than in other spheres of American life.

Like the expansion of the voucher program in Louisiana, lawmakers often present school-choice policies as the product of a proactive legislative response to state educational problems. When a state, however, adopts school-choice policies to address problems that are widespread and structural in nature—like social, racial, and economic isolation in school districts—the state abrogates communal responsibility for those problems. Although these additional “choices” result in perverse outcomes for marginalized parents and caregivers, having already made sufficient choices available, the state can now claim it is no longer responsible for addressing the achievement gap through school or housing integration. This phenomenon has led to the privatization of individual schooling decisions that are public in their effect.¹⁷⁰ It has also eliminated public debate of the merits and consequences of these ostensibly private decisions,¹⁷¹ and

168. For exploration of the problems attendant to the privatization of public functions, see Sharon Dolovich, *How Privatization Thinks: The Case of Prisons*, in GOVERNMENT BY CONTRACT 129 (Jody Freeman & Martha Minow eds., 2009) (using the privatization of prisons to illustrate how privatization frames thinking and can problematically limit thoughtful public policy regarding public health and healthcare), and Martha Minow, *Outsourcing Power: Privatizing Military Efforts and the Risk to Accountability, Professionalism, and Democracy*, in GOVERNMENT BY CONTRACT *supra*, at 110.

169. See *infra* Part II.C.3.

170. See Lawrence, *supra* note 37, at 1374–75.

171. See Minow, *supra* note 36, at 834 (acknowledging that the rhetoric of private, individual, and school choice cordons off from public debate the character of the kinds of choices school systems are permitting).

immunized these choices from attack or characterization as illegitimate,¹⁷² even as those choices marginalize some in the education system.

As responsibility shifts, so does blame. Having exercised the choices they were given, parents and caregivers of color are now made to exclusively bear a burden they cannot carry alone; individual parents, after all, cannot address structural causes of the achievement gap. When asked to give up on genuine equality in favor of the fiction of self-reliance, however, participants in the school system ultimately play into a sort of amnesia about the history of public education and the institutional structures that impede its potential. One must not forget segregation of public schools, the imperative of integration, and vulnerability of students—as manifested in food insecurity, low socioeconomic status, or inadequate healthcare—that the school system and the broader society must manage. Ignoring these realities and instead buying into school choice will only leave the vulnerable among us *more* vulnerable when market options and school choices fail to magically close the achievement gap, or result in more fraud and failing schools.

This outcome is particularly troubling because others in society already devalue the decisions and preferences of poor and minority people.¹⁷³ Given that undervaluing, responsibility for failure in education can then be easily laid at the feet of those who chose. This rhetorical move is familiar in gender equality policy debates, where any number of gender disparities (e.g., the disproportionate presence of women in lower-paying jobs and the financial insecurity which acting as primary caregiver creates) is justified as the result of women's choices.¹⁷⁴ One can similarly expect choice in education policy

172. See Roberts, *supra* note 82, at 395 (“‘Private’ is not a natural attribute nor descriptive in a factual sense, but rather is a political and contestable designation One of the main things a power-holder gains from successfully characterizing his power as ‘private’ is a degree of legitimacy and immunity from attack.” (quoting Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319, 319 (1993))).

173. Larry M. Bartels, *Economic Inequality and Political Representation*, in THE UNSUSTAINABLE AMERICAN STATE 167, 169 (Lawrence Jacobs & Desmond King eds., 2009) (finding, even after controlling for disparities in turnout and political knowledge, that senator voting behaviors are considerably more responsive to affluent constituents than middle-class constituents, and completely unresponsive to constituents in the bottom third of the income distribution); Martin Gilens, *Inequality and Democratic Responsiveness*, 69 PUB. OP. Q. 778, 793–94 (2005) (finding that high income, independent of education, has a significant correlation to policy outcomes, with policy outcomes strongly reflecting the preferences of the most affluent but bearing virtually no relationship to the preferences of poor or middle-income Americans); Roberts, *supra* note 82, at 381 (explaining that in addition to having less prestige, education, wealth, and power, Whites’ preferences are privileged and valued, in comparison to Blacks’ preferences, because they seem neutral and normal and compose a race-neutral cultural norm). Minorities, of course, are disproportionately more likely to be poor or working class. Given this reality, school enrollment choices that ultimately fail will be regarded as faulty and uninformed to the extent that minorities disproportionately made them, while the choices of more privileged Whites to remain in superior neighborhood schools will be lauded.

174. Although dated, *EEOC v. Sears, Roebuck & Co.* is one of the best examples of how the embrace of choice rhetoric within the law has worked against women. *EEOC v. Sears, Roebuck &*

to play the same role—once students and parents choose, policymakers can ignore the structural problems that drive the achievement gap but that cannot be traced to any single individual choice.

3. Individualism and Independence

School choice and choice rhetoric also problematically promote independence, autonomy, and individualism while overshadowing the reality of interdependence and vulnerability in education. Professor Charles Lawrence has written eloquently about the difficulty of discussing schooling decisions with others who also have school-age children:

When I speak of the loneliness of parenting I do not mean only that we are too often driving alone as we chauffeur children to soccer games and piano lessons. I am most concerned with the solitariness of our decisionmaking about how we raise our children [W]hen we decide where they will go to school and ponder how that school should look and feel, we are too often alone. We may consult a friend or colleague, the Internet, [b]ut these are consultations in which we ask for information to place on our private list of pros and cons. We rarely speak to other parents about what we want for our children and what they need, about our values and how we can best convey those values to our children. We rarely ask for or offer help in this solitary task because there is an unwritten sign that says “private.”¹⁷⁵

The common understanding is that these decisions are private, even though the effects of the decisions are far-reaching and public in consequence. The composition of individuals in the classrooms highly influences academic success of schools, and for students from disadvantaged backgrounds, in particular, the socioeconomic status of one’s peers exerts a significant influence on academic performance.¹⁷⁶ A three-year study of 20,000 students, for example, found that “for a large number of adolescents,

Co., 628 F. Supp. 1264 (N.D. Ill. 1986), *aff’d*, 839 F.2d 302 (7th Cir. 1988). In *EEOC*, Sears successfully countered evidence suggesting that women were denied access to commission sales jobs, which paid twice as much as the non-commission sales jobs in which women predominated, by arguing that their absence from the former was due to a lack of interest in commission work. *Id.* at 1302–03. Choosing a work environment and limited hours more conducive to their caregiving obligations was not recognized as a choice severely limited by social and structural constraints, but rather as merely the result of genuine “personal preference.” Williams, *supra* note 23, at 1609–10 (noting that the myth of genuine personal preference is also used against women in divorce proceedings, who are denied compensation for their decisions to subordinate their careers for their husbands and children). Choice rhetoric continues to influence and affect Title VII litigation on the issue today.

¹⁷⁵ Lawrence, *supra* note 37, at 1374–75.

¹⁷⁶ JAMES S. COLEMAN ET AL., U.S. DEP’T OF HEALTH, EDUC., & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY 302 (1966), available at <http://files.eric.ed.gov/fulltext/ED012275.pdf>.

peers—not parents—[were] the chief determinants of” investment in school and commitment to education.¹⁷⁷

Class and school composition also impact a school’s accessible resources, thus further affirming the importance of thinking about education collectively when making school assignments. Despite debates regarding the value of additional resources,¹⁷⁸ various studies have confirmed that money is useful “in producing higher student test scores when it [is used to attract] teachers with strong literacy skills, reduce[] class size[,] . . . retain[] experienced teachers, and increase[] the number of teachers with advanced degrees.”¹⁷⁹ The composition of a school, however, will determine the *access* to these better human resources that will produce higher test scores. Unfortunately, districts disproportionately assign novice teachers with few credentials to majority-minority schools and poor schools. Similarly, a 2004 Department of Education report found that high schools with at least seventy-five percent low-income students employed three times as many uncertified or out-of-field teachers in English and science than schools with lower poverty rates.¹⁸⁰ Moreover, other studies have found: (1) that the higher the percentage of black students in a school, the less likely those schools are to employ teachers with master’s degrees or teaching experience;¹⁸¹ (2) that districts disproportionately assign novice teachers to schools and classrooms that disproportionately serve minority students;¹⁸² (3) that high-poverty and high-minority schools report disproportionate levels of difficulty in filling math and science positions;¹⁸³ and (4) that high

177. KAHLENBERG, *supra* note 15, at 48 (quoting the research of Laurence Steinberg) (internal quotations marks omitted).

178. KERN ALEXANDER & RICHARD G. SALMON, PUBLIC SCHOOL FINANCE 349 (1995) (explaining that some argue “that there is no consistent relationship” between money input and achievement output, and “that more money for education is simply throwing ‘good money after bad’”).

179. *Id.* at 362 (citing Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465–98 (1991)); *see also* William H. Clune, *New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 CONN. L. REV. 721, 725–26 (1992) (arguing that increased financial input does produce substantial gains in student achievement when used in conjunction with resources like better teachers and well-designed curriculums).

180. NAT’L ASSESSMENT OF EDUC. PROGRESS, *supra* note 86, at 73.

181. Mickelson, *supra* note 15, at 1547; *see also* ESCH ET AL., *supra* note 15, at 70 (finding that of the 20% of teachers serving in California schools with minority populations in the 2004–2005 school year, between 91% and 100% were underprepared or novice, compared to only 11% of teachers in schools serving few to no minorities).

182. Charles T. Clotfelter et al., *Who Teaches Whom? Race and the Distribution of Novice Teachers*, 24 ECON. EDUC. REV. 377, 386 (2005).

183. *See* Gary Orfield, *The Growth of Segregation: African Americans, Latinos, and Unequal Education*, in DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 53, 68–69 (Gary Orfield & Susan E. Eaton eds., 1996).

teacher turnover is a problem in high-poverty, majority-minority schools.¹⁸⁴ Distressingly, research suggests that problems with staffing are due not only to the more numerous career options that are available to more talented teachers, but also to the racial preferences of the teachers themselves: high teacher mobility is positively correlated with higher black or Latino student enrollment, even after controlling for salaries, class size, and school poverty.¹⁸⁵ Put simply, teachers are more likely to exit majority-minority schools.

Academic atmosphere is also highly dependent on the composition of schools and the collective decisions of parents choosing to enroll in schools. Integrated schools, for example, have a positive effect on educational outcomes, in part because integrated schools are more likely to be middle-class schools that benefit from ample resources for curricular materials, more powerful parent advocates, highly qualified teachers, and small class sizes.¹⁸⁶ Diverse classrooms thwart the tendency to rely on learned thinking routines instead of deep, complex thought.¹⁸⁷ Integrated schools also have positive psychological effects on students, resulting in higher perceptions of safety and lower perceptions of vulnerability,¹⁸⁸ all the while positively influencing attitudinal and civic outcomes in ways that are important for an increasingly diverse society. “[I]nterracial contact in desegregated schools leads to an increase in interracial sociability and friendship.”¹⁸⁹ Students who attend integrated schools report greater levels of comfort with members of racial groups other than their own;¹⁹⁰ white students attending integrated

184. ORFIELD & LEE, *supra* note 14, at 17.

185. See Hanushek et al., *supra* note 118, at 350; Scafidi et al., *supra* note 118, at 148 (analyzing data from a study of Georgia public elementary schools suggesting that non-black teachers were more likely to exit schools with large proportions of minority students).

186. Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 *FORDHAM L. REV.* 791, 797–99 (2005). There has been considerable debate regarding the effect of integration on the academic achievement of minority students, with some scholars attributing decreases in the black academic achievement gap over the last fifty years to upward social mobility of Blacks, rather than desegregation. See Mickelson, *supra* note 15, at 1516 n.9 (citing DAVID J. ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* 221 (1995)) (noting that according to Armor, “evidence of educational benefits of desegregation [is] ‘mixed at best’”); *id.* at 1517. Other scholars have argued, however, that racially identifiable black schools and classrooms do exert significant negative effects on black and white student outcomes, and that ambiguous conclusions regarding the academic benefits of desegregated schools are due to failures to consider the effects of second-generation segregation, or racial tracking within schools. *Id.* at 1560–61.

187. Mickelson, *supra* note 15, at 1548.

188. Jaana Juvonen et al., *Ethnic Diversity and Perceptions of Safety in Urban Middle Schools*, 17 *PSYCHOL. SCI.* 393, 396 (2006) (finding that African-American and Latino students in ethnically diverse classrooms felt safer and less lonely while also experiencing less peer harassment).

189. Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 *OHIO ST. L.J.* 733, 745 (1998).

190. CATHERINE L. HORN & MICHAEL KURLAENDER, *HARVARD UNIV.: CIVIL RIGHTS PROJECT, THE END OF KEYES—RESEGREGATION TRENDS AND ACHIEVEMENT IN DENVER PUBLIC SCHOOLS* 5 (2006),

schools exhibit greater racial tolerance and less fear of their black peers;¹⁹¹ and black and white students who graduate from desegregated school settings are more likely to attend college, work, and live in desegregated settings long-term.¹⁹² Finally, integrated schools “teach children, particularly white children, to respect and protect each other’s human dignity.”¹⁹³

This body of research illustrates that choices about school enrollment do not happen in isolation. Rather, enrollment decisions have significant effects not just for the children opting out, but also for the children left behind in the old classroom or joined in a new one. To the extent that those migrating out take with them social capital and influence, those left behind are harmed by their diminished capacity to pursue equity and reform.¹⁹⁴ If we want to take education reform seriously and commit to the potential that education reform has for social equity, we must acknowledge the interdependence among students and their families in the education system and the ways in which that interdependence leaves minority students most vulnerable to the unaddressed problems in the system.

Choice rhetoric, however, makes unimportant any acknowledgement that considerations about where our children go to school, and with whom they should go, should be both about their benefit *and the benefit of others*. It encourages individuals to make decisions without any regard for the vulnerabilities of others, instead of reflecting on the restraints on others’ choices, on how one’s choice might directly undermine others, or on how one’s choice might ultimately undermine common progress.¹⁹⁵ School choice inaccurately presents school decisions as the result of individual contemplation. Despite choice rhetoric, education is a site of extreme interdependence. Public education, perhaps more than any other area of civic life, is precisely about the decisions we make as a community.

available at <http://civilrightsproject.ucla.edu/research/k-12-education/testing-and-assessment/the-end-of-keyes2014resegregation-trends-and-achievement-in-denver-public-schools/horn-the-end-of-keyes-resegregation-2006.pdf>.

191. *Id.*

192. Liu & Taylor, *supra* note 186, at 797.

193. Sharon E. Rush, *Protecting the Dignity and Equality of Children: The Importance of Integrated Schools*, 20 TEMP. POL. & CIV. RTS. L. REV. 73, 75–76 (2010) (emphasis omitted); *id.* at 74 (noting that “[o]nly a belief in the inferiority of students of color can justify the persistent legal and social acceptance of providing them with inferior (less resource-rich) educations,” while “only a belief in the superiority of white students can justify the persistent legal and social insistence that they be provided with superior (more resource-rich) educations”).

194. If equity is pursued at all, it is the less-privileged parents and caregivers that must bear the burden of that pursuit, while those who opt out are free-riders to any achieved change.

195. See Alfie Kohn, *Only for My Kid: How Privileged Parents Undermine School Reform*, 79 PHI DELTA KAPPAN 568, 572 (1998) (noting that this behavior is not surprising in the United States).

4. *Brown, Pierce, and Citizenship: Liberty Before Equality*

Because school choice privatizes public education reform while also promoting individualism and independence, vulnerable groups that might form coalitions to address structural problems in the education system are Balkanized, encouraged by school choice and choice rhetoric to undermine each other in an attempt to maximize individual preferences. In pursuit of maximized preferences, liberty is problematically prioritized over equality.

One might argue that choice programs advance two fundamental goals of public education—liberty and equality. The former might be said to spring from *Pierce* and its progeny,¹⁹⁶ while the latter emanates from the equal protection principles that *Brown* advances.¹⁹⁷ Pursuit of liberty through choice in the school system, however, is overvalued. Even assuming it improves academic outcomes for a small fraction of the population, that fraction enjoys the achievement at the expense of many.¹⁹⁸ Moreover, notions of superior parental knowledge about children and their care inform the purported ideal of parental liberty.¹⁹⁹ Notions of parental expertise, however, are arguable exaggerated when one considers the expertise necessary to understand the subjects and methods of preparation most likely to prepare children for a future in the new information society.

Alternately, one might argue that parental liberty interests spring from parents' personal stake in the success of their children. Even so, that interest does not necessarily trump state interests in properly educating children, as reflected by arguments against unchecked parental liberty to transfer to children the values of white supremacy, sexism, or violence.²⁰⁰ Similarly,

196. See *supra* notes 30–31 and accompanying text.

197. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”).

198. See Roberts, *supra* note 82 (arguing the same about the conflict between liberty and equality, more generally).

199. See *supra* notes 30–31 and accompanying text; see also AMY GUTMANN, *DEMOCRATIC EDUCATION* 28–29 (1987) (canvassing the philosophical underpinnings of placing educational authority for children exclusively in the hands of parents, including the belief that parents are the “best protectors of their children’s future interests . . . that parents have a natural right to educational authority,” and that freedom for individuals requires that parents enjoy the freedom to “pass their own way of life on to their children”).

200. See, e.g., Martha Albertson Fineman, *Taking Children’s Interests Seriously*, in *WHAT IS RIGHT FOR CHILDREN* 229 (Martha Albertson Fineman & Karen Worthington eds., 2009) (arguing that parental control should not necessarily trump state interests in educating and protecting children, particularly given potential parental interests in imparting religious values or ideology that are dangerous for both children and society at large); Barbara Bennett Woodhouse, *Speaking Truth to Power: Challenging “The Power of Parents to Control the Education of Their Own,”* 11 CORNELL J.L. & PUB. POL’Y 481 (2002) (demonstrating that parental control over children’s education can impose social isolation, prevent access to life-saving information,

(although not as obvious) opting out of public school education also perpetuates hierarchy and oppression that must be considered when limits on parental liberty are deliberated.

It is true that some interpret *Pierce* to protect the privacy and autonomy of the family through recognition of a parental right to control a child's secular and religious upbringing.²⁰¹ As scholars have argued, however, requiring families to "throw in [their] lot with [their] less fortunate neighbors," does not necessarily compromise family autonomy or intimacy. Rather, the ability to exercise choice, as less vulnerable and more privileged parents in the school system do, is actually about exercising privilege—privilege ultimately un-divorced from "power and inequality or from the history that has created those inequities of power."²⁰² To exercise that privilege is more about protecting an impulse to give children "the best" at the expense of others, rather than about protecting family intimacy.²⁰³

In addition to being more about privilege and less about protecting family intimacy and autonomy, choice does not advance equality or dignity in education because genuine choice is neither broadly available nor does it address inequality in the school system. The latter proposition, of course, depends on how we understand equality to operate in public education. Although the language in *Brown* striking down segregated schools as inherently unequal draws attention to unequal academic outcomes,²⁰⁴ a broader understanding of *Brown* reveals it is also about anti-subordination and inclusion in community.²⁰⁵ If genuine equality means inclusion in the communities that public schools create, then the solution is not to maximize choice, such that those with more options can exit the school system and exclude those who are left behind, but to minimize choice and refocus

and "confine and break" defiant youths, and arguing that children's education rights need to be recognized as basic human rights).

201. See *supra* notes 30–31 and accompanying text.

202. Lawrence, *supra* note 37, at 1386–87.

203. See, e.g., Kohn, *supra* note 195 (noting that this behavior is not surprising in the United States and that "[i]t isn't just that these parents are *ignoring* everyone else's children, focusing their efforts solely on giving their own children the most desirable education. Rather, they are in effect *sacrificing* other children to their own The psychology of those parents is that it's not enough for their kids to win: others must lose—and they must lose conspicuously" (quoting Harvey Daniels of National Louis University) (internal quotation marks omitted)).

204. Lawrence, *supra* note 37, at 1377 ("Today we often think of the moral of *Brown* as about improving test scores for poor children rather than about integration. Vouchers, charter schools, Edison Schools, and the No Child Left Behind Act all offer educational reform for poor minority children with no direct attention to race or class integration.").

205. *Id.* at 1375–78 ("The moral mandate of *Brown* is that all children in this country have a right to full membership in the community and to the community resources that membership brings.").

efforts on building the inclusive community that public schools should represent. If our goal is equality, then choice must be minimized.²⁰⁶

III. THE END OF SCHOOL CHOICE

*“[W]e must struggle together to define ourselves both as a collective and as individuals.”*²⁰⁷

Given not only the failures of school choice to improve educational opportunities, but the ways in which it masks ongoing racial subordination, school-choice plans should be eliminated or limited to the maximum extent possible. This Part begins to explore ways of minimizing school choice, before going on to counter claims that limiting school choice is paternalistic because it eliminates the choices of marginalized parents in the school system.

A. LIMITING OR ELIMINATING EXIT

School choice is not the answer. Rather, the elimination of school choice through compulsory universal public education is, given the near impossibility of establishing a properly functioning market, the low likelihood that parents who opt-out are genuinely empowered to do so, and the incompatibility of school-choice values with quality public education. Prohibiting exit from the traditional public school system would reaffirm education as a core democratic function of the state, while retaining in the public school system the power and influence needed to reform public schools across the board. Eliminating choice also ensures that values like competition, absolute family privacy, independence, and individualism, which are both incompatible with public education and perpetuate racial subordination, are minimized.

Limiting school choice, a proposal suggested by scholars in the United States before,²⁰⁸ would bring much-needed social and cultural capital back to public schools, while also creating the circumstances for successful school integration by race and class. Having eliminated explicit competition, and minimized the centrality of individual liberty in schooling decisions, parents

206. Some scholars have even gone so far as to suggest that school exit, in the form of choice, might be eliminated altogether, if the overall guiding principle of equity is compelling enough. See, e.g., Liebman, *supra* note 50, at 299–308 (presenting an interpretation of *Pierce* and its progeny that justifies making public school attendance compulsory).

207. Fineman, *supra* note 200, at 237. Fineman argues that an appropriate solution for the “current educational dilemma” is mandatory and universal public education, so that all American children learn a fundamental lesson in community, while parents learn to be invested in the opportunities of all children, not merely their own. See *id.*

208. *Id.* at 237 (arguing that the solution to our educational dilemmas may very well be universal and mandatory public education); Liebman, *supra* note 50, at 299–308 (detailing the constitutionality of legislation that requires public school attendance for all but the few citizens whose religious beliefs require them to exit organized society).

will be better invested in improving educational experiences across the board.²⁰⁹

Moreover, as school choice is eliminated, school-choice rhetoric and values can be reined in and replaced with rhetoric and values more aligned with the realities of public education and the ultimate goal of social justice. That rhetoric must acknowledge interdependence among students, and the particular vulnerabilities of minority students, while also responding to the tendency in American society to idealize contract and choice in ways that hide structural obstacles to equality.²¹⁰ Indeed, choice only serves as both a distraction from, and an amplifier of, vulnerability that must be accounted for and acknowledged in education law and public policy if equity is to be achieved. As choice rhetoric renders vulnerability invisible, genuine choice is further undermined.

For a country founded on notions of individual liberty, compulsory, universal public education is unrealistic, at least in the short-term. More realistic, although not as effective, are broadly implemented reform policies that substantially limit school choice. For example, the school districts that employ controlled-choice programs in an attempt to maximize public school integration palatably limit choice in the form of exit. Under these programs, parents can choose to express preference for public school assignments, but the state ultimately maintains power to make the assignments in ways that benefit the school system. By accommodating parental preferences, such programs keep parents, otherwise inclined to opt-out of traditional public schools, invested in the system while creating an impetus for school districts to improve the quality of schooling to respond to parental concerns.

In making the assignments, districts should naturally be sensitive to racial and economic isolation at schools, taking care to assign students in ways that do not reinforce existing race and class segregation at public schools. Two of the most recognizable race-conscious, school-choice programs were implemented in Louisville, Kentucky and Seattle, Washington. Although the Supreme Court ultimately struck down both

209. Of course, residential segregation by race, class, and unequal school financing still pose huge structural hurdles to equitable education. This Article, however, suggests compulsory and universal public education as one integral component of effective education reform.

210. See Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 2 (2008). In response to this tendency, Professor Fineman advocates for an understanding of vulnerability: “the realization that [mildly adverse to catastrophically devastating] events are ultimately beyond human control.” *Id.* at 9. Furthermore, the state’s function is to engage in vulnerability analysis by conducting “a ‘post-identity’ inquiry . . . not focused only on discrimination against defined groups, but concerned with privilege and favor conferred on limited segments of the population by the state and broader society through their institutions.” *Id.* at 1. Professor Fineman’s vulnerability theory, then, would be more responsive to disadvantaged minority students in the public school system than equal protection, which is unresponsive to racial subordination perpetuated by school choice as long as access to the programs are distributed in a race-neutral manner.

programs due to the programs' explicit consideration of race, Justice Kennedy left open the possibility of assigning students in race-conscious ways as long as race was not an explicit consideration.²¹¹ Moreover, consideration of economic status is still a constitutionally viable consideration in school assignments, although class-conscious assignments often fail to produce racial integration at public schools, or worse, aggravate public school segregation.²¹²

Other scholars have suggested managing public school lotteries so as to give priority to those parents who enter the lottery as part of a heterogeneous group of students and families.²¹³ Again, limiting choice is made palatable by providing the possibility of priority, while also forcing parents to acknowledge their dependence on each other. This mechanism enhances integration efforts at schools, while retaining in the public school system those parents and families with power and influence. Here again, *Parents Involved in Community Schools* presents a prohibition on the explicit consideration of race, although the consideration of residential location, economic status, and even parental education may pass muster as more race-neutral considerations that nevertheless result in racial diversity among the groupings.²¹⁴

211. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 706, 787–90 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (characterizing the plurality opinion as “too dismissive of the legitimate government” interest in ensuring equal educational opportunity; noting that individual racial classifications could be used only if they are a “last resort” to achieve a compelling interest; and maintaining that if districts are concerned that racial composition at schools interferes with equal educational opportunity, then school districts could pursue “race-conscious measures” that take into account the inequality of opportunity but avoid the assignment of students by race, like “strategic site selection of new schools[,] drawing attendance zones with general recognition of [neighborhood demographics, and] recruiting students and faculty in a targeted fashion”). Professor Charles Ogletree has applauded Justice Kennedy for “refus[ing] to follow the lead of the other four justices in eviscerating the legacy of Brown.” See Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES (June 29, 2007), <http://www.nytimes.com/2007/06/29/us/29assess.html>. But see Osamudia R. James, *Business as Usual: The Roberts Court's Continued Neglect of Adequacy and Equity Concerns in American Education*, 59 S.C. L. REV. 793, 822–23 (2008) (critiquing Justice Kennedy's concurrence).

212. See, e.g., Jonathan D. Glater & Alan Finder, *School Diversity Based on Income Segregates Some*, N.Y. TIMES (July 15, 2007), <http://www.nytimes.com/2007/07/15/education/15integrate.html>; Deborah C. Malamud, *A Response to Professor Sander*, 47 J. LEGAL EDUC. 504 (1997) (discussing negative effects of UCLA law school's change from race-based to class-based affirmative action). To be effective, socioeconomic integration plans require district poverty rates to be low enough to facilitate the creation of middle-class schools, an unlikely circumstance in high-poverty urban districts unless the plans also incorporate the suburbs or use incentives to lure middle-class parents back into urban school districts.

213. Lawrence, *supra* note 37, at 1396.

214. Note also that the Supreme Court declined to answer the question of whether diversity itself was a compelling interest at the K-12 level. *Parents Involved in Cmty. Schs.*, 551 U.S. at 726–33, 739–43 (“The parties and their *amici* dispute whether racial diversity in schools in fact has a marked impact on test scores and other objective yardsticks or achieves intangible socialization

Given the exodus of parents from urban school districts to the suburbs, limiting choice in some districts will do nothing but entrench existing segregation by race and class unless attempts are made to encourage housing integration. Accordingly, housing policy that integrates privileged and disadvantaged students could address the choice that residential preferences mask. For example, Montgomery County, Maryland, one of the country's most affluent counties, operates the nation's oldest inclusionary zoning program.²¹⁵ The zoning program "requires real estate developers to set aside a portion of the homes they build to be rented or sold at below-market prices," thus allowing "the public housing authority . . . to purchase one-third of the inclusionary zoning homes," which serve as federally subsidized public housing.²¹⁶ Children from the public housing units who attended the district's most-advantaged schools "far outperformed in math and reading those children in public housing who attended the district's least-advantaged elementary schools."²¹⁷ Such a program further illustrates that classroom composition heavily influences academic performance. Rather than dismiss as irremediable the school choices that more privileged parents make through housing decisions, the program limits the ability of privileged parents to opt out of public education that might include poor, low-income, or minority students, while distributing access to quality education more broadly. Federal grant programs like Race to the Top would do well to reward states that encourage coalition-building between more and less privileged groups, as well as state programs that incentivize the return of privileged parents from the suburbs to urban districts, rather than reward states that encourage people to leave the traditional school system.

The rhetoric buttressing these types of programs must neither stigmatize dependence²¹⁸ nor ignore the impact of race and class on the

benefits. The debate is not one we need to resolve, however, because it is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity."). Accordingly, the pursuit of diverse student and family groupings for preference in school assignment policies remains a distinct possibility.

215. HEATHER SCHWARTZ, THE CENTURY FOUND., HOUSING POLICY IS SCHOOL POLICY: ECONOMICALLY INTEGRATIVE HOUSING PROMOTES ACADEMIC SUCCESS IN MONTGOMERY COUNTY, MARYLAND 4 (2010), available at <http://tcf.org/assets/downloads/tcf-Schwartz.pdf>.

216. *Id.*

217. *Id.* at 5.

218. An inability, for example, to mask dependency by retreating into "contrived social institutions such as the family," renders the vulnerabilities of particular groups more apparent, thus "deviant by our discourse." Martha Albertson Fineman, *The Nature of Dependencies and Welfare "Reform,"* 36 SANTA CLARA L. REV. 287, 291 (1996); see also Fineman, *supra* note 200, at 260-61 (acknowledging that if autonomy is, in fact, desirable, it "must be cultivated by a society that pays attention to the needs of its members, the operation of its institutions, and the implications of human fragility and vulnerability"; only then, after an acknowledgement that autonomy "cannot be attained without an underlying provision of substantial assistance,

interaction between students and the state, or among students themselves. The rhetoric of dependence and vulnerability²¹⁹ might be employed both to counter the individualism that choice rhetoric perpetuates, and to legitimize an understanding that the fate of minority or poor students is ultimately, and appropriately, tied to the fate of more privileged students in the education system.²²⁰ This would also counteract the tendency of even the most vulnerable among us to promote the mythology of complete self-sufficiency, independence, and autonomy.²²¹

B. BEYOND PATERNALISM

In the abstract, choice can be an integral feature of law or policy that promotes equal rights and opportunities. Accordingly, defenders of school choice may ultimately argue that limiting school choice, particularly for minority parents and caregivers unsatisfied with their local schools, is pernicious paternalism. After all, *some choice* is better than no choice at all. My response is threefold.

First, limiting choice is not grounded in attempts to protect parents and children from their irrational choices. To the contrary, opting out, even to enroll in comparable schools that fail to improve academic outcomes, might be characterized as a rational response to the negative and racialized school experiences that families of color as well as poor and working-class families experience. And until system-wide problems in the American educational system are addressed, caregivers and families have few options other than exercising the limited “choice” they have been afforded to either take advantage of school choice or exit the public school system altogether. Accordingly, I advocate for limitations on school choice to prevent the disastrous social consequences—the abandonment of the public school system, to particularly deleterious consequence for poor and minority schoolchildren and their families—that occur as the collective result of

subsidy, and support from society and its institutions, which give individuals the resources they need to create options and make choices”).

219. See *supra* note 210; see also, e.g., Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1076 (2011); Darren Lenard Hutchinson, “Unexplainable on Grounds Other than Race”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 696–98; Jessica Knouse, *From Identity Politics to Ideology Politics*, 2009 UTAH L. REV. 749, 782–85. The rhetoric of vulnerability theory, therefore, is particularly fitting in education reform, although to the extent that the theory seeks to conduct a post-identity theory, it may fail to account for the particularly racialized way in which minorities interface with the education system.

220. Lawrence, *supra* note 37, at 1395 (using Washington D.C. as an example where a “handful of good schools in the city have survived only because there remains a critical mass of parents who can bring these resources to them”).

221. See, e.g., Angela Onwuachi-Willig & Osamudia James, *The Declining Significance of Presidential Races?*, 72 LAW & CONTEMP. PROBS. 89, 94–96 (2009) (chronicling support among poor Whites for Republican fiscal policies that eschew government support but ultimately work to their disadvantage).

individual, albeit rational, decisions.²²² I also advocate for limitations on school choice in an attempt to encourage individuals to consider their obligations to children not their own, but part of their community all the same. Although outside the scope of this Article, this thought exercise applies with equal force to school choice that extends beyond charter schools and voucher programs, including homeschooling, private school education, and even housing decisions made by the wealthy.

Second, as I have argued, students of color and their families may, indeed, be “opting out,” but those decisions do not reflect genuine choice or agency. Rather, opting out is a response of parents with no reasonable alternatives who are sensitized to the way their actions, or failures to act, will be devalued on account of their race and class. In such a context, genuine choice is not exercised at all. As such, advocating for limits on school choice for those students and their families does not really undermine their exercise of choice—which was minimal or nonexistent to begin with. Placing limitations on choice for *everyone* in the school system, however, may materially improve education for all when those families that used their choice and privilege to leave the system are required to return.

Third, the actual impact of school choice cannot be ignored. Given the racialized realities of the current education system, choice is not ultimately used to broaden options or agency for minority parents. Rather, school choice is used to sanitize inequality in the school system; given sufficient choices, the state and its residents are exempted from addressing the sources of unequal educational opportunities for poor and minority students. States promote agency even as the subjects supposedly exercising that agency are disabled. Experience makes clear that school choice simply should not form an integral or foundational aspect of education reform policy. Rather, the focus should be on improving public schooling for all students such that all members of society can exercise genuine agency, initially facilitated by quality primary and secondary education. Ultimately, improving public education begins with preventing its abandonment.

CONCLUSION

The rhetorical shift in education reform—from justice, equity, and community to privacy, liberty, and independence—is a troubling one that has been driven by the dominance of school choice and choice rhetoric in education policy. Our public school system, however, is meant to educate and instill values that lead to more genuine equality and liberty long-term. Although counterintuitive, in order to successfully cultivate equality and liberty, policymakers must limit choice in public education, thus creating

222. In this sense, the problem is not unlike the problem illustrated through the allegory of the “tragedy of the commons.” See generally Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

opportunities to dismantle the structures in the school system that perpetuate inequality. Until then, school choice in public education, particularly for the most vulnerable among us, will only reflect decisions made in response to continued racial and economic subordination. And, ultimately, what choice is that?