

Liberty to Subordinate?

Kimberly West-Faulcon*

I.	THE FICTION AND FACTS OF SCHOOL CHOICE.....	155
II.	LIBERTY TO OPT-OUT AS FUNDAMENTAL?.....	159
III.	CONCLUSION.....	165

Parents, many of whom are Black or Latino, are literally rallying in support of the “choice” to opt-out of public school to enroll in publicly funded but privately managed charter schools.¹ Yet, Professor Osamudia James suggests that an integral component of reform of traditional public schools is compulsory universal public education—the wholesale elimination of school choice.² Though such disagreement over “school choice” policies is longstanding,³ Professor James’s criticism that school choice constitutes the racial and economic subordination of poor, working class, and minority children is particularly thought provoking.

In *Opt-Out Education: School Choice as Racial Subordination*, Professor James first contends that poor and racially marginalized parents lack true educational choice when they decide to exit their neighborhood public schools and, second, that the “rhetoric of choice” masks the significant structural barriers to academic achievement currently impacting America’s less privileged children, particularly less privileged African-American children. Thus, in the context of the educational decisions of racially and economically marginalized parents and caregivers, “opt-out” is a euphemism

* James P. Bradley Chair in Constitutional Law and Professor of Law, Loyola Law School, Los Angeles; B.A., Duke University; J.D., Yale Law School. Special thanks to Karl Manheim and Kent Faulcon for their comments and to the editors of the *Iowa Law Review Bulletin* for their editorial assistance.

1. Javier C. Hernández & Susanne Craig, *Cuomo Played Pivotal Role in Charter School Push*, N.Y. TIMES (Apr. 3, 2014), <http://www.nytimes.com/2014/04/03/nyregion/cuomo-put-his-weight-behind-charter-school-protections.html>.

2. Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1129 (2014). Professor James softens her proposal by describing it as “unrealistic” because the United States is “a country founded on notions of individual liberty.” *Id.* at 1130.

3. See generally *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (holding that the Ohio Pilot Project Scholarship Program, through which the state funds school choice in the Cleveland area, does not violate the Establishment Clause).

for a coerced decision. If parents exit their neighborhood public school because they *cannot* receive a quality education in that school, characterizing their decision to leave as a “choice” is disingenuous. Put even more starkly—less privileged children are, as a practical matter, *forced* out of public schools; they are not “opting out.” This is because socially and economically disadvantaged children, particularly African-American and Latino children, are caught in a “catch-22” scenario wherein they suffer educationally if they remain in traditional public schools but their alternative options may be only minimally better and thus still subpar. These children often do not experience significant improvement in academic achievement at private and charter schools due, in part, to high levels of racial and socio-economic isolation. In other words, not only is school choice ineffectual as an educational reform, in such circumstances, it affirmatively harms children who are racially and economically marginalized in American society. What prompts Professor James to propose the elimination of school choice is her conclusion that race, class and identity “necessarily impede genuine choice in the education system.”⁴ Her position is further bolstered by the impact that choice rhetoric has on the perception of the morality of individual educational choices. Due, in some part, to an overblown interpretation of the Supreme Court’s decisions protecting parents’ substantive due process right to make educational choices for their children, privileged Americans take little responsibility for the negative consequences that the decision to opt-out of public schools has on traditional public schools.

Although Professor James does not characterize it this way, *Opt-Out Education* deserves credit for presenting an alternative analytic frame for considering school choice—a frame with the potential to alter the view that it is morally appropriate to make choices that undermine traditional public schools. Professor James explicates how the notion of privacy has previously operated to insulate a parent’s decision to opt-out of public schools from any blame for the damage it inflicts on the academic, economic, and social success of other children. In addition, she underscores the interconnected nature of parents’ educational decisions and asserts that our entire society, including parents of school-aged children, has a collective responsibility for supporting public education.

Opt-Out Education is critical of the view that we can hide behind either our obligation to do the best for our own children or, for non-parents, our view that educational decisions are private family concerns that are none of our business. Apart from engaging in extensive ethical and moral analysis of our collective obligation to public education, Professor James’ thesis suggests it is

4. James, *supra* note 2, at 1102–04 (“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 . . .”).

possible to interrogate whether a state law mandating public school attendance would necessarily violate the substantive due process rights of parents to make educational decisions for their children. In response to Professor James' analysis, my consideration of the Supreme Court's parent-control jurisprudence suggests that Professor James' universal compulsory public education proposal is theoretically feasible as a matter of constitutional law doctrine.

I. THE FICTION AND FACTS OF SCHOOL CHOICE

As a point of departure, *Opt-Out Education* observes that the participation of marginalized parents and caregivers in school choice reforms—like charter schools, voucher programs, and parental trigger laws school—is generally neither a truly voluntary nor liberating choice.⁵ Instead, the coerced nature of such parents' exit from traditional public schools is masked by the rhetoric of choice, which, as Professor James describes it, enables society to ignore the racial and economic subordination and class and race inequality in American education. Under such circumstances, there is no “properly functioning education market where choices are presumably exercised.”⁶

After examining the ascendancy and salience of school choice policies and choice rhetoric in American culture, policy, and constitutional jurisprudence, *Opt-Out Education* critiques “the legal, moral, and pedagogical legitimacy” of school choice plans.⁷ Having identified a variety of mechanisms by which choice policies lower the quality of education available to low-income and nonwhite students, Professor James asserts that school choice policies and rhetoric “render[] minority students and their families socially and politically vulnerable to racial subordination through the public school system.”⁸ The decision of privileged parents as well as racially and economically marginalized parents to opt-out of traditional public school has this effect because it undermines coalitional efforts to redress structural

5. *Id.* at 1085. To make her point, Professor James notes the similarity between how rhetoric of choice is used in the discourse describing working mothers' exit from the workforce and in describing parents exiting the public school system to find better educational options for their children. *See id.* She believes it is inaccurate to conceive the phenomenon of women quitting their jobs because they find it essentially impossible to balance professional and childcare obligations as these women opt-out of the workforce. Professor James' point in *Opt-Out Education* is that, like modern working mothers, marginalized parents are not exercising true choice under school choice programs. They are coerced into the decision to exit public schools much as working women are coerced into the decision to exit the workforce due to “structural obstacles to professional success for many women.” *Id.*

6. *Id.* at 1102.

7. *Id.* James describes two categories of choice policies—“market choice” and “public choice.” *Id.* at 1093. Publicly funded voucher programs and tuition credits to pay for enrollment in private parochial schools fall into the former category whereas charter schools and magnet schools fall into the latter. *Id.*

8. *Id.* at 1119.

obstacles to the academic success of poor, working-class, and minority students.⁹

Following this logic, *Opt-Out Education* examines the idea of parental liberty to opt-out of traditional public schools from two vantage points. First, it explains how the liberty school choice policies purport to confer on marginalized parents in the education system actually further marginalizes them—“choice [of charter schools and voucher programs] does not provide the promised liberation.”¹⁰ Second, Professor James is of the view that assessments of the morality of opting-out of public school is heavily influenced by the perception that boundless protection of a parent’s educational choices is of high constitutional value.¹¹ She observes that school choice and the rhetoric of independence that accompanies it implicitly allow us, as a society, to abdicate our collective responsibility for the quality of education offered to poor and minority children in racially and economically segregated public schools. Moreover, instead of viewing public schools as failing poor and minority children, the guise of choice makes it possible to pretend that marginalized children are failed by their own parents due to their lack of good sense or motivation to find a better school. Under a regime of school choice, if a child attends his or her low-performing neighborhood public school, we can blame the parent.¹²

Hence, as explained by Professor James, school choice shifts the burden and blame for education reform and low academic achievement from the state to marginalized parents and caregivers. At the same time, school choice policies entrench major structural barriers to quality education such as “segregation by race and class, food and housing insecurity, and inadequate school financing.”¹³

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.¹⁴

In contrast to the proponents of school choice, Professor James believes it is morally and legally appropriate to constrain the currently unlimited range

9. *See id.* at 1086.

10. *Id.* at 1087.

11. *See id.* at 1093.

12. *See id.* at 1114. According to Professor James “school choice also privatizes responsibility for public education” reform. *Id.* at 1121.

13. *Id.* at 1087.

14. *Id.* at 1114.

of educational opt-out choices because these choices are racialized.¹⁵

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.¹⁶

As explicated in *Opt-Out Education*, one version of such subordination is the consistent manner in which race and economic class impact the “choice” to opt-out of schools with significant populations of African-American students.¹⁷ Citing studies finding that decisions to opt-out of predominantly African-American schools are not correlated to the quality of education available in those schools, Professor James observes that “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.”¹⁸

Professor James implicitly argues that the Supreme Court's decision in *Brown v. Board of Education* should be read as prohibiting educational policies that economically and racially subordinate children.¹⁹ Yet, she notes that the Supreme Court has refused to fully implement the values of *Brown* in subsequent school desegregation cases like *Milliken v. Bradley*.²⁰ Professor James correctly points out that in cases like *Milliken*, the Court protects the schooling choices of “privileged parents”²¹ at the expense of improved academic achievement for African-American students attending traditional public schools—this “abdication of obligation to community propelled the

15. *Id.* at 1118–19. “[S]tudents 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.” *Id.* at 1114.

16. *Id.* at 1106.

17. *See id.* at 1086–88. The same phenomenon no doubt takes place in the evaluation of predominantly Latino schools. *See also generally* Andy Hinds, *Why I Want to Choose the ‘Disadvantaged’ Local School (and Why I Might Not)*, N.Y. TIMES (MAY 30, 2013 2:30 PM) http://parenting.blogs.nytimes.com/2013/05/30/why-i-want-to-choose-the-disadvantaged-local-school-and-why-i-might-not/?_php=true&_type=blogs&_r=0.

18. *Id.* at 1105. Professor James also explains that “minority students are often subject to highly racialized educational experiences that push them out of the public school system” and force them to choose highly racialized educational environments like racial affinity charter schools. *Id.* at 1115.

19. *See id.* at 1117; *see also* *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955). I should be clear that Professor James's article does not explicitly analyze the constitutionality of school choice policies.

20. James, *supra* note 2, at 1092; *see also* *Milliken v. Bradley*, 418 U.S. 717 (1974).

21. James, *supra* note 2, at 1092.

abandonment of urban schools that *Milliken* sanctioned and which continues today.”²² Likewise, “in *Missouri v. Jenkins*, the Court failed to even affirm a school’s role in addressing the achievement gap,” implying that lower academic achievement of African-American students was “beyond the control of schools” but presumably within the control of those students’ families and cultural communities.²³ This perverse reasoning was also present in the more recent *Parents Involved in Community Schools. v. Seattle School District No. 1* school desegregation case.²⁴ Professor James explains the reasoning in *Parents Involved* as follows:

[H]aving failed . . . to acknowledge equity as a compelling interest, [justifying the use of race-consciousness under equal protection analysis,] the Court implicitly reaffirmed the centrality of [African-American] 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. 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.²⁵

Having thus solidly critiqued the Court’s school desegregation equal protection jurisprudence, *Opt-Out Education* points out how the Court’s legal analysis in this area “influence[s] the behavior of those about which the cases and policies are concerned.”²⁶ The cultural-deficit-type explanations for low academic achievement in predominantly African-American schools suggest to all parents—privileged white parents, African-American middle-class parents,

22. *Id.* at 1106. Professor James explains:

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 impoverished inner city, the Court failed to acknowledge how factors external to minority culture and values undermine academic achievement.

Id. at 1111–12.

23. *Id.* at 1112.

24. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

25. James, *supra* note 2, at 1112 (footnote omitted). “[C]ultural-deficit theories—close cousins of the ‘pull yourself up by your bootstraps’ mantra—deeply impact minority parents in the school system by placing responsibility for academic achievement exclusively at their feet.” *Id.* at 1113.

26. *Id.* at 1113.

poor and working-class white and nonwhite parents—“that community schools in minority areas will never be capable of providing quality education.”²⁷

Professor James’ ultimate contention is that the damage that school choice exacts on public schools is significant enough to justify limiting parental control of educational decisions.²⁸ Her prescription is the wholesale elimination of school choice—*compulsory* universal public education. There should be less opportunity for privatization in the sphere of education because of “the interdependent nature of education”²⁹ and “the extent to which access to quality education has largely been shaped by the economic and racial composition of classrooms.”³⁰ However, as Professor James anticipates, a key criticism of her proposal to eliminate school choice is that it would unconstitutionally infringe upon a parental liberty interest in choosing to send one’s children to private school.

II. LIBERTY TO OPT-OUT AS FUNDAMENTAL?

Professor James asserts that the proponents of school choice policies “overvalue[]” the pursuit of liberty through educational choice.³¹ She also suggests that our collective view of a parental right to opt-out of public schools as a core American constitutional value has a relationship to early Supreme Court decisions explicitly protecting the right of parents and caregivers to make decisions about the education of their children.³² In fact, during the

27. *Id.* Again, although Professor James makes this point to explain racially segregated African-American schools, a similar view likely exists of predominantly Latino schools albeit based on different presumptions as to why such schools are incapable of providing quality education. See Hinds, *supra* note 17.

28. James, *supra* note 2, at 1134–35.

29. *Id.* at 1121. “In the end, the commercialization of the education process alienates individuals from the community nature of public schooling.” *Id.* at 1106.

30. *Id.* at 1121. The Supreme Court has exacerbated this through its failure to implement school desegregation, in *Milliken* for example, and its refusal to find a fundamental right to quality education on equal terms or that differential treatment on the basis of poverty as a suspect classification under equal protection in *Rodriguez*. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

31. James, *supra* note 2, at 1127.

32. In *Pierce v. Society of Sisters*, citing its prior decision in *Meyer*, the Court struck down the Oregon Compulsory Education Act of 1922 observing:

[W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and

Lochner era,³³ the Court even went so far as to observe that “it is the natural duty of the parent to give his children education *suitable to their station in life*.”³⁴

Since Professor James’ article calls for an intervention based on her view that the negative impact of school choice is on the verge of decimating America’s traditional public school system, as a doctrinal matter, her argument is essentially that the parental-control liberty interest the Court has protected in cases like *Pierce v. Society of Sisters* and *Meyer v. Nebraska* has its limits. The state’s need to provide what I would term a “democratically adequate” level of public education as conceived by Professor James could potentially be a constitutionally sufficient justification for requiring that all students attend public schools.³⁵ The key question is whether the evidence presented to demonstrate the need to eliminate school choice is sufficiently compelling and narrowly tailored.

Pierce and *Meyer* have been cited often as the foundation for the Court’s modern protection of a parental liberty interest in the custody and control of the upbringing of one’s own children. However, nothing in the Supreme Court’s decisions in those cases contradicts the basic constitutional axiom that no constitutional right, no matter how dear, is absolute. Even the Court’s reasoning in *Pierce*³⁶ and *Meyer*³⁷ seems to have left room for a greater exercise of state power if the state can demonstrate something akin to exigent

direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Pierce v. Soc’y of Sisters, 268 U.S. 510, 534–35 (1925). It has been noted that the Court relied on substantive due process because of a desire to provide Catholics an escape from attending public schools controlled by Protestants. *See, e.g.*, Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion: Meyer, Pierce and the Origins of Wisconsin v. Yoder*, 25 CAP. U. L. REV. 887 (1996). It also has been noted that the Court likely used substantive due process analysis in these *Lochner*-era cases such as *Pierce* because the Free Exercise Clause of the First Amendment had yet to be incorporated to the states. *See id.*

33. Here I refer to the pre-1937 period of constitutional jurisprudence in which the Supreme Court protected the liberty to contract as fundamental in a line of cases beginning with *Lochner v. New York*, 198 U.S. 45 (1905).

34. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (emphasis added).

35. James, *supra* note 2, at 1119. Proponents of choice use the Supreme Court’s decision in *Pierce* to contend they have “the moral and legal right of parents to leave the school system.” *Id.* at 1093.

36. The Court assessed the impact that compulsory public school would have on a corporation’s “liberty to contract” in the context of its right to run a private school and a teacher’s right to pursue the calling of teaching. *Pierce*, 268 U.S. at 530–34. “The inevitable practical result of enforcing the act under consideration would be destruction of appellees’ primary schools . . .” *Id.* at 534.

37. In *Meyer*, the Court very explicitly focused noted its view that the right of a German teacher to teach German was a protected “liberty” under the Due Process Clause: “[Plaintiff’s] right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.” *Meyer*, 262 U.S. at 400.

educational need.³⁸ Specifically, in *Pierce*, the Court suggests that had there been “peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education,” the compulsory public education law at issue in *Pierce* may have been constitutional.³⁹

In modern (post-*Lochner*) parental-control cases, the Court has been even more explicit that the “the family itself is not beyond regulation in the public interest.”⁴⁰ While it is certainly true that the fundamental liberty interest of parents in “control” of their children is among the “oldest” substantive due process rights still protected by the Supreme Court,⁴¹ the Court’s parental-control rulings have consistently recognized the weight of states’ significant and longstanding interest in providing public education.⁴² In *Wisconsin v. Yoder*, the modern parental-control case evaluating the constitutionality of a law requiring compulsory school attendance until age sixteen, the Supreme Court further narrowed the sphere of protected parental liberty interest.⁴³ In *Yoder*, the Court treats parental-control liberty claims as falling into two different tiers of protection—religious and non-religious.⁴⁴ Under the Court’s reasoning in *Yoder*, parents’ *non-religious* interest in controlling the education of their children is not protected to the same extent as parents’

38. Some members of the current Court are of the view that the *Pierce* line of substantive due process cases have “small claim to *stare decisis* protection” and refuse to extend them further. *Troxel v. Granville*, 530 U.S. 57, 92 (2000) (Scalia, J., dissenting) (noting that the *Pierce* and *Meyer* cases are “from an era rich in substantive due process holdings that have since been repudiated”). Under this view (if consistently applied), Professor James’ proposal to make public education compulsory would be upheld as constitutional under substantive due process analysis. While Justice Scalia leaves open the possibility that he might deem laws impacting children’s upbringing under the theory that they infringe on *the child’s* First Amendment rights of association or free exercise, he was not inclined in *Troxel* to protect a parent’s right to direct the upbringing of her own children. *Id.* at 93 n.2. (Scalia, J., dissenting) (expressing the view that the Court lacks the power to enforce a right of parents to direct and control the upbringing of their children because it is not an enumerated right).

39. *Pierce*, 268 U.S. at 534.

40. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The Court in *Prince v. Massachusetts* notes that cases like *Pierce* and *Meyer* have respected “the private realm of family life which the state cannot enter.” The Court then held that Massachusetts had a sufficient interest in “the healthy, well-rounded growth of young people” that the state could override the parent’s decision to let her daughter participate in street preaching. *Id.* at 169.

41. *Troxel*, 530 U.S. at 65 (“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.”).

42. *See id.* at 87 (Stevens, J., dissenting) (“Despite this Court’s repeated recognition of these significant parental liberty interests, these interests have never been seen to be without limits.”).

43. *Wisconsin v. Yoder*, 406 U.S. 205 (1972)

44. *Id.* at 233–34 (“To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.”). *Yoder* makes it clear that a parental liberty interest in educational decision making is subject to a higher standard of review “when linked to a free exercise claim.” *Id.* at 233.

interest in directing the *religious* upbringing of their children.⁴⁵ In fact, *Yoder* suggests that the Court might even apply the deferential rational basis standard to compulsory school-attendance laws if objection to such laws is based on “nothing more than the general interest of the parent in the nurture and education of his children.”⁴⁶ The Court’s view of secular parental decisions as warranting less constitutional protection than religious ones was further emphasized when the Court explained in *Yoder* that a philosophical desire to separate oneself (or one’s children) from others is not entitled to constitutional protection:

A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations [T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau’s choice was philosophical and personal rather than religious⁴⁷

Hence, Professor James’s proposal of compulsory public education cannot be dismissed as prohibited by prior substantive due process precedent. In fact, because most parents’ objection to compulsory private school attendance would be based only on the very type of “general interest” in education or “philosophical and personal rather than religious” choice categorized as non-fundamental in *Yoder*, it could be argued that such a public school requirement, as applied to non-religious school choices, does not infringe on a fundamental liberty interest. Indeed, since the choice to opt-out of traditional public schools is, for most parents, an educational decision made in order to preserve or improve the social status of their children—what I would characterize as a decision driven by a “social-class-preservation

45. *Id.* at 232–33 (distinguishing the parental interest in “inculcation of moral standards, religious beliefs, and elements of good citizenship” from “the general interest of the parent in the nurture and education of his children”). When the parental liberty interest is linked to a First Amendment free exercise claim, the validity of a state law is subject to a stricter “compelling state interest” test. *Id.* at 233–34. But, even still, the Court noted in *Yoder* that the state’s interest in directing the control of children could constitutionally trump the parent’s *religious* educational choices if it appears the parental decision would “have a potential for significant social burdens.” *Id.*

46. *Id.* at 233.

47. *Id.* at 215–16.

interest,” it need not necessarily be treated as fundamental under the Court’s reasoning in *Yoder*.⁴⁸ In other words, despite the belief of many, the Supreme Court has not recognized nor protected a fundamental right to *social status-driven* educational choice—the type of choice currently exercised by the vast majority of American parents.

That said, even if the Supreme Court were to treat a parent’s interest in choosing private school over public school as fundamental, Professor James’ proposal of universal compulsory public education could be constitutional if deemed sufficiently compelling and not overly burdensome. Citing education experts like Diane Ravitch, an outspoken critic of school choice programs,⁴⁹ *Opt-Out Education* sets forth the groundwork for establishing that the state interest in economically and racially integrated public education is sufficiently compelling to justify some intrusion on parental liberty interests for the greater societal good.⁵⁰ Though this is a more difficult legal standard for the state to satisfy, Professor James presents convincing analysis that the necessity of full citizen enrollment and social investment in public schooling could potentially satisfy the compelling interest standard.⁵¹ If “[t]he process of

48. This would mean that the state only meets the lower standard of rational basis by showing that the law impacting these types of interests is a “reasonable” education regulation. The Court’s fractured decision in *Troxel* makes the nature of constitutional protection to be afforded a social-class preserving parental-control liberty interest even less clear. The plurality opinion announcing the judgment in *Troxel* asserted that “it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *Troxel v. Granville*, 530 U.S. 57, 66 (2000). However, Justice Souter’s concurring opinion stops short of describing the interest as fundamental, instead describing it only as “generally protected.” *Troxel*, 530 U.S. at 77 (Souter, J., concurring) (“We have long recognized that a parent’s interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment.”). Justice Stevens seemed to agree with the plurality’s articulation of the interest as fundamental. *Id.* at 87 (Stevens, J., dissenting) (noting that “[o]ur cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children”). Justice Kennedy observed that “the custodial parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate the child.” *Id.* at 95 (Kennedy, J., dissenting). Furthermore, Justices Thomas and Scalia do not deem the parental-control liberty interest to be fundamental because they consider all of the Court’s substantive due process jurisprudence to be ill conceived and illegitimate. *See id.* at 80 (Thomas, J., concurring); *id.* at 91–93 (Scalia, J., dissenting).

49. *See id.* at 1086 n.7, 1088 n.12, 1089 n.16, 1098 n.67, 1100 n.84.

50. It is not clear whether Professor James contemplates a requirement that all students attend public school from kindergarten through 12th grade or for some shorter period, such as for only elementary and middle school. Likewise, a compulsory education law could require public school attendance for partial periods of the year, month, week or day and obviously would, as required under First Amendment and substantive due process doctrine, accommodate those with a religious need to opt-out of the requirement. In any event, under the Court’s current precedent, there is room to argue that having the vast majority of Americans participate in public school to some degree could conceivably meet the applicable constitutional standard.

51. Professor James identifies various “problematic behaviors” that follow from the market competition school choice policies encourage. James, *supra* note 2, at 1119–20. These include

exercising choice . . . ultimately degrades the societal understanding of public schooling as an exercise in citizenship and democracy and erodes the sense of community obligation to others,”⁵² the argument follows that forcing the privileged to have a personal stake in traditional public schools is integral to the preservation of a public school system that will sustain American citizenship and democracy. Moreover, there is substantial empirical support for Professor James’ claim that school choice policies like charter schools siphon away public commitment to public schools and ignore structural obstacles to the academic achievement of marginalized children in or out of public schools.⁵³

Professor James’ significant contribution in *Opt-Out Education* is that she explicitly asserts that school choice racially and economically subordinates poor, working class, and minority children. In so doing, her analysis problematizes the fact that school choice rhetoric “sanitizes unequal access to the societal good of education.”⁵⁴ Importantly, she challenges the correctness of permitting misconceptions about constitutional law doctrine to influence our moral view of parents’ educational decisions. Professor James observes that rhetoric referencing the Court’s holdings in substantive due process cases like *Pierce* contributes to the commonly-held but incorrect perception that, irrespective of the harm it causes to our society, any educational decision made by parents that preserves their child’s relative social and economic status is morally acceptable.⁵⁵

Professor James challenges the view that parents and caregivers have no moral culpability for decisions that harm “children not their own”⁵⁶ and expresses her view that it is both immoral public policy and ill-advised education policy to permit school choice because doing so preserves and entrenches America’s existing social and racial hierarchies. On all these points, Professor James is most certainly correct. She is equally correct in concluding that “privatizing” parents’ educational decisions, first, operates to use choice rhetoric to absolve society of any responsibility for the structural barriers to improving the educational options of racially and economically marginalized children and, second, empowers privileged parents to make choices that subjugate less privileged children. *Opt-Out Education* is clarion call

“cream-skimming” of students with the best records of academic achievement and the greatest levels of parental social and economic capital, the tendency for schools to encourage “teaching to the test” even if it has the effect of undermining substantive education, “investing facilities and appearance instead of in quality instruction,” and “layoffs and school closings in already destabilized neighborhoods.” *Id.*

52. James, *supra* note 2, at 1106.

53. *Id.* at 1134–35.

54. *Id.* at 1088.

55. *Id.* at 1128–29 & n.205.

56. *See id.* at 1134 (referring to marginalized children as “children not their own, but part of their community all the same”).

to acknowledge that we have a collective obligation to *all* children, not just “our own.”

In light of the reality that the doctrinal foundation for claiming a fundamental right to opt-out of public education is weaker than the rhetoric of choice presumes, Professor James’ key accomplishment is exposing that weakness. *Opt-Out Education* potentially disrupts the feedback loop between moral values and constitutional values by distinguishing between religiously-motivated and, as I am highlighting here, the far more prevalent status-motivated decisions of privileged parents to opt-out of public schools. Thus, Professor James invites reevaluation of the moral correctness of social and financial divestment from America’s public schools. Instead of constitutional law doctrine posing the greatest hurdle to Professor James’ proposal, the major impediment to the elimination of school choice is arguably Americans’ collective mindset that opting out of public education to improve the lot of one’s own children at the expense of less fortunate children is virtuous and moral because the decision-maker is a parent.

III. CONCLUSION

Were Professor James’ suggestion to eradicate school choice ever to come to fruition as policy, she has clearly articulated the nature of the state’s interest in preserving traditional public schools with the funding and infrastructure sufficient to offer true opportunity for social and economic advancement to less privileged children. Though the Court’s parental liberty decisions including *Pierce* and its progeny would be a substantial obstacle if a state were to enact a compulsory public school requirement, the Supreme Court has not squarely addressed the limits of parental control in this realm. Assuming Professor James is correct in concluding that preventing the exit of privileged children is essential to a public education system that fulfills our nation’s core democratic values, the Court’s parental-control substantive due process jurisprudence may very well permit the state to require some form of compulsory public education in furtherance of that state interest. Hence, the greater challenge to universal compulsory public education is the view that the educational decisions we make for our own children are not subject to public assessments of their morality.

The social view that parents’ educational decisions fall within a sphere of privacy that makes consideration of their impact on the rest of society morally and legally inappropriate is more cultural belief than definitively settled Supreme Court precedent. Since Supreme Court decisions like *Pierce* do not provide the constitutional “cover” the rhetoric of choice purports, privileged parents who opt-out of public schools must reckon with Professor James’ illumination of the harm that their educational choices impose on less privileged children. Fittingly, because of Professor James’ insightful analysis, we are left to grapple with how our individual choice to opt-out of traditional

public schools subordinates “children not our own, but part of our community all the same.”⁵⁷

57. *Id.*