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Confronting the Seduction of Choice: Law, Education, and American Pluralism

ABSTRACT. School choice policies, which allow parents to select among a range of options to satisfy compulsory schooling for their children, have arisen from five periods of political and legal struggle. This Feature considers the shape of school choice that emerged in the 1920s education fight over Americanization of immigrants; the freedom-of-choice plans used to avoid court-ordered school desegregation in the 1950s and 1960s; magnet schools used to promote school desegregation in the 1970s until they were halted by the Supreme Court; constitutional campaigns for vouchers to pay for religious schooling; and current experiments with charter schools and other alternatives, including special-identity schools. The idea of school choice appeals to individual freedom, market competition, religious freedom, multiculturalism, and ideological neutrality. School choice programs draw new talent into schooling and offer new avenues for social integration but only if that goal becomes an explicit public commitment, shaping available choices. Otherwise, school choice can enable new forms of social separation and obscure the absence of equal opportunities for all students.

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INTRODUCTION

Five distinct moments of legal, political, and cultural conflict over schooling in the United States have offered "choice" as the solution to conflict. Its seductive frame at times obstructs, and at other times serves, equal opportunity, antiracism, tolerance, and multiculturalism. The captivating appeal of the rhetoric of choice obscures the dangers and masks the influence of choice policies on the character of schools, social identity, and the polity. No single umbrella can contain our conflicting values, certainly not one as apparently innocuous as "choice." Yet choice offers a tempting avenue for channeling—or papering over—deep conflicts over religion, race, immigration, national identity, and even the meaning and content of "school choices."

By "school choice," I mean the explicit policies granting parents and guardians the opportunity to select from among more than one option for complying with state compulsory school laws. In the United States, these policies include options like magnet schools devised by public school systems to offer special curricular programs, publicly funded charter schools launched by entrepreneurial groups, and public funding for vouchers allowing parents to pay private school tuition. In addition, school choice includes constitutional protection of private—including religious—schools as an option for satisfying compulsory schooling but only for those parents who have or can find private resources.

How did "school choice" emerge as a persistent framework across more than a century of conflicts over schooling in America? During the nineteenth century, political and constitutional movements in the United States enshrined both compulsory schooling and the dual tracks of secular publicly funded schools and privately funded education, including religious schools; during the early twentieth century, public struggles erupted over religious differences as the compulsory school movement pressed for "Americanizing" Catholic and Jewish immigrants. Then, as the civil rights movement put racial equality squarely on the public agenda, school choice paradoxically surged as a means for Southern whites to resist racial desegregation in the wake of *Brown v. Board of Education*.[1] Shortly thereafter, public efforts promoting voluntary racial desegregation constructed school options intended to attract students of all races. The slogan of "school choice" in this country has long signaled support for parochial schools. It has, at times, also been a vessel big enough to encompass both resistance to school desegregation and tactics to achieve it.

1. 347 U.S. 483 (1954); *see* MARTHA MINOW, IN *BROWN*'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK 5-32, 109-37 (2010); *infra* notes 20-26 and accompanying text.

School choice resonates with the liberal value of autonomy and the market conception of consumer sovereignty. School choice seems to have something to offer everyone.

In the abstract, giving parents the opportunity to choose schools for their children looks like a boost to freedom, altering government assignment of students to schools based on neighborhood. Yet there are reasons for caution with the rhetoric of choice when used to describe vital public policies. The rhetoric may belie reality; choice implies freedom when coercion or constraint may be the fact. Hence, school choice can involve "seduction," by which I mean powerful attraction and appeal that can also carry diversion, obfuscation, or deceit.[2] The seductive attractions of "choice" as a framework imply that freedom and equality exist even when they are absent; the framework of choice suggests neutrality even when effectively tilting in particular directions.[3] In light of existing preferences and inequalities, the options of private schooling and public subsidies for school vouchers, magnet schools, and charter schools can easily undermine integration along lines of race, class, gender, and disability—unless the school choice arrangement includes deliberate integration dimensions. The polity needs to prepare the next generation not only for jobs but also for democracy and citizenship, making schooling a crucial collective good not necessarily best guided by individual family decisions.

This Feature explores unintended consequences and surprising developments following legal and political struggles over unity and difference, race and religion, and public and private. Each struggle circles around "school choice." Choice has framed five pivotal moments in American schooling, and each moment produced policies and dynamics that continue to shape debates

2. The *Oxford English Dictionary* defines "seduction" as "[t]he condition of being led astray." 2 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 2706 (1971). *Webster's* defines "seduction" as "something that entices or influences by attraction or charm." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2054 (1993).

3. Talk of "choice" can obscure constraints in many contexts. *See* Martha Minow, *Choices and Constraints: For Justice Thurgood Marshall*, 80 GEO. L.J. 2093 (1992). In the context of schools, the language of choice typically shifts attention from intergroup comparisons to individual freedom; it can also render less than obvious real obstacles to the exercise of choice by some and even veil a complete lack of options. *See, e.g.*, Ted Wragg, *Don't Fall for the Rhetoric of Choice*, GUARDIAN (London), Oct. 17, 2005, http://www.guardian.co.uk/education/2005/oct/17/schools.uk ("A group of children in one town were left without a school place at all. Most of the schools were foundation schools, able to turn down those they did not want. The would-be pupils left unplaced were Travellers' children. It tells its own story."); *see also* Miriam David et al., *Choice Within Constraints: Mothers and Schooling*, 9 GENDER & EDUC. 397 (1997) (examining structural and moral constraints experienced by parents despite sources of freedom of choice for parents as consumers in the education marketplace).

and practices over schooling, equality, pluralism, American identity, and freedom. The first moment introduced the discourse of school choice with the fight over Americanization during the 1920s. In the second, the rise of private school options and "freedom of choice" plans used by whites to bypass court-ordered racial desegregation in the 1950s and 1960s associated school choice with self-segregation by whites.[4] In the third moment, federal courts and local school systems turned to magnet schools and other forms of public school choice in pursuit of voluntary dimensions of racial desegregation from the 1970s until the Supreme Court curbed such efforts.[5] In the fourth moment, longstanding constitutional campaigns to enable publicly financed vouchers to pay for religious schooling reached fruition in 2002.[6] And, finally, during the early decades of this new century, proliferating experiments with charter schools, magnet schools, and other forms of choice present occasions for local, state, and national debate over whether to renew commitments to integration within schools across lines of race, religion, class, and other student differences or to promote plural kinds of schools that enable variety and competition as well as permit increasing separation of different kinds of students into different schools.

The rhetoric of choice has appealed to religious free exercise, individual autonomy, free market values, American multiculturalism, and ideological neutrality. While choice in this regard may have much to commend it, enthusiasm for the notion of choice should not be used to conceal unfairness or to obstruct racial equality or genuine debates over American identity. Too often, the rhetoric of choice has papered over conflicts about immigration, religion, race, and national identity. This look into five moments offers cautionary lessons about what may seem attractive—even seductive—about school choice. It also identifies tools for how parents, other voters, and policymakers can interrogate "choice" options now and in the future.[7]

4. *See* Green v. Cnty. Sch. Bd., 391 U.S. 430 (1968); Griffin v. Cnty. Sch. Bd., 377 U.S. 218 (1964).

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

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

7. The worries about "seduction" in the use of "school choice" frameworks are already present in popular debates. *See, e.g.*, KEVIN K. KUMASHIRO, THE SEDUCTION OF COMMON SENSE: HOW THE RIGHT HAS FRAMED THE DEBATE ON AMERICA'S SCHOOLS (2008).

I. "CHOICE" AS INDIVIDUAL RELIGIOUS AND CONTRACTUAL LIBERTY

In the first part of the twentieth century, nativist anxieties about waves of immigrants and Bolshevism fueled movements to "Americanize" the children of newcomers. These sentiments took an extreme form in Oregon where the Ku Klux Klan, Federated Patriotic Societies, Scottish Rite Masons, and other groups pushed not only for compulsory schooling but also for required attendance at public schools in particular. The reformers sounded white supremacist, anti-Catholic, and anti-Semitic tones while pushing assimilation of immigrants into "American" culture—meaning white Protestantism. The relative homogeneity of Oregon may have contributed to the success of the initiative even as it prompted civil libertarians, African-Americans, Catholics, and Jews to build a coalition to challenge the law.

Operators of two private schools, the Catholic Society of Sisters of the Holy Name of Jesus and Mary and the Hill Military Academy, persuaded the Supreme Court in 1925 to strike down Oregon's compulsory school law. Arising in the era of *Lochner v. New York*,[8] the case fell within the Court's view that government could not regulate private property in a way that destroys people's ability to earn a living—that is, the state could not put private schools out of business. But as the private property theme lost its appeal, the Court's asides respecting parental choice and pluralism have attained reverence and defined *Pierce v. Society of Sisters*[9] as a key precedent for religious freedom, parental rights, fundamental privacy, and a woman's right to choose to terminate a pregnancy.[10] Justice McReynolds's memorable sentences are frequently quoted from the case: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[11] The decision accorded enduring constitutional protection to parental choice of parochial and other private schooling.

But the decision also produced a system in which only public schools received public funding, leaving parental choice of private schooling to private

8. Lochner v. New York, 198 U.S. 45 (1905).

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

10. *See* Martha Minow, *We, the Family: Constitutional Rights and American Families*, 74 J. AM. HIST. 959, 961-62 (1987) (discussing cases).

11. *Pierce*, 268 U.S. at 535.

philanthropy and families with economic resources.[12] Hence, the rhetoric of choice in this context obscured inequality in economic resources that made the option of private schools available to some and not to others, whether due to the wealth gap between individual families or the funds some groups collected to subsidize the selection of particular private schools. The translation of intergroup conflicts into the rhetoric of individual choice also veiled the conflicts between groups—notably between Protestants, shaping public schools, and Catholics, preferring to fund a separate private school system rather than lose control over the socialization of their children.[13]

On the trail of fights over public power and religion, *Pierce* illustrates the pattern of constitutional challenge to policies framed in universal terms but having the effect or underlying purpose of excluding or subordinating members of minority groups. Ensuring a degree of choice over education—preserving the option of private schools to fulfill the compulsory education requirement—*Pierce* at the same time gave rise to decades of efforts by parents and religious organizations seeking legislative and constitutional reforms to secure public funding for religious schooling. This early chapter and its aftermath exemplify well how the notion of school choice can reflect, but also submerge, tensions over national identity and protect minority groups while veiling unequal treatment. Even as *Pierce* established the option of private schooling as constitutionally protected, it entrenched the pattern of a two-tiered system of schooling, which sanctions private opt-outs from publicly run schools.[14] Public schooling is financed by taxpayers, and private schooling is

12. This presentation of private choice—protected to the extent that private resources allow—is well summarized in the Universal Declaration of Human Rights, drafted and ratified by the United Nations' General Assembly in 1948. Article 26 of the Declaration includes two provisions that when read together imply that even private elementary education options selected by parents must be free, imposing no financial costs to the family. First: "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory." Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at 76 (Dec. 10, 1948). Second: "Parents have a prior right to choose the kind of education that shall be given to their children." *Id.* However, it is possible to conclude, consistent with practice in the United States, that governments satisfy the fundamental right to an education by providing a free public school option and ensuring that private options satisfy the compulsory schooling requirement while leaving such alternatives to private funding.

13. *See* PAULA ABRAMS, CROSS PURPOSES: *PIERCE V. SOCIETY OF SISTERS* AND THE STRUGGLE OVER COMPULSORY PUBLIC EDUCATION (2009); Martha Minow, Keynote, *Before and After* Pierce*: A Colloquium on Parents, Children, Religion and Schools*, 78 U. DET. MERCY L. REV. 407 (2001); Minow, *supra* note 10.

14. Because it was not in question in the case, the ability of a state to regulate private schools and mandate curricular elements and qualifications for teachers was treated as a given:

financed by parental user fees and philanthropy (with only the small public subsidy accorded through tax-exempt status for religious and independent schools).

II. "CHOICE" AS RESISTANCE TO RACIAL DESEGREGATION

The second moment deployed school choice as a way to avoid racial desegregation; private schooling became an avenue for circumventing court-ordered school desegregation in the wake of *Brown*. Plans ostensibly allowing students to transfer across "public schools"—introducing the phrase to educational policy—did the same, but produced essentially no movement between historically black and historically white schools. The use of school choice to sidestep racial desegregation exploited the rationale for choice as a vehicle for individual liberty and market-propelled competition that emerged in the 1950s and 1960s.

In fact, an intellectual justification for "school choice" as a mechanism for school improvement appeared in the scholarly world in 1955. Free-market economist Milton Friedman advanced a consumer-sovereignty and market rationale for using public funds to give parents vouchers, enabling them to select among public and private schools and harness competition as a motor for school improvement.[15] Application of this idea to schooling required viewing schooling as a product and preserving the state's role in disbursing funds and ensuring minimum standards. Friedman later elaborated on his school voucher

> No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

268 U.S. at 534. Several decades later, the Court permitted an exemption from compulsory schooling for high-school-aged children in Amish families. Wisconsin v. Yoder, 406 U.S. 205 (1972).

15. *E.g.*, *School Choice*, CATO INST., http://www.cato.org/school-choice (last visited Oct. 11, 2010) (listing books, articles, and chapters sponsored by the Cato Institute on school choice as a policy to promote individual liberty, free markets, and peace); Press Release, Heritage Found., School-Choice Movement Continues To Grow, Report Says (Apr. 26, 2005), *available at* http://www.heritage.org/press/newsreleases/nr042605a.cfm (summarizing a Heritage Foundation study reporting that more than one million families homeschool their children and more than 624,000 use vouchers, tax credits, or tax deductions to attend the schools of their choice). *See generally* LIBERTY & LEARNING: MILTON FRIEDMAN'S VOUCHER IDEA AT FIFTY (Robert C. Enlow & Lenore T. Ealy eds., 2006) (reexamining Friedman's school vouchers proposal from theoretical and practical perspectives).

proposal in his 1962 book, *Capitalism and Freedom*,[16] and ultimately created a philanthropic foundation that advocated for school choice through research and grants for advocates and for educational innovation.[17] Friedman consistently emphasized that vouchers would promote a free society, produce competition, and improve schooling, though he always supported public financing because of the vital role schools play in instilling the common values and literacy skills needed to sustain a democracy.[18]

Although he first published his argument shortly after the Supreme Court's decision in *Brown*, Friedman reported that it had been spurred by no contemporaneous events[19] and that he had drafted the paper before learning that several Southern states were exploring public funding of private schooling "as a means of evading the Supreme Court ruling against segregation."[20] White Southerners did, in fact, use school choice practices as a form of resistance to court-ordered desegregation. They also created organizations across the South to fight the implementation of *Brown* and effectively threatened retaliation against anyone who advocated integration.[21] In Virginia, the legislature cut off public funds for all racially integrated schools, and the governor decided to close schools rather than to integrate them. The National Association for the Advancement of Colored People (NAACP) filed challenges to these laws, and eventually both the Virginia Supreme Court of Appeals[22] and the United States District Court of the Eastern District of Virginia[23] rejected the school closings and the state's efforts to resist desegregation.[24]

16. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 85-107 (1964) [hereinafter FRIEDMAN, CAPITALISM]; *see* Milton Friedman, *The Role of Government in Education*, *in* ECONOMICS AND THE PUBLIC INTEREST 123 (Robert A. Solo ed., 1955) [hereinafter Friedman, *Role of Government*].

17. *See Our Founders*, FOUND. FOR EDUC. CHOICE, http://www.edchoice.org/About-Us/Our-Founders.aspx (last visited Oct. 11, 2010); *What We Do*, FOUND. FOR EDUC. CHOICE, http://www.edchoice.org/Foundation-Services/What-We-Do.aspx (last visited Oct. 11, 2010).

18. Friedman, *Role of Government*, *supra* note 16, at 124-35.

19. *See* Nick Gillespie, *The Father of Modern School Reform*, REASON, Dec. 2005, at 44, 46, *available at* http://www.reason.com/news/show/36333.html.

20. Friedman, *Role of Government*, *supra* note 16, at 131 n.2.

21. *See* Dan Wakefield, *Respectable Racism*, NATION, Oct. 22, 1955, at 339, *reprinted in* REPORTING CIVIL RIGHTS, PART ONE: AMERICAN JOURNALISM 1941-1963, at 222, 222-23 (2003).

22. Harrison v. Day, 106 S.E.2d 636 (Va. 1959) (holding that the legislation closing integrated schools and cutting off state funds for such schools violated the Virginia Constitution).

23. James v. Almond, 170 F. Supp. 331 (E.D. Va. 1959) (per curiam) (denying motions to dismiss a challenge to the school closing law).

24. *See* Griffin v. Cnty. Sch. Bd., 377 U.S. 218 (1964) (discussing this history).

Despite these judicial decisions, the Prince Edward County Board of Supervisors voted to halt all funding of public schools in 1959, and the public schools there closed. Private schools opened their doors to educate the county's white children, and white leaders used state scholarship grants and additional county funds to support these schools.[25] This marked only one of many times when private schools became associated with resistance to desegregation. In this extreme instance, most of the county's 1700 black children had no educational opportunities for five years, although neighboring Norfolk Catholic High School integrated voluntarily.[26] A full ten years after *Brown*, the Supreme Court found that "closing the Prince Edward schools and meanwhile contributing to the support of the private segregated white schools that took their place denied petitioners the equal protection of the laws."[27] The Court declared that the time for "'deliberate speed' has run out."[28]

School authorities in many communities then turned to "freedom of choice" plans. Developed ostensibly to implement desegregation within public school systems, "freedom of choice" plans became a euphemism for resurgent racial separation. Some public systems simply allowed students to opt out of desegregated schools in favor of private schools.[29] One plan assigned students to racially segregated schools while offering them transfer options.[30] By September 1964, no pupil had applied for admission to another school under the arrangement and racially separated schools persisted even though the community did not have residential segregation. White families almost uniformly selected the historically white schools, and black families almost

25. *See* J. KENNETH MORLAND, THE TRAGEDY OF PUBLIC SCHOOLS: PRINCE EDWARD COUNTY, VIRGINIA: A REPORT FOR THE VIRGINIA ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS 12 (1964), *available at* http://www.library.vcu.edu/jbc/speccoll/report1964.pdf. The lawfulness of racial exclusion in private settings itself reflects a series of public policy choices. *See* Imani Perry, *Dismantling the House of* Plessy*: A Private Law Study of Race in Cultural and Legal History with Contemporary Resonances*, 33 STUD. L. POL. & SOC'Y 91 (2004).

26. In Prince Edward County, the local NAACP organization tried to organize alternatives for black students while also challenging the resistance to desegregation. *See* Jill L. Ogline, Challenging the Conventional Narrative: Prince Edward County, the NAACP, and the Role of Litigation in the Civil Rights Movement (Sept. 28, 2004) (unpublished manuscript), *available at* www.allacademic.com/meta/p116576_index.html.

27. *Griffin*, 377 U.S. at 232.

28. *Id.* at 234. For details on the Prince Edward County story, see OLIVER W. HILL SR., THE BIG BANG: *BROWN V. BOARD OF EDUCATION* AND BEYOND (Jonathan K. Stubbs ed., 2000).

29. *See* Gerard Robinson, *Freedom of Choice: From* Brown *to School Vouchers*, SCH. REFORM NEWS, June 2004, http://www.heartland.org/Article.cfm?artId=15065.

30. *See* Monroe v. Bd. of Comm'rs, 427 F.2d 1005, 1007 (6th Cir. 1970) (holding that these transfer options were unacceptable).

uniformly chose the black-identified schools. This choice-based strategy did nothing to alter entrenched resource inequality, prejudices, and ostracism, enforced through law and vigilante violence. In 1968, the Supreme Court rejected the "freedom of choice" plan as insufficient to meet the district's obligation to desegregate.[31]

It should not be surprising that "school choice" in many quarters became tainted as an anti-desegregation tactic. The Prince Edward County episode showed how "freedom" and "choice" could be empty phrases when underlying structures of opportunity and attitudes remain unchanged. Voluntary transfers from schools that are both racially segregated and unequal produce equality only in the most superficial and formal sense. Even this most superficial equality was vitiated by the threat of violence against black students who considered entering traditionally white schools.

III. "CHOICE" AS AN INSTRUMENT OF RACIAL DESEGREGATION

However, the pendulum of choice swung again, and the third moment attracted liberals and progressives to school choice; policymakers introduced public vouchers to allow low-income families access to private schools, and school officials, sometimes under court supervision, created special public "magnet" schools to attract students of all races and to produce racial integration voluntarily. Yet as a tool for racial integration, school choice faced practical and legal obstacles; as a device deploying competition in hopes of improving all schools, no version of this policy generated clear success, even though individual students gained access to schools that they otherwise would not have attended through both vouchers to private schools and access to public magnet schools.

School choice initiatives took the forms of vouchers and magnet schools during the 1970s and 1980s and reflected designs to open up better educational

31. Green v. Cnty. Sch. Bd., 391 U.S. 430 (1968). The Court noted:

> "Freedom of choice" is not a sacred talisman; it is only a means to a constitutionally required end – the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a "unitary, non-racial system."

Id. at 440 (quoting Bowman v. Cnty. Sch. Bd., 382 F.2d 326, 333 (4th Cir. 1967) (Sobeloff, J., concurring)).

options for students confined to failing inner-city public schools.[32] An initial experiment with school vouchers in Alum Rock, California, proceeded with federal funding and hopes of racial and socioeconomic integration but yielded no evidence of improved student achievement or racial integration.[33]

In the 1970s and 1980s, some courts included elements of choice in judicially ordered school desegregation plans; this time, school choice was intended to promote racial integration.[34] School system designers sought to harness the appeal of "choice" in a kind of "soft paternalism," enticing white parents to choose public urban schools by endowing them with special programs and drawing black, Hispanic, and immigrant students out of their neighborhoods to these special schools.

Public school systems in Dallas,[35] Richmond,[36] and Boston[37] used "magnet schools" with special programs to attract students from different races and backgrounds and thereby reduce, eliminate, or prevent racially distinct schools.[38] The magnet schools have enriched curricular offerings and provided specialization in performing arts and other fields. Some have used exams for competitive admissions, and most have provided access to extra resources.

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32. *See* James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 GEO. L.J. 1287, 1309-12 (2005); Christopher Jencks, *Private Schools for Black Children*, N.Y. TIMES, Nov. 3, 1968, § 6 (Magazine), at 30; Theodore Sizer & Phillip Whitten, *A Proposal for a Poor Children's Bill of Rights*, PSYCHOL. TODAY, Apr. 1968, at 59.

33. *See* PETER W. COOKSON, JR., SCHOOL CHOICE: THE STRUGGLE FOR THE SOUL OF AMERICAN EDUCATION 75-76 (1994); Forman, *supra* note 32, at 1312; Eliot Levinson, *The Alum Rock Voucher Demonstration: Three Years of Implementation* (RAND Paper Series, Paper No. P-5631, 1976), *available at* http://www.rand.org/pubs/papers/P5631/. Initial reports of declines in reading achievement seem to reflect methodological difficulties rather than a genuine effect. Paul M. Wortman, Charles S. Reichardt & Robert G. St. Pierre, *The First Year of the Education Voucher Demonstration: A Secondary Analysis of Student Achievement Test Scores*, 2 EVALUATION Q. 193 (1978).

34. *See* Scott Gelber, *"The Crux and the Magic": The Political History of Boston Magnet Schools, 1968-1989*, 41 EQUITY & EXCELLENCE EDUC. 453 (2008); Christine H. Rossell, *Magnet Schools: No Longer Famous but Still Intact*, EDUC. NEXT, Spring 2005, at 44, *available at* http://findarticles.com/p/articles/mi_m0MJG/is_2_5/ai_n13487200/.

35. '*Super Highs' Sought: Estes Unveils Plan for Specialty Schools*, DALLAS MORNING NEWS, Aug. 29, 1971, at 37A.

36. *Armstrong High School*, RICHMOND PUB. SCHOOLS, http://www.richmond.k12.va.us/history/armstrong.html (last visited Nov. 13, 2010).

37. *Education: Integration By Magnets*, TIME, June 16, 1975, at 66, *available at* http://www.time.com/time/magazine/article/0,9171,917542-1,00.html.

38. *See* 20 U.S.C. § 7231a (2006) ("[T]he term 'magnet school' means a public elementary school, public secondary school, public elementary education center, or public secondary education center that offers a special curriculum capable of attracting substantial numbers of students of different racial backgrounds.").

Yet magnet schools have also created new difficulties. As a device to promote racial balance in previously segregated or racially isolated schools,[39] magnet programs sometimes produce diverse enrollments while reducing diversity in the nonmagnet schools. One commentator summarized worries this way: "[W]hy not focus on making all schools in effect Magnet schools? Why should the Magnet schools receive extra funds to make them special programs? What about the many students who get turned away?"[40] The magnet programs may attract resources to the frustration of neighborhood schools. In addition, they may seem too expensive to offer a feasible model for other schools or beyond the remedial power of a desegregation court. When ordered as part of a remedy for racial segregation, magnet schools using race as a factor in admissions draw sharp legal and political attacks.

In 1995, magnet schools faced two major legal setbacks. The Supreme Court rejected the court-ordered desegregation plan for Kansas City, Missouri, which had been enacted after the district court found that illegal racial segregation persisted even after legislation rescinded race-based assignments.[41] The remedy grappled with evidence of white flight, which left the city's school student population comprised of 68.3% black students.[42] The remedial plan essentially converted most of the district schools into magnet schools, seeking to improve the quality of schooling for the students in the system and to make the district attractive to suburban families.[43] An appellate court upheld the plan, explaining that it "would at the same time compensate the blacks for the education they had been denied and attract whites from within and without the [Kansas City system] to formerly black schools."[44] But the Supreme Court rejected the plan. It reasoned that trying to attract students from outside the district fell outside the mandate to remedy segregation within the district.

The year 1995 brought a second setback for magnet schools as Sarah Wessmann, a white ninth grader, filed suit challenging the admissions policies of Boston's three citywide exam schools for reserving slots for African-

39. *See* Grace Chen, *What Is a Magnet School?*, PUB. SCH. REV. (Dec. 4, 2007), http://www.publicschoolreview.com/articles/2; *Who We Are*, MAGNET SCHOOLS OF AMERICA, http://www.magnet.edu/modules/info/who_we_are.html (last visited Oct. 11, 2010).

40. Chen, *supra* note 39.

41. Missouri v. Jenkins, 515 U.S. 70 (1995).

42. *Id.* at 76.

43. *Id.*

44. Jenkins *ex rel.* Agyei v. Missouri, 855 F.2d 1295, 1301 (8th Cir. 1988), *aff'd in part*, *rev'd in part sub nom.* Missouri v. Jenkins, 495 U.S. 33 (1990).

Americans and Hispanics.[45] Exam schools represented the selective variant on magnet schools; approximately one-third of magnet schools across the country use selective admissions criteria to determine who can attend their schools.[46] These selective schools typically offered notably better academic opportunities, avenues to college, and special resources than do other schools. Some of the exam schools, like Boston's, became part of court-ordered desegregation remedies. Wessmann pursued her suit, even after Boston changed its policies, and persuaded the court of appeals to reject the use of racial categories in the public school's competitive admissions.[47] This became a crucial stepping stone in the assaults on the use of racial categories in school and college admissions.[48]

School choice plans pursuing racially integrated schools also generated resentments among families in systems with a limited number of good public options. That scarcity made even public high schools look like competitive colleges and graduate schools, and challenges to affirmative action reached a fever pitch. And even though the Supreme Court has permitted colleges and graduate schools to include race as a plus-factor when engaging in individualized assessment of candidates in higher education admissions,[49] the Court in the recent Seattle and Louisville schools cases sharply curbed the use of racial categories even when intended to promote racial integration in public

45. *See* William F. Doherty, *School Admissions Policy Defended*, BOSTON GLOBE, Feb. 10, 1998, at B1.

46. Chen, *supra* note 39.

47. Wessman v. Gittens, 160 F.3d 790 (1st Cir. 1998). A shift to class-based admissions could preserve some features of diversity but would not ensure access to competitive schools for the most disadvantaged minority youth. *See* Gabriel O'Malley, *An Effective Compromise: Class-Based Affirmative Action in Boston Schools*, NEW ENG. J. PUB. POL'Y, Spring/Summer 2001, at 97, *available at* http://www.mccormack.umb.edu/centers/nejpp/articles/16_2/6_omalleyg.pdf.

48. Another case signaling the end of race-conscious admissions as a technique to end desegregation in magnet schools is *Ho v. San Francisco United School District*. *Ho* was a class action filed in 1994 that ended with a settlement terminating race-conscious admissions practices initially instituted by a court-ordered school desegregation remedy. *See* Ho v. S.F. Unified Sch. Dist., 147 F.3d 854 (9th Cir. 1998) (dismissing an appeal of the district court's denial of an injunction); Ho v. S.F. Unified Sch. Dist., 59 F. Supp. 2d 1021 (N.D. Cal. 1999) (ending in settlement). For competing assessments, compare Jeff Chang, *On the Wrong Side: Chinese Americans Win Anti-Diversity Settlement—and Lose in the End*, COLORLINES, Summer 1999, at 12, *available at* http://www.colorlines.com/article.php?ID=322, with *The San Francisco Ho Case*, ASIAN AM. LEGAL FOUND., http://www.asianamericanlegal.com/index.php?option (last visited Oct. 11, 2010). *See also* Ted Jou, *Grutter* Goes Back to School: Revisiting *Ho v. San Francisco United School District* (unpublished manuscript) (June 2005), *available at* http://www.ugcs.caltech.edu/~tjou/words/law/GrutterSchool.pdf (analyzing the impact of *Grutter* on the goals of the Asian American Legal Foundation as seen in *Ho*).

49. Grutter v. Bollinger, 539 U.S. 306 (2003).

elementary, middle, and high schools.[50] The Supreme Court's decision in *Parents Involved* forbade official use of individual students' racial identities to ensure racial balance absent a prior judicial finding of intentional racial discrimination.[51] The plurality opinion expressly called for ending the use of race as a factor when school systems invite students to choose among educational options.

Arguments here and elsewhere over the use of race as a factor in school choice plans almost completely obscured the fact that family access to information and resources prevented a level playing field for school choice programs. As the litigation over the Boston Latin School program unfolded, the school department disclosed that most of the admitted students had taken the admission test twice and all but six of the 115 students who took the admission test twice came from private schools. This reinforced complaints that higher-income families sending their children to private school could offer their children an advantage in taking the high-stakes entrance test when compared with other children's opportunities.[52] Unequal access to information about school choice options affects admissions even at those schools without competitive testing. Criteria such as mandatory parental involvement and inadequate transportation skew enrollments in specialized schools toward disproportionately white and wealthier families.[53] The temptation to use school choice to produce racial integration not only failed legally but also fueled campaigns against affirmative action. And it obscured the continuing patterns of unequal access to test preparation and information used in the school choice systems.

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

51. 551 U.S. 701. Cambridge, Massachusetts, the site of a model controlled choice plan, replaced attention to racial balance with socioeconomic balance in 2001. *See* Edward B. Fiske, *Controlled Choice in Cambridge, Massachusetts*, *in* DIVIDED WE FAIL: COMING TOGETHER THROUGH PUBLIC SCHOOL CHOICE 167 (Century Found. Task Force on the Common Sch. ed., 2002). Controlled choice plans can avoid exacerbating segregation by race and class. *See* Richard D. Kahlenberg, *Public School Choice: Student Achievement, Integration, Democracy, and Public Support*, *in* PUBLIC SCHOOL CHOICE VS. PRIVATE SCHOOL VOUCHERS 137 (Richard D. Kahlenberg ed., 2003).

52. *See* Beth Daley, *Most Pupils Who Tested Twice Admitted*, BOSTON GLOBE, Oct. 28, 1997, at B1.

53. *See* Amy Stuart Wells et al., *Charter Schools and Racial and Social Class Segregation: Yet Another Sorting Machine?*, *in* PUBLIC SCHOOL CHOICE VS. PRIVATE SCHOOL VOUCHERS 81, *supra* note 51, at 85-86.

IV. "CHOICE" AS AN INSTRUMENT OF EDUCATIONAL OPPORTUNITY —AND A TRIUMPH OF RELIGIOUS SCHOOL CAMPAIGNS FOR PUBLIC FUNDING

The fourth seductive moment brings to the fore the revival of calls for public funding of religious schools, with new advocates urging this policy as a means for affording good educational opportunities to low-income members of racial minorities. Even though critics and supporters acknowledged for decades the constitutional vulnerabilities of school choice initiatives if they directed public dollars to private religious schools,[54] advocates for poor children of color joined forces with free-market supporters and endorsers of public aid for parochial schools to seek publicly funded school choice programs that would include private religious schools.

The constitutional barriers were well known and ultimately proved vulnerable to concerted challenge. Federal courts in the 1970s and 1980s had found Establishment Clause violations when statutes reimbursed private schools for secular textbooks and teachers' salaries[55] or when they authorized tax credits and deductions for tuition paid to nonpublic schools.[56] Also impermissible were deployments of public school staff who provided remedial instruction and guidance services on the campus of religious schools.[57] These decisions stood in the way of using public vouchers to pay for religious schooling, and unusual bedfellows joined forces for legal change. The doctrine was in fact inconsistent. The Supreme Court had permitted public aid to students enrolled in religious schools if public school personnel offered standardized tests and speech, hearing, and psychological services[58] and provided services mandated by the state outside the campus of the religious school.[59] The Court also allowed some tax deductions for children's school

54. *Cf.* Martha Minow, *Reforming School Reform*, 68 FORDHAM L. REV. 257, 263 (1999) (noting that religious schools are sometimes the only options for parents wanting to avoid failing public schools); Jeffrey R. Henig, Book Review, 89 AM. POL. SCI. REV. 1039 (1995) (arguing that empirical data may suggest that choice in national school systems does not improve results).

55. Lemon v. Kurtzman, 403 U.S. 602 (1971).

56. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973). Similarly, in *Sloan v. Lemon*, 413 U.S. 825 (1973), the Court rejected a statute reimbursing parents for $150 or $75 paid as tuition to nonpublic schools.

57. Aguilar v. Felton, 473 U.S. 402 (1985).

58. Wolman v. Walter, 433 U.S. 229 (1977).

59. *E.g.*, Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) (allowing reimbursement to nonpublic schools, including parochial schools, for the expenses involved in maintaining records and administered tests required by the state); Bd. of Educ. v. Allen,

tuition, textbooks, and transportation associated with public or private schools.[60]

School choice advocates joined forces with others who found the Court's treatment of government aid to religious institutions unfair and unpredictable. Some social conservatives found market rhetoric congenial if it would support public aid to religious schools. Secular liberals opposed "choice" as a code for public aid to religion, undue pressure on poor families to select religious schools, and a war on the critical thinking and integrative missions of public schooling.

Reimagining the issue in terms of the allegation of discriminatory treatment—government exclusion from otherwise available public aid for schooling—leading advocates put the spotlight not only on the treatment of religious schools but also on the treatment of religious students and religious speakers.[61] This effective strategy succeeded rhetorically by resonating with the concern over exclusion and subordination voiced in *Brown*. It succeeded doctrinally by switching the focus from the Establishment Clause to concerns about governmentally imposed viewpoint discrimination under freedom of speech. Michael McConnell and Clint Bolick led reformers who sought equal treatment of religious and secular schools.[62]

392 U.S. 236 (1968) (permitting the government to loan secular textbooks to students in nonpublic schools).

60. Mueller v. Allen, 463 U.S. 388 (1983).

61. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000); Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992); Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991). This view should be distinguished from the conception that religion should never be treated differently from other personal views or commitments. Christopher Eisgruber and Lawrence Sager argue that equality would forbid the government from treating religion differently from any other category even if that difference takes the form of a preference or accommodation. *See* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994).

62. McConnell, then a law professor, later became a federal judge before returning recently to the academy. Clint Bolick got his professional start with the Mountain States Legal Foundation, funded by conservative businessman Joseph Coors and led by James Watt, who later headed the Department of the Interior under President Ronald Reagan. Bolick then worked for the Equal Employment Opportunity Commission under conservative Clarence Thomas (whom President George H.W. Bush later appointed to the Supreme Court). Subsequently, Bolick developed the Landmark Legal Foundation to adopt the long-term strategies of the NAACP Legal Defense Fund to pursue what he called libertarian aims. *See*

In a 1997 case, in which McConnell and Bolick each submitted friend-of-the-Court briefs, the Supreme Court explicitly overruled prior decisions and allowed public employees to provide services on the campuses of religious schools where the programs supported the same kinds of services for public school students.[63] That decision paved the way for the Court's dramatic turn in 2002, when, in *Zelman v. Simmons-Harris*, the Court approved a voucher plan in Cleveland, Ohio that offered financial assistance to allow low-income parents to choose religious schools from a selection of public and private schools.[64]

The Court upheld the voucher program because parents, not school officials, selected religious schools from options that included alternative and magnet public schools and private religious and secular schools. Participating private schools also agreed neither to discriminate on the basis of race, religion, or ethnic background, nor to teach hatred of any person or group on the basis of race, religion, or ethnicity.[65] Justice Thomas, the sole African-American on the Court, identified school choice as arguably the best educational opportunity for poor students and students of color in Cleveland.[66] It is hard not to note the irony that choice plans had once promoted white flight and segregation.[67]

STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 79-80, 85, 245 (2008).

63. Agostini v. Felton, 521 U.S. 203 (1997), *overruling* Aguilar v. Felton, 473 U.S. 402 (1985).

64. 536 U.S. 639 (2002).

65. *Id.* at 645.

66. *Id.* at 676-84 (Thomas, J., concurring); *id.* at 682 ("While the romanticized ideal of universal public education resonates with the cognoscenti who oppose vouchers, poor urban families just want the best education for their children, who will certainly need it to function in our high-tech and advanced society.").

67. *See id.* at 680-84 (discussing freedom-of-choice plans); *id.* at 682 (discussing Reconstruction and racial issues). Similarly, Justice Souter in dissent criticized the majority's inclusion of the public magnet and community schools in assessing the constitutionality of the plan. For Justice Souter, the proper question was whether public dollars were used to enable choice of private religious institutions. He noted:

> The majority's view that all educational choices are comparable for purposes of choice thus ignores the whole point of the choice test: it is a criterion for deciding whether indirect aid to a religious school is legitimate because it passes through private hands that can spend or use the aid in a secular school. The question is whether the private hand is genuinely free to send the money in either a secular direction or a religious one. The majority now has transformed this question about private choice in channeling aid into a question about selecting from examples of state spending (on education) including direct spending on magnet and community public schools that goes through no private hands and could never reach a religious school under any circumstance. When the choice test is

Thus, publicly funded school choice now lawfully includes religious schools. But four dangers stem from the use of vouchers. First, publicly funded school vouchers risk perpetuating unequal educational opportunities for poor students of color because they and their parents may not be able to take advantage of the private school options, as good options remain relatively scarce; "school choice" will allow schools to pick students as well as parents to pick schools—and parents with financial means or savvy will likely benefit most.[68] Second, the use of school vouchers risks skimming the most engaged families of whatever color or class from public schools, while leaving the rest of the students in inadequate schools without the political clout and active monitoring of engaged parents. Third, school vouchers risk pressuring students to attend schools not of their own religion and pressuring religious schools to modify their practices to suit the government funder. Fourth, school voucher programs offer the illusion of choice but in fact remain confined to district lines—stopping at the border of suburbs where strong public and private school options remain off-limits to poor urban students. Ohio, the innovator in vouchers, has not secured suburban public school participation.[69] The origin of this district-boundary problem does not stem from school choice, but school choice helps to obscure it and the political and legal choices behind it.[70]

Quite apart from these concerns, however, the decision in *Zelman* produced no mass movement for school vouchers. Indeed, despite the constitutional green light for school vouchers, the political movement for them has essentially stalled.[71] Despite enormous political efforts and dramatic legal success, the

> transformed from where to spend the money to where to go to school, it is cut loose from its very purpose.

Id. at 699 (Souter, J., dissenting). Justice Breyer, also writing in dissent, went even further by rejecting evidence of parental choice as insufficient to overcome the Establishment Clause's commitment to guard against the kinds of religious-based social divisions that could come with contests over public dollars. *Id.* at 728 (Breyer, J., dissenting).

68. *See* Carol Ascher & Nathalis Wamba, *An Examination of Charter School Equity*, *in* SCHOOL CHOICE AND DIVERSITY: WHAT THE EVIDENCE SAYS 77 (Janelle T. Scott ed., 2005).

69. *See* Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417, 436 (2000). Ohio ultimately changed the plan to include a larger region. OHIO REV. CODE ANN. §§ 3313.976-.98 (LexisNexis 2009).

70. *See* JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA (2010); Peter Schrag, *"F" Is for Fizzle: The Faltering School Privatization Movement*, AM. PROSPECT, May-June 1996, at 67, *available at* http://www.prospect.org/cs/articles?article=f_is_for_fizzle.

71. *See* RYAN, *supra* note 70, at 207-09, 230-31. Nascent advocacy by libertarian commentators to establish a constitutional right to school choice where legislatures or school boards do not

movement for vouchers halted in 2008—right at the feet of suburban parents who liked their public schools. Disillusionment with privatization after the Iraq War, Hurricane Katrina, and the stock market collapse may have contributed to declining interest in school vouchers as private market-based solutions lost cachet. Voters defeated five state school choice referenda, and none of the results were close.[72] By 2008, public vouchers to support private schooling receded from the public stage, leaving entrepreneurial school reformers engaged with charter, magnet, and pilot schools, as well as other forms of school choice, within public school systems.[73]

V. "CHOICE" FOR PLURALISM AND SCHOOL REFORM—AND RENEWED RISKS OF THE REGIME OF "SEPARATE BUT EQUAL" SCHOOLING

This brings us to the current moment. School choice now accompanies expanding public options, styled not only as "magnet" schools but also as charter schools—new schools with potentially greater autonomy than that of typical public schools. As public school systems increasingly offer parents and students a range of educational choices, individuals may be able to enroll in more appealing schools. Nevertheless, three serious problems persist with contemporary school choice. First, not all families are informed and equipped to navigate the increasingly complex process of selecting among educational options, and some of the most disadvantaged students will lose out as a result.

enact it have failed, matching prevailing political views. *See, e.g.*, *Education*, U.S. FREEDOM FOUND., http://www.freedomfoundation.us/education (last visited Oct. 11, 2010); David W. Kirkpatrick, *Nonpublic Schools and the Courts*, SCH. REFORM NEWS, Sept. 2003, http://www.heartland.org/policybot/results/12757/Nonpublic_Schools_and_the_Courts.html.

72. *See* Sol Stern, *School Choice Isn't Enough: Instructional Reform Is the Key to Better Schools*, CITY J., Winter 2008, at 53, 54.

73. *See* Greg Anrig, *An Idea Whose Time Has Gone: Conservatives Abandon Their Support for School Vouchers*, WASH. MONTHLY, Apr. 2008, at 29, 32-33; Frederick M. Hess, *Fulfilling the Promise of School Choice*, AM. ENTERPRISE INST. (Sept. 2008), http://www.aei.org/docLib/20080925_EducationalOutlook_g.pdf (reporting how even staunch defenders of school choice concede disappointing results). Public aid to private school education is not over, however. In 2008, Georgia joined five other states by enacting a $50 million scholarship tax credit offering one-hundred-percent tax credits for donations by corporations to pay for scholarships to enable low-income students to attend private schools. *See* Press Release, Alliance for Sch. Choice, Georgia Gov. Sonny Perdue Approves $50 Million School Choice Program (May 14, 2008), *available at* http://www.prnewswire.com/news-releases/georgia-gov-sonny-perdue-approves-50-million-school-choice-program-57248997.html.

Second, the ideal of integration—across racial differences, religious differences, and other kinds of demographic differences—grows more elusive as school choice enables new forms of student separation based on identities and aspirations. Finally, the rhetoric of private individual school choice cordons off from public debate the very character of the kinds of choices—and kinds of education—school systems are permitting.

School choice permeates entire public school systems. In Cambridge, Massachusetts, every student must apply to be assigned to a school, and New York City's education department touts the choices of high schools that include career and technical schools, charter schools, "small learning communities" within larger schools, small schools partnering with nonprofit organizations and businesses, specialized high schools (some with competitive admissions), and "transfer schools" offering personalized programs for students who have dropped out or fallen behind.[74] The New York City schools include the Harvey Milk High School designed for (though not limited to) gay, lesbian, bisexual, and transgender teens as a safe space away from peer harassment and an escape valve for a system that has failed to halt that harassment.

School choice within public school systems like New York's can generate varied, vibrant, successful schools that attract diverse students and promote social integration across many dimensions. But it could also yield more schools separated by race, ethnicity, language, gender, disability, or other student traits. The new choices are increasingly in the form of charter schools that invite entrepreneurial groups of teachers, parents, and others to devise their own schools with public funding. According to their authorizing laws, some charter schools operate apart from the usual state and local bureaucracy, as well as collective bargaining terms, although others are highly regulated.[75]

Although Minnesota enacted the first charter statute in 1991,[76] almost all states have now enacted charter school laws.[77] Even though fewer than three

74. *Choices*, N.Y.C. DEP'T EDUC., http://schools.nyc.gov/ChoicesEnrollment/High/Choices/default.htm (last visited Oct. 11, 2010).

75. *See* Martin H. Malin & Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 HARV. J.L. & PUB. POL'Y 885, 892 (2007); Jonathan P. Krisbergh, Comment, *Marginalizing Organized Educators: The Effect of School Choice and 'No Child Left Behind' on Teacher Unions*, 8 U. PA. J. LAB. & EMP. L. 1025 (2006); SARA MEAD & ANDREW J. ROTHERHAM, EDUC. SECTOR, A SUM GREATER THAN THE PARTS: WHAT STATES CAN TEACH EACH OTHER ABOUT CHARTER SCHOOLING 1, 10 (2007), *available at* http://www.educationsector.org/usr_doc/CharterSchoolSummary.pdf. *See generally* Arne Duncan, U.S. Sec'y of Educ., Remarks to the National Education Association: Partners in Reform (July 2, 2009), *available at* http://www.ed.gov/news/speeches/partners-reform (discussing, inter alia, the role of unions in school reform).

76. *See* 1991 MINN. LAWS 1123-33.

percent of all public school students attend charter schools, the number of public charter schools is increasing rapidly, growing by eleven percent in 2006.[78] The federal infusion of approximately twenty million dollars to rebuild New Orleans schools after Hurricane Katrina promoted charter schools to improve a failing school system, and now a majority of New Orleans public school students attend charter schools, which attract teachers and administrators from across the country.[79]

The current possibility of school choice authorizes development of schools that attract population subgroups, inviting self-segregation by religion, ethnicity, language, and disability. Recognition and support for schools organized along these different lines may be understood as an embrace of differences—a form of system-wide or society-level inclusion or, to use Professor Heather Gerken's term, "second-order diversity"—enabling an institutional practice that involves variation among, not within, particular settings or groups.[80] Such specialized settings may reflect deep and considered preferences or may instead result from the echo-chamber effect studied by Cass Sunstein, who suggests that people use enclaves, short-hand, and even

77. *Answers to Frequently Asked Questions*, US CHARTER SCHOOLS, http://www.uscharterschools.org/pub/uscs_docs/o/faq.html#2 (last visited Oct. 1, 2010). Nationwide, there were a total of 4578 charter schools operating in 2009, with a total of 1,407,421 students enrolled. CTR. FOR EDUC. REFORM, THE ACCOUNTABILITY REPORT 2009: CHARTER SCHOOLS 8 (2009), *available at* http://www.edreform.com/accountability; *see also* Sam Dillon, *Ohio Goes After Charter Schools That Are Failing*, N.Y. TIMES, Nov. 8, 2007, at A26 (noting the existence of four thousand charter schools); Press Release, Ctr. for Educ. Reform, Number of Charter Schools Up 11 Percent Nationwide: More than Half of Charter Students Are Low-Income or Minority (May 10, 2007), *available at* http://www.edreform.com/Archive/?Number_of_Charter_Schools_Up_11_Percent_NationwideMore_than_Half_of_Charter_Students_Are_LowIncome_or_Minority (noting 3940 charter schools operating in 2007).

78. *Characteristics of the 100 Largest Public Elementary and Secondary School Districts in the United States: 2005-06*, NAT'L CTR. FOR EDUC. STAT., tbl.A-7 (June 26, 2008), http://www.nces.ed.gov/pubs2008/100_largest_0506/tables/table_a07.asp (providing national charter school data for the 2005-2006 school year); *see* Press Release, Ctr. For Educ. Reform, *supra* note 77.

79. *See* Jay Mathews, *Charter Schools' Big Experiment: New Orleans's Post-Katrina Test May Offer Lessons for Ailing Systems*, WASH. POST, June 9, 2008, at A1; Susan Saulny, *U.S. Gives Charter Schools a Big Push in New Orleans*, N.Y. TIMES, June 13, 2006, at A19. For a caution that the New Orleans experiment jeopardizes accountability by loosening state and federal requirements, see Danielle Holley-Walker, *The Accountability Cycle: The Recovery School District Act and New Orleans' Charter Schools*, 40 CONN. L. REV. 125 (2007).

80. Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005) (proposing a model of "second-order diversity" for decisionmaking bodies).

stereotypes to filter choices and information.[81] Expressing tolerance or appreciation at some level, a system enabling special-identity schools may also serve as a focal point for particular communities.[82]

Examples abound. In particular communities, Hispanic parents disproportionately select thematic charter schools such as the Cesar Chavez Academy in Pueblo, Colorado.[83] Specialized curricular programs also appeal to other particular communities, such as Hmong or Somali immigrants[84] and Native Hawaiians.[85] Hawaii authorized the creation of twenty-five charter schools in 2001, and in the twelve of these that pursue Native Hawaiian educational programs, culture, and language, Native Hawaiians comprise about ninety-three percent of the students enrolled, even though only twenty-six percent of the entire student population of the state is Native Hawaiian.[86]

Parents are often drawn to a school organized to celebrate their own cultural heritage.[87] One such school in Illinois is the Betty Shabazz International Charter School, named for an advocate for African-Americans and designed to offer cultural affirmation with references to the contributions of Africans and African-Americans across the subjects in the curriculum.[88] A notable increase in racially segregated schools in Michigan can be traced to charter schools, as black families use them as alternatives to failing

81. CASS R. SUNSTEIN, REPUBLIC.COM 2.0 (2007).

82. *See* Richard A. Shweder, *After Just Schools: The Equality-Difference Paradox and Conflicting Varieties of Liberal Hope*, *in* JUST SCHOOLS: PURSUING EQUALITY IN SOCIETIES OF DIFFERENCE 254, 259 (Martha Minow, Richard A. Shweder & Hazel Rose Markus eds., 2008).

83. *See* Nancy Mitchell, *Charters More Diverse*, ROCKY MTN. NEWS, Dec. 20, 2005, at 6A.

84. *See* Katherine Kersten, *Don't Protest, Just Shop Somewhere Else*, WALL ST. J., Mar. 2, 2006, at A15 (reporting statistics compiled by the Center for School Change at the University of Minnesota's Humphrey Institute).

85. *See* MINOW, *supra* note 1, at 96.

86. Gordon Y.K. Pang, *Native Hawaiian Students Bloom in Charter Schools*, HONOLULU ADVERTISER, Nov. 15, 2006, at A1 (describing statistics from a Kamehameha schools study).

87. *See, e.g.*, Joe Robertson, *KC Considers Extending African-Centered Schools*, KAN. CITY STAR, Feb. 6, 2006, at A-1. Therein, Robertson explained:

> Advocates describe [African-centered education] as an academic and character-building program guided by African and African-American cultural and intellectual traditions. Students who otherwise might think the culture is inferior are immersed in it and presented with role models. They don't have to overcome anything, but can expect to excel as who they are.

Id.

88. *See* Regina Jennings, *Institute of Positive Education*, *in* ENCYCLOPEDIA OF BLACK STUDIES 272 (Mambo Ama Mazama & Molefi Kete Asante eds., 2004); Rosalind Rossi, *School Bd. Approves Plans for Final 2 Charter Schools*, CHI. SUN-TIMES, Apr. 30, 1998, at 20.

conventional public schools.[89] Minority students exited conventional Minneapolis schools through choice options at notably higher rates than whites, leaving the traditional schools with a higher white enrollment.[90] Charter schools may attract black parents who feel disenfranchised in highly racially isolated urban schools.[91] This kind of choice may allow parents to gain a sense of control in selecting a school.[92] Some parents have at times chosen to send their children to charter schools with test scores that are demonstrably lower than in the districts they exited.[93]

Charter schools and other school choice options could promote racial and ethnic integration if students of all backgrounds are recruited and their choices are given effect. But inadequate transportation, poorly distributed information about options, and admissions criteria (such as mandatory parental involvement) skew enrollments in some specialized schools toward disproportionately white and wealthier families,[94] while the details of individual schools and of school choice programs can tip parental preferences and school enrollments away from racial and ethnic integration.

Triumphant Learning Center and Los Milagros Academy are both charter schools claiming to serve all students in the same Arizona town. Each offers a college-preparatory curriculum. Yet their names, locations, founders, schedules, expectations of parental involvement, and meals attract different student populations, with Triumphant Learning Center appealing to white families (producing 95% white enrollment the first year and current white enrollment of about 90%) and Los Milagros Academy appealing to Hispanic and Catholic students (producing roughly 75% Hispanic enrollment the first year and current Hispanic enrollment of 53%).[95] Designed to appeal to particular segments of the population, with foreseeable disparate application rates across racial and ethnic groups, schools with specialized ethnic, cultural,

89. *See* Kersten, *supra* note 84; Judy Putnam, *Michigan Has More Segregated Schools: Charters That Draw Students from Mostly Black Schools Drive Up Numbers*, GRAND RAPIDS PRESS, Feb. 15, 2006, at A1.

90. *See* Steve Brandt, *Minority Students Continue Minneapolis Schools Exodus*, STAR TRIB. (Minneapolis), Feb. 22, 2006, at 3B.

91. *See* Linda A. Renzulli, *District Segregation, Race Legislation, and Black Enrollment in Charter Schools*, 87 SOC. SCI. Q. 618, 620-22 (2006).

92. *See id.*

93. *See* Gregory R. Weiher & Kent L. Tedin, *Does Choice Lead to Racially Distinctive Schools? Charter Schools and Household Preferences*, 21 J. POL'Y ANALYSIS & MGMT. 79, 90-91 (2002).

94. Wells et al., *supra* note 53, at 81.

95. Lynn Schnaiberg, *Charter Schools: Choice, Diversity May Be at Odds*, EDUC. WK., May 10, 2000, at 1.

or bilingual programs are likely to reduce racial mixing absent concerted efforts to generate diverse enrollments.[96] More choice does not always mean more diversity, at least within individual schools. Instead, and perhaps even because of choice, families may seek enclaves and use identity categories to simplify choice.

Specialized schools may draw diverse student bodies, but some schools will yield self-separation absent regulation or careful design within a system of other choices. For example, Arabic-language schools could draw students from varied backgrounds, as Arabic is of great cultural and historical importance and in great need by America's military and diplomats.[97] Yet experience shows that Arabic-language schools could facilitate self-segregation by an immigrant group, making it easy for the majority to proceed without mixing with these immigrant students. Minneapolis and St. Paul established the Twin Cities International Elementary and the Twin Cities International Middle School in 2001 as a response to desires of a particular immigrant community.[98] The elementary school's website explains: "Founded by educational leaders in the East African community, this public charter school ultimately seeks to prepare students for successful and productive lives as United States citizens while allowing them to retain their unique cultural heritage."[99] Drawing students mainly from the large Somali immigrant population in the area, the schools teach Arabic and serve halal food appropriate for their largely Muslim student population. The dress code permits head coverings, and all of the girls pictured in the schools' materials wear hijabs.[100]

In another example of a school created to support a group or special identity, New Jersey created a Hebrew-language immersion program in a public school.[101] A Hebrew-language charter school in Florida emphasizes the benefits of its bilingual, bicultural curriculum; but that school had to change its

96. *See* Alexandra O'Rourke, Rethinking Race and Education: Ethnocentric Charter Schools and the Law (May 19, 2006) (unpublished manuscript) (on file with author).

97. One such school triggered national controversy. *See* Anthony DiMaggio, *Arabic as a Terrorist Language: The Right-Wing's War on the Gibran Academy*, COUNTERPUNCH (Aug. 30, 2007), http://www.counterpunch.org/dimaggio08302007.html.

98. *See* Peg Meier, *An Oasis for Learning*, STAR TRIB. (Minneapolis), Feb. 2, 2003, at 1E.

99. TWIN CITIES INT'L ELEMENTARY SCH., http://www.twincitiesinternationalschool.org/ (last visited Oct. 11, 2010).

100. In a 2001 study by the American Muslim Council, American Muslims ranked school choice as their top political priority. Dan Lips, *School Choice: Right for America*, CATO INST., http://www.cato.org/research/education/articles/schoice.html (last visited Oct. 11, 2010).

101. *See* Larry Yudelson, *N.J. School May Get Hebrew Track*, JEWISH DAILY FORWARD, Feb. 27, 2009, at 5.

curriculum and its principal due to Establishment Clause issues.[102] Charter legislation in some states allows faith leaders to sit on the governing boards and accommodate students' religious schedules and after-school religious instruction.[103]

One school has triggered so much controversy it has been given a pseudonym for purposes of policy discussions. The "Valley Charter School" was launched in 1994 to supplement the education of homeschooled children in a California community where most of the participating families are conservative Christians.[104] The program is entirely composed of self-selected families, using the charter device to obtain public funds to enrich homeschooling.[105] The example is controversial probably because the charter school device would allow for monies to pay for parents as instructors, establishing both an exception to compulsory school and a shift of public funds to private families in support of their own view of educational priorities.

Special-identity schools are also cropping up for students with disabilities. Such schools may offer valuable accommodation but also depart from the legal presumption in favor of mainstreaming such students so they learn alongside those without disabilities. Many states allow a programmatic focus on disability inclusion as long as all interested students are eligible for admission.[106] Four states target students with disabilities in charter schools as "at-risk students."[107] Ohio's charter law explicitly permits the creation of

102. *See* Abby Goodnough, *Hebrew Charter School Spurs Florida Church-State Dispute*, N.Y. TIMES, Aug. 24, 2007, at A1; *see also* Note, *Church, Choice, and Charters: A New Wrinkle for Public Education?*, 122 HARV. L. REV. 1750, 1757-69 (2009); Karen Matthews, *Debate Rages over Hebrew Charter School in NYC*, ASSOCIATED PRESS, Feb. 3, 2009, *available at* http://www.msnbc.msn.com/id/28992198/.

103. *See* U.S. DEP'T OF EDUC., PRESERVING A CRITICAL NATIONAL ASSET: AMERICA'S DISADVANTAGED STUDENTS AND THE CRISIS IN FAITH-BASED URBAN SCHOOLS 40 (2008), *available at* http://www.ed.gov/admins/comm/choice/faithbased/report.pdf (reporting that the administration of President George W. Bush endorsed the use of charter schools to permit greater religious expression within public school settings).

104. *See* Luis A. Huerta, *Losing Public Accountability: A Home Schooling Charter*, *in* INSIDE CHARTER SCHOOLS: THE PARADOX OF RADICAL DECENTRALIZATION 177 (Bruce Fuller ed., 2000).

105. *See id.*

106. *See* Julie F. Mead, *Charter Schools Designed for Children with Disabilities: An Initial Examination of Issues and Questions Raised*, US CHARTER SCHOOLS 11 (2008), http://www.uscharterschools.org/specialedprimers/download/special_report_mead.pdf.

107. Lauren Morando Rhim et al., *Charter School Statutes and Special Education: Policy Answers or Policy Ambiguity?*, 41 J. SPECIAL EDUC. 50, 55-56 (2000).

schools specifically designed for students with autism;[108] Florida authorized a commission to consider creating a similar school.[109] Although only seventy-one out of 3632 charter schools across the country in 2008 were designed specifically for students with disabilities, thirty-three of these schools were chartered in two years.[110]

Special-identity schools include single-sex schools, and the administration of President George W. Bush and a cottage industry of consultants encouraged their growth. Increasingly, charter schools and specialized public schools adopt single-sex instruction. Although only eleven public schools offered single-sex programs in 2002, at least 540 public schools did so by 2010, including forty-seven charter schools and three magnet schools.[111] School Superintendent Walter Milton said that he planned two new gender-based academies in Springfield, Illinois, in part "to preempt expected growth in independent charter schools in central Illinois."[112]

The prospect of special-identity schools enabled by school choice should prompt questions about the character of schools that the public should support. Should school systems, local communities, states, or the federal government establish guidelines to encourage or to discourage special-identity schools or school choice initiatives promoting self-segregation along the lines of race, ethnicity, or religion? The capacity of parents and students to use school choice arrangements to self-segregate is a feature that school systems can curb or promote. In this sense, choice schemes are not neutral. The landscape of choices is zoned by public design that itself should summon public debate. Frankly, choice initiatives in practice may equalize the ability of groups other than well-off whites to self-segregate. This fact should alert policymakers to the effects of the system they design. Officials involved in the system and the voters behind them bear some responsibility for the results. But the seductiveness of a "choice framework" makes enrollment patterns seem natural or the sheer result of private choices.

108. Mead, *supra* note 106, at 11-12.

109. Florida directed the commission charged with approving charter school applications to examine the feasibility of charter schools specifically for students with disabilities, including autism. *See* FLA. STAT. § 1002.335(4)(b)(13) (2007).

110. Mead, *supra* note 106, at 10.

111. *See Single-Sex Schools / Schools with Single-Sex Classrooms / What's the Difference?*, NAT'L ASS'N FOR SINGLE SEX PUB. EDUC., http://www.singlesexschools.org/schools-schools.htm (last visited Oct. 10, 2010).

112. Pete Sherman, *Single-Sex Schools May Open in Fall*, ST. J.-REG. (Springfield, Ill.), Apr. 21, 2009, at 15.

Some may argue in favor of school choice frameworks that allow self-separation, especially if as a result people who are in a minority in the larger community can acquire decisionmaking power as members of a majority within the particular school context.[113] Weighing these potential benefits against potential risks would improve analysis of school choice initiatives, especially if public debate can sharpen when there are trade-offs and when there are convergences in the goals of family empowerment and individual student opportunities to succeed in the larger society.[114]

School systems do not, however, operate like voting districts where the prospects of majority-minority control can introduce new kinds of voting power. Given the racial and class separations in this country, members of racial and ethnic minorities in large urban districts are so often already in the numerical majority that creating schools where they can be in the majority does not by itself afford new kinds of governance opportunities. Explicit efforts to change the governance and accountability structures of schooling might be more productive if family or group empowerment emerges as a priority. Discerning whether this emphasis will produce better educational opportunities and outcomes for children is still a separate undertaking, and scholars have cast doubt on the success of both past local control and current school choice initiatives in these terms.[115] And, despite repeated claims that charter schools would produce better educational outcomes for students, studies to date have not demonstrated improved results for students attending charter schools.[116] A more promising initiative, Geoffrey Canada's Harlem

113. Heather Gerken has raised this point with me and in her scholarship. *See* Gerken, *supra* note 80, at 1109.

114. For analyses and case studies addressing these contrasting goals, see JUST SCHOOLS: PURSUING EQUALITY IN SOCIETIES OF DIFFERENCE, *supra* note 82.

115. For example, Diane Ravitch has raised questions about the effectiveness of earlier black power, local control efforts, and current school choice initiatives. *See* DIANE RAVITCH, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION 113-47 (2010); DIANE RAVITCH, THE TROUBLED CRUSADE: AMERICAN EDUCATION, 1945-1980, at 268-71 (1983); *see also* DEREK EDGELL, THE MOVEMENT FOR COMMUNITY CONTROL OF NEW YORK CITY'S SCHOOLS, 1966-1970: CLASS WARS (1998) (recounting the history of demands for decentralized and local control of New York City schools and its politics and outcomes); David L. Kirp, *Community Control, Public Policy, and the Limits of Law*, 68 MICH. L. REV. 1355, 1369-70 (1970) (discussing, inter alia, the relationship between choice-based school reform and educational outcomes).

116. *See* NAT'L CTR. FOR EDUC. STATISTICS, AMERICA'S CHARTER SCHOOLS: RESULTS FROM THE NAEP 2003 PILOT STUDY 4 (2004), *available at* http://nces.ed.gov/nationsreportcard/pdf/studies/2005456.pdf; Janelle T. Scott, *Introduction* to SCHOOL CHOICE AND DIVERSITY: WHAT THE EVIDENCE SAYS, *supra* note 68, at 1, 1-3; *see also* EDWARD B. FISKE & HELEN F. LADD, WHEN SCHOOLS COMPETE: A CAUTIONARY TALE 277-80 (2000) (studying the New

Children's Zone, aligns prenatal care, preschools, schools, health care, social services, and other resources with the aim of getting children to college—and depends upon considerable investment of resources from people outside the community.[117] The challenge of changing the opportunities for the most disadvantaged children, Canada suggests, seems to require changing everything affecting their lives, even though his efforts take for granted their isolation from people of other races and socioeconomic classes.

If you excuse the expression, we have a choice about what kind of school choice to promote. Even within current frameworks, school choice can stimulate the development of specialized schools along many lines other than identity cleavages. New York City has a public high school devoted to law and community service, a middle school focused on game technology, and schools organized around arts, sciences, and health careers. Who decides whether these are the kinds of schools to promote or instead whether schools organized around culture, language, gender, immigration status, or disability should proceed?

The very framework of choice pushes the character of emerging schools off the screen of public discussion and treats the question as one of private consumption rather than collective character. Schools specialized by student identity can have strengths and drawbacks, and the decision about how much education should tilt in their direction deserves collective, not merely private, family choice.

This could instead be a moment of truth about what kinds of schools society should allow and encourage. While current public school choice efforts are relatively modest, they permit and even invite self-separation of students—by gender, language, immigration status, disability, and even by race. School choice programs, while currently affecting modest numbers of students, nonetheless are altering the composition of student bodies and the experience of schooling.

Zealand choice experiment); NEL NODDINGS, WHEN SCHOOL REFORM GOES WRONG 73-78 (2007) (questioning the relevance of measures of choice and test scores as they are frequently discussed); KEVIN B. SMITH & KENNETH J. MEIER, THE CASE AGAINST SCHOOL CHOICE: POLITICS, MARKETS, AND FOOLS 55-61 (1995) (reviewing data showing that presence of school choice does not necessarily improve outcomes in a school system).

117. *See* PAUL TOUGH, WHATEVER IT TAKES: GEOFFREY CANADA'S QUEST TO CHANGE HARLEM AND AMERICA (2008).

VI. THE PROMISE AND LIMITS OF SCHOOL CHOICE

What does this all mean? Since the Supreme Court announced constitutional protection for parental choice of private schools eighty-five years ago, school choice has come to mean many different beguiling things. Enunciating a fundamental right for parents to select religious schools or other private alternatives to government-run schools, *Pierce* launched a two-tiered system, opening private schools to the well-off or philanthropically benefited. *Pierce* also propelled nearly a century of advocacy for public aid for private religious schools—a movement that succeeded constitutionally but stalled politically. School choice offered an exit strategy for whites seeking to avoid school desegregation, then a strategy to incentivize voluntary racial mixing, and then an arena for killing off any form of race consciousness. By constitutionalizing private school choice and public funding of religious and other private schools, the Supreme Court has authorized pluralism and diversion from the common school—but there is little evidence that the most disadvantaged students gain.

By now, school choice has altered the landscape of American schooling by dislodging the assumption that most students simply attend the school assigned by the local district. But the borders of districts—separating suburbs and cities, middle-class and poor—remain intact, preserving high-quality suburban public schools for those who can afford the real estate. Through charter schools, pilot and magnet schools, and other vehicles for local experimentation and innovation, public resources support parental selection of schools for more students and encourage innovation and specialization. School choice increasingly captures hopes as a mechanism for improving the quality of schooling and a powerful sense of school mission; school choice can draw new talent into teaching and engage parents and communities in the tasks of education. Yet unless carefully framed, school choice regimes open new risks of separatism and even fear about different social groups.[118] Despite federal policies promoting mainstreaming of kids with disabilities, local school choice programs can give parents of nondisabled kids an end-run option and draw parents of disabled kids into specialized schools without a mainstreaming mission. Encompassing specialized schools for immigrant students, for girls, and for instruction in Arabic, Hebrew, and Spanish, school choice increases

118. *Cf.* Charles Venegoni & David J. Ferrero, *A Regulated Market Model: Considering School Choice in the Netherlands as a Model for the United States*, *in* EDUCATING CITIZENS: INTERNATIONAL PERSPECTIVES ON CIVIC VALUES AND SCHOOL CHOICE 368, 378-79 (Patrick J. Wolf & Stephen Macedo eds., 2004) (pointing out this tendency in the Netherlands's model of regulated school choice).

chances for parents and students to opt for education in enclaves of students with similar identities.

Indeed, it may be easier and cheaper to differentiate and market individual school programs in a competitive environment in terms of identity markets such as gender, disability, and culture than by demonstrated successes in pedagogy. And it may be easier for parents to use shorthand markers to sort through choices even if society as a whole might be much better off with schools that bridge rather than reinforce these differences.

When designed well, choice initiatives open new possibilities not only for appreciating differences on a societal level[119] but also for drawing together students from different backgrounds. Even schools focused on particular identity-linked traits can promote mixing different kinds of students if the individual schools are developed to have broad appeal and if student assignment policies can take diversity into account. School systems, local communities, states, and the federal government can establish regulatory frameworks with more or less encouragement for special-identity schools. Public frameworks affecting charter schools, school vouchers, and even private schools can direct more or less attention to civic education and cultivation of respect for others in the curriculum and extracurricular opportunities. Should there be no limits on the use of public schooling resources to promote instruction that sorts students explicitly or implicitly by gender? By disability or ability status? By language or immigrant status? If schools organized around culture, language, gender, disability, and the like become significant in scale, this trend may exacerbate social divisions.[120] At stake is nothing less than the character of the society and the polity a generation hence.[121]

And yet we may not notice. Choice itself seems neutral and appealing. In a diverse and at times divided society, the language of choice can be a solvent of difference. It can defuse conflict over collective decisions by deferring to private, individual ones. It can avoid constitutional restrictions on government support of religion and government endorsement of biases by allowing parents to choose religious schools and to favor schools that are predominantly white, all-female, or unable to accommodate students with serious disabilities. In upholding the inclusion of religious schools in Cleveland's voucher program, the Supreme Court's majority wrote: "'[I]f numerous private choices, rather

119. *Cf.* Gerken, *supra* note 80, at 1104 (describing the benefits of allowing civic institutions to be organized around identity-linked traits).

120. *See* Shweder, *supra* note 82, at 275-76, 285. *See generally* EDUCATING CITIZENS: INTERNATIONAL PERSPECTIVES ON CIVIC VALUES AND SCHOOL CHOICE, *supra* note 118 (exploring school choice programs' effects on social division from a global perspective).

121. *See* AMY GUTMANN, IDENTITY IN DEMOCRACY 38-44 (2003).

than the single choice of a government, determine the distribution of aid, pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment.'"[122] The plurality opinion for the Court, rejecting voluntary use of race to achieve racial mixing in the Seattle and Louisville schools, drew upon a previous decision for the proposition that "'[w]here resegregation is a product not of state action but of private choices, it does not have constitutional implications.'"[123] School choice may even come to excuse the stark differences in the achievement levels of students in different schools—if parents can pick, then what's the problem?

By subordinating racial and other kinds of integration to school choice, contemporary schooling policies in the United States expressly elevate private preferences. But given our history, school choice programs that foreclose attention to race reinforce or even worsen racial separation in American schools. School choice programs, unless mindfully designed, can propel increasing separation of different kinds of students.

School choice implies market mechanisms and consumer sovereignty—rather than public debate and explicit priorities over the big questions about the purposes and design of schooling. As a public policy, school choice appears to allow the collective to defer to individual actors in shaping how much publicly funded education should mix students of different races, genders, abilities and disabilities, ethnicities, languages, immigration status, and socioeconomic classes. As practiced, school choice programs do not, in fact, secure consumer sovereignty. So many choices are not available or not available for all due to district boundaries, financial inequality, the Supreme Court's rejection of racial integration plans pursued by elected school boards, and the failures of public schools to become places where all students feel valued and thrive. Schooling offers the chance to develop mutual respect across differences and to experience working in teams of diverse people in preparation for democracy—but not if the system of schooling enables self-separation against the backdrop of inequality.

Ironically, given the history of *Brown*, the only constitutional constraint now is the use of an individual student's racial identity—a constraint that in effect limits the voluntary integration efforts by local school systems. Despite the Supreme Court's rejection of the use of race in the school choice programs

122. Zelman v. Simmons-Harris, 536 U.S. 639, 652-53 (2001) (alteration in original) (quoting Mitchell v. Helms, 530 U.S. 793, 810 (2000)).

123. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 736 (2007) (quoting Freeman v. Pitts, 503 U.S. 467, 495 (1992)).

in Seattle and Louisville, schools can still use residential neighborhoods and household income levels to produce school assignments promoting diverse student bodies. Justice Kennedy's critical concurrence in *Parents Involved* left room for schools to "devise race-conscious measures to address the problem in a general way"[124] and through "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race."[125] Communities thus can try to produce racially integrated schools through these indirect means, well articulated in a manual coproduced by the NAACP Legal Defense and Educational Fund.[126] A California court last year upheld a plan that assigned students to schools based not on their own races but on consideration of the racial composition of the neighborhood as a whole, thereby generating racially mixed schools.[127]

Different opportunities for racial mixing would arise if school choices bridged districts and crossed the lines between cities and suburbs or between towns and rural areas. However, it has been easier to move families than to open school choice across districts. One dramatic initiative, the Gautreaux Assisted Housing Program, has moved low-income families of color from inner cities to middle-class suburbs and ultimately proved effective in opening up educational and employment opportunities.[128]

Short of moving people's residences, school choice itself could bridge districts and cross the lines between cities, suburbs, towns, and rural areas. School districts need not be coterminous with municipal borders, and, historically, many were not.[129] State procedures for consolidating and annexing school districts could allow inclusion of neighborhoods that would diversify

124. *Id.* at 788-89 (Kennedy, J., concurring in part and concurring in the judgment).

125. *Id.* at 789.

126. NAACP LEGAL DEF. & EDUC. FUND, INC. & THE CIVIL RIGHTS PROJECT, STILL LOOKING TO THE FUTURE: VOLUNTARY K-12 SCHOOL INTEGRATION: A MANUAL FOR PARENTS, EDUCATORS, & ADVOCATES 34-41 (2008), *available at* http://naacpldf.org/files/publications/Still_Looking_to_the_Future_Voluntary_K-12_School_Integration;_A_Manual_for_Parents,_Educators_and_Advocates.pdf.

127. Am. Civil Rights Found. v. Berkeley Unified Sch. Dist., 90 Cal. Rptr. 3d 789 (Ct. App. 2009).

128. *See* LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA 49-72 (2000).

129. *See* William A. Fischel, The Congruence of American School Districts with Other Local Government Boundaries: A Google-Earth Exploration 14-22 (Apr. 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=967399.

the racial and economic mix of students.[130] As my student Taryn Williams has argued:

> Dividing up urban districts and consolidating them with surrounding middle-class districts would create opportunities for socioeconomic integration. By arranging these new districts like flower petals emanating from the center of the city, the distances students and teachers would have to travel if they were assigned to a new school could be kept reasonable.[131]

This approach could enable school choice to cross suburban and urban lines while offering suburban parents the choice to share the tax base of urban areas. But redrawing school districts is the kind of policy option that disappears if school choice makes the whole question of schooling seem like one of private consumption.

These concerns should be coupled with the question: whose choice are we talking about? When is and when should the choice of school be made by parents or by children? When are the schools—not the family—making the choice, explicitly or implicitly, steering some in and some out? Who actually gets a choice of a good or even great school, and who never gets that choice? Who chooses the school district boundaries? Who designs the zoning affecting the price of housing? Who knows the contexts that shape where school choice does and does not signal real options for real people? In the twisting story of school choice, courts seem to be the big winners in the choosing business, displacing legislatures, school boards, and educators.

Our laws have made school choice a force, thus influencing the worlds of families, nations, cultures, religions, genders, sexualities, disabilities, and even the narratives we tell about what we want for the next generation. Here we might learn from what Barry Schwartz calls "the paradox of choice."[132] Schwartz collects burgeoning research in social psychology and behavioral economics showing how increased choices do not make people happier and, instead, divert people from reflecting on what really matters to them.[133] We may choose particular options, but, Schwartz says, "we never cast a vote on the whole package of choices."[134]

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130. *See* Taryn Williams, *Outside the Lines: The Case for Socioeconomic Integration in Urban School Districts*, 2010 BYU EDUC. & L.J. 435, 455-56.

131. *Id.* at 461.

132. BARRY SCHWARTZ, THE PARADOX OF CHOICE: WHY MORE IS LESS (2004).

133. *Id.* at 75.

134. *Id.* at 44.

There is a final seduction of the framework of choice. Choice may seem to put all options on the table, yet it is not neutral. It converts schooling to private desires. It obscures continuing inequalities in access and need; it invites self-separation unless collectively controlled. It treats the aggregation of separate decisions as free when the result so often impedes freedom and equality. The frame of "consumerism" itself may stamp individuals and the community into roles and identities that, left to themselves, they would not want. The government and the people whom it represents are implicated one way or the other, just as the government is implicated one way or the other when it allows or refuses tax-exempt status to a university engaging in racist policies.[135]

School choice itself is not bad. It can be a vehicle for valuable reform for parental and community engagement, and for educational innovation. But school choice is troubling if public responsibility for ensuring adequate, if not excellent, education for all children is obscured by the seductive qualities of choice programs. Debates over what constitutes adequate—or excellent—education would be appropriate for a democratic society, committed to equal opportunity, to undertake as an obligation of self-governance and an investment in the future. Quality and effectiveness of instruction, achievements in bringing together students from different backgrounds and supporting networks of friendships that span the diversities of the country, and indications of how students progress through graduation and beyond would be sensible measures that local, state, and national policymakers could adopt in assessing, funding, and promoting individual schools and systems of schools. In contrast, a choice regime that leaves all such elements to chance would neither advance democratic goals nor invest in the nation's future to the same degree; nor would it even push for data about how we are doing on the measures that the communities affected think should matter. Collectively, we all would be better off if we challenged individual schools and school systems to do better—to address the tensions between accommodating differences and offering a sense of belonging, as well as the tensions between validating subgroups and forging a common world.

135. *See* Julen Etxabe, *Nomos, Conflict, and the Tragedy of Adjudication: The Jurisprudence of Robert Cover* 67-70 (bepress Legal Series, Working Paper No. 1899, 2006), *available at* http://law.bepress.com/expresso/eps/1899.