

Blurred Lines: Public School Reforms and the Privatization of Public Education

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INTRODUCTION

Expansive public school reform initiatives are being adopted in school systems nationwide.¹ Most of the reform initiatives are aimed at improving the public schools attended by predominately poor and minority students.² Judicially based reforms are however noticeably absent from the reform agenda.³ Previously, judicially based reforms aimed at desegregating schools⁴ and reforming school finance⁵ were the primary mechanisms used to improve educational opportunities

1. See generally DIANE RAVITCH, REIGN OF ERROR: THE HOAX OF THE PRIVATIZATION MOVEMENT AND THE DANGER TO AMERICA'S PUBLIC SCHOOLS 9–31 (2013) (discussing and critiquing the various local, state and federal based school reform efforts in public education over the course of the last decade).

2. At the federal level in particularly, sweeping legislation aimed at closing achievement gaps between minority and poor students and their nonminority and middle class counterparts have been a catalyst for reforms implemented at the state and local level. See, e.g., The No Child Left Behind Act, 20 U.S.C. § 6301(3) (2006) (noting that one purpose of the No Child Left Behind Act is “closing the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers”); The Race to the Top Initiative, Pub. L. No. 111-5, 123 Stat. 115, 284 (2009) (enacted as part of the American Recovery and Reinvestment Act of 2009, the Race to the Top initiative is a competitive grant program that provides grants to states that, among other things, implement education reforms, close achievement gaps, and increase high school graduation rates).

3. See, e.g., Derek Black, *Civil Rights, Charter Schools and Lessons to Be Learned*, 64 FL. L. REV. 1723, 1731–38 (2012) (noting the decline in court orders that address racial segregation, poverty, disability and language access) [hereinafter Black, *Civil Rights*]; Erika K. Wilson, *Gentrification and Urban Public School Reforms: The Interest Divergence Dilemma*, 118 W. VA. L. REV. 101, 125 (2015) (arguing that “those looking to improve urban public schools are now more likely to look outside of the federal or state judiciary”) [hereinafter Wilson, *Gentrification*].

4. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

5. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).

for poor and minority students.⁶ However, the more recent public school reform initiatives largely rest upon free-market based tools such as charter schools, vouchers, and district wide school choice programs.⁷ While judicially based reform efforts center around collectively improving public schools for poor and minority students as a whole, market-based reforms focus on providing individual families and students with the opportunity to improve their own educational opportunities. The shift from collectively-based judicial reform efforts to individually focused, market-based reforms is significant for two reasons.

First, it suggests that advocates are accepting of a diminished role for the judiciary in regulating educational opportunities for poor and minority students. The federal judiciary has long been the institution “looked upon to remedy issues of racial segregation and inequality” in public schools.⁸ However, since at least the 1990s—and some may argue even earlier—federal courts have become increasingly hostile to court mandated desegregation schemes.⁹ Among other things, the Supreme Court imposed an arduous causation standard that requires plaintiffs seeking school desegregation orders to show a connection between past *de jure* segregation policies and current school segregation in order to prevail.¹⁰ Plaintiffs often fail to meet this

6. See *supra* note 3.

7. The term “free-market tools” is used to mean tools that allow for individual parent and student autonomy, flexibility, and choice. See generally JOHN E. CHUBB & TERRY MOE, *POLITICS, MARKETS AND AMERICA’S SCHOOLS* (1990) (arguing that the government has failed to successfully reform schools because government intervention in schools is the problem and advocating for market based school governance that has parental choice as a foundation); Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1085 (2013) (“In education, racial discrimination and structural inequality are increasingly ignored as the education system gives broadened ‘options’ to those it underserves, in the form of private schools, charter schools, and voucher programs.”).

8. Erika K. Wilson, *Leveling Localism and Racial Inequality Through the No Child Left Behind Public Choice Provision*, 44 U. MICH. J.L. REFORM 625, 628 (2011) [hereinafter Wilson, *Leveling Localism*].

9. See, e.g., Black, *Civil Rights*, *supra* note 3, at 1726 (arguing that “[t]he United States Supreme Court placed major limitations on desegregation as early as the 1970s and effectively ensured its end in the 1990s”).

10. See, e.g., Wendy Parker, *The Decline of Judicial Decision-Making: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1646 (2003) (discussing the high causation standard in school desegregation cases and noting that “plaintiffs are entitled to their ultimate goal in the lawsuit—desegregation to the extent practicable—but only to the extent that current segregation is attributable to the defendants”) [hereinafter Parker, *Decline*].

arduous standard. Instead, courts routinely find that current racial segregation in schools is attributable to changing racial demographics or housing segregation rather than past *de jure* school desegregation policies.¹¹ Consequently, modern day racial segregation in schools often escapes judicial scrutiny or intervention.

Judicial attempts to reform public schools through school finance reform have achieved mixed results at best. While some state courts are issuing orders finding that state school financing systems violate state constitutional provisions regarding a student's right to an education,¹² the courts tend to take a very limited view of their remedial authority. They often decline to order remedies that would require state legislatures to make specific budgetary allocations.¹³ Instead, they emphasize that judicial intervention in the state budgeting process is warranted only in very limited circumstances.¹⁴

11. *See, e.g.*, *Missouri v. Jenkins*, 515 U.S. 70, 102 (1995) (“[E]xternal factors beyond the control of the KCMSD and the State affect minority student achievement. So long as these external factors are not the result of segregation, they do not figure in the remedial calculus.”); *Thomas Cnty. Branch of the NAACP v. City of Thomasville Sch. Dist.*, 299 F. Supp. 2d 1340, 1369 (2004) (“While the record in this case establishes that many poor black children in Thomasville, Georgia are not receiving what this Court would consider an adequate education, the record is clear that Defendant has not engaged in intentional discrimination based upon race.”).

12. *See, e.g.*, *Rose v. Council for Better Educ. Inc.*, 790 S.W. 2d 186, 213 (Ky. 1989) (finding that Kentucky's public schools failed to satisfy the state constitutional mandate to provide an efficient system of public education); *Abbott v. Burke* 575 A. 2d 359, 384 (N.J. 1990) (holding that the poorer urban school districts in New Jersey did not satisfy the state constitutional requirement that schools provide students with a thorough and efficient education). *See generally* Michael Heise, *Equal Educational Opportunity Hollow Victories and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543 (1998).

13. *See, e.g.*, *Campaign for Fiscal Equity, Inc. v. State*, 861 N.E. 2d 50, 57 (N.Y. 2006) (reversing the court of appeals directive to the state legislature to calculate the cost of a sound basic education for New York public school students reasoning that “[t]he role of the courts is not, as Supreme Court assumed, to determine the best way to calculate the cost of a sound basic education in New York City schools, but to determine whether the State's proposed calculation of that cost is rational”); *Hancock v. Commissioner of Educ.*, 822 N.E.2d 1134 (Mass. 2005) (refusing to order a study to assess actual costs of effective implementation of educational programs intended to provide an adequate education in focus public school districts and, therefore, finding that the state was not violating the Massachusetts education clause by not providing an adequate education to students).

14. *See, e.g.*, *Campaign for Fiscal Equity, Inc.*, 861 N.E. 2d at 56 (“Judicial intervention in the state budget ‘may be invoked only in the narrowest of instances’.”); *Neely v. West-Orange Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 785 (Tex. 2005) (finding that the system of school financing did not violate the education provision of the Texas state

As a result, state legislatures are often left with wide discretion to craft funding schemes, and all too often those schemes are insufficient at remedying funding disparities and inadequacies.¹⁵

Second, the shift from court-based to market-based reforms demonstrates a structural change in our conceptualization of the purpose of public education. From the inception of public education in America, the states' primary justification for providing free education to its citizenry was to produce a robust, literate citizenry that was not only capable of earning a living, but more importantly, capable of contributing to and participating in the American democracy.¹⁶ Market-based school reforms such as charter schools, vouchers, and some school choice programs invert that logic by allowing individual parents and students with the political capital to do so to leave their assigned public school and to attend a public or private school that they believe can provide a higher quality education. The reforms do nothing to address the state of public schools more broadly. Rather than focusing on the collective benefits of public education for the citizenry as a whole, market-based reforms focus on the ability of particular parents and students to control educational opportunities by moving away from failing schools to better performing schools.¹⁷

This Article critically examines the rise of market-based reforms. It argues that market-based reforms result in *quality* public education being normatively conceptualized and treated as what political

constitution and reasoning that “[i]f the Legislature’s choices are informed by guiding rules and principles properly related to public education—that is, if the choices are not arbitrary—then the system does not violate the constitutional provision”).

15. See Laurie Reynolds, *Skyboxes Schools: Public Education As Private Luxury*, 82 WASH. U. L.Q. 755, 755 (2004) (arguing that even when state legislature increase funding for all public schools, most school funding legislation does not place a cap on how much districts can spend on students thereby allowing wealthier districts to continue to drastically outspend poorer districts).

16. See Julie A. Reuben, *Patriotic Purposes: Public Schools and the Education of Citizens*, in *THE PUBLIC SCHOOLS* 1, 2–3 (Susan Furham & Marvin Lazersons eds., 2005).

17. See, e.g., Black, *Civil Rights*, *supra* note 3, at 1729 (noting that parents who select charter schools desire self-determination and the power to control their own children’s educational interests with little regard for the educational health of the charter school as a whole and describing the purposes of government’s involvement in providing public education as being for patriotic or democracy building purposes). See *infra* Part I for a further and more thorough discussion of the purposes of public education in America.

economists call a private, rather than public, good.¹⁸ To be clear, this Article uses the classic definition of a “public good” to mean a good that is “non-excludable” and “non-rivalrous.”¹⁹ On the other hand, it uses the term “private good” to mean a good that is both excludable and rivalrous.²⁰

While public education is admittedly not a pure public good, it is widely recognized as a “quasi” or “impure” public good because of the ability to exclude people from receiving it.²¹ Quasi or impure public goods share some characteristics of a private good, but are still considered public goods because there are positive externalities associated with the good—such that not all benefits of the good accrue solely to the individual, but instead to society as a whole.²²

Market-based school reform efforts often diminish public education’s ability to truly bring positive externalities to society as a whole. They do so by situating the positive externalities associated

18. Other legal scholars have also written about the ways in which the purpose of public education is being skewed due to an influx of market based principles and a trend towards privatization. See, e.g., John A. Powell, *The Tensions Between Integration and School Reform*, 28 HASTINGS CONST. L.Q. 655, 671–80 (2001) (arguing that a reformist agenda based principles of choice that are tied to market-based philosophies is taking root and critiquing that choice based movement on the grounds that it allows public education to be commodified in ways that are harmful to African-American students); Derek W. Black, *Charter Schools, Vouchers, and the Public Good*, 48 WAKE FOREST L. REV. 445, 446 (2013) (suggesting that the influx of voucher and charter programs as a vehicle for reforming public schools results in a “commodification of education [that] corresponds with our overall cultural shift toward individualized, rather than common, experiences”) [hereinafter Black, *Charter Schools*]. This Article adds to and builds upon that prior scholarship.

19. See Randall G. Holcombe, *A Theory of the Theory of Public Goods*, 10 REV. AUSTRIAN ECON. 1, 1–2 (1997). “[P]ublic good, as defined by economic theory, is a good that, once produced, can be consumed by an additional consumer at no additional cost.” *Id.* Further the term “non-excludable” means that it is difficult to keep people from consuming a good once it has been produced while the term “non-rivalrous” means that once a good is produced for one person, additional consumers can consume at no additional cost. *Id.*

20. See Dennis Epple & Richard E. Ramono, *Public Provision of Private Goods*, 104 J. POL. ECON. 57 (1996).

21. John R. Brooks, *Income-Driven Repayment and the Public Financing of Higher Education*, 104 GEO. L.J. 229, 236 (2016) (“Education is a primary example in the economics literature of a ‘quasi-public good’—a good that, although not strictly speaking a nonrivalrous, non-excludable classic public good, still has such substantial positive externalities and spillover effects as to be within government’s purview.”); Christopher Lubienski, *Public Schools in Marketized Environments: Shifting Incentives and Unintended Consequences of Competition-Based Educational Reforms*, 111:4 AM. J. EDUC. 470 (Aug. 2005) (describing public education as a quasi-public good.).

22. See Holcombe, *supra* note 19; Brooks, *supra* note 21.

with *a quality public education*²³ in ways that do not benefit the greater society. Instead, they allow a shallow subset of people to take advantage of market-like exchanges to select—rather than be assigned to—a particular school that they believe will provide a quality public education for *only* them. Little regard is given to the overall quality of education received by students collectively. Instead, market-based reforms allow students to individually improve their own lot, while failing to address systemic issues that plague many failing schools. For these reasons, this Article makes a normative argument in favor of re-thinking market-based reforms as the *primary* vehicle for improving educational opportunities for poor and minority students.

Part I of the Article examines the decline of federal and state courts in effectively regulating educational opportunities for poor and minority students. It analyzes the reasons school desegregation and school finance cases fell short in their quest to effectively reform public schools for those students. Part II chronicles the rise in market-based reforms. It then argues that the rise in market-based reform efforts allows a quality public education to be normatively conceptualized as a private good rather than a public good. Part III considers the import of conceptualizing a quality public education as a private good rather than a public good. Part IV concludes by suggesting alternative non-market based educational reform models that should be considered in order to re-conceptualize public education as a public rather than private good.

23. This Article uses the term “quality public education” to mean: (i) being educated in environments that are safe and protective; (ii) content that is reflected in relevant criteria and allows for the acquisition of basic skills in literacy, numeracy and more importantly the acquisition of critical thinking skills; and (iii) outcomes that demonstrate knowledge and mastery of skills. See generally THE INT’L WORKING GRP. ON EDUC., UNICEF, DEFINING QUALITY IN EDUCATION (June 2000), available at <http://www.unicef.org/education/files/QualityEducation.PDF> (the aforementioned criteria are three of five criteria suggestions by UNICEF as constituting a quality education).

I. THE DECLINE OF THE JUDICIAL REMEDIES AS AN EFFECTIVE MECHANISM FOR REFORMING PUBLIC SCHOOLS

Scholars, commentators, and advocates often suggest that American public schools, particularly public schools that serve high numbers of poor and minority students, are in need of serious reform.²⁴ The basis for their claim lies in the fact that white, African-American, and Latino students often attend schools that are significantly segregated by race.²⁵ For African-American and Latino students, they not only attend schools that are segregated by race, but that also have high levels of students living in poverty.²⁶ The combination of racial segregation and high levels of students living in poverty makes it difficult for those schools to provide a high-quality education.²⁷

Nevertheless, the number of racially-segregated schools with high poverty levels providing sub-par education to students is only increasing.²⁸ The reasons for this are manifold; but an important one

24. See, e.g., RAVITCH, *supra* note 1, at 55 (noting that those seeking to reform public schools rely heavily on the argument that “public schools are failing and that Black and Hispanic students must be liberated from public schools”); Michael Heise, *The Courts, Educational Policy, and Unintended Consequences*, 11 CORNELL J.L. & PUB. POL’Y 633, 643 (2002) (analyzing public school reform effort and noting that “markedly few serious scholars dissent from the proposition that many urban public schools confront substantial challenges in their efforts to serve their students, many of whom are members of minority groups or come from low-income households or both”).

25. See GARY ORFIELD & ERICA FRANKENBERG, THE UCLA CIVIL RIGHTS PROJECT, BROWN AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE 18–19 (May 15, 2014), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf> (describing the high levels of racial segregation in urban or central city schools for Black and Latino students).

26. *Id.* at 15–16.

27. Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 410–11 (2012) (“A small but high-profile contingent of predominantly poor and minority schools defy the odds and achieve at high levels . . . [b]ut delivering a quality education to students under these circumstances can cost far more per pupil than it otherwise would.”) [hereinafter Black, *Middle-Income*]; Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts’ Role*, 81 N.C. L. REV. 1597, 1599 (2003) (“By any measure, predominately minority schools are not equal in their resources or their quality.”).

28. See generally GARY ORFIELD, GENEVIEVE SIEGEL-HAWLEY & JOHN KUCSERA, THE UCLA CIVIL RIGHTS PROJECT SORTING OUT DEEPENING CONFUSION ON SEGREGATION TRENDS (Mar. 2014), available at

is that the institution long looked upon to improve schools for poor and minority students—the judiciary—has had limited success over the last forty years in doing so.²⁹ This part examines the decline in the effectiveness of the judiciary in reforming public schools through school desegregation and school finance remedies.

*A. The Limits of Public School Reform Through Federal Court
School Desegregation Remedies*

For much of the mid-to-late twentieth century, attempts at equalizing public education opportunities for minority students were made through the federal judiciary. This was particularly true of federal school desegregation remedies.³⁰ This part provides a brief overview and analysis of why federal court school desegregation remedies ultimately floundered as an effective vehicle in providing equal educational opportunities to minority students.

When the Supreme Court declared racially-segregated schools unconstitutional, the Court recognized the ways in which racially-segregated schools impede the ability of minority students to obtain a quality education.³¹ Yet in the immediate aftermath of *Brown v. Board of Education*, the Court was slow to require schools to take meaningful steps towards desegregating.³² It was not until the late

Trends-Dispute-CRP-Researchers.pdf (arguing that segregation and inequality in public schools is increasing rather than decreasing).

29. See, e.g., Kimberly Jenkins Robinson, *Resurrecting the Promise of Brown: Understanding and Remediating How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787, 833–37 (2010) (describing how the Supreme Court’s school desegregation jurisprudence reconstitutionalized racially segregated schools and failed to remedy inferior schools).

30. See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2052–58 (2002) (analyzing federal court decisions attempting to desegregate public schools).

31. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955) (“Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.”).

32. See Chemerinsky, *supra* note 27, at 1603 (noting that the court failed to do enough in the years after *Brown* to hasten desegregation and highlighting the fact that the Court in *Brown*

1960s that the Court became more aggressive in its mandate that schools desegregate. Among other things, the Court required schools to take affirmative steps, such as enacting race conscious plans for assigning students to schools, implementing racial quotas to ensure racial balance in schools, and bussing students.³³ To be sure, those aggressive measures towards desegregation were initially effective. Public schools, in the South, where most of the federal court desegregation orders were put into place, ultimately became the most desegregated schools in the country.³⁴ For a brief period, desegregation of schools was seen as an effective method for reforming the public school system for all—and particularly for minority—students.³⁵

Despite the initial success engendered by the school desegregation cases, the Supreme Court's subsequent school desegregation jurisprudence suffered from two critical shortcomings that would go on to substantially impede the federal judiciary's ability to effectively address racial segregation in schools.³⁶ First, the Court upheld the

“did not even order the Topeka Board of Education to admit Linda Brown to a segregated school”).

33. *Green v. Cnty. Sch. Bd. of New Kent Cnty., Va.*, 391 U.S. 430 (1968) (requiring schools to take affirmative steps to dismantle segregated schools); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (allowing for racial quotas and busing as measures to desegregate schools).

34. ORFIELD & FRANKENBERG, *supra* note 25, at 8–11, 18.

35. *Id.* at 39 (“[T]here is also a mounting body of evidence indicating that desegregated schools are linked to profound benefits for all children. In terms of social outcomes, racially integrated educational contexts provide students of all races with the opportunity to learn and work with children from a range of backgrounds. These settings foster critical thinking skills that are increasingly important in our multiracial society—skills that help students understand a variety of different perspectives.”).

36. As other scholars have noted, the Supreme Court's school desegregation jurisprudence was never a model of clarity or cohesiveness and this in part has contributed to the inability of school desegregation remedies to effectively address racial segregation in schools. *See, e.g.*, Kevin Brown, *Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation*, 58 GEO. WASH. L. REV. 1105, 1109 (1990) (“One of the intractable problems of the Supreme Court's jurisprudence in the area of de jure segregation has been its inability to articulate a coherent theory of the constitutional harm resulting from de jure segregation of public schools that justifies desegregation as the principal means to eliminate the harm.”). The two shortcomings that I argue diminished the effectiveness of school desegregation remedies are not the only shortcomings but are instead, I suggest, the most salient.

sanctity of local control and school district boundary lines.³⁷ In doing so, the Court narrowly interpreted the scope of the judiciary's authority to remedy racial segregation between suburban and urban school districts. Importantly, in most urban cities, especially outside of the south, segregation in schools is caused by residential racial segregation between the suburbs and urban cities rather than *de jure* school segregation policies.³⁸ Indeed, inter-district segregation rather than intra-district segregation is the most prevalent form of school segregation today.³⁹ As a result, in order to effectively use a judicial remedy to desegregate schools in any meaningful way, especially outside of the south, courts would have to issue a school desegregation order between multiple school districts, not just within a single school district.

Unfortunately, the possibility of a court issuing such a desegregation order was for all practical purposes foreclosed by the Supreme Court's decision in *Milliken v. Bradley (Milliken I)*.⁴⁰ There, the Court found that a federal district court could not order an inter-district school desegregation plan between a suburban Detroit school

37. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973) (upholding the constitutionality of a local property tax system of school financing system that resulted in unequal funding between school districts, reasoning that local control of school finance is important because it would result in "experimentation, innovation, and a healthy competition for educational excellence"); *Milliken v. Bradley*, 418 U.S. 717, 740–41 (1974) (declining to issue an inter-district school desegregation order reasoning that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process").

38. It is important to note however, that residential segregation between the suburbs and urban cities was very much caused by explicit federal, state, and local policies. Yet the Supreme Court does not recognize this state action as sufficient to trigger court mandated school desegregation orders. *See generally* Wilson, *Leveling Localism*, *supra* note 8, at 649–51 (2011) (analyzing the ways in which explicit government policies caused racial residential segregation in the suburbs and urban cities).

39. *See* AMY STUART WELLS, CHARLES HAMILTON HOUSTON INSTITUTE FOR RACIAL JUSTICE, *BOUNDARY CROSSING FOR DIVERSITY, EQUITY AND ACHIEVEMENT: INTER-DISTRICT SCHOOL DESEGREGATION AND EDUCATIONAL OPPORTUNITY I* (Nov. 2009), *available at* http://www.onenationindivisible.org/wp-content/uploads/2012/03/Wells_BoundaryCrossing.pdf (noting that "a full 84% of racial/ethnic segregation in U.S. public schools occurs between and not within school districts"); Erika K. Wilson, *Towards a Theory of Equitable Federated Regionalism in Public Education*, 61 *UCLA L. REV.* 1416, 1437–39 (2014) (describing how the combination of metropolitan fragmentation and residential segregation leads to intense segregation between rather than within school districts) [hereinafter Wilson, *Regionalism*].

40. *Milliken*, 418 U.S. at 741.

system and the city of Detroit school system unless there was proof of an inter-district violation.⁴¹ Put another way, the Court in *Milliken I* required proof that “racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district” before it would issue an inter-district desegregation order.⁴² In coming to this conclusion the Court reasoned that “traditions of local control of schools, together with the difficulty of a judicially supervised restructuring of local administration of schools, render improper and inequitable such an inter-district response to a constitutional violation found to have occurred only within a single school district.”⁴³

The standard for issuing an inter-district desegregation order set forth by the Court in *Milliken I* is a very difficult standard to meet. In fact, only a handful of courts have ordered an inter-district desegregation since the Court’s decision in *Milliken I*.⁴⁴ By affording such weight to local control of schools and school district boundary lines, even in the face of racial segregation, the Court made it difficult to reach the most common type of segregation—inter-district segregation.⁴⁵ To be sure, the Court’s focus in *Milliken I* on the primacy of local control and the sanctity of school district boundary lines is a key reason that school desegregation remedies are limited in the effect.

The Supreme Court also compromised the efficacy of school desegregation by imposing an arduous causation requirement in

41. *Id.* at 741–43.

42. *Id.* at 745.

43. *Id.* at 755.

44. *See, e.g.*, *United States v. Bd. of Sch. Comm’rs*, 637 F.2d 1101 (7th Cir. 1980) (finding that Indiana intentionally discriminated through its drawing of municipal boundary lines, that such discrimination had the effect of causing racial segregation between school districts, and ordering an interdistrict school desegregation decree); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 778 F.2d 404 (8th Cir. 1985) (finding that the State of Arkansas intentionally created racially segregated housing conditions which in turn contributed to segregation between school districts and that an inter-district desegregation decree was warranted); *Newburg Area Council v. Board of Educ.*, 510 F.2d 1358 (6th Cir. 1974) (finding that an inter-district school desegregation order was appropriate where school district boundary lines in Kentucky were previously ignored for the purpose of maintain segregated schools); *Evans v. Buchanan*, 582 F.2d 750 (3d Cir. 1978) (affirming an inter-district desegregation order where there was evidence of inter-district de jure school segregation)

45. *See* STUART WELLS, *supra* note 39.

school desegregation cases.⁴⁶ In these cases, plaintiffs must show a causal connection between past state-mandated school segregation policies and the segregation that exists in schools today, in order to obtain or sustain a federal court desegregation order.⁴⁷ This causation standard is a stark departure from the Court's previous plaintiff-friendly causation standards.

Initially, in *Keyes v. School District No. 1* the Court afforded plaintiffs a generous causation presumption that made it relatively easy for them to show a connection between past segregation in schools and existing racial segregation in schools.⁴⁸ In *Keyes*, one of the first desegregation cases to reach the Supreme Court outside of the South, the Court was asked to decide the appropriate legal to apply standard when examining segregation in schools that was the result of de facto rather than de jure school segregation.⁴⁹ The Court held that if a plaintiff could establish that intentional discrimination was the cause of a substantial portion of segregation in a school district, they were entitled to a presumption that intentional discrimination was the cause of *all* other segregation within the school district.⁵⁰ Under this presumption, causation between state action and the segregation that existed in schools was essentially presumed to exist.⁵¹

The *Keyes* presumption was critical to the early success enjoyed by school desegregation plaintiffs. It “reflected either a belief, or perhaps a value, that absent defendant's illegal actions, racial equality would exist in our public schools . . . [and] [a]ny racial disparity was presumed to have been caused by defendant, not by private forces.”⁵²

46. See, e.g., *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977); *Freeman v. Pitts*, 503 U.S. 467, 496 (1992).

47. Black, *Civil Rights*, *supra* note 3, at 1731 (arguing that “[t]he centrality of causation to the fall of educational claims is most obvious in school desegregation”).

48. *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973).

49. *Id.* at 192.

50. *Id.* at 208.

51. See Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1170 (1999–2000) (noting that in the Supreme Court's school desegregation jurisprudence, initially, “proximate cause played only a minimal role in school desegregation . . . [d]efendants were generally held responsible for all disparities, and little attention was paid to defining the precise effects caused by the violation”) [hereinafter Parker, *Desegregation*].

52. *Id.*

Over time, however, the *Keyes* presumption was either not applied at all or when it was applied, it was substantially weakened.

For example, in *Milliken I*, the Court declined to apply the *Keyes* presumption at all despite clear evidence that state-sponsored segregation led to substantial segregation in the urban Detroit school district.⁵³ In fact, the court in *Milliken I* did not even mention the *Keyes* presumption. In *Dayton Board of Education v. Brinkman*, the Court did apply the *Keyes* presumption, but the Court required the plaintiffs to show the “incremental segregative effects” that *de jure* school assignment policies had on the student population of a school, and to compare it to what the population of the school would have been in the absence of the segregative effect of the *de jure* assignment policy.⁵⁴ Importantly, the Court then noted that federal courts could *only* order a remedy designed to address the difference between what the student population would have been in the absence of the *de jure* assignment policy and what it was as a result of the *de jure* assignment policy.⁵⁵

Subsequent Supreme Court cases continued to ratchet up the causation requirement for plaintiffs while loosening it for defendants. For example, in *Freeman v. Pitts* the Court held that the *Keyes* presumption could essentially be rebutted by a defendant school district through a showing that demographic changes or residential segregation was responsible for segregation in schools.⁵⁶ The ruling in *Freeman* made it even more difficult for plaintiffs to obtain or sustain school desegregation orders while simultaneously making it easier for defendants to escape liability.⁵⁷

53. *Milliken v. Bradley*, 418 U.S. 717, 745 (1974) (acknowledging the record before the district court contained “evidence of de jure segregated conditions only in the Detroit schools”).

54. *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977).

55. *Id.*

56. *Freeman v. Pitts*, 503 U.S. 467, 496 (1992) (“[T]he *de jure* violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system. The causal link between current conditions and the prior violation is even more attenuated if the school district has demonstrated its good faith.”).

57. See Parker, *Desegregation*, *supra* note 51, at 1178 (arguing that “the Court has steadily increased the viability of proximate cause as a limit on the reach of school desegregation litigation by accepting racial segregation and disparities”).

In sum, the preference for local control of public education, along with the heightened causation standard in school desegregation cases, played a significant role in limiting the effectiveness of the federal judiciary in addressing racial segregation in schools.⁵⁸ While some schools are still operating under school desegregation orders, many school districts have been released from federal court supervision.⁵⁹ Further, even when school districts remain under federal court desegregation orders, due to shifting racial demographics, the school districts remain segregated by race.⁶⁰ For those reasons, the efficacy of judicially based reform of public schools through school desegregation orders continues to decline significantly.

B. The Limits of School Reform Through School Finance Litigation

Another way in which judicial reform of public schools is attempted is through school finance reform litigation. Those who seek reform of schools through school finance litigation do so under a theory that students—particularly students in predominately minority-attended, urban public schools—are performing very poorly academically and that an infusion of more financial resources into the schools will help improve their academic performance.⁶¹ While the accuracy of this theory is subject to much debate, it is the driving force behind attempts to reform urban schools through school finance litigation.⁶²

58. See, e.g., Black, *Civil Rights*, *supra* note 3, at 1737–38 (“[T]he retreat from presumption regarding causation ultimately marked the end of mandatory desegregation and allowed resegregation to take its place.”).

59. Parker, *Decline*, *supra* note 10, at 1655 (“Most school districts have been declared fully unitary . . .”).

60. See, e.g., DAVID J. ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* 208–09 (1995).

61. See Michael Heise, *Litigated Learning, Law’s Limits, and Urban School Reform Challenges*, 85 N.C. L. REV. 1419, 1451 (2007) (noting that two assumptions underpin school finance lawsuits—that school quality is best understood in terms of student achievement and that student academic achievement is a function of spending).

62. The debate regarding the importance of school funding to academic achievement is complex and nuanced. Some commentators suggest that increased funding to schools does not correlate with increased academic performance while others take the opposite view. See, e.g., Eric A. Hanushek, *When School Finance “Reform” May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423, 425 (1991) (arguing that “there is no systematic relationship between school expenditures and student performance. . . . Legal arguments and policy decisions that allegedly

Putting aside the question of whether or not there is indeed a link between school funding and academic achievement, scholars and commentators often find that predominantly poor and minority urban schools receive less funding than more affluent, typically predominantly white suburban schools.⁶³ That is the case because a major component of school funding is local property taxes.⁶⁴ Urban school districts tend to be located in poorer areas that are able to collect fewer local property taxes; consequently, urban school districts typically allocate less local funding to schools than more affluent, typically suburban districts.⁶⁵

This system of funding schools through local property taxes was initially challenged in federal court as violating the Fourteenth Amendment's equal protection clause.⁶⁶ Advocates alleged that all children were entitled to have the same amount of money spent on their education but that local property taxation schemes for funding schools resulted in students in poorer districts having less money spent on them than students in more affluent districts in violation of the U.S. Constitution.⁶⁷ However, the Supreme Court ultimately rejected this argument and instead found that there is no fundamental right to an education under the Constitution and that local property

advance educational equity are suspect if based on the conventional assumptions about expenditure variations.”); Marta Elliott, *School Finance and Opportunities to Learn: Does Money Well Spent Enhance Students' Achievement?*, 71 SOC. EDUC. 223, 233 (1998) (finding that “per-pupil expenditures indirectly increase students’ achievement by giving them access to educated teachers who use effective pedagogies in the classroom”).

63. See, e.g., Black, *Middle-Income*, *supra* note 27, at 374 (“[P]redominantly poor and minority schools routinely receive thousands of dollars less per pupil than their suburban counterparts.”); Gillian B. White, *The Data Are Damning: How Race Influences School Funding*, THE ATLANTIC (Sept. 30, 2015), <http://www.theatlantic.com/business/archive/2015/09/public-school-funding-and-the-role-of-race/408085/> (examining research showing that in Pennsylvania, “districts that have a higher proportion of white students get substantially higher funding than districts that have more minority students”).

64. Wilson, *Regionalism*, *supra* note 39, at 1444–45 (describing the ways in which school districts are funding through the levying of property taxes on all of the properties that lie within the school district’s boundaries).

65. *Id.* at 1444–45 (“School districts that encompass higher valued property can levy taxes at a lower rate yet still collect large sums of money while school districts that encompass lower valued property must levy taxes at a higher rate but still collect less money, thereby allowing fiscal disparities between districts to persist.”).

66. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

67. See William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 601–04 (1994).

tax funding schemes were rationally related to a legitimate governmental purpose.⁶⁸

After being rejected by the Supreme Court, school funding advocates next turned to state constitutions to make claims for equal funding of schools.⁶⁹ They did so under two different theories. The first theory was an equity theory—that local property funding schemes were unconstitutional under state constitutions because they violated provisions in state constitutions specifically enumerating a right to an education.⁷⁰ Under this theory, advocates challenged per-pupil spending disparities between districts as violating state constitutions on state equal protection grounds and sought parity in per-pupil expenditures between districts.⁷¹

The second theory was an adequacy theory—that the quality of education students in urban school districts was inadequate and therefore violated state constitutional provisions regarding a right to an education.⁷² In adequacy challenges to systems of school funding, plaintiffs essentially asked courts to “compel the state to do more than simply open up schools and demand student attendance; . . . [but to] ensure that some meaningful level of education is offered in the schools.”⁷³ More often than not plaintiffs seeking to reform schools through pleading both equity and adequacy theories of relief.⁷⁴

Equity and adequacy based school finance reform efforts are achieving mixed success, with adequacy claims often proving more successful than equity claims.⁷⁵ Yet neither equity nor adequacy

68. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 1.

69. *See* Thro, *supra* note 67.

70. *See, e.g.*, *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) (challenging constitutionality of New Jersey school funding statutes on the grounds that they discriminated against students in area with low property tax rates under the New Jersey constitution); *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976) (finding that the California local property taxation for funding schools violated the California constitution equal protection clause); *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 585 P.2d 71 (Wash. 1978) (finding the Washington system of local property taxation to fund schools unconstitutional under the Washington state constitution).

71. Thro, *supra* note 67, at 600–01.

72. *Id.* at 601–02.

73. *See* Aaron Y. Tang, *Broken Systems, Broken Duties: A New Theory for School Finance Litigation*, 94 MARQ. L. REV. 1195, 1206 (2011).

74. *Id.* at 1207 (“[A]dequacy claims are typically raised alongside equity arguments . . .”).

75. *Id.* at 1208.

claims have come close to effectively reforming public schools attended by predominately poor and minority students for a number of reasons. Three fundamental reasons for the limited success of school finance litigation in reforming urban public schools are worth highlighting.

First, school finance lawsuits in general are premised upon the idea that academic achievement is an appropriate barometer for whether a school is providing quality education and that increasing funding to public schools will increase students' academic achievement.⁷⁶ This is a specious claim that over time has proved increasingly faulty. The variables that ultimately influence a student's academic achievement are manifold and do not always correlate precisely with the type of education that the student is being provided. Indeed, research suggests that factors outside of school, such as family environment, access to quality pre-school, and other intangible social environment factors, influence a student's academic achievement more so than the particular school they attend.⁷⁷ Further, owing in part to the success of both equity and access claims, some urban schools receive more in funding per-pupil than non-urban districts.⁷⁸ Yet the increased funding has not overhauled urban student achievement.⁷⁹

Second, adequacy claims have found some success, but they grapple with appropriately defining and measuring what it means to provide an "adequate" education.⁸⁰ Adequacy lawsuits are often premised on language in state constitutions that require the state to provide a certain kind of education to students such as "thorough" or "efficient." Courts facing adequacy-based cases struggle to determine what constitutes an "adequate" education, leading to a variety of

76. See Tang, *supra* note 73, at 1211–13.

77. See, e.g., JAMES S. COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY 22–23 (1966) (finding a higher correlation between student achievement and non-school based factors); Heise, *supra* note 61, at 1458 (“To the extent that such variables as familial interactions (or lack thereof), poverty, diet, and home stability are among the set of variables that influence student achievement and are not surmountable by whatever positive influence a school can muster, then an already difficult litigation task becomes virtually impossible.”).

78. Heise, *supra* note 61, at 1447.

79. *Id.* at 1450.

80. Tang, *supra* note 73, at 1207–08 (noting that the difficulties and methods that judges in adequacy suits use to determine what constitutes an adequate education).

opinions and remedies.⁸¹ Importantly, with adequacy cases, legitimate separation of powers concerns exist, because state constitutions often contain specific language that delegates the task of developing a system of school financing to the state legislature.⁸² For that reason, there is often great deference given to state legislatures to determine how much and how to spend money to ensure an “adequate” education.⁸³ Even when courts are ambitious in defining what constitutes a constitutionally adequate education, the road to implementation can be complex, arduous and often left to the whims of the various state legislatures.⁸⁴ Thus, judicially based adequacy remedies often suffer from a lack of consistency across jurisdictions as to what constitutes a constitutionally adequate education, and how much money state legislatures are actually willing to spend to ensure that students receive an “adequate” education. To that end, adequacy suits have at best achieved mixed results, depending upon the jurisdiction.

Finally, even when states have the political will and energy to make substantial changes, funding disparities still persist between wealthy and non-wealthy school districts, primarily due to the infusion of private money in wealthy districts that goes beyond state

81. *See, e.g.*, *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997) (finding that the North Carolina state constitution guaranteed every child an opportunity to receive a sound basic education in our public schools and outlining specific academic skills that would meet that criteria); *Campaign for Fiscal Equity v. State*, 187 Misc. 2d 1, 11, 719 N.Y.S. 2d 475, 483 (Sup. Ct. 2001) (finding that the system of education in New York violated the state constitution but noting that under the state constitution a “state of the art” education is not required; rather all that is required is an education that instills students with the skills they need to become productive citizens).

82. *See, e.g.*, *City of Pawtucket v. Sundlun*, 662 A.2d 40, 56 (R.I. 1995) (grappling with the appropriateness of the court weighing in on school finance questions and noting that “[t]he education clause leaves all such determinations to the General Assembly’s broad discretion to adopt the means *it* deems ‘necessary and proper’ in complying with the constitutional directive”).

83. *See, e.g.*, *Campaign for Fiscal Equity*, 187 Misc. 2d at 77 (“The choice of measures designed to remedy the constitutional violation described herein lies in the first instance with the State Legislature informed by the expertise of the Governor, SED, BOE and the Regents. At this juncture, the court does not prescribe the precise spending measures that must be taken.”).

84. *See generally* Paul L. Tractenberg, *Beyond Educational Adequacy: Looking Backward and Forward Through the Lens of New Jersey*, 4 STAN. J. C.R. & C.L. 411 (2008) (describing New Jersey’s *Abbott* litigation and the road to achieving an adequate education in New Jersey).

allocations of funds.⁸⁵ States for the most part do not stop wealthy districts from spending above and beyond minimal state allocations.⁸⁶ To be sure, even if they did, it is not guaranteed that reducing funding disparities between wealthy and non-wealthy districts would actually improve the educational opportunities for students in less affluent districts. For these reasons, school finance litigation is not a completely effective mechanism for reforming school systems, particularly urban school systems.

II. THE RISE OF MARKET-BASED REFORMS

As a consequence of the shortcomings of school desegregation litigation and school finance litigation discussed in the previous part, efforts to reform public schools—particularly public schools with large numbers of poor and minority students—do not prominently feature in litigation-based reform strategies. Instead, there continues to be a great deal of debate regarding the efficacy of litigation-based school reform strategies in general,⁸⁷ and more specifically, the institutional competency of courts to solve the complex issues inherent to issues of public school reform.⁸⁸ To that end, much of the recent debate around school reform is focused outside of the courts.

While lawsuits challenging the sufficiency of urban education are still ongoing,⁸⁹ the predominant forms of school reform for poor and minority students are related to ensuring that they have more choice

85. See generally John Schomberg, *Equity v. Autonomy: The Problems of Private Donations to Public Schools*, 1998 ANN. SURV. AM. L. 143 (1998) (chronicling the equity problems that can occur when more affluent schools accept parental donations and how such donations can have the effect of nullifying state attempts to create funding parity between school districts).

86. See Reynolds, *supra* note 15, at 759 (“[I]n most states, school districts retain the ability to set their own upper limits on spending. Though statutory reform may push up the bottom to ensure that all districts receive at least a certain minimum level of per-pupil dollars, only a few states have dared to limit the expenditures at the top.”).

87. See, e.g., Ryan & Heise, *supra* note 30, at 654–56 (describing the difficulties posed by courts attempting to reform schools through school finance litigation).

88. See ERIC A. HANUSHEK & ALFRED A. LINDSETH, *SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA’S PUBLIC SCHOOLS* 138–41 (2011).

89. See, e.g., Teresa Watanbee, *Compton Unified Sued for Allegedly Failing to Address Trauma-Affected Students*, L.A. TIMES (Mar. 18, 2015), <http://www.latimes.com/local/lanow/la-me-ln-trauma-school-lawsuit-20150518-story.html>.

in where they go to school.⁹⁰ This part suggests that market-based reforms such as charter schools, vouchers, and other school-choice related programs are now the primary reform mechanisms while reform-based litigation plays a much less prominent role. It outlines the rise of market-based reforms and argues that market-based reforms allow public education to be conceptualized as private good rather than a public good.

A. Choice as Reform

Students are typically assigned to public schools in accordance with where they live.⁹¹ As a result, the demographics of schools and school districts for the most part mirror the demographics of the neighborhoods and localities in which they are located.⁹² To the extent those neighborhoods and localities are racially and economically segregated, public schools are as well.⁹³ The harms of racially and economically segregated schools are well documented.⁹⁴ In order to ameliorate the harms of racially segregated and underfunded schools, judicially-based public school reform efforts often attempt to disrupt the strong tie between school and municipal boundary lines that all too often leads to schools being racially segregated and underfunded.⁹⁵ Indeed, as Professors James Ryan and Michael Heise observed:

90. See, e.g., Karla Scoon Reid, *Minority Parents Quietly Embrace School Choice*, EDUCATION WEEK (Dec. 5, 2001), <http://www.edweek.org/ew/articles/2001/12/05/14intro minority.h21.html> (noting that “[m]any minority parents are impatient at what they see as the plodding pace of school reform; they’re concerned that their own children won’t benefit from long-term improvements to the current public school system”).

91. See Wilson, *Leveling Localism*, *supra* note 8, at 627 (“[S]chool district boundary lines are drawn so that students for the most part attend schools in close proximity to where they live.”).

92. See Wilson, *Regionalism*, *supra* note 39, at 1438–39.

93. *Id.*

94. Gary Orfield, *The Growth of Segregation: African Americans, Latinos, and Unequal Education*, in *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 53, 53–55 (Gary Orfield & Susan E. Eaton eds., 1996).

95. See Ryan & Heise, *supra* 30, at 2050 (noting that both school desegregation and school finance reform “sought to equalize opportunities by erasing boundaries, whether physical or financial, that separated schools and school districts”).

To a very real extent, both school desegregation and school finance reform pitted equality of opportunity against local control regarding student attendance and finances. Put differently, desegregation and school finance reform often threatened the concept of the traditional neighborhood school attended only by local students and paid for primarily by local residents who could devote as much money to their “own” schools as they wished.⁹⁶

Yet, as described in Part I, school desegregation and school finance reform efforts achieved only limited success in challenging the public education local control paradigm. In many ways, Supreme Court decisions like *Milliken I* reified rather than disrupted the sanctity of local control over schools.⁹⁷ As a result, a concerted push outside the judicial system to change the ways in which students are assigned to schools emerged as an alternative to judicial remedies for improving educational opportunities for poor and minority students.⁹⁸

Importantly, the quest to change the way in which students are assigned to schools is undergirded by the idea that infusing more choice into the school assignment process will both improve the options available to individual students and spur competition between schools that improves the public school system as a whole.⁹⁹ This approach to school assignment is undoubtedly a relic of free-market principles.¹⁰⁰ Proponents of choice-based reform suggest that infusing more choice into the public school system will breed competition by schools for students.¹⁰¹ This competition will allow parents to choose which school they want their children to attend, which will in turn incentivize schools to provide high quality public education so that

96. Ryan & Heise, *supra* note 30, at 2050–51.

97. *Id.* at 2046–52.

98. *Id.* at 2051 (“The core principle of school choice is an equitable one, as school choice grants poorer students an opportunity—the chance to choose their own schools—that is now reserved for wealthier students.”).

99. Black, *Charter Schools*, *supra* note 18, at 458 (“Those favoring an individualized concept of education argue that the absence of competition in the traditional public school system is the weakness that stymies its progress. For them, it is the marketplace and the competition it brings that would force schools to be responsive to individuals.”).

100. Henry M. Levin, *Education as a Public and Private Goods*, 6 J. POL’Y ANALYSIS & MGMT. 628, 629 (1987).

101. *Id.*

parents will choose their school for their children.¹⁰² It will also give students the opportunity to select the school that best meets their needs.¹⁰³

Conceptually, the idea that such a free-market approach is appropriate for the dissemination of public education was rooted in the Supreme Court's decision in *Pierce v. Society of the Sisters*.¹⁰⁴ There, the Court found that parents have a liberty interest in controlling the way in which their children are raised and upheld parents' rights to opt out of the public school system and send their children to a private school.¹⁰⁵ While the Court's holding in *Pierce* paved the way for the proliferation of private schools that exists today, the Court's reasoning in *Pierce* is now being extrapolated to justify choice-based public school reform.¹⁰⁶ The choice-based public school reform movement consists of vouchers, charter schools, and various school-district-wide choice programs. Each of these choice-based reform programs is discussed in-turn.

1. Vouchers

Voucher programs allow public tax dollars to be given to parents to use to pay tuition at private schools.¹⁰⁷ To date, at least fourteen states and the District of Columbia have adopted voucher programs.¹⁰⁸ Many of the voucher programs are limited to students who are poor and/or attending a school that is deemed failing or performing poorly.¹⁰⁹ Notably, the amount of funding offered by each

102. *Id.*

103. *See id.* at 636.

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

105. *Id.*

106. *See* Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1093 (2013) ("Using the 'constitutional values' articulated in *Pierce*, proponents of choice justify market and public choice as expressions of the moral and legal right of parents to leave the school system.")

107. *See* Ryan & Heise, *supra* note 30, at 2078.

108. NAT'L CONFERENCE OF STATE LEGISLATURES, SCHOOL VOUCHER LAWS: STATE-BY-STATE COMPARISON (Jan. 2014), available at <http://www.ncsl.org/documents/educ/StateByStateVoucherComparison.pdf>; *Fast Facts on School Choice*, EDCHOICE <http://www.edchoice.org/our-resources/fast-facts/> (last modified Aug. 22, 2016).

109. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 108. For example, Arizona, Indiana, Louisiana, North Carolina and Ohio all limit their voucher programs to poor students and/or students attending failing schools.

of the voucher programs is relatively modest.¹¹⁰ As a result, vouchers are typically used at moderately priced religious schools rather than the more elite religious or secular schools.¹¹¹ While voucher programs remain rather limited in their scope, they are proliferating, and states increasingly view them as a viable alternative to reforming public education for poor and minority students.¹¹²

2. Charter Schools

Charter schools are publicly funded schools that are run by private persons or corporations.¹¹³ Students are not required to pay tuition to attend charter schools.¹¹⁴ Charter schools are exempt from most state rules and regulations and in exchange are required to meet certain performance accountability standards.¹¹⁵ Charter schools are seen as an attractive alternative to traditional public schools precisely because they are not required to adhere to state rules and regulations.¹¹⁶ Indeed, because they are not required to meet certain state rules and regulations, charter schools are often conceptualized as being innovative and able to enact rules such as longer work days for teachers in order to meet the special needs of poor and minority students.¹¹⁷ In school systems serving large numbers of poor and

110. See NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 108. Most of the voucher programs are limited to the state-level per-pupil expenditures.

111. See James, *supra* note 7, at 1095.

112. KATHERINE CIERNIAK ET AL., CTR. FOR EVALUATION & EDUC. POLICY, MAPPING THE GROWTH OF STATEWIDE VOUCHER PROGRAMS IN THE UNITED STATES 10 (Mar. 2015), available at http://ceep.indiana.edu/projects/PDF/Statewide_Vouchers_CEEP_EPB.pdf (noting that “[t]he number and scope of statewide voucher programs targeting students from low-income households (and/in some cases attending poorly performing schools) have expanded quickly in recent years”).

113. See Thomas A. Kelley III, *North Carolina Charter Schools' (Non-?) Compliance with State and Federal Nonprofit Law*, 93 N.C. L. REV. 1757, 1767 (2015).

114. *Id.*

115. See James, *supra* note 7, at 1096; Kelley III, *supra* note 113, at 1767.

116. See Kelly III, *supra* note 113, at 1767 (“To allow for innovation, charter schools are exempt from most of the rules, regulations, and statutes that apply to other public schools.”); PUB. SCHS. FIRST N.C., THE FACTS ON CHARTER SCHOOLS (2013), available at <http://www.publicschoolsfirstnc.org/wp-content/uploads/2013/01/PSFNC-Charter-School-Fact-Sheet.pdf> (chronicling the ways in which charter schools are exempt from regulations and statutes in North Carolina that apply to other North Carolina public schools).

117. For example, schools like the Harlem Success Academy and the KIPP schools often cite to their status as charter schools that are not required to adhere to the same formalities as

minority students, charter schools have grown so much that in many instances they either approximate or exceed the number of traditional public schools in the school district.¹¹⁸

3. School-District-Wide School Choice Programs

School-district-wide choice programs offer another way in which choice is infused into public education as a means of reforming public schools. Such programs allow students to elect out of the school they are assigned to attend according to their address. Instead, district-wide choice programs allow students to attend another traditional public school outside of their assigned neighborhood school.¹¹⁹ They may also attempt to create more diversity, particularly to attract more white students, by establishing magnet schools- schools that offer specialized instruction in a particular area.¹²⁰ The majority of these programs are intra-district, meaning

traditional public schools as the reasons for their success. *See, e.g.*, Alexandria Neason, *Charter Schools Latest Innovation: Keeping Teachers Happy*, SLATE MAGAZINE (Apr. 27, 2015), http://www.slate.com/blogs/schooled/2015/04/27/charter_schools_and_churn_and_burn_how_they_re_trying_to_hold_on_to_teachers.html; Kate Taylor, *At Success Academy Charter Schools, High Test Scores and Polarizing Tactics*, N.Y. TIMES (Apr. 6, 2015), http://www.nytimes.com/2015/04/07/nyregion/at-success-academy-charter-schools-polarizing-methods-and-superior-results.html?_r=0 (describing the tactics that make Harlem success academy uses to achieve results such as teachers working twelve hour days and public disclosure of students test results in order to shame the students into performing better).

118. *See, e.g.*, Michael Allison Chandler, *Enrollment Up in DC Public Schools for the Seventh Consecutive Year*, WASH. POST (Oct. 20, 2015), https://www.washingtonpost.com/local/education/enrollment-up-in-dc-public-schools-for-seventh-consecutive-year/2015/10/20/84ef94ec-7742-11e5-bc80-9091021aeb69_story.html (noting that in Washington D.C. “Charter schools continue to serve about 44 percent of the city’s public schools”); Alan Greenblatt, *New Orleans District Moves to an All Charter System*, NPR.ORG (Mar. 30, 2014), <http://www.npr.org/sections/ed/2014/05/30/317374739/new-orleans-district-moves-to-an-all-charter-system> (describing the shift in the predominately poor and minority school system in New Orleans to an all charter system of schools).

119. *See, e.g.*, U.S. DEPT. OF EDUC., CREATING STRONG DISTRICT CHOICE PROGRAMS (May 2004), available at <https://www2.ed.gov/admins/comm/choice/choiceprograms/report.pdf> (describing the various types of district wide choice programs, including open-enrollment which allows parents to choose any school within a school district and specially themed magnet schools).

120. Christine Rossell, *Whatever Happened to Magnet Schools? No Longer Famous But Still Intact*, EDUC. NEXT (Spring 2005), available at http://educationnext.org/files/ednext20052_44.pdf (describing magnet schools as being created in order to “draw white students to predominantly black schools by offering a special education with a focus on a particular aspect

that students can only exercise choice within the district, not between districts, thereby severely limiting the number of truly viable options for students in predominately poor and minority school districts.¹²¹ Nevertheless, school-district-wide choice programs are also often conceptualized as a means of improving educational options for poor and minority students.¹²²

B. Quality Public Education as a Private Good

The aforementioned market-based reforms have achieved varying success in improving educational opportunities for individual students.¹²³ Yet the reforms do not improve the public education system *as a whole*. Choice-based market reforms are premised on the idea that certain schools are inadequate and students should be able to leave those schools for greener pastures. The reforms do nothing to improve the inadequate schools that students are leaving behind. To the contrary, a rich body of literature suggests that market-based reforms only make the schools left behind worse.¹²⁴

of the curriculum, such as performing arts, or Montessori, or advanced math, science, and technology”).

121. Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 *FORDHAM L. REV.* 791, 800–01 (2005) (describing the widespread availability of intra-district choice programs and noting that “there are few meaningful options for public school choice within district boundaries in inner-city school systems”).

122. *Id.* at 800.

123. *See, e.g.*, Susan Dynarski, *Urban Charter Schools Often Succeed. Suburban Ones Don't*, *N.Y. TIMES* (Nov. 20, 2015), <http://www.nytimes.com/2015/11/22/upshot/a-suburban-urban-divide-in-charter-school-success-rates.html> (finding that “[i]n urban areas, where students are overwhelmingly low-achieving, poor and nonwhite, charter schools tend to do better than other public schools in improving student achievement”); Matthew M. Cringos & Paul E. Peterson, *A Generation of School Voucher Success*, *WALL ST. J.* (Aug. 23, 2012), <http://www.wsj.com/articles/SB10000872396390444184704577585582150808386> (“[A] study shows that an African-American student who was able to use a voucher to attend a private school was 24% more likely to enroll in college than an African-American student who didn’t win a voucher lottery.”).

124. *See, e.g.*, ERICA FRANKENBERG, GENEVIEVE SIEGEL-HAWLEY & JIA WANG, *CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS* (Jan. 2010), *available at* <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/frankenber-choices-without-equity-2010.pdf> (finding that charter schools are increasing racial segregation in schools); CTR. FOR RESEARCH ON EDUC. OUTCOMES, *NATIONAL CHARTER SCHOOL STUDY 82* (2013), *available at* <http://credo.stanford.edu/documents/NCSS%202013%20Final%20Draft.pdf> (finding that

Importantly, market-based reforms like vouchers, quality charter schools, and slots in quality public choice programs are in limited supply.¹²⁵ Thus, poor and minority students trapped in failing schools must compete with one another for even the chance to achieve improved educational opportunities. This part argues that combination of these two forces results in public education being conceptualized as a private rather than public good. The part first provides an operational definition of public and private goods. It then makes the argument that market-based reforms, combined with localist public education governance structures, are situating public education as a private rather than public good.

1. Private and Public Goods: An Operational Definition

Public goods theory lays a theoretical foundation for how much of a particular good the government should supply.¹²⁶ In theorizing how much of a particular good the government should supply, public goods theory characterizes goods as either public goods or private goods. Public goods are goods that are non-excludable and non-rivalrous.¹²⁷ Non-excludable “means that it is difficult to keep people from consuming the good once it has been produced.”¹²⁸ Non-rivalrous means that that once the good is produced it can be consumed by an additional person at no additional cost.¹²⁹ On the other hand, private goods are rivalrous and excludable, meaning one person’s consumption of the good precludes another person from consuming the good and that the good can only be consumed by an additional person at an additional cost.¹³⁰ Examples of public goods include highways and national defense; once these goods are

students in charter schools perform similar to or worse than students in traditional public schools).

125. See, e.g., Kyle Spencer, *School Choice Is No Cure All, Harlem Finds*, N.Y. TIMES (Sept. 2, 2012) (describing the limited supply of high quality magnet and charter schools available in Harlem, N.Y.).

126. See generally Paul A. Samuelson, *The Pure Theory of Public Expenditures*, 36 REV ECON. & STAT. 387 (1954); RICHARD CORNES & TODD SANDLER, *THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS* 143–239 (2d ed. 1996).

127. Holcombe, *supra* note 19, at 1.

128. *Id.* at 2.

129. *Id.* at 1, 2.

130. Samuelson, *supra* note 126, at 387–89.

produced it is not practically feasible to stop others from enjoying those goods, and an additional person's consumption of the good does not add additional costs.¹³¹ Examples of private goods include goods such as food and clothing.

Some theorists suggest that goods with one or both of the characteristics of a public good (e.g., non-rivalrous or non-excludable) should be produced by the government because it is more efficient for the government to produce such goods.¹³² They further suggest that this is the case because there is lack of an incentive for the private market to produce goods that have one or both characteristics of a public good.¹³³ Thus, a key component of goods that have one or more characteristics of a public good is that the state needs to provide it in order to ensure an appropriate or optimal allocation of the good.¹³⁴ On the other hand, goods that are characterized as private goods are thought to be optimally allocated or provided through private markets, because the profits will motivate appropriate and optimal allocation of the goods through the private market.¹³⁵

Importantly, education is neither a pure public or private good. It is instead an impure or quasi-public good.¹³⁶ Impure or quasi-public goods are goods that contain some characteristics of public goods and some characteristics of private goods.¹³⁷ Education it is considered an impure-public good because the possibility of excludability exists.¹³⁸

131. Holcombe, *supra* note 19, at 2–3.

132. Samuelson, *supra* note 126, at 387–89.

133. *Id.*

134. See DAVID BRIDGES & TERENCE H. McLAUGHLIN, EDUCATION AND THE MARKET PLACE 139 (1996) (“Public goods will be underprovided without state intervention.”). To be sure, there is much debate as to whether the state must always produce goods that have one or more characteristics of a public good. The private market has provided and is capable in some instances of providing certain types of public goods. See, e.g., Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635, 643 (2007) (“What began as a framework for determining the proper scope of public expenditure has evolved into a technical term of art that is no longer coterminous with goods that *must* be provided by the government.”).

135. Samuelson, *supra* note 126, at 387–89.

136. Brooks, *supra* note 21; Lubienski, *supra* note 21.

137. CORNES & SANDLER, *supra* note 126, at 9.

138. For example, you could exclude students from receiving a specific type of education by requiring that they pay tuition or requiring that they live in a certain area in order to obtain the education. Education in charter schools is also often limited by weighted lottery systems.

Yet for reasons having to do with pragmatics and government legitimacy, public education continues to be produced by state governments.¹³⁹ Indeed, despite education being an impure public good, the state provides public education because of the large number of positive externalities that public education provides. Those positive externalities include “benefits to the community or society at large . . . in terms of equality of opportunity, social cohesion, democratic benefits, law and order, economic growth” for which “the external benefits or costs are likely to be available to all with zero marginal costs.”¹⁴⁰ Thus, because of the aforementioned positive externalities associated with education it is considered an impure or quasi-public good which justifies the state providing it.

As argued in the next part however, the infusion of market-based reforms threatens to push the way that we conceptualize public education further away from that of an impure public good and closer to that of a private good. Such a shift has important implications for the level of public education that the state will then be willing to provide. It also has important implications for the ability of the most vulnerable members of the public education marketplace—poor and minority students—to receive a quality public education.

2. Market-Based Reforms Combined Situate Public Education as a Private Good

The current slate of reforms situates public education, particularly for poor and minority students, closer to that of a private good. They do so in two ways: first by emphasizing the individual benefits of public education rather than the collective benefits of public education, and second by shifting the responsibility for obtaining a quality public education from the state to parents and students. With respect to the emphasis on individual rather than collective benefits, the rationale for charters, vouchers and certain school-district-wide choice programs is premised upon the idea that individual students

See generally Katie Ash, *Weighted Admissions Lotteries: Will They Reshape Charter Demographics*, EDUC. WEEK (Mar. 26, 2014), <http://www.edweek.org/ew/articles/2014/03/18/26charterlottery.h33.html>.

139. BRIDGES & MCLAUGHLIN, *supra* note 134, at 143.

140. *Id.*

and parents should be able to improve their own lot by moving to a better performing school. The reforms do not attempt to address the problems with the schools that students are leaving behind. Instead, the market-based rationale for these reforms merely presumes that the prospect of students exiting poorly performing schools will spur competition and force those schools to improve.¹⁴¹

Yet the premise that competition will improve the poorly performing schools is faulty. In fact, in most states, state money follows students. Therefore, when students leave traditional public schools for a charter school, a voucher program, or a better public school through a school choice program, the public school that the student would have attended loses some or all of the state per-pupil allotment that the school would have received if the student remained.¹⁴² While proponents of market-based reforms contend that the public schools are not worse off, because they still receive the same amount of local money to educate fewer students,¹⁴³ there is room for debate as to whether the local money is sufficient in and of itself, particularly since many of the students left behind in the traditional public schools have greater needs.¹⁴⁴ Further, aside from

141. See *supra* Part II.A.

142. See generally Preston C. Green III et al., *Having It Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools*, 63 EMORY L.J. 303 (2013) (describing the ways in which charter schools receive public funding); Julie F. Mead, *The Right to an Education or the Right to Shop for Schooling: Examining Voucher Programs in Relation to State Constitutional Guarantees*, 42 FORDHAM URB. L.J. 703, 706 (2015) (noting that “in voucher programs, the funds flow directly from state coffers to parents in the form of a voucher that can only be spent at a private school participating in the program”).

143. See generally Valerie Strauss, *Separating Fact From Fiction: 21 Claims About Charter Schools*, WASH. POST (Feb. 28, 2012), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/02/28/separating-fact-from-fiction-in-21-claims-about-charter-schools/>; Michael McShane, *School Choice Critics Try to Have it Both Ways*, U.S. NEWS & WORLD REP. (Sept. 8, 2015), <http://www.usnews.com/opinion/knowledge-bank/2015/09/08/school-choice-critics-try-to-have-it-both-ways> (“[A]lmost every program in the country allows only a fraction of a student’s per-pupil allotment to follow that student. For example, in Indiana, the voucher for low-income students is capped at 90 percent of the state’s contribution toward a child’s education. All of the locally raised tax dollars stay in the traditional public school system.”).

144. See, e.g., *Recent Cases, State Constitutional Law—Education Clause—Florida Supreme Court Declares State’s School Voucher Program Unconstitutional—Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), 120 HARV. L. REV. 1097, 1103 (2007) (describing the impact of market-based reforms such as vouchers on traditional public schools and noting that “the children left behind will be distinctly underprivileged in ways that will keep them in failing public schools being drained not only of funds, but also of their best students”).

money, few changes occur at poorly performing schools; instead poorly performing schools are likely to be closed down and the remaining students transferred to marginally better or equivalent public schools.¹⁴⁵

Moreover, that market-based reforms emphasize the individual, rather than collective, benefits of public education is evident in the limited supply of market-based reforms. For example, while there is a proliferation of charter schools, the number of high quality charter schools, particularly in school districts serving predominantly poor and minority students, is limited.¹⁴⁶ Similarly, voucher programs are limited in the amount that they will pay which limits the ability of students using vouchers to attend more expensive and higher quality private schools.¹⁴⁷ District-wide school choice programs also have limited number of slots for the high quality and most sought after schools.¹⁴⁸ This results in the enactment of tools such as lotteries for slots in the better charter schools or magnet schools.¹⁴⁹ In the end,

145. Wilson, *Gentrification*, *supra* note 3, at 134–37.

146. See CTR. FOR RESEARCH ON EDUC. OUTCOMES (CREDO), STANFORD UNIV., MULTIPLE CHOICE: CHARTER SCHOOL PERFORMANCE IN 16 STATES 1 (2009), available at http://credo.stanford.edu/reports/MULTIPLE_CHOICE_CREDO.pdf (“Nearly half of the charter schools nationwide have results that are no different from the local public school options and over a third, 37 percent, deliver learning results that are significantly worse than their student would have realized had they remained in traditional public schools.”); Dylan P. Grady, *Charter School Revocation: A Method for Efficiency, Accountability, and Success*, 41 J.L. & EDUC. 513, 514 (2012) (“[E]mpirical data reveal that there is inconsistent quality in the charter school sector. The results show that, in fact, charter schools may not be increasing the academic achievement of the children they serve when compared with traditional public schools.”).

147. See, e.g., Brittany Bronson, *Why Vouchers Won’t Fix Vegas Schools*, N.Y. TIMES (Aug. 25, 2015), <http://www.nytimes.com/2015/08/26/opinion/why-vouchers-wont-fix-vegas-schools.html> (noting that “[p]rivate school tuition in Nevada can be as high as \$12,000, and the biggest problem with the vouchers is that the poorest families will be unable to make up the difference”).

148. See, e.g., Marlon A. Walker, *Parents Frustrated with DeKalb Magnet School Lottery*, ATLANTA J. CONST. (June 6, 2015), <http://www.myajc.com/news/news/local-education/parents-frustrated-with-dekalb-magnet-school-lotte/nmWpC/> (noting a parent’s frustration with magnet lottery school system and the parent indicating “[d]emand is more than supply, and the county has not done a thing about it. It’s no longer about merit. It’s about luck”).

149. See, e.g., Neema Roshania, *Philly Families Face High-Stakes Hunt for Prized Charter Lottery Slots*, NETWORKS.ORG. (Mar. 16, 2015), <http://www.newsworks.org/index.php/local/nw-philadelphia/79420-philly-families-face-high-stakes-hunt-for-prized-charter-school-lottery-slots> (chronicling the story of a family trying to win a coveted seat in a Philadelphia charter school through a lottery process).

students and families are left to scrap for a seat in a high-quality school, though most will fail to gain admission. Given the limited number of slots available for high-quality charter or magnet schools and the limited reach of voucher programs, a quality public education becomes rivalrous in that one student's gain is another's loss. Individual students may obtain some gains, but collectively the options available to students are not better. Collectively, students may in fact be worse off.

The second way in which market-based reforms bring public education closer to conceptualization as a private, rather than a public, good is that it shifts our understanding of who should be responsible for ensuring a quality education. As discussed in Part II.B.1, private goods are those in which optimum allocation occurs through the private market, not the government. In a nod to the collective benefits provided by public education, the state provides public education but the quality varies significantly by locality.¹⁵⁰ Prior to the enactment of market-based reforms, public school reforms aimed at improving education for poor and minority students, particularly judicially based reforms, placed pressure on the state not just to provide an education, but to provide a quality education.¹⁵¹

On the other hand, market-based reforms put the onus on parents and students to affirmatively seek out high quality public education.¹⁵² While the state continues to provide a basic or baseline education, the state ducks the issue of quality by putting the burden on parents to escape poorly performing or failing schools. Indeed, the proliferation of market-based reforms to the exclusion of any other types of reforms, tacitly allows state retrenchment from the duty of

150. See Wilson, *Regionalism*, *supra* note 39, at 1444–45 (noting that the “combination of fragmentation and localism creates significant disparities between neighboring school districts within metropolitan areas,” including disparities in the quality of education provided).

151. Black, *Charter Schools*, *supra* note 3, at 1736–37.

152. To be sure, in order for students to even take advantage of market-based reforms, it requires that they or their parents have the social capital that it takes to navigate what is often a byzantine process of applying for charters, vouchers, or school choice programs. See, e.g., Conor Williams, *What Applying to Charter Schools Showed Me About Inequality*, THE ATLANTIC (Mar. 20, 2014), <http://www.theatlantic.com/education/archive/2014/03/what-applying-to-charter-schools-showed-me-about-inequality/284530/> (describing how parents with more time and resources can increase their chances of obtaining a coveted spot in the charter school lottery by applying to more schools and having the ability to stand in line early in the morning to submit charter applications).

providing a quality education to students, particularly poor and minority students. Put another way, market based reforms allow the state to essentially turn over responsibility for providing a quality public education to parents and students under the guise that parental choice that results in a few select students improving the education they receive is the same as offering quality public education that benefits the collective good. Poor and minority students whose parents lack the social capital to navigate the system of school choice often suffer the most from the state retrenchment of providing wholesale quality public education.¹⁵³

In sum, market-based reforms focus on the individual rather than collective benefits of public education. They also shift the responsibility for obtaining a quality public education from the state to students and parents. As a result, quality public education is now in many ways an excludable good distributed through private-market like exchanges. This in turn results in public education being situated closer to a private good than a public good. As discussed in the part that follows, situating a quality public education as a private good has implications for how we normatively conceptualize public education that in turn leads to distributional inequalities that harm poor and minority students.

III. THE IMPLICATIONS OF QUALITY PUBLIC EDUCATION AS A PRIVATE GOOD

A. Normative Shift in Our Conceptualization of Public Education

An important consequence of market-based reforms is that they are causing a seismic shift in the ways in which public education is normatively conceptualized. Throughout the history of public education in America, two competing normative justifications for public education have existed, the first rooted in principles of democracy and the second rooted in principles related to social

153. See, e.g., Valerie Lee, *Educational Choices: The Stratifying Effect of Selecting Schools and Courses*, 2 EDUC. POL'Y 125, 137–38 (June 1993) (noting that there is little evidence to suggest that low quality schools close down as advocates of school choice suggest but that instead low quality schools remain and continue to serve the students whose parents lacked the motivation or interest in choosing a higher quality school).

mobility or social advantage.¹⁵⁴ As described in the parts that follow, situating public education as a private rather than public good diminishes the democracy-related justifications for public education and allows the social mobility justification for public education to dominate. Such a shift in our normative conception of the justification for public education causes harm to the most vulnerable: poor and minority students.

1. Democracy Rationale

For much of the history of American public education, the democracy rationale for public education played a larger role than the social mobility justification.¹⁵⁵ For example, during the American colonial period, public education was seen as necessary in order to indoctrinate residents with religious principles so that they would be less inclined towards barbarianism and social disorder.¹⁵⁶ Indeed, one of the first pieces of education-related legislation during this period, the Massachusetts Bay School Law, indicated that people must be taught to read and write so that they could “obey the laws of God and the state.”¹⁵⁷ Several other laws enacted in colonial Massachusetts mandating some form of public school for segments of the population often emphasized that “the good education of children is of singular benefit to any common-wealth”¹⁵⁸ and the importance of ensuring children’s ability “to read and understand the principles of religion.”¹⁵⁹

The vision of education as being necessary for the health of the democracy was most prevalent at the start of the 1800s.¹⁶⁰ At that time, it was widely believed that an educated citizenry would allow

154. David F. Labaree, *Consuming the Public School*, 61 *EDUC. THEORY* 381 (2011) [hereinafter Labaree, *Consuming*].

155. *See id.*

156. *Id.* at 382.

157. *See* THE CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 68–69 (T.B. Wait & Co. 1814).

158. *See* Marcus W. Jernegan, *Compulsory Education in the American Colonies: I. New England*, 26 *SCHOOL REV.* 731, 740 n.1 (1918).

159. *See* 2 RECORDS OF THE GOVERNOR AND COMPANY OF MASSACHUSETTS BAY IN NEW ENGLAND 6 (Nathaniel B. Shurtleff, M.D. ed., Press of William White 1853).

160. Erica Frankenberg & Chinh Q. Le, *The Post-Parents Involved Challenge: Confronting Extralegal Obstacles to Integration*, 69 *OHIO ST. L.J.* 1015, 1034–35 (2008).

citizens to cast informed votes and to participate knowingly and effectively in the democracy.¹⁶¹ To that end, the state established compulsory education laws and provided citizens with free education.¹⁶² Common school founders such as Horace Mann envisioned public education as providing crucial citizenship training functions because they believed that an effective democracy required citizens with proper civic virtue.¹⁶³ Common school founders also believed that public education could provide citizens with a “common culture and a sense of shared membership in the community.”¹⁶⁴ The common culture and shared sense membership was seen as necessary to prevent class conflict that was arising from the growth of capitalism. In that vein, common school founders believed that public education could serve as the “great equalizer” of men.¹⁶⁵ Thus, the common school founders situated education as benefiting the public through citizen training and ensuring that all citizens were equally educated in order to avoid class conflict.¹⁶⁶

161. *Id.*

162. PATRICK J. RYAN, *HISTORICAL FOUNDATIONS OF PUBLIC EDUCATION IN AMERICA* 256 (1965) (noting that during the 1800s and early 1900s, public education was made available at no cost by all states. The chief reason compelling the provision of free public education was that it was seen as undemocratic to require students to pay since “education for citizenship in a republic was not only a vested right of the individual but also a social obligation”); ALLAN S. HORLICK, *PATRICIANS, PROFESSORS, AND PUBLIC SCHOOLS: THE ORIGINS OF MODERN EDUCATIONAL THOUGHT IN AMERICA* 15 (1994).

163. See David F. Labaree, *Public Goods, Private Goods: The American Struggle Over Educational Goals*, 34 *AM. EDUC. RES. J.* 39, 44 (1997) (explaining that early common school reformers saw citizen training as a key reason to provide public education and quoting Horace Mann as saying “it is a very laborious thing to make Republicans; and woe to the republic that rests upon no better foundations than ignorance, selfishness, and passion”) [hereinafter Labaree, *Public Goods*].

164. *Id.* at 45.

165. See Horace Mann, *Report for 1848*, in *ANNUAL REPORTS ON EDUCATION* 668–69 (1872) (“Now, surely nothing but universal education can counterwork this tendency to the domination of capital and the servility of labor. If one class possesses all the wealth and the education, while the residue of society is ignorant and poor, it matters not by what name the relation between them may be called: the latter, in fact and in truth, will be the servile dependents and subjects of the former. But, if education be equably diffused, it will draw property after it by the strongest of all attractions. . . . Education then, beyond all other devices of human origin, is a great equalizer of the conditions of men—the balance wheel of the social machinery.”).

166. See Labaree, *Public Goods*, *supra* note 163, at 44–45; Frankenberg & Le, *supra* note 160, at 1034–37. Notably, the common school founders’ vision of equally educating all citizens did not apply to all demographics of the citizenry. Instead, the vision was limited to “a select

2. Social Mobility Rationale

The “social mobility” or “social advantage” normative justification for public education also existed but came to particular prominence during the late 1800s. At that time, a group of education reformers led by elite members of society believed that “education had to be made appropriate to life chances”¹⁶⁷ and to prepare “students for their future social roles.”¹⁶⁸ The impetus behind this change was the development of the industrial economy and the desire for elites to maintain their place of privilege within the industrial economy.¹⁶⁹

Elitist educational reformers pushed for a more stratified system of public education with varying skills being taught to different students, rather than the universal curriculum advocated by the common school founders.¹⁷⁰ The stratified system of education required students to “climb upward through a sequence of grade levels and graded institutions and to face an increasing risk of elimination as they approach the higher levels of the system.”¹⁷¹ Those who were able to navigate their way through the stratified system of education were able to obtain more credentials, which allowed them to obtain better jobs and a higher social status.¹⁷² This

group of those residing in the U.S., namely white, male landowners.” FRANKENBERG ET AL., *supra* note 124, at 1034.

167. HORLICK, *supra* note 162, at 3, 10–22.

168. Labaree, *Consuming*, *supra* note 154, at 385.

169. HORLICK, *supra* note 162, at 51–54 (contrasting the views of the common school founders who believed that universal education was necessary in order to enhance the intellectual and moral level of all Americans in order to make a more effective republic, with the elitist education reformist of the late 1800s/early 1900s who believed that a social and cultural elite was necessary to give direction to society. Elitist education reformers believed that the industrial economy which was characterized by “tremendous capacity for productive output and frightening confrontations between capital and labor” which lead to high rates of social mobility. The elites believed that stratification in the skills taught would help them to maintain their privileged place in society).

170. HORLICK, *supra* note 162, at 10–22. *See also* Labaree, *Public Goods*, *supra* note 163, at 51 (commenting that “[t]he last thing that a socially mobile educational consumer wants out of education is the kind of equal educational outcome produced in the name of democratic equality”).

171. Labaree, *Public Goods*, *supra* note 163, at 52.

172. *See* Labaree, *Consuming*, *supra* note 154, at 390–92 (arguing that elitist education reformers “turned the common school, where everyone underwent the same educational

stratified system of education favored (and continues to favor) elites because of the privileged station from which they began.¹⁷³

To be sure, these two visions of public education—education for the health of the democracy and education for purposes of individual social mobility—are contrasting visions. The view of education as necessary for the health of the democracy situates education as a public good—or a good “where benefits are enjoyed by all members of the community, whether or not they actually contributed to the production of the good.”¹⁷⁴ As a result, the individual social mobility rationale suggests that education is private property and that excluding people from consuming it can assist the individual in differentiating themselves and moving-up the social and class ladders.

While the democracy and social mobility rationales are contrasting they have until recently co-existed with one another.¹⁷⁵ However, the normative justifications for providing public education have slowly been re-conceptualized through market-based reforms to public education such that the vision of public education for social mobility purposes dominates the vision of public education for the health of the democracy.¹⁷⁶ This shift is explored in the part that follows.

experience, into the uncommon school where everyone entered the same institution but then pursued different programs”).

173. Labaree, *Public Goods*, *supra* note 163, at 52 (quoting RUSSELL COLLINS, *THE CREDENTIAL SOCIETY: AN HISTORICAL SOCIOLOGY OF EDUCATION AND STRATIFICATION* 183 (Academic Press 1979) (“As education has become more available, the children of higher social classes have increased their schooling in the same proportions as children of the lower social classes have increased theirs; hence the ratios of relative educational attainment by social classes [remain] constant.”)).

174. Labaree, *Public Goods*, *supra* note 163, at 51.

175. *Id.*

176. *See, e.g.*, Frankenberg & Le, *supra* note 160, at 1036–37 (“Originally conceived as a system of ‘common schools’ that teach civics and citizenship and that are supposed to erase inequality, many now perceive that public schools serve essentially as college prep schools and the center of elite, merit-based learning that ‘separate the wheat from the chaff,’ and as a means for *private* advancement.”); Labaree, *Public Goods*, *supra* note 163, at 73 (“[T]he increasing hegemony of the mobility goal and its narrow consumer-based approach to education have led to the reconceptualization of education as a purely private good.”)).

B. Market-Based Reforms Allow the Social Mobility Justification for Public Education to Dominate

The social mobility justification for public education suggests that the purpose of public schools is to “provide students with the educational credentials they need in order to get ahead.”¹⁷⁷ Put another way, it envisions public education as necessary in order to provide individuals with a vehicle they can use to obtain economic security. Though the social mobility justification for public education has always existed, it became particularly acute and dominant when the American economy shifted from a manufacturing-based to a knowledge-based one.¹⁷⁸ This is the case because the manufacturing economy, for the most part, required its workers to possess very highly specialized skills that were specific to different manufacturing industries and could be taught on the job.¹⁷⁹ As a result, only a general high school diploma, not a post-secondary education, was necessary in order to obtain a well-paying job that would allow a person to maintain a middle-class lifestyle.¹⁸⁰

In the new knowledge-based economy on the other hand, “knowledge is a commodity that when exploited can reap tangible benefits upon the possessor.”¹⁸¹ In particular, the kind of knowledge that is necessary in order to obtain most jobs, particularly well-paying ones, in the new knowledge-based economy is a college or advanced degree.¹⁸² To that end, the number of people with at least some

177. Labaree, *Public Goods*, *supra* note 163, at 50.

178. *See generally* RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS, REVISITED* (2012) (arguing that a creative class composed of scientists, technologists, innovators and other knowledge based professionals had become the central force in the American economy propelling economic growth).

179. ANTHONY CARNEVALE & DONNA DESROCHERS, OFFICE OF VOCATIONAL AND ADULT EDUC., *THE MISSING MIDDLE: ALIGNING EDUCATION AND THE KNOWLEDGE ECONOMY 1* (Apr. 4, 2002), *available at* <http://files.eric.ed.gov/fulltext/ED465092.pdf>.

180. *Id.* at 5 (describing the types of and availability of jobs in the manufacturing-based economy and noting that during that time period “people could start at the bottom and, without much formal education, work their way to the top” without much formal education).

181. Aaron N. Taylor, “*Your Results May Vary*”: *Protecting Students and Taxpayers Through Tighter Regulation of Proprietary School Representations*, 62 ADMIN. L. REV. 729, 744 (2010).

182. CARNEVALE & DESROCHERS, *supra* note 179, at 6 (describing the change in the education level required to obtain a job in the knowledge based economy and noting that the bar is set particularly high with most jobs requiring some college or a bachelor’s degree).

college or a college degree has increased substantially.¹⁸³ As a result, it is becoming increasingly important in the new knowledge based economy for individuals to not only have college experience or a degree, but to obtain that degree from a highly regarded college or university.¹⁸⁴ This has in turn led to college admission at all levels, but especially the most elite colleges, becoming increasingly competitive.¹⁸⁵

The aforementioned shift in the kinds of education necessary to obtain economic security and social mobility in the new knowledge-based economy is having a profound impact on elementary and secondary public education in America. Indeed, because of the importance of a college degree to the new knowledge-based economy, public elementary and secondary schools are increasingly conceptualized as necessary launching pads to help students get into the best colleges and universities.¹⁸⁶ As a result, not all public schools are created equally; rather there is *intentional* stratification amongst public schools.

183. Catherine Rampell, *Data Reveal a Rise in College Degrees Among Americans*, N.Y. TIMES (June 12, 2013), http://www.nytimes.com/2013/06/13/education/a-sharp-rise-in-americans-with-college-degrees.html?_r=0 (noting the increasing number of Americans with a college degree and finding that “college attendance has increased in the past decade partly because of the new types of jobs that have been created in the digital age, which have increased the wage gap between degree holders and everyone else”).

184. See Kevin Carey, *Gaps in Earnings Stand Out in Release of College Data*, N.Y. TIMES (Sept. 13, 2015), <http://www.nytimes.com/2015/09/14/upshot/gaps-in-alumni-earnings-stand-out-in-release-of-college-data.html> (finding that “students who enroll in wealthy, elite colleges earn more than those who do not”); Jordan Weissmann, *Does It Matter Where You go to College?*, THE ATLANTIC (May 17, 2012), <http://www.theatlantic.com/business/archive/2012/05/does-it-matter-where-you-go-to-college/257227/> (analyzing data showing a correlation between college and prestige and future earnings).

185. Nick Anderson, *Ivy League Admission Rate: 8-Point-Something Percent*, WASH. POST. (Mar. 28, 2014), https://www.washingtonpost.com/local/education/the-ivy-league-admission-rate-8-point-something-something-percent/2014/03/28/558400de-b67e-11e3-8cc3-d4bf596577eb_story.html (reporting that the admission rate for the elite Ivy League schools was approximately 8.9%).

186. While the subject of this Article is public schools, private schools also play a role in conceptualizing the purpose of education more broadly as being for social mobility purposes. In fact, affluent students who do not attend well-regarded public schools instead attend private elementary and secondary schools that have selective admissions processes and charge tuition rates that approximate or rival the tuition rate at selective colleges. See generally Anna Bahr, *When Getting Into College Starts at 3*, N.Y. TIMES (July 29, 2014), <http://www.nytimes.com/2014/07/30/upshot/when-the-college-admissions-battle-starts-at-age-3.html>.

Stratification is not only deemed appropriate but necessary if the purpose of public education is conceptualized as providing students with the credentials they need to “get ahead” in the knowledge based economy. When social mobility is the primary goal of public education “[t]he benefits of education are understood to be *selective* and *differential* rather than collective and equal.”¹⁸⁷ That leads to public education being “structured in such a manner that the social benefits of education are allocated differently, with some students receiving more than others.”¹⁸⁸ Put another way, schools are differentiated so that some students will be able to obtain an education that sets them apart from others and gives them a credential that makes them more attractive than another student, particularly in the quest for admission to selective colleges.

Market-based reforms exploit this differentiated system of education by requiring students to fight for admittance into the limited number of quality charter, magnet schools or voucher programs and not enacting reforms to schools that improve *all* schools. For poor and minority students who are often locked into neighborhoods where the traditional public schools are low quality, market-based reforms do not offer a meaningful opportunity for the majority of such students to obtain a quality education. Yet, they are allowed to serve as the predominate form of public school reform because we now conceptualize public education as a private rather than public good that is primarily necessary for social mobility purposes. To that end, there must be winners and losers in the race for quality public education. Given the vulnerable status of poor and minority students, they often become the losers. To be sure, market-based reforms are not all bad and should not be discounted altogether. However, they must not be permitted to remain the sole basis of public school reform. The part that follows outlines important public school reform alternatives that could be enacted along with market-based reforms in order to shift public education back to being a public good.

187. Labaree, *Public Goods*, *supra* note 163, at 51.

188. *Id.* at 52.

IV. EXPANDING THE REFORM AGENDA: ALTERNATIVES TO MARKET-BASED REFORMS

The decline of judicially-based remedies as a means of improving educational opportunities for poor and minority students is understandable given the limitations discussed in Part I. However, the saturation of the reform agenda with primarily market-based reforms is misguided. The primarily market-based reform agenda has a detrimental impact on the educational opportunities available to poor and minority student because it results in a quality education being conceptualized as a private good. As with most private goods, the most vulnerable members of society—in this case poor and minority students—have a difficult time obtaining it. Given the positive externalities associated with a quality public education, it is important that measures be taken to ensure that a quality public education remains a public, not a private good. To that end, this part provides a non-exhaustive summary of two expansive potential reforms that could be enacted in greater scope alongside market-based reforms in order to ensure that a quality public education remains a public good.

First, a primary reason that poor and minority students are unable to obtain access to a quality education is because residence is linked with school assignment.¹⁸⁹ Market-based reforms change this paradigm for a shallow subset of poor and minority students who are able to use the reforms to get into a quality school outside of their neighborhood school. The limited scope of these reforms, however, makes them an insufficient reform remedy. An alternative reform measure would be to enact reforms that allow for more inter-district mobility. Because of the high levels of racial and economic segregation between districts, and the harms associated with racially and economically segregated schools, reform that tightly links school attendance with residence is critical. Enacting some forms of regionalism in public school assignments would help to dislodge the current monopoly that more affluent and typically white students have on quality public education.¹⁹⁰

189. Wilson, *Leveling Localism*, *supra* note 8, at 645–49; Aaron Saiger, *The School District Boundary Line Problem*, 42 URB. LAW. 495, 501–07 (2010).

190. See Wilson, *Regionalism*, *supra* note 39, at 1465–68 (describing successful forms of

In addition to regionalism, another type of reform that could be enacted to lessen the connection between residence and school attendance is controlled choice. Controlled choice is a system of school assignment in which “rather than assign[ing] students to a zoned neighborhood school, controlled choice allows parents to rank their school preferences across a district—and then uses a computer algorithm to balance those choices to achieve a diverse mix of students in each school.”¹⁹¹ Successful controlled choice programs have been enacted in places like Wake County, North Carolina; Cambridge, Massachusetts; and San Francisco, California.¹⁹² Enacting programs that delink residence from school attendance through regionalism or controlled choice would broaden the ability of all children to obtain a quality public education thereby situating a quality public education closer to that of a public rather than private good.

Second, as other scholars have noted, most low-performing schools in urban areas are low-performing because, among other things, students and their families are dealing with a plethora of non-school issues that make learning difficult.¹⁹³ A better alternative might be to replace low-performing schools with Community Based Schools (CBS). CBSs are schools that partner with other public service providers to provide not just educational services, but also much needed support to distressed communities in areas such as health care, counseling, adult education, and cultural events.¹⁹⁴ For

regionalist education governance structures that have been enacted); ORFIELD & FRANKENBERG, *supra* note 25, at 35 (arguing for expansion of regionalism in public education as a reform that would vastly improve educational opportunities for poor and minority students).

191. Brad Lander & Ritchie Torres, *What Would It Take to Integrate Our Schools*, N.Y. TIMES (Dec. 15, 2015), http://www.nytimes.com/2015/12/15/opinion/what-would-it-take-to-integrate-our-schools.html?_r=0.

192. See Eric Schulzke, ‘Controlled Choice’: Does Mixing Kids Based on Family Income Improve Education, DESERT NAT’L NEWS (Apr. 10, 2014), <http://national.deseretnews.com/article/1265/controlled-choice-does-mixing-kids-based-on-family-income-improve-education.html>.

193. See, e.g., Black, *Civil Rights*, *supra* note 3, at 1759–60.

194. See, e.g., *What Is a Community School?*, COALITION FOR COMMUNITY SCHS. http://www.communityschools.org/aboutschools/what_is_a_community_school.aspx (last visited Nov. 5, 2015) (describing community schools as a “place and set of partnerships between the school and other community resources” and noting that community schools “bring

example, in Cincinnati, Ohio, the Cincinnati School District revamped its failing schools with CBSs called “community learning centers.”¹⁹⁵ The community learning centers in Cincinnati have shown modest but important progress. Improved graduation rates, test scores, attendance, and community revitalization have been a hallmark of the community learning center expansion in Cincinnati.¹⁹⁶ Some forms of CBSs have been successfully implemented in other high poverty urban school systems.¹⁹⁷ A reform agenda that includes CBSs would assist in re-conceptualizing a quality public education as a public good rather than a private good.

CONCLUSION

This Article argues that market-based reforms as the primary method of reforming schools for poor and minority students situates a quality education as a private good rather than a public good. It suggests that they do so through their emphasis on the individual rather than collective benefits of public education and by putting the onus on individual parents and students rather than the state to provide a quality education. It further suggests that the enactment of wholesale market-based reforms results in social mobility rather than democratic values being normatively conceptualized as the primary

together many partners to offer a range of supports and opportunities to children, youth, families and communities”).

195. *Bylaws & Policies § 7500*, CINCINNATI CITY SCH. DIST, <http://community.cps-k12.org/sites/boardpolicies/7000%20Property/7500%20Policy%20Community%20Learning%20Centers.pdf> (last visited Nov. 5, 2015) (“[E]ach school should also be a community learning center in which a variety of partners shall offer academic programs, enrichment activities, and support to students, families, and community members before and after school as well as during the evenings and on weekends throughout the calendar year.”).

196. See Javier C. Hernández, *Mayoral Candidates See Cincinnati as a Model for New York Schools*, N.Y. TIMES (Aug. 11, 2013), http://www.nytimes.com/2013/08/12/nyregion/candidates-see-cincinnati-as-model-for-new-york-schools.html?_r=0 (“[A]fter years of poor performance and an exodus of middle-class families to the suburbs, Cincinnati has made some of the greatest gains in test scores in Ohio in recent years, even though it lags behind state averages. School officials here credit the city’s embrace of the community-schools model, which is now fully in place in 34 of 55 schools in the system.”).

197. *Community School—Results that Turn Around Failing Schools: Test Scores, Attendance, Graduation and College-Going Rates*, COALITION FOR COMMUNITY SCHS. 2 (May 2010), http://www.communityschools.org/assets/1/AssetManager/Turning_Around_Schools_CS_Results2.pdf (describing successful implementation of community schools in New York, New York; Providence, Rhode Island; and Tukwila, Washington).

purpose of public education. This results in a stratified system of public education which is normatively considered appropriate but operates to the disadvantage of poor and minority students. In order to re-conceptualize public education as public rather than private good, the Article proposes enacting reforms that decouple school attendance from residence through regionalism and controlled choice. It also proposes enacting reforms such as community-based schools that actually improve neighborhood schools located in predominately poor and minority areas. Enacting such reforms, in addition to market-based reforms, will help to ensure that a quality public education remains a public rather than private good.