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Martha Minow

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LECTURE

REFORMING SCHOOL REFORM

Martha Minow

With crime seeming to be more under control, education is the primary domestic policy priority for politicians and voters in the United States at the end of the twentieth century. Bold proposals to improve education for children aged three to eighteen have momentum. Governments at all levels are undertaking reforms. Even that elusive “public” seems engaged. The pace of sweeping innovation is so great that I am reminded frequently of Jean Kerr’s insight: “[I]f you can keep your head when all about you are losing theirs, it’s just possible you haven’t grasped the situation.”¹

What is the problem that the current reforms seek to address? American public schools are commonly described as “in crisis,” or failing to generate adequate levels of achievement.² Another persistent charge addresses the disparate quality of educational opportunities between cities and suburbs, between public and private, and across other familiar social divisions. The contemporary push for reforms thus mirrors longstanding, potentially conflicting aspirations for American schooling: quality and equality. Universally available inadequate schooling would offer a tragic sort of equality; thus far, however, society has had far more success generating individual

* Professor, Harvard Law School. A version of this Article was delivered as the Robert L. Levin Distinguished Lecture at Fordham Law School on April 22, 1999. Thanks to members of the Fordham community and the Fordham Law Review, attendees at the Harvard Law School Faculty Summer Colloquium, and especially Elena Kagan, Todd Rakoff, Joe Singer, and Richard Weissbourd for their helpful suggestions.

1. Jean Kerr, *Please Don't Eat the Daisies* 13 (1957).

2. The contemporary sense of school crisis is traced by some to the 1983 publication of *A Nation At Risk*, which called for accountability and higher expectations while arguing that U.S. schools fall far short of international counterparts. See National Commission on Excellence in Education, *A Nation At Risk: The Imperative for Educational Reform* 5-14, 23-33 (1983); see also Martin Gerry, *Service Integration and Beyond: Implications for Lawyers and Their Training, in Law and School Reform: Six Strategies for Promoting Educational Equity* 244, 247 (Jay P. Heubert ed., 1999) (tracing contemporary school reform to the publication of *A Nation At Risk*). Although some argue that the claim that American schools are in crisis is exaggerated, the insufficiencies of contemporary school models and practice are widely acknowledged. See Linda Darling-Hammond, *The Right to Learn: A Blueprint for Creating Schools that Work* 22-31 (1997).

schools of high quality rather than widespread high quality schooling.

The new reforms gather under the banner of "choice."³ Rather than assigning students to public schools based on the location of their residence or some other characteristic, choice proposals would let parents and guardians select a school. In so doing, they seek to generate competitive pressures to promote higher quality schooling overall. In addition, choice proposals are said to afford some measure of equality. Voucher plans are meant to grant to poor and low-income families some of the latitude for selecting schools already enjoyed by families with enough resources to move to high quality suburban districts or to opt for private schools.⁴ Charter plans, offering resources to entrepreneurial groups interested in running innovative public schools, are intended to offer high quality options within the public system.⁵ Vouchers and charters also risk perpetuating inequality by excluding and segregating children with special needs, skimming from public schools those families motivated enough to take advantage of voucher and charter programs, and diverting resources from the project of improving the entire public school system.

In some respects, choice reforms try to redress failures of the last wave of school reform, the law-driven equality movement. Starting with racial desegregation, the push for equality expanded to gender equity, education rights for children with disabilities, bilingual and bi-cultural programs for English-language-learners, school finance reform, and even equal access for religious as well as non-religious student activities in public school settings. Each of these efforts reflects an underlying impetus to ensure equal opportunities for individual students, regardless of their race, gender, disability, linguistic and national background, economic class, or religion. Another way to perceive these reforms is to see them as extensions into our schools of the deep social struggles over group status and equality that pervade other sectors of the society. Under either

3. For examples of the proliferating literature on choice, see John E. Chubb & Terry M. Moe, *Politics, Markets and America's Schools* (1990) and Richard F. Elmore, *Choice as an Instrument of Public Policy: Evidence from Education and Health Care*, in 1 *Choice and Control in American Education: The Theory of Choice and Control in Education* 285 (William H. Clune & John F. Witte eds., 1990). For a discussion of classic early efforts to advance vouchers in particular, see John E. Coons & Stephen D. Sugarman, *Education By Choice: The Case for Family Control* (1978) and Milton Friedman, *Capitalism and Freedom* 85-107 (1962).

4. See Chubb & Moe, *supra* note 3, at 217-18; Matthew Miller, *A Bold Experiment to Fix City Schools*, *The Atlantic Monthly*, July 1999, at 15, 15-17.

5. See Phillip T. K. Daniel, *A Comprehensive Analysis of Educational Choice: Can the Polemic of Legal Problems be Overcome?*, 43 *DePaul L. Rev.* 1, 17 (1993). See generally Priscilla Wohlstetter, *Education by Charter*, in *School-Based Management: Organizing for High Performance* 139 (Susan Albers Morhman & Priscilla Wohlstetter et al. eds., 1994) (examining the potential of localized management in the charter schools of the United States and England).

formulation, these equality-based reforms absorbed enormous energy and dramatically reshaped schools and school practices around the country—with results both admirable and less than admirable.

Specific critiques of versions of school desegregation, special education for children with disabilities, school finance plans, bilingual education, and other equality reforms repeatedly appear in contemporary debates over reform. Yet the choice movement most immediately affects the equality reforms by rejecting their central features: centralized student assignment and bureaucratic compliance mechanisms. It may be coincidence, but the choice movement urges greater parental and guardian control over where and with whom each child will be educated after decades of desegregation orders and following more recent efforts to include children with disabilities in mainstream classrooms. Voucher and charter programs do not focus on either specific equality initiatives or their categorical approaches. Racial desegregation, school finance litigation, special education, and bilingual education may be once proud names of prior school reforms, but now they often are blamed, directly or indirectly, for the bureaucratization, fragmentation, and misallocation that needs redress.

Will today's reforms themselves generate the pressing need for future reforms twenty or thirty years hence? I worry that the choice movement will accelerate the already zany tendency noted by Linda Darling-Hammond, a wise observer of schools, who commented, "[s]chools chew up and spit out undigested reforms on a regular basis. This creates a sense within schools that whatever the innovation, 'this too will pass'—and that it probably should."⁶ Often it is difficult to evaluate education reforms because they come fast and furiously, with teachers and administrators sometimes participating and sometimes resisting. Schools are littered with the carcasses of partially or wholly abandoned school reforms. We have had school-based budgeting, computer-based learning, whole language reading, and back-to-basics. More recently, the standards movement has called for high expectations and the frequent use of standardized evaluations. It oversimplifies matters to suggest that new school reforms simply react to old ones. Yet the new reforms both implicitly and explicitly reject the older methods. In simple terms, the new reforms emphasize competition and standards, choice and incentives. The older efforts, framed by rights and remedies, focused on equality and fairness. The new reforms include valuable strategies but also faulty assumptions and dangers. The old reforms generated cumbersome bureaucracies and sometimes counterproductive court orders, but also provided fundamental values and protections.

Can we construct reform not by reacting against a prior wave, but

6. Darling-Hammond, *supra* note 2, at 22.

instead by building upon it? Can we challenge what it means to reform schools by reforming reform? The very phrase, "reforming reform," is gaining currency. It appears in contemporary efforts to fix what seems to have gone wrong with campaign finance reforms, Eastern European democratization, welfare reform, juvenile justice reform, bankruptcy reform, as well as school reform.⁷ Yet to be more than just another round of change, reformed reforms must anticipate what are usually the unanticipated consequences of the fresh turn of reforms. This can be done without waiting until current initiatives prompt still another demand for starting anew. It means starting with a sober evaluation of the claims and assumptions of the new reform movement. At the very least, this will reduce a new round of false promises and disappointments. It also means resisting the temptation to neglect goals that remain important because of the underrealization of other goals. Reforming reform involves learning to build constructively on the past while putting in place the capacity to learn from new initiatives.

For school reform, the relationship between equality and quality deserves sustained and simultaneous attention. Equality reforms hit the barriers of reaction, such as "white flight" in the face of desegregation orders and English-only referenda that have halted bilingual education in some communities. In trying to create remedies for unequal education along the lines of race, gender, language, disability, and financial inputs, the equality reforms also confronted the basic difficulties in elevating the quality of instruction and educational experiences. It makes sense, therefore, for current reforms to embrace the goal of quality through a combination of competition through choice mechanisms, and high expectations through standards. Yet the new reforms expose children to new risks of inequality by leaving some students in dismal existing schools and by making crucial to the selection of children's schools the parents' and guardians' motivation and knowledge—qualities that are most

7. See, e.g., R. Glen Ayers, Jr., *Reforming the Reform Act: Should the Bankruptcy Reform Act of 1978 Be Amended to Limit the Availability of Discharges to Consumers?*, 17 *New Eng. L. Rev.* 719, 719 (1982) (offering a critical analysis of the proposed bankruptcy improvements act of 1981); Ronald Daniels & Robert Howse, *Reforming the Reform Process: A Critique of Proposals for Privatization in Central and Eastern Europe*, 25 *N.Y.U. J. Int'l L. & Pol.* 27 (1992) (assessing the impact of economic reforms in Central and Eastern Europe); Kimit Muston, *Valley Perspective: Dire Warnings, Brought to You by Democracy Lite*, *L.A. Times*, Apr. 12, 1998, at B14 (considering reforms of Los Angeles's reform charter); *Reforming Reform*, *Denver Post*, Apr. 30, 1998, at A13 (discussing a bill to allow leftover campaign finance money to pay for constituent mailings); *Reforming the Reform: Heed Calls to Fix the Welfare Law*, *Star Trib. (Minneapolis-St. Paul)*, Feb. 9, 1997, at A28 (analyzing recent welfare reform measures); see also Phyllis Eisen, *Where Do We Stand Vis-a-Vis Our Major Competitors in the Development of Human Resources*, 22 *Can.-U.S. L.J.* 63, 65 (1996) (commenting that business and policy makers addressing human resources around the world "were reforming their reforms or they were reforming the reforms that they had already reformed").

certainly not equally distributed.

In hopes of preventing yet another reform movement's demise and facile replacement by a similar successor, I here explore the limitations of both the choice and equality reforms. I identify potential common ground and synergies of present and past school improvement struggles. I will end by suggesting ways that legislators and other public bodies can craft choice reforms that sustain the commitments to both equality and quality.

I. THE CHOICE MOVEMENT

School choice is a broad phrase which can encompass many kinds of proposals and programs, some of which are quite inconsistent with one another. One cluster of programs works exclusively within the public system. Here, choice could refer to modest opportunities for parents and guardians to seek to enroll a child in one of a handful of specialized, or "magnet," schools within a public school system. It could refer to more ambitious efforts to de-link residence from school assignment, such as the system-wide controlled choice plan of Cambridge, Massachusetts.⁸ In this approach, parents rank desired schools throughout the system, and a complex algorithm produces school assignments by combining private preferences with targets for racial and gender mixing, along with special weights for families seeking to keep siblings in the same school or seeking to enroll in the neighborhood school. Choice within public school systems also might involve limited cross-district enrollments, such as the Metco Program offered in Boston to enable inner city residents to enroll in participating suburban schools on a limited basis.⁹

The newest element of choice within the public system is the charter school idea. Established by a chartering agency, such as a legislature or municipality, these independent schools are intended to operate with public funds but outside the regulations of the public system. Actually, authorizing legislation in different jurisdictions varies

8. See Karla A. Turekian, Note and Comment, *Traversing the Minefields of Education Reform: The Legality of Charter Schools*, 29 Conn. L. Rev. 1365, 1378 (1997). See generally William Haft, *Charter Schools and the Nineteenth Century Corporation: A Match Made in the Public Interest*, 30 Ariz. St. L.J. 1023, 1024, 1035 (1998) (analyzing charter school reform through the nineteenth century public/private model of a corporation).

9. See Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 Minn. L. Rev. 825, 870 & n.148 (1996); see also Mary Jane Lee, Note, *How Sheff Revives Brown: Reconsidering Desegregation's Role in Creating Educational Opportunity*, 74 N.Y.U. L. Rev. 485, 502, 512-27 (assessing the cross-district enrollment opportunities available in Connecticut after the Connecticut Supreme Court's 1996 ruling in *Sheff v. O'Neill*). Economist Caroline Hoxby argues that in areas where public schools face the competition of metropolitan transfer programs and parochial schools, public school students obtain higher test scores, and thus competition improves schooling. See John Cassidy, *Schools Are Her Business*, *The New Yorker*, Oct. 18, 1999, at 144, 153.

considerably in the degree of autonomy charter schools are granted. Some governmental units exempt these schools from otherwise prevailing collective bargaining agreements, curricular requirements, and spending requirements, while others impose some or all of these obligations.¹⁰ Typically awarded on a competitive basis to entrepreneurial groups, charters for such schools usually have a limited term before which they must be either renewed or else terminated by the authorizing authority.¹¹ Charter school arrangements also vary in the degree to which they specify how school admissions are to be governed. Some authorizing legislation does not address whether charter schools may select among applicants and, if so, on what bases.

A different set of choice initiatives cross the border between public and private systems. Typically using the device of vouchers, these initiatives offer public monetary payments to enable families to enroll their children in private schools. One kind of program extends only to secular, non-parochial private schools.¹² Another, considerably more controversial kind allows the vouchers to be used in any approved private school, including parochial schools.¹³ More than 3700 students in Cleveland—about five percent of the public school enrollment—use public vouchers to pay for private schooling. The vast majority of these students attend religious schools.¹⁴ However, the usual amount set for a voucher is insufficient to cover the costs of the most elite, selective private schools. Instead, the voucher total approximates the tuition level set by parochial schools, a tuition level that reflects subsidies from other sources.¹⁵ Some parents, of course, gladly choose

10. A challenge to such a plan, brought by parents who wished to use the voucher money to pay for sectarian schools, recently lost in the Maine Supreme Court. *See Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 147 (Me. 1999).

11. The leading examples here are Cleveland, Ohio, and Milwaukee, Wisconsin. Both plans have withstood state constitutional challenges predicated on concerns about state support of religion. *See Simmons-Harris v. Goff*, 711 N.E.2d 203, 209 (Ohio 1999); *Jackson v. Benson*, 578 N.W.2d 602, 630 (Wis. 1998), *cert. denied*, 119 S. Ct. 466 (1998).

12. *See Bagley*, 728 A.2d at 133-35 (withstanding free-exercise challenge).

13. *See Simmons-Harris*, 711 N.E.2d at 210; *Jackson*, 578 N.W.2d at 607-10.

14. Adam Cohen, *A First Report Card on Vouchers*, *Time*, Apr. 26, 1999, at 36, 36. The Cleveland plan, for example, targets low-income children. *See Margaret A. Nero, Case Comment, The Cleveland Scholarship and Tutoring Program: Why Voucher Programs Do Not Violate the Establishment Clause*, 58 Ohio St. L.J. 1103, 1103 (1997) (describing the Cleveland Plan). Universal plans, unrestricted by income, are often criticized for remaining unavailable to low-income families where the voucher would not cover the total cost of private education. *See Dominick Cirelli, Jr., Utilizing School Voucher Programs to Remedy School Financing Problems*, 30 Akron L. Rev. 469, 497 (1997); Molly S. McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, in *Law and School Reform: Six Strategies for Promoting Educational Equity*, *supra* note 2, at 88, 120-128.

15. In Cleveland, for example, the voucher level is nowhere close to paying for schooling at the most prestigious secular private schools, which charge nearly six times as much as the amount of the voucher. The voucher basically permits working

parochial schools precisely for the instruction in religion and values, or because they hope that the school will offer discipline and social mobility. But for others, the religious schools are simply the one available option to get out of failing public schools. Voucher programs could vary the degree to which they target low-income families as recipients as opposed to all families.¹⁶

The movement for educational choice may seem modest or almost marginal because it often involves small-scale experiments. Yet actually, the choice movement involves a radical challenge to the common school ideal that generated public schools and compulsory schooling from the nineteenth through the early part of the twentieth century. As Seymour Sarason recently observed, "charter schools rest on a devastating critique of the present system because it implies that for a school meaningfully to innovate to achieve more desirable outcomes, it must be free of the usual rules, regulations, and traditions of a school system."¹⁷ If real innovation and desirable results are possible only for schools that diverge from the public school system, then the system itself is the problem. The choice movement thus represents a dramatic departure from almost all prior school reforms. Rather than aspiring to create the "one best system" of public schooling that is run by experts for all children, charter, magnet, and voucher-based education proposals seek to multiply options, promote competition, and concentrate the mechanisms for evaluation and accountability in the hands of individual parents. In theory, some measure of comparability and public accountability would then be sought through general, even legislated, standards to set expectations and methods for assessment.

The public school system itself is seen as the main source of obstacles to innovation and good outcomes. Injecting private choice, coupled with public standards, into the schooling business is supposed to bypass the bureaucracies of mediocrity to produce higher quality schooling. Indeed, eight distinct assumptions underlie the pursuit of quality by those who advance choice:

(1) Competition will produce accountability. Schools that successfully secure student enrollments and waiting lists will do so

class and poor families to select parochial schools, which can keep tuition low because of charitable contributions and extremely low teacher salaries. See Nero, *supra* note 14, at 1111-12; see also *Education: Answered Prayer*, *The Economist*, Apr. 5, 1997, at 27, 27-28 ("Lower teachers' pay is the main reason why Catholic schools are cheaper [than public schools]"). In addition to direct church-based grants, parochial schools often have teachers and other staff who are not paid at market rates. See, e.g., Steve Kloehn, *Hales . . . More Than Just a School: In These Halls, Everyone is Family*, *Chi. Trib.*, June 2, 1996, at A1 (discussing the success of one inner-city Catholic high school in Chicago).

16. See McUsic, *supra* note 14, at 127-28.

17. Seymour B. Sarason, *Charter Schools: Another Flawed Educational Reform?* 18 (1998).

because they offer desirable educational programming. Successful schools will attract students and unsuccessful schools will lose theirs.

(2) Successful schools will grow and unsuccessful schools will shut down or change. Growth will occur as managers expand the number of seats they control or they will generate copycats; bad schools will fail to attract enrollments, and will lose sufficient funding to stay open and/or lose their public charters. Successful schools will spread their methods; charter schools, in particular, will develop innovative methods and will then export them to remaining public schools. In these ways, competition will generate an increasing, and ultimately sufficient, supply of quality options.

(3) Competition among schools will generate sufficient, relevant, and comparable information for assessing the quality of each school.

(4) Parents and guardians will seek out or otherwise obtain sufficient, relevant, and comparable information to enable them to make informed, responsive, and responsible choices. At best, a sufficient number will do so to signal to others how to choose or to trigger the appropriate signals to competing schools.

(5) Competition will cut through burdensome bureaucracy that stunts educational innovation and responsiveness to parents and students.¹⁸

(6) Competition will permit desirable pluralism in teaching methods and in the kinds of values and traditions to be emphasized. Pluralism of this sort is compatible with American commitments to the free exercise of religion and multiculturalism. Educational research suggests that quite different teaching philosophies can each sustain successful schools.

(7) Competition structured in these ways is well suited to the enterprise of educating children and youth.

(8) Other reform efforts have not worked, so more radical change is necessary, even if it involves abandoning features of the common school ideal.

These assumptions converge around confidence in market-style mechanisms to generate quality. They are anchored in faith in consumer sovereignty, skepticism about experts, and the turn to plural solutions to any dispute about substantive good. These themes may characterize what is distinctive in the American political and economic traditions, as well as the beliefs that appear globally triumphant at the close of the twentieth century.

There are significant problems with the fit between many of the

18. See Chubb & Moe, *supra* note 3, at 3-35. The fly-by-night diploma mill schools that cropped up in the wake of the G.I. Bill leads many observers to warn that school vouchers similarly will elicit unscrupulous offers of inadequate schools. See Gerald Uelman, *A 'Kick in the Pants' With Dangerous Ramifications*, L.A. Times, Oct. 15, 1993, at B9; Lionel Van Deerlin, *Shell Game: Vouchers Would Leave Some Schools in Chaos*, San Diego Union-Trib., Mar. 5, 1993, at B7.

particular assumptions and the context of schooling because with start-up schools, either granted charters or created to take advantage of vouchers, basic structural issues involved in setting-up effective organizations and programs interfere with the assumption that competition readily will generate a range of successful options. One of the few reports on charter schools, which are so new that there is not yet much of a track record, reviewed five charter schools one year after they started.¹⁹ It identified barriers to success and implementation problems in six areas. The newly founded charter schools had difficulties developing effective school governance, particularly in defining roles and processes for decision-making. Because teachers and parents often perform unfamiliar tasks in a charter school context, role definition problems were intense. The start-up schools had problems creating a school climate and culture of trust and respect, and devising manageable work loads for teachers and principals. They had trouble gaining a stable financial base to cover fixed and variable costs, overcoming isolation, and producing a believable and attractive public image to communities outside the school. Student diversity was either absent or a source of tension for the schools.²⁰

An experienced school researcher who reviewed this report concluded, "the creators, the state [education] department, and the political leadership simply did not appreciate the *predictable* problems the new settings would or may encounter."²¹ Ironically, perhaps, the very faith and excitement in newness that helps to animate the charter school movement works from indifference to well-documented problems faced by other reform efforts. Rather than trying to learn from prior school experiments, the new entrepreneurs seize the chance to make their own mistakes.

Aside from predictable start-up problems, most of the other fundamental assumptions behind choice proposals also are at best problematic. For example, the assumption that competition will produce accountability is flawed. Competition may produce schools that offer superficial attractions but little actual accountability. Unless admissions practices are regulated, schools may skim for students based on their ability to perform on standardized tests;²² schools may simply "teach to the test" rather than provide deep education; schools may opt for glitzy appearance, such as gleaming computers, rather than quality instruction, which is more difficult to

19. See Abby R. Weiss, *Going It Alone: A Study of Massachusetts Charter Schools 1-27* (1997).

20. See *id.*

21. Sarason, *supra* note 17, at 62.

22. Kevin B. Smith & Kenneth J. Meier, *The Case Against School Choice: Politics, Markets, and Fools* 56 (1995).

establish and to parade before potential customers.²³ Many vocational and technical schools have sprung up in response to college-level loan and grant programs; they offer overpromise and still survive, though students leave, because they draw in the next generation of gullible students.²⁴

Further, there are key analytic problems with the claim that successful schools and programs will expand and that failing ones will shut down or change. Growth, or scaling up, of successful schools or schooling methods is the single most notable gap in prior effective school reforms.²⁵ There is abundant knowledge about how to build one good school, yet we have poor or at best mixed results in spreading that knowledge to other school buildings. Schools do not operate with the kind of economies of scale that generate expansion in the private sector. Schooling is a retail, not wholesale business.²⁶ For-profit schools are inclined to expand without waiting for demonstrated success or developing a sensible strategy precisely because short-term expansion may look like success.

Market-style failures may significantly injure children caught in schools that shut down. In Milwaukee, Juanita Hill School, one of the schools receiving vouchers, closed its doors in the middle of its first year. Its students were dumped back into public schools.²⁷ The choice advocates simply assure that the schools that will close are the inadequate public schools. But public bureaucracies are notoriously poor at closing down bad schools. Inertia, pressure by teachers, unions, and parents, and the inadequacy of alternatives (in terms of quantity, quality, transportation, and other resources) contribute to the maintenance of inadequate schools. Thus, the assumption that failing schools will close or change is faulty.²⁸ Even if such schools

23. See, e.g., *In '96, Phoenix Built for Future: Renovations, New Structures Led Changes*, Ariz. Republic/Phoenix Gazette, Jan. 1, 1997, § 4 (Central Phoenix Community), at 1 (noting that a fledgling charter school is closing its doors despite a glitzy opening). The danger of fly-by-night schools opening to take advantage of public dollars has already been demonstrated by the GI Bill. See *World War II: 50 Years Ago Today*, St. Petersburg Times, May 31, 1995, at A4.

24. See Smith & Meier, *supra* note 22, at 28-29.

25. See Richard Weissbourd, *The Vulnerable Child* 171-84 (1996). Robert Slavin's Success for All program offers one of the most impressive efforts at scale-up, but the replication problem remains difficult. See Lisbeth B. Schorr, *Common Purpose* 58-60 (1997). Second and third generation versions of the program do not generate as strong results as do the first impressive experiments. See Weissbourd, *supra*, at 171-84.

26. Development of a replicable curriculum is not enough given the shortage of high-quality teachers. As a result, scale-up efforts typically sacrifice classroom level creativity for rigid, predictable passage through prescribed materials. See *id.* at 176-78 (discussing Success for All).

27. Smith & Meier, *supra* note 22, at 28.

28. The Chicago Public Schools provide an example of one system that has shut down failing schools not by relying on individual choice mechanisms, but instead utilizing a centralized administrative structure that puts schools on probation and

close, delays will most likely persist, costing particular children valuable years of schooling opportunities.²⁹ Experts predict the emergence of a two-tiered system: elite schools benefiting from competition and other schools declining—but not shutting down—as their student enrollments shrink and resources accordingly diminish.³⁰ Further, diffusion of successful methods is not well practiced and competition between charter schools and other public schools, and between private and public schools, if anything presses against sharing information about what works.

A central problem is likely to remain the absence of reliable, comparable information about schools eligible for election. Competition among schools elevates the significance of standardized test scores, which are in fact more influenced by parents' background and income than by the quality of school instruction offered to children.³¹ If standardized tests are the chief source of information about school success, individual schools have powerful incentives to screen students at the admissions stage, to skim for the best test-takers, and to push out those who do not perform. Prevalent use of standardized tests pressures competing schools to teach to the test rather than to develop inquiring, problem-solving minds capable of approaching issues with a healthy skepticism.³² Deeper measures of

pairs them with advisors under a tight time frame for required improvement. See Cameron McWhirter & Sheryl Kennedy, *Windy City Shines as School Reform Success: Progress is Reported a Decade After Being Labeled Nation's Worst*, Detroit News, Mar. 21, 1999, at A10. The results in Chicago have been encouraging. See *id.*

29. See Smith & Meier, *supra* note 22, at 49-50 (noting that there are not enough good schools to provide sufficient slots if all the failing schools close).

30. See *id.* at 49-50 (citing Bill Honig, *Why Privatizing Education is a Bad Idea*, Brookings Review, Winter 1990-91; *Problems Concerning Education Vouchers Proposals and Issues Related to Choice: Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 101st Cong. (Comm. Print 1990)). Smith and Meier conducted their own empirical study using district-level data from Florida that pointed toward precisely this development of a two-tiered system where an exit option existed. See *id.* at 56. "Choice may reward schools that succeed in offering quality education, but it may also leave behind and take resources from schools dealing with the most pressing problems confronting the educational system." *Id.* at 56.

31. Studies repeatedly show the enormous impact of family income and parents' education on children's school performance and performance on standardized tests. See Leroy D. Clark, *The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization*, 38 Cath. U. L. Rev. 795, 806 (1989). Racial differences also persist in standardized tests for reasons that are not entirely clear. For a thoughtful treatment of the continuing racial gap in test scores, see generally Christopher Jencks & Meredith Phillips, *America's Next Achievement Test: Closing the Black-White Test Score Gap*, The American Prospect, Sept.-Oct. 1998, at 44. Nonetheless, affirmative action at the college level does improve the post-school opportunities for minority students. See generally William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (1998) (analyzing the benefits of a race-based admissions process by tracing the income and opportunities of minority students after college).

32. For a broad critique of testing and grades, see Alfie Kohn, Punished by

instructional quality are costly, complex, and nonstandardized. They also take several years to develop. Thus, adequate information is not likely to be available in the short term to identify quality instruction in new and expanding schools.³³ In public systems that adopt high-stakes testing, which links student promotion and graduation to test performance, students will pay the price directly for failures by teachers and parents.³⁴

Comparable data are often difficult or impossible to obtain for evaluations across public and private schools. Schools often administer different tests; the private schools have no obligation and instead actually have disincentives to share their results; and, once again, richer measures of the quality of school programs are either absent or not comparable across schools. Even if adequate information begins to emerge, not all parents and guardians are likely to get it, understand it, or act upon it. Interest in becoming and capacity to be an informed advocate for one's children is not evenly distributed across all parents and guardians, to put it mildly. While motivated and competent parents will seek out information (to the extent that it exists) about quality programs, other parents will not do so, or they will be more influenced by matters of convenience (transportation, availability of after-school programs) or familiarity. Rather than having a sufficient number of informed and motivated parents making choices to generate the kinds of signaling necessary to reform all schools, the choice reforms may instead remove from existing public schools the motivated parents who make those schools as adequate or good as they currently are. The remaining students then will face risks even worse than they do now.³⁵ Engaged and active parents will remove their children from schools where their interest in their own children benefited other children in the past.³⁶

Rewards 200 (1993).

33. One of the very few evaluations of voucher programs focused on Cleveland's experiment and produced findings that now fuel the arguments of both advocates and opponents. Although two-thirds of parents of students receiving vouchers report that they are very satisfied—compared with only thirty percent of other parents—actual results, measured by test scores, show small gains for voucher students in science and language and no differences in reading, math, social studies, and overall results when compared with students in the regular schools. *See* Cohen, *supra* note 14, at 37. Teachers in the regular public schools had better credentials in terms of post-college work and teaching experience than teachers in the schools receiving vouchers, although the voucher schools offered on average somewhat smaller classes—smaller, on average, by three students. No suburban public schools proved willing to accept the vouchers. *See id.* at 36-38.

34. *See generally* Jay Heubert & Robert Hauser, *High Stakes: Testing for Tracking, Promotion and Graduation* (1999) (issuing recommendations about the appropriate use of tests as instruments of education policy).

35. *See* Janet Bingham, *Statewide Charter School District Proposed*, *Denver Post*, Jan. 13, 1999, at A18 (discussing a Colorado State Board of Education proposal to create a statewide charter school district).

36. *See* McUsic, *supra* note 14, at 122 ("The irony of the school choice model is

One of the most emphatic claims by advocates for choice is the benefit of bypassing central bureaucracies. Whether through charters or vouchers, or simply as adopted within existing public schools, school-based management offenders bypass some features of centralized bureaucracy, but sometimes at the cost of fraud. Arizona, for example, adopted vouchers to bypass public school bureaucracies and ended up with a full-fledged fraud scandal, requiring the state to shut down schools mid-term.³⁷ In addition, new inefficiencies are likely to emerge as each school has to make expenditure and managerial decisions. There are also obvious risks of misallocation of funds into public relations and marketing rather than programming. And there is the loss of economies of scale in the provision of specialized services, such as education for students with disabilities. Each individual school will have more difficulty spreading the costs of educating students with particular disabilities than the entire system would and thus, each individual school will have strong incentives to exclude students with disabilities.

Independent of academic quality, at least in theory, choice programs enhance pluralism. Absent some external regulation, having unregulated pluralism in the educational world may produce its own problems. Rather than generating a desirable pluralism of methods and values, vouchers and charters could instead produce self-segregation that exacerbates intergroup misunderstandings along the familiar fault-lines of race, class, gender, religion, disability, and national origin.³⁸

The most basic assumption behind the choice programs is that competition mechanisms are at least sufficiently suited to the educational task to warrant their use. It seems difficult to disagree that some degree of competition and some additional efforts to promote accountability could improve school systems that notoriously have been plagued by laborious top-down managerial bureaucracies. Yet, a full-fledged market approach to schooling seems a mismatch between means and ends. Schooling has crucial features that depart from privately consumed goods and services. The fit between market models and schooling is awkward and partial. The choosers are parents and guardians, who are not themselves the consumers, or children, who are not usually empowered to make crucial choices about such important matters. The consequences of these choices are not the same as the consequences of choices about what kind of bicycle or dishwasher to buy.

that it requires two components that are not in adequate supply: committed and interested parents, and empty desks in high quality public or private schools.”).

37. See Bingham, *supra* note 35.

38. See Smith & Meier, *supra* note 22, at 76-77 (“Choice seems to have a real potential to exacerbate the already considerable problems of de facto segregation in the public school system.”).

Education has dimensions of a public good, with crucial externalities affecting the entire population. Ensuring a good education for members of the next generation is important to the entire society; to our economic, cultural, and political well-being, as well as to the life prospects for the individual students involved. Cultivating capacities to act as informed and responsible citizens and as productive workers matters to everyone else. Our political fortunes, retirement benefits, and tax dollars are all at stake.

In addition, *public* education has distinct purposes in a democratic society. Philosophers and pundits have debated the purposes of education through the centuries. Historians still dispute the core motivations behind America's public school movement.³⁹ But a basic statement of public school purposes would include forging commonality, promoting civic engagement in a diverse and democratic nation, and offering quality opportunities on an equal basis.

Further, the capacity of schools to reach all children pose special public concerns because so many children risk remaining in or falling into poverty, failing to obtain needed skills, never getting connected to the political process, and drifting into crime, drugs, and violence. Students with disabilities who do not learn well may become dependent on the state for support. The assumptions at work in market competition to produce better products for private consumption are not mirrored in the school context. Although the particular taxpayer may not see the direct benefits of public education today, failure to invest and to provide universal education will affect national economic, political, and social conditions for decades. Have we become so captivated by free market rhetoric that it is our answer to everything? It is often said that everything looks like a nail if you only have a hammer. But who will be helped, and who will be hammered, if market mechanisms pervade schooling? The classic economic rationales for regulation—inadequacy of information, large externalities, collective action problem—are particularly acute in the educational context.

The final assumption behind current choice proposals is that radical change is necessary because prior reform efforts have failed to remedy chronic school crises. This assumption is overstated, yet, in my view, it is the most compelling of the entire set. It is overstated in part because measuring the success and failure of past educational reforms is complex and highly politicized. Using some calipers, contemporary education in the United States has never been better. More kinds of students are taught more equitably in American schools today than

39. See Diane Ravitch, *The Great School Wars: New York City, 1805-1973: A History of the Public Schools as Battlefield of Social Change* 107-230 (1974); David B. Tyack, *The One Best System: A History of American Urban Education* 78-176 (1974).

thirty years ago, and there are higher graduation and literacy rates today.⁴⁰ Students who would have dropped out in the past are now often helped by special programs.

On other measures, however, there are real signs of failure. American schools are more racially segregated today than thirty years ago.⁴¹ They also are marked by extreme disparities in expenditures and quality within and between states.⁴² For example, the state in which a student lives has a profound impact on math achievement.⁴³ Student performance in the United States on many measures (notably math) falls below student performance elsewhere (notably Taiwan, Korea, and Russia), although U.S. students perform better on reading comprehension.⁴⁴ Even ostensibly good schools widely underestimate their students' capacities. Urban and rural children are at serious risk of stultifying years in nearly futile classrooms.⁴⁵

We must do better. If we cared only about economic competitiveness in a global environment, we would have to improve the educational opportunities and achievement of all students because there are no students we can afford to waste. And surely we should care about equality and individual opportunity as values in and of themselves, as expressions of deep national and constitutional commitments, and as minimal necessities for the dignity of each person.

The assumption that American schools are in crisis neglects the real achievement of what appears to be the most inclusive school system in the world. The assumption that the common school project should be abandoned neglects promising results with recent efforts to improve public school systems. For example, Texas moved from forty-sixth among all states in math instruction to fourth after giving incentives to principals whose schools had the *lowest* test scores.⁴⁶ It turns out to

40. See Darling-Hammond, *supra* note 2, at 24; see also Smith & Meier, *supra* note 22, at 16 (showing an apparent decline in SAT scores attributable to shifting demographics). "If 1990 SAT scores are weighted to reflect the demographic makeup of the 1975 pool of test takers, scores actually improved by 30 points in fifteen years." *Id.* (citation omitted).

41. See Gary Orfield, *The Growth of Segregation: African Americans, Latinos, and Unequal Education*, in *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education* 53, 53-55 (Gary Orfield & Susan E. Eaton eds., 1996) [hereinafter Orfield, *The Growth of Segregation*].

42. See Darling-Hammond, *supra* note 2, at 26.

43. Students in Iowa, Minnesota, and North Dakota score close to the levels of math proficiency needed to demonstrate moderately complex reasoning processes well above the level necessary to show proficiency in numerical operations and beginning problem solving. Students in Louisiana and Mississippi on average do not meet this lower threshold. See *id.*

44. See *id.*

45. See Derrick Bell, *A Model Alternative Desegregation Plan*, in *Shades of Brown: New Perspective on School Desegregation* 124, 136 (Derrick Bell ed., 1980) [hereinafter Bell, *A Model Alternative*].

46. See Gerald Torres, Remarks at the Nathan Huggins Lectures at Harvard

make a real difference if we focus on bringing up those with trouble learning, if we teach for mastery, and if we reject the view that some kids just cannot learn.

American schools overall do not hold young people to the same high expectations prevailing in schools in many other countries. American schools reflect gross disparities in expectations and resources across state lines, between cities and suburbs, and between social classes and races.⁴⁷ Some of these disparities are the legacy of inequalities not redressed in the last wave of school reform. Some, to be frank, were exacerbated by that wave. The flight of middle-class and largely white families from cities to suburbs has a large place in the decline in the quality of urban schools and the striking contrast with many public suburban school systems.

Whether the choice initiatives merely neglect equality goals or directly abandon them, they are flawed. Unless choice initiatives try to address the goal of equality along with quality, they will become illegitimate in the eyes of those still committed to the prior wave of reform. And they will likely generate yet another round of reforms precisely to remedy the new inequalities. If the new wave of reforms helps to generate drastic changes, to jump-start more profound efforts to raise educational opportunities for the least advantaged, and to raise expectations for all students, it could help to realize the still-unattained goal of equal opportunity and high quality schooling. But to get there, we need to consider both why those goals are as yet unachieved and what it would take for choice initiatives to help reach them.

II. THE LAST WAVE: ASSUMPTIONS AND RESULTS OF EQUALITY REFORMS

Starting with the struggles to end racial segregation in public schooling, equality reforms since the 1950s brought a civil rights agenda to education while taking seriously the ideal of universal schooling that was launched by the common school movement of the nineteenth century. Crucially, the civil rights reformers identified schools as a proper setting to attack the patterns of inequality, discrimination, and segregation that dominated the country. Along with earlier common school reformers, they imagined universal education as itself a form of politics, a crucial engine of a society committed to preparing people for self-governance and social improvement.⁴⁸ In the industrialized and urban society, moreover,

University (Apr. 21, 1999).

47. See *supra* notes 41-45 and accompanying text.

48. See generally Lawrence Cremin, *American Education: The Metropolitan Experience 1876-1980*, 153-55 (1988) (emphasizing the transformation and proliferation of educational institutions as the United States became a metropolitan society and exploring the role of those institutions in the export of American culture

formal education increasingly became the essential entrance ticket to jobs and economic security. Access to decent education thus became the critical predicate to sharing in the American dream.

The deliberate exclusion of African-Americans from decent schools through Jim Crow segregation practices combined segregation with sharp disparities in the resources made available to the shabby, inadequate schools available for black children. The focus was equality, but to the civil rights reformers equality meant access to quality education in integrated settings, in no small part because whites could not exclude blacks from quality programs if blacks and whites sat next to one another.⁴⁹ Legal rights and remedies became the levers for change.

Similar, later struggles for equal access to educational opportunities in integrated settings focused on students with disabilities, students with limited English proficiency, and on girls in instances when high-quality boys schools excluded girls. With regard to disability, English-language learning, and gender, however, advocates sometimes argued for separate or specialized educational opportunities as more likely to offer comparable educational experiences. Further reforms addressed fiscal inequities in public schools' expenditures between states and among districts within a state.

The accomplishments and limitations of those reforms—centered around equality over the past fifty years—provide the larger context for contemporary school reforms. After several years of strategic lawsuits challenging the exclusion of African-Americans from public professional and graduate schools, the National Association for the Advancement of Colored People (“NAACP”) turned to elementary and secondary schools. The victory in *Brown v. Board of Education*⁵⁰ is not only a landmark in schooling, but also the single most famous and influential decision of the U.S. Supreme Court of this century. Finding official systems of racially segregated education inherently unequal, and recognizing that they affect children’s “hearts and minds in a way unlikely ever to be undone,”⁵¹ the Court ruled that racial assignment systems violated the Fourteenth Amendment’s guarantee

to other regions of the world).

49. Sometimes called the theory of “green follows white,” racial integration of institutions where whites remain the majority should protect the institutions against racially unequal distribution of resources. See, e.g., Richard Kluger, *Simple Justice* 748-78 (1975) (describing the history of *Brown v. Board of Education* and discrimination against African-Americans); Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 *Stan. L. Rev.* 1365, 1366 (1997) (examining the effect of racial segregation on political empowerment); Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 *Colum. L. Rev.* 728, 776 (1986) (describing compensatory educational improvements as an element of integration plans).

50. 347 U.S. 483 (1954).

51. *Id.* at 494.

of equal protection of the laws.⁵² The Court soon made clear that its ruling extended to segregation of Hispanic-American, Indian-American, and Asian-American students. But the Court then left to trial level district courts around the country the task of devising and enforcing remedial orders. Although a few communities quietly complied, many generated opposition and delay until they faced direct court orders, and often even after that. In addition, many whites organized private schools to avoid orders to desegregate public education.

Following ten years of largely unsuccessful efforts to desegregate public schools, Congress included education as a central concern in the landmark Civil Rights Act of 1964. Federal courts, spurred in part by federal Department of Justice advocates, began to order more aggressive measures, including busing, to achieve racial integration in the North as well as in the South. Such remedies focused on changing the assignment of students to eliminate racial segregation and racially identifiable schools. They suggested objective features that courts could measure as well as the assumption that integration would not only be good for social relations, but that it also would afford students of all races the same educational opportunities. Quality and equality would thus go hand in hand. The federal Department of Health, Education, and Welfare threatened to withhold federal education funds to schools that resisted desegregation. Even though the Nixon administration favored delay between 1968 and 1973, courts engaged in intensive litigation and enforcement actions throughout the country.

Thereafter, federal courts and federal agencies backed off, partly in response to continuing local resistance to desegregation as well as to shifting national political agendas.⁵³ Federal appellate courts began to set sharp constraints on the power of district courts to devise and enforce remedies. The Supreme Court forbade desegregation plans that would span city and suburban districts absent proof that urban school segregation could be proved specifically to have been caused by intentional actions of suburban officials.⁵⁴

Instead, the patterns of racial segregation would be attributed to voluntary and legally untouchable decisions by private individuals about where to live and whether to opt out of the urban public schools. Known as "white flight," the phenomenon entailed white families in large numbers leaving urban public schools by moving to the suburbs or by enrolling their children in private schools. For these and other reasons, schooling in America now in many communities is

52. See *id.* at 495.

53. See Gary Orfield, *Conservative Activists and the Rush Toward Resegregation, in Law and School Reform: Six Strategies for Promoting Educational Equity*, *supra* note 2, at 39, 46-48 [hereinafter Orfield, *Conservative Activists*].

54. See *Milliken v. Bradley*, 418 U.S. 717, 752 (1974).

more racially segregated than it was thirty years ago.⁵⁵ Latinos, in particular, experience more segregated schooling with worse educational opportunities today than in the past.⁵⁶ Segregation within schools is also more pronounced due to tracking and effects of special education placements.

For some civil rights advocates, the quality of educational opportunities for students of color seemingly was obscured by the preoccupation with racial balance.⁵⁷ Oddly, perhaps, the very case that produced a wall between urban and suburban districts for purposes of remedying school desegregation also generated a basis for court-ordered remedies to address harmful effects of racial segregation.⁵⁸ Thus, the courts have encouraged some focus on the quality of educational opportunities even in the face of limits on racial integration remedies.⁵⁹ Yet, there is no legal basis, in the absence of demonstrable harm from prior race discrimination, for remedies solely addressing inequalities of educational opportunity.⁶⁰

Reformers, in the meantime, turned to inequities in school financing. One of the underlying motives behind *Brown* ensuring equal access to educational resources regardless of students' race or ethnicity was pursued by the adage "green follows white."⁶¹ The per-pupil expenditures and other resources devoted to white students would have to reach non-white students if they were sitting side by side. Initial school finance litigation efforts stressed that differential expenditures often reflected racial discrimination or lesser political power due to racial differences. Through the 1980s and 1990s, reformers targeted disparities between rich and poor districts on a state by state basis.⁶² Yielding varying results and varying remedies,

55. See generally Orfield, *The Growth of Segregation*, *supra* note 41, at 53 (analyzing trends towards increased segregation). Housing resegregation has been a major reason for this pattern. See Gary Orfield, *Segregated Housing and School Resegregation*, in *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education*, *supra* note 41, at 291, 291-330.

56. See Orfield, *Conservative Activists*, *supra* note 53, at 73. *But see* *Missouri v. Jenkins*, 515 U.S. 70, 102 (1995) (finding the district court's effort to improve student achievement and enhance desegregation exceeded its authority).

57. See Derrick Bell, *Serving Two Masters*, 85 *Yale L.J.* 470, 471-72 (1976).

58. See *Milliken v. Bradley*, 433 U.S. 267 (1977); Bell, *A Model Alternative*, *supra* note 45, at 130.

59. See *Jenkins*, 515 U.S. at 70; *Milliken*, 433 U.S. at 282-83; *see also* Orfield, *Conservative Activists*, *supra* note 53, at 69-71 (discussing the withdrawal of court supervision over schools).

60. See Nathaniel R. Jones, Letter to the Editor, 86 *Yale L.J.* 378 (1976).

61. See *supra* note 49 and accompanying text; *see also* Bell, *A Model Alternative*, *supra* note 45, at 135-36; Marilyn V. Yarbrough, *Still Separate and Still Unequal*, 36 *Wm. & Mary L. Rev.* 685, 692 (1995).

62. Once the Supreme Court ruled out a federal right or remedy in response to wealth-based differences in school finance, the reform effort turned to state claims, chiefly under state constitutional provisions. *See, e.g., Serrano v. Priest*, 557 P.2d 929, 957-58 (Cal. 1976) (holding that California's public school financing system violated the equal protection provisions of the California Constitution); *Helena Elementary*

the school finance challenges share a vision of improving the quality of education for children who are relatively disadvantaged.⁶³ Assuming initially that equal expenditures would generate comparable results, the reformers found that generous spending levels—even when higher than state averages—do not usually elevate educational achievement for poor, disadvantaged students. Therefore, reform efforts recently shifted to a focus on adequacy of education, measured by a combination of monetary and non-monetary inputs and outcomes. How money is spent is as important as how much is spent. A recent study showed that fourteen poor districts in Texas which each obtained a surge of increased federal funding showed no improvement in student performance even though the districts drew on research-based recommendations to put money into smaller classes with a better teacher-student ratio. Two similar schools in Texas did show marked improvement when they plowed their extra funds into intensive teacher training tied to a curricular reform.⁶⁴ Money alone may make no difference if the instructional process remains the same, but money can certainly enable vital changes in instruction and support.

Gender equity reforms have focused largely on opening up access to vocational and training opportunities not traditionally available to members of one sex, as well as in equalizing expenditures and opportunities for athletics.⁶⁵ These reforms reflect the assumption

Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989) (finding the state's method of funding elementary schools unconstitutional); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990) (declaring New Jersey's Public School Education Act unconstitutional as applied to poor urban school districts).

63. Thus, some suits seek redistribution of resources from wealthier to poorer communities; some seek to supplement low-wealth districts either through higher taxes or shifts from other portions of the state budget; some focus on gaining comparable yields on property taxes or the same rate even if the valuation of the properties in different districts sharply diverge; and others emphasize financial and other reforms necessary to ensure minimal levels of adequacy in schooling. *See* McUsic, *supra* note 14, at 105-08.

64. *See* Richard Elmore, Remarks During a Panel Presentation at the Harvard Civil Rights-Civil Liberties Law Review's Symposium on School Choice (March 6, 1999). Thus, regulation of sexual harassment causes considerable concern among those who want to make sure that schools avoid excessive interference with normal student behavior or that schools devote more resources to law enforcement than education. *See* Jehan A. Abdel-Gawad, Note, *Kiddie Sex Harassment: How Title IX Could Level the Playing Field Without Leveling the Playground*, 39 *Ariz. L. Rev.* 727, 767-68 (1997). Many observers also worry about the disparate impact of both school discipline rules and special education placement on boys.

65. Some schools have experimented with girl-only math classes to redress apparent patterns of math phobia and underachievement among girls; others have pursued male-only academies in minority neighborhoods. *See infra* note 66 and accompanying text. The current state of the law suggests that gender segregation may be permissible if comparable opportunities are available to members of the other sex. *See Vorchheimer v. School Dist. of Philadelphia*, 532 F.2d 880, 882 (3d Cir. 1976), *aff'd per curiam*, 430 U.S. 703 (1977). But the law is changing. *See United States v. Virginia*, 518 U.S. 515 (1996).

that cultural stereotypes, rather than innate differences, explain why boys and girls have different experiences in schools, sports, and employment. At times, advocates have challenged all-boy schools for excluding girls, but on other occasions they have argued for specialized opportunities designed for girls alone.⁶⁶ Lawsuits and legislative efforts create pressure for the articulation of enforceable rights and remedies linking equality and quality. The logic of *Brown* inspired the strategy, but ongoing arguments focus on the details of gender equity in contexts such as sexual harassment and the disparate impact of school disciplinary rules.⁶⁷

Brown also helped animate a movement on behalf of children with disabilities. Largely excluded from public schooling or consigned to segregated classrooms without appropriate services or significant educational content, children with physical and mental impairments inspired test case litigation in the 1970s which, in turn, helped motivate federal and state legislative initiatives guaranteeing a free, appropriate education and related services for children with disabilities. Both access to instruction and to other children held significant places in the reformers' goals for children with disabilities. As with racism, the stigma and misunderstanding surrounding

66. Compare Isabel Wilkerson, *Detroit's Boys-Only Schools Facing Bias Lawsuit*, N.Y. Times, Aug. 14, 1991, at A1 (discussing a women's group's challenge of all-boy academies), and Maureen M. Smith, *Roseville District Dropping All-Girls Class Plan*, Star Trib. (Minneapolis-St. Paul), Mar. 11, 1998, at B1 (noting that the district feared challenges to all-girls classes and dropped the idea), with Shirley Salemy, *Girls-Only Class May Be Equation for Mastering Math*, Chi. Trib., Apr. 14, 1996, § 4 (Metro Lake), at 1 (describing support from women's research group for girls-only math classes). A federal court granted an injunction against all-male academies in Detroit. See *Garrett v. Board of Educ. of the Sch. Dist. of Detroit*, 775 F. Supp. 1004, 1014 (E.D. Mich. 1991). But, a compensatory purpose may justify all-girl classes under some circumstances. See Catherine G. Krupnick, *Legal and Policy Issues Raised by All-Female Public Education*, 14 N.Y.L. Sch. J. Hum. Rts. 155, 170-73 (1998) (presenting contrasting views on all-female public schooling); Note, *Inner-City Single Sex Schools: Educational Reform or Invidious Discrimination?*, 105 Harv. L. Rev. 1741, 1757-58 (1992) (finding educational studies about single-sex and single-race education inconclusive but potentially worth experimentation). Another approach is to alter the instructional techniques but maintain co-educational instruction. See Deborah L. Rhode, *Single-Sex Schools Can Only Be Way Stations*, Nat'l L.J., Aug. 18, 1997, at A19.

67. On sexual harassment, see generally Abdel-Gawad, *supra* note 64 (arguing that Title IX provides students with a right to sue their school districts for hostile environment sexual harassment), and Melanie Hochberg, Note, *Protecting Students Against Peer Sexual Harassment: Congress's Constitutional Powers to Pass Title IX*, 74 N.Y.U. L. Rev. 235 (1999) (contending that Title IX is within Congress's Fourteenth Amendment power and abrogates sovereign immunity). Concerns about differential rates of punishment for boys and girls in the school context often intersects with concerns about racial disparities, for it is usually minority boys who face the disproportionate number of suspensions and expulsions. See Chris Adams, *Suburban Black Boys Also At Risk*, Times-Picayune (New Orleans), Feb. 10, 1992, at A1; Myriam Marquez, *Why Are the Orange County Schools Failing So Many Hispanics?*, Orlando Sentinel, Mar. 3, 1998, at A8.

disabilities are fed by isolation. In addition to adapting *Brown's* challenge to segregation and separation, disability reformers also borrowed strategies from litigation against conditions in state mental institutions. There, the legal theory grew from due process protections against deprivations of liberty. The central idea was that people should not be confined without having a hearing and without benefits in exchange for the substantial deprivations of their liberty. In particular, courts advanced the rights of persons with mental retardation and mental illness to obtain not only hearings, but also treatment tailored to their needs.⁶⁸

When lawyers and legislators adapted such ideas to the situation of children with disabilities in the educational context, they developed a commitment to include specialized services, often remote from the classroom, as part of educational entitlement. In practice, the two ideas have led to many conflicts between parents and school systems about whether a particular child should be educated in the same classroom with children without disabilities or, instead, in a specialized setting, and what extra services or supports the public should have to shoulder in either case.

The "free" dimension of an appropriate education obscures large and growing expenses associated with specialized evaluation and instruction. School systems often have incentives to fight both the diagnosis and the educational plans that parents and experts recommend. Besides the adversarial relationships such disputes engender, they also increase the number of parents who are resentful of the resources spent on children with special needs rather than on their own children. The laws assume that individualized assessments of children with special needs will produce appropriate education plans, without building in methods to assess, for example, whether placing a fourth child with special needs in a mainstream classroom will overtax a teacher who otherwise could manage with three special needs students. Inclusionary efforts that could benefit all students require a considerably more comprehensive approach to each classroom, as well as extending the focus on individual students to each student in the room, not only those with special needs.

Advocates for equality have made efforts for a long time to meet the educational needs of children with limited knowledge of English. The challenge has been to produce agreement upon what equality should mean for them—immersion in mainstream classrooms or specialized instruction in both English and in content subjects (math, history) taught in their native languages.⁶⁹ Historically, school systems

68. See *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1960); *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

69. See generally Thomas F. Felton, Comment, *Sink or Swim? The State of Bilingual Education in the Wake of California Proposition 227*, 48 *Cath. U. L. Rev.*

directly or indirectly excluded immigrants, migrants, non-citizens, and children of non-citizens.⁷⁰ At a minimum, equality means ending those exclusions. Yet, virtual exclusion may result from instruction entirely in what amounts to a foreign language for the students. The Supreme Court concluded that Chinese-speaking immigrant children instructed solely in English received an unequal education when compared with their English-speaking classmates who received the same instruction.⁷¹ Sitting in the same classroom does not grant the same opportunity to students with vastly different language proficiencies.⁷²

Reformers in this realm generated judicial opinions and regulations allowing a range of responses, including bilingual instruction, intensive instruction in English, and immersion in the mainstream classroom. In practice, many districts' bilingual education programs effectively segregate English-language learners from other students and often yield poor results, both in English and in other academic subjects.⁷³ Recently, California adopted a referendum banning bilingual instruction; other states, however, continue it.⁷⁴ Researchers indicate that the crucial question is not bilingual versus other kinds of instruction, but the quality of instruction. Once again, equality and quality converge in theory, but not in practice.⁷⁵

Despite varied histories, each of the equality initiatives produced some accomplishments and also some counterproductive, unintended results. Backlash and changing circumstances supply some reasons for the failures. Growing immigration and changing migration patterns

843 (1999) (exploring the effects of California's termination of bilingual education).

70. See Marcelo Suarez-Orozco et al., *Cultural, Educational, and Legal Perspectives on Immigration: Implications for School Reform*, in *Law and School Reform: Six Strategies for Promoting Educational Equity*, *supra* note 2, at 160, 173 (discussing the exclusion of immigrants and other limited English proficiency students).

71. See *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974) (interpreting a federal statute); Dan Losen, Remarks During a Panel Presentation at the Harvard Civil Rights-Civil Liberties Law Review's Symposium on School Choice (March 6, 1999).

72. See *Lau*, 414 U.S. at 568.

73. See Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 Cal. L. Rev. 1249, 1288 (1988) (quoting Gary Orfield's concerns about segregative impact of bilingual education programs); Suarez-Orozco et al., *supra* note 70, at 173.

74. See Felton, *supra* note 69, at 847-48. Just as California is ending bilingual education, Texas began recruiting California teachers to staff its bilingual education programs. See Liz Seymour, *Texas Tries to Lure Away Teachers: Bilingual Education: After Prop. 227 Victory, School District with Growing Spanish-Speaking Population Is Sending Recruiters to California*, L.A. Times, June 5, 1988, at A3; Leif B. Strickland, *Texans Corall Few Spanish-Speaking Teachers from Area*, San Diego Union-Trib., June 20, 1998, at B8.

75. See generally Paul Weckstein, *School Reform and Enforceable Rights to Quality Education*, in *Law and School Reform: Six Strategies for Promoting Educational Equity*, *supra* note 2, at 306 (stressing the importance of high quality instruction).

make many urban districts multicultural and multiracial. Therefore, desegregation orders and visions which presume only two races are no longer directly relevant. In the meantime, in many cities and suburbs, most of the white students have been enrolled in schools that were mostly white; most of the black and Hispanic students were enrolled in schools composed mostly of black and Hispanic students.⁷⁶ Bilingual programs often push in the direction of segregating students who might at the same time be subjected to desegregation orders. Special education referrals and placements disproportionately place minority children, and especially minority boys, in separate classrooms, raising concerns about racial and gender segregation and about the validity of the screening and placement procedures in many communities.⁷⁷ The recent Supreme Court decision declaring public schools potentially liable for student-to-student sexual harassment has triggered widespread conjectural concerns about regulating playground conduct and diverting educators into policing.⁷⁸ Bureaucratic regulations, reporting requirements, and administrative complexity accompany all recent equality initiatives. They often seem to distract attention from or fail to advance quality instruction.

At the same time, each of the equality efforts has advanced a vision of an inclusive society, capable of and committed to redressing exclusions and the widespread mistreatments of people due to reasons beyond their own control. That vision, in turn, supplies a basis for questioning the new choice-inspired school reforms, as well as predicting lines of resistance to them.

III. EQUALITY AND QUALITY: PRIVATE CHOICE AND PUBLIC COMMITMENTS

Choice reforms, notably vouchers and charters, could undermine equality goals unless there are direct efforts to maintain and enforce them. Offering vouchers and creating charters would exacerbate existing problems for the most disadvantaged students. Either there will be only a limited number of exit tickets or, if there are universally available vouchers and charter school places, they will not offer quality instruction for everyone. Not enough slots exist in demonstrably good schools, not enough is known about how to start up quality programs quickly and effectively, and there are not enough qualified and competent teachers.

African-American and Latino students in impoverished areas disproportionately attend inadequate schools that will lose out in any

76. See Orfield, *The Growth of Segregation*, *supra* note 41, at 64-65.

77. See Thomas Hehir & Sue Gamm, *Special Education: From Legalism to Collaboration*, in *Law and School Reform: Six Strategies for Promoting Educational Equity*, *supra* note 2, at 205, 229-30.

78. See Mary Leonard, *School Ruled Liable in Harassment Case*, *Boston Globe*, May 31, 1999, at C7.

real competition.⁷⁹ Anyone able to move or afford transportation would select other schools. Those unable to move or pay for transportation “will be trapped in inferior institutions providing inferior educations”⁸⁰ The loss of motivated students and families from those inferior institutions will cause them to decline further.

Indeed, the most vulnerable children are those who are not only poor and members of historically disadvantaged groups, but who also have parents lacking the skills, motivation, or ability to be engaged advocates for their children. Taking advantage of a choice system requires knowledge and initiative, which not all parents have. Children have no choice about who their parents are. A system that makes the content and form of schooling turn on parental choice makes the differences in parents matter even more than they already do in shaping educational opportunities. A choice system will make the inequalities among parents directly cost the children currently enrolled in public schools.

Inequalities along these fault-lines already deeply affect children’s chances, to be sure. Wealthier, more educated, and more motivated parents already choose to live in districts with better schools, to pay for private schools, or to press for scholarships or slots in magnet schools, Metco programs, or a particularly effective teacher’s classroom. Expanding choice options through vouchers and charter schools initially may seem to advance equality by opening up more options for more children. In practice, however, at least for a considerable time to come, such choice schemes will also put the most vulnerable children at an even greater disadvantage by simply abandoning them to failing schools.

With vouchers, practically speaking and given the existing institutions and the levels at which vouchers are set, the most likely option is parochial schools. Advocates of vouchers trumpet the ability of Catholic schools to generate higher test scores and more successful graduates than neighboring public schools, although the mutual selection process involved renders the comparison much less than scientific. Ironically, Catholic schools started originally in reaction to the curriculum devised for public schools, which Catholic leaders at the turn of the century feared imposed a dominant Protestant ideology.⁸¹ Catholic schools today already reflect the diversity of their communities in many urban areas and often educate more non-Catholics than Catholics.⁸² Many take on the goals of promoting tolerance across groups and civic engagement even more avidly than do the public schools, although from the vantage point of Catholic

79. See Smith & Meier, *supra* note 22, at 27-28.

80. *Id.* at 28.

81. See Ravitch, *supra* note 39, at 6-76.

82. See Tim King, Commentary, *Catholic High Schools Offer Hope*, Chi. Trib., Feb. 16, 1999, at A14.

teachings. If they took on the task of educating not ten or twenty percent of the student cohort, but instead fifty or sixty percent, not only the mission of the Catholic schools but also the public education mission could be put in serious jeopardy. Catholic schools are private schools and do not, and probably should not, embrace the mission of public education.

What is or should be the mission of *public* education? The equality reformers fundamentally pursued the public missions of forging commonality, promoting civic engagement in a diverse and democratic nation, and offering quality opportunities on an equal basis.⁸³ Such goals may seem lost at times in the conflicts and disappointments surrounding racial desegregation, bilingual education, gender equity struggles, school finance fights, and special education reform. Yet, the equality focus articulates the understanding that the entire society is affected by the educational opportunities and achievements of each new generation, and that no one can be wasted.

Choice initiatives advance equality only indirectly: if schools must compete for students, then more opportunities for high quality education could be generated and each individual might then seek out those opportunities. In addition to the worries already discussed about the obstacles to producing sufficient information about success and sufficient effective schools, the choice initiatives jeopardize the primary public education mission of promoting commonality and civic preparation.⁸⁴ Schools inculcate and express values never more profoundly than when they model and enact in microcosm what could be imagined for the entire society. Taken to an extreme, choice reforms abandon the ideal of common, public institutions. They are premised on self-segregation and sorting, and they encourage competitors to slice off sectors, to skim for excellence, to celebrate competition over dialogue, and exit over debate. One school may offer military-style discipline; another could specialize in Western Civilization; a third in an Afro-centric curriculum. Others might be framed for Orthodox Judaism, Islam, or Baptist Revival. School choice tells us to treat schooling as a matter of private consumption rather than shared time that is formative of community and nation. Vouchers and charters risk abandoning our longstanding commitment to a common future. They therefore may pose the greatest jeopardy to equality and democracy that schools have seen in decades.

83. See *supra* Part II.

84. The civic dimensions of public schools include: (1) democratic political control; (2) public dollars collected and distributed through public mechanisms; (3) public management staffed by public employees; (4) implementing public norms, such as racial desegregation, free speech protections, due process protections; and (5) preparing students for civic participation through explicit and implicit curricular activities. Does abandoning 1, 2, and 3 jeopardize 4 and 5?

Choice programs also could exacerbate inequalities unless we establish systemic safeguards against exclusions and segregation. Without vigorous, creative regulatory efforts, vouchers and charter schools will increase the growing racial and ethnic segregation in American schools.⁸⁵ Initial reports indicate that charter schools generally serve a lower percentage of disabled students and limited English proficiency students than do ordinary public schools.⁸⁶ Charter schools could avoid the stratification that vouchers to private schools are likely to produce by maintaining the same per-pupil expenditure and the same tuition rate at each school. But what about students who actually cost more to educate due to disabilities or limited English proficiency? Dollars for their special needs should follow those students so that charter schools will seek, or at least, accept them. Here, too, market pressures and economies of scale push for specialty niche schools rather than schools that mainstream and integrate. Although national data indicate that charter schools serve more than their proportional share of students of color, charter schools in both Georgia and Colorado serve about half as many black students, in percentage terms, as do traditional public schools.⁸⁷

Voucher programs risk enlarging class-based divisions in schooling options. Wealthier people will continue to be able and willing to pay a premium above the level set by vouchers and to enroll their children in more expensive schools.⁸⁸ People able to move to wealthier districts will have better-endowed charter school options unless charter programs cut across district lines. A market niche may develop for schools specializing in difficult youth, such as dropouts. Yet, such schools do not promote access to higher quality education, advanced placement classes, or integration with other kinds of students.⁸⁹

With these risks of worsening existing inequalities and divisions, charter and voucher schools face challenges from those still committed to equality in schooling. Such challenges will directly pose the question of whether freedom from bureaucratic requirements that accompanies charters and vouchers includes freedom from public obligations to combat discrimination and to promote equality across groups identified in terms of race, class, gender, disability, language, and religion. This raises knotty problems customarily gathered by lawyers under the state-action doctrines: when do obligations attached to public entities or actors also attach to private entities or

85. See Orfield, *The Growth of Segregation*, *supra* note 41, at 64-65.

86. See Kevin S. Huffman, *Charter Schools, Equal Protection Litigation, and the New School Reform Movement*, 73 N.Y.U. L. Rev. 1290, 1299 (1998).

87. See *id.* at 1299.

88. See McUsic, *supra* note 14, at 126.

89. See *id.* at 127. These are not the kinds of problems well addressed by litigation challenges to school finance schemes.

actors? It is easier to craft arguments applying constitutional and statutory obligations to charter schools,⁹⁰ which receive public authorization, than to voucher programs, which essentially direct public funds to private families who in turn select private schools.⁹¹ Different answers also could emerge depending upon the particular kind of category at issue (courts are more likely to find state action involved where racial exclusions occur than in other circumstances with some important exceptions). On many matters other than racial exclusiveness, courts will be reluctant to attach public obligations to private actors. The Supreme Court has ruled that even when ninety percent of the revenues funding a private school are from the public, that school is not bound by federal statutory and constitutional restrictions in employment decisions.⁹²

Judicial decisions are too remote and indirect for addressing the policy judgments today about how much should public dollars for schooling also entail public norms and obligations. Rather than pursue the arguments that could be mounted through litigation surrounding state-action issues or legal restrictions on private school conduct, those concerned with the direct consequences for equality of choice proposals should work to ensure that the governing legislation includes appropriate restrictions and guidelines.

These are the most obvious, basic questions that must be tackled:

(1) Can a participating charter or voucher school exclude students on the basis of race, class, or religion?

(2) Can a participating school reserve places for students of one race or gender in order to produce a desired balance or mix?

(3) Under what, if any, conditions can a participating school restrict enrollment to students of one gender, or students with or without particular disabilities, or students with or without English language proficiency?

(4) Can participating schools mitigate the tendency toward segregation along the many lines of difference among students by joining in system-wide programs or activities?

(5) How will participating schools be evaluated and how can analysis be generated to permit parents, school administrators, governmental and non-governmental leaders, as well as other community members, to assess choice experiments seriously as well as to assess particular schools?

More crucial than my own answers is the basic proposition that

90. See Justin M. Goldstein, *Exploring 'Unchartered' Territory: An Analysis of Charter Schools and the Applicability of the U.S. Constitution*, 7 S. Cal. Interdisc. L.J. 133, 149-50 (1998); see also Huffman, *supra* note 86, at 1291-93 (discussing the large variation of charter schools among different states).

91. See Goldstein, *supra* note 90, at 162. Even private schools receiving no public funds may face the sanction of loss of their tax exempt status.

92. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-43 (1982).

authorizing legislation, backed by enforcement possibilities, address each of these issues with specificity.

I offer my own initial responses simply to begin to sketch possible legislative guidelines. First, no school receiving public dollars through charter or voucher programs should be permitted to exclude applicants on the basis of race, class, or religion; but schools should be allowed to seek racial and gender balance by reserving spots until a brief period (such as one month) before each fall starting date, at which time unreserved spots should open on a random basis. Second, no school should be allowed to accept a voucher and then demand additional tuition payments from the family; the voucher should cover the entire tuition expense. Third, no school should be allowed to exclude persons of one sex, persons with (or without) particular disabilities, or persons based on their degree of English proficiency *unless* the school is part of a cooperative plan with other school(s) or systems ensuring comparable opportunities for those excluded from that school. If an all-boy charter school is permitted, for example, there must be comparable educational programs available in all-girl settings and also in co-ed settings. If students with mental retardation are excluded from a school, there must be integrated educational programs designed for those students available elsewhere. Fourth, segregation that occurs either by design or through patterns of self-selection must be mitigated by requiring each school to participate in city or region-wide programs to mix students enrolled in different schools and programs in joint projects such as journalism, drama, music, and sports (on cross-school teams). Only such programs have been shown to have success in reducing stereotypes and mistrust among students across group lines.⁹³ Finally, participating schools must join in gathering data with uniform guidelines to permit evaluations of each school; the data should include standardized tests, but also richer measures of school programming, implementation, and results.

These recommendations balance the current law governing public schools with respect for innovation and experimentation that choice initiatives can bring. They also embody cautions about choice initiatives, cautions anchored in the hopes and the disappointments of the equality reforms of the recent past.

IV. STEERING THE WAVES⁹⁴

Much analysis proceeds by puncturing balloons of optimism. I do something like that here in the hope of reducing the hot air, but not

93. See John B. McConahay, Reducing Racial Prejudice in Desegregated Schools, in *Effective School Desegregation: Equity, Quality and Feasibility* 35, 48 (Willis D. Hawley ed., 1981).

94. I apologize to Jim Wallis, who coined the phrase "steering the wind."

the pressure, for change. The biggest problem with the current phase of reforms is the familiar one of exaggeration. Exaggeration and simplification seem to have become simply part of the territory you have to know of mass democratic politics both in the statement of the problem—most schools are NOT in great or increasing crisis—and in the promise of solutions—quick, easy, and painless. We should know better than to believe recycled themes that can be discerned in almost all the waves of past school reform. Excessive claims seem necessary to get the lift and buoyancy needed for movement. But puffed up claims are waiting to be punctured.

More than two decades ago, I evaluated a then-new small federal program termed “career education.” Its supporters claimed that the program would solve student apathy, curricular irrelevance, tension between generations, and that it also would ease the transition between school and adult work—all this by introducing students through brief and simple lectures to various kinds of adult career options. I am sure I do not need to state in detail how far short the results fell from these high aims. But I will hum a few bars: I concluded that the program should have been called the “76 Trombones of Career Education.” Like the Music Man,⁹⁵ the program promised to create enormous changes simply by modeling some thinking about them. Fancy talk, and even fancy uniforms, do not make students into a well-tuned marching band.

What if we tried to mobilize around reforming school reform? Then we would talk of the costs of trying and discarding reforms that litter the lives of children. We would criticize new and prior reforms not as part of the perpetual puncture game, but as part of a demand for honest assessments of the mixed picture of the present and the mixed promises of any given initiative.⁹⁶ School choice proposals admirably generate energy, initiative, creativity, and resources. Let us solicit new entrepreneurs to schools and substantial donations to end business as usual; let’s build high expectations for all children, and demand accountability of parents as well as school administrators. We also should acknowledge the limitations of past equality reforms. But we must not abandon either equality or the commitment to free, high quality education for all children. The challenge is not to shift schools into the private frame of markets, but to build the benefits of choice and competition into the public frame. The goal is not to get every kid into a private school, but to make all schools the kinds of places that give every kid the best possible fighting chance. The goal

95. *The Music Man* (Warner Brothers Pictures 1960).

96. We could join the bandwagon of excessive claims, but in the name of uniting the best of past and future reforms. Consider, accordingly, that shifting to school choice is a reform that we could not simply discard and then start over again. If fully embraced, school choice would not leave enough of a system in place to return to common schools.

is to steer the wave rather than watch it crash across and inundate prior dreams.

In my view, building on the best of the past and the most promising features of school choice means expanding charter schools rather than vouchers for private schools. Charter schools remain within the public system. Therefore, they remain more likely to be tied to the mission of the public schools. They also can be encouraged to share information about successes and failures. Technical assistance can and should be available so that each individual school does not have to invent its own solutions to predictable start-up problems.

Additionally, charter schools can be directed not to set tuition higher than the public stipend accompanying each student. Even charter schools have incentives, however, to skim talented students who have active parents while abandoning others to less desirable schools. Charter schools can and should be bound by the same admissions guidelines applicable to any other public school; preferably, charter schools should select randomly from the pool of those students who apply. Guidelines mean regulation, bureaucracy, and administration, but the entrepreneurship stimulated through charter schools can assist the development of better guidelines and more effective regulation. Just as industries now participate in negotiating over the specific details of environmental and safety regulations to produce more effective but less onerous rules, individual schools could participate in designing the means, but not the ends, of school regulations promoting equality and quality.⁹⁷ Voucher plans also could be brought within this regulatory process to promote equality, although many private schools then would likely decline to participate.

The excitement and radical reconsideration opened by choice initiatives should be tapped to enlarge the range of good choices available to the most disadvantaged families. If residential segregation by race and class produces patterns of increasing school segregation, then genuine choice programs must transcend geographic and district borders. Cross-district choice programs and incentives to help suburban schools make room for urban students could make the promises of choice more genuine. So would college and university direct engagement in the tasks of supporting and mentoring classroom teachers, generating rich educational experiences for young children, and aiding in the collating and dissemination of crucial data.

School reform is always a symbolic as well as a practical fight. Schools afford an arena for fighting about what kind of society we should be, how the old and new generations should relate, whether

97. See Jody Freeman, *Collaborative Governance in the Administrative State*, 45 *UCLA L. Rev.* 1, 33-35 (1997). See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *Colum. L. Rev.* 267 (1998) (outlining a more collaborative form of government rule-making).

commerce should govern democracy or democracy shall govern commerce, and how individual freedoms should be rendered compatible with the common good. It is imperative that the new round of school fights center as much on the symbols of inclusion and equality as upon the rhetoric of individualism and quality. These values need one another so that the whole is at least as worthy as the sum of the parts, if not perhaps more so.

School reform traditionally chews up and spits out undigested initiatives. What if school choice reforms afforded the occasion for building on the past while undertaking bold experiments. What if we recognized, as Audre Lorde put it, that “[w]e have the power those who came before us have given us, to move beyond the place where they were standing.”⁹⁸ We must keep our commitments, if not quite our heads.

98. Audre Lorde, *Sister Outsider* 144 (1984).