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The Root and Branches of Structural School Racism in Missouri: A Story of Failure by Design and the Illusion and Hypocrisy of School Choice

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THE ROOT AND BRANCHES OF STRUCTURAL
SCHOOL RACISM IN MISSOURI:
A STORY OF FAILURE BY DESIGN
AND THE ILLUSION AND HYPOCRISY OF SCHOOL CHOICE

Kimberly Jade Norwood* and Ronald Alan Norwood**

ABSTRACT

Since Missouri was first admitted into the Union as a slave state, it has been hostile to the education of its Black residents. This Article examines the evolution of that hostility from 1821 through 2021 (from the most overt and blatant in the early years, to the subtler and covert in the modern era). Starting with the original total ban on the education of Black slaves to the reluctant allowance of separate but equal education for Black Missouri residents in 1865 after the Civil War and continuing with the separate but

* Henry H. Oberschelp Professor of Law and Professor of African & African American Studies, Washington University. Thank you to my former colleague and friend, Katherine Goldwasser for her insightful comments. A special thank you to my research assistants, Jonathan O'Neill (class of 2022), and Shelby Rees (class of 2023) for their excellent work on this project. Researching was more challenging in 2021 as a result of the COVID-19 pandemic. A special thank you to the dynamic team at Washington University School of Law who made the research experience during a pandemic as seamless as possible: Dorie Bertram, Director, Public Services/Librarian, Lecturer in Law; Hyla Bondareff, Electronic Resources Librarian, Lecturer in Law; Gail Boker, Associate Dean and Chief of Staff; Rachel Mance, Faculty Support Supervisor; Kathie Molyneaux, Interlibrary Loan Assistant; Anne C. Taylor, Reference Librarian. Several others granted me interviews and allowed me access to not readily available information and documents. Thank you Deanna Childress, Data Strategist, Consortium Partnership Network, SLPS; Representative Phil Christofanelli, Member, House of Representatives, R-105th District; Jay Hartman, Executive Director, SLPS Consortium Network; Jere I. Hochman, Network Superintendent, SLPS; Harris Stowe State University; Sarah Jane Hunt, Attorney at Law, Kennedy Hunt, P.C.; Peter Merideth, Member, House of Representatives, D-80th District; Michael Middleton, former Interim President of the University of Missouri and former Interim President of Lincoln University; Zora Mulligan, Commissioner, Missouri Department of Higher Education and Workforce Development; Jeffrey St. Omer, Partner, Mickes O'Toole, LLC; Douglas Thaman, Executive Director of the Missouri Charter Public School Association; and Dwaun Warmack, former President of Harris Stowe State University, current President of Claflin University.

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unequal policies that have thrived in the state from 1865 to 2021, Black students continue to be subjected to under-resourced educational opportunities vis-à-vis their White counterparts at both the K through 12 levels as well as in the state's two HBCUs. The significant damage caused by this under-resourcing is now being compounded by public school privatization in the form of the false promises of "school choice," comprised of charter schools and voucher programs that cannibalize those limited public school resources. For the vast majority of Black, low-income students and their school districts, these school choice programs do far more harm than good. And when the State was presented with an opportunity to facilitate real choice for one struggling Black school district in St. Louis County, the State manipulated that district for more than two decades in a manner that denied choice to the students in that district. This Article reveals various permutations of this dual, unequal system and suggests that intentional decisions by Missouri lawmakers for over a century are some of the key reasons Black students in the State struggle in public school systems that both historically and currently appear designed not for the success of majority Black learning institutions, but for their failure.

Table of Contents

Introduction..... 296

Part I – Statehood and the Education of Blacks in Missouri in the 19th Century..... 298

Part II – Segregated and Underfunded Education in St. Louis City Schools 300

A. Desegregating Schools in the St. Louis Public School District..... 301

B. Settlement that Settled the Case but Ultimately Settled Nothing..... 307

Part III – The Fallacy of School Choice in Majority Black and Under-Resourced School Districts 310

A. No Good Reasons to Pit Charter Schools Against Traditional Public Schools..... 313

B. Vouchers for Disabled Students, Poor Students, and Everyone Else..... 324

C. How the State Arbitrarily Limits School “Choice”..... 333

Part IV – Missouri Also Has Given Short Shrift to its HCBUs 338

A. The Quest for Funding Parity..... 340

B. Underfunded Capital Improvements 348

C. Lincoln Land Grant Funding Deficiencies..... 350

Conclusion 354

INTRODUCTION

*Throughout the history of the United States, institutional racism has created an invisible chain holding down students of color in the educational system. Limitations and denial of access to education created a culture where students of color were treated as less than equals, a mindset that is still deeply rooted in our educational system today.*¹

Missouri, a slave state, was admitted into the Union as part of the Missouri Compromise in 1821.² Since that time, the State legislature has thrown up roadblocks over many decades to prevent, outright obstruct, and/or impede the education of its Black residents. Whether it was the criminalization of teaching enslaved Blacks to read or write; the employment of anti-literacy laws; the constitutional enshrinement of its mandate requiring racially segregated schools; the refusal to immediately follow the dictates of *Brown v. Board of Education (Brown)*;³ the steadfast refusal to acknowledge and remediate its shameful facilitation of dual educational systems, one for Black students and one for White students; or the underfunding of its historically Black colleges and universities, Missouri has made clear that the root and branches of its “separate and unequal” educational system will continue unabated.

More recently, the State—via public school privatization established under the guise of “school choice” and through the use of charter schools and vouchers—has set up a dual system of competition—that pits public schools against charter schools and private schools—within its never fully remediated K-12 dual system. This new dual system not only financially bleeds majority Black urban school districts of critical funding, but also could lead to the demise of public education as we know it.

1. Matthew Lynch, *History of Institutional Racism in U.S. Public Schools*, (Oct. 9, 2019), <https://www.theedadvocate.org/history-of-institutional-racism-in-u-s-public-schools/> [perma.cc/3XPW-GXVP].

2. 16th Cong., 3 Stat. 545 (1820), <https://www.loc.gov/law/help/statutes-at-large/16thcongress/c16.pdf> [https://perma.cc/F3BR-7MNS].

3. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954) (*Brown*).

Using two examples—first, the education of children in the majority Black St. Louis public school district (SLPSD; the District); and second, the education of Black students in the State’s two historically black college and universities (HBCUs), this Article analyzes how legislative actions and inactions have hindered the education of Black, underprivileged students. Part I will look briefly at the early history of education of Blacks in Missouri. Using SLPSD as an example, with some references to its actions in the Kansas City public school district (KCPSD),⁴ Part II will examine how the State relentlessly fought school desegregation at every turn, and eventually spearheaded its end despite the fact that schools were not fully desegregated, and despite evidence that court-ordered desegregation was actually working.⁵ Part III will look at additional financial drains on the SLPSD, advanced under the ruse of school choice that have—in the case of charter schools—and will—in the case of the newly enacted voucher law—further hamper the efforts of the majority Black SLPSD and other majority Black school districts to provide quality education for the students who are unable to transition to a charter school or use a voucher to attend some other independent school. This Part will also reveal the hypocrisy of Missouri’s claimed concern for school choice by examining how the State impeded school choice in the case of the Normandy Schools Collaborative (NSC). The story of the NSC will demonstrate that “choice” is rarely a consideration for the State when it comes to the disadvantaged Black students the State claims to have in mind. Part IV will shift to the State’s two HBCUs, Harris-Stowe State University and Lincoln University, and demonstrate how Missouri lawmakers have chronically underfunded these two institutions and how State roadblocks that began in the nineteenth century continue to prevent Black students from receiving a quality education in the twenty-first century.

4. St. Louis is the largest urban school district in the state of Missouri. *Largest School Districts in Missouri*, NICHE, <https://www.niche.com/k12/search/largest-school-districts/s/missouri/> (last visited Nov. 28, 2021).

5. AMY STUART WELLS & ROBERT L. CRAIN, *STEPPING OVER THE COLOR LINE: AFRICAN-AMERICAN STUDENTS IN WHITE SUBURBAN SCHOOLS* 340 (1997). *See also* VOLUNTARY INTERDISTRICT CHOICE CORP., choicecorp.org [perma.cc/VRX3-VA4E].

PART I – STATEHOOD AND
THE EDUCATION OF BLACKS
IN MISSOURI IN THE 19TH CENTURY

*But some of us would try to steal
A little from the book.
And put the words together.
And learn by hook or crook.*⁶

During the eighteenth and nineteenth centuries, many of the states that entered the Union were slave states. These states codified atrocious and inhuman “Slave Codes,” which dictated the daily life of enslaved people.⁷ These states also typically had “anti-literacy laws” that criminalized teaching enslaved Black people to read or write.⁸ Punishments for violations included fines and imprisonment of Whites, the whipping of free Blacks, the whipping “on the bare backs” of enslaved Black people, and the maiming and death of other enslaved Black people.⁹ Missouri was a slave state that similarly prohibited the teaching or any “instruction of negroes or mulattoes, in reading or writing.”¹⁰ Its anti-literacy law applied to all

6. *Learning to Read*, by Frances Ellen Watkins Harper, <https://www.poetryfoundation.org/poems/52448/learning-to-read-56d230ed0fdc0> [perma.cc/NZ94-LVNK].

7. See, e.g., GEORGE M. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA (1856); see also An Act Concerning Servants and Slaves, 24 N.C. LAWS §§ 1–58 (1741) (abolished by Thirteenth Amendment in 1865); Slaves, 1825 Mo. Laws 741–50 (1825) (repealed 1865); An Act for the Better Ordering and Governing of Negroes and other Slaves in this Province (1755) (abolished by Thirteenth Amendment in 1865), in 18 COLONIAL REC. GA. 102–44, 225–35, 277–82, 558–66, 649–88, 760–62, 799–802 (1910); An Act Relating to Servants and Slaves, 44 MD. LAWS §§ 1–34 (1715) (repealed 1864); An Act for Regulating of Slaves, 39 N.J. LAWS §§ 1–14 (1714) (abolished by Thirteenth Amendment in 1865); REMEMBERING SLAVERY: AFRICAN AMERICANS TALK ABOUT THEIR PERSONAL EXPERIENCES OF SLAVERY AND EMANCIPATION (Ira Berlin, Marc Favreau & Steven Miller eds., 1996).

8. South Carolina enacted the first anti-literacy law in 1740. Birgit Brander Rasmussen, “Attended with Great Inconveniences”: *Slave Literacy and the 1740 South Carolina Negro Act*, 125 PMLA 201 (2010); see also STROUD, *supra* note 7, at 60. By 1834, the law included the whipping of free or enslaved Blacks who knew how to read or were caught teaching other Blacks how to read. *Id.* Other states followed suit. *Id.* at 60–63.

9. See STROUD, *supra* note 7, at 60. See also *Slavery in America and the World: History, Culture & Law*, HEINONLINE, <https://heinonline.org/HOL/Page?handle=hein.slavery/ssactsnc0118&div=1&id=&page=&collection=slavery> [perma.cc/8DH2-5CWE].

10. Act of Feb. 16, 1847, § 1, 1847 Mo. Laws 103.

“negros or mulattoes,” whether free or enslaved.¹¹ This law prevailed until the end of the Civil War in 1865.¹²

With the Civil War’s end, the process to end slavery began.¹³ Missouri abolished slavery in its constitution in 1865 and changed its anti-literacy law.¹⁴ The Missouri Constitution was amended to provide that “separate schools *may* be established for children of African descent.”¹⁵ A decade later, the conditional language was changed to *require* racially segregated schools.¹⁶ This language was in the State’s constitution in 1954 when *Brown v. Board of Education (Brown)* was decided.¹⁷ Holding that racially segregated schools violated equal protection of the laws guaranteed by the Fourteenth Amendment, *Brown* famously declared that “[s]eparate educational facilities are inherently unequal.”¹⁸ Despite this unequivocal language from the high court, Missouri did not change its constitution to comply with this new federal constitutional mandate. Rather, the Missouri Attorney General declared Missouri’s separate but equal constitutional

11. *Id.* See also *Adams v. United States*, 620 F.2d 1277, 1280 (8th Cir. 1980).

12. The Civil War, 1861-1865, was the deadliest war in U.S history. DREW GILPIN FAUST, *THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR* xi (1st ed. 2008).

13. Two of the most important laws enacted after the Civil War impacting slavery were the Thirteenth Amendment abolishing slavery, ratified in 1865, and the Fourteenth Amendment, granting citizenship to all people born or naturalized in the United States and ratified in 1868. U.S. CONST. amend. XIII; U.S. CONST. amend. XIV.

14. The Missouri Constitution initially provided that “[t]he general assembly shall have no power to pass laws . . . [f]or the emancipation of slaves without the consent of their owners.” MO. CONST. of 1820, art. III, § 26; see also *id.* at §§ 27–28 (establishing other laws related to slavery). This provision was abolished in January 1865 following a constitutional convention in St. Louis, three weeks before the federal Congress proposed the Thirteenth Amendment to the U.S. Constitution. See *Guide to African American History*, MO. ST. ARCHIVES, <https://www.sos.mo.gov/archives/resources/africanamerican/guide/image005c> [perma.cc/5KTX-858F].

15. MO. CONST. of 1865, art. IX, § 2 (emphasis added). See also Act of February 17, 1865, § 13, 1865 Mo. Laws 170; Act of June 11, 1889, § 7051a, 1889 Mo. Laws 226.

16. MO. CONST. of 1875, art. XI, § 3 was amended to provide that “separate free public schools *shall* be established for the education of children of African descent” (emphasis added). The mandatory language was carried forth in the 1945 revision to the constitution: “[s]eparate schools shall be provided for white and colored children, except in cases otherwise provided for by law.” MO. CONST. of 1945, art. IX, § 1(a).

17. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954).

18. *Id.* at 495.

mandate was unenforceable.¹⁹ The unconstitutional language in Missouri's constitution was not repealed for another twenty-two years.²⁰

This backdrop set the stage for the State's refusal to comply with *Brown* and its mandates in 1970s desegregation remediation lawsuits—where it relentlessly pushed back against acknowledging its defalcations and refused to voluntarily make amends for structural racism that served as the foundation for depriving generations of Blacks equal educational opportunity in Missouri. Moreover, the tone-deafness and racial insensitivity of Missouri lawmakers are compounding that historical inequality by their current unwavering support for public school privatization cloaked as “school choice,” which, in the long run, threatens the very survival of the majority Black public school districts historically disenfranchised by the State.

PART II – SEGREGATED AND UNDERFUNDED EDUCATION IN ST. LOUIS CITY SCHOOLS

*We deal here with the right of all of our children, whatever their race, to an equal start in life and to an equal opportunity to reach their full potential as citizens. Those children who have been denied that right in the past deserve better than to see fences thrown up to deny them that right in the future.*²¹

In *Brown*, the Supreme Court of the United States held that racially separate schools were inherently unequal and unconstitutional.²² It was around this time that White flight began to occur in St. Louis City. White flight is the social phenomenon of White people leaving the cities and relocating to the suburbs.²³ As long as racial segregation was the law of the

19. See *Adams v. United States*, 620 F.2d 1277, 1280 (8th Cir. 1980).

20. *Id.*

21. *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Thurgood Marshall, J., dissenting).

22. *Brown*, 347 U.S. at 495.

23. See *White Flight*, MAPPING DECLINE: ST. LOUIS AND THE AMERICAN CITY, <http://mappingdecline.lib.uiowa.edu/map/> (last visited July 15, 2021) (on the “White Flight” tab, click “1950-1960” on the timeline under the map). Many White families who did not abandon the city nevertheless abandoned its public schools, enrolling their children in private schools instead. See also CHARLES T. CLOTFELTER, *AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 184–85* (2011). St. Louis city in 2021 was 46.53% White, *St. Louis, Missouri Population 2021*, WORLD

land, Whites seemed content to have their children attend St. Louis City public schools. Prior to *Brown*, White children in St. Louis were assigned to schools based on their neighborhoods. Black children in the city, however, were not. Rather, they were bused to certain all Black schools.²⁴ After *Brown*'s holding, the fear of continued neighborhood schooling and government sanctioned incentives to move to the suburbs²⁵ greatly contributed to this White flight. Lawsuits filed in the 1970s demanding compliance with *Brown* fueled those fears.²⁶ Indeed, as a result of White flight and the decision of a majority of remaining Whites to take their children out of city public schools, it became harder to desegregate. In the 1978-79 school year, for example, SLPSD was 74.5% Black.²⁷

A) *Desegregating Schools in the St. Louis Public School District*

*"[The] public record reveals extraordinary machinations by the State defendants in resisting Judge Meredith's orders. In these circumstances, the court can draw only one conclusion. The State has, as a matter of deliberate policy, decided to defy the authority of the Court."*²⁸

Ten years ago, this Journal told the story of a Black mother in St. Louis, the matriarch behind a 1972 lawsuit against SLPSD and Missouri, who sought a quality education for all children in St. Louis City public schools.²⁹

POPULATION R., <https://worldpopulationreview.com/us-cities/st-louis-mo-population> [perma.cc/L3TL-EPHF]; yet public schools in St. Louis city were only 11% White. *About the District*, ST. LOUIS PUBLIC SCHOOLS FOUND., <https://slpsfoundation.org/about-slps-students/> [perma.cc/S68J-WFK9].

24. *Liddell v. Bd. of Educ. of the City of St. Louis*, 469 F. Supp. 1304, 1314-15 (E.D. Mo. 1979), *rev'd on other grounds sub nom., Adams*, 620 F.2d 1277.

25. *See, e.g., COLIN GORDON, MAPPING DECLINE: ST. LOUIS AND THE FATE OF THE AMERICAN CITY* 88-98, 206 (2009).

26. *See, e.g., Jenkins v. Kansas City Mo. Sch. Dist.*, 525 F.3d 682 (8th Cir. 2008); *Liddell v. Bd. of Educ. of the City of St. Louis*, No. 4:72CV100 SNL, 1999 WL 33314210 (E.D. Mo. Mar. 12, 1999).

27. *Liddell*, 469 F. Supp. at 1329, 1365; David Laslo, *The St. Louis Region, 1950-2000: How We Have Changed*, in ST. LOUIS METROMORPHOSIS: PAST TRENDS AND FUTURE DIRECTIONS 8 (Brady Baybeck & E. Terrence Jones eds., 2004); *see also White Flight*, *supra* note 23.

28. Order, *Liddell v. Bd. of Educ.*, No. 4:72CV 100 (Mar. 4, 1981). *See also Liddell*, 667 F.2d at 654.

29. Kimberly J. Norwood, *Minnie Liddell's Forty-Year Quest for Quality Public Education*

When that mother, Minnie Liddell, filed the lawsuit, *Brown's* prohibition against separate but equal had been on the books for eighteen years.³⁰ The St. Louis City schools were then still clearly separate and unequal.³¹

Once *Brown* was decided, the St. Louis City School Board (the Board) appeared to embrace *Brown* openly. It adopted a plan supposedly designed to phase in integration between 1954 and 1956.³² A key component of the plan abolished school assignments based on race and reassigned students to schools based on where they lived.³³ Simultaneously, it created “general principles,” ostensibly to help smoothly transition to a desegregated system, but which had the effect of maintaining the status quo. Teachers who worked in segregated schools pre-*Brown* were allowed to remain in those schools, and White students reassigned to Black schools were allowed to remain in their previously segregated schools until they graduated.³⁴ After the Board implemented this process, St. Louis’s few remaining integrated neighborhoods turned virtually all Black.³⁵

In addition to largely unsegregated schools, children who were left remaining in primarily Black schools found themselves in severely overcrowded schools. While White children were allowed to attend neighborhood schools, Black children “were instead bused to the black schools at the core of the City[,] leading to extremely large attendance zones for black schools.”³⁶ To alleviate overcrowding, Black students were typically shuffled from one school to another.³⁷ In some cases, Black students transferred to White schools under a policy known as “intact

Remains a Dream Deferred, 40 WASH. U.J.L. & POL'Y 1 (2012).

30. For a look at the strategic journey taken by Charles Hamilton Houston, the architect of *Brown*, and the NAACP that ultimately led to the victory in *Brown*, see *The Road to Brown*, CAL. NEWSREEL (1990), <http://newsreel.org/video/THE-ROAD-TO-BROWN> [perma.cc/YJD9-W5EG].

31. GERALD W. HEANEY & SUSAN UCHITELLE, UNENDING STRUGGLE: THE LONG ROAD TO AN EQUAL EDUCATION IN ST. LOUIS 53–68 (2004); and see, e.g., JOSHUA M. DUNN, COMPLEX JUSTICE: THE CASE OF *MISSOURI V. JENKINS* 57 (2008).

32. *Adams v. United States*, 620 F.2d 1277, 1280 (8th Cir. 1980); see also *Liddell v. Bd. of Educ.*, 469 F. Supp. 1304, 1316 (E.D. Mo. 1979).

33. *Adams*, 620 F.2d at 1281.

34. HEANEY & UCHITELLE, *supra* note 31, at 11, 73–76.

35. *Adams*, 620 F.2d at 1281.

36. *Liddell*, 469 F. Supp. at 1315.

37. Mrs. Liddell’s oldest son attended three different elementary schools by the time he was in fifth grade. Each said school was severely overcrowded, in dangerous buildings, and with inadequate resources. He was also a part of the district’s racially segregated intact busing system. Norwood, *supra* note 29, at 8–10.

busing.”³⁸ Specifically, the district transferred entire (thus, left intact) classes of students, with their teachers, from one overcrowded Black school to a vacant classroom in a White school.³⁹ These Black classes were then treated as administratively separate from the White schools to which they were bused. As a result, there was absolutely no integration. Black teachers continued to teach Black students; White teachers taught White students. The bused-in students arrived, recessed, and ate lunch at different times; they entered the school buildings from separate entrances; they drank from water fountains at designated times; and they were required to wait for school buses outside the schoolyard while White children played inside the yard.⁴⁰

In addition, schools attended by Black students were inferior to those attended by White students. Schools in Black neighborhoods were often housed in dilapidated, unsafe buildings; their secondhand textbooks were outdated; and their teachers were not always similarly qualified and credentialed as their White colleagues.⁴¹

These were the conditions in 1972 when Mrs. Liddell and a group of “Concerned Parents,” through their lawyers—William P. Russell and Joseph McDuffie, both graduates of Lincoln Law School, one of two HBCUs in the state of Missouri, and both past Presidents of the Mound City Bar Association⁴²—filed a lawsuit against the Board. The lawsuit alleged violations of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.⁴³ Three years later, a Consent Decree was entered,⁴⁴ but it was not to be. The Consent Decree received substantial pushback from the NAACP and others, who demanded a broader look at the State’s role and the role of suburban school districts in public school segregation. These groups were eventually granted the right to intervene in

38. See Claude Weathersby & Yolanda Weathersby, *The “Intact Busing” Program in 1960s St. Louis Public Schools District*, 45 J. URB. HIST. 908, 909 (2018).

39. *Id.*

40. HEANEY & UCHITELLE, *supra* note 31, at 74, 77.

41. Norwood, *supra* note 29, at 7–10.

42. The Mound City Bar Association (MCBA) is the oldest Black Bar Association west of the Mississippi. It was founded in January of 1922 and will celebrate its centennial in 2022. See *Mound City Bar Association*, <https://www.moundcitybar.com/about.html>. The volume that this Article is being published in is dedicated to the commemoration of the MCBA.

43. *Adams v. United States*, 620 F.2d 1277, 1277 (8th Cir. 1980).

44. HEANEY & UCHITELLE, *supra* note 31, at 86.

the lawsuit.⁴⁵ The successful intervention transformed the lawsuit from one that focused on quality education for Black students to one seeking desegregated education for all students.⁴⁶ The State of Missouri was added as a defendant in 1977.⁴⁷

As the case moved through the courts, a citizen publicly complained that the lawsuit was moving too slowly and suggested he could do better in settling the case.⁴⁸ That citizen was Washington University law professor Bruce LaPierre. Shortly after his public comments, Professor LaPierre got a call from newly assigned Federal District Court Judge William Hungate, who appointed him as Special Master.⁴⁹ Working with others appointed by the court,⁵⁰ Special Master LaPierre was able to successfully facilitate what would ultimately amount to a preliminary settlement of the lawsuit. Effective beginning with the 1983-1984 school year, the “1983 Settlement Agreement,” involving over twenty-five parties, contained three key provisions: (1) it provided for the voluntary inter-district transfer of 15,000 Black students living in St. Louis City to suburban schools, known as the inter-district transfer program; (2) it provided for the establishment and growth of magnet schools in the city; and (3) it envisioned quality education improvements and capital improvements for the estimated 10,000-15,000 children who, even after transfers and magnet schools, would remain in segregated schools in the city.⁵¹

45. *Adams*, 620 F.2d at 1281.

46. HEANEY & UCHITELLE, *supra* note 31, at 87.

47. *Id.* at 88.

48. Norwood, *supra* note 29, at 18 n.81.

49. *Id.* See generally D. Bruce LaPierre, *Voluntary Inter-district School Desegregation In St. Louis: The Special Master's Tale*, 1987 WIS. L. REV. 971, 1001-05 (1987).

50. Tad Foote, Dean of Washington University School of Law from 1973-1980, was appointed Chairman of the court-appointed Desegregation Monitoring Committee. Dr. Gary Orfield was the court-appointed expert. HEANEY & UCHITELLE, *supra* note 31, at 108.

51. LaPierre, *supra* note 49, at 987-1005. The Judge in *Liddell v. Bd. of Educ. of the City of St. Louis*, 567 F. Supp. 1037, 1043 (E.D. Mo 1983), *aff'd in part, rev'd in part sub nom.*, *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir. 1984), mandated the creation and use of magnet schools as a desegregation tool but did not define the term. The creation of magnet schools became a popular school desegregation remedy in the 1980s. “Magnet schools are public schools without school boundaries.” *2016-17 Magnet School Guide*, ST. LOUIS PUBLIC SCHOOLS, at 2, https://www.slps.org/cms/lib03/MO01001157/Centricity/Domain/49/Full%20Guide_Choice.pdf [https://perma.cc/2VVP-WHRE]. They offer specialized programs and concentrations for students focusing on many areas, for example, focusing on technology, the arts, or curriculums for gifted students. They were used to attract, like a magnet, White children from outside of inner school district boundaries, into those schools. Erica K. Wilson, *The New White Flight*, 14 DUKE J. CONST. L. & PUB. POL’Y 233, 244-45 (2019); Erica Frankenberg & Genevieve Siegel-Hawley, *Choosing Diversity:*

Despite having been found to be “a primary constitutional wrongdoer[] who [had] abdicated [its] affirmative remedial duty,”⁵² Missouri refused to sign the 1983 Settlement Agreement. As Judge Hungate noted in 1983, from 1954 to 1983, Black children hoped for the fulfillment of *Brown*’s promise of constitutional equality. For those twenty-nine years, Missouri did *everything but* fulfill its constitutional obligations to those students.⁵³ At every step of the court proceedings and negotiations, the State refused to negotiate or agree to pay any money to remedy its constitutional violations.⁵⁴ It would take a threat of contempt and the exhaustion of numerous appeals before the State would finally begin paying to implement the desegregation remedies contained in the settlement.⁵⁵ And for an *additional* sixteen years after the 1983 Settlement Agreement, the State continued to file motion after motion to terminate its payment obligations and otherwise end the lawsuit.⁵⁶

Implementation of the 1983 Settlement Agreement proceeded—some would say successfully⁵⁷—until 1991, when the Supreme Court of the United States began rolling back the gains made by *Brown*. Initially, *Brown*’s holding that “[s]eparate educational facilities are inherently

School Choice and Racial Integration in the Age of Obama, 6 STAN. J.C.R. & C.L. 219, 224–26 (2010). In St. Louis, White children in St. Louis County schools, but not Black children in St. Louis County, are eligible to apply to attend a magnet school, all located in the primarily Black St. Louis public school district. Any student who lives in the SLPSD, regardless of race, can apply through a lottery system, to attend a magnet school in St. Louis City. *2016-17 Magnet School Guide*, *supra*, at 4.

52. Liddell v. Bd of Educ. of City of St. Louis, 667 F.2d 643, 655 (8th Cir. 1981).

53. Liddell v. Bd of Educ. of City of St. Louis, 567 F. Supp. 1037, 1042 (E.D. Mo 1983).

54. The Eighth Circuit found that pursuant to pre-*Brown* law, the city and suburban districts conspired to keep Black children in Black City schools; and this included Black children who lived in suburban school districts who were bused into City schools. *Adams v. United States*, 620 F.2d 12, 1280, 1293–94 (8th Cir. 1980).

55. HEANEY & UCHITELLE, *supra* note 31, at 122.

56. Norwood, *supra* note 29, at 22 n.104. By the time the lawsuit finally settled in 1999, the State had spent over \$8 million just pursuing legal actions. HEANEY & UCHITELLE, *supra* note 31, at 200.

57. See WELLS & CRAIN, *supra* note 5, at 340 (Despite data showing Black students who participated in desegregation programs closed test score gaps with White students by 50% and were less likely to drop out of schools, get pregnant, or get in trouble with the law, desegregation transfer programs were still abandoned). See also VOLUNTARY INTERDISTRICT CHOICE CORPORATION, *supra* note 5 (“Unfortunately due to certain legal limitations on the indefinite continuation of a race-based school integration program we have been gradually reducing the total number of students participating [in our desegregation transfer program] despite the mutual benefits for all students involved.”).

unequal”⁵⁸ was given teeth in two subsequent decisions.⁵⁹ In *Green v. County School Board of New Kent*,⁶⁰ the Supreme Court held that school districts were obligated to eliminate racial segregated education systems “root and branch.”⁶¹ Three years later, in *Swann v. Charlotte-Mecklenburg Board of Education*, the Supreme Court recognized busing as a legitimate tool to effectuate desegregation.⁶² However, the momentum building for the elimination of racially segregated schools took a dramatic turn in 1991.⁶³ That was the year the Court decided *Oklahoma City Board of Education v. Dowell*.⁶⁴ *Dowell* allowed school districts to move to terminate court desegregation cases by demonstrating that they had done all they could, acting in good faith, to make the district a *unitary* one (*even if the district was still, in fact, racially segregated*).⁶⁵ The ink was barely dry on the *Dowell* decision when the State filed a motion to have the St. Louis public school system declared unitary even though the district was still racially segregated.⁶⁶

One year after *Dowell*, the Supreme Court again retreated from *Brown*. In *Freeman v. Pitts*, the Court held that districts could seek incremental

58. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (*Brown*).

59. A year after *Brown* was decided, the Court revisited *Brown* to discuss implementation of the Court’s decision. In *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (*Brown II*), the Court held districts were to begin racial desegregation of public schools with “all deliberate speed.” *Id.* at 301.

60. *Green v. Cty. Sch. Bd. of New Kent*, 391 U.S. 430 (1968).

61. *Id.* at 437–38.

62. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 30 (1971).

63. In 1974, the Supreme Court ruled that non constitutional violators could not be part of remedying constitutional violations. In *Milliken v. Bradley*, 418 U.S. 717 (1974), the court overturned the district court’s attempt to desegregate schools by including school districts not found to have violated the constitution. *Id.* at 752. White flight took off in the Detroit school district after *Milliken*. See Cedric Merlin Powell, *Milliken, “Neutral Principles,” and Post-Racial Determinism*, 2015 HARV. J. RACIAL & ETHNIC JUST. ONLINE 1 (2015).

64. *Oklahoma City Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991).

65. *Id.* at 249–50. With a focus on five areas: the student body, the faculty, staff and administration, transportation, extracurricular activities, and facilities, *Green* held that if one could look at a school and tell the race of the school, the district was still operating as a dual, i.e., non-unitary, system. *Green*, 391 U.S. at 441–42.

66. HEANEY & UCHITELLE, *supra* note 31, at 186. *Dowell*, 498 U.S. at 249–50. Although unitary status was not declared in St. Louis, it was in Kansas City. Concerned parents and teachers in the KCPSD filed a lawsuit against the State to remedy past effects of unlawful racial school segregation. *Jenkins v. Kansas City Mo. Sch. Dist.*, 516 F.3d 1074 (8th Cir. 2008). That lawsuit, filed a mere five years after the *Liddell* suit, raised nearly the identical issues being litigated in *Liddell*. *Id.* at 1074. When unitary status was granted to the KCPSD in 2003, the District was almost seventy percent Black. *State of Missouri, Districts, Charters and Schools*, MO. DEP’T OF ELEM. & SECONDARY EDUC., <https://apps.dese.mo.gov/MCDS/home.aspx> [hereinafter MO. DESE DATA SYS.].

release from desegregation orders. Thus, *partial* unitary status determinations could be made.⁶⁷ Less than sixty days after *Freeman* was handed down, Missouri filed its motion for *partial* unitary status in the *Liddell* case.⁶⁸ The motion was denied.⁶⁹

The State would go on to file three more motions for unitary status in *Liddell*.⁷⁰ The court held a three-week hearing on unitary status.⁷¹ Shortly after the hearing, the court appointed Dr. William Danforth, former chancellor of Washington University in St. Louis, as the settlement coordinator for the case.⁷²

B) A Settlement that Settled the Case but Ultimately Settled Nothing

[The State of Missouri violated the constitutional rights of African Americans for more than a century before it was forced to try and remedy that situation.] “Ten, fifteen, twenty—however many years of interdistrict transfers don’t strike me as undoing 115 years of state-imposed segregation.”⁷³

When Dr. Danforth was appointed as Settlement Coordinator in 1996, the 1983 Settlement Agreement was still in effect.⁷⁴ Thousands of Black children were being bused into suburban schools, and White children were being transported into the city’s magnet schools. Dr. Danforth was concerned that granting unitary status (and thus stopping those transfers overnight) would result in chaos as thousands of Black children then being bused to county schools would be returned to still-dilapidated city school

67. *Freeman v. Pitts*, 503 U.S. 467, 489 (1992).

68. *Liddell by Liddell v. Bd. of Educ. of the City of St. Louis*, 105 F.3d 1208, 1211 (8th Cir. 1997); *see also* HEANEY & UCHITELLE, *supra* note 31, at 186.

69. *Liddell by Liddell*, 105 F.3d at 1211.

70. Norwood, *supra* note 29, at 22.

71. HEANEY & UCHITELLE, *supra* note 31, at 188.

72. *Liddell v. Bd. of Educ. of the City of St. Louis*, No. 4:72CV100 SNL, 1999 WL 33314210, at *1 (E.D. Mo. Mar. 12, 1999).

73. WELLS & CRAIN, *supra* note 5, at 342–43 (quoting Special Master to the 1983 Settlement Agreement Bruce LaPierre).

74. HEANEY & UCHITELLE, *supra* note 31, at 193.

buildings.⁷⁵ After studying the financial records and capital needs of the District, Dr. Danforth concluded that more money, *and a different source of money*, were needed to effectuate a settlement.⁷⁶ Dr. Danforth ultimately played a crucial role in the political process, helping to shepherd the passage of a law that decreased the State's contribution and added a second source of funding.⁷⁷

At the time, the State was paying approximately \$70 million annually to SLPSD through the 1983 Settlement Agreement.⁷⁸ Senate Bill 781 ("S.B. 781") would change that. Under S.B. 781, the State's financial contribution was estimated to total \$40 million (a savings to the State of \$30 million); an additional \$20 million was slated to come from a St. Louis City voter-approved sales tax.⁷⁹ This was a 2/3 of 1-cent sales tax designed specifically to fund the District's portion of the desegregation remediation programs.⁸⁰ Once the funding source was secured, the 1999 Settlement Agreement superceded the 1983 agreement. It did, however, incorporate several of the programs in the 1983 agreement. For example, it included the District's continuation of the 1983 desegregation remediation programs "to ensure that the enjoyment of full equality of opportunity by plaintiff school children is not impaired by the effects of past segregation."⁸¹ These obligations included maintaining court-ordered all-day kindergarten;

75. *Id.* Special Master to the 1983 Settlement Agreement Bruce LaPierre complained that a portion of the 1983 Settlement Agreement required capital improvements to the existing unsafe and dilapidating buildings in Black neighborhoods that were never made. LaPierre, *supra* note 49, at 1032.

76. As Dr. Danforth once noted: "When we got into the negotiations, it was very clear that there was not enough money available in the system that was being spent to settle the case . . . [T]here was no incentive at all for the plaintiffs or the St. Louis public schools or really most of the country school districts, to settle the case. They had a good deal going, and without sufficient resources, there was very little chance of getting it settled." HEANEY & UCHITELLE, *supra* note 31, at 194.

77. *Id.*

78. Plaintiff's Reply Memorandum in Support of Motion to Enforce Settlement Agreement at 8, Liddell v. Bd. of Educ., 674 F.Supp. 687 (E.D. Mo. 1987) (4:72-cv-00100-HEA, Doc. #507-1).

79. Liddell v. Special Admin. Bd. of Transitional Sch. Dist. of City of St. Louis, 894 F.3d 959, 963 (8th Cir. 2018); *see also* Liddell v. Bd. of Educ. of the City of St. Louis, No. 4:72CV100 SNL, 1999 WL 33314210, at *1 (E.D. Mo. Mar. 12, 1999).

80. The campaign literature provided assurances to the voters that: "If the sales tax increase is passed and a settlement is reached and approved by the court, the funds raised by this tax increase will go only to the St. Louis Public Schools to fund the City's portion of the desegregation programs." *See Focus on Desegregation: Questions and Answers about the Implication of Citywide Vote on February 2, 1999*, a publication of FOCUS St. Louis in partnership with The League of Women Voters Information Service, at 5 (on file with author).

81. *See* the Unpublished Settlement Agreement, at 2 (1999) [hereinafter 1999 Settlement Agreement] (on file with author).

summer school; college prep and preschool programs; and maintaining the magnet school program, with some modifications, for at least ten years.⁸²

The 1999 Settlement Agreement also transformed the court-supervised inter-district transfer (busing) program into a voluntary one. These transfers were to continue for at least ten years.⁸³ The 1999 Settlement Agreement did allow, however, suburban districts to voluntarily accept new students into the transfer program after the program's ten-year expiration.⁸⁴

Unfortunately, the 1999 settlement fell short of solving the problems for which the lawsuit was filed. On the day of the settlement, SLPSD was still racially segregated.⁸⁵ As Special Master Bruce LaPierre lamented after the settlement, "they had a party in the Chase Park Plaza to celebrate, and I thought the party was wildly inappropriate, because what we were celebrating was abandoning our commitment rather than staying with the commitment."⁸⁶ The settlement occurred even though much needed capital improvements had yet to be made.⁸⁷ And there were still quality of education issues; the SLPSD was then unaccredited, having met only three of the eleven accreditation requirements.⁸⁸

The District was left with these challenges, and with \$10 million less in funding, to address their ongoing desegregation remediation obligations.⁸⁹ The District was in a poor position financially to compete with charter schools. Yet instead of strengthening the District, the State began creating "school choice" programs that began to financially drain SLPSD, a district already weakened by State's unremediated constitutional violations.

82. *Liddell*, 1999 WL 33314210, at *2; 1999 Settlement Agreement, *supra* note 81.

83. 1999 Settlement Agreement, *supra* note 81.

84. *See* 1999 Settlement Agreement, *supra* note 81, at Appendix A; VOLUNTARY INTERDISTRICT CHOICE CORPORATION, [choicecorp.org \[https://perma.cc/LYC7-ZY2Y\]](https://perma.cc/LYC7-ZY2Y).

85. In 1999, the White non-Hispanic, non-Latino population in St. Louis city was 45%. *See* e-mail from Tanner Turley, Sr. Research Analyst for the Bureau of Health Care Analysis and Data Dissemination (Oct 1, 2021, 15:42 CST) (on file with author). In that year, Blacks were 80.28% of the SLPSD. *See* MO. DESE DATA SYS, *supra* note 66.

86. HEANEY & UCHITELLE, *supra* note 31, at 202 (quoting Special Master to the 1983 Settlement Agreement Bruce LaPierre).

87. LaPierre, *supra* note 49, at 1032.

88. Norwood, *supra* note 29, at 33 n.147. Full accreditation required meeting *at least* four the eleven standards. *Id.*

89. *See supra* notes 78–79 and accompanying text.

PART III – THE FALLACY OF SCHOOL CHOICE
IN MAJORITY BLACK AND UNDER-RESOURCED
SCHOOL DISTRICTS

[Some] [s]tates . . . have passed legislation that authorizes the privatization of the entire public education system. Other states . . . have not yet gone that far but have been growing their voucher and charter programs at staggering rates while public education funding falls. In fact, they have passed legislation that takes money directly from traditional public schools and transfers it to charter schools and voucher programs The environment for public schools is so unfavorable in some states that their major cities are on their way to having more charter schools than public schools.⁹⁰

Charter schools were first introduced into the lexicon by Ray Budde, a professor of education at the University of Massachusetts, Amherst, in the mid-1970s. His idea went nowhere. It was not until the 1983 report, *A Nation at Risk: The Imperative for Education Reform*, that the alarms began to sound about the quality of education America's public school students were then receiving.⁹¹ Professor Budde resurrected his idea in his 1988 book, *Education by Charter: Restructuring School Districts, Key to Long-Term Continuing Improvement in American Education*.⁹² Charter schools are publicly funded, independently privately run, tuition free, non-sectarian schools which operate independently from traditional school districts.⁹³ They were promoted to parents as the key to providing a better quality of education for their children trapped in under-resourced or failing schools.⁹⁴

90. DEREK W. BLACK, *SCHOOLHOUSE BURNING: PUBLIC EDUCATION AND THE ASSAULT ON AMERICAN DEMOCRACY* 17 (2020) (footnote omitted).

91. Zachary Jason, *The Battle Over Charter Schools*, HARV. ED. MAG. (Summer 2017), [<https://perma.cc/KR4N-ESKM>].

92. RAY BUDDE, *EDUCATION BY CHARTER: RESTRUCTURING SCHOOL DISTRICTS, KEY TO LONG-TERM CONTINUING IMPROVEMENT IN AMERICAN EDUCATION* (1988).

93. Amanda N. Aldridge, *Charter Schools as a Choice for Missouri Families*, 3 MO. POL'Y J. 1, 3 (2015).

94. BLACK, *supra* note 90, at 18; *see also* Joanne Barkan, *Death by a Thousand Cuts*, JACOBIN, [<https://jacobinmag.com/2018/06/us-public-schools-charters-vouchers-privatization>] [<https://perma.cc/4MB8-Z2TD>].

Some of the proponents of charter schools believed that public schools were failing because of the bureaucracy—government regulation, school boards, and unions. By obtaining a charter from school boards, parents could create their own schools free of those perceived constraints, resulting in top quality education for their children. The idea was picked up by Albert Shanker, then-President of the American Federation of Teachers, and endorsed at the group's 1988 Convention.⁹⁵ The first charter school opened in Minnesota in 1991.⁹⁶

Nationally, charter school performance has been inconsistent with its promises, and although there may be some waning of support for them, strong supporters and opponents on both sides remain.⁹⁷ There are, however, some serious concerns that cannot be ignored. For example, charter schools are often riddled with problems of financial mismanagement and fraud; they typically create highly racially segregated schools; attrition rates are often atrocious; and they have been criticized as a primary driver in the school to

95. See generally JOSEPH MURRAY & CATHERINE DUNN SHIFFMAN, UNDERSTANDING AND ASSESSING THE CHARTER SCHOOL MOVEMENT 22–28 (2002); JOE NATHAN, CHARTER SCHOOLS: CREATING HOPE AND OPPORTUNITY FOR AMERICAN EDUCATION 65–71 (1996).

96. Claudio Sanchez, *From A Single Charter School, A Movement Grows*, NPR (Aug. 31, 2012, 6:19 PM), <https://www.npr.org/2012/09/02/160409742/from-a-single-charter-school-a-movement-grows> [<https://perma.cc/2AVC-N9FG>]; see also Mark Binelli, *Michigan Gambled on Charter Schools. Its Children Lost.*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/magazine/michigan-gambled-on-charter-schools-its-children-lost.html> [<https://perma.cc/MC2J-LSDV>] (discussing the rapid spread of “[t]he Minnesota charter experiment” to California and Michigan).

97. See, e.g., THOMAS SOWELL, CHARTER SCHOOLS AND THEIR ENEMIES (2020); DOUGLAS N. HARRIS, CHARTER SCHOOL CITY: WHAT THE END OF TRADITIONAL PUBLIC SCHOOLS IN NEW ORLEANS MEANS FOR AMERICAN EDUCATION (2020); Erica L. Green, *Charter Schools in Surprise Political Fight as Trump and Democrats Turn Away*, N.Y. TIMES (Feb. 25, 2020), <https://www.nytimes.com/2020/02/25/us/politics/charter-schools-trump-devos-democrats.html%20> [<https://perma.cc/AE7V-YRPK>].

prison pipeline.⁹⁸ They also have high failure rates,⁹⁹ sending parents scrambling for an educational replacement. These students often end up back in the traditional public schools from which they left; they then are often further behind academically, and find themselves in a district drained of vital resources.¹⁰⁰ Additionally, charter schools have been ripe for manipulation by parents exercising school choice. As law professor Osamudia James notes:

Although competition and varied options are expected to produce rational choices, parents who engage in a school choice market do not necessarily make those decisions informed by what would be academically best for their children. Research suggests instead that white parents prefer predominantly white schools to predominantly Black schools even when other factors germane to education quality, like resources, are equal. Other studies show that as much as 75% of the variation in school choice

98. See, e.g., *#AnotherDayAnotherCharterScandal, August 2021*, NETWORK FOR PUB. EDUC., <https://networkforpubliceducation.org/another-day-another-charter-scandal-2-2/> [<https://perma.cc/88RW-LTYL>] (monthly collection of news items about charter school scandals); Diane Ravitch, *Texas: Public Schools Are Better Than Charter Schools: Stop Funding Failure!*, DIANE RAVITCH'S BLOG (Apr. 7, 2021), <https://dianeravitch.net/2021/04/07/texas-public-schools-are-better-than-charter-schools-stop-funding-failure/> [<https://perma.cc/5KYE-UFZW>]; ERICA FRANKENBERG ET AL., CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS 4 (2010); Jenn Ayscue et al., *Charters as a Driver of Resegregation*, Jan. 30, 2018, <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/charters-as-a-driver-of-resegregation/Charters-as-a-Driver-of-Resegregation-012518.pdf> [<https://perma.cc/NY7X-TE33>]; Mikaila Carwin, *The Charter School Network: The Disproportionate Discipline of Black Students*, 21 CUNY L. REV. F. 49, 53 (2018); Daniel J. Losen et al., *Charter Schools, Civil Rights and School Discipline: A Comprehensive Review*, THE CIVIL RIGHTS PROJECT, Mar. 16, 2016, [<https://perma.cc/A937-3F6H>]. See also Barkan, *supra* note 94.

99. See generally Shawgi Tell, *More Than 1,650 Charter Schools Closed in Seven Years*, DISSIDENT VOICE (May 8, 2021), [<https://perma.cc/J95J-CNUT>]; Carol Burris & Ryan Pflieger, *Broken Promises: An Analysis of Charter School Closures from 1999-2017*, NETWORK FOR PUB. EDUC. (2020) (calculating and describing charter failure rates and the resulting student displacement across all American charter schools between 1999 and 2017); Valerie Strauss, *New Report Finds High Closure Rates For Charter Schools Over Time*, WASH. POST (Aug. 6, 2020), <https://www.washingtonpost.com/education/2020/08/06/new-report-finds-high-closure-rates-charter-schools-over-time/> [<https://perma.cc/C6EZ-SDDS>]. For Missouri, see NICOLE GALLOWAY, CHARTER SCHOOL OVERSIGHT: REPORT NO. 2020-028 (2020).

100. See Elisa Crouch, *Shuttering of Imagine Charter Schools in St. Louis is Daunting*, ST. LOUIS POST-DISPATCH (Apr. 20, 2012), https://www.stltoday.com/news/local/education/shuttering-of-imagine-charter-schools-in-st-louis-is-daunting/article_ec4adf66-bde4-5e11-91d2-baca703df156.html [<https://perma.cc/6FG9-FHR6>].

preferences can be explained by the percentage of Black students in the schools. White middle-class families, moreover, are also particularly adept at using school choice policies as a way to enroll in selective charters schools or specialized programs, often hoarding these resources in ways that limit access for others.¹⁰¹

As further illustrated in the next section, a look at how charters have fared, as compared to traditional public schools in the SLPSD, demonstrates that charters are not outperforming traditional public schools, despite greater financial resources and fewer applicable state regulations.

A) *No Good Reasons to Pit Charter Schools Against Traditional Public Schools*

*Each new charter school siphons funding from public school districts, forcing cuts at already struggling neighborhood schools. Charter schools cost Oakland, California's school district \$57.3 million per year, meaning \$1,500 less in funding for each student who attends a neighborhood school. Some families with the time and know-how to enroll their kids in a charter school might escape the sinking ship, but only at the expense of other students.*¹⁰²

Missouri parents were looking for a better education for their children, and charter schools seemed to provide that opportunity.¹⁰³ In 1998, Missouri

101. Osamudia James, *Risky Education*, 89 GEO. WASH. L. REV. 667, 691 (2021) (citations omitted). See also Chana Joffe-Walt, *Nice White Parents*, N.Y. TIMES (2020), <https://www.nytimes.com/2020/07/30/podcasts/nice-white-parents-serial.html>.

102. Jeremy Mohler, *The "Choice" Bait and Switch*, JACOBIN (Jan. 8, 2019), <https://jacobinmag.com/2019/01/choice-rhetoric-charter-schools-reproductive-rights> [<https://perma.cc/54WL-E8H2>].

103. Aldridge, *supra* note 93, at 3. See also, e.g., JOSHUA M. DUNN, COMPLEX JUSTICE: THE CASE OF *MISSOURI V. JENKINS* 172 (2008) (Charter schools offer "the allure of greater freedom and more-committed students and the added bonus of more parent involvement since parents who send their children to charter schools presumably take a greater interest in their child's education than other parents.").

charter schools were authorized in S.B. 781.¹⁰⁴ Of the over 500 school districts in the state in 1998,¹⁰⁵ charter schools were only authorized in two districts: SLPSD and KCPSD.¹⁰⁶ SLPSD, like KCPSD, was then a majority Black and majority impoverished district, and many of its schools were struggling academically.¹⁰⁷ Yet there were other impoverished and struggling school districts in the state at the time. Predominately White and poor rural districts in the State, also with under-resourced and academically struggling schools, were statutorily prohibited from taking advantage of the touted wonderful school choice presented in the form of charter schools.¹⁰⁸

SLPSD had higher percentages of impoverished students than its surrounding wealthier suburbs.¹⁰⁹ Without question, there is a strong correlation between socioeconomic status and academic success.¹¹⁰

104. S.B. 781, 89th Gen. Assem., 2nd Reg. Sess. (Mo. 1998).

105. Missouri has 564 school districts. *Search for Public School Districts*, NAT'L CTR FOR EDUC. STATISTICS, <https://nces.ed.gov/ccd/districtsearch/> (search State for "Missouri," check all District Types under "Additional Characteristics," and leave all other fields blank). Only eleven States—Arizona, California, Illinois, Michigan, Minnesota, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, and Texas—have a greater number of school districts. *See id.* (replacing "Missouri" with the names of these States). Almost all of those States are more populous than Missouri. *States – Ranked by Size & Population*, INTERNET PUBLIC LIBRARY, <https://www.ipl.org/div/stateknow/popchart.html> [<https://perma.cc/QM6L-NX49>].

106. MO. REV. STAT. § 160.400 (1998); *see also* *Jenkins v. Kansas City Mo. Sch. Dist.*, 516 F.3d 1074, 1078 (8th Cir. 2008).

107. Blacks were 79.9% of SLPSD in 1998; 80.6% of the students in SLPSD participated in the free and reduced lunch program, a marker for poverty, that year. MO. DESE DATA SYS., *supra* note 66. The District remains majority Black and majority impoverished today. In 2021, Blacks are 83% of the SLPSD and 100% are on the free and reduced lunch program. *See About the District*, *supra* note 23. Another 15% are special education students and 25% are students in transition (homeless). *Id.*

108. MO. REV. STAT. § 160.400 (1998).

109. In 1999, 14.1% of the children attending the wealthy Clayton School District were on the free and reduced lunch program. In the SLPSD, the figure was 81.5%. MO. DESE DATA SYS., *supra* note 66, ("Reports and Resources"). For context, see William D. Duncombe & John Yinger, *How Much More Does a Disadvantaged Student Cost?* 25 (Ctr. For Policy Rsch., Working Paper No. 60, 2004); *see also* Sarah Gonzalez, *Taking On Poverty And Education In School Costs A Lot Of Money*, NPR (Apr. 30, 2016), <https://www.npr.org/2016/04/30/474166231/taking-on-poverty-and-education-in-school-costs-a-lot-of-money> [<https://perma.cc/LN65-GWG7>]. As a result of the pandemic, the USDA provided free lunches to children in all public schools effective March of 2020. Jessica Fu, *The Pandemic Has Made Universal School Meals The Norm. This Model Could Help Cafeterias Save A Lot Of Money Over Time*, THE COUNTER (Mar. 11, 2021), <https://thecounter.org/universal-school-meals-usda-lunch-covid-29-biden/> [<https://perma.cc/MJ7G-E5H9>]. This was extended through September of 2021. *USDA Extends Free Meals to Children through Summer 2021 Due to Pandemic*, USDA (Mar. 9, 2021), <https://www.usda.gov/media/press-releases/2021/03/09/usda-extends-free-meals-children-through-summer-2021-due-pandemic> [<https://perma.cc/VZW5-NXWM>].

110. In 2019, St. Louis had a youth poverty rate of nearly 40%. G. Scott Thomas, *St. Louis Ranks Among Nation's 20 Worst Cities For Child Poverty*, ST. LOUIS BUS. J. (Jan. 17, 2019),

Additionally, the District had a higher percentage of children with special needs and a higher percentage of homeless children than its surrounding wealthier suburbs.¹¹¹ The District was also expected to receive less funding as part of the 1999 Settlement than it had been receiving from the State pre-settlement.¹¹² Despite these challenges, the State permitted charter schools to be created in competition with SLPSD (and KCPSD) but not in other similarly situated, predominately White districts. The statute was recently revised and now authorizes charter schools in any jurisdiction where the school district has been classified as unaccredited and in some provisionally unaccredited school districts.¹¹³

Missouri charter schools are “independent” public schools and are not part of any public school district.¹¹⁴ S.B. 781 also provided how they were to be funded. The State could have provided these independent public schools with their own source of funding. It did not. Instead, S.B. 781 required the district in which the charter was created to pay to the charter “a per pupil portion of its state aid for each resident student who chose to attend a charter school rather than a District school.”¹¹⁵ The State did this although

<https://www.bizjournals.com/stlouis/news/2019/01/17/st-louis-ranks-among-nations-20-worst-cities-for.html> (last visited Nov. 9, 2021). Dunklin County, a rural community, has a poverty rate of 26.1%. MISSOURI COMMUNITY ACTION NETWORK & MISSOURIANS TO END POVERTY, MISSOURI POVERTY REPORT 17 (2020). Compare this with Clayton, which reports a poverty rate of 4.4%; and Ladue, which reports a poverty rate of 3%. *Clayton School District, MO*, NAT'L CTR FOR EDUC. STATISTICS (NCES), <https://nces.ed.gov/Programs/Edge/ACSDashboard/2909720> (last visited July 16, 2021); *Ladue School District, MO*, NCES, <https://nces.ed.gov/Programs/Edge/ACSDashboard/2917820> (last visited July 16, 2021). Socioeconomic status has an often-determinative effect on academic achievement. *Education and Socioeconomic Status*, AMERICAN PSYCHOLOGICAL ASS'N, <https://www.apa.org/pi/ses/resources/publications/education> (last visited July 28, 2021); see also *Young Adult Educational and Employment Outcomes by Family Socioeconomic Status*, NCES (May 2019), https://nces.ed.gov/programs/coe/pdf/coe_tbe.pdf.

111. See *Missouri Education Dashboard*, MISSOURI DEP'T OF ELEM. & SECONDARY EDUC., <https://apps.dese.mo.gov/MCDS/Visualizations.aspx?id=22> (last visited Nov. 28, 2021). In the 2019-2020 school year, 15.14% of the SLPSD were special education students; 11.04% were homeless. Comparative numbers in the Clayton school district, a wealthy neighboring district were 12.67% and .69% respectively. The numbers in the Ladue School District, another wealthy neighbor, were 12.26% and .68% accordingly. *Id.*

112. See *supra* notes 79, 81–82 and accompanying text.

113. MO. REV. STAT § 160.400.2(3)-(4) (2016).

114. *What is a Charter School*, MO. CHARTER PUB. SCH. COMM'N, <https://mcpssc.mo.gov/families/what-is-a-charter-school> (last visited July 1, 2021).

115. *Liddell v. Special Admin. Bd. of Transitional Sch. Dist. of City of St. Louis*, 894 F.3d 959, 963 (8th Cir. 2018).

it had not provided sufficient funding to correct, repair, demolish, or otherwise address the District's dilapidated, unsafe buildings.¹¹⁶ This cannibalization through public school privatization had (and has) the effect of draining financial resources from the District.

The funding of K-12 public schools in Missouri is a complex formula that includes State contributions, local efforts, and federal tax dollars.¹¹⁷ A simplified version of how it works is as follows. Federal dollars are sent to states, typically in the form of Title I dollars.¹¹⁸ State contributions are the next component. In 2020, Missouri ranked forty-ninth out of the fifty states

116. After the 1983 Settlement was adopted, the following conditions were found in St. Louis public schools:

The schools have not received major repairs in the memory of most of the staffs. Roofs leak in over half the schools. The leaks receive only temporary attention. In classroom after classroom, in gymnasiums, in libraries and study halls and in cafeterias, water is everywhere. It drips from the ceiling, down the walls and even from light fixtures.

Cans, buckets and other receptacles are all over. A sixth grader in a reading class leans over in her chair to avoid the steady drip of water going into a bucket at her feet.

Some of the plumbing is intolerable. On one occasion in a school when the water was flushed from a urinal, portions came down a wall in the room below, while a devoted teacher was attempting to teach her students in that room.

Ceiling tile in many rooms no longer exists or is so permeated with water that it hangs perilously. Plaster falls to the floor sometimes placing the student or teacher in some danger.

Paint peels from many walls and exposes the plaster or wall board and sometimes the studs.

Many buildings are old and dilapidated and were designed for education seventy-five years ago. Some have no gymnasiums. Others have gymnasiums, but the ceilings are only seven or eight feet high. In many schools, a student must bend or duck going from some rooms to others to avoid hitting exposed pipes or mechanical supports.

Liddell v. Bd. of Educ. of the City of St. Louis, 674 F. Supp. 687, 689 (E.D. Mo. 1987). See also Kathryn Rogers, *16 Schools Ordered Closed*, ST. LOUIS POST-DISPATCH, Sept. 4, 1987, at 1A, col. 1; Kathryn Rogers, *Judge's Homework Pays Off in School Plan*, ST. LOUIS POST-DISPATCH, Sept. 6, 1987, at 1C, cols. 2-4. The 1999 Agreement did require the State to provide capital improvement dollars to the district. HEANEY & UCHITELLE, *supra* note 31, at 199.

117. MO. REV. STAT. § 163.031 (2006). See also Comm. for Educ. Equal. v. State, 294 S.W.3d 477 (Mo. 2009) (en banc).

118. *Public School Revenue Sources*, NCES (last updated May 2021), <https://nces.ed.gov/programs/coe/indicator/cma>; see also Nora Gordan & Sarah Reber, *Schools Need More Federal Dollars, But Title I Is Not The Right Tool For The Job*, THE HILL (Apr. 27, 2021), <https://www.msn.com/en-us/news/politics/schools-need-more-federal-dollars-but-title-i-is-not-the-right-tool-for-the-job/ar-BB1g761Y> [<https://perma.cc/95BY-5TZZ>].

in the percentage of State resources allotted for K-12 school funding.¹¹⁹ Because of this severe underfunding, reliance on revenue from local property taxes, or local effort, occurs at “significantly higher rate[s] [in Missouri] than the national average.”¹²⁰ Depending on where one lives and the value of that property, some districts are able to raise substantially more in tax dollars to contribute to their public education system than others.¹²¹ For example, some districts, particularly large urban districts, have large swaths of non-taxable property within their boundaries. Government-owned buildings (City Hall, libraries) and other property (like parks) are not taxed.¹²² Hospitals and not-for-profit businesses are also exempt from property taxes in the city.¹²³ This directly affects collectible tax revenues.

119. NICOLE GALLOWAY, ELEMENTARY AND SECONDARY EDUCATION FUNDING TRENDS: REPORT NO. 2021-027 (May 2021), <https://auditor.mo.gov/AuditReport/ViewReport?report=2021027> [hereinafter Elem and Secondary Auditor’s Report].

120. *Id.* at 8.

121. Clayton’s tax rate per \$100 of assessed value is \$3.57, and their local effort is approximately \$50 million; Ladue’s tax rate is \$2.77, and their local effort is approximately \$53.5 million; Normandy’s tax rate is \$4.12, and their local effort is approximately \$12 million; St. Louis City’s tax rate is \$4.39, and their local effort is approximately \$197 million; and the rural town in Dunklin County’s tax rate is \$3.30, and their local effort is approximately \$751,000. NICOLE GALLOWAY, 2020 PROPERTY TAX RATES: REPORT NO. 2020-113, 42, 108, 116 (2020) [hereinafter GALLOWAY]. Now, consider these local effort dollars in the context of the total number of students within the respective school districts. In K-12 schools, Clayton educates 2,618 students (which translates to approximately \$19,000 per student); Ladue educates 4,236 (which translates to approximately \$12,600 per student); Normandy educates 2,987 (which translates to approximately \$4,000 per student); St. Louis City educates 19,222 (which translates to approximately \$10,250 per student); and Holcomb School District in Dunklin County educates 453 (which translates to approximately \$1,660 per student). *Missouri District Report Card*, MO. DEP’T OF ELEM. AND SECONDARY EDUC., (Nov. 28, 2020), https://apps.dese.mo.gov/MCDS/Reports/SSRS_Print.aspx?Reportid=6a5392af-6f3d-46a5-92e1-f39fdfa861c2 (search School Year for 2020, enter the names of these districts, and scroll to section (3) K-12 Enrollment).

122. MO. ANN. STAT. § 137.100 (West 2013).

123. *See, e.g., id.*; *see also* Joseph Miller, *Saint Louis Property Taxes, Part 1: This Land is Their Land*, SHOW-ME-INST. (Aug. 28, 2015), <https://showmeinstitute.org/blog/municipal-policy/saint-louis-property-taxes-part-1-this-land-is-their-land/> [<https://perma.cc/9KWA-DNAV>] (sharing a map that identifies all the areas made up of tax-exempt, government-owned land and property in St. Louis City and explaining, “[i]n Saint Louis City, many properties are owned by other quasi-governmental bodies, including: the Bi-State Development Agency, the Metropolitan St. Louis Sewer District, Great River Greenways, the Land Reutilization Authority (LRA), the Saint Louis Convention and Visitors Commission (CVC), the Saint Louis Housing Authority, the St. Louis Municipal Finance Corporation, and others Many large entertainment venues in the city, including the Scott Trade Center and the Edward Jones Dome, are on public land. Different government organizations own housing complexes, office buildings, theatres, parking lots, and wharfs.”); and Scott Ogilvie, *The Non-Profit Paradox. 40% of Real Estate in St. Louis is Government Owned or Tax-Exempt*, NEXTSTL (Nov. 8, 2018), <https://nextstl.com/2018/11/the-non-profit-paradox->

Tax breaks also are commonly given to businesses to encourage them to stay in an area. The Superintendent of the St. Louis City Public Schools, Kelvin Adams, noted that during his twelve years in office, SLPSD lost *over \$126 million* in property tax revenue because of tax increment financing and abatements.¹²⁴ All of this affects what is collected by a school district for educational purposes. The total from all sources is ultimately divided by the number of the children in the district. The resulting per pupil allotment is the amount used for the education of the child. And that amount varies significantly, depending on the tax base of the district.¹²⁵

Once the child moves from a public school district to a charter school, the per pupil allotment follows the child to the charter school.¹²⁶ This takes money away from the District. The District still has the same teachers and bills to pay, resources to provide for, and buildings to maintain, but with less money.¹²⁷ The idea that taking the child and the money away from the District fosters competition is a fallacy. One simply is hard pressed to compete with less.

In addition to this per pupil allotment, the 1999 Settlement Agreement relied on a special sales tax passed in St. Louis to specifically help fund various remediation programs.¹²⁸ This financing was part of the two-step funding laid out in the 1999 Settlement and S.B. 781.¹²⁹ As discussed above, in S.B. 781, the state aid portion of this funding would follow the child on

40-of-real-estate-in-st-louis-is-government-owned-or-tax-exempt/ (discussing the tax exemptions allowed for large hospitals and universities in St. Louis and specifically noting, “[s]tate government exempts non-profits from paying property taxes, which is common. State law also exempts non-profits from paying sales and use taxes, which is unusual nationally. Local law exempts non-profits from the St. Louis payroll tax, a .5% tax on payroll paid by for profit companies.”).

124. Blythe Bernhard, *St. Louis Schools Superintendent Says District Missed Out on \$126 Million Over 12 Years From Tax Breaks*, ST. LOUIS POST-DISPATCH (June 22, 2021), https://www.stltoday.com/news/local/education/st-louis-schools-superintendent-says-district-missed-out-on-126-million-over-12-years-from/article_000afb40-b9e0-526e-bf2f-52eb4d531205.html [https://perma.cc/U8T9-KZTR].

125. See *supra* note 121.

126. See MO. REV. STAT. § 160.415.2 (2019); Interview with Tabitha Herndon, Administrative Assistant, Mo. Dept. of Elem. and Secondary Educ. (July 29, 2021) (notes on file with author).

127. Barkan, *supra* note 94.

128. See *supra* notes 77–79 and accompanying text.

129. Liddell v. Special Admin. Bd. of Transitional Sch. Dist. of City of St. Louis, 894 F.3d 959, 963 (8th Cir. 2018); Liddell v. Bd. of Educ. of the City of St. Louis, No. 4:72CV100 SNL, 1999 WL 33314210, at *2 (E.D. Mo. Mar. 12, 1999) (“It is understood by the parties that City Board will receive a minimum of \$60m a year from *State aid* under Senate Bill 781 *and the new sales tax*”) (emphasis added).

a per pupil basis, from the District to the charter school. But the law made no pronouncements with respect to the sales tax following students to charter schools.¹³⁰ And indeed, as Dr. Danforth noted: “No one gave thought to charter schools in the future when the settlement was worked out . . . I worked hard for the tax but remember no conversations about charter schools”¹³¹

The State paid the District one hundred percent of this sales tax revenue between 1999 and 2006.¹³² However, in 2006, the State enacted Senate Bill 287 (S.B. 287) which revised the state aid funding formula for public schools by allowing charter schools to be formed as “local educational agencies” (“LEA”). As LEAs, the charter schools would then receive aid directly from the State instead of the local district.¹³³ For the first time, the State redirected portions of the revenue raised from the sales tax for remediation programs per the 1999 Settlement Agreement to charter schools on a per pupil basis.¹³⁴ So as noted by the Eighth Circuit Federal Court of Appeals, “[w]hile Senate Bill 781 in 1998 had not required the district to pay any portion of its local tax revenue to the charter schools, Senate Bill 287 in 2006 mandated that charter students receive a per pupil percentage of local tax revenues received by the district.”¹³⁵ Under this new law, as of 2019, over \$86 million of this sales tax money designated for desegregation remediation programs under the 1999 Settlement Agreement has been paid to charter schools.¹³⁶

130. *Liddell*, 894 F.3d at 963.

131. Dale Singer, *Old Deseg Settlement Generates New Rivalry Between St. Louis Public Schools and Charters*, ST. LOUIS PUB. RADIO (May 12, 2016), <http://news.stlpublicradio.org/post/old-deseg-settlement-generates-new-rivalry-between-st-louis-public-schools-and-charters#stream> [<https://perma.cc/XVW5-G98D>].

132. See *Liddell*, 894 F.3d at 963; *Liddell*, 1999 WL 33314210, at *2. The desegregation remedial programs to be funded pursuant to the 1999 Settlement Agreement included all-day kindergarten, summer school, college-prep and preschool programs, and magnet school programs. 1999 Settlement Agreement, *supra* note 81, at 3–5.

133. Once declared an LEA, the State then “reduce[s] the payment made to the school district by the amount specified in [the] subsection and pay[s] directly to the charter school the annual amount reduced from the school district’s payment.” *Liddell*, 894 F.3d at 963 (quoting MO. REV. STAT. § 163.415.4 (2006)).

134. MO. REV. STAT. § 163.415.4 (2006). See also *Liddell*, 894 F.3d at 963.

135. *Liddell*, 894 F.3d at 963.

136. Declaration of Angela Banks at 3, *Liddell v. Bd. of Educ.*, 674 F. Supp. 687 (E.D. Mo. 1897) (4:72-cv-00100-HEA, Doc. # 502-2).

The State also unsuccessfully tried to unilaterally modify the 1996 Settlement Agreement in the Kansas City desegregation litigation. In *Jenkins v. Kansas City Missouri School District*, the Eighth Circuit rejected the State's similar attempt to redirect funds purposefully targeted to desegregation remediation from KCPSD to charter schools.¹³⁷ Specifically, after the adoption by the court of a 1996 Settlement Agreement, Missouri, as it had done on the St. Louis side of the State, moved for unitary status to completely end the litigation.¹³⁸ After several failed motions and appeals, unitary status was finally granted in 2003.¹³⁹ Almost immediately thereafter, the State amended the statute to take funding contemplated by the *Jenkins* 1996 Settlement Agreement for successful implementation of that Agreement and redirect those resources to charter schools. The new law would have allowed the Board of Fund Commissioners to compel KCPSD to satisfy its desegregation bonds immediately—regardless of the devastating effect this would have had on the KCPSD's budget—and then divert a portion of funds to charter schools.¹⁴⁰ Finding that the money was part of the 1996 Agreement adopted as a Court Order, the Eighth Circuit Court of Appeals rejected the State's attempt to divert money away from KCPSD to charter schools.¹⁴¹ The court found that the money that the State sought to redirect from the district was “unquestionably critical” to the district's success and that its “removal . . . would result in ‘fiscal chaos.’”¹⁴²

In addition to the ways depletion of revenue weakens the SLPSD overall, the bait and switch component of school choice is another problematic issue. Charter schools were sold to the public as a better option for children. Yet overall, national data establishes that they are no better and are often worse than traditional public schools. Indeed, “[f]rom the US Department of Education's first comprehensive study of charters through the Stanford University Center for Research on Education Outcomes' *multiple* studies, overwhelming evidence demonstrates that charter schools

137. *Jenkins v. Kansas City Mo. Sch. Dist.*, 516 F.3d 1074, 1076 (8th Cir. 2008).

138. *Id.* at 1079.

139. *Id.*

140. *Id.*

141. *Id.* at 1080–82.

142. *Id.* at 1083 (emphasis added).

do not outperform public schools. Roughly 80% perform the same as *or worse* than traditional public schools.”¹⁴³

This is true in Missouri as well.¹⁴⁴ Despite fewer resources, the SLPSD is not only performing on par with most of the charter schools in the District, the District is actually performing *better* than most of those charter schools.¹⁴⁵ This is consequential when one considers that charter schools in Missouri have fewer regulations and constraints than SLPSD, which works a further disadvantage for SLPSD.¹⁴⁶ For example, while 100% of public school district teachers must be certified, only 75% of charter schoolteachers must be certified. Additionally, while SLPSD school boards are elected and answerable to the local voters, charter school boards are not elected, are not answerable to local voters, and Board members do not even have to reside in the State, much less reside in the actual district, as is required of those serving on the St. Louis City School Board.¹⁴⁷ Another less highlighted fact is that, despite the suggestion that both accept the same students, this is not entirely true. Charter schools within the SLPSD, for example, only educate 37% of the current SLPSD body.¹⁴⁸ There is no indication that if every SLPSD student *wanted* to attend a charter school in

143. Black, *supra* note 90, at 233 (footnotes omitted) (emphasis added); *see also* CTR. FOR RSCH. ON EDUC. OUTCOMES, NAT'L CHARTER SCH. STUDY 2013, https://credo.stanford.edu/sites/g/files/sbiybj6481/f/ncss_2013_final_draft.pdf; and JAMES L. WOODWORTH ET AL., CTR. FOR RSCH. ON EDUC. OUTCOMES, CHARTER MGMT. ORGS. 2017, at 71–93 (2017).

144. *St. Louis Education Profile: 2020*, PRIME CTR. SAINT LOUIS U., 34–49, <https://static1.squarespace.com/static/5c8a78c9e5f7d15aab22c61c/t/609d890a46df5d2f9bac2f50/1620936976438/STL-2020-profile.pdf> (last visited Jan. 9, 2022). *See also* WILLIAM BRATBERG ET AL., PERFORMANCE OF CHARTER SCHOOLS IN MISSOURI (OpenStax CNX 2007), at 8 (suggesting “no significant improvement in student achievement over those students still in the regular public schools”); Curt Fuchs & Carole Kennedy, *Commentary: State Should Start Over On Charter Schools*, COLUMBIA DAILY TRIB. (Jan. 15, 2020), <https://www.columbiatribune.com/opinion/20200115/commentary-state-should-start-over-on-charter-schools/> [<https://perma.cc/8D3A-A8GL>] (“Missouri’s Department of Education 2017-18 performance data reports the 10 worst-performing *school systems in the state were charter schools.*” (emphasis added)).

145. *St. Louis Education Profile: 2020*, *supra* note 144, at 34–49; *see also* *Opportunity Trust 2020*, THE OPPORTUNITY TR., <https://theopportunitytrust.org/>.

146. *School Accountability in State Law*, MO. SCH. BOARDS’ ASS’N, <https://cqrcengage.com/msba/file/GJUPDQECWyE/Accountability%20Comparison%20w%20Statutes.pdf> (last visited July 14, 2021) [hereinafter MOSBA Report]; *cf.* MO. REV. STAT. §§ 162.261, 162.471, 162.581 (2016).

147. MOSBA Report, *supra* note 146.

148. E-mail from Cheryl L. VanNoy, Deputy Superintendent, Accountability, Assessment, Tech. Services, Student Records, & Data for St. Louis Pub. Schools, (Nov. 5, 2021, 10:06 CST) (on file with author).

the district, they could. Choice is not actually a real option for all. Relatedly, unlike every non-magnet school in SLPSD and in KCPSD, there are charters in both districts that accept students based only on a lottery system.¹⁴⁹ Traditional public schools in Missouri cannot do this.¹⁵⁰ Some charter schools even reserve seats to students who live in their communities.¹⁵¹ For gentrifying communities, this likely explains the upward increase in White charter school students seen in the St. Louis area over the past ten years.¹⁵² There is, in effect, a double whammy of sorts here. Not only are charter schools competing with traditional public schools, but they also, overall, are not performing better than traditional public schools.¹⁵³

149. See WAITING FOR “SUPERMAN” (Walden Media 2010); THE LOTTERY (Variance Films 2010); *The Lottery*, ST. LOUIS PUB. SCHOOLS, <https://slpsmagnetschools.org/site341.php> [<https://perma.cc/H327-WZ3R>]. Moreover, there is a disturbing national trend of charter schools suspending students at much higher rates than traditional public schools. This helps feed the school to prison pipeline. See Norman Black, *Study Finds Many Charter Schools Feeding “School-to-Prison Pipeline”*, UCLA CIVIL RIGHTS PROJECT (Mar. 16, 2016), <https://civilrightsproject.ucla.edu/news/press-releases/featured-research-2016/study-finds-many-charter-schools-feeding-school-to-prison-pipeline> [<https://perma.cc/E3VC-HJAQ>]; see also *No-Excuses*, NYC CHARTER SCHOOLS, <https://raceandschools.barnard.edu/charterschools/no-excuses/> [<https://perma.cc/3LE9-5QDG>] (criticizing “the strict behavioral code enforced at a no-excuses charter school[,] Success Academy, in New York City”); Jay Mathews, *A Revealing Look At America’s Most Controversial Charter School System*, WASH. POST (Aug. 17, 2019), https://www.washingtonpost.com/local/education/a-revealing-look-at-americas-most-controversial-charter-school-system/2019/08/16/a3c09034-c02b-11e9-a5c6-1e74f7ec4a93_story.html [<https://perma.cc/G572-X7C2>]. Although not the case in St. Louis, charter schools nationally also have created hyper-segregated school districts. See, e.g., GARY ORFIELD ET AL., E PLURIBUS... SEPARATION: DEEPENING DOUBLE SEGREGATION FOR MORE STUDENTS (Civil Rights Project Sept. 2012). The ten-year trend in St. Louis, however, has shown an increase in White students attending St. Louis charter schools in gentrified or gentrifying communities. See Deanna Childress, *Percent black students data analysis* (demographic comparisons.xlsx) (on file with author).

150. See, e.g., MO. REV. STAT. §167.020 (2019); see also MO. REV. STAT. § 167.151 (2019). For a list of the differences between what is required of charter schools as compared to traditional public schools in Missouri, see MOSBA Report, *supra* note 146.

151. See, e.g., *Admissions Information*, CITY GARDEN MONTESSORI SCH., <https://www.citygardenschool.org/admissions-information> (last visited July 14, 2021) (“Only children who reside in the City of St. Louis are eligible for enrollment at City Garden . . . [and the school] offers enrollment preference to families who live in specific regions of St. Louis City.”).

152. Childress, *supra* note 149.

153. Blythe Bernhard, *Arch Community Charter School in North St. Louis Loses Its Sponsor, Could Close*, ST. LOUIS POST-DISPATCH (Oct. 21, 2021) [<https://perma.cc/GHV7-74J3>] (“The local, state, and federal support for school choice programs continues to create a system of schools and programs that fight over a declining population of children and a shrinking pool of resources, leading to duplicated services and system-wide inefficiencies. . . . Of the 30-plus charter schools that have opened in St. Louis since 2000, about half have been shut down for academic or financial failure. Carondelet Leadership Academy was the latest to shutter in June 2020, displacing 400 students and 50 staff members.”).

Charters in Missouri have recently been given *more* resources. During the COVID-19 pandemic, charters in the State received millions of federal dollars, not only in CARES Act monies but also in PPP money.¹⁵⁴ And at least one charter school shut down immediately after receiving millions of dollars in PPP money.¹⁵⁵

Parents leaving public schools for charters were promised a better education. Most of the children in charter schools in the St. Louis area are not getting a better education than they would in SLPSD. Charters in Missouri also have a high failure rate,¹⁵⁶ and they contribute to the financially weakened condition of SLPSD, which is left with the same fixed expenses but fewer resources. Despite all of this, and over local resident opposition, a charter school has been recently approved in another majority Black district.¹⁵⁷ Predominately White rural communities have successfully

154. Charters were allowed to receive money as elementary and secondary schools under the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act *and* also as small businesses under the Payroll Protection Plan (“PPP”). Public schools were not eligible for this PPP funding. Blythe Bernhard, *St. Louis Charter Schools Under Scrutiny for Federal Coronavirus Relief Funds and State Audit*, ST. LOUIS POST-DISPATCH (June 30, 2020), https://www.stltoday.com/news/local/education/st-louis-charter-schools-under-scrutiny-for-federal-coronavirus-relief-funds-and-state-audit/article_5b902610-39b9-520f-b0e2-cdede8841e5e.html [<https://perma.cc/T5X7-Z63Q>]; Carol Burris & Greg Leroy, *Charter Schools’ Unexpected Windfall: They Got Funds From Two Federal Government Programs; Public Schools Only Got From One*, N.Y. DAILY NEWS (Oct. 30, 2020), <https://www.nydailynews.com/opinion/ny-oped-charter-schools-unexpected-windfall-20201030-54krt4tvnbbe3jjih3u2vql32y-story.html>. As public school districts, neither the SLPSD nor the KCPSD were allowed to take advantage of the PPP money. *See id.*; *see also* Kevin Hardy, *Kansas City Charter, Private Schools Received Millions in PPP Funding. KCPS Got Zilch*, KANSAS CITY STAR (July 26, 2020), <https://www.kansascity.com/news/politics-government/article244434397.html>.

155. Not only did charters in Missouri receive millions in PPP funds, at least one charter shut down after receiving the check. *See* Ryan Delaney, *Carondelet Leadership Academy Charter School To Close*, ST. LOUIS PUB. RADIO (May 4, 2020), <https://news.stlpublicradio.org/education/2020-05-04/carondelet-leadership-academy-charter-school-to-close> [<https://perma.cc/NY8A-42RW>] (“the Missouri Charter Public School Commission said [in April 2020] it will not renew [Carondelet Leadership Academy]’s charter”); *and* *Carondelet Leadership Academy Charter Holder*, CNN POLITICS, <https://www.cnn.com/projects/ppp-business-loans/businesses/carondelet-leadership-academy-charter-holder> [<https://perma.cc/Y2TX-K8DK>] (describing a \$350K-\$1M loan to Carondelet Leadership Academy approved in April 2020).

156. CHARTER SCHOOL OVERSIGHT REPORT, *supra* note 99, at 8–9, 11–12.

157. *See infra* note 229 and accompanying text. *See also* Blythe Bernhard, *University of Missouri Loses Sponsorship of Three Low-Performing Charter Schools*, ST. LOUIS POST-DISPATCH (Dec. 7, 2021), https://www.stltoday.com/news/local/education/university-of-missouri-loses-sponsorship-of-three-low-performing-charter-schools/article_7ccda1a3-c4e6-5603-b701-b0a1adff0d65.html [<https://perma.cc/QB2J-EZQZ>] (“The state school board . . . stripped the University of Missouri-Columbia of its sponsorship of three charter schools . . . for failed oversight.” “[And indeed][n]one of

avoided expansion of the charter school movement in their communities.¹⁵⁸ Majority Black communities have not been so fortunate.

The question no one wants to answer is why are charter schools so good for majority Black districts in Missouri but not for similarly situated majority White districts? And, given the questionable success of charter schools nationally and locally, the fact that independent charters schools are wholly autonomous from the taxpaying residents they purport to serve, and the undisputed fact that they drain needed financial resources from public school districts to the detriment of those students remaining in those districts, one can only wonder as to the true motives behind this particular “choice” of public school privatization.

*B) Vouchers for Disabled Students, Poor Students,
and Everyone Else*

“[Vouchers] increase costs, by requiring taxpayers to fund two school systems, one public and one private. The result is that public schools, which educate 90 percent of students, wind up with less funding. This leads to larger class sizes and fewer resources, such as textbooks, school nurses and counselors, lab equipment, and music and athletic programs.”¹⁵⁹

Vouchers are state issued payments to parents to be used for their child’s education in a school other than the child’s neighborhood school. Using some of the public funding set aside to educate children, the funds typically spent by the school district to educate the child is reallocated to the family in the form of a voucher to use towards the tuition for the child’s attendance at a private school.¹⁶⁰ Vouchers have been expanded for use in public schools outside of the child’s current school district, private schools, virtual

the seven charter schools under Mizzou’s watch meet performance goals for test scores, graduation rates or other measures, state board members said.”).

158. Merideth, *infra* note 184.

159. *Opposing Vouchers*, NAT’L EDUC. ASS’N, <https://www.nea.org/student-success/smart-just-policies/funding-public-schools/opposing-vouchers> [https://perma.cc/H8V3-M7U5].

160. *School Vouchers*, EDCHOICE, <https://www.edchoice.org/school-choice/types-of-school-choice/what-are-school-vouchers-2/> [https://perma.cc/TVD2-QCSH].

schools, and homeschooling.¹⁶¹ The requirements for eligible students, the amount of the voucher, and whether the vouchers can be used to pay tuition at religious schools are all variables that range widely depending on the state.¹⁶²

One of the earliest vouchers in the nation had a well-known and tawdry beginning. It appeared after *Brown* was decided and was a definitive, state-sanctioned pushback from desegregation. Prince Edward County in Virginia first used vouchers for the benefit of its White children. Rather than desegregate its public schools, the county closed its entire public school system.¹⁶³ A private organization known as the Prince Edward School Foundation then opened a series of all-White private schools. The General Assembly created tuition grant programs to give money to students, regardless of race, to attend a nonsectarian private school or public school not in their district. With the public schools closed and the private schools exclusively admitting White students, Black students were left without options for education.¹⁶⁴ In *Griffin v. County School Board*, the Supreme Court of the United States held that this racially segregated voucher program violated the equal protection rights of Black students.¹⁶⁵ Despite the Supreme Court holding, the District continued to support vouchers for White students.¹⁶⁶

Vouchers are no longer used for the specific stated purpose of allowing White students to leave desegregated public schools to attend private segregated schools. They are now offered as a school choice option for all students, advanced as a way to rescue poor students and students of color

161. *Id.* See also H.B. 349 § 166.700.7, 101th Gen. Assemb., 1st Reg. Sess. (Mo. 2021).

162. Many school voucher programs determine eligibility based on income level. For example, North Carolina's Opportunity Scholarship is available to students whose household income is up to 150% of the income requirements for free or reduced-price lunches. N.C. GEN. STAT. § 115C-562.1-8 (2020). Florida's Family Empowerment Scholarship has similar criteria, including qualifying for certain food assistance programs or having a household income no more than 185% of the federal poverty level. FLA. STAT. ANN. § 1002.394 (West 2019). Whether vouchers may be used for religious schools depends on the provisions of the state's constitution. See, e.g., Clint Bolick, *The Dimming of Blaine's Legacy*, 19 CATO SUP. CT. REV. 287 (2020).

163. Kara Miles Turner, *Both Victors and Victims: Prince Edward County, Virginia, the NAACP, and Brown*, 90 VA. L. REV. 1667, 1667-68 (2004).

164. *Griffin v. Cty. Sch. Bd.*, 377 U.S. 218, 233 (1964).

165. *Id.* at 225.

166. Turner, *supra* note 163, at 1690.

from failing urban public schools.¹⁶⁷ And yet, the results are strikingly similar to what the school district in Prince Edward County implemented all those decades ago. Although modern day vouchers date back to 1990 and come in a variety of forms,¹⁶⁸ the evidence suggests that they drain limited resources from public schools and ultimately do not provide viable choice options for many underprivileged school children. Recent studies have shown that children perform *worse* in school when they use vouchers to attend private schools.¹⁶⁹ They were specifically created under the guise of providing students, particularly low-income students and students with disabilities access to better schools.¹⁷⁰ But the evidence suggests that they are failing in that mission.

Missouri has recently passed a voucher program. And while it is not as blatantly segregationist as the voucher program instituted by Prince Edward County in the 1960s, it likely will have a similar segregationist and classist effect. The new law set forth in Missouri, House Bill 349 (“H.B. 349” or “the Bill”), is known as the Missouri Empowerment Scholarship Accounts Program.¹⁷¹ According to its sponsor, House Representative Phil Christofanelli, the stated purpose of H.B. 349 is “to allow a targeted number of children left behind by the state in education to obtain an alternative that

167. Kevin G. Welner & Preston C. Green, *Private School Vouchers: Legal Challenges and Civil Rights Protections 2* (UCLA Civil Rights Project, Working Paper No. 1, 2018), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/private-school-vouchers-legal-challenges-and-civil-rights-protections/> [<https://perma.cc/KRH3-PZBZ>].

168. The earliest modern day voucher program was enacted in 1990 via the Milwaukee Parental Choice Program (“MPCP”). See WIS. STAT. § 119.23 (1989). Although over thirty years old, it has had mixed results. A five-year study indicated similar academic achievement in math between MPCP students and Milwaukee Public School students and a slight advantage to MPCP students in reading. PATRICK J. WOLF, UNIV. ARK., *THE COMPREHENSIVE LONGITUDINAL EVALUATION OF THE MILWAUKEE PARENTAL CHOICE PROGRAM 6–7* (2012), <http://www.uaedreform.org/downloads/2012/02/report-36-the-comprehensive-longitudinal-evaluation-of-the-milwaukee-parental-choice-program.pdf> [<https://perma.cc/Q25L-53ZK>].

169. BLACK, *supra* note 90, at 233; Welner & Green, *supra* note 167, at 7; Barkan, *supra* note 94.

170. See *Who Uses School Choice Programs?*, EDCHOICE, <https://www.edchoice.org/school-choice/faqs/who-uses-school-choice-programs/> [<https://perma.cc/2ZMV-JW72>]. “In America’s system of residentially assigned district schooling, [] those who have the financial means exercise school choice by purchasing homes in districts that have high-performing schools. School choice programs break the link between housing and access to a quality education with the goal of expanding educational opportunity to all children, especially the most disadvantaged.” *Id.* See also Margareth Etienne, *Private School Vouchers and the Failed Promise of Osmosis*, 5 BELMONT L. REV. 59, 66–67 (2018).

171. H.B. 349, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021).

better serves their needs.”¹⁷² H.B. 349 and its companion, Senate Bill 86 (“S.B. 86”),¹⁷³ were signed into law on July 14, 2021.¹⁷⁴ As H.B. 349 is the “meat” of the voucher program, this section focuses on H.B. 349.¹⁷⁵

H.B. 349 is in two parts. The first part sets up a *tax credit* for any taxpayer who contributes to an educational assistance organization (“EAO”) approved by the Missouri Treasurer’s office.¹⁷⁶ The second part of the law deals with the scholarship to the student (or voucher). A qualifying student must be a resident of the state and live in a county with a charter form of government or in any city with over 30,000 inhabitants.¹⁷⁷ The student must have attended a public school for at least one semester during the previous twelve months or be a child eligible to begin kindergarten or first grade under Mo. Rev. Stat. § 160.051-160.055.¹⁷⁸ Scholarships are distributed

172. Zoom interview with Phil Christofanelli, Representative, Mo. House of Representatives (June 25, 2021) (notes on file with author). *See also* e-mail from Jaret Schamhorst, Legis. Assistant to Rep. Christofanelli (June 28, 2021, 08:54 CST) (on file with author).

173. S.B. 86, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021).

174. Kurt Erickson, *School Choice Measure in Missouri Signed Into Law*, ST. LOUIS POST-DISPATCH (July 14, 2021), https://www.stltoday.com/news/local/govt-and-politics/school-choice-measure-in-missouri-signed-into-law/article_bfad0929-8538-5adb-bd3a-ce67ed76878a.html [<https://perma.cc/N4GH-QBAD>].

175. S.B. 86 lowers the funding caps from \$50 million and \$75 million to \$25 million and \$50 million, respectively. *Compare* H.B. 349, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021), *with* S.B. 86, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021).

176. H.B. 349 § 135.713.1-4 (Mo. 2021). Taxpayers who make qualifying contributions are able to claim a credit against a tax otherwise due in an amount equal to one hundred percent of the amount the taxpayer contributed during the tax year for which the credit is claimed. H.B. 349 § 135.713.1-2 (Mo. 2021). Monies donated to EAOs are then distributed to qualifying students via scholarship applications. H.B. 349 § 135.714.1 (Mo. 2021). The details on who or what the EAOs are, how they will determine who gets the scholarship and the amount, and other mechanics are details not set forth in the law.

177. Counties in Missouri with charter forms of government include Clay, Jackson, Jefferson, St. Charles, and St. Louis. *Missouri Counties by Classification*, MO. ASS’N OF COUNTIES (Jan. 2021), http://www.mocounties.com/images/1282/document/missouri-counties-by-classification-2021_1082.pdf [<https://perma.cc/3AJM-ZUDF>]. Many of Missouri’s cities with more than 30,000 residents are located within these counties, with St. Louis and Kansas City serving as the primary hubs. Cities not in these counties but which meet the population requirement include Cape Girardeau, Columbia, Jefferson City, Joplin, Liberty, St. Joseph, and Springfield. *Annual Estimates of the Resident Population for Incorporated Places in Missouri: April 1, 2010, to July 1, 2019*, U.S. CENSUS BUREAU (Apr. 6, 2021), <https://www2.census.gov/programs-surveys/popest/tables/2010-2019/cities/totals/SUB-IP-EST2019-ANNRES-29.xlsx>.

178. H.B. 349 § 166.700.8 (Mo. 2021). The statutory provisions at MO. REV. STAT. § 160.051-160.055 simply provide the guidelines and requirements for children between the ages of five and twenty to attend public school in Missouri.

based on a hierarchical tiered system. Students who have an Individualized Education Plan (IEP) are first eligible to apply for the scholarship.¹⁷⁹ Students who live in a household whose total annual income does not exceed an amount equal to one hundred percent of the income standard used to qualify for free and reduced-price lunches are eligible for the scholarship in tier two. A third tier includes students who live in a household where the total annual income does not exceed an amount equal to two hundred percent of the income standard. The fourth and final tier allows *all* other qualifying students in the district, although the student may neither have an IEP nor meet the poverty guidelines in the law, to apply for the scholarship.¹⁸⁰

Representative Christofanelli has said the Bill is designed to help poor children by giving them better educational choices.¹⁸¹ This goal will likely fall short. First, the Bill excludes virtually *all* rural communities in the State. Many children who live under the federal poverty level live in rural Missouri communities.¹⁸² Representative Christofanelli explains this, ironically, with a choice example. He told us in an interview that although he wanted the Bill to apply to all poor children who attend public school in the State, his rural colleagues demanded exclusion in exchange for their support of the measure.¹⁸³ State Representative Peter Merideth agreed:

Many of the rural representatives are strongly pro-public education and oppose privatization. They also feel a great deal of influence from powerful and popular local superintendents and do not like to oppose their interests. That's why they were only able to first pass charter schools

179. 20 U.S.C. § 1414(d).

180. H.B. 349 § 135.714.1.4 (Mo. 2021).

181. Christofanelli, *supra* note 172. An individual or family is considered impoverished when the family's total income is less than the family's poverty threshold. *How the Census Bureau Measures Poverty*, U.S. CENSUS BUREAU (Aug. 26, 2020), <https://www.census.gov/topics/income-poverty/poverty/guidance/poverty-measures.html> [<https://perma.cc/ZBA9-NTR7>].

182. The poverty rate for Missouri in 2019 was 12.9%. For rural areas in Missouri in 2019, the poverty rate was 16.8%. *State Fact Sheet: Missouri*, U.S. DEP'T OF AGRIC. (Sept. 9, 2021), <https://data.ers.usda.gov/reports.aspx?StateFIPS=29&StateName=Missouri&ID=17854> [<https://perma.cc/H5TK-RSNJ>]. See also *2020 Missouri Poverty Report*, MO. CMTY. ACTION NETWORK, <https://missouripovertyreport.org/> [<https://perma.cc/J24K-64AN>] (“Nine of the 10 Missouri counties with the highest poverty rate are rural; St. Louis City is the only urban location on the list of top 10 with the highest poverty rates, and neighboring St. Charles County has the lowest poverty rate. Nine of the 10 counties with the lowest poverty rate are urban.”).

183. Christofanelli, *supra* note 172.

if limited to urban areas, and now this voucher bill that excludes most rural areas. They were willing to vote for these bills only if their districts were excluded¹⁸⁴

Second, there is a very serious question as to whether poor children who do qualify for the program will be able to take advantage of the scholarship. This program first requires a very active parent who is aware of the program and has the resources and time to comply with the scholarship program requirements.¹⁸⁵ The scholarship amount is limited to \$6,400 per year.¹⁸⁶ A student who attempts to use the scholarship allotment at a private school might end up owing the school an excess amount to cover the school's full tuition.¹⁸⁷ Unless the school agrees to cap its tuition at the scholarship amount or provide other funding, there will be a deficit owed by the parent to the school.¹⁸⁸ Parents with incomes below the federal poverty level will

184. E-mail from Peter Merideth, Mo. State Representative for the 80th Dist. (July 22, 2021, 09:39 CST) (on file with author).

185. Because this law is so new, these EAOs do not exist yet. The Treasurer must certify the organizations. What requirements the Treasurer will take into account when considering the certification of these EAOs and how the EAO receive money from the Treasurer is not yet known at the time of this writing.

186. The scholarship amount cannot exceed the state adequacy target. H.B. 349 § 135.714.6 (Mo. 2021). The state adequacy target is the “sum of the current operating expenditures of every performance district that falls entirely above the bottom five percent and entirely below the top five percent of average daily attendance, when such districts are rank-ordered based on their current operating expenditures per average daily attendance, divided by the total average daily attendance of all included performance districts.” MO. REV. STAT. § 163.011.18 (2016).

187. The average private school tuition for the state of Missouri is \$9,971. *Best Missouri Private Schools*, PRIVATE SCH. REV. (2021), <https://www.privateschoolreview.com/Missouri> [<https://perma.cc/9ZP4-BX79>]. Tuitions for private schools in the St. Louis area range from \$4,100 to \$31,800. *The Private School Charts*, ST. LOUIS MAG. (2021), <https://www.stlmag.com/family/private-school-charts/2021-2022>. In Kansas City, the average private school tuition is \$10,013. *Best Kansas City Private Schools*, PRIVATE SCH. REV. (2021), <https://www.privateschoolreview.com/missouri/kansas-city> [<https://perma.cc/Z3AJ-M2GC>].

188. MICDS is a private school in Missouri. Its tuition for a kindergartener in 2021 was \$22,240. *Tuition and Affordability*, MARY INST. & ST. LOUIS CNTY COUNTRY DAY SCH. (2021), <https://www.micds.org/admission/tuition-and-affordability/> [<https://perma.cc/AR5Y-CWHY>]. The scholarship amount of \$6,400 leaves a balance due on tuition to the school of \$15,840. Assuming a student qualifies for a needs based reduction, the needs based reduction at MICDS drops its normal tuition for kindergarteners from \$22,240 to \$12,200. Note, though, that even at \$12,200, the parent of the needs-based student would have a balance of \$5,800 in tuition owed to the school. *Id.* Consider, too, Christ the King. Tuition for a kindergartner is \$6,190, but each enrolled student is responsible for a \$300 Curriculum & Technology Fee. Each family also owes an annual \$125 Activity Fee. *Admissions &*

likely be unable to make up that gap. Third, students who receive free or reduced-price lunches in their home schools may not receive those meals without separate charges in their new private school. Unless the private school has included the cost of meals in its tuition, breakfast and lunch will need to be provided by the parent.¹⁸⁹ Fourth, transportation expenses represent another potential drawback as transportation is not normally provided by private schools or most charter schools.¹⁹⁰

In addition to impoverished students, the law includes children with IEPs as qualifying for the scholarships. Again, the goals behind the law will likely fall short. A child who has an individualized education program (“IEP”)¹⁹¹ and attempts to use the voucher in a private school faces a steep climb. Private schools that do not receive federal funding are *not* obligated to provide a majority of what is considered IEP services to the child.¹⁹² Moreover, many voucher laws “are also very deferential to private schools regarding special education—often stating that parents’ choice to use a voucher entails a voluntary waiver of their children’s right to a free appropriate public education under the [Individuals with Disabilities Education Act (“IDEA”)].”¹⁹³ It may even be the case that the district of residence, too, is relieved of any obligation to provide IEP *services* to the child. H.B. 349 provides that once the child uses the voucher to attend another school, the district of residence is released “from all obligations to educate the qualified student while the qualified student is enrolled in the program; the sole exception being that the district of residence is not

Tuition, CHRIST THE KING CATHOLIC CHURCH (2021), <https://www.ckstl.com/admissions> [<https://perma.cc/4J72-A3PS>].

189. Welner & Green, *supra* note 167, at 10. The voucher amount will not cover the cost of food. H.B. 349 § 166.705.1(4) (Mo. 2021).

190. Welner & Green, *supra* note 167, at 10.

191. “The term ‘individualized education program’ or ‘IEP’ means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d).” 20 U.S.C. § 1401.14.

192. The IDEA does not apply to private schools that do not receive any federal assistance. *See* 20 U.S.C. § 1400(d)(1). They are responsible for some of the services, for example, physical therapy, occupational therapy, speech. E-mail from Sarah Jane Hunt, Special Educ. Law. (July 26, 2021, 13:27 CST) (on file with author). Individuals with Disabilities Education Act, 20 U.S.C. § 1401(26)(A). The private school also has obligations under Section 504 of the Rehabilitation Act and/or Title II of the American with Disabilities Act. *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (2006)); Americans with Disabilities Act of 1990, Pub. L. No. 101-366, title II, 104 Stat. 337 (codified as amended at 42 U.S.C. §§ 12131–12134).

193. Welner & Green, *supra* note 167, at 8.

relieved of the obligation to conduct an *evaluation* for disabilities.”¹⁹⁴ Providing evaluations is not the same as providing ongoing services. A huge question presented is whether a state law can waive the federal mandate of the IDEA. That aside, it is also true that whatever the parents’ costs of the IEP services, they can surely be great and indeed, simply cost prohibitive.¹⁹⁵

Finally, and most tellingly, any money donated by taxpayers to this scholarship fund that is not used (after qualifying students who have IEPs or who reach the poverty level limits set up in the law) can then be used by *any* qualifying student in the district of residence.¹⁹⁶ In other states, this has meant that the students who end up taking advantage of the scholarships or vouchers “are white and not poor Accordingly, voucher subsidies have become little more than transfer payments for those more advantaged families.”¹⁹⁷

Thus, as families who can “exit the public school system in favor of private placement, [public] schools are left with fewer funds with which to offer appropriate services to the students who remain behind.”¹⁹⁸ And the

194. H.B. 349 § 166.705.1(2) (Mo. 2021). The statutory provision requires the home district school to *conduct* the evaluation. It does not obligate the home school to *provide* the actual IEP services dictated by that evaluation. If the child attempts to use the voucher in a different public school, IEP services might be required by the new public school. The IDEA requires public schools to provide any needed services to eligible public school children. 20 U.S.C. § 1400(d) (“to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities”). Although the student waives services from the district of residence, presumably any public school the child attends would still be obligated to provide the necessary services.

195. Missouri calculates funding for students with disabilities by multiplying its standard per-student base amount by 1.75. *FundEd: State Policy Analysis (Missouri)*, EDBUILD (2021), <http://funded.edbuild.org/state/MO> [<https://perma.cc/S2ZD-THBX>]. Missouri also provides special education funding through the High Need Fund (HNF). The HNF provides reimbursement for “high need students,” those students whose education costs exceed three times the Local Education Agency’s (LEA) average daily attendance expenditure. *Special Education Finance HNR, PPF and RBP*, MO. DEP’T OF ELEM. & SECONDARY EDUC. (2021), <https://dese.mo.gov/financial-admin-services/special-education-finance/special-education-finance-hnf-ppf-and-rbp> [<https://perma.cc/5WGT-8MG4>].

196. H.B. 349 § 135.714.1(4) (Mo. 2021).

197. Welner & Green, *supra* note 167, at 11. Consider this: “Indiana’s voucher policy began in 2011, targeted toward low-income students. In 2013, the state expanded this program to include middle- and upper-middle-class families. By 2017, more than half of the program’s 34,000 students had never attended public schools. Arizona’s ESA program recently reached the \$1 billion mark in cumulative scholarships, which are financed by the state treasury. In Florida, that’s the annual amount; private schools received nearly \$1 billion in state funding in 2017 from Florida’s various voucher-like programs.” *Id.* at 6 (footnotes omitted) (emphasis added).

198. Lydia Turnage, *Out of Sight, Out of Mind: Rural Special Education and the Limitations of the IDEA*, 54 COLUM. J.L. & SOC. PROBS. 1, 19–20 (2020).

situation is even worse for children with special needs who remain the SLPSD. It is no secret that the IDEA is chronically underfunded by the federal government. This means state and local revenue ends up providing most of the needed services, which leads to substantial disparities depending on the revenue base of the school districts involved.¹⁹⁹ Reliance on thin budgets in financially weak districts especially hurts for children who are left behind and in need of special education.²⁰⁰

The voucher law in Missouri will likely take effect with the 2022-2023 school year.²⁰¹ Yet the challenges presented are significant. The school choice vouchers will also take money away from public school districts.²⁰² This will make it even harder for those districts to compete and provide quality educational opportunities; it might even threaten the State's constitutional guarantee of a free public education to its residents.²⁰³ Privatization of public schools via school choice would ultimately interfere with that constitutional promise.²⁰⁴ The law may also be unconstitutional.²⁰⁵

199. *Id.* at 21.

200. Wendy F. Hensel, *Vouchers for Students with Disabilities: The Future of Special Education?*, 39 J. L. & EDUC. 291, 337 (2010).

201. Christofanelli, *supra* note 172.

202. The State typically pays each district a per-pupil fee for students who attend a given school. That fee is determined based on a funding formula tied to the weighted average daily attendance at the school. Wherever the child goes, that money would follow the child. Under H.B. 349, however, there would be a five-year hold harmless period. Specifically, the law would allow the per-pupil amount to continue to be paid to the school the child no longer attends for a period of five years. H.B. 349 § 166.720.4, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021). The five-year period is designed to give the school that lost the student time to adjust to the financial loss. Christofanelli, *supra* note 172. After the five years, though, the district will begin to feel the loss of revenue. It will be harder to educate the students who remain in the district with the loss of that revenue.

203. MO. CONST. art. IX, §1(a).

204. Welner & Green, *supra* note 167, at 6. The authors note:

The expansion of these voucher programs might eventually compromise their states' ability to support their public schools in a constitutional manner . . . [T]he states' duty to provide for public education [takes] precedence over the creation of publicly funded voucher initiatives. States should be especially concerned about the potential impact of expansive private school choice programs on higher need districts. Many of these districts already lack the necessary funding to satisfy their constitutional obligations. This insufficiency is due, in large part, to state school finance systems that have failed to meet the educational needs of these high-poverty districts. Unfettered private school subsidy programs might exacerbate these financial problems by further draining resources from them.

Id.

205. The Missouri Constitution provides "[t]hat no money shall ever be taken from the public treasury, directly or *indirectly*, in aid of any church, sect or denomination of religion, or in aid of any

C) *How the State Arbitrarily Limits School “Choice”*

[Normandy Schools Collaborative] is not merely “unaccredited”: it is abysmally unaccredited. The Normandy School District’s 2012 APR was 11.1 percent of all possible points. Incredibly, the APR rating for the NSC worsened to an unbelievable 7.1 percent in 2014. Yet, Defendants [, including the State,] wish to force students to remain in this failing district. To force students who seek little more than an adequate education to remain in this unaccredited district – rather than allow them to continue their education in accredited school districts – will cause them irreparable harm. This harm cannot be repaired after the fact.²⁰⁶

Interestingly, the State’s hypocrisy regarding the need for “choice” to afford better educational opportunities for poor Black students became evident when such school “choice” was both manipulated and denied by the State when it came to another majority Black district in the state, the Normandy Schools Collaborative (NSC), formerly the Normandy School District (NSD). NSC, a predominately Black and poor district, had been unaccredited since 1991.²⁰⁷ The Missouri Department of Elementary and Secondary Education (“DESE”) is required by law to annually review school performance to evaluate which schools (and students) need

priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.” MO. CONST. art. I, § 7 (emphasis added). For a general look at the constitutionality of voucher programs throughout the United States, see Matthew Sondergard, *Blaines Beware: Trinity Lutheran and the Changing Landscape of State No-Funding Provisions*, 66 U. KAN. L. REV. 753, (2018); Julie F. Mead, *The Right to an Education or the Right to Shop for Schooling: Examining Voucher Programs in Relation to State Constitutional Guarantees*, 42 FORDHAM URB. L.J. 703 (2015).

206. *Massey v. Normandy Schools Collaborative*, No. 14SL-CC02359, 2015 WL 7070113, at *19 (Mo. Cir. Feb. 15, 2015) (emphasis added), *aff’d*, 492 S.W.3d 189 (Mo. Ct. App. 2016).

207. See FERGUSON’S FAULT LINES: THE RACE QUAKE THAT ROCKED A NATION 103–04 (Kimberly J. Norwood ed., 2016).

improvement.²⁰⁸ Under this DESE system, schools are ranked as either accredited (9–14 points), provisionally accredited (6–8 points), or unaccredited (0–5 points).²⁰⁹ From 1991 to 2009, NSC had never received more than 5 points.²¹⁰ This meant that including 1991 through 2013—when NSD was finally labeled unaccredited—NSD had actually been unaccredited for twenty-two years. The State refused to label them as such. Rather, they were considered provisionally accredited for all those years, even though they were clearly unaccredited.²¹¹ This is significant. A student transfer statute in Missouri then provided that students who resided in an unaccredited school district may transfer to “an accredited school in another district of the same or an adjoining county.”²¹² Had NSD been declared unaccredited at any time during 1991–2013, parents and students in that district might have exercised their “choice” by transferring to another district. They were deprived of that choice because the statute is only triggered if and when a district becomes unaccredited.²¹³ And the district was not declared unaccredited until 2013. Choice here was purposefully delayed, for years, by the State.

In 2009, while NSD was technically unaccredited but labeled provisionally accredited, and instead of supporting the District with greater funding and resources, the State took another unaccredited district, a predominately Black and predominately poor school district, Wellston School District (WSD), dissolved that district, and “merged” WSD into NSD.²¹⁴ WSD was not just unaccredited. In a state with over 500 school districts, WSD ranked last in 2009. One of the poorest districts in the state,

208. See, e.g., MO. CODE REG. tit. 5 § 20-100.105(2); see also *Comprehensive Guide to Missouri School Improvement Program*, MO. DEP'T OF ELEM. & SECONDARY EDUC. 1 (May 2012) [hereinafter *Guide to MSIP*].

209. See also *2012 School District Performance and Accreditation: A presentation to the State Board of Education*, MO. DEP'T OF ELEM. & SECONDARY EDUC. 109 (Sept. 18, 2012) (on file with author); *What Happens When A School Becomes Unaccredited?*, MO. DEP'T OF ELEM. & SECONDARY EDUC. (May 2012), [<https://perma.cc/4637-W8JG>].

210. E-mail from Kelli Dickey, Mo. Dep't of Elem. & Secondary Educ. (June 4, 2015, 11:05 CST) (on file with author). See also *2012 School District Performance and Accreditation*, *supra* note 209, at 109; *What Happens When A School Becomes Unaccredited?*, *supra* note 209.

211. Norwood, *supra* note 29, at 32.

212. MO. REV. STAT. § 167.131 (2019). See also *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660 (Mo. 2010) (en banc).

213. *Massey v. Normandy Schools Collaborative*, No. 14SL-CC02359, 2015 WL 7070113, at *10 (Mo. Cir. Feb. 15, 2015).

214. *FERGUSON'S FAULT LINES*, *supra* note 207, at 99.

WSD had struggled for years.²¹⁵ Why the State merged WSD with NSD is not clear. The State could have merged the troubled WSD into several other adjoining, high performing school districts like Clayton School District (CSD) or the Ladue School District (LSD). However, the State did not even consider this “choice.” As then-Missouri State Board of Education Vice President Michael Jones remarked: “The [Wellston] students were not going to be absorbed into any of the high-performing, mostly White districts nearby. You’d have had a civil war.”²¹⁶ In this instance, the State denied “choice” to one group (WSD and NSD) while acquiescing in the choice of another (CSD and LSD). The decision to collapse WSD into the barely provisionally accredited NSD drew the ire of hundreds of residents.²¹⁷

The merger of WSD into the NSD in 2009 threw NSD into a tailspin. By 2012, things had become so bad that the State was forced to downgrade NSD from provisionally accredited to unaccredited, which would have facilitated transfer choice options for students. But through State sleight of hand, choice to these Black parents was again denied. Although the State announced in August of 2012 that NSD was unaccredited, *it simultaneously delayed unaccreditation from taking effect until January of 2013*. By deliberately delaying the unaccredited label until January of 2013, the State again denied choice to parents and students in that district by preventing NSD students who wanted to transfer at the beginning of the school year in August of 2012 from doing so.²¹⁸ Postponing unaccredited status until the middle of the school year discouraged many families from transferring, as many parents did not want to move their children to a different school in the middle of a school year.²¹⁹ The delay also provided fodder for the Francis Howell School District (FHSD), the majority White district which fought

215. See generally Eric Higgins, *Anti-Black School Policy Making: A Critical Policy Analysis of the Wellston/Normandy Merger*, UMSL GRADUATE WORKS, May 29, 2018.

216. Nikole Hannah-Jones, *School Segregation, the Continuing Tragedy of Ferguson*, PROPUBLICA (Dec. 19, 2014), <https://www.propublica.org/article/ferguson-school-segregation> [<https://perma.cc/WZW2-MQK9>].

217. Leah Thorsen, *School Merger Draws Fire At Forum That Draws More Than 400 People, Wellston District Residents Question Whether Normandy Schools Are Much Better*, ST. LOUIS POST-DISPATCH (Dec. 15, 2009), http://www.stltoday.com/news/school-merger-draws-fire-at-forum-that-draws-more-than/article_a713f679-717d-526b-bb7c-4b792d335237.html [<https://perma.cc/W29N-7WY6>].

218. FERGUSON’S FAULT LINES, *supra* note 207, at 101.

219. *Id.*

the transfers of students from NSD tooth and nail.²²⁰ Calling NSD children everything from whores to drug addicts to trash, parents in FHSD made national news with its attacks on the right of children from NSD to attend FHSD schools.²²¹ Again, the State's unexplained delay denied "choice" to one group (NSD) while acquiescing in the choice of another (FHSD).

As NSD continued to struggle, the State Board of the Department of Education used its statutory power to dissolve Normandy Schools. They then proceeded to create a new district, appointed a new School Board for the district, and announced that the new district would be operated under direct state oversight. This new district was labeled a "'State Oversight District' *without an accreditation status* for up to three years."²²² This new district, renamed the Normandy Schools Collaborative (NSC), would be *not-unaccredited*. This meant that the transfer statute would not apply to NSC. With this move, the State, *again*, attempted to deprive these Black parents and students of the "choice" afforded by the transfer statute.

This blatant violation of state law by the State was struck down by the court in *Massey, et al. v. The Normandy Schools Collaborative, et al.*²²³ The Judge found that the district was "abysmally unaccredited."²²⁴ It rejected the State's attempt to dissolve the district and then recreate it under a different name, and thus postpone accreditation status.²²⁵ The court found that any attempt to recognize NSC as anything other than unaccredited would "completely def[y] logic."²²⁶ The court concluded: "The State Defendants' efforts to circumvent the statutory process leaves this court with no other option than to find that the Defendants committed 'legal wrongs' which need to be addressed by this court."²²⁷ Choice was ultimately afforded to the parents and children in Normandy, but by the court, not the State.

220. See, e.g., Hannah-Jones, *supra* note 216; Chris McDaniel, *Francis Howell Parents Express Outrage Over Incoming Normandy Students*, ST. LOUIS PUB. RADIO (July 12, 2013), <http://news.stlpublicradio.org/post/francis-howell-parents-express-outrage-over-incoming-normandy-students> [<https://perma.cc/4AHM-Y5KJ>].

221. Hannah-Jones, *supra* note 216.

222. *Massey v. Normandy Schools Collaborative*, No. 14SL-CC02359, 2015 WL 7070113 (Mo. Cir. Feb. 15, 2015), *aff'd*, 492 S.W.3d 189 (Mo. Ct. App. 2016) (emphasis added).

223. *Id.* at 20.

224. *Id.* at 19.

225. *Id.* at 18–20.

226. *Id.* at 11.

227. *Id.* at 12.

In this clear instance, school choice for Black parents and students was manipulated and denied by the State at multiple levels over several decades in Normandy. Interestingly and ironically, a different type of choice now awaits NSC parents and students in the form of privatization. A charter school was originally scheduled to open in Normandy in the fall of 2021; opening has been pushed back to the fall of 2022.²²⁸ If and when this charter school opens, it will drain students and financial resources from the district. And this opening is scheduled to occur despite the staunch objections from residents in the community, the Normandy School Board, and all of the almost two dozen municipalities served by the NSC.²²⁹ When the residents wanted and were entitled to exercise choice and transfer to accredited schools, per their statutory right to do so, the State impeded that choice. Now, the residents do not want charter schools bleeding their public school, and yet the State is primed to force this privatization choice down their collective throats. Choice is not offered to everyone; in fact, this example is a perfect one to demonstrate the role of one's skin color and social status as determinates of whether choice, and what choice, will be offered.

228. Blythe Bernard, *Low Enrollment Delays Normandy Charter School Launch to 2022*, ST. LOUIS POST-DISPATCH (Apr. 21, 2021), https://www.stltoday.com/news/local/education/low-enrollment-delays-normandy-charter-school-launch-to-2022/article_738c898c-e341-560e-b12e-d14372fb9b93.html.

229. See, e.g., Sophie Hurwitz, *Normandy Leaders Call for Resignation of Superintendent, Rejection of Bond Issues On April 6 Ballot*, ST. LOUIS AM. (Mar. 31, 2021), http://www.stlamerican.com/news/local_news/normandy-leaders-call-for-resignation-of-superintendent-rejection-of-bond-issues-on-april-6-ballot/article_238341ca-926e-11eb-8f28-4ff278755fb9.html [https://perma.cc/Z7LQ-R8VE]; Blythe Bernhard, *Normandy Charter School Meets Resistance From Community Leaders*, ST. LOUIS POST-DISPATCH (Nov. 20, 2020), https://www.stltoday.com/news/local/education/normandy-charter-school-meets-resistance-from-community-leaders/article_953498b1-ab82-5e00-9210-eb90c4672982.html [https://perma.cc/S2LK-P9XC]; *Not Without Us: The Historic Perspective on the Education Crisis in the Normandy 24:1 Community and Our Battle for Educational Sovereignty*, 24:1 MUNICIPAL PARTNERSHIP, at 9 (Nov. 2020) (on file with author).

PART IV – MISSOURI ALSO HAS GIVEN
SHORT SHRIFT TO ITS HBCUS

*“Everything here is razor thin” “Every operating budget is barebones; every departmental budget is barebones, meaning there is no fat. At Harris-Stowe, you have to do 10 jobs because we can’t afford to hire the three other people needed to do those other jobs;” “Things have to be deferred, or choices have to be made;” “Things like deferred maintenance get put off to next year or the following year. There are fewer full-time professors here, so now we have adjunct professors.”*²³⁰

Historically, Missouri has discriminated in various significant ways regarding to the creation and funding of the State’s two HBCUs. When Lincoln University was formed in 1866,²³¹ it was a direct result of the separate but unequal educational policies of the State.²³² The State’s refusal to admit Blacks into the then “Whites-only” Harris Teachers College (formed in 1857)²³³ triggered the creation of the separate Black Stowe Teachers College in 1890. It was not until *Brown* that Missouri begrudgingly permitted the merger of the Whites-only Harris Teachers College with the Black Stowe Teachers College.²³⁴ And the State’s separate

230. Andrea Y. Henderson, *Missouri’s HBCUs Face Challenges Keeping Pace in Higher Education*, ST. LOUIS PUB. RADIO (Dec. 11, 2019), <https://news.stpublicradio.org/education/2019-12-11/missouris-hbcus-face-challenges-keeping-pace-in-higher-education> [https://perma.cc/FE5M-P9XF] (quoting HSSU’s Chief Financial Officer Brian Huggins).

231. “Lincoln University’s beginnings were also rooted in segregation. In 1866, following the civil war, members of the 62nd Colored Infantry began Lincoln Institute in Jefferson City with a few thousand dollars. The second Morrill Act of 1890 established the educational program as a land grant institution as its curriculum expanded to include industrial and agricultural courses.” Lexi Churchill, *Leaders, Lawmakers Frustrated By Chronic Underfunding of Missouri’s Historically Black Colleges*, COLUMBIA MISSOURIAN (Apr. 23, 2018), https://www.columbiamissourian.com/news/state_news/leaders-lawmakers-frustrated-by-chronic-underfunding-of-missouris-historically-black-colleges/article_e4d98484-44b9-11e8-bbad-bf745f9036b5.html [https://perma.cc/Q59U-JZXH].

232. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 344 (1938).

233. *Campus History*, HARRIS-STOWE STATE UNIV., https://www.hssu.edu/rsp_content.cfm?wid=50&pid=478 [https://perma.cc/NFJ4-C7BZ].

234. *Id.* Harris and Stowe were “two racially segregated teachers colleges, both operated by the St. Louis Board of Education,” and their merger following *Brown v. Board of Education* “represented the first instance of desegregated public education in the city of St. Louis.” See Kenneth Allen Wetstein, *Student Experiences During the 1954-1955 Merger of Harris and Stowe Teachers Colleges* (Dec. 13,

but unequal policy caused it to deny admission into the University of Missouri law school to Lloyd Gaines. Gaines, a Black man who had applied to the law school, was refused based solely on his skin color, despite there being *no* other law school in the state he could attend.²³⁵

The structural racism integral to the formulation of separate and unequal systems of higher education arguably persisted, and continues to persist, in the form of funding disparities for Missouri's HBCUs, compared with non-HBCUs, as it relates to core funding and capital improvements funding. We see this with the use of performance funding guidelines that traditionally penalized open enrollment HBCUs such as Lincoln University and Harris-Stowe State University ("HSSU") for things like poor "graduation rates." Despite the fact such performance funding legislation remains on the books, the State now purportedly awards core funding allotments not based on "performance," but "historic" allotments made to all public higher education institutions. That methodology locks in past disparities in HBCU funding and makes those historical disparities the foundation on which any future allotments are made. Additionally, there is a deprivation of matching funds to Lincoln University. As a land-grant institution, it is eligible to receive matching federal funding if the State is willing to match those federal funds. There are only two land-grant institutions in the state: Lincoln and the University of Missouri.²³⁶ Historically, the State has not matched the grant in Lincoln's case, but it has fully matched the grant for the University of Missouri-Columbia, its flagship, predominately White institution.²³⁷

2005) (Ph.D. dissertation, University of Missouri-St. Louis) (on file with the Institutional Repository Library, University of Missouri-St. Louis).

235. At the time of *Missouri ex rel. Gaines v. Canada*, the State provided some separate (and unequal) education to Blacks in higher education in Missouri, complying with *Plessy v. Ferguson*. It did not, however, have a law school in the State for Blacks when Lloyd Gaines applied to attend the University of Missouri School of Law. *Gaines*, 305 U.S. 337. The Supreme Court held that the State's compromise, to send Gaines to a law school in an adjacent State, paying his tuition until the law program at Lincoln was up and running, while "commendable," violated Gaines's rights under the Fourteenth Amendment of the United States Constitution. *Id.* at 351–52. The State did ultimately create a law school for Blacks as part of the separate Lincoln University system. That law school operated in St. Louis, Missouri (separate from Lincoln's main campus in Jefferson City, Missouri) from 1939–1955. ARNOLD G. PARKS, *LINCOLN UNIVERSITY: 1920-1970* 89 (2007).

236. *Land-Grant Colleges and Universities*, NAT'L INST. OF FOOD AND AGRIC., <https://nifa.usda.gov/land-grant-colleges-and-universities> [<https://perma.cc/T8CH-5Q5U>].

237. See *infra* notes 303–08 and accompanying text.

In truth, the State underfunds all of its higher education institutions. The State “ranked 47th in the nation in FY 2018,” the latest data available, in education support per capita. “Missouri is also *last* among states since 2009 in the rate of change in total education revenue per [full-time equivalent (“FTE”)] and is only one of two states with a negative rate of change in net tuition revenue per FTE.”²³⁸ As demonstrated below, HBCUs are even further underfunded.

A) *The Quest for Funding Parity*

Despite school administrators, community leaders, and the NAACP regularly advocating for HBCUs in appropriation sessions, commentators and civic leaders have complained that Missouri’s HBCUs routinely emerge from the budget process underfunded. There is little dispute that historically HSSU²³⁹ and Lincoln received less total state dollars than practically all other four-year public universities in Missouri.²⁴⁰ As a result of these funding shortfalls, both schools struggle to serve their student populations.

238. *Department of Higher Education & Workforce Development Overview: 101st General Assembly*, DEP’T OF HIGHER EDUC. AND WORKFORCE DEV. (Jan. 2021) [<https://perma.cc/QES9-V93G>] (emphasis in original). A full-time undergraduate student is one “enrolled for 12 or more semester credits, or 12 or more quarter credits, or 24 or more clock hours a week each term.” *Full-time student*, INTEGRATED POSTSECONDARY EDUC. DATA COLLECTION SYS. (“IPEDS”) GLOSSARY, <https://surveys.nces.ed.gov/ipeds/public/glossary> (last visited June 25, 2021).

239. Moreover, in addition to the problems stemming from underfunding, HSSU in particular has faced attacks in the Missouri press which highlight negative data, while underreporting or wholly ignoring positive data; this skewed reporting provides inclined legislators with further justifications to underfund HBCUs. See Ronald Alan Norwood, *Harris-Stowe Deserves Broad-Based Community Support*, ST. LOUIS POST-DISPATCH (May 17, 2018), https://www.stltoday.com/opinion/columnists/harris-stowe-deserves-broad-based-community-support/article_fc495af-1407-55ae-8203-64f1712bbb27.html [<https://perma.cc/6GPC-N7Y7>]. When the University announced the departure of its then president in June 2021, the mainstream local newspaper not only sought to ascribe sinister motives for his departure, but also used the article to attack HSSU’s highly successful past president, even citing issues that predated his presidency. See Blythe Bernhard, *Bradford Out At Harris-Stowe State University After One Year As President*, ST. LOUIS POST-DISPATCH (June 7, 2021), <https://www.stltoday.com/news/local/education/bradford-out-at-harris-stowe-state-university-after-one-year-as-president/> [<https://perma.cc/RR9V-3NP9>].

240. See, e.g., *FY 2019 Higher Education Operating Budget Status – HB 2003*, DEP’T OF HIGHER EDUC. AND WORKFORCE DEV. (“DHEWD”), <https://dhewd.mo.gov/about/legislative/documents/FY19OperatingBudgetUpdate.pdf> [<https://perma.cc/LH8C-V84V>]; see also Andrea Y. Henderson, *Challenges And Then A Pandemic, But Harris-Stowe’s President Is Finding A Way Forward*, ST. LOUIS PUB. RADIO (May 10, 2021), <https://news.stpublicradio.org/education/2021-05-10/challenges-and-then-a-pandemic-but-harris-stowes-president-is-finding-a-way-forward> [<https://perma.cc/HXK4-TLH9>].

It has been suggested that these funding shortfalls have caused Lincoln, for example, to suspend its history department; place its journalism and social work programs on academic monitoring; end degrees in early childhood education, music education, and sacred music; and contemplate suspending its chemistry major, as well as faculty promotions, tenure, and sabbatical requests.²⁴¹

Various arguments justify the State's need not only to provide at least *equal* funding for Missouri's HBCUs, but to provide *greater* funding. First, Missouri's HBCUs require greater financial support to remedy inequities that exist in St. Louis's majority Black, underfunded educational system and other majority Black districts which serve students from low-income backgrounds. Nearly all of HSSU's undergraduates (77% in 2020), and half of Lincoln's undergraduates (52% in 2020), are Pell Grant recipients.²⁴² Many of them are first-generation college students.²⁴³ As a result, these students frequently require greater institutional resources²⁴⁴ and their tuition must be kept low, which means the State resources available to them must be more plentiful.²⁴⁵ Without increased State appropriations, HBCUs can

241. See Bennito L. Kelly, *Lincoln University Fights For Survival Amid Pressure On Many Fronts*, COLUMBIA MISSOURIAN (June 28, 2017), https://www.columbiamissourian.com/news/higher_education/lincoln-university-fights-for-survival-amid-pressure-on-many-fronts/article_45caebd8-513c-11e7-9244-e702f7314c3f.html [<https://perma.cc/BQ44-YRHM>].

242. See Rebecca Rivas, *NAACP and New Coalition Say Missouri Needs to Address 'Unconstitutional' Underfunding of HBCUs*, ST. LOUIS AM. (May 1, 2018), http://www.stlamerican.com/news/local_news/naacp-and-new-coalition-say-missouri-needs-to-address-unconstitutional-underfunding-of-hbcus/article_dbfb7e1c-4d8d-11e8-90d9-376e196ee941.html. Pell Grants are federal scholarships “usually . . . awarded only to undergraduate students” when they have not yet earned a degree and have “exceptional financial need” based upon their expected family contributions and the cost of their school's tuition. *Federal Pell Grants*, FED. STUDENT AID, <https://studentaid.gov/understand-aid/types/grants/pell> [<https://perma.cc/SEQ2-QGFB>]; see also *Fed. Pell Grant Program, Payment Schedule for Determining Full-Time Scheduled Awards in the 2021-2022 Award Year*, FED. STUDENT AID, <https://fsapartners.ed.gov/sites/default/files/attachments/2021-01/20212022PellPaymentSchedule.pdf> [<https://perma.cc/Q5SQ-XVS6>]; DHEWD, HIGHER EDUCATION FACTBOOK 11–12 (2020), <https://dhewd.mo.gov/data/documents/FactBook2020.pdf> [<https://perma.cc/RN44-WMKQ>].

243. See Michael T. Nietzel, *Four Reasons Why 2020 Was the Year of the HBCU*, FORBES MAG. (Jan. 2, 2021), <https://www.forbes.com/sites/michaelt Nietzel/2021/01/02/four-reasons-why-2020-was-the-year-of-the-hbcu/> [<https://perma.cc/J6XK-B6UA>].

244. See Churchill, *supra* note 231.

245. This need for plentiful resources was highlighted during the COVID-19 pandemic, when students faced widespread issues with technology, family stability, and eviction—they necessarily looked to their schools for help. Henderson, *supra* note 240.

only provide this additional help by scrimping elsewhere in their meager budgets at further expense to already underfunded school programs.²⁴⁶

This economic paradox—receiving less total revenue yet providing more services that cost more—is difficult to resolve without increased government-provided financial support. The lower tuition, State-mandated caps on annual tuition increases,²⁴⁷ and relatively small endowments at HBCUs all work to limit the aid they can provide directly to students and render HBCUs highly vulnerable to dips in revenue—reductions that have become commonplace in Missouri higher education funding.²⁴⁸ Moreover, these problems are magnified for public HBCUs like HSSU and Lincoln, which means they rely on government funding more heavily than private HBCUs and non-HBCU institutions, particularly those with greater student populations and tuition revenue.²⁴⁹ Nonetheless, Missouri’s public HBCUs continue to be underfunded.²⁵⁰

Second, HBCUs have been recognized for getting more bang for every dollar of State appropriation, which suggests they would use increased funding effectively. In general, HBCUs “pave a broad avenue of access to postsecondary education” for a wide spectrum of underserved students.²⁵¹ In creating these opportunities, HBCUs recognize they play a critical role in “molding and forging our leaders, thinkers, and innovators”—and

246. *Id.* See also Churchill, *supra* note 231.

247. Current Missouri law only permits State institutions to increase tuition annually at an amount no higher than the inflation rate or face a funding penalty if it exceeds that amount. See Patterson Fallis, *Missouri House Bill Would Allow Public Colleges, Universities to Hike Tuition Beyond Inflation*, KOMU 8 (Apr. 14, 2021), https://www.komu.com/news/state/missouri-house-bill-would-allow-public-colleges-universities-to-hike-tuition-beyond-inflation/article_234ef344-9d53-11eb-a7f1-83c6ed7825f2.html [<https://perma.cc/9M8V-DFHA>].

248. See Nietzel, *supra* note 243; see also KRYSTAL L. WILLIAMS & BREANNA L. DAVIS, AM. COUNCIL ON EDUC., PUBLIC AND PRIVATE INVESTMENTS AND DIVESTMENTS IN HISTORICALLY BLACK COLLEGES AND UNIVERSITIES 2 (2019), <https://www.acenet.edu/Documents/Public-and-Private-Investments-and-Divestments-in-HBCUs.pdf>. (“Both public and private HBCUs experienced the steepest declines in federal funding per FTE student between 2003 and 2015 . . .”).

249. See WILLIAMS & DAVIS, *supra* note 248, at 2 (“Public HBCUs rely on federal, state, and local funding more heavily than their non-HBCU counterparts.”), and *id.* at 4 (“While public funds are the largest source of revenue for public institutions, private institutions are generally more tuition dependent.”).

250. See DHEWD, MO. PUB. HIGHER EDUC. INST. APPROPRIATIONS (FY 2007–2016), <https://dhewd.o.gov/about/legislative/documents/WebFY02thrupresentinstitutionapprop.pdf> [<https://perma.cc/SKA6-N3LG>]; and DHEWD, MO. PUB. HIGHER EDUC. INST. APPROPRIATIONS (FY 2013–2018), <https://dhewd.mo.gov/about/legislative/documents/FY13thrupresentinstitutionapprop.pdf> [<https://perma.cc/N7DB-N3WF>].

251. See Nietzel, *supra* note 243.

statistics show that they often rise to the challenge.²⁵² Thus, in Missouri, “[d]espite significant state underfunding” and other “state-funding cuts,” commentators point out that the State’s HBCUs persevere with encouraging results.²⁵³

For example, between 2014 and 2018, HSSU’s academic profile, educational offerings, and degree production increased significantly.²⁵⁴ It also remains one of the least expensive State universities by credit hour, claimed an over eight-hundred percent increase in application rates between 2013 and 2018, and leads Missouri in producing African-American degree holders in biology and math, among other achievements.²⁵⁵ Even during the COVID-19 pandemic, HSSU’s retention rate increased.²⁵⁶ As a result, HSSU has claimed accolades in national publications. The *U.S. News & World Report* ranked HSSU nationally for its academic programs, and *Washington Monthly* touted it as one of the nation’s best baccalaureate programs.²⁵⁷

252. Joseph Karl Grant, *A Conversation with President Obama: A Dialogue About Poverty, Race, and Class in Black America*, 1 U. MIAMI RACE & SOC. JUST. L. REV. 25, 36 (2011).

253. See Norwood, R., *supra* note 239; see also Demetrius Johnson Jr., *Midwestern HBCUs Do Exist and Has the Right to Matter*, HBCU CAMPAIGN FUND (June 6, 2018), <https://Hbcucampaignfund.org/2018/06/06/midwestern-HBcus-do-exist-and-has-the-right-to-matter> [https://perma.cc/4EKS-6PSU].

254. Dwaun J. Warmack, *Harris-Stowe Has a Right to Exist*, ST. LOUIS AM. (May 17, 2018), http://www.stlamerican.com/news/columnists/guest_columnists/harris-stowe-has-a-right-to-exist/article_3d0095bc-5a40-11e8-b148-fb938d8a74f.html; see generally Letter from Dwayne Smith, Interim President of Harris-Stowe State University, to Zora Mulligan, Commissioner of DHEWD (Oct. 11, 2019), <https://dhewd.mo.gov/documents/STEMStatewideMissionApplication101119Combinedwithletters.pdf> [https://perma.cc/5QNZ-ZQD8] (enumerating HSSU’s achievements, with a special focus on STEM programs).

255. See Norwood, R., *supra* note 239. In fact, *U.S. News & World Report* and other data sources have consistently listed Harris-Stowe in the top ten in terms of lowest tuition costs among four-year public colleges for in-state and out-of-state students as well as among HBCUs. See Rebecca Safier, *10 Most Affordable Public and Private HBCUs in the US*, THE MOGULDOM NATION (Aug. 17, 2018), <https://moguldom.com/153792/10-most-affordable-hbcus-public-and-private-us/> [https://perma.cc/XML4-HX7L]; Farran Powell, *10 Cheapest Public Schools for In-State Students*, YAHOO FINANCE (Feb. 28, 2017), <http://finance.yahoo.com/news/10-cheapest-public-schools-state-140000000.html> [https://perma.cc/MTK2-GGGP]; Delece Smith-Barrow, *10 Schools With the Lowest Out of State Tuition*, YAHOO FINANCE (Sept. 15, 2015), <http://finance.yahoo.com/news/10-schools-lowest-state-tuition-130000417.html> [https://perma.cc/RFX9-HWSL].

256. See WILLIAMS & DAVIS, *supra* note 248.

257. See Johnson Jr., *supra* note 253.

Third, data establishes that HBCU graduates are not the only persons who benefit from an HBCU education. Local and national economies thrive when the workforce is better educated and more diverse, and increasing HBCU funding would increase these benefits. Economists recognize that properly funded HBCUs could usher in a virtuous cycle, which benefits graduates, their greater communities, and the American economy as a whole.²⁵⁸ Better HBCU funding provides for better education, better education provides better jobs, better jobs provide better national economies, and better national economies provide better national competition on the global economic stage.²⁵⁹ For example, a study by the United Negro College Fund (UNCF) identified “HSSU’s annual economic impact on the St. Louis region at \$65 million” in 2018 and “further estimates the lifetime earning potential for an HSSU graduate is approximately \$2.5 million, 70 percent higher than if they only had a high school diploma.”²⁶⁰

Nonetheless, opposing commentators and some State legislators claim that HBCUs are not underfunded. In 2018, Missouri’s budget committee chair Scott Fitzpatrick (R-Shell Knob) argued HBCUs receive greater funding “per student” than other Missouri state schools.²⁶¹ This focus on per-FTE funding wholly ignores the reality that HBCUs rely more heavily on State funding when compared to larger public universities, which are able to claim tuition, endowments, private gifts, and other funding sources as a greater percentage of total revenue.²⁶² It also ignores the higher costs associated with educating academically and economically disadvantaged college students.²⁶³

258. See Grant, *supra* note 252; see also Janell Ross & National Journal, *Is Open-Access Community College a Bad Idea?*, THE ATLANTIC (June 23, 2014), <https://www.theatlantic.com/politics/archive/2014/06/is-open-access-community-college-a-bad-idea/431052/> [https://perma.cc/NM8Z-JJCX] (“[T]he only way to ensure America keeps pace in the global economy is to maintain the quality of our nation’s postsecondary institutions and programs.”).

259. Ross & National Journal, *supra* note 258.

260. See Warmack, *supra* note 254.

261. See Churchill, *supra* note 231.

262. See WILLIAMS & DAVIS, *supra* note 248, at 3. Moreover, Missouri’s HBCUs do not receive much more per FTE than other colleges. In FY 2021, for instance, both HBCUs received approximately \$10,000 in appropriations per FTE; Truman also received approximately \$10,000 per FTE, Mizzou received approximately \$9,000 per FTE, and both the University of Central Missouri and Northwest Missouri State University received approximately \$7,000 per FTE. See MO. COORDINATING BD. OF HIGHER EDUC., FY 2021 HIGHER EDUCATION OPERATING BUDGET STATUS 158 (2020), <https://dhewd.mo.gov/cbhe/boardbook/documents/Book-0620.pdf>.

263. See Duncombe & Yinger, *supra* note 109.

Opponents claim funds appropriated to HBCUs reward poor performance. Nationally, many taxpayers and politicians have expressed worry over State funding for colleges that serve underprivileged students, claiming these students are “underprepared” and experience “modest success rates.”²⁶⁴ Accordingly, opponents claim that funds appropriated to these schools “are, in effect, ‘rewarding incompetence’” by sustaining aid to such students.²⁶⁵ In Missouri, commentators have launched similar, specific attacks against HSSU.²⁶⁶ HSSU responded with data indicating the open enrollment requirements, coupled with its mission of serving underrepresented, first generation college graduates, and information reflecting how performance measures improperly penalize historically underfunded HBCUs all serve to present a false portrayal of the value and successes of HSSU and Lincoln.²⁶⁷

Additionally, much of the criticism directed at HSSU is tied to the disparity in “graduation rates”—a skewed, highly deceptive measure that penalizes open enrollment institutions like HSSU and Lincoln.²⁶⁸ To determine graduation rates, Missouri uses numbers reported by colleges to

264. Patrick Sullivan, *An Essential Question: What Is “College-Level” Writing?*, in WHAT IS “COLLEGE-LEVEL” WRITING? 11 (Patrick Sullivan & Howard Tinberg eds., 2006). Available at http://media.ocean.edu/files/OCC_VIDEO/upload/Faculty_Resources/dbordelon/An_Essential_Question_What_is_college-level_writing.pdf [<https://perma.cc/P748-9HQ6>].

265. *See id.*

266. In 2018, the *St. Louis Post-Dispatch* published an op-ed entitled *Poor leadership at Harris-Stowe is rewarded*, which attacked HSSU as incompetent, “worthless,” and “failing in almost all measurable academic matrices,” citing its purported six-percent graduation rate and “ever-growing list of expensive lawsuits;” as a result, it argued, taxpayer dollars are unwisely appropriated to HSSU. *See* Brian Elsesser, *Poor Leadership at Harris-Stowe is Rewarded*, ST. LOUIS POST-DISPATCH (May 10, 2018), https://www.stltoday.com/opinion/columnists/poor-leadership-at-harris-stowe-is-rewarded/article_0a643468-5c9b-5199-997c-fc08d74299a7.html [<https://perma.cc/F9NZ-SVSY>]; *but see* Norwood, R., *supra* note 239 (responding to Elsesser); and Dale Singer, *Presidential Search, New Faculty Contract Put Spotlight on Harris-Stowe*, ST. LOUIS PUB. RADIO (Mar. 21, 2014), <https://news.stlpublicradio.org/education/2014-03-21/presidential-search-new-faculty-contract-put-spotlight-on-harris-stowe> [<https://perma.cc/PUF9-RPEN>] (“Are students getting the preparation they need before they graduate from high school? If they are not, what do we do? Just turn our back on them and say you cannot go any further, this is your lot in life? Or do we provide them opportunities so they can achieve success?”).

267. Norwood, R., *supra* note 239.

268. In general, the Department of Higher Education requires open enrollment institutions to “admit any Missouri resident with a high school diploma or its equivalent as a first-time, full-time degree-seeking freshman.” *See Admissions Selectivity Categories*, DHEWD, <https://dhewd.mo.gov/policies/admissions-selectivity.php> [<https://perma.cc/FJB4-ZKXK>].

the federal government as a requirement of the Student Right-to-Know Act.²⁶⁹ Under this Act, “graduation rates” measure “the number of students entering the institution as full-time, first-time, degree/certificate-seeking undergraduate students in a particular year . . . [against] the number completing their program within 150 percent of normal time to completion [or] transfer[ring] to other institutions if transfer is part of the institution’s mission.”²⁷⁰ A first-time student is one “who has no prior postsecondary experience,” with limited exceptions, and “attend[s] any institution for the first time at the undergraduate level.”²⁷¹ A full-time student is one “enrolled for 12 or more semester credits, or 12 or more quarter credits, or 24 or more clock hours a week each term.”²⁷² Together, these definitions create a narrow definition for “graduation rates” because they necessarily exclude students who transfer into or from another school, who enroll as part-time students and later become full-time students, or who return to higher education following a hiatus.²⁷³ As a result, despite the fact that HSSU’s total graduates increased from 132 in 2014 to 196 in 2019,²⁷⁴ a large percentage of these graduates would not be counted in the “graduation rates” because they would not qualify as “first-time, full-time” students.

While this narrow definition may legitimately measure a non-open enrollment college’s ability to graduate traditional students on a traditional timeframe, it poses problems for open enrollment schools which, by design, serve underrepresented students—many of whom are rejected for admission in or flunk out of more selective public colleges in the State. In 2017,

269. See Student Right-to-Know and Campus Security Act, Pub. L. No. 101–542, 104 Stat 2381 (1990); see also *Graduation Rate*, IPEDS GLOSSARY, <https://surveys.nces.ed.gov/ipeds/public/glossary> (last visited June 25, 2021).

270. See *Graduation Rates (GR)*, IPEDS GLOSSARY, <https://surveys.nces.ed.gov/ipeds/public/glossary> (last visited June 25, 2021).

271. See *First-time student (undergraduate)*, IPEDS GLOSSARY, <https://surveys.nces.ed.gov/ipeds/public/glossary> (last visited June 25, 2021).

272. See *Full-time student*, IPEDS GLOSSARY, <https://surveys.nces.ed.gov/ipeds/public/glossary> (last visited June 25, 2021).

273. If a student transfers into HSSU after one semester at a community college and goes on to graduate in 3.5 years, that student would not count in the HSSU graduation rates. See Camille Phillips, *Harris-Stowe President Says Low Graduation Rate is “Extremely Deceiving”*, ST. LOUIS PUB. RADIO (July 1, 2017), <https://news.stpublicradio.org/education/2017-07-01/harris-stowe-president-says-low-graduation-rate-is-extremely-deceiving> [<https://perma.cc/MCX8-488Y>]; see also *Harris-Stowe State University “True Truth” Fact Checker*, HARRIS-STOWE ST. UNIV., (July 16, 2021), http://go.hssu.edu/rsp_content.cfm?wid=8&pid=1368 [<https://perma.cc/4NV4-V4F6>].

274. DHEWD, HIGHER EDUCATION FACTBOOK 11 (2020), <https://dhewd.mo.gov/data/documents/FactBook2020.pdf> [<https://perma.cc/RN44-WMKQ>].

HSSU's president criticized the graduation rate formula as "extremely deceiving," noting that over "70 percent of Harris-Stowe students transferred in from other schools or attend part time" and thus such students, even if they eventually graduate, are excluded from HSSU's graduation rate.²⁷⁵

Accordingly, HSSU and Lincoln produce a substantial population of "invisible graduates" each year and do not receive full credit for educating and graduating them.²⁷⁶ This false narrative regarding graduation rates and skewed performance measures makes HBCUs appear ineffective despite their successes, and it leaves them open to further attacks in the press, all of which hinders their abilities to successfully advocate for greater State appropriations.²⁷⁷

Interestingly, even the Commissioner of the Missouri Department of Higher Education (MDHE), Zora Mulligan, acknowledges this point. Invisible graduates skew graduation statistics, which skews the larger performance parameters important to funding allotments.²⁷⁸ It is in part because of this, and in part because the legislature routinely funds based on its own considerations, that Commissioner Mulligan advises the MDHE no longer relies on performance-based funding measures when deciding how much of a school's requested budget it will recommend. Rather, it makes core funding recommendations to the legislature under what the MDHE calls a "base plus" model. Under this model, MDHE looks at what has been allotted to colleges and universities *in the past*, makes an adjustment for inflation, and comes up with its recommended amount—which

275. Phillips, *supra* note 273.

276. See also "True Truth" Fact Checker, *supra* note 273.

277. Although some might argue that the only other open enrollment institution, Missouri Western, has better graduation rates, Missouri Western students come from greater wealth than HSSU students. For HSSU students, the median family income is \$29,000, and 32% of students are in the bottom 20% for family income. For Missouri Western students, the median family income is \$67,000, and only 8.9% of students are in the bottom 20% for family income. *Compare Economic Diversity and Student Outcomes at Harris-Stowe State University*, N.Y. TIMES: THE UPSHOT, <https://www.nytimes.com/interactive/projects/college-mobility/harris-stowe-state-university> [https://perma.cc/TCN6-DU3U], with *Economic Diversity and Student Outcomes at Missouri Western State University*, N.Y. TIMES: THE UPSHOT, <https://www.nytimes.com/interactive/projects/college-mobility/missouri-western-state-university> [https://perma.cc/A9W8-KUR3].

278. Zoom interview with Zora Mulligan, Commissioner of the Missouri Department of Higher Education (June 29, 2021).

recommendation must be approved by lawmakers. There is no other formula for awarding money to institutions of higher education. All core funding determinations are made from this method.²⁷⁹

The problem with this method is that it does not take improved performance into account. More disturbingly, it bases its recommendation on past funding allotments. Because those past funding allotments penalized HBCUs for their graduation numbers and for deficiencies arising from decades of structural racism, that past punishment becomes the foundational basis for the current allotment recommendations. In effect, it locks in the status quo, which penalizes the HBCU institutions in the state while preserving the privileged status of the non-HBCU institutions. Such arbitrary funding also exists in the area of capital improvement funding to the detriment of Missouri's HBCUs.

B) Underfunded Capital Improvements

In general, HBCUs also require greater funding to maintain their physical campuses, which fall into disrepair when their budgets are stretched thin. In May 2021, NPR described the “deteriorating” condition of several HBCU campuses and noted that already-thin HBCU budgets could not stretch further to maintain their buildings.²⁸⁰ This poses practical issues. Deteriorating campuses can pose safety hazards and create obstacles to instruction, including campus-wide blackouts and a stifling lack of air conditioning.²⁸¹ This may make the school less attractive to potential students, which further restricts the school's income.²⁸²

279. Mulligan, *supra* note 278.

280. Ailsa Chang et al., ‘*Theft At A Scale That Is Unprecedented*’: *Behind The Underfunding Of HBCUs*, NPR (May 13, 2021), <https://www.npr.org/2021/05/13/996617532/behind-the-underfunding-of-hbcus>. See also Katherine Mangan, *The Betrayal of Historically Black Colleges* (Sept. 24, 2021), <https://www.chronicle.com/article/the-betrayal-of-historically-black-colleges> [<https://perma.cc/NCZ8-UET8>] (HBCUs in Tennessee shortchanged by state to the tune of half a billion dollars).

281. Francesca Chambers, *Aging campuses? Lawmakers Want To Help Modernize Historically Black Colleges, Universities*, THE DETROIT NEWS (May 5, 2021), <https://www.detroitnews.com/story/news/education/2021/05/10/aging-campus-lawmakers-want-help-modernize-historically-black-colleges-universities/4997767001/> [<https://perma.cc/5BD6-Z54W>].

282. Christine Fernando, *Historic Black Colleges to Get \$650,000 to Preserve Campuses*, ASSOCIATED PRESS (Feb. 17, 2021), <https://www.usnews.com/news/us/articles/2021-02-16/historic-black-colleges-to-get-650-000-to-preserve-campus> [<https://perma.cc/4DS4-73H5>].

The MDHE maintains publicly available data on capital improvement allocations for fiscal years (“FY”) 2010–2019.²⁸³ In 2020, HSSU requested \$34 million for capital improvements that included a request for a new STEM building (\$23,297,763), a new Center for Innovation and Entrepreneurship (\$3,207,201), and renovation and restoration of the nearly one-hundred-year-old Dr. Henry Givens Jr. Administration Building (\$7,414,635)—the building where most of HSSU’s classroom instruction is delivered.²⁸⁴ However, between FY 2010 and 2019, Missouri appropriated \$4.7 million in capital improvements funding to HSSU—but \$2 million of these funds was later vetoed or withheld.²⁸⁵ This means that over the last decade, HSSU only received capital improvement funding in FY 2016 (\$2,204,580) and FY 2019 (\$500,000).²⁸⁶ In FY 2015, 2017, and 2019, it received funds that were later vetoed or withheld. In FY 2010, 2011, 2012, 2013, 2014, and 2018, HSSU received no capital funding at all.²⁸⁷

During the same period, Missouri appropriated \$7 million in capital improvements funding to Lincoln—but \$3 million of these funds were later vetoed or withheld.²⁸⁸ Lincoln thus received such funding only in FY 2016 (\$4,039,140).²⁸⁹ In FY 2015 and 2017, it was awarded funds that were later vetoed or withheld.²⁹⁰ In FY 2010, 2011, 2012, 2013, 2014, 2018, and 2019, Lincoln received no capital funds at all.²⁹¹

HSSU and Lincoln receive considerably less than other four-year colleges and even some community colleges. Every four-year college (with the exception of two campuses of Missouri State University) received more in capital improvement allotments between FY 2010 and 2019.²⁹² Moreover, the discrepancy in allotments is wide. In FY 2016 alone, for instance, eleven four-year colleges and two community colleges—including

283. DHEWD, FACILITY REVIEW (2018), <https://dhewd.mo.gov/initiatives/documents/facility-review2018.pdf> [https://perma.cc/EU5P-TXJG].

284. See HARRIS-STOWE STATE UNIVERSITY, CAPITAL FUNDING SUBMISSION, <https://dhewd.mo.gov/initiatives/documents/frharrisstowe.pdf> [https://perma.cc/38PC-PJ5R].

285. See DHEWD, *supra* note 283, at 17.

286. *Id.*

287. *Id.*

288. *Id.* at 23.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

Missouri Western, a non-HBCU open enrollment college—individually received more capital improvement funding than either HSSU or Lincoln received in total between FY 2010 and FY 2019.²⁹³

The MDHE currently publishes a comprehensive list of capital improvement allotment requests,²⁹⁴ and for FY 2021 HSSU has submitted nine such requests.²⁹⁵ One recent request stated that the Dr. Henry Givens Jr. Administration Building “is nearly 100 years old and in need of renovations” totaling \$17,012,110.²⁹⁶ Missouri’s Coordinating Board of Higher Education included this one request among this year’s “Top Ranked Capital Improvement Projects.”²⁹⁷ As a result, HSSU will be “invited to present” to the Coordinating Board an “oral presentation” in favor of funding these renovations.²⁹⁸ The Coordinating Board will then decide whether to recommend this improvement to the Office of Administration’s Division of Budget & Planning, which then presents the request to the governor to review.²⁹⁹ Improvements not recommended by the Coordinating Board, including HSSU’s remaining eight requests, will still be presented to the governor, yet unranked and without a recommendation.³⁰⁰

C) *Lincoln Land Grant Funding Deficiencies*

Another area of HBCU underfunding relates to the failure of the State to provide matching funds to Lincoln University to support the federal government’s land-grant funding pursuant to the 1862 Land Grant College Act, also known as the Morrill Act, as augmented by the Morrill Act of 1890.³⁰¹ The Morrill Act of 1890 was enacted because Blacks could not benefit from the original Morrill Act in states like Missouri that did not allow them to attend institutions of higher learning.³⁰² This Act prohibited

293. *Id.* at 149.

294. DHEWD, FY 2021 CAPITAL IMPROVEMENT RECOMMENDATIONS (Sept. 11, 2019), <https://dhewd.mo.gov/cbhe/boardbook/documents/tab21-09112.pdf> [<https://perma.cc/W7F5-GLDF>].

295. *Id.* at 14–16 (describing all nine of HSSU’s capital improvement allotment requests).

296. *Id.* at 14.

297. *Id.* at 3.

298. *Id.* at 1.

299. *Id.*

300. *Id.*

301. 7 U.S.C. §§ 321–29 (1890).

302. ASSOCIATION OF PUBLIC AND LAND-GRANT UNIVERSITIES, LAND-GRANT BUT UNEQUAL—STATE ONE-TO-ONE MATCH FUNDING FOR 1890 LAND-GRANT UNIVERSITIES 3 (Sept.

the distribution of money to States that made distinctions of race in admissions unless at least one land-grant college for Blacks was established.³⁰³

Under the Morrill Act, land-grant schools like Lincoln can receive federal funds if there is a dollar-for-dollar state or local match. It has been reported that unlike the University of Missouri—which has consistently received matching land-grant funding as a part of its Missouri state core funding³⁰⁴—Lincoln has been consistently shortchanged with matching state funding. For instance, for fiscal years 2007 and 2014, the Missouri legislature failed to allocate *any* of the land grant match to Lincoln, which resulted in the University being deprived of millions in matching federal dollars.³⁰⁵

Although the State has stepped up more recently to provide some of this matching land-grant funding, Lincoln has lost matching federal dollars because of the State's failure to provide full matching dollars. Although Lincoln was eligible for \$7.1 million in federal land-grant funding for FY 2019, it only received \$3.8 million in state appropriations for the land-grant mission, leaving a match shortfall of \$3.3 million.³⁰⁶ For FY 2020, Lincoln was allocated approximately \$7.6 million in federal land-grant capacity funding. Because of the State's failure to provide a full match by only

2013), <https://www.aplu.org/library/land-grant-but-unequal-state-one-to-one-match-funding-for-1890-land-grant-universities/file> [https://perma.cc/554K-VQR8].

303. *Id.*

304. Alexis Allison, *Separate and Unequal: How Lincoln's Land-Grant Funding Woes Hurt Missouri's Small Farmers*, COLUMBIA MISSOURIAN (Apr. 1, 2010), https://www.columbiainmissourian.com/news/higher_education/separate-and-unequal-how-lincolns-land-grant-funding-woes-hurt-missouris-small-farmers/article_6e3d4622-1e2a-11e8-825d-6f0c857bd295.html [https://perma.cc/7Y43-MXFL] (“The land-grant mission of MU, Missouri’s other and first land-grant institution, is funded through a different process — and has received its required allotment in the same time period. ‘We’ve created a dual system within the land-grant community, and it doesn’t work,’ said John Michael Lee, Jr., former vice president of the Office for Access and Success at the Association of Public and Land-grant Universities.”).

305. Bennito L. Kelty, *Lincoln University Fights For Survival Amid Pressure On Many Fronts*, Columbia Missourian (June 28, 2017), https://www.columbiainmissourian.com/news/higher_education/lincoln-university-fights-for-survival-amid-pressure-on-many-fronts/article_45cae8d8-513c-11e7-9244-e702f7314c3f.html [https://perma.cc/9DCH-M723].

306. LINCOLN UNIVERSITY, INDEPENDENT AUDITOR'S REPORT AND FINANCIAL STATEMENTS 16 (June 30, 2019, and 2018).

providing \$3.8 million in state appropriations, Lincoln was left with a match shortfall of \$3.8 million.³⁰⁷

In contrast, because the University of Missouri has been permitted to include the State's land-grant match as part of its core state funding,³⁰⁸ the University of Missouri has consistently received all its matching federal land grant dollars:

[T]he state doesn't specifically provide MU's land-grant money as a separate line item — it's rolled into MU's core, so the university decides how much of its state appropriations to designate as the land-grant match.

“It appears that the University of Missouri has passed through sufficient funding to MU Extension to retain federal funds every year (since 2000),” Dennis Gagnon, director of communications for MU Extension, wrote in an email. “MU pulls from its allocated funding to provide MU Extension's funding.”³⁰⁹

HBCUs have begun to challenge historical state underfunding and failures to match the land grants. In Tennessee, a bipartisan legislative committee determined that the State failed to adequately fund Tennessee State University in matched land grants going back to the 1950s, which resulted in that institution being deprived of an amount ranging from \$150 million to \$544 million.³¹⁰ A fifteen-year-old lawsuit filed against the State of Maryland by four HBCUs—Bowie State University, Coppin State University, Morgan State University, and the University of Maryland, Eastern Shore—has resulted in a \$577 million settlement approved by a federal judge in May 2021.³¹¹ The local chapter of the St. Louis NAACP has recently begun research into potential legal steps, following the lead of the HBCUs in Maryland, due to similar underfunding and failure to match

307. LINCOLN UNIVERSITY, INDEPENDENT AUDITOR'S REPORT AND FINANCIAL STATEMENTS 17 (June 30, 2020, and 2019).

308. Mulligan, *supra* note 278.

309. Allison, *supra* note 304.

310. Chang et al., *supra* note 280.

311. Brian Witte, *Maryland Finalizes \$577 Million Settlement for HBCU Federal Lawsuit*, AP NEWS (Apr. 28, 2021), <https://apnews.com/article/larry-hogan-maryland-lawsuits-legislation-education-d9a76565b03653234200033bed7a5862>.

Lincoln land grants here in Missouri.³¹² Such court intervention might indeed be necessary to redress what HBCU proponents in the state and the data suggest is significant underfunding of Missouri HBCUs. It might be that the State's recent efforts to provide at least partial land grant funding to Lincoln has been prompted by the threat of litigation. Still, it may be too little too late.

When one couples the funding disparities for HBCUs with the State's failure to adequately fund majority Black public school districts and adequately remediate over one hundred years of structural racism, and its adoption of so-called choice programs that slowly bleed those districts of crucial funding, it becomes clear that the root of Missouri's shameful history in the education of Black citizens continues to be manifested in the branches of today's current dual systems of education existing at both the K-12 levels and the higher education level. It is way past time for Missouri to own up to its blatant historical violations of Black students' basic, fundamental right to an education, and take whatever bold steps are necessary to provide some measure of long sought-after equity in this critical area.

312. Henderson, *supra* note 231. See generally DHEWD, HIGHER EDUCATION FACTBOOK (Feb. 2021), <https://dhewd.mo.gov/data/documents/FactBook2021.pdf> [<https://perma.cc/RN44-WMKQ>].

CONCLUSION

*Draining resources from public schools has already undermined districts around the country, especially those serving low-income and minority students. Time is short for rescuing and improving public education. Destroying it will not require privatizing the entire system or anything near that. We are watching death by a thousand cuts.*³¹³

*“The question isn’t why [HBCUs] still exist; the issue is really, how excellent can we be? We are an essential part of the fabric of higher education because of the contribution we make to diversifying many fields. Clearly, the outcomes from the HBCUs speak for themselves. So, what we have to do is make sure they’re as strong as possible so they can fulfill and continue to fulfill that role as strongly as possible.”*³¹⁴

Because of the breadth and depth of the structural racism that has existed and currently exists at all levels of Missouri’s educational apparatus, this Article only scratches the surface of how over a century of structural public school racism in Missouri has thwarted and is thwarting the ability of Blacks to obtain a quality education, on par with those educational opportunities afforded White students. However, the truisms amply supported by the historical and current data highlighted in this piece are summarized as follows.

Prior to *Brown*, the State of Missouri deprived Blacks of equal educational opportunities in various, hideous ways. Whether it was the outright criminal prohibition of education of Blacks, the constitutional and discriminatory mandate of separate and unequal in K-12 and higher education, or the facilitation of a dual system of education for Blacks that was inherently inferior to that afforded to Whites and conducted in inferior

313. Barkan, *supra* note 94.

314. Adam Harris, *Why America Needs Its HBCUs* (May 16, 2019), <https://www.theatlantic.com/education/archive/2019/05/howard-universitys-president-why-america-needs-hbcus/589582/> [<https://perma.cc/53J2-AA24>] (The President of Howard University argues that “it is a danger to the national interest to not invest in these institutions.”).

school buildings with substandard resources, Missouri has historically denied Blacks quality educational opportunities based solely on the color of their skin.

Once the scourge of separate but equal in public education was outlawed by the Supreme Court, Missouri dragged its feet for almost two decades, prompting federal lawsuits in St. Louis and Kansas City designed to force compliance. Throughout those two desegregation remediation lawsuits, Missouri vigorously and relentlessly fought all efforts to make things right by refusing to acknowledge how its decades of discriminatory laws, policies, and practices worked to deny generations of Blacks the fundamental right to be educated on par with its White residents. The State was active in resisting any attempt to fashion a remedy that would level the playing field and redress over one hundred years of segregated public schools. Ultimately, the federal courts had to force the State's compliance by mandating that it begin paying for desegregation remediation programs that, in the short-term, offered some small measure of recompense and hope for future generations of Black students.

This compliance was short-lived. As soon as legal avenues opened for Missouri to seek partial unitary status and derail what by all measures were successful desegregation remediation programs, Missouri jumped at the chance to jettison those successful programs and leverage partial unitary status to achieve premature settlements and an end to Court supervision. The State's lack of good faith and lack of commitment to honoring any of the promises made in both desegregation settlements quickly became evident when it sought to change state law to deprive both SLPSD and KCPSD of agreed-upon, post-litigation funding designed to continue the operation of desegregation remediation programs.

Once unshackled from court supervision, the State created a new type of dual system. The dual system reflected in the racially segregated and unequal system left in place post-settlement was then infused with another layer of duality under the guise of "school choice." School choice here serves to privatize public education in mostly Black urban school districts in the form of charter schools controlled by neither the State nor local, predominantly Black residents. This privatization depletes already limited public education funding, which has ultimately wreaked havoc on SLPSD

and KCPSD and those mostly Black students who do not attend charter schools.

The hype surrounding the wonders and benefits of charter schools and how competition through privatization would improve public school districts and student performance has proven to be just that—all hype. The data both nationwide and statewide reveals charter school students do not perform much better than students in traditional public school districts. In the many cases where charter schools fail, families are left scrambling to find new schools, often ending up back at the safety net afforded by financially weaker traditional public schools.

Undeterred, the State is doubling down on experimenting with public school privatization by implementing a voucher program promoted as a further school choice effort to help poor students. The national data reveals voucher programs do not work for poor students or most students with special education needs. Rather, they ultimately become a subsidy for the mostly White students of parents with means to send their children to private schools. In Missouri, taxpayers who donate to this subsidy get a nice benefit of their own in the form of a tax credit. And sadly, as has been the case with charter schools, for each student that leaves those mostly Black public school district, that district will be deprived of much-needed funding to cover the fixed and other costs required to maintain the district.

In a more blatantly sinister move that demonstrates the State's hypocrisy on the issue of choice, Missouri was sternly rebuked by the court for further attempting to deny parents and students in the majority Black Normandy School Collaborative from exercising their choice for a better education afforded under the transfer law, after ignoring NSC's unaccredited status for two decades, which precluded students from transferring.

Missouri's structural racism likewise persists in its originally separate and woefully unequal HBCUs. Created because of the State's prohibition against racially integrated education, Missouri's HBCUs—designated as open enrollment institutions and charged with filling educational deficiencies of students graduating from under-resourced K-12 schools—have been forced to survive with meager funding and deteriorating facilities. Despite the fact that these institutions require more resources to educate the disadvantaged college students that they serve and have much older and antiquated facilities, Missouri—which ranks at the very bottom nationally

in higher education funding generally—refuses to take the bold legislative actions needed to provide the necessary resources to close the widening gap between its HBCUs and other higher learning institutions, a gap created and perpetuated by structural racism. And, in the case of Lincoln University, Missouri continues to leave federal dollars on the table by consistently refusing to match federal land-grant dollars in the same way that it matches those federal land-grant dollars for its flagship institution the University of Missouri.

As this article has demonstrated, Missouri has had a long, shameful history of segregation and discrimination in public education. Its underfunding of HBCUs; its vigorous opposition to desegregation litigation and efforts to divert monies targeted as desegregation remediation; and its current hypocritical use of so-called “school choice” programs—that, while touted as the cure for underperforming schools, are excluded from the opportunity to also “cure” many of the predominately White rural districts also suffering academically—point to the conclusion: the State’s assault on the rights of Black students to receive a quality education in Missouri on par with White students in White majority districts, first implemented in 1821, continues unabated in 2021.