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James Forman Jr.
*Georgetown University Law Center*, jrf27@law.georgetown.edu

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Professor of Law
Georgetown University Law Center
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# DO CHARTER SCHOOLS THREATEN PUBLIC EDUCATION? EMERGING EVIDENCE FROM FIFTEEN YEARS OF A QUASI-MARKET FOR SCHOOLING

*James Forman, Jr.**

*Governments increasingly rely on private entities to institute educational reforms. This article examines the effects of the most significant of these market-based reforms: charter schools. As of the 2004–2005 school year, the United States boasted over three thousand charter schools, with state governments facing continued pressure to expand that number. Some critics, however, fear that charter schools pose a threat to the traditional public school system. Their central concern, generally referred to as "cream-skimming," is that the educational choice system created by charter schools privileges those students and parents whose race, class, or educational background afford them a better position to navigate the market for schools. This article will contend that the threat of cream-skimming currently appears unsubstantiated. Additionally, it will posit that charter schools may actually become allies with district schools, potentially aiding in efforts to increase educational funding. However, because the reforms are so new and the educational landscape is changing in so many ways, additional research is necessary to fully ascertain charter schools' impact on the traditional public school system.*

## INTRODUCTION

In America, as in much of the world, government increasingly relies on nongovernment actors, including private firms, to achieve public ends. This has sparked controversy across various sectors, most passionately in the field of education. Of the market-based reforms in education, char-

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ter schools have had the greatest impact. By the 2004–2005 school year, there were approximately three thousand charter schools in forty states and the District of Columbia, and governments face continued pressure to expand that number.[1] In some cities the pace of growth has been especially quick: charter schools enroll more than 25% of the students in Dayton, Ohio, and almost 25% in Washington, D.C., and Kansas City, Missouri.[2]

Charter schools—and the market-based arguments often made for them—are seen by some as threatening traditional public schools. One of the central fears motivating charter skeptics is typically referred to as "cream-skimming." A choice system, critics have long suggested, would privilege those students and parents whose race, class, or educational background give them a better position to navigate the market for schools. Similarly, schools would have an incentive to recruit students whose educational ability and family backgrounds make them attractive. At the end of the day, the traditional public system would be left populated by the least able children with the least active parents. Thus, even if choice benefited individual families, society as a whole, and especially disadvantaged families, would suffer.

The fear of cream-skimming is connected to the other fundamental fear of public school supporters—that schools will lose political clout as more advantaged families depart from the traditional public system.[3] Similarly, some public school supporters worry that charter schools, over time, will undermine the legitimacy of public authority and reduce citizen engagement on behalf of the public system. Bruce Fuller has suggested that "[c]harter school founders—leading their human-scale institutions, and, in the aggregate, the charge to decentralize government—may paradoxically erode the strength of public authority and the very agencies on which their local livelihood depends."[4] Stated more broadly, the question is whether charters will tilt the balance toward government for the pursuit of individual interests and away from the common good?[5] Given

1. CTR. FOR EDUC. REFORM, NATIONAL CHARTER SCHOOL DATA AT-A-GLANCE (2005), *available at* http://www.edreform.com/_upload/ncsw-numbers.pdf. For discussions of the future growth of charter schools, see Paul T. Hill, *Doing School Choice Right*, 111 AM. J. EDUC. 141, 141–42 (2005), and Lisa Snell, *Defining the Education Market: Reconsidering Charter Schools*, 25 CATO J. 267, 274 (2005).

2. HOPES, FEARS, & REALITY: A BALANCED LOOK AT AMERICAN CHARTER SCHOOLS IN 2005 4 n.6 (Robin J. Lake & Paul T. Hill eds., 2005).

3. In a widely cited early study of charter schools, Amy Stuart Wells and a team of researchers argued that "[o]ther major equity issues that have been ignored by many of the major advocates of charter school reform include charter schools' role at the forefront of marketization and privatization of the public education system." UCLA CHARTER SCHOOL STUDY, BEYOND THE RHETORIC OF CHARTER SCHOOL REFORM: A STUDY OF TEN CALIFORNIA SCHOOL DISTRICTS 63 (1998) [hereinafter UCLA STUDY]. The result, they said, "could lead to less political support for public funding of education as a whole." *Id.*

4. Bruce Fuller, *Introduction* to INSIDE CHARTER SCHOOLS: THE PARADOX OF RADICAL DECENTRALIZATION 1, 4 (Bruce Fuller ed., 2000).

5. In discussing school choice generally, Martha Minow suggests that "schooling is increasingly viewed as a private consumption item, instead of a shared experience for children from all classes,

the move towards privatization across industries and the hostility of many policymakers to a robust state, do charter schools undermine the notion that providing high-quality schooling for all children is a core public responsibility?[6]

Many of the participants in this debate argue with great passion.[7] Alex Molnar, for example, claims that the goal of many powerful charter school advocates "is not nearly as caring as their rhetoric. Bluntly put, it is to dismember public education and feed off the carcass."[8] Similarly, National Education Association President Reg Weaver warns parents to be careful of "the voucherizers, the privatizers, the charterizers who will come and try to fool our communities, saying that this is best for your kid. . . . [T]hey're not coming with solutions for all of our children. They might be coming with solutions for one or two or three but not for the vast majority."[9] In many respects the intensity of the debate is predictable. After all, if the proper role of government is a matter of great interest to Americans, nowhere is that more the case than with schooling. Education has long been viewed as the ultimate guarantor of equal opportunity for all Americans and has played a central role in the struggle for racial equality.[10]

The intensity of the rhetoric, however, masks the reality that, especially in the early years, nobody knew the answers to some key questions. The first charter law passed in Minnesota in 1991. Because charter schools were so new, the absence of data inescapably limited the debate in the early years. In the scheme of American educational policy history, charter schools are still relatively novel. I do not suggest that we know enough today to resolve all the questions I have described. But we do have substantial additional data upon which to draw. Charter schools have expanded rapidly, and interest from researchers has remained high. The last few years especially have seen an outpouring of empirical and other research touching on issues central to the charter experiment.

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races, and ethnic backgrounds. Decisions about schooling become a matter of consumer choice rather than citizen self-governance or public policy." MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 52–53 (2002).

6. *See, e.g.*, Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1082 (2000) ("[B]lurring the public/private line can jeopardize any sense of public obligation to provide social services, aid to the poor, health care, and even schooling.").

7. Hill, *supra* note 1, at 143 (noting that the choice debate often reflects a "struggle between those alleging that choice would be an automatic success and those claiming it would be a certain disaster").

8. ALEX MOLNAR, GIVING KIDS THE BUSINESS: THE COMMERCIALIZATION OF AMERICA'S SCHOOLS 153 (1996).

9. *News and Notes with Ed Gordon, Reg Weaver on the NEA's Strategy to Improve America's Public Schools* (National Public Radio broadcast July 6, 2005).

10. I discuss the relationship between race and education *infra* notes 58–78, 89–90 and accompanying text. On the question of education and equal opportunity more generally, see DAVID TYACK & LARRY CUBAN, TINKERING TOWARD UTOPIA 40–59 (1995).

In this article I intend to use what we have learned from fifteen years of experience with charter schools and explore whether the prediction that they would threaten public education has proven accurate. In Part I, I will briefly outline why I see charter schools as a "quasi-market" reform, and discuss the surprisingly complicated question of what constitutes a public school. In Part II, I will delineate the backdrop to the debate over charter schools by situating it within the larger struggle over the privatization of government functions. Although government partnerships with private providers are not new, the nature of the debate has changed in the last two decades, as critics of bureaucracy have increasingly pressed for market-based alternatives in various sectors. Charter schools came into being against this historical backdrop and reflect the themes of the larger movement to introduce market-based reforms and new governance schemes.

In Part III, I will investigate the question of cream-skimming. I will first explain why there was such good reason to fear cream-skimming, by pointing to evidence from international choice programs and magnet schools in the United States. In both of those contexts, choice programs tended to attract more privileged students and families. I will then review evidence from charter schools themselves and suggest that the research to date—while it has its limitations—does not confirm the expectation that charters would cream-skim. Though this could change in the future (and I will suggest a specific reason to fear that it might), the weight of the evidence so far suggests that charters and traditional public schools serve similar students. To the extent there are differences, charter schools are *more likely* to serve African American students.

I will then explore why this reform has not had the negative implications for equity that so many feared. In particular, I will emphasize that charter schools provide an example of how deregulation can, under certain circumstances, promote access for the less advantaged. At the same time, charter schools also show that some government regulation of the market for schools may be needed to ensure that the promise of access is realized. Finally, throughout Part III, I will point out that many questions relating to cream-skimming remain incompletely answered, and I will suggest areas for further research.

In Part IV, I will discuss whether, even in the absence of cream-skimming, charter schools might ultimately undermine support for funding traditional public schools. This question is at the heart of why many supporters of the traditional public system fear the deregulation inherent in the notion of charters. If the most privileged parents left for charters, what would happen to the political constituency for the traditional public schools? And wouldn't the success of charters be used as evidence by those who hope to reduce spending on education? Bruce Fuller asks, "[I]f we are to elect the proud pursuit of private interests in a revamped education marketplace, and to hell with the other guy, then why would a

no-longer-civil society tax itself to support *public* schools?"[11] Fuller's question does not lend itself to the same sort of straightforward empirical analysis as does cream-skimming. Nonetheless, the nation's experience so far with charters provides some evidence bearing on the issue.

My thesis is that, counterintuitively, deregulation via charter schools might have exactly the opposite effect from that which traditional public school supporters fear: it might create an additional constituency for the public school system to which charters were intended to be a market alternative. My argument to this effect in Part IV will proceed in three steps. First, I will outline the charter sector's dependence on private philanthropy, arguing that this makes such schools economically vulnerable. Second, I will suggest that this vulnerability has contributed to a shift in rhetoric within the charter school movement, as advocates move away from claims that charters will cut costs and instead focus on securing additional public funding. Third, I will argue that the structure of education funding means that charter school efforts to obtain greater public support will likely depend on increasing per pupil spending in all public schools.

## I. WHAT ARE CHARTER SCHOOLS? WHAT ARE PUBLIC SCHOOLS?

Before proceeding to the heart of this article, let me define some terms. "Charter schools" are typically created when a government contracts with (or grants a charter to) an independent school operator.[12] State law typically requires that the charter operator be a nonprofit, though in many states the nonprofit may in turn partner with a for-profit firm to manage the school.[13] Charter operators receive a specified sum of government money for each student who chooses to attend their school, and have a great deal of control over the key levers of personnel, budget, and curriculum. In exchange for this freedom from regulation, the schools must meet student achievement and other goals specified in their charter.[14]

Charter schools are, therefore, a move away from the bureaucratic model of service provided by a single monopolistic government entity. While charters are a more market-based approach to education, they nonetheless act in a highly regulated marketplace. A firm can enter the market only after obtaining the approval of the authorizing agency.

11. Fuller, *supra* note 4, at 4.

12. The definition of charter schools provided in this and the following paragraph is necessarily truncated; for a fuller description, see BRYAN C. HASSEL, THE CHARTER SCHOOL CHALLENGE: AVOIDING THE PITFALLS, FULFILLING THE PROMISE 1–12 (1999). For a detailed and compelling account of the origins of one Bay Area charter school, see JONATHAN SCHORR, HARD LESSONS: THE PROMISE OF AN INNER CITY CHARTER SCHOOL (2002).

13. Julie F. Mead, *Devilish Details: Exploring Features of Charter School Statutes that Blur the Public/Private Distinction*, 40 HARV. J. ON LEGIS. 349, 362 (2003).

14. Charter schools are also accountable under the federal No Child Left Behind legislation. 20 U.S.C.A. § 6311(b)(2)(K) (West 2006).

Consumers do not themselves pay school fees, and schools cannot require families to pay more than the government allotment. Schools are not free to select students based on ability or other traits, but instead must take students by lottery if they have more applicants than spaces. While a school can go out of business because it loses customers, it can also be shut down by the government for financial irregularities or failure to meet student achievement goals, even if its customers are satisfied. For these reasons, among others, although charter schools are a move towards decentralization, the charter school market is so thoroughly regulated I suggest we consider it a "quasi-market" in education.[15]

Charter schools are a form of "school choice," and for the purposes of this article, unless otherwise specified, when I refer to school choice I mean charter schools. Charters are not, however, the only form of school choice. Publicly funded *private* school choice programs, including school vouchers and tuition tax credits, are also part of the broad move toward privatization in education. Even these forms of choice—charter schools and private school choice—are not the only existing types. The majority of students in choice plans are in programs run directly by the traditional public school system. These include magnet schools, alternative schools, and specialty schools. In addition, some jurisdictions have moved away from neighborhood school assignment and offer "controlled choice," in which parents rank schools in a district by order of preference.[16] In a few cities, choice is allowed across district lines, typically permitting a specified number of students from the city system into higher performing suburban districts.[17] And of course, the most common choice program of all is the choice that parents with sufficient financial means exercise when deciding where to live. However, these other forms of choice do not involve the trends toward privatization or new governance arrangements that are my focus, and I do not address them in detail here.[18]

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15. *Cf.* Howard Glennerster, *Quasi-Markets for Education?*, 101 ECON. J. 1268, 1268–69 (1991) (discussing why Britain's move toward introducing market elements in education falls short of a complete market solution). For arguments that charter schools fail to meet certain market criteria, see ANDREW J. COULSON, MARKET EDUCATION: THE UNKNOWN HISTORY 339 (1999), and JOHN MERRIFIELD, THE SCHOOL CHOICE WARS 12, 35 (2001). More recently, Lisa Snell has argued that although "the charter movement is far from a true education market," it is nonetheless the school choice reform that has "generated the most growth in the crucial for-profit education sector and substantial growth in brand-name nonprofit schools." Snell, *supra* note 1, at 276.

16. *See, e.g.*, Richard Lee Colvin, *Public School Choice: An Overview*, *in* LEAVING NO CHILD BEHIND? OPTIONS FOR KIDS IN FAILING SCHOOLS 25 (Frederick M. Hess & Chester E. Finn, Jr. eds., 2004).

17. *See id.* at 28.

18. For discussions of the various categories of school choice, see generally *id.* at 11; BROWN CTR. ON EDU. POLICY, BROOKINGS INST., SCHOOL CHOICE: DOING IT THE RIGHT WAY MAKES A DIFFERENCE, A REPORT FROM THE NATIONAL WORKING COMMISSION ON CHOICE IN K–12 EDUCATION 14–15 (2003); and James E. Ryan & Michael Heise, *The Political Economy of School Choice,* 111 YALE L. J. 2043, 2063–85 (2002). For a discussion of choice within public school districts, see DEBORAH MEIER, THE POWER OF THEIR IDEAS: LESSONS FOR AMERICA FROM A SMALL SCHOOL IN HAVEN 91–104 (1995).

Finally, the introduction of the notion of school choice has highlighted some ambiguity regarding what it even means to be a "public school."[19] One might argue that a school is public if it is free for all students. If so, charter schools would be public under this definition, but so would private schools—including religious schools—that accept government-funded vouchers for students. Indeed, some "private" schools have opened in response to voucher legislation and exclusively serve students who pay with government funds.[20] Further complicating matters are public universities, which we call public even though they are neither free for the students who attend them nor exclusively supported by public funds.

Perhaps a school should be considered public when it is open to all students and does not engage in selective admission. While these features certainly add to a school's public-ness, focusing on them as necessary conditions raises some questions about the selective schools run by the government, which long have been considered public. To rely on a personal story for a moment: I spent seventh grade at New York City's Hunter College High School, a selective public school. It never occurred to any of us that the test we took to be admitted made our school unpublic. In fact, we (even the wealthiest among us) took great delight in contrasting ourselves to kids from nearby private schools like Dalton and Collegiate (whom we labeled "soft"). Hunter was an entire school of selectively admitted students, but of course the public system sorts and selects students all the time within a single school, limiting some programs (such as gifted and talented, or Advanced Placement) to those with a certain academic profile.

So is Hunter more "public" than a school that is free and open to all students regardless of academic ability, but is run by a nonprofit that has a charter granted by a quasi-governmental agency? If so, perhaps what we mean when we call a school "public" is that it is run by the school district or government. I raise these points to suggest that our current language of schooling does not capture the complexity of education today. For the sake of precision, I will use the term "district schools" or "traditional public schools" when referring to schools that are run by the school district, and "charter schools" when referring to that specific category of schools.

## II. CHARTER SCHOOLS IN THE CONTEXT OF THE LARGER PRIVATIZATION DEBATE

Americans both support and fear government, bureaucracy, and regulation. Accordingly, the proper role of government in society re-

19. For a thoughtful discussion of some of the issues raised here, see Frederick Hess, *Making Sense of the "Public" in Public Education*, PROGRESSIVE POL'Y INST. POL'Y REP., Nov. 2002, at 1.

20. Zelman v. Simmons-Harris, 536 U.S. 639, 656–57 n.4 (2002) (discussing Cleveland private schools created in response to voucher plan).

mains one of our nation's great ongoing debates. Since at least the 1980s, the dominant trend in both government and the academy has been to critique the activist state.[21] "Government is not the solution to the problem; government is the problem," announced Ronald Reagan in his first inaugural address.[22] Intimately connected to this challenge to government's capacity are claims about the superiority of markets for regulating human affairs. The Republican House Majority Leader at the time, Dick Armey, stated the claim in its most extreme form when he proclaimed, "[t]he market is rational and the government is dumb."[23] These political arguments find substantial support in the academy, where public choice theorists and others have critiqued the New Deal administrative state for being inefficient, inequitable, and unwieldy.[24]

The political and academic attacks on the activist state have supported policy shifts toward increased privatization over the past thirty years. The term "privatization"—defined broadly as "the shifting of a function, either in whole or in part, from the public sector to the private sector"—has multiple meanings.[25] It can involve selling government assets, such as when the government sold the bulk of its interest in Conrail, a freight rail service.[26] Privatization also includes government reliance on private entities to establish regulatory standards.[27] Additionally, it can involve user fees, where the government charges individual citizens for services or facilities—such as using a highway—that might otherwise be supported by general tax revenue. Another type of privatization occurs when government contracts with private for- and non-profits to provide services that the government previously provided itself. This is an extremely broad category; it includes outsourcing tasks as diverse as run-

21. As Steve Croley points out, "Not since the 1960s have either Republicans or Democrats run on a platform that defends big government, much less calls for increased reliance on regulatory government as a solution to social problems." STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: ON THE POSSIBILITIES OF GOOD REGULATORY GOVERNMENT (forthcoming 2007) (manuscript at 1, on file with author).

22. President Ronald Reagan, First Inaugural Address (Jan. 20, 1981), *reprinted in* THE INSIDER, Winter 2006, at 25, *available at* http://www.insideronline.org/archives/2006/winter/winter.pdf.

23. DICK ARMEY, THE FREEDOM REVOLUTION: THE NEW REPUBLICAN HOUSE MAJORITY LEADER TELLS WHY BIG GOVERNMENT FAILED, WHY FREEDOM WORKS, AND HOW WE WILL REBUILD AMERICA 316 (1995).

24. For a discussion of public choice and related theories, see HARVEY FEIGENBAUM ET AL., SHRINKING THE STATE: THE POLITICAL UNDERPINNINGS OF PRIVATIZATION 20–26 (1999), and Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 567–71 (2000).

25. Stuart Butler, *Privatization for Public Purposes*, *in* PRIVATIZATION AND ITS ALTERNATIVES 17, 17 (William T. Gormley, Jr. ed., 1991). For a discussion of some of the varied approaches to privatization by one of its most enthusiastic supporters, see E. S. Savas, *Privatization and the New Public Management*, 28 FORDHAM URB. L.J. 1731 (2001). For more dispassionate perspectives, see FEIGENBAUM ET AL., *supra* note 24, at 5–11, and Lester M. Salamon, *The New Governance and The Tools of Public Action: An Introduction*, 28 FORDHAM URB. L.J. 1611 (2001).

26. FEIGENBAUM ET AL., *supra* note 24, at 115. The sale of state assets is more typically a feature of privatization internationally than here, as the U.S. government did not hold as many assets in the modern era as did many governments, and therefore had less to sell.

27. Freeman, *supra* note 24, at 553–54 (discussing negotiated rule making and self-regulation of industries).

ning prisons, providing sanitation or snow removal services, managing welfare reform, and rebuilding war zones.[28]

Closely related to these forms of privatization has been the emergence of a variety of new regulatory and governance regimes, many of which advertise themselves as capturing the potential of market-based reforms and deregulation while retaining what is useful about bureaucracy. Environmental regulation, for example, increasingly relies on market-based mechanisms in place of more prescriptive regulation.[29] Further, under some of these new approaches to governance, collaboration between the government, private firms, and citizens is meant to replace the hierarchy and control of the New Deal era.[30] In addition, government agencies are supposed to run themselves more like private firms.[31]

In describing the trend toward privatization and market-based mechanisms, some caveats deserve special emphasis. First, framing the debate as a stark dichotomy between prescriptive and market-based regulation overlooks the extent to which markets rely on government and vice versa.[32] Second, the attack on the administrative state does not necessarily amount to an attack on the welfare state; one can endorse the purposes of the welfare state without supporting the means typically associated with the administrative state.[33] Of course, the two critiques are often associated, for both "are informed by a skepticism about the ability

28. Jack M. Beerman, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1519 (2001). The final category—using private contractors to do work previously done by the armed forces—has attracted substantial attention during the occupation of Iraq. For a compelling account of the death of four Americans killed in Fallujah while working for private contractor Blackwater Security, see Sean Flynn, *The Day the War Turned*, GQ, Feb. 6, 2006, at 104.

29. *See, e.g.*, Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 814–21 (2005). The most familiar example in the environment sector is the acid rain program in the Clean Air Act, where emissions trading schemes allow firms to trade their pollution allocations with one another. *Id.* at 814.

30. Orly Lobel has catalogued the range of scholarly theories that have given rise to the new governance field, including "'reflexive law,' 'soft law,' 'collaborative governance,' 'democratic experimentalism,' 'responsive regulation,' 'outsourcing regulation,' 'reconstitutive law,' 'post-regulatory law,' 'revitalizing regulation,' 'regulatory pluralism,' 'decentering regulation,' 'meta-regulation,' 'contractarian law,' 'communicative governance,' 'negotiated governance,' 'cooperative implementation,' and 'interactive compliance.'" Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 345–47 (2004).

31. Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1245 (2003); MINOW, *supra* note 5, at 6–49. *See generally* DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR (1992).

32. Freeman & Farber, *supra* note 29, at 819–20. Indeed, the very analytic value of distinguishing between public and private has been challenged since the advent of legal realism. Gary Peller, *Public Imperialism and Private Resistance: Progressive Possibilities of the New Private Law*, 73 DENV. U. L. REV. 1001, 1003–05 (1996); *see also* FEIGENBAUM ET AL., *supra* note 24, at 8–11.

33. Matthew Diller, *Redefining the Public Sector: Accountability and Democracy in the Era of Privatization*, 28 FORDHAM URB. L.J. 1307, 1307–08 (2001). Moreover, some of the most thoughtful advocates for reforming the regulatory state identify themselves as political progressives. For example, Susan Rose-Ackerman argues that her "goal is not to dismantle the state but reform it," and suggests that "[p]rogressive reform of government programs challenges the simplistic economic analysis used by right-wing critics of the regulatory-welfare state." SUSAN ROSE-ACKERMAN, RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE 190 (1992).

of government to solve problems and a suspicion of government decision-makers."[34]

Third, in focusing on the recent trend toward privatization, I must emphasize that these developments are not always as novel as their proponents or detractors sometimes suggest. San Francisco first contracted with private companies to collect its garbage in 1932.[35] Without attracting much notice or controversy, private firms deliver most government-financed job training, mental health, and drug abuse programs in some cities.[36] In an earlier era, it was political liberals who were skeptical of bureaucracy and sought to have services provided by nongovernmental agencies.[37] The leading War on Poverty programs, for example, relied heavily on both partnerships between the federal government, which provided funds, and community-based nonprofits, which planned and delivered services.[38] As a result, nonprofits today run 80% of America's social service agencies, 70% of its vocational rehabilitation facilities, 50% of its hospitals, almost 50% of its colleges and universities, 30% of its daycare centers, and 25% of its nursing homes.[39] This blurring of the lines between public and private also explains how today's body of federal employees is one-third smaller on a per capita basis than it was immediately after the New Deal, even though government has taken on additional functions.[40]

Despite these historical antecedents, the moves toward privatization over the past thirty years have had, at least in part, a different tone. If the partnerships of the War on Poverty era were crafted out of optimism about what government could achieve, school choice arose in an era when many powerful constituencies argued that government should get out of the way.[41] The Reagan administration laid the groundwork for privatization with critiques of the activist state that included the proposal

34. Diller, *supra* note 33, at 1307.

35. FEIGENBAUM ET AL., *supra* note 24, at 123.

36. David R. Riemer, *Government as Administrator vs. Government as Purchaser: Do Rules or Markets Create Greater Accountability in Serving the Poor?*, 28 FORDHAM URB. L.J. 1715, 1726 (2001).

37. Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. REV. 1739, 1748 (2002); James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 GEO. L.J. 1287, 1301–05 (2005).

38. Lester M. Salamon, *The Resilient Sector*, *in* THE STATE OF NONPROFIT AMERICA 5 (Lester M. Salamon ed., 2002); *see also* DONALD F. KETTL, SHARING POWER: PUBLIC GOVERNANCE AND PRIVATE MARKETS 4 (1993) ("[E]very major policy initiative launched by the federal government since World War II—including Medicare and Medicaid, environmental cleanup and restoration, anti-poverty programs and job training, interstate highways and sewage treatment plants—has been managed through public-private partnerships.").

39. Salamon, *supra* note 38, at 9–10.

40. Lobel, *supra* note 30, at 374.

41. JEFFREY R. HENIG, RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR 5 (1994) ("Not only in the United States, but in much of the world, dissatisfaction with the growing apparatus of government has sparked a privatization movement. Its goals are to shrink the public sector by selling government-owned assets and contracting with private firms to provide public services, and to replace large social-welfare 'helping' agencies with simpler voucher-type programs that encourage recipients to help themselves.").

to abolish the Department of Education.[42] By the 1990s, when charter schools were first considered, the Republican Party's critique of nondefense government spending was matched by Democrats, with President Bill Clinton proclaiming that "the era of big government is over."[43] Clinton was influenced by David Osborne and Ted Gaebler, whose book, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector*, emphasized how public officials could learn important lessons from the private sector, including leveraging the market.[44] Shortly after taking office, Clinton appointed Vice President Al Gore to oversee a National Performance Review whose goal was to set the framework for the "shift from top-down bureaucracy to entrepreneurial government."[45] Gore's subsequent report contained a damning critique of government failure, with conclusions such as "Washington's failures are large and obvious," "it is almost as if federal programs were *designed* not to work," and "we have spent too much money for programs that don't work."[46]

Public confidence in most American institutions was declining during the 1990s, and some data suggested that faith in government was falling faster than confidence in the nonprofit and private sectors.[47] The rhetoric for privatization became increasingly heated. For example, Grover Norquist, president of Americans for Tax Reform and an influential conservative leader, told National Public Radio's *Morning Edition* in 2001, "I don't want to abolish government. I simply want to reduce it

42. Bruce Fuller, *The Public Square, Big or Small?, Charter Schools in Political Contest*, *in* INSIDE CHARTER SCHOOLS: THE PARADOX OF RADICAL DECENTRALIZATION 12, 54 (Bruce Fuller ed., 2000). Although the Department of Education proposal did not go far, other Reagan administration initiatives had a more lasting impact. In 1983, the Office of Management and Budget directed federal agencies to open more of their activities to private businesses in the competitive marketplace. Kirsten A. Gronbjerg & Lester M. Salamon, *Devolution, Marketization, and the Changing Shape of Government-Nonprofit Relations*, *in* THE STATE OF NONPROFIT AMERICA, *supra* note 38, at 454. Reagan also established a Commission on Privatization, which suggested increasing private sector involvement in a number of areas, including low-income housing, schools, prisons, and the postal service. DAVID F. LINOWES, PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT, REPORT OF THE PRESIDENT'S COMMISSION ON PRIVATIZATION (1988). For a discussion of the gap between the rhetoric and reality of the Reagan administration's attacks on the regulatory-welfare state, see ROSE-ACKERMAN, *supra* note 33, at 149–83.

43. Clinton used the language of the market to endorse charter schools, arguing that "[c]harter schools are living proof of what parents and teachers can do to reinvigorate public education. They keep their charters only so long as their customers are satisfied they're doing a good job." Fuller, *supra* note 42, at 25.

44. *See generally* OSBORNE & GAEBLER, *supra* note 31. For a discussion of the book's influence on Clinton, see FEIGENBAUM ET AL., *supra* note 24, at 143.

45. BILL CLINTON & AL GORE, PUTTING PEOPLE FIRST: HOW WE CAN ALL CHANGE AMERICA 24 (1992).

46. AL GORE, CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS: REPORT OF THE NATIONAL PERFORMANCE REVIEW 1–2 (1993).

47. *See* Leslie Lenkowsky, *Foundations and Corporate Philanthropy*, *in* THE STATE OF NONPROFIT AMERICA, *supra* note 38, at 372.

to the size where I can drag it into the bathroom and drown it in the bathtub."[48]

What did these trends mean for schools? As with the larger privatization debates, the argument for greater market involvement in schools has historical antecedents. Private contractors have long provided services to schools, including testing materials, textbooks, transportation, and food. School systems routinely contract with private vendors to provide teaching and other core education-related services to particular groups of students, such as special education students or those with behavioral issues.[49] Nor were governance debates entirely new. Educational historian David Tyack points out that "when Americans grow dissatisfied with public schools, they tend to blame the way they are governed."[50]

Yet, the school governance debates ignited by choice proposals were different. Previous efforts to decentralize control had presumed that key decisions would be made by a public entity.[51] Indeed, schools typify the model of direct governmental service—the government alone decides how much schooling to offer, finances it, and delivers it with its own employees. Moreover, bureaucratization in schools has meant that central administrators at all levels of government have tried to control what takes place in the classroom through hierarchy and rule.[52]

But increasing numbers of critics argued that existing public institutions were incapable of making the changes needed to create effective learning environments. One of the principal arguments for choice was that failing government-run schools could not reform themselves. In 1990, political scientists John Chubb and Terry Moe wrote *Politics, Markets and America's Schools*, a hugely influential book arguing that democratic control of schools caused district schools to fail and only markets could provide a solution.[53] "Existing institutions cannot solve the problem" of low-performing students, they wrote, "because they *are* the

48. Mara Liasson, *Conservative Advocate*, *Morning Edition* (National Public Radio broadcast May 25, 2001), *available at* http://www.npr.org/templates/story/story.php?storyId=1123439.

49. GUILBERT C. HENTSCHKE ET AL., TRENDS AND BEST PRACTICES FOR EDUCATION MANAGEMENT ORGANIZATIONS 3 (West ed. 2003).

50. David Tyack, *School Governance in the United States: Historical Puzzles and Anomalies*, *in* DECENTRALIZATION AND SCHOOL IMPROVEMENT 1, 1 (Jane Hannaway & Martin Carnoy eds., 1993). Tyack also points out that changes in governance do not typically influence how students are taught in the classroom, with basic patterns of instruction remaining largely unchanged. *Id.*; *see also* LARRY CUBAN, HOW TEACHERS TAUGHT: CONSTANCY AND CHANGE IN AMERICAN CLASSROOMS, 1890–1980 (1984). Richard Elmore makes a similar point, arguing that debates about centralization concern who has the power to make decisions about what happens in schools, but do not address the actual process of teaching and learning or how to improve it. Richard F. Elmore, *School Decentralization: Who Gains? Who Loses?*, *in* DECENTRALIZATION AND SCHOOL IMPROVEMENT, *supra*, at 33, 40.

51. James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 184 (2003).

52. *Id.*

53. JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS AND AMERICA'S SCHOOLS 65, 141, 180–81 (1990).

problem . . . ."[54] Instead of attempting to change public sector institutions, the new reformers argued that schools needed to be deregulated and to operate more like businesses. Schools were to fight for "market share," and create "brand loyalty" among their "customers."[55]

These market metaphors seemed foreign, even threatening, to educators. Many responded that markets do not serve everybody equally well. They remarked that markets have winners and losers, and that the poor and minorities usually lose. As one privatization opponent argued, for America's poorest children, "it is the market that has destroyed their neighborhoods and the livelihoods of the adults they rely on. Unleashing the market on the public schools will only compound the harm."[56] Another worried that "charter school reform may lead to a form of competition between schools that will allow those with the most valued cultural capital to commodify it in the educational marketplace, leaving those whose cultural capital is less valued with far less market power."[57]

## III. DO CHARTERS CREAM-SKIM ADVANTAGED STUDENTS AND FAMILIES?

### *A. The Fear of Cream-Skimming*

Supporters of traditional public schools have long feared that by providing additional exit options, charter schools allow the most advantaged parents and children to flee the public system.[58] Charter schools "tend to attract parents who live and work in relatively privileged communities," worried Michael Apple.[59] Geoff Whitty argued that charter schools in the United States "are being colonized by the already advan-

54. *Id.* at 3.

55. For examples of school choice advocates using market metaphors, see Paul Hill, *The Educational Consequences of Choice*, 77 PHI DELTA KAPPAN 671 (1996), and Bruno Manno et al., *How Charter Schools are Different*, 79 PHI DELTA KAPPAN 489 (1998). For a discussion of efforts to import business practices into schools, see generally LARRY CUBAN, THE BLACKBOARD AND THE BOTTOM LINE: WHY SCHOOLS CAN'T BE BUSINESSES (2004).

56. Alex Molnar, *Charter Schools: The Smiling Face of Disinvestment*, EDUC. LEADERSHIP, Oct. 1996, at 9, 15.

57. Amy Stuart Wells et al., *Charter Schools as Postmodern Paradox: Rethinking Social Stratification in an Age of Deregulated School Choice*, 69 HARV. EDUC. REV. 172, 181 (1999). A related critique is advanced by Jonathan Kozol, who argues that the market metaphor in education encourages schools to focus exclusively on training children for the workplace. JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA 89–108 (2005).

58. I do not suggest that this is the only criticism levied against charter schools. For example, there is a fierce fight among educational researchers regarding whether charter schools promote increased student achievement for those students who attend them. *Compare* F. HOWARD NELSON ET AL., CHARTER SCHOOL ACHIEVEMENT ON THE 2003 NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS (2003) (students in charters do worse), *with* CAROLINE M. HOXBY, ACHIEVEMENT IN CHARTER SCHOOLS AND REGULAR PUBLIC SCHOOLS IN THE UNITED STATES (2004) (students in charters do better). My interest here, however, is with a different question—the threat posed by charters to the traditional public system.

59. Michael W. Apple, *Are Markets and Standards Democratic?*, 27 EDUC. RESEARCHER 24, 26 (1998) (book review).

taged."[60] Bruce Fuller said that charter schools are a response to parents' yearning for the days when politics happened in town meetings and education in tiny school houses. "A return to the one-room schoolhouse is an attractive ideal, for it keeps our communal customs, moral beliefs, language, and forms of literacy within the four walls of that little schoolhouse just down the street," said Fuller.[61] "But all tribes are *not* created equal: some elders hold more wealth than others; the parents in some tribes hold better jobs and are better educated than those in other tribes."[62]

These fears were most frequently expressed during the earliest years of the debate over charter schools, but they persist today. According to a 2005 task force that interviewed charter and district school representatives in the Bay Area, "Many people on all sides of the issue continue to be locked into what appear to be frozen positions."[63] School district leaders and teachers still believe that "charters are skimming off the best students in public education," and imagine "total destruction of public education as the motivation driving supporters of charter schools."[64] Amy Stambach and Natalie Crow Becker argue that local officials and affluent white parents can work together to create segregated charter schools that "reinforce traditional lines of exclusion and stratification."[65]

If charter schools cream-skim more privileged students, the traditional public system is doubly damaged. First, district schools are left with the most expensive children to educate. Second, the system loses a critical asset—those parents whose race and class status make them best able to advocate for schools.[66] As the authors of a prominent early study

60. GEOFF WHITTY ET AL., DEVOLUTION AND CHOICE IN EDUCATION 98 (1998).

61. Fuller, *supra* note 42, at 28.

62. *Id.*

63. ERIC ROFES, DISTRICT SCHOOLS, CHARTER SCHOOLS: FINDING COMMON GROUND, A REPORT FROM THE ALAMEDA COUNTY OFFICE OF EDUCATION 7 (2005).

64. *Id.* at 6, 7. More recently, some charter school supporters have flipped the original cream-skimming argument on its head, claiming that charter schools actually serve a disproportionately *disadvantaged* student population. *See, e.g.*, William G. Howell & Martin R. West, *Gray Lady Wheezing: The AFT Hoodwinks the Times*, 2005 EDUC. NEXT 74, 76; Jay Mathews, *Are Charter Schools Any Good?*, WASH. POST, Oct. 28, 2004, http://www.washingtonpost.com/wp-dyn/articles/A18571-2004Nov2.html (quoting Martin West's claim that "black students who attend charter schools may well come from poorer families than black students in traditional public schools").

65. Amy Stambach & Natalie Crow Becker, *Finding the Old in the New: On Race and Class in U.S. Charter School Debates*, 9 RACE ETHNICITY & EDUC. 159, 160 (2006).

66. In focusing on the claim that cream-skimming could lead to less political support for traditional public schools, I do not mean to suggest that this is the only reason one might appropriately fear cream-skimming. Many have debated the value that integrated educational environments play in promoting academic achievement and exposing young people to a world beyond their own, and I do not join that discussion here. For arguments emphasizing the benefits of integrated education, see *Grutter v. Bollinger*, 539 U.S. 306, 330–33 (2003); AMY STUART WELLS & ROBERT L. CRAIN, STEPPING OVER THE COLOR LINE: AFRICAN-AMERICAN STUDENTS IN WHITE SUBURBAN SCHOOLS 180–218 (1997); and Ryan & Heise, *supra* note 18, at 2102–08. For suggestions that integration may be overrated, see Justice Thomas's concurring opinion in *Missouri v. Jenkins*, 515 U.S. 70, 114–38 (1995),

on charters put it: if wealthy parents end up with greater access to charter schools, "[t]heir success in this could lead to less political support for public funding of education as a whole."[67] The potential for cream-skimming in a more deregulated educational marketplace comes from both schools and families. Schools subject to market conditions might seek to recruit students whose background characteristics make them the most likely to achieve high test scores at relatively low cost to the school. For their part, privileged parents might be more active buyers, better able to manage the marketplace.[68]

The idea that schools benefit from the presence of wealthy and white families has an impressive pedigree in America. The engineers of the school desegregation effort argued that they fought for *Brown v. Board of Education* in part because they believed that "green follows white."[69] Black children, they believed, need to sit next to white children in schools not because white children have magical properties, but because they have white parents. Given our nation's history of racial discrimination, white parents were more likely to have the political and economic clout necessary to secure well-funded, high-quality schools.

The "green follows white" intuition has survived,[70] even as *Brown*'s prominence has waned.[71] This intuition was the basis for the magnet school movement that sought voluntary desegregation, and has since been advanced through the writings of Jonathan Kozol and Gary Orfield.[72] Still others, like Richard Kahlenberg, have abandoned the notion's racial overtones but kept the core of the idea by arguing for economic integration of schools. Kahlenberg suggests that middle-class parents and children bring assets to which poor children need access.[73]

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and Robin D. Barnes, *Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375, 2381–98 (1997).

67. UCLA STUDY, *supra* note 3.

68. As Bruce Fuller argues, "To shop around for choice schools in Boston or Milwaukee or San Antonio, you have to be out there for a few days to sign up for schools and to get into the lottery." Bruce Fuller, Remarks at Forum Co-sponsored by the Harvard Graduate School of Education and Pioneer Institute: Charter Schools: Raiders or Reformers? (Oct. 23, 1996), *available at* http://www.pioneerinstitute.org/research/dialogues/pidlg17.cfm; *see also* LARRY KUEHN, BRITISH COLUMBIA TEACHERS' FED'N, TEN PROBLEMS WITH CHARTER SCHOOLS (1995), *available at* http://bctf.ca/publications/ResearchReports.aspx?id=5610 ("Charter schools create two-tiered education" in part because "parents with the most resources [take] advantage of the situation for their children.").

69. Jack Balkin, *What* Brown *Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1570–71 (2004).

70. Lia Epperson, *Resisting Retreat: The Struggle for Equity in Educational Opportunity in the Post-*Brown *Era*, 66 U. PITT. L. REV. 131, 145 (2004) (arguing from the perspective of a school desegregation lawyer that the "green follows white" adage remains relevant).

71. Molly S. McUsic, *The Future of* Brown v. Board of Education*: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1334 (2004) ("[T]he influence of *Brown* is thirty years past its peak . . . .").

72. For recent contributions from these prolific authors, see KOZOL, *supra* note 57; GARY ORFIELD & CHUNGMEI LEI, *BROWN* AT 50: KING'S DREAM OR *PLESSY*'S NIGHTMARE? (2004), *available at* http://www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf.

73. RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 47–58, 61–67 (2001).

The idea resonates outside of education as well, serving as the justification for housing policy that seeks to promote race and class integration.[74]

The fear that charter schools would encourage white and middle-class parents to leave district schools is especially worrisome for those who remember the way southern states used choice to evade *Brown*. Some adopted "freedom of choice" plans, which purported to give options to black and white families, but in fact were an attempt to keep black and white students in the same segregated schools they attended before *Brown*.[75] Others gave tuition grants that allowed white students to attend private, segregated academies.[76] Though these plans were eventually struck down, they effectively delayed *Brown*'s implementation by at least a decade.[77]

As for the North, a different kind of freedom of choice led to white flight from central-city school districts. There, many whites moved to the suburbs, a choice which became yet more attractive after the Supreme Court effectively eliminated mandatory interdistrict busing in *Milliken v. Bradley*.[78]

Against this historical backdrop, supporters of a robust, equity-oriented public education system were on high alert for any evidence that charters would cream-skim privileged students. When charter school laws were initially proposed, researchers turned to analogous contexts and made predictions about the likely impact of charters. Findings from two areas suggested that cream-skimming was likely. The first was evidence from school choice experiments overseas. In England, for example, choice programs led schools to market themselves to gifted stu-

74. Perhaps the most well-known housing integration programs of this sort are the *Gautreaux* program and the subsequent federal Moving to Opportunity program, both of which sought to provide inner-city blacks access to housing in suburban neighborhoods. For a discussion of these programs and other attempts to promote residential diversity, see PETER H. SHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE 227–31 (2003). *See also* SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 222–28, 258–60 (2004) (discussing the *Gautreaux* program as a mechanism to increase school integration by increasing housing integration).

75. *See, e.g.*, Green v. County Sch. Bd., 391 U.S. 430, 431–55 (1967).

76. *See, e.g.*, Griffin v. State Bd. of Educ., 296 F. Supp. 1178, 1180–81 (E.D. Va. 1969); *see also* Jerome C. Hafter & Peter M. Hoffman, Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436, 1440 (1973) (discussing tuition grant legislation in southern states). These plans were not racially discriminatory on their face. For example, Virginia's plan made tuition grants available to "[e]very child in [the] Commonwealth . . . who desires to attend a nonsectarian private school." *Griffin*, 296 F. Supp. at 1180. They had the effect of furthering segregation, however, because voucher recipients could use vouchers in all-white private schools that had the freedom to discriminate in admissions. *Id.* at 1181.

77. *See* Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TUL. L. REV. 563, 568 (2001) (arguing that "choice has a history of unlawfully segregating students"); *see also* Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 398 (1997) (discussing history of private school tuition voucher programs, and arguing that it is "a movement propelled by racism and fueled by propaganda").

78. 418 U.S. 717, 745–47 (1974); *see* Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791, 792 (2005) ("With [*Milliken*], enclaves of affluent white families in suburban school districts obtained near immunity from the reach of school desegregation, even when such remedies were logistically feasible and necessary to correct a racial wrong.").

dents.[79] Disadvantaged students, including those with special needs, cost more to educate and schools fear getting a reputation for serving such students well. To do so might scare off the parents of more desirable children.[80]

As a result, English schools have ended up recruiting students with one or more of the following characteristics: South Asian, middle class, highly motivated, and academically advanced.[81] Interestingly, in light of the historical pattern of sex discrimination in education, research from England also suggests that schools seek female students, who tend to score higher and pose fewer behavioral challenges.[82] Finally, in line with the conclusion that schools have sought more advantaged children, evidence from England also indicates that parents with means are better able to take advantage of choice offerings.[83]

Those who feared that charters would cream-skim did not have to rely solely on evidence from choice overseas. Findings from choice in U.S. schools also raised concerns about creaming effects. In the initial debates over whether to enact charter legislation, research from the magnet school experience was frequently cited as suggesting that the most advantaged parents would exercise choice. In the 1970s and 1980s, many public school systems developed magnet schools and other schools of choice, frequently as a way of encouraging voluntary desegregation. The idea was simple: in addition to neighborhood schools, families would be able to choose from among a menu of magnets, which would attempt to draw families by offering specialized courses in fields such as technology, math and science, or the arts. "If you think shopping for sneakers is a kick, try shopping for a high school," advertised a flyer for choice

79. For discussions of choice leading to cream-skimming in England, see Michael W. Apple, *Comparing Neo-liberal Projects and Inequality in Education*, 37 COMP. EDUC. 409, 417 (2001); Will Bartlett, *Quasi-Markets and Educational Reforms*, *in* QUASI-MARKETS AND SOCIAL POLICY 125, 125–53 (Julian Le Grand & Will Barlett eds., 1993); Carol Vincent et al., *Policy and Practice: The Changing Nature of Special Educational Provision in Schools*, 22 BRIT. J. SPECIAL EDUC. 4, 5–6, 9 (1995); Geoffrey Walford, *Diversity and Choice in School Education: An Alternative View*, 22 OXFORD REV. EDUC. 143, 147–50 (1996); Geoff Whitty, *Creating Quasi-Markets in Education: A Review of Recent Research on Parental Choice and School Autonomy in Three Countries*, 22 REV. RES. EDUC. 3, 7–8 (1997).

80. SHARON GEWIRTZ ET AL., MARKETS, CHOICE AND EQUITY IN EDUCATION 141–42 (1995); *see also* RICHARD BOWE ET AL., REFORMING EDUCATION AND CHANGING SCHOOLS 137 (1992) (discussing "longer-term costs involved in giving too high a profile" to special education students, including "market image" and "national testing performance").

81. RICHARD BOWE ET AL., *supra* note 80, at 138–41.

82. *Id.* at 140. Whether the U.S. experience with choice will result in privileging girls in the educational marketplace remains an open question.

83. Stephen J. Ball et al., *Market Forces and Parental Choice: Self-Interest and Competitive Advantage in Education*, *in* EDUCATIONAL REFORM AND ITS CONSEQUENCES 13, 19 (Sally Tomlinson ed., 1994) (noting that middle class parents are "more likely to have the knowledge, skills and contacts to decode and manipulate what are increasingly complex and deregulated systems of choice and recruitment"). The same results hold for New Zealand and Scotland, where wealthier families are more likely to exercise choice, leaving working-class and poor children in increasingly disadvantaged schools. For evidence from New Zealand, see EDWARD B. FISKE & HELEN F. LADD, WHEN SCHOOLS COMPETE: A CAUTIONARY TALE (2000); WHITTY ET AL., *supra* note 60, at 3, 120–21; and Apple, *supra* note 79, at 418. For research on Scotland, see Walford, *supra* note 79, at 148.

within the Boston public school system. "And if you're in the eighth grade, you can do just that: shop around and 'buy' the best high school for you."[84]

Magnet schools are typically allowed to choose from among student applicants. As a result, they often choose students with better academic records or more aggressive parents.[85] In their study of New York, Chicago, Philadelphia, and Boston, Donald Moore and Suzanne Davenport found that "low-income students, black students, Hispanic students, special education students, bilingual students, and students with attendance problems were systematically underrepresented in academically selective schools, but heavily concentrated in low-income and low- to moderate-income nonselective schools."[86] The result for the neighborhood schools was dire; they "often lost those active and well-connected parents who could have worked to improve and aid their children's neighborhood high school."[87] Other reviews of magnet schools reached the same conclusions about cream-skimming.[88] Given the evidence from choice experiments overseas and from magnet schools in the United States, it was reasonable to predict that charters would also cream-skim.

### *B. The Evidence from Charter Schools*

A decade later, however, we no longer have to speculate, based on these other choice experiments, about the likelihood of charters cream-skimming. We now have evidence from charter schools themselves. As I will explore, although many questions remain unanswered, what we have learned to date does not confirm fears of charter cream-skimming. I will discuss what we do (and do not) know in the following areas: race, class, parent and student motivation, parental education levels, and student achievement. These categories are salient for at least two reasons. First, they predict, to various degrees, student educational outcomes. For example, we know that, on average, wealthy students outperform poorer ones, and students with better educated parents do better than those with less educated ones. Second, those who fear cream-skimming have long suggested that these areas are the dimensions in which it was likely to occur.

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84. The publication, *An Exercise in Decision Making: Choosing a High School*, is quoted in HENIG, *supra* note 41, at 13.

85. Donald R. Moore & Suzanne Davenport, *School Choice: The New Improved Sorting Machine*, *in* CHOICE IN EDUCATION: POTENTIAL AND PROBLEMS 187, 199–202 (William Lowe Boyd & Herbert J. Walberg eds., 1990).

86. *Id.* at 192.

87. *Id.* at 204.

88. Valerie Martinez et al., *Public School Choice in San Antonio: Who Chooses and with What Effects?*, *in* WHO CHOOSES? WHO LOSES? CULTURE, INSTITUTIONS AND THE UNEQUAL EFFECTS OF SCHOOL CHOICE 50, 57–60 (Bruce Fuller et al. eds., 1996).

### *1. Race*

Race and education have long been inextricably linked. Southern state constitutions protect the right to a free public education because of the work of Reconstruction Republicans and black southern political conventions.[89] *Brown*, of course, solidified the connection between race and education in the minds of many Americans. Today, the Holy Grail for educational reform is reducing the gap in test scores between black and white students.[90] Results from the 2003 National Assessment of Educational Progress, the most reliable nationwide study of educational achievement levels, reveal that while 74% of white public school fourth graders tested at the "basic" level, only 39% of black students did.[91] The disparities grew at the next level, with 39% of whites testing proficient and 12% of blacks reaching that level.[92] Given these disparities, combined with our nation's history, nothing prompted more concern in the early discussion of charter schools than the thought that they might become havens for white families.

So far the data does not suggest this has happened. Nationally, the proportion of blacks in charters is higher than the proportion in district schools; the opposite is true for whites. Thirty-one percent of charter students nationwide are black, compared to 17% of district school students.[93] Whites make up 45% of the charter school population and 58% of district school students.[94] State-level studies reach similar conclusions. In California, where blacks make up 8% of the students in all public schools, they are 16% of the charter school population.[95] In Texas, blacks are 14% of traditional public school students and 39% of those in charters.[96] Findings from Connecticut, Florida, Illinois, Massachusetts, and North Carolina also indicate that charter schools attract equal or greater proportions of black students.[97]

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89. JAMES ANDERSON, THE EDUCATION OF BLACKS IN THE SOUTH, 1860–1935, at 18–19 (1988); HEATHER A. D. WILLIAMS, SELF-TAUGHT: THE ROLE OF AFRICAN AMERICANS IN EDUCATING THE FREE PEOPLE, 1861–1871, at 67–79 (2005).

90. ABIGAIL THERNSTROM & STEPHEN THERNSTROM, NO EXCUSES: CLOSING THE RACIAL GAP IN LEARNING 11–23 (2003). *See generally* THE BLACK-WHITE TEST SCORE GAP (Christopher Jencks & Meredith Phillips eds., 1998). For a provocative argument that black educational attainment (as measured by high school and college graduation rates) is equal to that of whites after controlling for income, wealth and other parental assets, see DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH AND SOCIAL POLICY IN AMERICA 55–81 (1999).

91. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., AMERICA'S CHARTER SCHOOLS: RESULTS FROM THE NAEP 2003 PILOT STUDY 5 (2004) [hereinafter NAEP PILOT STUDY].

92. *Id.* The test has three levels: basic, proficient, and advanced. *Id.* at 4.

93. *Id.* at 2. All the results reported here from the NAEP study concern fourth graders.

94. *Id.*

95. RON ZIMMER ET AL., CHARTER SCHOOL OPERATIONS AND PERFORMANCE: EVIDENCE FROM CALIFORNIA 27 (2003).

96. TIMOTHY J. GRONBERG & DENNIS W. JANSEN, NAVIGATING NEWLY CHARTERED WATERS: AN ANALYSIS OF TEXAS CHARTER SCHOOL PERFORMANCE 12 (2001), *available at* http://www.texaspolicy.com/pdf/2001-05-17-educ-newly.pdf.

97. For Connecticut, see GARY MIRON & JERRY HORN, EVALUATION OF CONNECTICUT CHARTER SCHOOLS AND THE CHARTER SCHOOL INITIATIVE 44, *available at* http://www.wmich.edu/

But national and state-level data has its limitations, a point which has been largely overlooked by the discussion to date regarding cream-skimming and charter schools.[98] If charter schools are disproportionately located in inner-city neighborhoods with disproportionate concentrations of African Americans, then cream-skimming of white students at suburban or rural charter schools might be hidden from view when looking at statewide aggregate numbers.[99] To begin to disentangle the effects of school location, we need to compare charter schools with the demographics of the school district where they are located. Such numbers are available for some states, and they also fail to support the cream-skimming hypothesis. In California and Massachusetts, for example, charter schools have a higher proportion of black students than do the surrounding school districts.[100] In Michigan, the percentages are "virtually identical."[101]

If the data for black students fails to confirm the fears that they would be left behind as more privileged whites fled to charters, the data for Hispanics is more complicated. Like blacks, Hispanics underperform whites on important educational indicators, so evidence that Hispanics did not have the same ability to access the deregulated educational marketplace would be of concern.[102] At the national level, Hispanics make

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evalctr/charter/ct_cs_eval_final_report.pdf. For Florida, see Tim R. Sass, *Charter Schools and Student Achievement in Florida*, 1 EDUC. FIN. & POL'Y 91 (2006). For Illinois, see CHRISTOPHER NELSON & GARY MIRON, THE EVALUATION OF THE ILLINOIS CHARTER SCHOOL REFORM (2002). For Massachusetts, see PAUL REVILLE ET AL., MASSACHUSETTS CHARTER SCHOOLS & THEIR FEEDER DISTRICTS: A DEMOGRAPHIC ANALYSIS (2004), *available at* http://www.renniecenter.org/research_docs/0411_CharterSchools.pdf. For North Carolina, see ROBERT BIFULCO & HELEN F. LADD, THE IMPACTS OF CHARTER SCHOOLS ON STUDENT ACHIEVEMENT: EVIDENCE FROM NORTH CAROLINA 40 (2004), *available at* http://www.pubpol.duke.edu/people/faculty/ladd/SAN04-01.pdf.

98. Most discussions of cream-skimming in charter schools use national comparisons. *See, e.g.*, Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753, 769–70 (2000).

99. *See infra* note 100 (discussing how Massachusetts charter schools are disproportionately located in cities); *see also* Jeffrey R. Henig & Jason A. MacDonald, *Locational Decisions of Charter Schools: Probing the Market Metaphor*, 83 SOC. SCI. Q. 962, 977 (2002) (discussing how Washington, D.C. charter schools are disproportionately located in neighborhoods with high numbers of minorities and in neighborhoods with high levels of home ownership).

100. ZIMMER ET AL., *supra* note 95, at 28–29 (discussing California findings). Massachusetts charter schools are disproportionately concentrated in urban areas. REVILLE ET AL., *supra* note 97, at 4. At the district level, the greatest disparity exists in Boston, where 67% of charter students are black in a district that is 46% black. *Id.* at 7. Charters in other urban districts also draw disproportionate numbers of African American students. *Id.* For Massachusetts suburban and rural districts, charter schools are slightly less likely to have African American students (charters are 2.5% black in these districts, whereas the overall student population is 3.5% black), but blacks are so scarce in these districts it is hard to assess the import of the 1% difference for the larger cream-skimming question. *Id.*

101. Randall W. Eberts & Kevin M. Hollenbeck, *Impact of Charter School Attendance on Student Achievement in Michigan* 10 (W. E. Upjohn Inst. for Employment Research, Working Paper No. 02-080, 2002), *available at* http://ssrn.com/abstract=316562; *see also* GARY MIRON & CHRISTOPHER NELSON, WHAT'S PUBLIC ABOUT CHARTER SCHOOLS? LESSONS LEARNED ABOUT CHOICE AND ACCOUNTABILITY 75 (2002).

102. Using the same NAEP indicators I previously referenced, 43% of Hispanic public school fourth graders tested at the "basic" level and 14% at the "proficient" level. These numbers are slightly

up a slightly greater percentage of charter school students than of district school students.[103] At the state level, the picture is more mixed: Hispanics are underrepresented in charter schools in California, Illinois, and Massachusetts, equally represented in Florida and Texas, and overrepresented in Connecticut.[104] The district-level data, in the two states where it exists, is consistent with state-level findings from those states.[105]

The discussion of Hispanics adds an important level of complexity to the black-white dichotomy. The cream-skimming argument, particularly in its race-based form, is grounded on the relative political and economic power of whites over blacks. But what are the cream-skimming implications if the district schools lose whites *and* blacks? What if, in other words, traditional public schools lose a portion of the relatively privileged and relatively disadvantaged? That is (at least to date) part of the California story, where both whites and blacks are disproportionately drawn into charters and away from district schools, leaving the traditional public system increasingly Hispanic.[106]

### 2. *Class*

Even if the evidence does not confirm cream-skimming for African Americans and is mixed for Hispanics, that is not the end of the story. Poverty, a significant predictor of political power and educational achievement, also warrants discussion. Indeed, a trend in educational policy research is to emphasize the salience of class, even suggesting that some differences that have long been considered race based are actually largely a derivative of economic status.[107] In education, the typical class measure is the percentage of a school's students who are eligible for federally subsidized (either free or reduced-price) lunches. The available evidence does not show class-based cream-skimming. According to the most recent national study, charter and district schools serve roughly equal numbers of low income students: 44% of traditional public school students and 42% of charter students are eligible for free or reduced-price lunch.[108] This measurement has its drawbacks. Some charter

higher than the numbers for black students, but still considerably lower than those for white students. *See supra* note 91 and accompanying text.

103. NAEP PILOT STUDY, *supra* note 91, at 2; OFFICE OF THE DEPUTY SECRETARY, U.S. DEP'T OF EDUC., POLICY AND PROGRAM STUDIES SERVICES, EVALUATION OF THE PUBLIC CHARTER SCHOOLS PROGRAM: FINAL REPORT 24 (2004).

104. *See, e.g.*, GRONBERG & JANSEN, *supra* note 96, at 12; MIRON & HORN, *supra* note 97, at 44; NELSON & MIRON, *supra* note 97, at 97; REVILLE ET AL., *supra* note 97, at 9; ZIMMER ET AL., *supra* note 95, at 27; Sass, *supra* note 97, at 102.

105. *See* REVILLE ET AL., *supra* note 97, at 9; ZIMMER ET AL., *supra* note 95, at 29–30.

106. *See* ZIMMER ET AL., *supra* note 95, at 27, 29.

107. *See, e.g.*, CONLEY, *supra* note 90, at 55–81.

108. NAEP PILOT STUDY, *supra* note 91, at 2. As with the data on race, the national numbers mask some differences from state to state. For example, charters serve a slightly higher percentage of lunch-eligible students in Texas and Washington, D.C. *See* GRONBERG & JANSEN, *supra* note 96, at 12; Jack Buckley et al., *Are Charter School Students Harder to Educate? Evidence from Washington,*

schools do not participate in the federal program, typically because they perceive the compliance costs to outweigh the financial benefit.[109] Attaining a more precise assessment of the relative class status of charter and district school students will require additional research using methods other than measuring school lunch participation.[110]

### 3. *Parent and Student Motivation, Parental Education, and Student Achievement*

Even if the evidence does not confirm cream-skimming by either race or class, other cream-skimming claims deserve consideration. Central among them is the possibility that charter schools will attract parents who attach greater value to, or are more engaged with, their children's schooling. It is certainly possible to imagine two schools in the same neighborhood, one a charter and the other a district school, with the same racial and economic mix of families, but where the charter school has a disproportionate share of parents who are committed to their children's educational success.[111] Similarly, perhaps the students of the charter school take their own education more seriously. If true, these findings would be significant, as parental and student motivation levels have long been understood to influence student achievement levels.[112]

Unfortunately, the available data on this issue is quite limited and leaves as many questions as answers. The only attempt to measure family and student characteristics is a single study from Washington, D.C. In it, the authors survey students in charter and traditional public schools to

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*D.C.* 13 (Nat'l Ctr. for the Study of Privatization in Educ., Occasional Paper No. 96, 2004), *available at* http://ncspe.org/publications_files/OP96.pdf. The reverse is true in Florida, Illinois, and Massachusetts. *See* NELSON & MIRON, *supra* note 97; REVILLE ET AL., *supra* note 97, at 10; Sass, *supra* note 97, at 102. In Michigan both district and charter schools serve an equal number of lunch-eligible students. MIRON & NELSON, *supra* note 101, at 78; Eberts & Hollenbeck, *supra* note 101, at 10. In California, charter schools serve lower proportions of free and reduced lunch-eligible students. MARGARET E. RAYMOND, THE PERFORMANCE OF CALIFORNIA CHARTER SCHOOLS 11 (2003), *available at* http://credo.stanford.edu/downloads/ca_chart_sch.pdf. Under an expanded definition of "disadvantaged," California charter students are indistinguishable from district students. DAVID ROGOSA, STUDENT PROGRESS IN CALIFORNIA CHARTER SCHOOLS, 1999–2002, at 3–4 (2003), *available at* http://www-stat.stanford.edu/~rag/api/charter9902.pdf. In California, students are identified as "Socioeconomically Disadvantaged" if neither of the student's parents has a high school diploma or if the student qualifies for subsidized lunch. *Id.* at 3. Under this measure charters and noncharters both serve almost identical numbers of disadvantaged students (49% for charters, 48% for traditional public schools). *Id.* at 4.

109. Forty percent of California charter schools, for example, did not report subsidized lunch eligibility. *See* RAYMOND, *supra* note 108, at 11.

110. Some researchers have suggested using parent surveys to compare household incomes of charter and district school families. MIRON & NELSON, *supra* note 101, at 79.

111. As Amy Stuart Wells and her colleagues argue, even in those cases "when charter schools look similar to regular public schools in terms of the racial/ethnic and even socioeconomic makeup of their students, they often may enroll the students from the local community with the most involved parents or the strongest support systems." Amy Stuart Wells et al., *Charter Schools and Racial and Class Segregation: Yet Another Sorting Machine?*, *in* A NOTION AT RISK: PRESERVING PUBLIC EDUCATION AS AN ENGINE FOR SOCIAL MOBILITY 169, 207 (Richard D. Kahlenberg ed., 2000).

112. KAHLENBERG, *supra* note 73, at 51–55, 61–67.

determine whether one group of students was more likely to have higher educational aspirations, get good grades, have friends with good grades, get in trouble at school, or use bad language.[113] The authors find no statistically significant differences between charter and district school students on these measures.[114] They also try to learn from students about their parents' level of engagement with their education. Here, too, they find that students in charter schools are no more likely to report that their parents talk to them about school or know a lot about their school.[115] This last finding appears to run contrary to the fear that charters cream-skim the most active and knowledgeable parents. However, more research is needed in order to test parental engagement levels directly, rather than through student assessment.

Another potential difference between district and charter parents concerns parental education levels, which we know to be a powerful influence on student achievement.[116] Unfortunately, only one state-level study examines this factor. Robert Bifulco and Helen Ladd report that parents of students in North Carolina charter schools are more likely to have college degrees and less likely to be high school dropouts than district school parents.[117] This finding raises intriguing questions given that North Carolina charters have disproportionate numbers of black students. Here, then, the cream-skimming evidence points in conflicting directions, as charters have disproportionate numbers of well-educated parents and black parents. Given that blacks are less likely to be college graduates than are whites, and more likely to be high school dropouts, this combination of findings is counterintuitive. One (but not the only) possibility is that among a relatively disadvantaged population (blacks), the more educationally advantaged seek charter schools. More research is needed to explain what drives the North Carolina results and to see if they are replicated in other states.

The final area of possible cream-skimming to consider is selection based on students' academic ability, as measured by standardized tests. On the one hand, we might expect cream-skimming along this dimension, for this is an area where overseas choice and U.S. magnet programs saw substantial cream-skimming, and many predicted that charters would lead to the same result. On the other hand, there is an equally compelling reason to doubt that prediction. Given that most students start their academic careers in traditional public schools, and those who do well there have fewer reasons to leave, perhaps our hypothesis should be that

113. Buckley et al., *supra* note 108, at 18.

114. *Id.* at 21, 36.

115. *Id.* at 17–18, 21, 35.

116. Dalton Conley finds, for example, that the head of household's level of education is the most powerful single predictor of whether a child in that house will complete high school and college. CONLEY, *supra* note 90, at 69–75. Conley finds that parental education levels matter more than race, income, or wealth (including liquid assets and home value). *Id.*

117. BIFULCO & LADD, *supra* note 97, at 40.

charters would draw disproportionate numbers of struggling students. The evidence on this is limited and somewhat confounded by what are known in educational research as "school effects." In other words, when we compare the achievement levels of students in charters to those in district schools, we cannot easily tell whether differences are attributable to characteristics of the student or of the school.[118] With that caveat, the fact that students in charter schools perform no better than, and sometimes worse than, their district school counterparts,[119] provides some evidence that charters do not cream-skim academically.[120]

### *4. Conclusions, and Cautions, Regarding Cream-Skimming*

To sum up, I would suggest that the evidence to date—while not unequivocal—does not confirm the cream-skimming hypothesis. For race, blacks are disproportionately in charters,[121] whites are disproportionately in traditional public schools,[122] and Hispanics are fairly evenly distributed between the two.[123] These findings should matter to those who believe that white flight to charters combined with the "green follows white" principle[124] will diminish support for district schools. Looking at class measures, poor students are distributed fairly equally between the two types of schools. Turning to other measures of privilege, the evidence, while limited, does not point strongly in either direction. Nationally it appears that the students who attend charters and district public schools are of roughly equal academic ability;[125] more educated parents choose charters in North Carolina;[126] and charter parents are no more or less engaged in their children's education in Washington, D.C.[127]

However, it would be a mistake to suggest, as some charter school proponents have recently done, that charter schools in fact serve a more "at-risk" population of students.[128] First of all, other than attracting a greater proportion of black students, there is no dimension where charter schools consistently draw less privileged students. Moreover, charter

118. Standardized tests typically used to measure achievement levels are generally administered in the spring. Accordingly, even comparing a group of students who are in their first year at a charter with a district school cohort necessarily implicates school effects, at least to a degree, because students have been in the school for at least half of one year.

119. NAEP PILOT STUDY, *supra* note 91; NELSON ET AL., *supra* note 58.

120. For arguments to this effect, see LEWIS C. SOLOMON & PETE GOLDSCHMIDT, COMPARISON OF TRADITIONAL PUBLIC SCHOOLS AND CHARTER SCHOOLS ON RETENTION: SCHOOL SWITCHING, AND ACHIEVEMENT GROWTH 13–14, 21 (2004), and ZIMMER ET AL., *supra* note 95, at 25–26.

121. BIFULCO & LADD, *supra* note 97, at 10.

122. *See* NAEP PILOT STUDY, *supra* note 91, at 2.

123. *Id.*

124. *See supra* notes 70–71 and accompanying text.

125. *See* NAEP PILOT STUDY, *supra* 91, at 4–8.

126. *See supra* note 118 and accompanying text.

127. *See supra* notes 114–16 and accompanying text.

128. *See, e.g.*, Howell & West, *supra* note 64, at 76 ("As schools of choice, charters are likely to attract students who are not doing well in their traditional public schools. Moreover, many charter schools explicitly target at-risk students.").

school advocates eager to rebut claims of cream-skimming (and eager to explain uninspiring academic achievement results)[129] overlook the fact that the demographic makeup of the schools could change. State and federal studies of charter student demographics have found varying enrollment patterns over time, which is not surprising given that the market is new and growing rapidly.[130]

Indeed, it is worth watching whether the federal No Child Left Behind (NCLB) legislation[131] increases cream-skimming by charters, especially at the high school level. Under NCLB, high schools—including charters—are judged by the percentage of their tenth graders who pass state tests.[132] Each year, an increasing percentage of tenth graders must meet state proficiency levels for the school to satisfy federal requirements.[133] Under federal law, schools are not judged based on how much each student's test scores improve while the student is at that school.[134] Instead, a school is thought to have improved if this year's tenth grade class performs better than last year's.[135] This regime gives a school two choices. It can teach better—and for high schools this means teaching better in the ninth grade and the first half of tenth grade, since the tests upon which the entire school is judged are administered mid-way through the sophomore year. Alternatively, the school can try to recruit students who enter the ninth grade with higher test scores, because they are more likely to test well eighteen months later. Because schools are just beginning to face significant sanctions for repeatedly failing to meet federal standards, it is too early to tell whether charter schools will respond with increased cream-skimming. However, the law creates incentives for them to do so.[136]

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129. *See supra* note 58.

130. Nationally, for example, between 1999 and 2002 the proportion of charter students who were black, as well as the proportion eligible for subsidized lunch increased, while the proportion of charter students who were white declined. *See* OFFICE OF THE DEPUTY SECRETARY, *supra* note 103, at 24–25. In Connecticut, charter schools have over time attracted increasing numbers of black parents and parents with lower income and formal education levels. *See* MIRON & HORN, *supra* note 97, at 44–45. In Michigan, the first studies of charter schools found that charters did not serve the same percentages of minority and poor children as did district schools, but more recent data indicates that now they do. For a discussion of these trends, see Eberts & Hollenbeck, *supra* note 101, at 10.

131. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

132. *Id.* § 1111(b)(3)(C), 115 Stat. at 1449–52 (codified at 20 U.S.C. § 6311(b)(3)(C)).

133. *Id.*

134. *Id.*

135. In response to extensive criticism of this portion of the law, the Bush administration recently said it would grant ten states permission to experiment with "growth models." These models allow schools to be judged on the academic growth of their students, even if their scores do not meet state standards. Nick Anderson, *Bush Administration Grants Leeway on 'No Child' Rules*, WASH. POST, Nov. 22, 2005, at A1. Twenty states recently submitted requests to be among the ten allowed to use growth models. Diana Jean Schemo, *20 States Ask for Flexibility in School Law*, N.Y. TIMES, Feb. 22, 2006, at A12.

136. *Cf.* Glennerster, *supra* note 15, at 1271 (arguing that judging English schools principally by test scores gives incentive to avoid students who will depress scores).

Moreover, though the current evidence does not support the claim that, in the aggregate, charters cream-skim, the data has limits. For example, individual schools can engage in marketing and other practices that might favor certain groups of parents.[137] Some charters have (unenforceable) admissions contracts requiring parents to volunteer time in the school and participate in other school activities, which might deter parents who are less able or inclined to support the work of the school.[138] Nor is it unheard of for students to be deterred from applying at some charter schools on the grounds that another school might serve them better. Over my years of involvement with a Washington, D.C., charter school, I have learned of more than a few students with special needs or attendance problems who have arrived at our doors at the encouragement of another charter school to which they had considered applying.[139] Cream-skimming can also result once a school acquires a certain reputation in the community.[140] For example, some believe that the well-regarded Knowledge is Power Program (KIPP) middle schools have become known in some communities as places for highly motivated kids and families.[141] Accordingly, some teachers in referring elementary schools tend to encourage only those students and families to apply.[142]

### *C. Markets, Regulation, and Equality in Schooling*

Earlier I pointed out how the charter school debate raised questions about the relationship between privatization and equality, with some charter skeptics arguing that expanding the role of markets in education

137. ZIMMER ET AL., *supra* note 95, at 21 ("Schools . . . can indirectly influence the type of students who apply by focusing their missions or curricula on specific types of students such as gifted and talented or at-risk students.").

138. Wells et al., *supra* note 111, at 205–06. More research is needed to determine whether this practice has this effect. Wells speculates that it might. On the other hand, one charter school leader told me that parents at his school interpret the contracts as a welcome, if surprising, statement that they are wanted in the school, a government institution from which they had long felt excluded. This advocate suggests that parents at traditional public schools would also welcome the contracts, and that their unenforceable nature minimizes the likelihood that they would serve as exclusionary devices.

139. This is an area warranting further study. Some research has been done regarding schools as choosers in the U.S. educational marketplace. *See* MARTIN CARNOY ET AL., THE CHARTER SCHOOL DUST-UP: EXAMINING THE EVIDENCE ON ENROLLMENT AND ACHIEVEMENT 31 (2005); Carol Ascher & Nathalis Wamba, *An Examination of Charter School Equity*, *in* SCHOOL CHOICE AND DIVERSITY: WHAT THE EVIDENCE SAYS 77, 81–82 (Janelle T. Scott ed., 2005). But insufficient attention has been paid to the subtle ways in which schools of choice may steer students away. Kevin G. Welner & Kenneth R. Howe, *Steering Toward Separation: The Policy and Legal Implications of 'Counseling' Special Education Students Away from Charter Schools*, *in* SCHOOL CHOICE AND DIVERSITY, *supra*, at 93, 99–107 (reporting the absence of a systematic large-scale study of whether charter schools steer special education students away, but noting anecdotal evidence to that effect).

140. Stambach and Becker report on the founding of one charter school that served disproportionate numbers of wealthy white students. Stambach & Becker, *supra* note 65, at 164. The reason, they assert, was that "informational meeting[s] had been held in private, upscale homes from which low-income families had been excluded." *Id.* at 169.

141. CARNOY ET AL., *supra* note 139, at 51–65.

142. *Id.* at 55–59.

would necessarily harm less advantaged children and families.[143] In concluding this discussion of cream-skimming, it is worth returning to that issue. What lessons can we draw from the absence of cream-skimming in charter schools compared to its prevalence in overseas choice and U.S. magnet programs? I would suggest two. First, the differences reinforce an important yet often overlooked principle: in constructing a choice program, the specific design is highly significant.[144] Second, despite the powerful rhetoric deployed in the debate over government versus markets, neither side has a monopoly on promoting equality. To the contrary, it appears that in certain circumstances deregulation can increase access for the less advantaged, while government limitations on the free market are sometimes necessary to promote equity.

Consider first the question of selectivity in admissions. Magnet and specialty schools are typically allowed to select all or a portion of their students from among those who apply. The same is true of choice schools overseas. Charter schools, by contrast, are prohibited from choosing students and must use a lottery if oversubscribed. Even if some charters occasionally fail to comply, as I suggested might be the case,[145] they undoubtedly employ less student selection than a regime that expressly permits it. The prohibition against selective admissions likely explains part of why charters do not cream-skim. If I am correct, then regulating the market by restricting schools' ability to selectively admit students promotes equity.

By contrast, another distinction between legal regimes suggests how deregulation can promote equity. Magnet schools offer options to families, but the law leaves in place barriers to entry for new providers. Indeed, under magnet and other similar choice programs in the United States, new providers are excluded, as choice is limited to the state school system. Importantly, before the advent of charters, when the government had a monopoly on publicly funded choice, it frequently opted for programs that expressly discriminated in admissions based on student ability. Thus, there is some irony in opponents of market-based deregulation premising their argument on evidence of cream-skimming in government-run magnet schools.[146]

Charter school laws, by contrast, make it relatively easy for new providers to enter the market. If allowing new market entrants has produced choice without the cream-skimming associated with the earlier public choice programs, it is worth exploring why that is so. Though ad-

143. *See supra* notes 56–57 and accompanying text.

144. JOHN E. COONS & STEPHEN D. SUGARMAN, SCHOLARSHIPS FOR CHILDREN vii (1992).

145. *See* discussion *supra* Part III.B.

146. This brings to mind Gary Peller's argument that while the left has long been concerned that a move toward markets would undermine equity in public schools, "the 'public' character of schools that is defended against the evils of privatization is more or less a total fantasy." Peller, *supra* note 32, at 1005. For Peller, "American public schools by and large represent the paradigm of alienating, unresponsive, often corrupt, inefficient, and culturally repressive social institutions." *Id.*

ditional research is needed to confirm this conclusion, I suspect it has something to do with the supply side—in particular, the mission-driven education providers. These market entrants include neighborhood groups and community-based nonprofits, many of whom see charter schools as a vehicle for advancing a community service or antipoverty mission.[147] While we might typically think that "[a]ny school entrepreneur acting rationally would seek to exclude pupils who would drag down the overall performance score of the school,"[148] the values of mission-driven charter schools may cause them to act differently. As a result, these mission-driven schools are more likely than other charters to recruit low-income students, special education students, or English-language learners.[149] Evidence from one jurisdiction suggests that mission-driven schools bear significant responsibility for the absence of cream-skimming among charters as a whole.[150] Here, then, is one final lesson for market-based reformers: while most of the discussion in the consumer choice literature focuses on the buyer (in this case parents and families), the supply side (school providers) matters just as much.

## IV. DO CHARTERS UNDERMINE SUPPORT FOR FUNDING DISTRICT SCHOOLS?

If the evidence does not confirm cream-skimming, what threat do charters pose to traditional public schools? Remember that cream-skimming is feared in part because of its secondary effects—that losing relatively privileged students and parents will cause district schools, over time, to lose legitimacy, support, and funding.[151] In this Part, I will look at the broader question of the impact of charter schools on district schools and ask whether, even in the absence of cream-skimming, charters nonetheless pose a threat. I will first outline the way in which advocates of traditional public schools saw charters as a threat to funding, and discuss how some of the rhetorical claims of charter advocates fed these fears. I will then examine how charter schools have increasingly turned to private philanthropy to supplement their public funding. This largely unanticipated phenomenon, I will argue, renders charter schools a financially vulnerable reform. Although reliance on private fundraising calls into question the stability of charters, it also highlights an emerging development in their relationship with traditional public schools. I will conclude by exploring this development. My suggestion is that the economic incentives of charter operators, combined with structural features of education funding, actually create the possibility that charters will be-

147. Natalie Lacireno-Paquet et al., *Creaming versus Cropping: Charter School Enrollment Practices in Response to Market Incentives*, 24 EDUC. EVALUATION & POL'Y ANALYSIS 145, 149–51 (2002).

148. Glennerster, *supra* note 15, at 1271.

149. Lacireno-Paquet et al., *supra* note 147, at 145, 153–55.

150. *Id.*

151. *See supra* notes 58–78 and accompanying text.

come an ally for increased public funding for *all* schools, including district schools.

### *A. The Fear of Losing Funding*

Critics of school choice argue that the long-term impact of charter schools will be to undermine support for funding district schools.[152] At first blush, the claim might seem to depend entirely on charters having a cream-skimming impact; in other words, if the more privileged parents and their political capital leave the district schools for charters, then district schools will have less support. In this formulation, the argument would be considerably weakened, and perhaps repudiated in full, by the absence of cream-skimming effects discussed in Part II. But there is another way to state the funding argument that is independent of cream-skimming. To the extent that charter schools are predicated on the notion that they can achieve better results with the same or less money than district schools receive, charters necessarily threaten those who defend district schools' performance. In so doing, they can undermine political support for district schools, which over time might result in less funding. Furthermore, many advocates for traditional public schools have seen the move toward market-based reforms as a direct challenge to their claim that poor children need additional resources devoted to their education. Richard Leone, President of the Twentieth Century Fund, explains:

> While there is undeniable evidence that highly targeted and very large additions to current educational expenditures would enhance the education of poor children, the political realities of the 1990's make such a remedy a nonstarter. Innovations involving organizational and management changes seem especially attractive since, by contrast, they usually are described as involving lower, or even no,

152. The fear that privatization will lead to reduced support for the public sector has been made in a variety of contexts, including homeowners' associations, private policing, and welfare reform. For example, Sheryll Cashin questions the growth of homeowners' associations, in which residents privately provide their own road repairs, recreation centers, sanitation, and snow removal. Sheryll Cashin, *Privatized Communities and the "Secession of the Successful": Democracy and Fairness Beyond the Gate*, 28 FORDHAM URB. L.J. 1675, 1676–77 (2001). Cashin suggests that "these private contractual arrangements for the provision of formerly 'public' services have put the nation on a course toward civic secession." *Id.* at 1677. As homeowners increasingly feel an obligation only to those in their private community, says Cashin, they will feel less empathy for those outside the gates. *Id.* at 1684–85, 1690. Homeowners will start to question whether they should support services for others, which ultimately will lead to "a reduced tax base for addressing the problems of the poor." *Id.* at 1690. Similarly, David Sklansky suggests that private policing can end up displacing public law enforcement. As Sklansky asks, "Why should Bel Air residents vote for higher taxes to pay for policing throughout Los Angeles, when they can—and do—hire private patrols for their own neighborhood?" David Alan Sklansky, *Private Police and Democracy*, 43 AM. CRIM. L. REV. 89, 97 (2006); *see also* David Alan Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1223–24 (1999). Finally, in the context of welfare reform, Matthew Diller argues that the privatization movement was built on claims that competition from the private sector would save money. Diller, *supra* note 37, at 1751–52. Diller argues that privatization has allowed public officials to cut rolls in a manner that spared them "from the political consequences of appearing harsh and uncaring for the poor." *Id.* at 1757.

> increases in spending. Thus, advocates of such ideas as vouchers, choice, privatization, charter schools, and a variety of other current proposals for changes in public education have found an interested audience all across the political spectrum.[153]

Similarly, some school finance advocates also see charters as a threat to their movement. Over the last thirty years, litigation challenging state and local school financing has been an important mechanism for those who seek to increase funding for low-income schools.[154] Money figures greatly in these lawsuits, because plaintiffs frequently rely on the fact that the allegedly inadequate school districts are funded at a lower level than some of the adequate ones. Of the state courts that have reached the issue, most have ruled that there is reliable evidence that spending is correlated with educational opportunity.[155] However, charters and other market reforms could jeopardize this progress. As two school finance experts argue, if alternatives outside the traditional public system are premised on the notion that schools do not need more funding to succeed, they "may subvert the goals of the school funding reformers" by reducing "taxpayer incentive to improve public school funding."[156]

The fears of district school supporters are reinforced by some of the rhetoric of school choice proponents. In the battle for public opinion, arguments against spending more on schools are often expressly linked to demands for choice. For example, during the 2004 presidential campaign, Jay Greene and Marcus Winters criticized John Kerry for clinging "to the habitually fruitless path of spending more money," rather than endorsing the promising reforms of high-stakes testing and school choice.[157] As the state has begun to lose its monopoly over public education, these critics cite the market-oriented reforms as proof of their claim that district schools do not need more money. This is most pronounced in the context of private choice initiatives such as vouchers or tuition tax credits. As researchers from the Heritage Foundation argue, because

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153. Richard Leone, *Foreword* to HARD LESSONS: PUBLIC SCHOOLS AND PRIVATIZATION, at v (Carol Ascher, Norm Fruchter, & Robert Berne eds., 1996).

154. Dozens of books and hundreds of law review articles have been devoted to the topic of school finance litigation. For thoughtful discussions of the current state of school finance litigation, see John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning the War?*, 57 VAND. L. REV. 2351 (2004), and James E. Ryan & Thomas Saunders, *Foreword to Symposium on School Finance Litigation: Emerging Trends or New Dead Ends?*, 22 YALE L. & POL'Y REV. 463 (2004). For a highly readable history of the litigation effort, see PETER SCHRAG, FINAL TEST (2003).

155. For a survey of the state court decisions addressing this issue, see Dayton & Dupree, *supra* note 154, at 2378–79 n.158.

156. *Id.* at 2411.

157. Jay P. Greene & Marcus A. Winters, *It's Elementary: Kerry Skips K–12*, NAT'L REV. ONLINE, May 12, 2004, http://nationalreview.com/comment/greene_winters200405120907.asp; *see also* CHUBB & MOE, *supra* note 53, at 218 (arguing for private school choice, rather than money); Kirk A. Johnson & Krista Kafer, *Why More Money Will Not Solve America's Education Crisis*, HERITAGE FOUND., June 11, 2001, http://www.heritage.org/Research/Education/BG1448.cfm (same); David Salisbury, Op-Ed., *Real Education Reform*, N.Y. SUN, Feb. 17, 2005, at 8 (same).

private schools cost less than district ones, private school choice "may yield billions in savings to states and schools districts."[158]

However, the claim is not limited to the private choice movement. Some charter school advocates have argued that they could achieve better results without more money. According to the founder of a Boston charter, for example, his school's success was a result of "[n]ot money, but effort."[159] Another charter advocate took an even more aggressive rhetorical position, arguing that charter schools "can produce quality schooling at a fraction of the cost of traditional public schools."[160] Edison Schools, the nation's largest for-profit education company, made a modified version of this argument, asserting that with the same amount of money district schools received it could achieve better results—and still have some money left over for profit.[161] The willingness of some charter supporters to embrace claims for reduced spending caused prominent researcher and district school advocate Amy Wells to conclude, with regret, that "free-market reformers won the battle for the soul of a movement that promised to be so much more than merely a deregulatory reform."[162]

### *B. Charter Funding and Private Philanthropy*

In this Section, I will outline the role of private philanthropy in supporting charter schools and argue that dependence on private fundraising renders charters financially vulnerable. This argument sets the stage for Part IV.C, where I will argue that charter advocates are moving away from the claim that charters save money and increasingly focusing on securing additional public funding.

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158. Johnson & Kafer, *supra* note 157; *see also* Leslie Andrews, *Magic Bullet: Here's a Long-Term Way to Fix State and Local Budget Deficits*, AM. ENTERPRISE, Oct.–Nov. 2003, at 42, 42 ("[S]chool choice is more than just an educational innovation. It also has the potential to make education spending more efficient, and thus to help reduce state and local budget pressures. Competition lowers the number of dollars needed to achieve good academic results."); Clint W. Green, *Private Schools Work: Less Can Mean More*, ACTON INST., Aug. 14, 2002, http://www.acton.org/ppolicy/comment.article.php?id=100 (arguing that "[c]ompetition, accountability, mission, and the overwhelming presence of religion in [private and parochial] schools demonstrate that schools can indeed succeed while spending substantially less than public schools").

159. Brett Peiser, *Charter Schools: Affordable Reform*, BOSTON HERALD, Mar. 13, 2000, at 23 ("We could always pay teachers higher salaries, give students a second set of textbooks or take them on more extensive field trips. But what we are finding through charter schools is that reform is often inexpensive.").

160. Thomas W. Carroll, *No More Spending*, CRISIS, Feb. 1998, at 14, *available at* http://www.catholiceducation.org/articles/education/ed0071.html; *see also* David Salisbury, *School Choice Can Help States Meet Budget Challenges*, CATO INST., Feb. 4, 2003, http://www.cato.org/research/articles/salisbury-030204.html ("States could also save money by expanding dramatically the number of charter schools.").

161. BRIAN P. GILL ET AL., INSPIRATION, PERSPIRATION AND TIME: OPERATIONS AND ACHIEVEMENT IN EDISON SCHOOLS 9 (2005).

162. Amy Stuart Wells, *Why Public Policy Fails to Live Up to the Potential of Charter School Reform: An Introduction*, *in* WHERE CHARTER SCHOOL POLICY FAILS: THE PROBLEMS OF ACCOUNTABILITY AND EQUITY 1, 17 (Amy Stuart Wells ed., Teachers College Press 2002).

Charters in fact typically receive fewer public dollars than traditional public schools—on average, nationwide, $1800 less per pupil.[163] Some charter schools simply get by with less, but others, including some of the nation's most well regarded, turn to private sources for money. For example, perhaps the best known charter schools in the country are the Knowledge is Power Program (KIPP) schools. Starting with a single site in Houston, the KIPP network has expanded to serve low-income students in cities across the country.[164] The Department of Education has identified KIPP schools as among the nation's most successful;[165] USA Today calls them "probably the most successful charter schools in the U.S.;"[166] and President Bush cited the original school as "the best middle school in the city of Houston."[167] Among KIPP's programmatic innovations is a longer school day and year. KIPP students are in school from 7:25 a.m. to 5:00 p.m. daily, every other Saturday, and for all but six weeks over the summer.[168] Taken together, KIPP students spend 67% more time in school than typical district school students, according to co-founder Michael Feinberg.[169]

KIPP's academic success has been accompanied by, and depends upon, extraordinary fundraising. Innovations such as the longer school day and year require KIPP to pay its teachers 15% to 20% more to compensate for the longer hours. KIPP's Dallas school, for example, annually spends $2000 per pupil more than district schools.[170] At the national level, one of the KIPP founders predicted that expanding their network of schools would require KIPP to raise over $200 million in philanthropic dollars in the cities and states where they would open.[171] KIPP's success has drawn a wide range of well-placed supporters, including the Bush family and Gap founders Doris and Donald Fisher, who made a $25 million gift.[172]

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163. Chester E. Finn, Jr. & Eric Osberg, *Foreword* to THOMAS B. FORDHAM INST., CHARTER SCHOOL FUNDING: INEQUITY'S NEXT FRONTIER, at viii (2005).

164. OFFICE OF INNOVATION & IMPROVEMENT, U.S. DEP'T OF EDUC., SUCCESSFUL CHARTER SCHOOLS 35 (2004).

165. *See* Rod Paige, *Foreword* to OFFICE OF INNOVATION & IMPROVEMENT, *supra* note 164, at v.

166. Editorial, *Charters: Success or Failure?*, USA TODAY, Jan. 4, 2005, at 14A.

167. President George W. Bush, Remarks on Education Reform and Parental Options (July 1, 2003), http://www.dcpswatch.com/vouchers/030701.htm ("I want to congratulate . . . the KIPP Academy entrepreneurs who are challenging mediocrity on a daily basis and raising standards for those who in some communities have been condemned to failure.").

168. OFFICE OF INNOVATION & IMPROVEMENT, *supra* note 164, at 35–36.

169. *The Success of Charter Schools: Hearing Before the H. Comm. on Educ. and the Workforce*, 106th Cong. (2000) [hereinafter *Success of Charter Schools*] (statement of Michael Feinberg, CEO and Co-founder, KIPP Foundation).

170. Kent Fischer, *KIPP Set to Open Doors to New School of Thought*, DALLAS MORNING NEWS, May 19, 2003, at A1.

171. *Success of Charter Schools*, *supra* note 169.

172. Ira Carnahan, *No Shortcuts*, FORBES, Nov. 10, 2003, at 122. To pay for these costs at the flagship Houston KIPP school, First Lady Laura Bush presided over a fundraising dinner that featured honorary chairs President Bush and Barbara Bush and brought in over $750,000 for the school. Shelby Hodge, *First Lady Attends KIPP Benefit*, HOUS. CHRON., Jan. 12, 2002, at 9.

KIPP's fundraising efforts have been especially successful, and others have followed their approach. Another frequently cited national model is Roxbury Preparatory Charter School in Boston, a middle school which has achieved impressive results on the Massachusetts statewide assessment and was cited as exemplary by the U.S. Department of Education.[173] Like KIPP, Roxbury Prep has an extended day for students, summer school, and an after-school homework center.[174] Roxbury Prep receives $9500 per student annually in public funding, but raises $3500 per pupil more from private fundraising efforts.[175] Similarly, the SEED Public Charter School, which advertises itself as the nation's first college preparatory urban boarding school, has attracted substantial acclaim and private money.[176] Located in Washington, D.C., it combines day classes with after-school activities and dormitory living during the week.[177] President Bush recently praised SEED for the 100% college acceptance rate of its most recent graduating class.[178] According to the *Washington Post*, the "idea of creating a highly structured urban boarding school for low-income children, who live on campus from Sunday night to Friday night, has attracted a powerful board of directors, $25 million in donations and support from the likes of Oprah Winfrey and Bill Gates."[179]

For some privatization advocates, the prominence of private philanthropy has its benefits.[180] The traditional market discipline argument for charter schools was that they would have to deliver a high quality product to compete for students. In one sense, the battle for philanthropic dollars is simply an extension of that rationale, as schools compete to prove their worth to private donors. Moreover, perhaps private donors are better able to identify quality schools than the public sector. In addition, for those who seek to shrink government's role, even partially shifting the responsibility for education funding from the public to the private sector is a step in the right direction.

On the other hand, charter schools' reliance on private philanthropy is possibly the Achilles heel of this quasi-market reform. Many current

173. OFFICE OF INNOVATION & IMPROVEMENT, *supra* note 164, at 47–50.

174. John B. King, Jr., *Fulfilling the Hope of* Brown v. Board of Education *Through Charter Schools*, *in* THE EMANCIPATORY PROMISE OF CHARTER SCHOOLS: TOWARD A PROGRESSIVE POLITICS OF SCHOOL CHOICE 55, 71 (Eric Rofes & Lisa M. Stulberg eds., 2004).

175. OFFICE OF INNOVATION & IMPROVEMENT, *supra* note 164, at 50; *see also* King, *supra* note 174, at 71 (estimating that Roxbury Prep raises $2500 per student above the public allotment).

176. The SEED Foundation, About the SEED Foundation, http://www.seedfoundation.com/about/history.asp (last visited Feb. 19, 2007).

177. The SEED Foundation, What Is a SEED School?, http://www.seedfoundation.com/WhatIs/index.asp (last visited Feb. 19, 2007).

178. Press Release, President and Mrs. Bush Discuss Helping America's Youth Initiative (Apr. 1, 2005), http://www.whitehouse.gov/news/releases/2005/04/20050401-1.html.

179. Spencer S. Hsu, *Land Transfer Bill Includes Provision Requiring School*, WASH. POST, July 20, 2005, at B8.

180. *See* Savas, *supra* note 25, at 1736 (noting that those who favor privatization understand that "voluntary action is needed to address social ills, as President George W. Bush stated in his inaugural address").

charter operators are gambling on their ability to convince private funders to focus indefinitely on their problem (K–12 education) and solution (charter schools) above others. Education—particularly K–12 schooling for lower-class and minority students—now has the attention of lawmakers, philanthropists, and the American public. As a result, an increasing amount of philanthropic giving is directed there. For example, in 1998 foundations gave $620 million to elementary and secondary schools, and $1.07 billion to higher education.[181] By 2003, giving to higher education had remained flat at $1.12 billion, but giving to K–12 education had doubled to $1.23 billion.[182]

However, no single social issue remains dominant.[183] The environmental movement discovered this in the late 1980s and 1990s, when, after two decades of remarkable growth and sustained individual and foundation giving, interest and money started to move to other causes.[184] In addition, individual foundations change their focus, sometimes moving away completely from sectors that previously had been priorities. This shift may happen after thoughtful and strategic analysis, or simply because a new director has his own pet project.[185] For the de-funded sector and its constituents, the results are the same. This should be a particular concern to the charter school movement, as a majority of giving to school choice related causes comes from just two foundations—the Bill and Melinda Gates Foundation and the Walton Family Foundation. Together, Gates and Walton gave six out of every ten foundation dollars that went to school choice in 2002.[186]

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181. *See, e.g.*, ROBERT W. BAIRD & CO., INSIGHTS ON THE EDUCATION MARKET 2 (2005).

182. Tamar Lewin, *Young Students Become the New Cause for Big Donors*, N.Y. TIMES, Aug. 21, 2005, § 1, at 21; *see also* Lenkowsky, *supra* note 47, at 366 (noting that during the 1990s "[i]mportant shifts have occurred within some categories, such as education, where foundations now devote a larger share of their gifts to precollegiate schooling than they used to").

183. *See* Anthony Downs, *Up and Down with Ecology—the "Issue-Attention Cycle,"* 28 PUB. INT. 38, 38 (1972) (arguing that domestic problems are governed by an "issue-attention cycle," in which "American public attention rarely remains focused upon one domestic issue for very long," no matter its importance).

184. MARK DOWIE, LOSING GROUND: AMERICAN ENVIRONMENTALISM AT THE CLOSE OF THE TWENTIETH CENTURY 3–4, 46, 49–53, 175–76 (1995). Other sectors have seen philanthropic interest rise and fall over the years. In 1965, for example, 3% of all giving to private charity went to the arts. By 2000 it was 6%. Meanwhile, the numbers were reversed for human services. In 1965, 14% of all private charitable giving was devoted to human services; by 2000 it was 9%. Virginia A. Hodgkinson, *Individual Giving and Volunteering*, *in* THE STATE OF NONPROFIT AMERICA, *supra* note 38, at 396.

185. Michael Bailin, Director of the Edna McConnell Clark Foundation, for example, describes the disciplined process by which his foundation moved from trying to influence large public systems such as education, child protection, and criminal justice to focusing solely on the field of youth development. Michael A. Bailin, *Requestioning, Reimagining, and Retooling Philanthropy*, 32 NONPROFIT & VOLUNTARY SECTOR Q. 635, 636 (2003). Former foundation executive Arnold Zurcher argues, by contrast, that new initiatives frequently match "the pet social or academic or the professional interests of a new head of a foundation or of some influential member of a foundation's staff." ARNOLD J. ZURCHER, THE MANAGEMENT OF AMERICAN FOUNDATIONS 64 (1972).

186. Bryan C. Hassel & Amy Way, *Choosing to Fund Choice*, *in* WITH THE BEST OF INTENTIONS: HOW PHILANTHROPY IS RESHAPING K–12 EDUCATION 183 (Frederick M. Hess ed., 2005).

The role of private philanthropy in funding successful charter schools, therefore, presents another paradox: deregulation has allowed school entrepreneurs to develop creative educational approaches and find alternative funding, yet the deregulated structure ensures the funding rests on uncertain ground. While public funding for schools can also rise and fall,[187] government funds are generally considered more stable than private contributions.[188] Also, though charter schools are not alone in relying on private philanthropy,[189] schools like KIPP and some of the others discussed here have been especially successful at raising enormous sums of money and spending it on schools in high-poverty neighborhoods. As a result, increasing numbers of poor and working-class parents see, and are encouraged to see, these schools as their children's best hope for a better life. Yet many of them rest on a partially privatized, precarious financial base.

### C. *A New Constituency for Public Funding of Public Education?*

In Part IV.B, I argued that the economic vulnerability of charter schools poses a threat to their growth and continued existence. In this final section, I will investigate how charter schools are responding to that vulnerability. My argument will proceed in two steps. First, I will argue that charter school advocates are now less likely to emphasize cost-savings as a rationale for school choice. Instead, charter school advo-

187. A famous example of this is the dramatic reduction in education spending in California after Proposition 13. After the California Supreme Court struck down that state's school financing system as inequitable, voters passed Proposition 13, which limited the ability of local districts to raise taxes in order to fund schools. Since then, California went from having the fifth-highest school spending in the nation to the forty-second-highest by the 1990s. For a discussion of these events, see William A. Fischel, *How* Serrano *Caused Proposition 13*, 12 J.L. & POL. 607, 607–13 (1996). In the nonprofit sector more generally, nonprofits have sometimes learned the hard way that government funding is not always stable. For example, nonprofits experienced a severe crisis in the 1980s when federal support for nonprofits declined by twenty-five percent. Salamon, *supra* note 38, at 3, 12.

188. Karen A. Froelich, *Diversification of Revenue Strategies: Evolving Resource Dependence in Nonprofit Organizations*, 28 NONPROFIT & VOLUNTARY SECTOR Q. 246, 255 (1999).

189. As most people with a child in a traditional public school can attest, the giving opportunities are endless. District schools now raise money and in-kind contributions from parents, community members, local and national corporations, and foundations. Here too, fairness issues loom large. A RAND study of fundraising in Los Angeles-area schools found that although low-income districts had greater access to some sources (in particular, foundations), in general the wealthier schools and wealthier districts could raise more. ZIMMER ET AL., PRIVATE GIVING TO PUBLIC SCHOOLS AND DISTRICTS IN LOS ANGELES COUNTY 57–59, 63–64 (2001). A potential source of future funding disparities is the growth of Local Educatior Foundations (LEFs), which are foundations, often run by parents and local community members, devoted to raising money for individual schools and districts. One California study found a direct relationship between the average annual income for a district and the effectiveness of its LEF. In California school districts with family incomes less than $30,000, the LEFs raised an average of $9 per student annually. LEFs in districts with average annual incomes of more than $70,000, in contrast, raised more than $240 per student. Eric Brunner & Jon Sontelie, Coping with Serrano: Voluntary Contributions to California's Local Public Schools 19 (Nov. 1996) (unpublished manuscript), http://www.spa.ucla.edu/ps/pdf/s99/PS294assign/Coping.pdf. A condensed version of this paper was presented at the National Tax Association's Eighty-Ninth Annual Conference on Taxation.

cates are devoting greater attention to the need for additional public funding to ensure school quality. Second, I will argue, perhaps counter-intuitively, that the push for greater charter funding may well result in charter schools allying with district schools to achieve increased education budgets for all schools. In this way, charter schools may become a new constituency for the government-run schools to which they were intended to be an alternative.

### *1. The Evolution of the Debate over Charter Schools and Money*

In 2005, the Fordham Institute published a prominent report arguing for public policy reform that would lead to increased charter funding.[190] Both the Fordham Institute and the report's coauthor, Chester Finn, have long been associated with the position that reforms such as choice and accountability are more important than money. *Charter School Funding: Inequity's Next Frontier*, however, reflects a shift in tone. It is premised on the notion that funding shortfalls for charter schools undermine school quality,[191] and that private philanthropy is not a sufficiently sustainable substitute.[192] "Charter schools are being starved of needed funds in almost every community and state," argue Finn and Osberg.[193] According to them, these funding disparities matter the most in inner-city communities.[194] "That's where today's greatest education challenges are found, where charter schools are most often located, and where disadvantaged and minority families have the greatest need for decent education options for their daughters and sons."[195]

In the highly politicized debate over how much funding schools need to succeed, the Fordham report takes a somewhat different rhetorical position than school choice proponents who claim the district schools do not need increased funding. As an example, compare the rhetoric regarding what $10,000 can buy. A couple of years ago, the Manhattan Institute's Jay Greene, who is among the leading scholars and advocates arguing against increased school funding, criticized a private fundraising initiative on behalf of New York schools.[196] Greene argued that the fundraising was unnecessary because taxpayers spent more than $10,000 annually per student on district schools, which he suggested was a "lavish" amount. By contrast, the Fordham report looked at funding levels for charter schools in New York and elsewhere, and found that the char-

190. Finn & Osberg, *supra* note 163.
191. *Id.* at vi.
192. *Id.* at vii.
193. *Id.* at v.
194. *Id.* at x.
195. *Id.*
196. Jay P. Green, *Raise Standards, Not Money*, WALL STREET J., Oct. 7, 2002, at A26.

ter schools were being "starved," despite the fact that in many jurisdictions they receive more than $10,000 annually per student.[197]

Perhaps most intriguing is what Finn and Osberg have to say about school finance lawsuits. According to them, such suits have been the principal legal mechanism by which public school advocates have achieved greater funding for poor districts, and many feared that school choice proposals would undermine the nexus they seek to establish between school funding and quality.[198] Some supporters of school choice have criticized these suits for presuming that funding disparities are a significant cause of the underperformance of students in low-income schools. For example, in response to the decision of New York's highest court that many New York City schools did not provide an adequate education, Sol Stern criticized the judges for deciding "just to throw more money at the problem."[199]

The Fordham report on charter school funding, however, suggests that charter schools should themselves consider filing school finance lawsuits.[200] After all, argues the report, "everybody's children must have the same right to a decent education. That includes equitable funding for that education."[201] Finn and Osberg do not abandon the ideas that charter schools are more efficient than traditional schools. But, they say, "particularly when one considers how far behind the education eight ball are many of the children entering U.S. charter schools and how much needs to be done to catch them up, it seems to us worse than naïve to suggest that these schools will deliver the necessary results without the requisite resources."[202]

In light of the aggressive rhetoric that marks the debates over both charter schools and the role of money in education, I want to be precise about how I see the debate evolving. The Fordham report and arguments like it are not claims that district schools deserve greater resources. Nor are they a repudiation of the belief—held by Finn and other prominent choice advocates—that a decentralized education market is preferable because government-run schools are wasteful and poorly organized. But charter advocates who demand level funding with traditional public schools *do* relinquish the claim that "states could also

197. *See* Finn & Osberg, *supra* note 163, at vi.

198. *See id.* at 9; *see also supra* notes 154–56 and accompanying text.

199. Sol Stern, *They Never Learn: Courts and Legislators Drive up New York School Costs, Without Boosting Education*, BARRON'S, Jan. 24, 2005, at 35; *see also* Paul E. Peterson & Herbert J. Walberg, *Catholic Schools Excel*, SCHOOL REFORM NEWS, July 1, 2002, http://www.heartland.org/Article.cfm?artid=887&CFID=1874593&CFTOKEN=84755177; Salisbury, *supra* note 157.

200. Finn & Osberg, *supra* note 163, at ix.

201. *Id.*

202. *Id.* at ix–x; *see also* NAT'L WORKING COMM'N ON CHOICE IN K–12 EDUC., THE BROOKINGS INST., SCHOOL CHOICE: DOING IT THE RIGHT WAY MAKES A DIFFERENCE 31 (2003) (noting that although "[p]olicy entrepreneurs working to enact choice programs understandably prefer to make the transformation appear to be straightforward and inexpensive," the truth is that "good education, in either a choice or a nonchoice environment, is not possible on the cheap").

save money by expanding dramatically the number of charter schools," or that charter schools "can produce quality schooling at a fraction of the cost of traditional public schools."[203] Given the fear such claims generated among advocates of increased funding for schools, their abandonment should provide them some relief.

### 2. *Charter Schools as Allies for Increased Funding for All Schools*

So far I have argued that charter advocates are relinquishing claims that they save money and adopting a stance that demands additional funding. The final piece of my argument is the claim that there is good reason to suspect that, in advocating for more money for themselves, charter schools will necessarily become proponents of greater education funding for all schools, including district schools. My argument here is in some tension with one strand of the literature critiquing privatization in other contexts. Some scholars of various forms of privatization have emphasized how withdrawal from the public system can undermine support for it. Sheryll Cashin's argument about the growth of private housing communities is representative: she claims that members of such communities will look out for themselves but not the larger public.[204] David Sklansky makes a similar point regarding the growth of private police forces, questioning why the residents of an affluent community would vote for increased funding of the public police if they are already well-protected by their private guards.[205]

But while allowing self-interested political constituencies to compete with the public sector will sometimes undermine support for the public system, the structure of education funding provides a reason to suspect that this might not occur in the education context. Charter school funding is derived using a formula based on what district schools spend per child.[206] Charter schools, therefore, have an incentive to argue for increased funding for district schools, because this increases their own per pupil allotment from the state. Some charter educators have identified this dynamic. Eric Rofes and Lisa Stulberg, for example, argue:

> Since charter school funding is so closely tied to district funding, raising public funding in urban and other low-income districts will help all public schools. We should not see charters as having a separate constituency from district schools, nor should we use our support of charter schooling as a stand-in for a broader commitment to public school change. In fact, we would be surprised if those who have argued against additional financing of public

203. *See supra* note 160 and accompanying text.

204. *See supra* note 152.

205. *See id.*

206. The process varies state to state and is significantly more complicated than I just described. My description, however, accurately conveys the core notion. For a fuller description, including detailed accounts of how charters are funded in each state, see Finn & Osberg, *supra* note 163, at 1–2.

> schools and then founded charters have not had their minds changed about the profound ways in which education is short-changed in our national and state budgets.[207]

As the Fordham report exemplifies, currently charters are clamoring for equal funding. If they succeed, they will have every incentive to join traditional public school advocates and argue for increased funding for all schools. To see why this is so, consider the case of Chris Whittle, the founder of Edison Schools. Whittle began Edison on the premise that existing government funding for education was sufficiently generous that he could make a profit running schools.[208] After ten years in the business, he now argues for increased public funding.[209] This is not surprising. More funding will allow him to run better schools, or increase his profits, or both. But given the structure of education financing, in order to achieve his goals, he needs to convince government to allocate greater sums not only to his schools, but to all schools. In other words, it is in the self-interest of Whittle and other charter operators to argue for increased funding for district schools.[210]

On one level it should not be surprising that by creating a wide range of for- and non-profit firms who are invested in running successful schools and depend on public funding, privatization may produce an additional political constituency for public education. It is well established in a variety of contexts that private firms might act in the political arena

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207. Eric Rofes & Lisa M. Stulberg, *Conclusion: Toward a Progressive Politics of School Choice, in* THE EMANCIPATORY PROMISE OF CHARTER SCHOOLS: TOWARD A PROGRESSIVE POLITICS OF SCHOOL CHOICE 294 (Eric Rofes & Lisa M. Stulberg eds., 2004).

208. CHRIS WHITTLE, CRASHCOURSE: IMAGINING A BETTER FUTURE FOR PUBLIC EDUCATION 67–68 (2005).

209. *Id.* at 37 ("Let me say right here: I'm for increased funding of our schools . . . .").

210. It is possible, though highly unlikely, that education funding could be restructured so that charter school funding levels would not be tied to district schools. No matter the precise mechanism for funding public schools, both political reality and the logic of arguments for charter schools suggest that charter funding will always be linked to overall public school funding. Politically this is true because the powerful interests supporting the public system are unlikely to accept a funding structure that would allow charter schools greater claims on the public fisc than district schools have. Nor would the logic of the charter argument permit such a claim—from their inception most charter advocates have argued that they could do as well or better with the same or less money. It would require an audacious repudiation of these premises for charter schools to demand greater funding than district schools.

to maintain public programs.[211] In the context of charter schools, however, this dynamic has been largely overlooked.[212]

One reason, perhaps, is that the structure of the debate surrounding how to improve our nation's struggling schools has long pitted choice versus additional resources.[213] Defenders of district schools typically argue against choice by saying that a better approach to reform involves giving district schools additional funding. In return, charter advocates seeking to justify a new charter law are more or less compelled to argue against the merits of extra spending, lest legislators adopt that solution instead. Charter supporters therefore make claims that inefficiently organized monopoly schools will simply waste any extra money. But as charters become an established fact, rather than a competing policy proposal, the structure of the debate necessarily changes. With charter laws on the books and charter schools in operation, charter advocates no longer have the same incentive to argue against increased funding—now, after all, some of the additional money will go to their schools. As charters grow, in other words, the choice versus money argument may evolve from an either/or to a both/and formulation. This evolution is even more likely as charter school operators recognize the limitations of private philanthropy as an adequate substitute for public funding.

Finally, if charters do become an additional constituency for education funding, they will be an especially well-placed one. The groups most associated with arguments for increased funding are the unions of teachers and other education professionals. Many critics, especially—though not exclusively—those in the Republican Party, see these organizations as an obstacle to reform. Perhaps the most extreme example of the hostility was demonstrated when President Bush's former Education Secretary Rod Paige called the National Education Association (NEA) "a terrorist organization."[214] By contrast, Republicans have supported the charter school movement, promoted individual successful schools, and lauded individual charter leaders. Arguments by charter operators that schools need greater funding may resonate with a different constituency

211. *See* ROSE-ACKERMAN, *supra* note 33, at 176–77 & n.29 (suggesting that private defense contractors become advocates for defense spending and privatizing prisons may increase the clout of corrections); Diller, *supra* note 37, at 1750 (describing the agricultural industry's lobbying for Food Stamps and the ABA's support of federal funding for civil legal services). As Diller argues, in certain circumstances privatization can create "a political constituency for programs that is more powerful than the poor clients served by the programs. Private parties involved in administering or implementing such programs can form powerful constituencies to support the enactment, continuation, and expansion of programs." *Id.*; *see also* MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973, at 33–34 (1993) (describing ABA support for legal services).

212. An exception to this is Jeffrey R. Henig et al., *Privatization, Politics and Urban Services: The Political Behavior of Charter Schools*, 25 J. URB. AFF. 37, 44, 51–52 (2003), which argues that charters increasingly try to influence the political context in which they exist.

213. *See supra* notes 157–63 and accompanying text.

214. Sam Dillon & Diana Jean Schemo, *Union Urges Bush to Replace Education Chief Over Remark*, N.Y. TIMES, Feb. 25, 2004, at A15.

than would the same argument coming from the American Federation of Teachers.

## V. CONCLUSION

Overall, the evidence from fifteen years of this quasi-market for schooling suggests that charter schools do not threaten public education. I have argued that the fear that charters would threaten traditional public schools by cream-skimming the privileged has not been borne out. And I have put forward a number of reasons to suspect that charter schools may in fact become allies with district schools in an effort to increase education funding.

At the same time, I have also suggested that it is too soon to proclaim a final verdict on a number of these issues, given that this reform is so new and the education landscape is changing in so many ways. Further research is needed in a number of areas. For example, while the evidence suggests that charter schools have not produced the sort of cream-skimming that marked overseas choice programs or magnet schools in this country, more empirical work is needed to explore a number of issues raised in Part III of this article. Some questions that deserve additional attention include:

- What explains the mixed picture for Hispanics in charter schools? In contrast to blacks, who are fairly consistently overrepresented in charters, we know that Hispanics in some states are overrepresented in charters while Hispanics in other states are underrepresented.[215]
- Are there differences in the educational backgrounds of parents in charters and those in district schools?[216]
- Even if charter schools do not attract more economically advantaged parents, do they disproportionately draw parents who attach greater value to, or are more engaged with, their children's schooling? Similarly, do they draw students who attach greater value to their own schooling?[217] Or, by contrast, do charters attract students with disadvantages that are not captured by race and class data?[218]
- Even if the evidence to date does not confirm cream-skimming, will No Child Left Behind's pressure on schools to

215. *See supra* notes 102–06 and accompanying text.
216. *See supra* notes 116–17 and accompanying text.
217. *See supra* notes 111–15 and accompanying text.
218. *See supra* note 128 and accompanying text.

increase student test scores result in increased cream-skimming?[219]

In addition to these empirical questions, additional research is needed to explore some of the issues raised in Part IV of this article. I have suggested that charter schools' reliance on private giving raises questions about sustainability. It is too early to tell whether my warnings will prove correct, but attention to this question is in order. So too with my suggestion that charter schools may become allies with district schools in the effort for increased education spending. As with the other claims made in this paper, this one is offered with humility and an invitation to further research.

Finally, a word about the tone of the debate in this area. At the outset of this article, I emphasized how, from its inception, the charter schools debate has been embedded in a larger fight over privatization in and outside of education. There has often been more rhetoric than evidence presented in the discussion.[220] Throughout this article, I have tried to suggest that the effects of charter schools on public education are significantly more complicated than defenders of district schools had predicted. In some circumstances, deregulation and a move toward market-based reforms appear to promote access for the disadvantaged, and in others, government regulation appears to promote fairness.[221] So perhaps it is worth turning down the volume a bit in the shouting match over markets versus government in education.

219. *See supra* notes 135–36 and accompanying text.

220. *Cf.* ROSE-ACKERMAN, *supra* note 33, at 188 ("[C]ommitted progressives must be willing to concentrate on fundamental problems without being diverted by surface agitations and without falling into rhetorical traps . . . . The temptation to forgo analysis and rely on slogans exists for people of all political persuasions eager to engage the public's attendance.").

221. *See supra* notes 143–49 and accompanying text.