

EXIT, VOICE, AND CHARTER SCHOOLS

ARTICLE*

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Introduction.....	894
I. Showdown in Los Angeles.....	895
A. Fixed v. Variable Costs	896
B. Exit v. Voice	897
II. Evolution of Charter Schools.....	898
A. Conservative Roots	900
B. Progressive Roots	904
III. Externalities of Charter Schools.....	908
A. Fiscal.....	909
B. Academic	912
C. Communal	914
Conclusion	915
A. Operating on the Margin	916
B. The Puerto Rican Challenge	917

INTRODUCTION

THE DEBATE OVER CHARTER SCHOOLS IN PUERTO RICO ECHOES CONFLICT across the mainland.¹ The mayor of New York, Bill de Blasio, has been battling for years with the state’s governor, Andrew Cuomo, and charter school leaders and advocates over the number of charter schools in the city and their entitlement to free space in the city’s school buildings.² Proponents of

* This article derives from a lecture by the same title delivered at a symposium on governance hosted by the University of Puerto Rico Law School on February 8, 2019.

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¹ Andrew Ujifusa, *Clash of Visions as New School Year Opens in Storm-Bruised Puerto Rico*, EDUC. WK. (Aug. 15, 2018), <https://www.edweek.org/ew/articles/2018/08/15/clash-of-visions-as-new-school-year.html>; Andrew Ujifusa, *Tensions Rise Over Path Forward for Puerto Rico Schools*, EDUC. WK. (Feb. 9, 2018), <https://www.edweek.org/ew/articles/2018/02/09/tensions-rise-over-path-forward-for-puerto.html>.

² Leslie Brody, *Charter Schools Pressure Mayor de Blasio for More Space*, WALL ST. J. (Aug. 8, 2017), <https://www.wsj.com/articles/charter-schools-pressure-mayor-de-blasio-for-more-space-1502141902>; Jesse McKinley & Elizabeth A. Harris, *A Charter School Rally Duels With Teachers’ Unions in Albany*, N.Y. TIMES, Mar. 5, 2015, at A23; Elizabeth A. Harris, *Charter School Backers Rally, Hoping to Influence de Blasio’s Policies*, N.Y. TIMES, Oct. 3, 2014, at A21; Ben Chapman, *Charter School Rally Sends Message to Bill de Blasio*, Joe Lhota, N.Y. DAILY NEWS (Oct. 8, 2013), <https://www.nydailynews.com/new-york/education/charter-school->

charter schools spent \$24 million on a ballot initiative in 2016 to lift the cap on charter schools in Massachusetts, while opponents spent \$14 million. Despite the heavy spending for the initiative as well as endorsements from the state's governor and leading newspapers, it lost at the polls by a measure of 62% to 38%.³

Three weeks before that vote, in its annual meeting in Cincinnati, the leadership of the National Association for the Advancement of Colored People (NAACP) called for a moratorium on charter school expansion, contending that charter schools lack sufficient transparency and accountability, divert funds from district schools, and screen out or expel underperforming students, all of whom district schools must educate.⁴ In a battle in California in 2017, reflecting the one in Massachusetts, charter advocates outspent opponents \$9.7 million to \$5.2 million in a successful campaign to get two pro-charter candidates elected to the seven-member school board of Los Angeles.⁵ In the midterm elections of 2018, victorious candidates for governor in Michigan, Illinois, and Wisconsin made charter policy a central issue and vowed to shift course and direct more funding to traditional public schools.⁶

I. SHOWDOWN IN LOS ANGELES

Perhaps no event has brought into sharper focus the controversial impact of charter schools than the six-day strike by teachers in Los Angeles in January 2019. Unlike earlier strikes by teachers in Los Angeles in 1970 and 1989, and unlike walkouts by teachers across West Virginia, Oklahoma, Kentucky, and Arizona in 2018,⁷ this strike was not about inadequate pay. In fact, the 6% raise won by teachers had already been negotiated with the Los Angeles Unified School District before the strike. The strike was rather about lowering class size, hiring a librarian for each middle and high school, staffing all schools with full-time nurses and, most crucially, putting a cap on charter schools.⁸

rally-sends-message-de-balsio-lhota-article-1.1479884; Al Baker & Javier C. Hernández, *De Blasio and Operator of Charter Schools Do Battle in Albany*, N.Y. TIMES, Mar. 5, 2014, at A24.

³ Lawrence Blum, *What We Can Learn from the Massachusetts Ballot Question Campaign on Charter School Expansion*, NAT'L EDUC. POLICY CTR. (Mar. 14, 2017), <https://nepc.colorado.edu/publication/ma-charter>.

⁴ *Statement Regarding the NAACP's Resolution on a Moratorium on Charter Schools*, NAACP (Oct. 15, 2016), <https://www.naacp.org/latest/statement-regarding-naacps-resolution-moratorium-charter-schools/>.

⁵ Harold Meyerson, *Why Do Billionaires Care So Much About Charter Schools?*, L.A. TIMES (May 26, 2017), <https://www.latimes.com/opinion/op-ed/la-oe-meyerson-billionaire-charters-20170526-story.html>.

⁶ Eliza Shapiro, *Blue Wave May Be Charter Schools' Black Cloud*, N.Y. TIMES, Nov. 10, 2018, at A25.

⁷ Dana Goldstein, *Arizona Teachers End Walkout as Governor Signs Bill Approving Raises*, N.Y. TIMES, May 4, 2018, at A16; Seth Mydans, *Teacher Strike Spreads Chaos in Los Angeles*, N.Y. TIMES, May 16, 1989, at A00014.

⁸ Alia Wong, *L.A. Teachers Got What They Wanted—For Their Students*, THE ATLANTIC (Jan. 25, 2019), <https://www.theatlantic.com/education/archive/2019/01/the-la-teachers-strike-settlement-is->

A. *Fixed v. Variable Costs*

Much research indicates that the last objective—putting a cap on charter schools—has much to do with the preceding objectives, from reducing class size to boosting the number of support staff. With the departure of students from district schools to charter schools goes the per-pupil funding allocated by the district. The substantial presence of fixed costs necessary to operate a school district—from staffing a central office to maintaining buildings and keeping the lights on—means disproportionately large cuts to variable costs when enrollment drops.⁹ Those variable costs come in the form of teachers, librarians, and nurses as well as textbooks, art supplies, musical instruments, microscopes, and computers. As the charter sector in a district grows, this problem of disproportionate impact on variable spending increases. With 225 charter schools, enrolling 23% of the district’s 486,000 students, Los Angeles is home to more charter schools than any city in the country.¹⁰

Opposition to charter schools in Los Angeles, thus became, in the words of one reporter for *The New York Times*, “the most contentious underlying cause of the strike”¹¹ Even an official with the Los Angeles Area Chamber of Commerce, an organization that endorsed rapid expansion of charter schools in the district a decade earlier,¹² concluded a week after the strike that the fiscal consequences of charter school growth ran counter to educational interests. “Competition can be healthy, but hyper competition can be very damaging,” said David Rattray, executive vice president of the Center for Education Excellence and Talent Development for the Los Angeles Area Chamber of Commerce, in an inter-

a-victory-for-students/581197/; Jennifer Medina & Dana Goldstein, *Los Angeles Teachers’ Strike to End as Deal Is Reached*, N.Y. TIMES, Jan. 22, 2019, at A1.

⁹ Robert Bifulco & Randall Reback, *Fiscal Impacts of Charter Schools: Lessons from New York*, 9 *EDU. FIN. & POL’Y* 86 (2014); GORDON LAFER, *BREAKING POINT: THE COST OF CHARTER SCHOOLS FOR PUBLIC SCHOOL DISTRICTS, IN THE PUBLIC INTEREST* 3-4 (2018), https://www.inthepublicinterest.org/wp-content/uploads/ITPI_Breaking_Point_May2018FINAL.pdf; Helen F. Ladd & John D. Singleton, *The Fiscal Externalities of Charter Schools: Evidence from North Carolina* 1-6 (CALDER, Working Paper No. 182, 2018), available at <https://files.eric.ed.gov/fulltext/ED583626.pdf>.

¹⁰ Howard Blume, *L.A. School Board Approves Teachers’ Contract Despite Financial Risks*, L.A. TIMES (Jan. 29, 2019), <https://www.latimes.com/local/education/la-me-edu-laUSD-teachers-contract-vote-20190128-story.html>.

¹¹ Dana Goldstein, *Democrats Are United on Teacher Strikes. But They’re in a ‘Gladiator Fight’ Over Education*, N.Y. TIMES (Jan. 18, 2019), <https://www.nytimes.com/2019/01/18/us/la-teacher-strike-laUSD.html>.

¹² *Los Angeles Approves School Choice Plan*, CBS NEWS (Aug. 26, 2009), <https://www.cbsnews.com/news/los-angeles-approves-school-choice-plan/>. For an understanding of where the U.S. Chamber of Commerce in general stands on charter schools, see Nina Rees, *Charter Schools Are a Bright Spot in Public Education*, U.S. CHAMBER OF COMMERCE FOUNDATION (May 2, 2016), <https://www.uschamberfoundation.org/blog/post/charter-schools-are-bright-spot-public-education>.

view with *The New York Times*.¹³ “We’ve turned education into a commodity—if that kid walks across the street, you’re chasing after him for the money attached to his seat. That’s ridiculous if you think about the long term. Nobody meant to do that.”¹⁴

Charter schools alone did not cause the financial hardship of schools in Los Angeles, but they have, as Rattray conveyed, exacerbated it.¹⁵ The origins of financial hardship of schools in Los Angeles and throughout California, date back to a taxpayer revolt in the 1970s that culminated with Proposition 13. According to Proposition 13, passed by popular referendum in 1978 and engraved as an amendment to the thirteenth article of the Constitution of California, taxes for homeowners would be limited to 1% of property assessments, with the stipulation that assessments themselves could not grow by more than 2% per year.¹⁶ While wealthy communities have compensated somewhat for the decline in tax revenues by levying parcel taxes and issuing local bonds, cities heavily populated with poor families like Los Angeles have not been able to take such countervailing measures.¹⁷ The result overall has been a plunge in school funding. According to one analysis, California slid from ranking seventh, among the fifty states, in per-pupil expenditures in 1977 to thirty-first in 2015.¹⁸

B. *Exit v. Voice*

Making matters worse, as conceded soon after the strike in an op-ed in *The Los Angeles Times* by a teacher at a local charter school who had come to see herself as part of the problem, charter schools not only divert funding from struggling district schools but also tend to attract students of more engaged and affluent parents, leaving needier students behind and thus making the job of teachers in district schools that much more challenging. In assessing the cost of such flight, the teacher, Riley McDonald Vaca, closed her piece in blunt terms: “I would urge Angelenos considering their education options to hold this thought: The schools you judge not good enough for your children or grandchildren or nieces and nephews aren’t good enough for any child.”¹⁹

¹³ Jennifer Medina & Dana Goldstein, *Strike Throws Cold Water on a City’s Embrace of Charter Schools*, N.Y. TIMES, January 29, 2019, at A1.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ CA. CONST. art. XIII A, §§ 1(a), 2(b).

¹⁷ Jennifer Medina, *At Los Angeles Teachers’ Strike, a Rallying Cry: More Funding, Fewer Charters*, N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/us/lausd-strike-schools.html>.

¹⁸ Daniel J. Willis *et al.*, *States in Motion: Visualizing How Education Funding Has Changed Over Time*, EDSOURCE, <https://edsources.org/2015/states-in-motion-school-finance-naep-child-poverty/83303> (last updated Nov. 14, 2018).

¹⁹ Riley McDonald Vaca, *I’m a Charter School Teacher. The LAUSD Strike Made Me Realize How I’m Part of the Problem*, L.A. TIMES (Jan. 23, 2019), <https://www.latimes.com/opinion/op-ed/la-oe-vaca-teacher-strike-20190123-story.html>.

With their candid judgments, both Rattray and Vaca articulated in concrete contemporary terms the theoretical argument made two generations earlier by the economist Albert O. Hirschman in his book *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States*. To Hirschman, one may try to reform institutions by exiting them, much as a disgruntled customer takes her business to another vendor, or, in the name of loyalty, by raising one's voice for change, much as a citizen wades into the political process by speaking up at a civic meeting or gathering signatures for a petition.²⁰ Yet, in some domains, such as education, wrote Hirschman, there can be no true exit: "a private citizen can 'get out' from public education by sending his children to private school, but at the same time he *cannot* get out, in the sense that his and his children's life will be affected by the quality of public education."²¹ In other words, the "public-good dimension" (or "externalities", in the parlance of economists) of some "ostensibly private" production or consumption decisions may have substantial impact on community life.²²

Through the prism of exit, voice, and loyalty, the story of charter schools gains significant definition. The externalities of charter school growth, in particular, as evidenced in Los Angeles, raise profound questions about education reform: who benefits from exit, who suffers, and how? As Puerto Rico rolls out a choice agenda involving vouchers as well as charter schools, these questions call for scrutiny. The first step is to examine the evolution of charter schools, with special attention to their conservative and progressive roots. The next step is to assess the externalities of charter schools: fiscal, academic, and communal.

II. EVOLUTION OF CHARTER SCHOOLS

Charter schools are a recent development. None existed before legislation in Minnesota in 1991 laid the foundation for an alternative form of education whereby independent boards, led by licensed teachers, could win approval from local or state school authorities to run "outcome-based schools" with distinctive though nonsectarian aims.²³ These schools could function outside the scope of many rules applying to traditional schools, "including budgeting, curriculum, and operating procedures."²⁴ However, all teachers would have to be licensed "to perform the particular service for which they are employed . . ."²⁵ Regarding admissions, the Minnesota legislation was specific: schools could not base en-

²⁰ See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 3-5, 21-43, 76-105 (1970).

²¹ *Id.* at 102.

²² *Id.*

²³ Act of June 4, 1991, ch. 265, art. 9, § 3, 1991 Minn. Laws 1123-24.

²⁴ *Id.* at 1127.

²⁵ *Id.*

rollment on “intellectual ability, measures of achievement or aptitude, or athletic ability.”²⁶

The following year, the first charter school, City Academy, opened in the state’s capital, St. Paul, dedicated to serving students who had dropped out of high school or were at risk of doing so.²⁷ In 1993, six more charter schools opened in the state: Bluffview Montessori, a K-8 in the small city of Winona, emphasizing student-centered learning, in keeping with Montessori schools around the world; Metro Deaf School, a K-8 in St. Paul, serving the hearing-impaired; Cedar Riverside, a K-8 in a low-income neighborhood in Minneapolis, focused on providing social services as well as classroom instruction; Toivola-Meadowlands, a K-12 serving a rural community with a multi-age project-based curriculum; and New Heights, a K-12 in both Minneapolis and the small city of Stillwater, dedicated to helping at-risk students through significant parent involvement and a strong emphasis on vocational experience in the community.²⁸

By 2017, there were 164 charter schools across Minnesota, enrolling 56,200 students, amounting to 6.5% of the state’s public school students.²⁹ With some differentiation in rules and regulations, states across the country followed in Minnesota’s path. California authorized charter schools in 1992. Colorado, Georgia, Massachusetts, Michigan, New Mexico, and Wisconsin—the so-called Class of 1993—authorized charter schools the following year.³⁰ By 2017, across the country there were 7,038 charter schools, spread over forty-three states and the District of Columbia, enrolling 3.2 million students,³¹ amounting to 6% of the nation’s public school students.³²

Unlike the initial charter schools in Minnesota, a significant subset of charter schools would belong to national or regional networks. Some of these networks would be for-profit operations, called educational management organizations (EMOs). Among EMOs in 2018, National Heritage Academies comprised eighty-nine schools across nine states; Imagine, fifty-three schools across eight

²⁶ *Id.* at 1126.

²⁷ SUE URAHN & DAN STEWART, MINNESOTA CHARTER SCHOOLS: A RESEARCH REP., H.R. Doc No. ED380 872, at 8 (MN 1994), available at <https://files.eric.ed.gov/fulltext/ED380872.pdf>.

²⁸ *Id.* at 56-58.

²⁹ *A Primer on Minnesota Charter Schools*, MINN. ASS’N OF CHARTER SCH. (Feb. 2018), http://www.mncharterschools.org/_uls/resources/A_Primer_on_Minnesota_Charter_Schools__2.pdf (last visited Apr. 30, 2019).

³⁰ GARY MIRON & CHRISTOPHER NELSON, WHAT’S PUBLIC ABOUT CHARTER SCHOOLS? LESSONS LEARNED ABOUT CHOICE AND ACCOUNTABILITY 23 (2002).

³¹ Rebecca David & Kevin Hesla, *Estimated Public Charter School Enrollment, 2017-2018*, NAT’L ALLIANCE FOR PUB. CHARTER SCH., at 3 (Mar. 2018), <https://www.publiccharters.org/sites/default/files/documents/2018-03/FINAL%20Estimated%20Public%20Charter%20School%20Enrollment%2C%202017-18.pdf> (last visited Mar. 30, 2019).

³² *The Condition of Education: Elementary and Secondary Enrollment*, NAT’L CTR. FOR EDUC. STATS. (May 2018), https://nces.ed.gov/programs/coe/indicator_cga.asp (last visited Mar. 30, 2019).

states and the District of Columbia; and the Leona Group, forty-nine schools across four states.³³

Although EMOs won much confidence on Wall Street in the 1990s that they would play a dominant role in managing charter as well as traditional public schools, lackluster financial and academic results pushed EMOs to the margins.³⁴ Most charter networks would be non-profit operations, called charter management organizations (CMOs). Among CMOs in 2018, Knowledge Is Power Program (KIPP) numbered 224 schools across twenty-three states and the District of Columbia; Uncommon Schools, fifty-three schools across Massachusetts, New York, and New Jersey; Achievement First, thirty-six schools across Rhode Island, Connecticut, and New York; IDEA Public Schools, fifty schools across Texas and Louisiana; Aspire, forty schools in California and Tennessee; Success Academy, forty-seven schools in New York; Mastery, twenty-four schools across Philadelphia and neighboring Camden, New Jersey; and Noble, eighteen schools in Chicago.³⁵

While charter schools date back only as far as 1992, their roots go back decades earlier to arguments made for vouchers, by progressive as well as conservative critics of public education. In essence, charter schools are funded with vouchers by another name. In their seminal book *Politics, Markets, and America's Schools*, published in 1990 and basic to the charter school movement, the political scientists John Chubb and Terry Moe used the term “scholarships” to describe the means by which students could attend privately managed but publicly funded schools.³⁶ Although that term is not used to define the money that follows students from traditional public schools to charter schools, it might as well be.

A. Conservative Roots

The father of vouchers and thus implicitly, as explained, charter schools, was the economist Milton Friedman. While principally known for his work in monetary and consumption theory, for which he won the Nobel Prize in 1976, Fried-

³³ Data gathered from the EMOs websites: NATIONAL HERITAGE ACADEMIES, <https://www.nhaschools.com/en> (last visited Mar. 30, 2019); IMAGINE SCHOOLS, <http://www.imagineschools.org/> (last visited Mar. 30, 2019); THE LEONA GROUP, <https://www.leonagroup.com/> (last visited Mar. 30, 2019).

³⁴ See SAMUEL E. ABRAMS, *EDUCATION AND THE COMMERCIAL MINDSET* 17-38, 137-68 (2016).

³⁵ Data gathered from the CMO's websites: KNOWLEDGE IS POWER PROGRAM, <https://www.kipp.org> (last visited Mar. 30, 2019); UNCOMMON SCHOOLS, <https://uncommonschoools.org> (last visited Mar. 30, 2019); ACHIEVEMENT FIRST, <https://www.achievementfirst.org> (last visited Mar. 30, 2019); IDEA PUBLIC SCHOOLS, <https://www.ideapublicschools.org/#> (last visited Mar. 30, 2019); ASPIRE PUBLIC SCHOOLS, <https://aspirepublicschools.org> (last visited Mar. 30, 2019); SUCCESS ACADEMY, <https://www.successacademies.org> (last visited Jan. 16, 2019); MASTERY, <https://www.masterycharter.org> (last visited May 5, 2019); NOBLE, <https://nobleschools.org> (last visited Mar. 30, 2019).

³⁶ JOHN CHUBB & TERRY MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 219-23 (1990).

man dedicated a considerable portion of his intellectual efforts to advancing school choice. To Friedman, public schools constituted classic illustrations of lazy monopolists, unmotivated to provide better service because of market capture or domination. In an essay in 1955 entitled *The Role of Government in Education*, Friedman made his initial case for vouchers, describing them as the best tool to satisfy parental demand rather than accommodate government supply.³⁷

“Governments could require a minimum level of education which they could finance by giving parents vouchers redeemable for a specified maximum sum per child per year if spent on ‘approved’ educational services”, Friedman wrote.³⁸ In elaboration, Friedman wrote:

Parents would then be free to spend this sum and any additional sum they themselves provided on purchasing educational services from an ‘approved’ institution of their own choice. The educational services could be rendered by private enterprises operated for profit, or by non-profit institutions. The role of government would be limited to assuring that the schools met certain minimum standards such as the inclusion of minimum common content in their programs, much as it now inspects restaurants to assure that they maintain minimum sanitary standards.³⁹

Such a shift in policy would turn the tables. Parents would be in charge much as customers in any marketplace. “Parents could express their views about schools directly,” Friedman wrote, “by withdrawing their children from one school and sending them to another, to a much greater extent than is now possible. In general they can now take this step only by changing their place of residence. For the rest, they can express their views only through cumbrous political channels.”⁴⁰

To Friedman, the benefits of vouchers would be numerous: better schooling generated by competition among providers; healthier variety brought by choice; better pay for teachers, given wider demand for their employment; and educational options for racial minorities outside residentially segregated neighborhoods.⁴¹ In subsequent writings, Friedman was more specific about how vouchers would translate into greater educational opportunity for urban minority children. Writing about the condition of black America in a column for *Newsweek* in 1967, Friedman condemned the state of “slum schools” and contended that vouchers would simultaneously provide educational freedom to black children

³⁷ See Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* 123, 123-44 (Robert A. Solo, ed. 1955).

³⁸ *Id.* at 127.

³⁹ *Id.*

⁴⁰ *Id.* at 129.

⁴¹ *Id.* at 129-30.

and “force improvement in public schools.”⁴² In reaction to the storm generated by mandated busing, Friedman argued five years later in another column for *Newsweek* that vouchers constituted a far more efficient means of aiding students living in segregated cities.⁴³

Although Friedman’s proposal failed to win significant backing, it did repeatedly take the oblique form of legislation in Congress for tuition tax credits redeemable for parents sending children to private schools. Such legislation passed in the Senate nine times from 1969 to 1984 yet went nowhere in the House of Representatives.⁴⁴ In the wake of these defeats, a commission designated by President Ronald Reagan to examine in what ways privatization might engender “more effective government” published a report in 1988 urging federal support of a system of school choice covering nonsectarian private schools.⁴⁵

Unlike Friedman, Reagan’s commission did not endorse outsourcing school management to for-profit entities, but the education scholar Myron Lieberman fully backed Friedman’s case. Equally critical of inner-city public schools, Lieberman fleshed out Friedman’s argument in two books during the Reagan era: *Beyond Public Education*, published in 1986, and *Privatization and Educational Choice*, published in 1989. Lieberman wrote in the latter that “the only ways to improve American education are to (1) foster private schools that compete with public schools and among themselves and/or (2) foster for-profit competition among service providers within the public school system.”⁴⁶ Moreover, Lieberman contended, “There is no public policy reason why school districts that can contract with ServiceMaster for custodial and maintenance services, or ARA for food services, or Burns International for security services, or ETS for testing services, or for dozens of other non-instructional services should not have the same right to contract for instructional services.”⁴⁷

Such advocacy of market-driven solutions for education comported with the rise of Reagan along with Margaret Thatcher and the concomitant fall of the Berlin Wall. Privatization had indeed become a celebrated strategy of policymakers around the globe.⁴⁸ With Lieberman, the previously mentioned political

⁴² Milton Friedman, *The Negro in America*, NEWSWEEK, Dec. 11, 1967, at 89, available at https://miltonfriedman.hoover.org/friedman_images/Collections/2016c21/NW_12_11_1967.pdf.

⁴³ Milton Friedman, *Busing: The Real Issue*, NEWSWEEK, Aug. 14, 1972, at 69, available at https://miltonfriedman.hoover.org/friedman_images/Collections/2016c21/NW_08_14_1972.pdf.

⁴⁴ ABRAMS, *supra* note 34, at 6; See also AMY STUART WELLS, TIME TO CHOOSE: AMERICA AT THE CROSSROADS OF SCHOOL CHOICE POLICY 152-53 (1993).

⁴⁵ PRESIDENT’S COMM’N ON PRIVATIZATION, PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT, REPORT OF THE PRESIDENT’S COMMISSION ON PRIVATIZATION 92-95 (1988), http://www.channelingreality.com/Documents/1988_Reagan_Commission_on_Privatization_Rpt.pdf; See also ABRAMS, *supra* note 34, at 7.

⁴⁶ MYRON LIEBERMAN, PRIVATIZATION AND EDUCATIONAL CHOICE 4 (1989).

⁴⁷ *Id.* at 268.

⁴⁸ See generally FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992); JOSEPH STANISLAW & DANIEL YERGIN, THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE

scientists John Chubb and Terry Moe were in sync with these changes in their 1990 book, *Politics, Markets, and America's Schools*, but were far more subtle in their prescription. While they never mentioned or cited Friedman, their debt to him was immense. And while they never mentioned charter schools—aside from noting that independent schools would be “chartered by the state” and obliged to comply with the terms of “their charters”—their message was clear that such schools, as they would be proposed by the Minnesota legislature a year later, corresponded in large part to their answer to public education.⁴⁹

Building on Reagan’s argument in his first inaugural address that “government is not the solution to our problem” but the problem itself, Chubb and Moe argued that autonomy was the most salient requirement for effective schools while “direct democratic control” and its associated bureaucracy constituted the most troubling obstacles.⁵⁰

For Chubb and Moe, the remedy was a muted iteration of Friedman’s recommendation. As such, this remedy, they opined, was a cure-all. “Without being too literal about it,” Chubb and Moe wrote, “we think reformers would do well to entertain the notion that choice is a panacea. This is our way of saying that choice is not like the other reforms and should not be combined with them as part of a reformist strategy for improving America’s public schools. Choice is a self-contained reform with its own rationale and justification. It has the capacity *all by itself* to bring about the kind of transformation that, for years, reformers have been seeking to engineer in myriad other ways.”⁵¹

Consistent with Friedman, Chubb and Moe allowed schools significant latitude, much more than would be permitted charter schools. Admission and retention of students would be decided by schools, whereas charter schools must use lotteries for admission if oversubscribed and can only counsel out, but not expel, students, except in cases of dangerous behavior. Schools could be sectarian or nonsectarian, private as well as public, whereas charter schools must be nonsectarian and public. And accountability would be largely determined by parental choice, not the government, which would be confined to “a supporting role,” defined by determining requirements for graduation, teacher certification, and health and safety; compelling nondiscrimination in admissions; and “monitoring the full and honest disclosure of information by the schools . . .”⁵² In this regard, Chubb and Moe’s vision aligned well with charter schools, though accountability for charter schools would be determined to a greater degree by the government with respect to student performance on state exams, as subpar results could mean revocation of the charter.

MARKETPLACE THAT IS REMAKING THE MODERN WORLD (1998); JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC (2017).

49 CHUBB & MOE, *supra* note 36, at 219-24.

50 *Id.* at 1-25.

51 *Id.* at 217.

52 *Id.* at 225.

On the topic of funding, however, Chubb and Moe were prescient. In parting with Friedman, Chubb and Moe specified that funds—or “scholarships,” as they put it—would at “no point . . . go to parents or students,” but would instead go from choice offices located in each district to participating schools selected by parents.⁵³ Moreover, Chubb and Moe, unlike Friedman as well as Lieberman, wrote nothing about for-profit schools as part of their market-based system, although Chubb a year later became a founding executive of the Edison Project, an early EMO with substantial backing on Wall Street. The Edison Project, renamed Edison Schools in 1999, would go on to manage as many as 133 schools across the country—split almost evenly between charter and traditional public schools—before running into financial trouble and reconfiguring itself as a manager of credit-recovery centers and provider of professional development.⁵⁴

B. *Progressive Roots*

The origins of school choice are typically thought to be of a conservative nature, identified with strong free-market advocates like Friedman, Lieberman, Chubb, and Moe. Yet school choice is also the product of progressives, frustrated, as well, with the consequences of big bureaucracy, residential segregation, and political lethargy.⁵⁵ What preceded the introduction of charter schools, in the opinion of these progressive scholars and school leaders, was accordingly far from paradise lost, a lesson that must be kept in mind in addressing contemporary debate.

In his epic study of the New York City Board of Education, *110 Livingston Street*, published in 1968, the sociologist David Rogers, in fact, cited Friedman’s case for vouchers as a reasonable response to the bureaucratic pathology pervading big-city school systems like New York’s.⁵⁶ Rogers defined the New York City school system, in particular, as “typical of what social scientists call a ‘sick’ bureaucracy—a term for organizations whose traditions, structure, and operations subvert their stated missions and prevent any flexible accommodation to changing client demands.”⁵⁷

The same year, the psychologist Kenneth Clark, a leader in the civil rights movement, went further in an essay in *The Harvard Educational Review*. Clark, whose landmark research with his wife, Mamie, into children’s views of race played a central role in the battle for school desegregation in the 1950s, wrote: “The rigidity of present patterns of public school organization and the concomi-

⁵³ *Id.* at 219-21.

⁵⁴ See ABRAMS, *supra* note 34, at 17-168.

⁵⁵ See James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 GEO. L. J. 1287, 1287-90 (2005).

⁵⁶ DAVID ROGERS, *110 LIVINGSTON STREET: POLITICS AND BUREAUCRACY IN THE NEW YORK CITY SCHOOL SYSTEM* (Random House ed., 1968).

⁵⁷ *Id.* at 267.

tant stagnation in the quality of education and academic performance of children may not be amenable to any attempts at change working through and within the present system.”⁵⁸

In calling for “parallel systems of public schools” as the remedy for this crisis, Clark anticipated the very development of charter schools a generation later. These “parallel systems” would be “organized and operated on a quasi-private level, and with quality control and professional accountability maintained and determined by Federal and State educational standards and supervision”⁵⁹ In addition, in lauding the merits of competition, Clark echoed Friedman. Clark was frank in this regard: “American industrial and material wealth was made possible through industrial competition. American educational health may be made possible through educational competition.”⁶⁰

Also in 1968, the sociologist Christopher Jencks, who, like Clark, was at the forefront of progressive scholars fighting on behalf of poor children, made plain his sense of despair in an essay entitled *Private Schools for Black Children* for *The New York Times Magazine*, calling inner-city schools “little more than custodial institutions for keeping children off the street.”⁶¹ Instead of Clark’s “parallel systems of public schools,” Jencks joined Friedman in calling for a system of vouchers yet one that barred for-profit schools from participation and favored poor families. The vouchers would be income-adjusted, applicable at sectarian as well as nonsectarian private schools, and complemented by better health care and welfare services.⁶²

Like Rogers, Jencks described public school systems as suffering from inertia, attributing the problem in large part in a 1970 article in *The New Republic* to “monopolistic privileges.”⁶³ In this article, a synthesis of a detailed feasibility assessment of vouchers he had co-written for the Office of Economic Opportunity, Jencks, in alliance with Friedman, explained vouchers as a means out of segregated schools. With vouchers, he wrote, “no child could be excluded from any participating school simply because his family was not rich enough or white enough to buy a house near the school.”⁶⁴

At the same time, the education historian Ted Sizer, a fellow champion of poor children and their rights, called for vouchers in an essay for *The Saturday Review* bluntly entitled *Education in the Ghetto: The Case for a Free Market*. With

⁵⁸ Kenneth B. Clark, *Alternative Public School Systems*, 38 HARV. EDUC. REV. 100, 108 (1968).

⁵⁹ *Id.* at 113.

⁶⁰ *Id.*

⁶¹ Christopher Jencks, *Private Schools for Black Children*, N.Y. TIMES MAGAZINE, Nov. 3, 1968, at 30.

⁶² *Id.* at 19-21.

⁶³ Christopher Jencks, *Giving Parents Money to Pay for Schooling: Education Vouchers*, THE NEW REPUBLIC, July 4, 1970, at 19.

⁶⁴ *Id.* at 20; See also LEONARD ROSST & RICHARD ZECKHAUSER, EDUCATION VOUCHERS: A PRELIMINARY REPORT ON FINANCING EDUCATION BY PAYMENTS TO PARENTS (Center for the Study of Public Policy ed., 1970).

Jencks, Sizer endorsed income-adjusted vouchers, applicable at sectarian as well as nonsectarian private schools and buttressed by better health care and social services.⁶⁵

Given little support for vouchers, Clark's recommendation of "parallel systems of public schools" gained traction. Vouchers stoked opposition, in particular, from defenders of the Establishment Clause of the First Amendment. Their great fear was and remains that public funding for tuition at sectarian schools violates the nation's commitment to a separation of church and state.⁶⁶ Public funding, however, for alternative forms of public education posed no such threat. For his part, Sizer later contributed to the development of charter schools with a pair of books: *Horace's Compromise*, published in 1984, and *Horace's School*, published in 1992. In both, Sizer urged districts to grant students more freedom in choosing schools and to confer principals and teachers more independence in designing curricula and scheduling the day.⁶⁷ Sizer soon after went on to co-found and lead the Parker Charter School in Devens, Massachusetts.⁶⁸

Seymour Fliegel and Deborah Meier, two progressive educators in East Harlem, likewise made a significant contribution in the 1970s and 1980s in paving the way to charter schools through calling for more autonomy for students as well as principals and teachers. Echoing Rogers, both Fliegel, a district supervisor in East Harlem, and Meier, one of his principals, objected to the heavy hand of the New York City Board of Education and all its red tape. In *The Nation*, one of the country's most liberal magazines, Meier made her case in a cover story in 1991 entitled *Choice Can Save Public Education*.⁶⁹ In describing the district's unlikely circumvention of centralized authority and consequent success, Fliegel made a similar case two years later in a book with an equally candid title: *Miracle in East Harlem: The Fight for Choice in Public Education*.⁷⁰

Such opposition to centralized authority was not restricted to the mainland. In Puerto Rico, Ana María García Blanco and José Javier Colón Morera made a similar case for greater pedagogical freedom in a 1993 essay explaining the mission of the community-based La Nueva Escuela Juan Ponce de León in the Barrio Juan Domingo of Guaynabo.⁷¹ This public school, founded in 1990 and defined by

⁶⁵ Theodore R. Sizer, *Education in the Ghetto: The Case for a Free Market*, SATURDAY REVIEW, Jan. 11, 1969, at 34-42, 93.

⁶⁶ See e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

⁶⁷ THEODORE R. SIZER, *HORACE'S COMPROMISE: THE DILEMMA OF THE AMERICAN HIGH SCHOOL* 206-21 (Houghton Mifflin Co. ed., 1984); THEODORE R. SIZER, *HORACE'S SCHOOL: REDESIGNING THE AMERICAN HIGH SCHOOL* 50-64 (Houghton Mifflin Co. ed., 1992).

⁶⁸ See THE PARKER CHARTER SCHOOL, <https://www.theparkerschool.org> (last visited Mar. 31, 2019).

⁶⁹ Deborah Meier, *Choice Can Save Public Education*, NATION, Mar. 4, 1991, 253, at 266-71.

⁷⁰ SEYMOUR FLIEGEL & JAMES MACGUIRE, *MIRACLE IN EAST HARLEM: THE FIGHT FOR CHOICE IN PUBLIC EDUCATION* (Manhattan Institute ed., 1993).

⁷¹ Ana María García Blanco & José Javier Colón Morera, *A Community-Based Approach to Educational Reform in Puerto Rico*, in COLONIAL DILEMMA: CRITICAL PERSPECTIVES ON CONTEMPORARY PUERTO RICO 157-69 (Edwin Meléndez & Edgardo Meléndez eds., South End Press 1993).

the student-centered Montessori curriculum, would become the anchor campus of a network that by 2018 comprised 44 schools across the island employing the same alternative approach to classroom learning and community involvement.⁷²

In language recalling arguments made by Rogers, Clark, Sizer, and Jencks as well as Chubb and Moe, García Blanco and Colón Morera contended that education policy was made far from the classroom and without regard to the needs of students. The authors moreover took aim at the island's dominant teachers' union, in particular, as being out of touch. "The centralized and authoritarian decision-making process that characterizes the Department of Education is generally kept out of the public spotlight," they wrote.⁷³ "Only the powerful and very conservative *Asociación de Maestros* (Teachers Association), a highly centralized and bureaucratic association that is itself a major financial contributor to the *Partido Popular Democrático* (PPD), is able to influence the internal decision-making process of the Department of Education."⁷⁴

The price of this detachment, García Blanco and Colón Morera asserted, was inferior schooling for poor children. While middle- and upper-class children benefited from supportive parents and attended either public or costly private schools aligned with their academic paths, poor children were confined to public schools that failed to engage them.⁷⁵ Their answer was neighborhood public schools that gave teachers the latitude required to respond to the everyday interests of their students, encouraged significant parental involvement, and integrated ample assistance where necessary from social workers, psychologists, and psychiatrists.⁷⁶

The actual architecture of charter schools underlying the 1991 legislation in Minnesota derived from two more champions of public education seeking reform to better suit the needs of teachers and students. Ray Budde, a professor of education, coined the term charter school in the 1970s and detailed his ideas in *Education by Charter: Restructuring School Districts*, published in 1988.⁷⁷ Albert Shanker, the president of the American Federation of Teachers (AFT), declared in a speech at the National Press Club in Washington, D.C., in the same year that school systems had become overly rigid and required the kind of flexibility prescribed by Budde. Shanker fleshed out his proposal for charter schools several

⁷² Keila López Alica, *Montessori en Puerto Rico lleva la delantera global*, EL NUEVO DÍA (Feb. 9, 2019), <https://www.elnuevodia.com/noticias/locales/nota/montessorienpuertoricollevaladelanteraglobal-2475740/>.

⁷³ García Blanco & Colón Morera, *supra* note 71, at 160.

⁷⁴ *Id.*

⁷⁵ *Id.* at 160-61.

⁷⁶ *Id.* at 163-69.

⁷⁷ RAY BUDDE, *EDUCATION BY CHARTER: RESTRUCTURING SCHOOL DISTRICTS: KEY TO LONG-TERM CONTINUING IMPROVEMENT IN AMERICAN EDUCATION* 4 (1988).

months later in San Francisco in his keynote address at the annual AFT convention and won support from delegates for the idea.⁷⁸

What Budde proposed is that school boards grant charters to groups of innovative teachers to manage their own schools within the public school system. The goal was to find novel pedagogical strategies that worked for a wider range of students than the current model. But Budde never intended an alternative to public education and long opposed the notion that charter schools should serve that purpose.⁷⁹

Shanker likewise lamented the outcome. He had been impressed by a visit in 1987 to a vocational school in Cologne, Germany, where teachers had effectively replaced the lecture format with cooperative learning among students. That experience convinced him that teachers in the United States should also be empowered to re-engineer schools and could do so by obtaining from school boards the kind of charter described by Budde. Yet Shanker did not foresee four critical developments and quickly turned on charter schools once they became apparent: (1) commercial management of charter networks, which he saw rife with conflict of interest, given the incentive operators would have to cut corners in the name of profit; (2) sorting, whereby charter schools employed parent contracts to screen out all but the most motivated families; (3) religious orientation, achieved by church groups creating charter schools with an implicit faith-based mission; and (4) circumvention of unionized teachers, as state legislation for charter schools allowed non-union staffing.⁸⁰

III. EXTERNALITIES OF CHARTER SCHOOLS

Much as Desiderius Erasmus laid the egg Martin Luther hatched, Ray Budde, Albert Shanker, and like-minded advocates of reforming public education unwittingly established the foundation for a charter movement they would not recognize. Erasmus had aimed to purify the Roman Catholic Church, not to break from it. Yet in his sharp criticism of the superstition and rigidity defining the religious practice of his day, Erasmus prepared the ground for Luther's rejection of papal authority and the splintering of doctrine that ensued.⁸¹

Shanker, as noted, was specific and swift in his response to the unintended consequences of charter schools. While Shanker did not live to see the charter movement evolve substantially—he died in 1997—scholars would later validate his concerns and add more of their own. Those concerns may, in sum, be categorized as fiscal, academic, and communal.

⁷⁸ RICHARD D. KAHLENBERG, *TOUGH LIBERAL: ALBERT SHANKER AND THE BATTLES OVER SCHOOLS, UNIONS, RACE, AND DEMOCRACY* 311-13 (2007).

⁷⁹ Susan Saulny, *Ray Budde, 82, First to Propose Charter Schools, Dies*, N.Y. TIMES (June 21, 2005), <https://www.nytimes.com/2005/06/21/us/ray-budde-82-first-to-propose-charter-schools-dies.html>.

⁸⁰ KAHLENBERG, *supra* note 78, at 313-18.

⁸¹ DESIDERIUS ERASMUS, *PRAISE OF FOLLY* 478-96 (Betty Radice trans., Penguin Books 1971) (1511); NORMAN DAVIES, *EUROPE: A HISTORY* 478-96 (1996).

A. Fiscal

Albert Shanker's central fiscal concern was profiteering by charter school operators cutting corners. He expressed dismay, in particular, with the emergence of the Edison Project, the aforementioned EMO that grew to run 133 schools across the country. Not only did the concept of a national network of schools employing a uniform curriculum fly in the face of the home-grown experimental nature of charter schools Shanker had in mind, but also the Edison Project's for-profit mission struck Shanker as incongruous.⁸²

To Shanker, the EMO model hinged on a misconception of contracting. As a complex process, with taxpayers as funders and children as direct consumers, schooling implicitly fails to provide the transparency requisite for conventional contract enforcement: the taxpayer is at a necessary distance while the child is in little if any position to judge the quality of instruction. Shanker, in essence, made this argument in 1994 in his weekly column, *Where We Stand*, sponsored by the AFT and published in *The New York Times*. "When a school district contracts with a for-profit company to build a new gymnasium," Shanker wrote, "it's relatively easy to make sure the district gets what it pays for. But when it considers hiring a for-profit company to manage schools, as a number are now doing, it's a different story."⁸³

This matter of incomplete contracting applies, in fact, to non-profit as well as for-profit charter school operators. In terms of principal-agent theory, the school operator, as agent, simply has more incentive in the case of for-profit school management to deny the interests of the taxpayer, as principal. The risk of moral hazard, in other words, climbs with the potential of profit but still exists in the non-profit context.

The underlying issue is outsourcing itself. Decades of economic literature address the costs of outsourcing from pricing and negotiation to transportation and inspection.⁸⁴ As Ronald H. Coase concluded in *The Nature of the Firm*, published in *Economica* in 1937, if the transaction costs related to the purchase of a good or service from an external provider prove excessive, the firm should develop the know-how to make rather than buy that good or service.⁸⁵

Given the challenge of writing contracts with adequate specificity for particularly complex processes, Oliver E. Williamson elaborated on Coase's case in *The Vertical Integration of Production: Market Failure Considerations*, published in the *The American Economic Review* in 1971.⁸⁶ "In more numerous respects than

⁸² KAHLBERG, *supra* note 78, at 313-14.

⁸³ Albert Shanker, *American Federation of Teachers advertisement: Where We Stand: Striking a Good Bargain*, N.Y. TIMES, June 5, 1994.

⁸⁴ ABRAMS, *supra* note 34, at 175-82.

⁸⁵ See Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

⁸⁶ Oliver E. Williamson, *The Vertical Integration of Production: Market Failure Considerations*, 5 J. REPRINTS ANTITRUST L. & ECON. 321 (1973).

are commonly appreciated,” Williamson wrote, “the substitution of internal organization for market exchange is attractive less on account of technological economies associated with production but because of what may be referred to broadly as ‘transactional failures’ in the operation of markets for intermediate goods.”⁸⁷

Henry M. Levin addressed this matter in the context of education directly in *The Failure of the Public Schools and the Free Market Remedy*, published in *The Urban Review* in 1968: “The fact that education as a good is difficult to define or measure . . . violates an important premise of the competitive market.”⁸⁸

It is precisely such opacity in education that, in part, provoked the NAACP to call in 2016 for its moratorium on charter school expansion. The NAACP faulted charter schools first and foremost for insufficient transparency and accountability. The organization’s second concern was more explicitly fiscal: the diversion of funding from district schools generated by the exit of students to charter schools, the issue basic to the teachers’ strike in Los Angeles in January.

The effects of such exit have been documented in detail in three recent studies. In their article *Fiscal Impacts of Charter Schools: Lessons from New York*, published in *Education Finance and Policy* in 2014, the economists Robert Bifulco and Randall Reback examined the costs of charter schools in 2009-2010 to Albany and Buffalo, where 20% and 17% of students, respectively, attended charter schools. Bifulco and Reback found that charter schools in these two cities had substantial negative fiscal effects, as reductions in enrollment did not allow the districts to realize reductions in expenditures commensurate with reductions in revenue.⁸⁹

Bifulco and Reback attributed these negative fiscal effects to several causes: (1) the added cost of educating students migrating from private schools to charter schools; (2) the abiding cost to districts of keeping the same number of classrooms running given both the marginal loss of students in each and the necessity of excess capacity should one or more charter schools fold or students return from charter schools; (3) the need to cover facility and maintenance costs at a greater number of buildings (while enrollment in Albany, they pointed out, remained nearly unchanged from 1999 to 2009, the number of schools climbed from seventeen to twenty-four); and (4) the requirement to provide health services, special education support, and transportation to more locations. The negative impact for Albany, they estimated, was \$976 to \$1,070 per pupil.⁹⁰ For Buffalo, it was \$633 to \$744 per pupil.⁹¹

⁸⁷ *Id.* at 323.

⁸⁸ Henry M. Levin, *The Failure of the Public Schools and the Free Market Remedy*, 2 *URB. REV.* 32, 34 (1968).

⁸⁹ Bifulco & Reback, *supra* note 9, at 9-12.

⁹⁰ *Id.* at 11.

⁹¹ *Id.*

In studying one urban and five suburban or rural districts with charter schools across North Carolina in 2015-2016, the economists Helen F. Ladd and John D. Singleton found similar effects in their 2018 working paper for the National Center for Analysis of Longitudinal Data in Education Research. Ladd and Singleton made clear that the distinction between fixed and variable costs is crucial: “Intuitively, the money that follows the students who leave public schools to charters requires that a district reduce its variable spending per pupil (as the district cannot reduce its spending on fixed costs). Such reductions represent a reduction in the educational services provided to students who remain in the district’s public schools.”⁹²

In measuring the negative impact of charter schools on variable spending, Ladd and Singleton estimated the cost to be \$500 to \$700 per pupil in the one urban district and lesser, though still significant, amounts in the non-urban districts.⁹³

In *Breaking Point: The Cost of Charter Schools for Public School Districts*, a 2018 report published by In the Public Interest, a research center based in Oakland, the political economist Gordon Lafer discovered similar results for Oakland, San Diego, and Santa Clara County’s East Side Union High School District in 2016-2017. Lafer, however, employed a somewhat different strategy. “Rather than estimating which costs are fixed or variable,” he wrote, “we worked directly with district staff to determine what it would actually cost to accommodate current charter school students in traditional public schools.”⁹⁴

By this means, Lafer found that Oakland, where 30% of students attended charter schools, experienced a net fiscal shortfall of \$57 million, or \$1,559 per pupil; San Diego, where 18% of students attended charter schools, a net fiscal shortfall of \$66 million, or \$620 per pupil; and Santa Clara County’s East Side Union High School District, where 17% of students attended charter schools, a net fiscal shortfall of \$19 million, or \$831 per pupil. In assessing the impact on Oakland, in particular, Lafer contended that if that \$57 million had been retained, class size in elementary schools could have been capped at eighteen, the school system could have had twice the number of counselors and nurses, and \$10 million would have remained for supplementary purposes.⁹⁵

In Lafer’s opinion, the negative fiscal externalities of charter schools are so profound that districts must reverse course. “If a school district anywhere in the country—in the absence of charter schools—announced that it wanted to create a second system-within-a-system, with a new set of schools whose number, size, specialization, budget, and geographic locations would not be coordinated with the existing school system,” Lafer wrote, “we would regard this as the poster

92 Ladd & Singleton, *supra* note 9, at 5-6.

93 *Id.* at 16-18.

94 LAFER, *supra* note 9, at 18.

95 *Id.* at 6, 9, 19.

child of government inefficiency and a waste of tax dollars. But this is indeed how the charter school system functions.”⁹⁶

B. Academic

To advocates of charter schools, such additional expenditures per pupil might be justified as the necessary price for counteracting a centralized approach to school management long criticized, as noted, by progressives and conservatives alike as inefficient. Much as advertising brings significant cost to everyday consumer goods, such advertising also brings to market new products and generates competition necessitating product improvement. Milton Friedman, in fact, cited competing supermarkets delivering better service as a model for the provision of better schooling in a 1973 essay for *The New York Times Magazine* entitled *Selling School Like Groceries*.⁹⁷

Setting aside the difference between assessing the quality of a discrete good like groceries and a complex service like education, there is little if any evidence that the quality of education has, on average, improved since the introduction of charter schools.⁹⁸ While some charter schools have posted impressive results on standardized tests and rates of college matriculation, such schools typically suit students capable of abiding by rigid behavioral and academic expectations. Meanwhile, students who cannot meet such expectations get concentrated in neighborhood public schools or underperforming charter schools.⁹⁹ This dichotomization gets to the heart of concerns about sorting voiced by Albert Shanker and leaders of the NAACP.

Once charter schools had established significant presence in cities across the country, scholars delved into the controversial subject of sorting. One team of scholars concluded in a 2005 book on enrollment and achievement at charter schools that high-performing charter schools managed to enroll far more students with strong academic records than neighboring public schools as well as far fewer English-language learners and students classified with special needs.

⁹⁶ *Id.* at 13.

⁹⁷ Milton Friedman, *Selling School like Groceries: The Voucher Idea*, N.Y. TIMES MAGAZINE, Sept. 23, 1973, at 280.

⁹⁸ One measure of improvement, or the lack thereof, comes from the performance of twelfth-graders in math and reading from 1992 to 2012, as determined by the National Assessment of Educational Progress (NAEP), an exam administered to a sample of students in fourth, eighth, and twelfth grades in states across the country. According to NAEP, twelfth-graders slipped slightly in both math and reading over this twenty-year period. Another measure comes from longitudinal analysis of the white-black and white-Hispanic achievement gap. From 1992 to 2015, the white-black achievement gap for twelfth-graders widened in reading and did not budge in math; the white-Hispanic achievement gap for this cohort did not budge in either subject. See *Achievement Gaps Dashboard*, THE NATION'S REPORT CARD, https://www.nationsreportcard.gov/dashboards/achievement_gaps.aspx (last visited Mar. 31, 2019). See also NAEP Data Explorer, THE NATION'S REPORT CARD, <https://www.nationsreportcard.gov/ndecore/landing> (last visited Mar. 31, 2019).

⁹⁹ ABRAMS, *supra* note 34, at 244-50.

While these high-performing schools by law employed lotteries for admission if oversubscribed, the students entering the lotteries did not reflect area demographics.¹⁰⁰ Another team of scholars concluded in a 2010 report that grade repetition at a leading CMO, with schools across the country, was consistently higher than at district public schools.¹⁰¹

Such grade repetition, it should be noted, stands to have three effects: it sends a message to the wider community that these schools are not for all students, which goes a long way in explaining why the applicant pool might not reflect neighborhood demographics; it leads to attrition of weaker students, as many students given the choice between repeating the grade or advancing to the next grade by transferring to a district school would choose the latter; and it eventually boosts the performance on standardized tests for those students who remain, as they get another year of schooling under their belts.¹⁰²

Touching on each of these issues, a third team of scholars concluded in a 2011 study of the same leading CMO that its schools not only managed to screen out a disproportionate number of underperforming students but also shed those students who did not live up to behavioral as well as academic expectations.¹⁰³ Working off the determination that girls on average are more cooperative students than boys, a fourth team of scholars found in a 2015 study of eleven years of national data that charter schools enroll significantly more girls than boys and that this gap has grown over time.¹⁰⁴ Finally, a fifth team of scholars reported in a 2018 study that charter schools across the board were significantly less responsive to inquiries from parents of potential applicants with special needs, weak academic transcripts, or conduct issues.¹⁰⁵

The problem with such screening and shedding does not stop with the bifurcation of students. Research in the field of peer-group effects makes clear that screening and shedding have a compounding impact. Of particular concern is the concentration of underperforming students in default neighborhood district schools, especially if a significant number exhibit behavioral problems. Much as motivated students have a positive influence on their peers, troubled students

100 MARTIN CARNOY *ET AL.*, *THE CHARTER SCHOOL DUST-UP: EXAMINING THE EVIDENCE ON ENROLLMENT AND ACHIEVEMENT* 51-65 (Teachers College Press, 2005).

101 CHRISTINA CLARK TUTTLE *ET AL.*, *STUDENT CHARACTERISTICS AND ACHIEVEMENT IN 22 KIPP MIDDLE SCHOOLS*, MATHEMATICA POLICY RESEARCH INC. (2010), http://www.mathematica-mpr.com/~media/publications/PDFs/education/KIPP_fnlrpt.pdf.

102 ABRAMS, *supra* note 34, at 244-46.

103 Gary Miron *et al.*, *What Makes KIPP Work? A Study of Student Characteristics, Attrition, and School Finance*, WESTERN MICH. U. (2011), https://ncspe.tc.columbia.edu/working-papers/OP195_3.pdf.

104 Sean P. Corcoran & Jennifer L. Jennings, *The Gender Gap in Charter School Enrollment* (New York University, Working Paper No. 223, 2015), available at <https://ncspe.tc.columbia.edu/working-papers/OP223.pdf>.

105 Peter Bergman & Isaac McFarlin, *Education for All? A Nationwide Audit Study of Schools of Choice* (National Bureau of Economic Research, Working Paper No. 25396, 2018), available at <https://www.nber.org/papers/w25396.pdf>.

have the opposite effect, making it harder for students to learn and teachers to teach.

Addressing this matter head-on in an article entitled *Externalities in the Classroom*, published in *The American Economic Journal* in 2010, the economists Scott Carrell and Mark Hoekstra concluded from an eight-year study conducted in twenty-two elementary schools in a Florida school district “that adding one more troubled boy peer to a classroom of 20 students decreases boys’ test scores by nearly 2 percentile points (one-fifteenth of a standard deviation), and increases the number of disciplinary infractions by 40 percent.”¹⁰⁶ While Carrell and Hoekstra lacked the data necessary to measure the exacerbating effect of adding two or more problematic boys to a classroom, Hoekstra separately confirmed that the effect would most likely be quite nonlinear: the effect on a classroom, that is, of four troubled boys stands to be far greater than four times the effect of one such boy.¹⁰⁷

C. Communal

The hardening division of a district’s schools into “good” and “bad” represents one communal externality of charter schools that Shanker foresaw and leaders of the NAACP condemned. Concomitant with such division is the decline of neighborhood schools and the community engagement such institutions have fostered for generations. Neighborhood schools have, after all, served far more than an academic function. For cultural, civic, and athletic events, neighborhood schools have been communal anchors. With children crisscrossing districts for their education, neighborhood schools lose their extracurricular purpose.¹⁰⁸

This crisscrossing also involves shopping for schools by parents. Those with more navigational savvy pull their children from neighborhood schools and send them to the best option they can find. In their wake follow members of the same social circles.¹⁰⁹ Accordingly, with the decline of the neighborhood school comes the splintering of neighborhoods and clustering of look-alike families. While such self-similarity indeed often defines neighborhoods, the dynamics of school choice intensify it.

At the school level, the exit from neighborhood schools of parents with such navigational know-how means the loss of the countervailing parental voice necessary to pressure administrators to keep classes small, pay teachers well, provide ample offerings in art and music, and fund laboratory equipment for science courses. If the parents with a sense of agency can easily exit the system, Hirsch-

¹⁰⁶ Scott E. Carrell & Mark L. Hoekstra, *Externalities in the Classroom: How Children Exposed to Domestic Violence Affect Everyone’s Kids*, 2 AM. ECON. J. APPLIED ECON. 211, 212 (2010).

¹⁰⁷ ABRAMS, *supra* note 34, at 170.

¹⁰⁸ For additional analysis, see DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* 220-229 (2010).

¹⁰⁹ *Id.* at 151, 274.

man wrote, they will not be around to deploy that agency against its deterioration.¹¹⁰

More generally, all this exiting in one direction and another means the erosion of public life. Judging Milton Friedman's recommendation of market-based reforms as a surrender rather than a solution, Hirschman came to the defense of the arduous course of political action: "[T]he decision to voice one's views and efforts to make them prevail are contemptuously referred to by Friedman as a resort to 'cumbrous political channels.' But what else is the political, and indeed democratic, process than the digging, the use, and hopefully the slow improvement of these very channels?"¹¹¹

Long before Hirschman, the education reformer Horace Mann made a similar case but in blunter terms. In an 1841 lecture entitled *An Historical View of Education; Showing Its Dignity and Its Degradation*, Mann described the retreat from public to private schools as a forfeiture of public responsibility: "The parent who wishes to bring up his own children well, but refuses to do all in his power to perfect the common, educational institutions around him, should go with his family into voluntary exile—he should fly to some Juan Fernandez, where no contagion of others' vices can invade his solitude and defeat his care."¹¹²

To the political scientist Jeffrey R. Henig, the issue of retreat is a fundamental concern. In his book *Rethinking School Choice: Limits of the Market Metaphor*, published in 1994, Henig principally addressed vouchers, though his argument pertained to charter schools. In sync with Hirschman, Henig wrote, "The real danger in the market-based proposals for choice is not that they might allow some students to attend privately-run schools at public expense, but that they will erode the public forums in which decisions with societal consequences can democratically be resolved."¹¹³

CONCLUSION

Hirschman conceded that exit, rather than voice, constituted the only sensible option in certain circumstances. In extreme cases, of course, there is no choice but exit. This is a lesson Hirschman knew from personal hardship. As a teenager in Berlin in the 1930s, Hirschman attended rallies protesting the ascension of Adolf Hitler. Facing the futility of these rallies, he fled, carrying on his studies in Paris, London, and Trieste before joining the French resistance movement in Marseille, which he, in turn, fled upon being exposed, putting him on a

¹¹⁰ HIRSCHMAN, *supra* note 20, at 45-46.

¹¹¹ *Id.* at 17.

¹¹² HORACE MANN, LECTURES ON EDUCATION 224 (1845).

¹¹³ JEFFREY R. HENIG, RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR 200 (1994).

perilous path over the Pyrenees through Spain to Portugal and the United States.¹¹⁴

A. *Operating on the Margin*

Hirschman was accordingly no soft-headed idealist. He firmly understood the limitations of individual action. This concession, in fact, constituted the foundation of his argument. In the preface to *Exit, Voice, and Loyalty*, Hirschman explained that he was inspired to write the book from observations in the 1960s of Nigerian farmers using trucks rather than trains to transport their goods hundreds of miles to the ports of Port d'Harcourt and Lagos. While transport by trains should have been far more efficient, poor coordination and substantial corruption made the trains unreliable.¹¹⁵ Trucks moreover clearly generated the negative externalities of pollution and congestion. But fixing the railroad constituted a matter for policymakers, not individual farmers, unless they could somehow bond for collective action, which in the case of Nigeria was out of the question given fierce divisions within the country.

A comparable scenario holds for schools. Parents can raise their voices to elect the right policymakers and lean on them to do the right thing. But they cannot be expected to act as selflessly as Horace Mann implied. Individuals must often operate on the margin. They cannot be expected to forge social policy on their own. Legislative and parental perspectives are necessarily distinct.

For Hirschman, the problem with Nigerian trains related directly to the problem with U.S. public schools. Because there is an alternative, those who can opt out do so and take with them their voice for change. "If public and private schools somewhere in the United States are substituted in the story for the railroads and lorries of Nigeria, a rather similar result follows," Hirschman wrote. "Suppose at some point, for whatever reason, the public schools deteriorate. Thereupon, increasing numbers of quality-education-conscious parents will send their children to private schools. This 'exit' may occasion some impulse toward an improvement of the public schools; but here again this impulse is far less significant than the loss to the public schools of those member-customers who would be most motivated and determined to put up a fight against the deterioration if they did not have the alternative of the private schools."¹¹⁶

This analysis, in fact, goes a long way in explaining the legendary excellence of the Finnish school system: outside of moving from one region or neighborhood to another, there is no exit in Finland. While there is a small number of private schools in Finland—defined by religion, language immersion, or alternative pedagogy—these schools are fully funded by the government and thus not

¹¹⁴ See JEREMY ADELMAN, *WORLDLY PHILOSOPHER: THE ODYSSEY OF ALBERT O. HIRSCHMAN* 52-186 (2014).

¹¹⁵ See HIRSCHMAN, *supra* note 20, at 44-45; See also ALBERT O. HIRSCHMAN, *DEVELOPMENT PROJECTS OBSERVED* 129-30 (1967).

¹¹⁶ HIRSCHMAN, *supra* note 20, at 45-46.

the province of the well-to-do.¹¹⁷ This shared educational experience cannot be separated from the country's heavy investment in high-quality teacher preparation, well-equipped schools, and generous teacher compensation.¹¹⁸

Hirschman's analysis likewise goes a long way in exposing a fundamental flaw in the arguments for school choice made by Milton Friedman, Myron Liberman, John Chubb, and Terry Moe as well as Kenneth Clark, Ted Sizer, and Christopher Jencks. As Hirschman explained and as these choice advocates failed to acknowledge, the very presence of private schools leads to the troubles with public schools provoking the call for access to private schools with vouchers. The same logic applies to the call for charter schools. Urban systems across the United States, in this light, do not, as choice advocates claim, function as lazy monopolists. The monopoly was long ago punctured by the presence of private schools, patronized by parents with the agency and income to pull their children from public schools. Urban systems function more accurately as handicapped operations.

B. *The Puerto Rican Challenge*

The challenge in Puerto Rico and across the mainland is to make policy that shields neighborhood public schools from the deterioration described by Hirschman. This is precisely why teachers in Los Angeles went on strike in January 2019. And the teachers won. In addition to obtaining funding to lower class size and to staff all schools with nurses and all middle and high schools with librarians, the teachers' union succeeded in getting all seven members of the city's school board to vote for a moratorium on new charter schools until a report could be completed to document their impact on district schools.¹¹⁹

The situation in Puerto Rico calls for vigilance. The island is currently home to just one charter school but may soon be home to 30 more, according to hearings held in February 2019.¹²⁰ *Puerto Rico's Education Reform Act*, approved in March 2018 in the wake of Hurricane María, introduced charter schools as well

¹¹⁷ For details about private schools in Finland, see the following website: FINNISH ASSOCIATION OF INDEPENDENT SCHOOLS, <http://www.yksityiskoulut.fi/> (last visited Apr. 24, 2019). This association reports 54 member schools, enrolling 3% of the country's primary, lower-secondary, and upper-secondary students.

¹¹⁸ See ABRAMS, *supra* note 34, at 280-300. See also PASI SAHLBERG, FINNISH LESSONS: WHAT CAN THE WORLD LEARN FROM EDUCATIONAL CHANGE IN FINLAND? (2011); MIRACLE OF EDUCATION: THE PRINCIPLES AND PRACTICES OF TEACHING AND LEARNING IN FINNISH SCHOOLS (Hannele Niemi *et al.* eds., 2012).

¹¹⁹ Blume, *supra* note 10. See Valerie Strauss, *In a major step, the Los Angeles School Board calls for a moratorium on new charter schools*, WASH. POST (Jan. 30, 2019), https://www.washingtonpost.com/education/2019/01/30/major-step-los-angeles-school-board-calls-moratorium-new-charter-schools/?utm_term=.132538534058.

¹²⁰ See *Educación rechaza que ya exista decisión sobre escuelas charter*, EL NUEVO DÍA (Feb. 18, 2019), <https://www.elnuevodia.com/noticias/locales/nota/educacionrechazaqueyaexistadecisionsobreesuelascharter-2477537/>. See also DEPARTAMENTO DE EDUCACIÓN: OFICINA DE LAS ESCUELAS PÚBLICAS ALIANZAS, *ESCUELAS EN CONVERSIÓN 8 DE FEBRERO DE 2019* (2019).

as vouchers, with the stipulation that no more than 10% of schools could be charter schools and no more than 3% of students could attend private or non-district public schools with the use of vouchers.¹²¹ This comes on top of substantial exit from public to private schools across the island going back decades. While 10% of students at the primary and secondary levels attend private schools across the mainland, 25% do so in Puerto Rico.¹²²

In the first year following the *Education Reform Act*, one charter school opened: Vimenti, an elementary school in San Juan operated by the Boys and Girls Club of Puerto Rico. Like some of the early charter schools in Minnesota, Vimenti is focused on helping students at risk of dropping out through curricula rich in art, music, drama, and sports as well as vocational opportunities in the community for hands-on experience. The school started in August 2018 with a kindergarten and first grade, enrolling 58 students in total, 31 of whom come from the neighborhood, 27 of whom come from nearby, and 13 of whom are classified for special education. The plan is to add one grade per year as students progress through school. Supplementary funding for Vimenti comes from the Alford Foundation, which donated \$1 million, the Colibri Foundation, which gave \$500,000, and the singer Marc Anthony, who gave another \$500,000.¹²³

In the hearings in February 2019, the Department of Education considered proposals for four more charter schools in San Juan, five in Humacao, one in Bayamón, three in Caguas, six in Ponce, two in Arecibo, and nine in Mayagüez. Like Vimenti, these charter schools and those that follow may offer innovative programs aimed at helping children on the margins. But if the future resembles the past, a good portion will be populated by students with stronger academic records, fewer special needs, and more engaged parents.

This pattern exposes an underlying problem addressed by Justice John Paul Stevens in his dissent in *Zelman v. Simmons-Harris*, the 2002 Supreme Court decision that permitted the use of vouchers at religious schools in Cleveland on the grounds that government funds went to religious schools only indirectly in the form of vouchers and that parents were not compelled to use these vouchers at religious schools. Beyond finding such funding of religious schools to be in violation of the Establishment Clause, Stevens contended that vouchers overshadowed the need for significant improvement in the lives of poor children.

¹²¹ Puerto Rico Education Reform Act, Act No. 85 of March 29, 2018, <http://www.oslpr.org/2017-2020/leyes/pdf/ley-85-29-Mar-2018.pdf> (last visited Apr. 24, 2019).

¹²² For mainland enrollment in private schools, see: *Private School Enrollment*, NATIONAL CENTER FOR EDUCATION STATISTICS, https://nces.ed.gov/programs/coe/indicator_cgc.asp (last visited Apr. 24, 2019). For enrollment in private schools in Puerto Rico, see: Consejo de Educación de Puerto Rico, *Panorama del Sector Educativo en Puerto Rico*, ISSUU, https://issuu.com/cepr-aepei/docs/panorama_del_sector_educativo_ago-2 (last visited Apr. 24, 2019) (the report documents in the third slide that the island in 2012-13 had 458,631 students enrolled in public K-12 schools and 153,817 students enrolled in private K-12 schools).

¹²³ Adriana De Jesús Salamán, *La fórmula de Boys & Girls Club de PR para su escuela charter*, NOTICEL (Aug. 14, 2018), <https://www.noticel.com/ahora/educacion/la-formula-de-boys-girls-club-de-pr-para-su-escuela-charter/781412418>.

Vouchers, he wrote, could not make up for “the disastrous conditions [in Cleveland] that prevented over 90 percent of the student body from meeting basic proficiency standards”¹²⁴ Such deficiency, he wrote, necessitated “massive improvements unrelated to the voucher program.”¹²⁵ This conclusion holds for charter schools as well as vouchers.

¹²⁴ *Zelman v. Simmons-Harris*, 536 U.S. 639, 684 (2002) (Stevens, J., dissenting).

¹²⁵ *Id.*