

FAMILY MOVES AND THE FUTURE OF PUBLIC EDUCATION

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ABSTRACT

State laws compel school-aged children to attend school while fully funding only public schools. Especially following the COVID-19 pandemic, this arrangement is under attack—from some for unconstitutionally coercing families to expose their children to non-neutral values to which they object and from others for ignoring the developmental needs of students, particularly students of color and in poverty whom public schools have long underserved. This Article argues that fully subsidized public education is constitutional as long as public schools fulfill their mission to model and commit people to liberal democratic values of tolerance and respect for all persons as equal choosers. To be sure, those values are not neutral. But as *Brown v. Board* famously concluded, their promotion in public schools is perhaps the nation's and states' single most compelling interest, because it is essential to the ability of people with diverse beliefs to live together harmoniously while preserving their vast freedoms in other respects. To keep public education from qualifying those freedoms any more than necessary, states give families a right to opt for private education, but at their own expense. This arrangement serves the compelling interest in public education, however, only if public schools—bolstered by compulsory education laws and their

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uniquely full public subsidization—attract enough families. For well over a century, public schools have attracted around 90% of all school children. Today, however, family moves away from public education are eroding its ability to attract children due principally to public education’s conflation of “public” with bureaucratically “uniform” education—precluding pedagogically, democratically, and equitably essential differentiation among students. The Article proposes ways public schools can better model liberal democratic values by engaging all families in the cooperative and differentiated direction of their children’s learning.

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INTRODUCTION

The constitutional status of public education has long puzzled observers. In *Brown v. Board of Education*, the Court extolled “the importance of education to our democratic society,” describing it as “required in the performance of our most basic public responsibilities, even service in the armed forces”; “the very foundation of good citizenship”; “a principal instrument in awakening the child to cultural values, in preparing [the child] for later professional training, and in helping [the child] to adjust normally to [the] environment”; an opportunity without which “it is doubtful that any child may reasonably be expected to succeed in life”; and “a right which must be made available to all on equal terms.”¹ In *San Antonio Independent School District v. Rodriguez*, however, the Court ruled that education is not a constitutionally recognized fundamental right.²

One explanation for this seeming contradiction is that education is the states’, not the federal government’s, business. All fifty state constitutions oblige state officials to provide all children with a free public education in publicly operated schools, which some state high courts have read to create a fundamental right of children to public schools providing an “equal” or “adequate” public education.³ Still, *Brown* clearly read the federal Constitution to give children a fundamental right to *racially desegregated* public education,⁴ begging the question of why the right does not extend to educational equality and effectiveness more broadly.

1. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954); see Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (alteration in original) (quoting C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)) (“[Public] education must prepare pupils for citizenship in the Republic . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.”); Joshua E. Weishart, *Democratizing Education Rights*, 29 WM. & MARY BILL RTS. J. 1, 38 (2020) (collecting numerous Supreme Court decisions tying public education to the practice and preservation of democracy).

2. 411 U.S. 1, 2 (1973).

3. See, e.g., *The State Role in Education Finance*, NAT’L CONF. STATE LEGISL., <https://www.ncsl.org/research/education/state-role-in-education-finance.aspx> [<https://perma.cc/AW9N-GVWW>] (containing text of fifty states’ constitutional public-school provisions); *infra* note 35 (quoting provisions).

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

A close reading of *Brown* resolves the puzzle. As usually understood, *Brown* decided one question: whether *Plessy v. Ferguson*'s doctrine of separate but equal⁵ remained a proper understanding of equal protection. But *Plessy* upheld legally mandated racial segregation of railroad passenger cars, and *Brown*'s ruling was "that, *in the field of public education*, the doctrine of 'separate but equal' has no place."⁶ Before the Court could reach the *Plessy* question, it first had to decide whether public schools were the right place to begin the momentous process of desegregating the nation. In explaining that starting point, the Court reasoned not that education is a fundamental right of children, but that it is a fundamentally important service to the states, nation, and "our democratic society."⁷ Rather than identifying public education as a fundamental individual right, *Brown* defined it as the one thing constitutionally more powerful than a fundamental right.⁸ Universal free education in public schools, it ruled, is a compelling public interest, perhaps the most compelling state and national interest of all.⁹

In a passage immediately preceding its discussion of *Plessy*,¹⁰ *Brown* explains that "[t]oday, education is perhaps the most important function of state and local governments," the object of "great expenditures," and a substantial coercive imposition on all Americans via "[c]ompulsory school attendance laws." Everything the Court says sounds not in rights but in public goods. Public schooling is the state's and our democratic society's self-perpetuating and self-protective assurance that the nation's people are prepared "to adjust normally to [their] environment" and "to succeed in life" "awaken[ed] . . . to cultural values" and are readied "for later professional training," for "good citizenship," and for "performance of

5. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).

6. *Brown*, 347 U.S. at 495 (emphasis added).

7. *Id.* at 493.

8. See, e.g., *Ramirez v. Collier*, 142 S. Ct. 1264, 1287 (2022) (Kavanaugh, J., concurring) (citing *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 444 (2015)) (stating that in applying the compelling state interest standard, "the Court starts with a heavy presumption against a state law that infringes" a constitutional right and allows the infringement "only when the State has a sufficiently 'compelling' state interest" and no "less restrictive alternatives could still satisfy the State's compelling interest").

9. See *infra* notes 10–20 and accompanying text.

10. *Brown*, 347 U.S. at 493.

our most basic public responsibilities.”¹¹ That assurance is essential to states and to our democratic society whether or not individual parents and children want or are able to provide it themselves. Desegregation of society had to begin with public schools because of schools’ compellingly important public role in orienting Americans towards tolerance, mutual respect, and good and productive citizenship. Because racial segregation of public schools so manifestly oriented children’s “hearts and minds” away from mutual respect and good citizenship “in ways unlikely ever to be undone,” it was compellingly important to the nation to begin desegregation there.¹²

Public education is compellingly important because it provides the nation’s only comprehensive solution to the great constitutional paradox of liberal democracy. Such democracies’ “most fundamental principle is one of tolerance: the state does not prescribe beliefs, identities, or any other kind of dogma,” aiming “not at ‘the good life’ as defined by a particular religion, moral doctrine, or cultural tradition but at the preservation of life itself under conditions in which populations cannot agree on what the good life is.”¹³ But while remaining neutral among the beliefs, identities, religions, moral convictions, and cultural traditions by which *individuals* and *groups* may choose to or otherwise consider themselves to be defined, liberal democratic *polities*—paradoxically—“cannot be neutral” as to, and instead “require” that all of their people “share[] values, such as tolerance, compromise, and deliberation.”¹⁴ Of necessity, such democracies must “construct national identities based on political principles, rather than race, ethnicity, or religion”—a proposition this country has embraced only “through a long and painful process,” still “incomplete” with “many setbacks,” of

11. *Id.*

12. *Id.* at 494.

13. Francis Fukuyama, *A Country of Their Own*, FOREIGN AFFAIRS (May/June 2022) <https://www.foreignaffairs.com/articles/ukraine/2022-04-01/francis-fukuyama-liberalism-country> (on file with the *Columbia Human Rights Law Review*); see James S. Liebman, *Desegregating Politics: “All-Out” School Desegregation Explained*, 90 COLUM L. REV. 1463, 1499 (1990) [hereinafter, Liebman, *Desegregating Politics*] (stating that public schools “help engender the intergroup tolerance and respect necessary to maintain a plural society,” while “expand[ing] the discernable options among which a liberal society encourages people to choose”).

14. Fukuyama, *supra* note 13 (emphasis added).

“progressively removing barriers to citizenship based on class, race, and gender.”¹⁵

To “sustain themselves,” “cohere,” and “prosper economically,” liberal democracies “need to prioritize public-spiritedness, tolerance, open-mindedness, and active engagement in public affairs” and “to prize innovation, entrepreneurship, and risk-taking.”¹⁶ Due to the paradox of non-neutrality as to the principle of neutrality, the constant danger liberal democracies face is that if their neutrality towards the values and principles their residents choose to live by lead “enough people [to] reject liberal principles themselves and seek to restrict the fundamental rights of others, or if citizens resort to violence to get their way, then liberalism alone cannot maintain political order.”¹⁷

In this light, it is no wonder that *Brown* links “the importance of education to our democratic society” to “[c]ompulsory school attendance laws and [states’ and localities’] great expenditures for education.”¹⁸ Compelling students to attend school, while directing great expenditures only to *public* schools that lay the “foundation of good citizenship” and are committed to preparing students for “our most basic public responsibilities” is the best and (along with compelled military service in wartime) the only way the nation can ensure that “enough people” embrace the non-neutral values on which our liberal democratic nation relies for its coherence and survival.¹⁹ For this reason, the nation’s interest in using its “great expenditures for education” to entice families into the “free” public schools that state constitutions promise is sufficiently important to the collective to outweigh even the First Amendment’s grand individualistic principles of religious and ideological neutrality and parents’ due process right to control their children’s education.²⁰

15. *Id.*

16. *Id.*

17. *Id.*

18. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

19. *Id.*; Fukuyama, *supra* note 13; see Weishart, *supra* note 1, at 38–39 (citations omitted) (“The core purpose of public education is to democratize schoolchildren. So says the Supreme Court. So say . . . education clauses in . . . state constitutions So say the highest courts in forty-eight states. So say state statutes.”).

20. *Brown*, 347 U.S. at 493; see *Wisconsin v. Yoder*, 406 U.S. 205, 215–21 (1972) (discussed *infra* note 36 and accompanying text).

Today, however, *free public* education—states’ full subsidization only of children enrolled in publicly operated schools—is under attack as an unconstitutional burden on families’ right to exercise their religions and control their children’s upbringing.²¹ As a proponent of this view recently declared, “[w]e are right now preparing a strategy of laying siege to [public education] institutions. . . . The public schools are waging war against American children and American families,” who accordingly are asserting “a fundamental right to exit,” taking the full public subsidy with them.²²

In a successful opening salvo, the campaign against public education convinced the Supreme Court in 2020 to invalidate state laws barring public funding of parochial schools.²³ Another victory

21. See, e.g., Philip Hamburger, *Is the Public School System Constitutional?*, WALL ST. J. (Oct. 22, 2021), <https://www.wsj.com/articles/public-school-system-constitutional-private-mcauliffe-free-speech-11634928722> (on file with the *Columbia Human Rights Law Review*) (arguing that “[e]ducation consists mostly in speech, and parents have a right under the First Amendment to exercise authority over what their children hear,” which states violate by compelling all children to attend school and “coerc[ing]” them to attend public schools by fully subsidizing only those schools even when the education those schools provide consists of speech parents do not want their children to hear); Fox 8 News (@fox8news), TWITTER (Oct. 24, 2021, 7:48 PM), <https://twitter.com/fox8news/status/1506055157200551937> [<https://perma.cc/5FH7-7N8A>] (quoting Tweet by Ohio Senate candidate stating “[s]hut down government schools and put schools in churches and synagogues”); see also Anna Kamenetz, *School Is for Everyone*, N.Y. TIMES (Sept. 1, 2022), <https://www.nytimes.com/2022/09/01/opinion/us-school-history.html> (on file with the *Columbia Human Rights Law Review*) (“[A] well-funded, decades-old movement that wants to do away with public school as we know it is in ascendance.”).

22. Michelle Goldberg, *Democrats Desperately Need Schools to Get Back to Normal*, N.Y. TIMES (Nov. 8, 2021), <https://www.nytimes.com/2021/11/08/opinion/public-school-enrollment.html> (on file with the *Columbia Human Rights Law Review*) (quoting Christopher Rufo, director of Discovery Institute’s Center on Wealth and Poverty) see Kamenetz, *supra* note 21 (noting “well-funded . . . movement” supported by recent Supreme Court free-exercise decisions to “do away with public school as we know it” and require full public funding for students in private schools in which families can “educate their children however they wish,” including “Republican schools for Republican students, Black schools for Black students, Christian schools for Christian students and so on, as long as those schools are freely chosen”).

23. *Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246, 2261 (2020); see also *Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022) (holding that when the state subsidizes some private schools through family tuition grants, it may not bar families from using grants for religious schools).

came in Virginia's November 2021 gubernatorial race, in which Democratic Party candidate Terry McAuliffe's defense of the public education establishment, that "I don't think parents should be telling schools what they should teach," transformed the election—in the words of the victor, Republican Glenn Youngkin—into "a movement being led by Virginia's parents."²⁴

Partly fortifying this campaign are some parents' objections to public instruction that honestly appraises the nation's treatment of its Black, Latinx, Native, and other populations.²⁵ More broadly fueling the campaign, however, are doubts among families otherwise disposed to enroll their kids in public schools and committed to inculcating mutual respect, but chastened by the turmoil and disappointing instruction they observed during the COVID-19 pandemic when public schooling moved from behind closed schoolhouse doors to kids' computers on kitchen tables at home.²⁶ As

24. See Shane Goldmacher, *5 Takeaways: How Youngkin's Win Makes Democrats Squirm About 2022*, N.Y. TIMES (Nov. 3, 2021), <https://www.nytimes.com/live/2021/11/02/us/election-news#election-takeaways> (on file with the *Columbia Human Rights Law Review*) ("Youngkin used [McAuliffe's] comment . . . to hammer [McAuliffe] on issues like race and transgender rights . . . motivat[ing] the G.O.P. base while casting the matter to moderates as an issue of parental rights. 'This is no longer a campaign,' Mr. Youngkin said. 'It is a movement being led by Virginia's parents.'"); see also Thomas Fuller, *In Landslide, San Francisco Ousts 3 Board of Education Members*, N.Y. TIMES (Feb. 16, 2022), <https://www.nytimes.com/2022/02/16/us/san-francisco-school-board-recall.html> (on file with the *Columbia Human Rights Law Review*) (describing successful effort by Asian-American and middle-class parents to remove school board members who supported extended school closures during the pandemic and relaxed standards for admission to elite high school).

25. See, e.g., Terry Gross, *Uncovering Who Is Driving the Fight Against Critical Race Theory in Schools*, NPR (June 14, 2021), <https://www.npr.org/2021/06/24/1009839021/uncovering-who-is-driving-the-fight-against-critical-race-theory-in-schools> [<https://perma.cc/7P3E-4G2B>] (discussing some parents' objections to teaching Critical Race Theory in public schools); Elizabeth A. Harris & Alexandra Alter, *With Rising Book Bans, Librarians Have Come Under Attack*, N.Y. TIMES (July 6, 2022), <https://www.nytimes.com/2022/07/06/books/book-ban-librarians.html> (on file with the *Columbia Human Rights Law Review*) ("[Parents' and officials'] efforts to ban books have spiked in recent months, reflecting a clash over whether and how to teach children about issues like L.G.B.T.Q. rights and racial inequality.").

26. See, e.g., Lisa Lerer & Jeremy W. Peters, *Republicans Pounce on Schools as a Wedge Issue to Unite the Party*, N.Y. TIMES (Nov. 3, 2021), <https://www.nytimes.com/2021/11/03/us/politics/school-republican-campaign-issue.html> (on file with the *Columbia Human Rights Law Review*) (reporting that "parental rights," around which Republicans galvanized Virginia voters,

a Democratic Party critic of McAuliffe said, “You cannot tell a group of people who have had, for 18 months or so, . . . to home-school their children that their opinion about their children’s education doesn’t matter.”²⁷ Long a secondary issue in national political debates, public education suddenly became an A-level concern for families, the resolution of which could seal public education’s fate.²⁸

encompassed not only conservative opposition to how children are taught about racism, but also a “free-floating sense of rage from parents, many of whom felt abandoned by the government during the worst months of the pandemic”; Asian parents’ worries “about progressive efforts to make admissions processes in gifted programs less restrictive”; Black parents’ unhappiness over “opposition of teachers’ unions to charter schools”; and anxiety of “suburban mothers of all races” about “having to juggle so much at home over the last year and a half”; *infra* notes 208–237, 355 and accompanying text; *see also* ALG RESEARCH, QUALITATIVE RESEARCH FINDINGS—VIRGINIA POST-ELECTION RESEARCH 1–3 (Nov. 15, 2021), <https://thirdway.imgix.net/pdfs/override/Qualitative-Research-Findings-%E2%80%93-Virginia-Post-Election-Research.pdf> [<https://perma.cc/2HG7-TEVU>] (finding that concerns about changing and inconsistent school closures and COVID policies, resulting learning loss, declining educational standards, and belief that “Democrats didn’t listen to parents” were “bigger factor[s] than [Critical Race Theory]” in swing voters’ decisions in Virginia gubernatorial election); Michael C. Bender, *School Reopening Mess Drives Frustrated Parents Toward GOP*, WALL ST. J. (Apr. 10, 2022), <https://www.wsj.com/articles/covid-school-reopenings-midterm-elections-democrats-republicans-11649286564> (on file with the *Columbia Human Rights Law Review*) (articulating the trend of disenchanting parents who usually are Democratic voters voting for Republican candidates for pandemic-related reasons).

27. Jonathan Martin & Alexander Burns, *Reeling From Surprise Losses, Democrats Sound the Alarm for 2022*, N.Y. TIMES (Nov. 3, 2021), <https://www.nytimes.com/2021/11/03/us/politics/democrat-losses-2022.html> (on file with the *Columbia Human Rights Law Review*) (quoting Virginia Congressman Donald McEachin); *see* Kathryn Watson et al., *CBS News Projects Glenn Youngkin Wins Virginia Governor’s Race*, CBS NEWS (Nov. 3, 2021), <https://www.cbsnews.com/live-updates/election-day-results-2021-virginia-governor-youngkin/> [<https://perma.cc/HP3D-MS84>] (describing the Republican candidate’s emphasis on parental choice in education as a powerful electoral tool).

28. *See, e.g.*, Jessica Grose, *What Will it Take to Restore the Social Contract on Public Schools*, N.Y. TIMES (Sept. 21, 2022), <https://www.nytimes.com/2022/09/21/opinion/midterms-schools-parents.html?smid=em-share> (on file with the *Columbia Human Rights Law Review*) (identifying parents’ declining “faith that public school systems can help their kids recover” as the cause of a “9 percent drop in families saying their children are enrolled in traditional public schools” and as the reason why public education has become the “number one [political] issue” and a “major source of frustration” for parents); *Public’s Top Priority for 2022: Strengthening the Nation’s Economy*, PEW RES. CTR. (Feb. 16, 2022), <https://www.pewresearch.org/politics/2022/02/16/publics-top-priority-for-2022->

Further fueling the fire, a 2021 report on students' performance on the National Assessment of Educational Progress (NAEP)—periodically administered for half a century and administered just *before* COVID-19 shuttered schools in 2020—registered the first ever statistically significant across-the-board drop in U.S. students' reading and math proficiency scores.²⁹ Declines were concentrated among Black and Hispanic students, reversing a fifty-year trend toward shrinking achievement gaps during which all students improved, but Black and Hispanic students improved more.³⁰

strengthening-the-nations-economy/ [https://perma.cc/U5VP-QRLX] (reporting national poll identifying “improving education” as fourth most pressing public priority, following three pandemic-related priorities (economic recovery, health, dealing with coronavirus) and eclipsing crime, immigration, social security, and terrorism).

29. See Lauren Camera, *America's Kids Earn Disappointing Grades on Nation's Report Card*, USNEWS.COM (Oct. 14, 2021), <https://www.usnews.com/news/education-news/articles/2021-10-14/americas-kids-earn-disappointing-grades-on-nations-report-card> (on file with the *Columbia Human Rights Law Review*) (reporting that as of 2012, thirteen-year-olds' NAEP reading and math scores had “improved significantly” for decades, with “greatest gains experienced by Black and Hispanic students,” but since then, thirteen-year-olds' scores have “declined dramatically”—the first major drops in those scores since NAEP started tracking long-term academic achievement trends in the 1970s); Kevin Mahnken, *Long-Term NAEP Scores for 13-Year-Olds Drop for First Time Since Testing Began in 1970s*, THE 74 (Oct. 14, 2021), <https://www.the74million.org/article/naep-long-term-unprecedented-performance-drop-american-13-year-olds/> [https://perma.cc/SR48-KQ4R] (“I’ve been reporting [NAEP] results . . . for decades, and I’ve never reported a decline like this.” (quoting National Center for Education Statistics Commissioner)).

30. See Mahnken, *supra* note 29 (“Compared to scores in 2012 [when the test was last given], students' overall scores dropped three points in reading and five points in math. In math, Hispanic students dropped four points, boys . . . dropped five points, girls six points, and Black students eight points, widening achievement gaps with white students.”); *infra* notes 233–235, 271–283 (documenting learning loss during the pandemic as measured by state and federal assessments).

As this article was going to press, the National Center for Education Statistics announced the results of the 2022 NAEP assessments for nine and thirteen-year-olds, documenting still further, “devastating” declines in reading and especially math results between 2019 and 2022. Sarah Mervosh & Ashley Wu, *Math Scores Fell in Nearly Every State, and Reading Dipped on National Exam*, N.Y. TIMES (Oct. 24, 2022), <https://www.nytimes.com/2022/10/24/us/math-reading-scores-pandemic.html> (on file with the *Columbia Human Rights Law Review*). Eighth-grade math scores “fell in nearly every state,” leaving a “meager 26 percent of eighth graders . . . proficient, down from 34 percent in 2019”; fourth-grade math

These developments reveal the constitutional salience of *Brown's* designation of the states' interest in fully subsidizing public, and no other form of, K-12 education as the most compelling of all public interests. Public schools' "most favored" constitutional status arises *because* fully subsidizing public, and only, public schools does what its opponents identify as its constitutional *failing*. Bolstered by compulsory education laws and by "great" public "expenditures,"³¹ the provision of entirely free education only in public schools incentivizes "enough people" to enroll their children in schools with features only publicly operated schools can be required to have: they are "for everyone";³² they are places where "children of different class backgrounds . . . learn together";³³ and they promote and model the non-neutral "cultural values," "public responsibilities," "good citizenship," and commitments to "democratic society" and equal personhood that are essential to the survival of a polity committed in all other ways to neutrality among different religions, beliefs, identities, and life plans.³⁴

Put another way, all States' recognition of a constitutional obligation to provide "free public schools"³⁵ in which all families and

scores declined in 41 states, with national proficiency rates of only 36%, compared to 41% in 2019 and with "Black and Hispanic students, who started out behind white and Asian peers, experience[ing] sharper declines than those groups in fourth-grade math." *Id.*

31. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

32. Kamenetz, *supra* note 21.

33. *Id.*

34. *Brown*, 347 U.S. at 493–94. *See infra* notes 41–45, *infra* text following note 291, and *infra* note 311 (discussing legal and practical reasons why states can require only public schools to have all these features).

35. *See supra* note 3 and accompanying text. State constitutions are redolent with language associating the requirement of "free public schools" with the objective of preserving democracy through the wide "diffusion" of non-sectarian liberal democratic values. *See, e.g.*, ARK. CONST. art. XIV, § 1 ("Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools . . ."); HAW. CONST. art. X, § 1 ("The State shall provide for the establishment, support and control of a statewide system of public schools free from sectarian control."); IND. CONST. art. VIII, § 1 ("[I]t shall be the duty of the General Assembly to . . . provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all."); ME. CONST. art. VIII, pt. 1, § 1 ("A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people; . . . it shall be [the Legislature's] duty to require, the several towns to make suitable provision, . . . for the support and maintenance of

children together may fulfill their compulsory educational responsibilities, together with *Brown's* recognition of the uniquely compelling importance of those schools to our democracy, affords public schools a *structural status* within our liberal democracy no less fundamental than the status of the legislative, executive, and judicial branches of our state and federal governments. For that structural reason, as well as because public education's *non-neutrality* toward the liberal democratic order's shared values makes state neutrality (and liberty) in other contexts possible, the principle of *free* education only in *public* schools trumps individual rights that the principle otherwise might be thought to infringe, absent a "less restrictive" way to implement that compelling principle.³⁶

In two early twentieth century rulings, the Supreme Court addressed both the breadth of States' power to assure families'

public schools."); N.D. CONST. art. VIII, § 1 ("[T]he legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children . . . and free from sectarian control."); S.D. CONST. art. VIII, § 1 ("The stability of a republican form of government depending on the morality and intelligence of the people, it shall be the duty of the Legislature to establish and maintain a general and uniform system of public schools wherein tuition shall be without charge, and equally open to all."); TEX. CONST. art. XII, § 1 ("A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.").

36. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court came close to adopting this proposition, prioritizing Wisconsin's interest in requiring all children to receive a primary education over parents' First Amendment and due process rights to religious free exercise and control of their children's education. *See id.* at 211, 227, 229 (identifying state's power to require "universal education" as among state "interests of the highest order and . . . not otherwise served [that] can overbalance legitimate claims to the free exercise of religion," citing Thomas Jefferson's view that "education prepares individuals to be self-reliant and self-sufficient participants in society" and "is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence"); *see id.* at 234, 236 (White, J., concurring) (relying on *Brown's* description of public education's importance to validate Wisconsin's overweening interest, superseding parents' free exercise rights, in "prepar[ing] children] for the lifestyle that they may later choose" and for "option[s] other than the life they have led in the past"). To be sure, *Yoder* involved a challenge to state-mandated K-12 education of *some sort*, not to mandated *public* education, but the state interest that made education sufficiently compelling to trump the constitutional rights at issue was the inculcation of the liberal democratic values the Court associated with Jefferson and *Brown* to which all public, but not all private, schools are committed.

uptake of public schooling and, conversely, the alternatives to public schooling that must be available to individual families.³⁷ Both cases invalidated state laws pursuing the “enough people” principle not only by requiring all children to attend school and making only *public* schools free but also by forbidding parents to enroll their children in religious schools or schools focused on the culture of a nation against which the United States had recently been at war.³⁸ The Court invalidated those laws as inconsistent with parents’ fundamental substantive due process right to control their children’s education.³⁹ Carefully read, however, the less restrictive alternative those decisions oblige states to adopt is to allow families to *supplement* compulsory public schooling with sectarian schooling of their choice. The Court has never formally ruled that states may not forbid parents entirely to *supplant* public with private education by compelling all children to attend public schools for some period of time.⁴⁰

That issue has never arisen because all states offer families another, still less restrictive, alternative, by letting parents who conscientiously object to public schools to substitute private or home schools.⁴¹ That statutory privilege has long come with two conditions, however. First, private schools in many states must satisfy state regulations setting, for example, mandatory subjects and hours of

37. *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

38. *See Pierce*, 268 U.S. at 534 (citing *Meyer*).

39. *Id.*

40. *See* James S. Liebman, *Voice, Not Choice*, 101 YALE L.J. 259, 304 (1991) [hereinafter Liebman, *Voice, Not Choice*] (interpreting Supreme Court’s cases to invalidate laws forbidding parochial and German schools to operate, but not forbidding states to require students to attend public schools for part of the time, as long as doing so did not prevent students from accessing private schools at other times).

41. *See, e.g., Home Instruction*, N.Y. ST. EDUC. DEP’T, <http://www.nysed.gov/nonpublic-schools/home-instruction> [<https://perma.cc/Q6LB-29P9>] (“Parents of, or persons in parental relation to, compulsory school age children have the legal right to instruct their children at home.”); *Alaska State Regulations of Private and Home Schools*, U.S. DEP’T OF EDUC. (2013), <https://www2.ed.gov/about/inits/ed/non-public-education/regulation-map/alaska.html> [<https://perma.cc/QH5P-MZGX>] (“The Alaska home school statute states that compulsory attendance is met ‘if a child is being educated in the child’s home by a parent or legal guardian.’”).

instruction.⁴² Such regulations range from somewhat demanding in some states to quite minimal in others.⁴³ These restrictions, however, are themselves limited by the First Amendment Free Exercise Clause as the Court now interprets it to forbid states from burdening individuals' sincere religious practice pursuant to a policy that is "not neutral" in regard to religious beliefs.⁴⁴ That interpretation seemingly bars state regulations requiring private schools to expose students to concepts or principles to which the private schools' operators and patrons object on religious and content-based grounds—for example, Darwinian evolution or that all people are created equal. Second, analogously to conscientious objectors to military service who surrender any right to public pay for their alternative public service, parents choosing private schools have long been required to surrender their state constitutional right to "free education."⁴⁵

For decades, many states structured this less restrictive alternative to allow parents to opt out of fully subsidized public

42. See U.S. DEPT OF EDUC. OFF OF INNOVATION AND IMPROVEMENT & OFF. OF NON-PUB. EDUC., STATE REGULATION OF PRIVATE SCHOOLS (2009) (collecting states' statutory requirements governing operation of private schools).

43. *Id.*; see also *infra* note 291 and accompanying text (detailing, classification system dividing state statutes into four categories based on how substantially they regulate homeschools).

44. See *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407, 2433–34 (2022) (announcing non-neutral burden standard and applying it to invalidate dismissal of high school coach whose on-field Christian prayers following football games violated school district policy); *Carson v. Makin*, 142 S. Ct. 1987, 2008 (2022) (Breyer, J., dissenting) (criticizing Court's ruling forbidding limits on public funding of schools that "completely intertwine" academic and religious education); Kamenetz, *supra* note 21 (quoted *supra* note 22); Brian M. Rosenthal & Eliza Shapiro, *New State Rules Offer Road Map for Regulating Private Hasidic Schools*, N.Y. TIMES (Sept. 13, 2022), <https://www.nytimes.com/2022/09/13/nyregion/new-york-rules-yeshivas.html> (on file with the *Columbia Human Rights Law Review*) (describing Hasidic Jewish religious schools' fervent objections on religious-free-exercise grounds to newly adopted New York state rules requiring that "private schools . . . prove they are teaching English, math and other basic subjects" at risk of losing public funding); Eliza Shapiro & Brian M. Rosenthal, *In Hasidic Enclaves, Failing Private Schools Flush With Public Money*, N.Y. TIMES (Sept. 11, 2022), <https://www.nytimes.com/2022/09/11/nyregion/hasidic-yeshivas-schools-new-york.html> (on file with the *Columbia Human Rights Law Review*) (documenting public funding of religious schools providing so little instruction in English, math, and science that nearly 100% of their students fail to demonstrate proficiency in those subjects on state tests).

45. See state provisions quoted *supra* note 35 (limiting states' constitutional obligation to provide and students' rights to receive "free" education to instruction provided in publicly operated schools).

schools into both private nonsectarian and private religious schools, while providing limited public funding (say, for transportation) only to non-sectarian schools and barring all public funding for religious schools.⁴⁶ More recently, the Supreme Court has ruled that the Free Exercise Clause bars states from withholding funding from religious schools that they provide to other non-public schools.⁴⁷ In so doing, however, the Court has repeatedly said that states constitutionally may provide no or minimal funding to private schools as long as they do not distinguish among private schools based on their religious affiliation.⁴⁸

The logic for allowing states to regulate, while also withholding any or full funding from, private schools—again, analogous to the logic behind the government’s limitations on conscientious objectors’ alternatives to mandatory military service—is the “enough people” principle. The states and the nation need to keep the number of people who choose the private option from obviating the compellingly important public goods that the default public option achieves. The analogy between compulsory education and compulsory military service grows even closer when one considers the military’s motivation for promoting, and Congress’s for adopting, the nation’s first truly national and universal draft around the time of World War I (just as states were adopting compulsory education laws). That motivation was not that too few men were volunteering to staff the armed forces—in fact, enough were volunteering.⁴⁹ Instead, the motivation was to assure the cohesion and survival of the democratic, liberty-conferring polity by committing “enough,” meaning nearly *all*, of the nation’s (male) people to the principle of service together across lines of religious, geographic, ethnic, and economic difference,

46. See *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2258 (2020) (overturning laws adopted by multiple states early in the twentieth century barring public funding of sectarian schools).

47. See decisions cited *supra* note 44.

48. See *Carson v. Makin*, 142 S. Ct. 1987, 1989–2000 (2022) (quoting *Espinoza*, 140 S. Ct. at 2252) (“A State need not subsidize private education . . . [b]ut once a State decides to do so, it cannot disqualify some private schools solely because they are religious.”).

49. See CHRIS CAPOZZOLA, *UNCLE SAM WANTS YOU: WORLD WAR I AND THE MAKING OF THE MODERN AMERICAN CITIZEN* 21–54 (2008) (discussing selective service’s embodiment of the national culture of voluntarism); ELIOT A. COHEN, *CITIZENS AND SOLDIERS: THE DILEMMAS OF MILITARY SERVICE* 82–85 (1985) (discussing use of selective service to demonstrate and preserve full citizenry’s commitment to the war effort).

notwithstanding its infringement of their freedom of movement and liberty to choose their own occupations and associates.⁵⁰

The disposition in favor of the public values that free public schools impart helps explain why, notwithstanding myriad religious, independent, and home school options and decades of agitation in favor of voucher alternatives,⁵¹ U.S. families with children in school enrolled 90% percent or more of them in public schools from 1890 to 1944, during most of the 1970s, and from 2008 to 2019 with the exception of 2016.⁵² That ratio has fallen below 89% for a sustained period only once, from 1945 to 1968—bottoming out at 86% in 1958–1959 at the height of massive resistance to racially desegregated public schooling.⁵³ From 1895 to 2017, the raw number

50. See COHEN, *supra* note 49, at 82–85 (noting that universal male enrollment in the military draft in both World Wars was a response not to insufficient volunteers—there were more than enough—but to the principle of a universal responsibility to prepare and commit a *nation* for war); see also CAPOZZOLA, *supra* note 49, at 21–54 (discussing ways selective service “reflected the state’s power at its most extreme by demanding that its citizens die for it”); JOHN WHITECLAY CHAMBERS II, *TO RAISE AN ARMY: THE DRAFT COMES TO MODERN AMERICA* 59, 93–95 (discussing competing motivations for conscription including a liberal political theory exemplified by the idea “[w]here the whole population participates in the rights, privileges, and immunities of a free people, they must share equally so in its burdens”).

51. See, e.g., JOHN CHUBB & TERRY MOE, *POLITICS, MARKETS AND AMERICA’S SCHOOLS* (1990) (advocating broadscale use of choice programs to broaden individuals’ access to non-public schools); Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* 124–44 (Robert A. Solo ed., 1955) (proposing voucher programs to limit state control over elementary and secondary education).

52. The data underlying the statistics described in the text accompanying this footnote and footnotes 53, 54, and 56–59 are from three sources: CRISTOBAL DE BRAY ET AL., U.S. DEPT OF EDUC., *DIGEST OF EDUCATION STATISTICS*, 2019, at 44 (55th ed. 2021), <https://nces.ed.gov/pubs2021/2021009.pdf> [<https://perma.cc/2EHR-28QZ>] (all data from 1993 to 2018 and estimates for total number of school students, 2019–2021); THOMAS D. SNYDER, U.S. DEPT OF EDUC., *120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT* 34–37 (1993), https://nces.ed.gov/pubs93/93_442.pdf [<https://perma.cc/Q6R3-RABB>] (all data from 1879 through 1992); U.S. DEPT OF EDUC., *DIGEST OF EDUCATION STATISTICS, 2022 TABLES AND FIGURES*, Table 203.10, https://nces.ed.gov/programs/digest/d22/tables/dt22_203.10.asp?current=yes [<https://perma.cc/67J8-7W6M>] (enrollment in public elementary and secondary schools, including 2019–2021 data).

53. Sources cited *supra* note 52. These figures, based on annual snapshots, understate family participation in public education given that many of the approximately 10% of the nation’s school children in private schools at a given moment spend some time in public schools or have siblings who do so.

of children in public schools rose every year with the exception of the eleven years between 1934 and 1944 (when the Great Depression and World War II depressed birthrates and led youth to leave school for work and military service⁵⁴), in 1965 when some southern public school districts shut down in order to avoid desegregation,⁵⁵ and between 1971 and 1984, the “Baby Bust” years.⁵⁶

Starting in 2011, however, something happened. In the succeeding ten years, the percentage of school students in *public* schools dropped every year but one, amassing the largest ten-year drop in nearly seventy years and the largest single-year drop—of 2.8 percentage points between 2019 and 2020—in 125 years.⁵⁷ Since 2017, overall public school enrollment has dropped 2.6 percentage points, with 2019-20 again registering the largest single-year decline since statistics were first collected in 1879 with the exception of two years during World War II.⁵⁸ Preliminary data suggest that neither the percentage of school students in public schools nor the total number of public school students recovered much in 2021–22 when schools reopened nationwide after the worst of the pandemic.⁵⁹ Especially worrisome for public education, some of its largest enrollment declines have been among Black and middle-class families who previously had been among public schools’ most loyal constituents.⁶⁰

For reasons just given, this Article takes as a given the constitutionality of free education provided only in public schools,

54. Sources cited *supra* note 52.

55. See, e.g., *Griffin v. School Bd.*, 377 U.S. 218 (1964).

56. Sources cited *supra* note 52; see *The Impact of the Baby Boom Echo on U.S. Public School Enrollments*, NAT’L CTR. EDUC. STAT. (Oct. 1997), <https://nces.ed.gov/pubs98/web/98039.asp> [<https://perma.cc/L6KC-ZXRV>] Following “Baby Boom” years (1946–1964), birthrate, then the number of school-aged children, declined dramatically in the 1970s and 1980s, which became known as the “Baby Bust” years. *Id.*

57. Sources cited *supra* note 52. The percentage of school children in public schools rose between 2015 and 2016.

58. Sources cited *supra* note 52. Since 1879, the percentage-point decline in the proportion of school children in public schools has declined more than the 2020 drop (-2.5 points) only in 1941 (-2.9 points) and 1943 (-3.7 points). *Id.*

59. See sources cited *supra* note 52 (projecting 2021-to-2022 gains of less than 0.2 percentage points in the proportion of school aged children in public school and of less than 0.2 percentage points in public school enrollment); *infra* notes 250–257 and accompanying text (documenting continuing enrollment losses during 2021-2022 in many large urban public school districts).

60. See *infra* notes 296–305, 322, 352–357 and accompanying text.

given its compellingly important and structural contributions to the preservation of our democracy.⁶¹ The different question this Article addresses is what structural changes public education systems need to make in order to assure that family moves triggered by the pandemic and other concerns among people otherwise disposed toward public education—along with moves driven by some parents’ objections to exposing children to the principles of liberal democracy—do not draw “enough people” away from public schools to keep the schools from serving that compellingly important socially cohesive purpose?

In addressing this question, we do not argue that states should—though they constitutionally could⁶²—require all students to attend public schools for some portion of their childhood years. Instead, we challenge public education systems to fulfill their end of the constitutional bargain by providing the public goods of public schooling in ways that—together with compulsory education laws and full subsidization only of public schools—attract “enough” of the nation’s children to assure that public schools can achieve their compelling, structural public goals. Doing so, we argue, requires public-school systems to stop conflating the democratic public goods that justify their near-monopoly on public funding with governance committed to bureaucratic uniformity.

To be sure, bureaucratic uniformity initially served the goal of preparing the children of millions of immigrants from abroad, of Black families moving North from the segregated South, and of other families moving from rural to urban settings for jobs on Fordist production lines and in newly forming municipal bureaucracies, including school systems.⁶³ But today’s diversified economy, a vast

61. See *supra* notes 5–20, 31–36 and accompanying text. In a recent op-ed, education writer Anya Kamenetz argues that, “[i]f we lose public education, flawed as it is, the foundations of our democracy will slip. Not only the shared knowledge base but also the skills of citizenship itself: communication, empathy and compromise across differences.” Kamenetz, *supra* note 21. Our fear is that we *will* lose this crucial foundation of our democracy if we allow public education to remain “flawed as it is.” *Id.*

62. See *supra* note 40 and accompanying text.

63. See, e.g., DIANE RAVITCH, *THE GREAT SCHOOL WARS* 161–80, 241–50 (1974) (chronicling New York City’s public school system’s evolution into a “vast, underfinanced, bureaucratic social-work agency, expected to take on single-handedly the responsibilities which had formerly been discharged by family, community, and employer,” including responsibility for “socializ[ing] and absorb[ing]” immigrant populations); sources cited *infra* notes 90–92.

expansion along racial, ethnic, gender, cultural, and economic lines of whose definition of preferred futures count, and a more sophisticated understanding of child development create a fundamental need—and fervent family and student demand—for schools that differentiate instruction by student and school.⁶⁴ Today, bureaucratic uniformity drives families with no *conscientious* objection to the liberal democratic values promoted by public education but real doubts about its ability to advance their children’s development *away* from public schools. Our task here is to consider how public schools can enable families and their children to join with educators in diversifying instruction to students, rather than forcing young people into uniform instructional modalities that don’t match their needs and aspirations.

This task, we argue, is not a matter of pedagogical policy. Instead, it is a matter of governance, democracy, law, and equality. Differentiation of need requires differentiation of solutions, which cannot be achieved by finding and faithfully implementing the “one right” curriculum or other educational policy for all children, or even, say, for all third graders—the forte of bureaucratic governance. What the Supreme Court said in *Rodriguez* in explaining its refusal to interpret the Equal Protection Clause to oblige it, bureaucratically, to make educational policy once for all schools, students, and time applies to educational bureaucracies themselves:

[T]his case . . . involves the most persistent and difficult questions of educational policy . . . [requiring] informed judgments made at the state and local levels . . . [on] a myriad of ‘intractable economic, social, and even philosophical problems.’ The very complexity of the problems . . . suggests that ‘there will be more than one constitutionally permissible method of solving them,’ On even the most basic questions in this area the scholars and educational experts are divided. . . . The ultimate wisdom as to these and related problems of education is not likely to be divined for all time In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial

64. See, e.g., Joel I. Klein et al., COUNCIL FOR. REL. U.S. EDUCATION REFORM AND NATIONAL SECURITY INDEPENDENT TASK FORCE REP. NO. 68 41–43 (2012) (discussing mismatch between the jobs for which public schools currently prepare U.S. students and the jobs that are available).

solutions to educational problems and to keeping abreast of ever-changing conditions.⁶⁵

The task, then, is to find new models of governance and participatory democracy that are grounded in continued research and experimentation, which in turn generate partial solutions attuned to variable conditions, and broaden and improve solutions based on what's learned.⁶⁶ The governance questions we ask, therefore, are: How can state and local officials and educators make informed initial judgments as to context-specific policy portfolios and their implementation? How can they evolve and improve the content and implementation of policies through continued research and experimentation—i.e., through careful observation of what initial experience shows? Because the most relevant experiences, especially of inequity in service delivery and outcomes, are those of students, families, and communities, the questions of democracy we ask are: How can state and local officials and educators join with students, families, and communities to adopt and adapt inevitably partial solutions to a myriad of ever-changing economic, social, and moral conditions? And how can those actors hold each other accountable for the rigor and results of their research and experimentation?

These questions are legal, because if law and lawyers are not part of how we retool public school systems' governance and engagement with their constituents, those systems' default to a misbegotten bureaucratic search for the "one, *uniform*, right policy" will continue to drive away public schools' core constituencies and keep those schools from serving their compelling public purpose. The questions are legal, as well, because of what they imply about the meaning of the equality principle the Supreme Court declared in *Brown* and has struggled to clarify since. Fundamental to bureaucracy—and to much of constitutional jurisprudence developed during public bureaucracy's heyday in the twentieth century—is the

65. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 58 (1973) (citations omitted).

66. *See, e.g.*, James S. Liebman, *Perpetual Evolution: A Schools-Focused Public Law Litigation Model for Our Day*, 117 COLUM. L. REV. 2005, 2017–18, 2038–41 (2006) [hereinafter, Liebman, *Perpetual Evolution*] (reconceptualizing states' obligations in regard to public education as a "duty of responsible administration" requiring ongoing exploration of existence and means of diminishing outcome disparities among different groups and outcome deficiencies vis-à-vis states' own proficiency standards).

requirement of likes treated alike.⁶⁷ Fundamental to that syllogism, however—but not so much to existing constitutional law—is the requirement that unlikes *not* be treated alike.⁶⁸ Uniformity misguidedly pursued under the guise of the bureaucratic “likes treated alike” principle also offends equality principles.⁶⁹

Illustrating the importance of rethinking democracy, governance, equality, and law in the public education context—and reorienting all those spheres away from uniformity and toward differentiation—is the perversity of one thing on which people of all political persuasions currently seem to *agree* about public education. Over the last several decades, both its defenders and detractors have defined public education, roughly, as education provided *to* students and families who passively follow public rules telling them where and when to send their children to be educated, what their children need from school, and how that service will be provided.⁷⁰ Conversely, politically active observers have tended to define *nonpublic* forms of education as ones chosen or broadly influenced *by* students and families, who, for example, actively select among public, private, parochial, and home schools based on personal preferences as to education’s where, when, what, and how.⁷¹ Charter schools have cemented these dispositions. Both public education’s defenders and detractors often conceptualize charter schools as “private,” notwithstanding the schools’ public authorization, funding, and regulation, because they enhance family choice as to what education

67. See, e.g., RUDI VOLTI, AN INTRODUCTION TO THE SOCIOLOGY OF WORK AND OCCUPATIONS 59–70 (2d. ed. 2012) (identifying bureaucracy’s key principles, including that likes be treated alike); David A. Strauss, *Must Like Cases Be Treated Alike?* (Univ. of Chicago Pub. Law & Legal Theory Working Paper, Working Paper No. 24, 2002) (describing and criticizing law’s focus on likes being treated alike).

68. See, e.g., Liebman, *Perpetual Evolution*, *supra* note 66, at 2008 (noting that logical adjunct to requirement of treating likes alike is the requirement to treat unlikes differently); Strauss, *supra* note 67, at 9 (quoted *infra* note 533).

69. Liebman, *Perpetual Evolution*, *supra* note 66, at 2008.

70. See, e.g., *infra* notes 119–120 and accompanying text (describing association of public education with bureaucratic control among observers with diverse political perspectives).

71. See, e.g., David Osborne, *‘Privatization’ Doesn’t Make Charter Schools Bad*, WASH. POST. (June 19, 2019), <https://www.washingtonpost.com/outlook/2019/06/19/privatization-doesnt-make-charter-schools-bad-its-what-makes-them-great/> [<https://perma.cc/25US-PRHL>] (associating charter, as well as private, schools with family choice).

is best for children, in the process disrupting the association of *public* with *uniform* schools.⁷²

Associating “public” education with uniformity and family passivity and associating only “private” education with diversification and family agency is perverse, we argue, given fundamental connections between “public” and “democratic” education, between democracy and families’ exercise of agency over their children’s education, and between truly equal treatment and differentiation to meet diverse needs. Making it perversely inequitable is that most middle-class parents already exercise a good bit of influence over their children’s public education. They do this (among other ways) through their choices among neighborhoods and the schools in them, their quiet interventions in their children’s assignment to particular teachers and classes, topics taught and books read in those classes, their influence over who teaches in and leads schools, and generally by putting principals and teachers in fear of getting crosswise with them.⁷³ As a result, the public education paradigm of enforced family passivity in the face of uniform rules and practices applies with full force only to schools in which students by and large are not white or middle class. We argue that public education can save itself only by

72. See, e.g., Peter Greene, *Charter Schools Are Not Public Schools*, FORBES (Feb. 2, 2019), <https://www.forbes.com/sites/petergreene/2019/02/02/charter-schools-are-not-public-schools/?sh=2d4680786832> (on file with the *Columbia Human Rights Law Review*) (explaining the position from a progressive viewpoint); Diane Ravitch, *Reader: There Is No Such Thing as a “Public Charter School”*, DIANE RAVITCH (Dec. 26, 2021), <https://dianeravitch.net/2021/12/26/reader-there-is-nosuch-thing-as-a-public-charter-school/> [<https://perma.cc/2CUY-7LUM>] (same: explaining that “[charter schools] aren’t run by school boards who are elected by, and therefore under the control of and accountable to voting taxpayers”); J.D. Tuccille, *Private Schools Provide Educational Choice—For Now*, REASON (Jan. 23, 2019), <https://reason.com/2019/01/23/viva-private-schools/> [<https://perma.cc/MA3U-XBFN>] (explaining the position from a conservative libertarian viewpoint; noting that charter schools are privately run, but tax-supported); Jacob Fischler, *Understanding Charter Schools Vs. Public Schools*, U.S. NEWS (Oct. 19, 2021), <https://www.usnews.com/education/k12/articles/understanding-charter-schools-vs-public-schools> (on file with the *Columbia Human Rights Law Review*) (noting confusions between charter and private schools).

73. See Elizabeth Chu et al., *Rise to Thrive: A Vision for a Transformed and Equitable Public Education System*, CTR. PUB. RES. & LEADERSHIP 3 (Mar. 23, 2021), https://cprl.law.columbia.edu/sites/default/files/content/Publications/CPRL_RISE%20to%20Thrive_FINAL.pdf [<https://perma.cc/Q24D-3SHB>] [hereinafter, Chu et al., *Rise to Thrive*]; *infra* note 107 and accompanying text.

finding ways to spread real instructional influence across all families. Choice is one way to do that. Voice and loyalty are others.⁷⁴

We argue, finally, that three years of pandemic-disrupted public education make this an opportune time—perhaps public education’s last real opportunity—to change its governance, democratic practices, and understanding of equality in the radical ways that are needed. On many observers’ accounts—both right and left—public education’s confusion of uniformity with the common good has left public education in crisis at least since the 1990s.⁷⁵ But the pandemic has more widely exposed these failings, triggering family departures in search of more suitable settings for their kids.⁷⁶ The pandemic also, however, impelled educators and school systems to depart from uniformity in search of ways, quite literally, to meet children and families where they actually are, not where they’re assumed or expected to be.⁷⁷ It led them, as well, to realize how much students and families can bring to the differentiated design and improvement of effective modes of learning, especially when brought into real partnership with teachers, with strong instructional materials to glue that trio together.⁷⁸

The pandemic leaves public education at a crossing of roads to accelerating decay or revitalizing change. If public-school systems recur to their rigidly uniform ways, their leakage of constituents may leave them without “enough people” to secure their own futures and diffuse liberal democratic principles sufficiently to secure the republic’s future. With every departing student, public schools’ per-capita public funding will shrink; with every departing family, their

74. See ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY (1970) (discussing uses governments and organizations can make of choice (exit), democratic participation (voice), and commitment over time (loyalty) to make themselves responsive to citizens’ and consumers’ needs).

75. See sources cited *infra* note 119.

76. See *infra* notes 238–284 and accompanying text.

77. See *infra* notes 358–387 and accompanying text.

78. See, e.g., Elizabeth Chu et al., *Fundamental 4: Pandemic Learning Reveals the Value of High-Quality Instructional Materials to Educator-Family-Student Partnerships*, CTR. PUB. RES. & LEADERSHIP 8–15 (July 27, 2021), https://cpri.law.columbia.edu/sites/default/files/content/Publications/CPRL_2021_Fundamental%204_Final.pdf [<https://perma.cc/L5DM-GVVU>] [hereinafter, Chu et al., *Fundamental 4*] (providing evidence associating positive impact of family and student collaboration with teachers on each student’s instructional plan with effective student learning during the pandemic).

tax base will erode.⁷⁹ As public subsidies for education wither, while voucher, education savings account, and tax credit laws, and private home, pod, micro, and prep school, and sectarian options proliferate,⁸⁰ families will segregate themselves along racial, economic, religious, and ideological lines far beyond the extent that fully and uniquely subsidized public schools have previously permitted. As the mindset becomes “every family for itself” and “every child at the mercy of her or his parents’ resources and aspirational horizons,” the social stability and coherence around the shared values of liberal democracy that undergird public education’s status as a compelling public interest will evaporate. If, instead, public-school systems seize this moment of disruption and innovation to involve families fully in co-creating better ways to educate their children, revitalization of public education and the bonds that hold the nation together is possible.

Initial signs are not promising. Fatigue, temporary infusions of public dollars, and the hardwiring of legal and contractual uniformities that the pandemic’s emergent conditions only temporarily short circuited are lulling districts back to the status quo ante.⁸¹ Contentious debates over vaccination, face masks, and critical race theory are the (dis)order of the day⁸²—giving the lie to the comforts the old normal and new dollars may seem to offer, while aggravating doubts about public schools as founts of tolerance, respect, and good citizenship. Meanwhile, the enormity and difficulty of public schools’ socially cohering function increases by the minute. If public education is to promote coherence around liberal democratic values and graduates’ ability to choose their own life plans, how can it put itself more fully under the influence of parents who want to seal off their children from students, values, aspirations, and facts about the nation’s past and present that they reject? We argue that the only way out of this paradox of diverse liberal democracy is to build trust in public-school systems by working with their families and

79. See *supra* notes 57–59; *infra* notes 242–270 and accompanying text.

80. See *infra* notes 285–348 and accompanying text.

81. See Frederick M. Hess, *Education After the Pandemic*, AM. ENTERPRISE INST. (2022), [aei.org/articles/education-after-the-pandemic/](https://perma.cc/LQT2-T7L6) [https://perma.cc/LQT2-T7L6] (discussing changes in schools post-Covid-19).

82. Sarah Mervosh & Giulia Heyward, *The School Culture Wars: ‘You Have Brought Division to Us’*, N.Y. TIMES (Nov. 8, 2021), <https://www.nytimes.com/2021/08/18/us/schools-covid-critical-race-theory-masks-gender.html> (on file with the *Columbia Human Rights Law Review*) (describing school systems’ struggles to maintain order during battles over masks, vaccinations, critical race theory, and gender identity).

communities to evolve local settlements to these questions that overcome intractable disagreement, instantiate the capacity for respect, tolerance, and good citizenship across lines of difference, and leave public schools and super-majorities of children attending them to their task of keeping a diverse nation whole. The best place to start building that trust, is not in divisive school board meetings and instead in school-family partnerships focused on what matters most—each child’s daily development.⁸³

In making our case for the latter of the two possible futures, Part I describes our vision of public democratic education that effectively serves the most compelling of public purposes and how public-school systems’ bureaucratic governance and interest-group politics have left them woefully short of that ideal and insulated from what students, families, communities, and the systems’ own frontline staff can tell them about how to differentiate services effectively. Part II turns to families’ and educators’ experiences during the pandemic and what they reveal about public education’s perils and possibilities. Part III provides three illustrative designs of governance and political structures that, by engaging families as key participants in defining and meeting their children’s needs and those of other children positioned to share their children’s fate, can revitalize public democratic education and our democracy itself.⁸⁴

83. See *infra* notes 446–481 and accompanying text.

84. By “democracy,” we mean liberal democracy: collective self-rule in service of and limited by individuals’ agency to decide for themselves, with government neutrality among, the beliefs, traits, and life plans that define and motivate individuals’ private endeavors. As we define it, democracy (1) is *directly participatory* and *deliberative*, affording all interested parties, not just elected or interest-group representatives, opportunities to learn from and change their minds in the process of reflecting on their own, others’ and public values and needs; (2) extends to *implementing* and *revising*, not just choosing, public policies; and (3) in school contexts where collective learning occurs, thrives best when racial and economic integration of students ties the fate of each child to that of *all* others. See Liebman, *Desegregating Politics*, *supra* note 13, at 1616–17.

By “families” and “parents” we mean people within deeply connective social configurations—“nuclear,” biological, or otherwise—that include children. By “school systems,” we mean public-school districts, charter management organizations, independent charter schools, and other publicly financed and operated PK-12 educational entities, as well as state and federal departments of education. By the nation’s “public school system,” we mean all of the above collectively.

I. Public Democratic Education Past and Present

A. Public Democratic Education Gained

Starting earlier but accelerating in the late nineteenth century, the United States imagined and implemented a system of education with some of the public and democratic attributes described above.⁸⁵ It was public in multiple senses. It was defined by state constitutions as a central state obligation—as the only positive right guaranteed in every state.⁸⁶ It was adopted, regulated, operated, and financed by public officials.⁸⁷ It was compulsory for all individuals who did not formally opt out in favor of private schools—and in most years, roughly 90% of students in fact enrolled in public schools.⁸⁸ Departing from past practice and that in most other nations at the time, it extended the state’s substitution of public for private parental care and control of children to seven or so hours a day, 180 days a year, and thirteen years, extending beyond the usual primary to middle and high school grades and eventually backwards to kindergarten then pre-K.⁸⁹ It took on the massively important task of acclimating and assimilating into the polity and its liberal democratic values the children of millions of immigrants pouring into the country around the turn of the twentieth century.⁹⁰ It effectively prepared

85. See *id.* at 1463; JOHANN NEEM, *DEMOCRACY’S SCHOOLS: THE RISE OF PUBLIC EDUCATION IN AMERICA* 1–2 (2017).

86. See Liebman, *Desegregating Politics*, *supra* note 13, at 1494 n.156; *supra* note 35 and accompanying text.

87. See *State Education Practices*, NAT’L CTR. FOR EDUC. STATS., table 1.2, https://nces.ed.gov/programs/statereform/tab1_2-2020.asp [<https://perma.cc/E2WU-QRMH>] (Jan. 8, 2018) (citing *50-State Comparison: Free and Compulsory School Age Requirements*, EDUC. COMM’N OF THE STATES, <https://www.ecs.org/50-state-comparison-free-and-compulsory-school-age-requirements/> [<https://perma.cc/P9XR-5F4C>]) (collecting states’ compulsory school attendance laws and minimum and maximum age limits for constitutionally required free public education).

88. See *id.*; *supra* notes 52–56 and accompanying text.

89. *State Education Practices*, *supra* note 87, at table 5.14, https://nces.ed.gov/programs/statereform/tab5_14.asp [<https://perma.cc/K4NJ-42GK>] (citing *50-State Comparison: Instructional Time Policies*, EDUC. COMM’N OF THE STATES, <https://www.ecs.org/50-state-comparison-instructional-time-policies/> [<https://perma.cc/DE88-SR23>]) (compiling states’ requirements for number of days and hours of public instruction).

90. See Liebman, *Desegregating Politics*, *supra* note 13, at 1498 n.172 (quoting *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring) (noting that “public schooling has long served as society’s ‘most pervasive means’ of assimilating citizens to a set of shared values

those and other children for jobs powering the nation's vast industrialization, for service in a citizen military with exponentially expanding international responsibilities, and for positions crucial to a burgeoning public sector, including public schools' own teachers.⁹¹ It did more than perhaps any other concentrated set of public actions to transform the nation into the most prosperous and powerful one in the world.⁹²

The education system further exhibited its public nature by creating state departments of education that in most cases were each state's largest public agency measured by budget and workforce.⁹³ Imitating Fordist governance mechanisms in the factories that public schools readied young adults to staff, these public agencies became a model for large public bureaucracies.⁹⁴ Through them, what was presumed to be a relatively low-skilled (mainly female) workforce followed efficient routines at each point in a multi-stage production line, infusing students as they passed through each grade with

and a 'common destiny'); Peter H. Schuck, *Immigration at the Turn of the New Century*, 33 CASE W. RES. J. INT'L L. 1 (2001) (discussing public education's longstanding role in assimilating immigrant populations).

91. Paul Beston, *When High Schools Shaped America's Destiny*, CITY JOURNAL: THE SHAPE OF WORK TO COME (2017), <https://www.city-journal.org/html/when-high-schools-shaped-americas-destiny-15254.html> [<https://perma.cc/J6HA-P445>] (identifying U.S.'s enrollment of students on mass scale at turn of twentieth century as central to its success preparing generations of young adults for effective participation in the nation's emerging industrial economy).

92. See, e.g., Kamenetz, *supra* note 21 ("It is hard to imagine how we could have established our industrial and scientific might, welcomed newcomers from all over the world, knit our democracy back together after the Civil War and become a wealthy nation with high living standards without [public] schoolhouses."); David Marchese, *Thomas Piketty Thinks America Is Primed for Wealth Redistribution*, N.Y. TIMES (Apr. 1, 2022), <https://www.nytimes.com/interactive/2022/04/03/magazine/thomas-piketty-interview.html> (on file with the *Columbia Human Rights Law Review*) ("[T]he . . . U.S. economy was so productive . . . in the middle of the 20th century . . . because of a huge educational advance over Europe. In the 1950s, you have 90 percent of the young generation going to high school in the U.S [compared to] 20 to 30 percent in Germany, France, Britain, Japan.") (quoting French Economist Thomas Piketty); sources cited *infra* note 109 (describing ways public education has promoted a productive industrial workforce).

93. See, e.g., *Appropriations by Agency*, OKLA. POL'Y INST., <https://okpolicy.org/resources/online-budget-guide/expenditures/state-government-expenditures/appropriations-by-agency/> [<https://perma.cc/D95P-QV5J>] (showing Oklahoma education department receives 39% of state's agency appropriations, while Medicaid (next highest expenditure) receives 13%).

94. See sources cited *supra* note 63.

standardized, age-appropriate units of knowledge and skill under a rigid division of labor and supervision from (mainly male) principals.⁹⁵ School systems likewise came to embody the interest-group politics extolled by mid-twentieth century political scientists through which individuals unable or ill-disposed to exercise vigilance over school board elections and school systems' daily administration could rely on interest groups like public teachers unions to negotiate policy with and monitor implementation by state education departments and school districts in support of their constituents' collective interests.⁹⁶

Education was democratic in that school systems were largely a function of local governments, and were run in principle by popularly and locally elected school boards and their appointees.⁹⁷ Supporting and projecting democratic ideals, states subsidized public-school systems in ways that made it economically attractive for nearly all families to enroll their children in them, so that—with the glaring exception of many systems' racial apartheid—schools roughly mirrored each locality's overall population ethnically, religiously, and economically.⁹⁸ Public education systems thus modeled in their form, while imparting through their curricula, social and cultural norms that—with that same hypocritical exception—idealized the nation's

95. See Jal Mehta, *From Bureaucracy to Profession: Remaking the Education Sector for the 21st Century*, 83 HARV. ED. REV. 463, 476–77 (2013) (linking development of teachers unions to Progressive Era hierarchy of male university scholars generating knowledge for mostly male school administrators, who in turn dictated and supervised mostly female teacher workforce).

96. See, e.g., ROBERT DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY 76, 155–62, 253–55 (1961); Andrew S. McFarland, *Interest Groups and Theories of Power in America*, 17 BRITISH J. POL. SCI. 129, 147 (1987); sources cited in James S. Liebman et al., *Governance of Steel and Kryptonite Politics in Contemporary Public Education Reform*, 69 FLA. L. REV. 365, 377 n.41, 381–85 (2017) [hereinafter Liebman et al., *Kryptonite Politics*].

97. See *50-State Comparison—K-12 Governance: School Boards*, EDUC. COMM'N OF THE STATES (Nov. 2020), <https://reports.ecs.org/comparisons/k-12-governance-school-boards-02> [<https://perma.cc/54X2-6DGU>].

98. See, e.g., NEEM, *supra* note 85, at 173 (2017) (discussing many Americans' desire to have public schools that mirror the cultural makeup of the community); Charles Benson & Kevin O'Halloran, *The Economic History of School Finance in the United States*, 4 ILL. J. EDUC. FIN. 495, 502–05 (1987) (chronicling increasing public-school funding in twentieth century and importance of achieving broad popular support for schools among local populations).

democratic history and practices and its integration of multiple populations.⁹⁹

At its best, education in schools operated by public actors has been democratic in an even deeper way, given those actors' direct dialogic interaction with millions of families every day. To a much greater extent than episodic service transactions with, for example, postal, motor-vehicle, and public-benefits offices that characterize most individuals' interactions with public officials, individuals' historical interactions with teachers, principals, school superintendents, and school boards have often instantiated many of the defining features of "strong democracy."¹⁰⁰ Those interactions have been *popular*, as educators and schools board members responded to parental and community preferences and voices; *participatory*, as parents took responsibility for assuring their children attended school, met behavioral expectations, and did their school work, while even broader swaths of the public influenced policy through school board elections and meetings; and *deliberative*, as the interactions generated actions and policies different from and potentially more effective than those any of the interacting parties would have generated on their own.¹⁰¹

Moreover, unlike the usual forms of representative and interest-group politics, public education has turned a vast array of workaday interactions—well beyond those associated with occasional elections, debates, and interest-group mobilization—into political exercises through which the public influences government policy and action. The table below, borrowing from political scientist Jeffrey

99. See, e.g., Amy Lueck, *How High Schools Shaped American Cities*, ATLANTIC (Oct. 23, 2018), <https://www.theatlantic.com/technology/archive/2018/10/how-high-schools-shaped-american-cities/573616/> [https://perma.cc/4YNU-P8WF] (tracing the history of public schools in the United States).

100. See, e.g., BENJAMIN BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 118 (2004) (discussing the interaction between liberalism, democratic society, and our public institutions); Jeffrey R. Henig et al., *Parent and Community Engagement in New York City and the Sustainability Challenge of Urban Education Reform*, in EDUCATION REFORM IN NEW YORK CITY 35 (Jennifer A. O'Day et al. eds., 2011) ("Strong democracy calls for robust public engagement and meaningful participation of community members.").

101. See, e.g., HENRIKE KNAPPE, DOING DEMOCRACY DIFFERENTLY: POLITICAL PRACTICES AND TRANSNATIONAL CIVIL SOCIETY 45–76 (2017) (identifying popular control, participation, deliberation, and equal access or influence as features characteristic of democracy); *supra* note 84 (defining as key features of democracy that political processes are popular, participatory, and deliberative).

Henig and coauthors, identifies the range of political interactions through which school systems engage politically with their publics and is divided into two categories, one focusing on making or implementing policy, the other on whether that policy formulation is individual (e.g., focused on a particular student) or collective.¹⁰² Although in most contexts, people's occasional engagement in Cell D/E activity (collective policy making) dominates interactions between them and government officials that are understood to be "political," the operation of public-school systems has long given parents and communities more frequent and authentic opportunities to influence public policy through actions in the other three cells.¹⁰³ Democratizing education in these additional ways enables a broader range of ideas on both policy and implementation to emerge from the people most affected, better sustaining and improving policies over time¹⁰⁴ and enhancing public accountability and good will.¹⁰⁵ The gaping exception called out above must be noted again here.¹⁰⁶ As Professor Henig and coauthors note when referring to New York City's schools,

African American and Hispanic parents had long argued that while their voices might be heard, education officials were not responding to them in the same way they responded to white parents. If democracy means having a say in the decisions that affect family and community, it was missing for [those] parents.¹⁰⁷

102. Henig et al., *supra* note 100, at 37–38 fig. 2-1.

103. *Id.* Examples include parents' complaints about late school buses and questions about children's homework assignments (Cell A); parent-teacher conferences to develop or revise a student's reading program (Cell B); and PTA's support for arts programming (Cell C).

104. *Id.* at 52.

105. *See, e.g., id.*; Liebman et al., *Kryptonite Politics*, *supra* note 96, at 379, 416 (explaining how mechanisms enabling constituencies of public agencies to participate on an ongoing basis in making, implementing, and improving decisions enhance public accountability and trust).

106. *See supra* notes 98–99 and accompanying text.

107. *See* Henig et al., *supra* note 100, at 35.

Types of Political Interaction over Public Education		
	Implementation	Policy Formulation
Individualistic (student & family)	A. Information and choice	B. Child-centered collaboration
Collective (school & district)	C. Supportive partnerships	D. Interest-group advocacy ----- E. Accountability through mayoral or school board election

In all these ways—and with that deeply confounding exception—public education historically acted as a powerfully unifying and equalizing counterforce to the nation’s deeply centrifugal and destabilizing individualism, libertarianism, localism, and ethnic diversity. Additionally, public education has helped free youth from the aspirational limits imposed by their parents’ economic and social statuses and religious and cultural strictures, endowing newly emerging adults with a broad capacity to define and pursue their own values and life plans.¹⁰⁸ In the process of creating enough of a common culture and enough respect or at least tolerance for difference to hold an exceptionally diverse nation together and broaden children’s horizons beyond those imagined by their parents

108. See *Wisconsin v. Yoder*, 406 U.S. 205, 238, 240 (1972) (White, J., concurring) (quoted *supra* note 36); Liebman, *Desegregating Politics*, *supra* note 13, at 1639–40 (noting public schools’ function of enabling students to escape limits otherwise imposed on their career and life choices by family and neighborhood economic and social conditions).

and neighbors, public education succeeded during most of the twentieth century in preparing adults for productive, fulfilling, civically responsible lives; triggering individuals' and organization's inventiveness and rising quality of life; building the nation's mighty middle class; and assuring the nation's economic growth and political and social stability.¹⁰⁹

Eventually, even if incompletely, the public education system confronted its egregiously hypocritical and undemocratic stain of racial segregation.¹¹⁰ As the Supreme Court ruled in *Brown*, by the education system's own logic, racially "separate but equal" is a contradiction in terms and an abomination from the standpoint of the system's public-ness (its commitment to serving the whole and linking everyone's fate to everyone else's) and its democracy (its commitment to preparing everyone to make their voice heard and assuring every voice counts equally).¹¹¹ In principle, if not anywhere near fully in practice, the system has come to accept that to be both public and democratic, extending its positive impact to all individuals and preserving its fundamental contribution to the nation's coherence, it must be more integrated along racial, economic, and social lines.¹¹² For that reason, the revitalization of public education must include steps not only to restore and improve our education systems' prior public and democratic features and their positive impact on individuals and the nation but also to fill the fissure in that construct from the system's history of racism and educational segregation.

109. See, e.g., Pamela Barnhouse Walters & Richard Rubinson, *Educational Output and Economic Expansion in the United States, 1890-1969: A Production Function Analysis*, 48 AM. SOC. REV., 480, 490 (1983) (describing public education's vital role in post-World War II middle class expansion and economic growth); Bradley Hardy & Dave Marcotte, *Education and the Dynamics of Middle Class Status*, BROOKINGS INST. 1 (June 2020) (discussing the important role public education plays in upward mobility); Liebman, *Desegregating Politics*, *supra* note 13, at 1547–48 (describing the ways in which humans are equal through their capacity to choose their own good); sources cited *supra* notes 90–92 (discussing public schools' inculcation of a common set of values among the American citizenry and creation of a productive industrial workforce).

110. See Liebman, *Desegregating Politics*, *supra* note 13, at 1465–72 (describing extent of mandated school desegregation in its heyday in 1970s and early 1980s and how much racial segregation it left untouched).

111. *Brown v. Board of Educ.*, 347 U.S. 483, 493–95 (1954).

112. See Liebman, *Desegregating Politics*, *supra* note 13, at 1614 (discussing ways desegregation facilitates a properly functioning democratic process).

B. Public Democratic Education Lost

In fact, the central question posed here is whether *two* gaps in the education system's realization of its own public and democratic principles, and those gaps' interaction, are so fundamental to the system's past logic and success that they cannot realistically be filled. As noted, the first gap is the segregation that has largely excluded the nation's Black, Native American, Latinx and increasingly its economically disadvantaged populations from the education system's integrative, unifying, and equalizing forces. The second gap is the system's private-school exemption, which allows the nation's most parochial and culturally contrarian populations to opt out of those centripetal forces. The question, then, awful as it is to consider, is whether the nation's public education system succeeded as well as it did pre-*Brown* only *because of* its devil's bargain to separate and exclude students of color as the price of the degree of economic, cultural, and social integration it otherwise achieved—a bargain it no longer can countenance. And, if so, is the system's decline ever since a paradoxical result of the Supreme Court's and Congress's necessary steps to ban—without, however, requiring action sufficient to eradicate the system's structural muscle memory of—racial exclusion? Underscoring this question are a concerted public campaign encouraging, and recent Supreme Court decisions validating, dissenters' exodus from “government schools” via publicly funded private school options.¹¹³

Greatly hindering a solution to both problems are two more recent features of public-education systems: their (1) bureaucratic governance structure and (2) allied interest-group approach to political engagement and accountability.¹¹⁴ These arrangements pursue operational efficiency and organization accountability through

113. See, e.g., Brief for Prosperity Foundation and Yes. Every Kid Amici Curiae Supporting Petitioner, *Carson v. Makin*, No. 20-1088 (2022); Brief for The National Legal Foundation et al. as Amici Curiae Supporting Petitioner, *Carson v. Makin*, No. 20-1088 (2022) (arguing that the Supreme Court should reject the use of the “pervasively sectarian” status of non-public schools as a basis for denying them public funding); *supra* notes 21–24 and accompanying text (discussing the growing movement against public education on the grounds of freedom of speech and religion).

114. See 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, 193 (2003) (describing a “poisonous mixture of bureaucratization and political and racial polarization of American public education”).

mandated compliance with inflexible, centrally ordained rules, sharp divisions of labor, and hierarchical supervisory structures.¹¹⁵ They assign the development and enforcement of those uniform policies to central experts and organized interest groups that do not fully represent students and families and prioritize only a small number of group members' shared material interests over more individualized needs and preferences.¹¹⁶ And they prioritize quantifiable instructional, behavioral, and procedural inputs over the diverse learning realities and outcomes of each "whole student."¹¹⁷ Increasingly since the 1970s, the limits of central experts' and formal interest groups' insight into—and their uniform solutions for—myriad local problems have kept bureaucratic governance in state departments of education, large city school districts, and many schools themselves from responding effectively to diverse and changing conditions at the system, school, and student levels.¹¹⁸

By the 1990s, strong critiques of public-school bureaucracies under the influence of adult interests arose on both the right and the left.¹¹⁹ Both critiques focused on the inefficiency, inflexibility, and joylessness of bureaucratically operated schools, districts, and state education departments, while identifying villains and victims differently—the right focusing on the stultifying effect of collective bargaining agreements; the left targeting benighted "educrats" and their programmatic, accountability, and disciplinary edicts.¹²⁰

A parallel critique of school systems, emanating mainly from parents and communities, focused on the ill effects of competition among a variety of interested adults, including curriculum providers and advocates of various pedagogical theories and programs, as well as teachers unions.¹²¹ Although each with a separate agenda, all

115. See Liebman et al., *Kryptonite Politics*, *supra* note 96, at 373–76 (describing impact of bureaucratic mindsets and practices on governance of school systems and schools).

116. See *id.* at 384.

117. See *id.* at 382.

118. See *id.* at 381.

119. See, e.g., CHUBB & MOE, *supra* note 51, at 10–11 (conservative critique); THEODORE SIZER, *HORACE'S COMPROMISE: THE DILEMMA OF THE AMERICAN HIGH SCHOOL* 24 (4th ed, 2004) (progressive critique).

120. See, e.g., CHUBB & MOE, *supra* note 51, at 10–11 (conservative critique); SIZER, *supra* note 119, at 254 (progressive critique).

121. See Liebman et al., *Kryptonite Politics*, *supra* note 96, at 379–81; Johnny Ray Youngblood, Under Mayor's Control, the Schoolkids Are Doing All Right, N.Y. DAILY NEWS (Feb. 8, 2009), <http://www.nydailynews.com/opinion/>

competing interests (1) coalesce only around the need for higher aggregate schools budgets rigidly split up among contending providers; (2) prioritize inputs to education over students' educational outcomes; (3) align especially poorly with the underrepresented interests of Black, Latinx, and economically disadvantaged students; (4) coalesce haphazardly around pragmatic compromises and divvied up school budgets with little in the way of coherent educational objectives; and (5) leave central bureaucrats and deciders uninformed about the social capital and academic needs of and the impact of their policy compromises on frontline professionals, students, families, and communities.¹²²

This dynamic is partly a result of the peculiar history of teachers unions, the public education sector's most influential interest group. Although the first national teachers associations formed about the same time as the American Medical and American Bar Associations, with the same goal of professionalizing and increasing the status of their members,¹²³ the teachers unions that came to dominate public education in the 1930s took a different path.¹²⁴ The gendered and oppressive nature of the division of labor in

mayor-control-schoolkidsarticle-1.390709 (criticizing interest group influence over the New York City Board of Education in the 1990s and before, describing the school system then as “tantamount to a jobs program” and a “massive, consolidated hiring hall”). For an example of the influence of curriculum providers on New York City public schools, see Dana Goldstein, *In the Fight Over How to Teach Reading, This Guru Makes a Major Retreat*, N.Y. TIMES (May 22, 2022), <https://www.nytimes.com/2022/05/22/us/reading-teaching-curriculum-phonics.html> (on file with the *Columbia Human Rights Law Review*).

122. See Liebman et al., *Kryptonite Politics*, *supra* note 96, at 383–85 (identifying adverse influence of interest-group politics on policymaking in and for public schools).

123. See *About Us*, AM. BAR ASS'N, https://www.americanbar.org/about_the_aba/ [<https://perma.cc/X45B-SQWC>] (discussing ABA's founding in 1878); *AMA History*, AM. MED. ASS'N, <https://www.ama-assn.org/about/ama-history> [<https://perma.cc/4RM6-764N>] (discussing AMA's founding in 1847); *National Education Association*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/social-sciences-and-law/education/education-terms-and-concepts/national-education-association> [<https://perma.cc/X5YF-PVDS>] (discussing NEA's founding in 1857); Campbell F. Scribner, *Beyond the Metropolis: The Forgotten History of Small-Town Teacher's Unions*, 121 AM. J. EDU. 531, 536 (2015) (describing early non-urban teaching unions' quest for greater professionalism).

124. See, e.g., Mehta, *supra* note 95, at 474–476 (contrasting teachers' status as “street-level” bureaucrats in top-down hierarchies with other

public education, exacerbated by the widely different training that university-based education schools provided district and school managers versus teachers, drove teachers away from a professional association model and towards a trade union model.¹²⁵ The latter model focused primarily on pay, promotion, pensions, hours, working conditions, and due process, rather than on assuring the quality of professional practice and the ethical and intellectual richness of professional environments.¹²⁶ These emphases persisted after teachers unions' relationships with public-school systems gradually evolved from deep antagonism to a cooperative interest-group symbiosis.¹²⁷

Limiting teachers unions' focus to building solidarity around material interests shared more or less equally by all members helped unions survive, gain influence, and avoid fragmentation.¹²⁸ Those successes undoubtedly improved teachers' collective work conditions and living standards. But the prioritization of teachers' collective interests over the much more variable requirements of rich and effective professional practice in daily interactions with diverse students and communities came at a cost. Rigidly formalized rules governing hours, divisions of labor, instructional methodology and materials, and salary scales of teachers faced with widely divergent conditions and students has left many student academic and social-

professionals' autonomy and prestige achieved through credentialing and rigorous practice standards).

125. See, e.g., *id.* at 476–77 (“Influenced by prevailing Taylorist models of business organization . . . mostly male superintendents were empowered as CEOs to lead school systems, while mostly female teachers were expected to follow the rules and programs their superintendents prescribed.”).

126. See RICHARD W. HURD, PROFESSIONAL WORKERS, UNIONS, AND ASSOCIATIONS 1, 14 (2000) shankerinstitute.org/sites/default/files/professionals_unionsaffiliationsfinal.pdf (on file with the *Columbia Human Rights Law Review*).

127. *Id.* at 377; see generally TERRY MOE, SPECIAL INTEREST: TEACHER'S UNIONS AND AMERICA'S PUBLIC SCHOOLS 6 (2011) (cataloguing ways teachers unions exert influence over school systems through collective bargaining and political alliances); Scribner, *supra* note 123, at 533 (describing accretion of state and federal influence over local school systems).

128. See MOE, *supra* note 127, at 79–80 (describing ways teachers unions use collective bargaining to gain political influence over school systems); Liebman et al., *Kryptonite Politics*, *supra* note 96, at 452–53 (describing 75% of staff agreeing to a waiver in their collective bargaining agreement for collaboration with community stakeholders); Mehta, *supra* note 95 at 479 (“In this [industrial union] model, representatives of teachers . . . advocated for increased pay and protected workers from capricious decisions of administrators.”).

emotional needs out of consideration and beyond educators' ability to address.¹²⁹ Although it is likely, if hard to prove, that improvements in teachers' collective work conditions and living standards correlate with students' learning success on average, teachers' shared interests are not the only ones that determine individual teachers' effectiveness and fulfilment as professionals, much less how well their mostly non-"average" students learn.¹³⁰ And the solidarity of teachers union members around a small number of inputs in which all teachers have a substantial interest gives those shared interests much greater influence in interest-group bargaining than needs and desires of the weak, if any, interest groups that form around students' and families' more variegated and transient interests. The tyranny of shared interests also can work against the aspirations of the many actual and prospective teachers who link their well-being to the quality of professional action and collaboration available to them in schools as they attend to students' and families' idiosyncratic needs.¹³¹ Even, therefore, if union-achieved gains as to the limited number of material interests that all teachers share translate into

129. See MOE, *supra* note 127, at 19–20 (explaining how union structure primarily incentivizes advocacy for better teacher working conditions, pay, and benefits); Liebman et al., *Kryptonite Politics*, *supra* note 96, at 383–86 (giving examples of lack of alignment between policies and practices driven by teachers' shared interests and students' diverse needs); Arthur E. Wise & Michael D. Usdan, *The Political Future of the Teaching Profession*, EDUC. WEEK (Mar. 12, 2013), <https://www.edweek.org/teaching-learning/opinion-the-political-future-of-the-teaching-profession/2013/03> [<https://perma.cc/2WBX-Z8Q2>] (“The NEA and the AFT have failed to use their advocacy, collective bargaining, political and financial strength to advance their ideas about professional accountability.”).

130. See, e.g., *Strategic Design of Teacher Compensation*, EDUC. RES. STRATEGIES 5, 9, 12 (Oct. 2012), <https://files.eric.ed.gov/fulltext/ED541221.pdf> [<https://perma.cc/PX3Q-3Y2K>] (noting teachers unions' over-emphasis on salary and under-emphasis on opportunities for professional growth, leadership, recognition, and collaborative planning with other professionals, hampering efforts to “attract and retain high-performing teachers” for schools “with high concentrations of poverty or special needs students”); Kristal Kuykendall, *Teachers Want More Online, On-Demand, and Targeted Professional Learning Opportunities, New Survey Shows*, THE JOURNAL (Feb. 15, 2022), <https://thejournal.com/articles/2022/02/15/teachers-want-more-flexible-and-more-targeted-professional-learning-opportunities.aspx> [<https://perma.cc/8WF6-MJUL>] (reporting national survey finding that only 20% of K–12 educators are “strongly satisfied” with current professional learning options, with 91% seeking professional learning targeted to each teacher's unique needs, rather than those of the profession at large).

131. Liebman et al., *Kryptonite Politics*, *supra* note 96, at 381–86, 413.

student learning gains on average, the question remains whether attention to a wider array of students' and teachers' individual needs and aspirations might generate even more, more widely spread, gains for both constituencies.

The combination of public-school systems' nested state, district, and school bureaucracies, the large portion of their budgets devoted to teacher salaries, and politics driven largely by trade unions with a singular focus on members' small set of shared material interests have aligned those systems around the single imperative of increasing aggregate budgets.¹³² Indeed, given unions' own interests in larger numbers of dues-paying members (including paraprofessionals and in some cases retired teachers with voting rights), their interest in increasing *aggregate* public revenue can work against the goals of increasing *per-pupil* revenue and entry-level *teachers'* salaries.¹³³ In this last-mentioned regard, the disposition common to professional associations toward fewer, better prepared, more highly paid, and more autonomous professionals contrasts with public bureaucracies driven by interests aiming mainly for a larger aggregate pie to slice up among growing constituencies.¹³⁴

Aggravating these problems is the tendency of interest-group politics to privilege stakeholder groups with more tightly connected and organized interests, like teachers and other school employees, over those with more diffuse interests,¹³⁵ and of public education systems to work hard to tamp down the access and influence of the latter interests.¹³⁶ Both tendencies diminish the influence of students

132. See, e.g., Zachary Jason, *The Battle Over Charter Schools*, HARV. EDU. MAG. (Summer 2017), <https://www.gse.harvard.edu/news/ed/17/05/battle-over-charter-schools> [<https://perma.cc/TBZ3-TQBZ>] (identifying as unions' and allies' main arguments against public charter schools that they diminish aggregate funding for traditional public schools).

133. See, e.g., Daniel DiSalvo, *Teachers Want Higher Pay, but Pensions Swallow Up the Money*, MANHATTAN INST. (Oct. 1, 2019), <https://www.manhattan-institute.org/teachers-want-higher-pay-but-pensions-swallow-up-the-money> [<https://perma.cc/8WQC-95L6>] (describing tendency of teachers unions' insistence on uniform pension rights to drive down teacher salaries).

134. See sources cited *supra* notes 124–125.

135. See Liebman et al., *Kryptonite Politics*, *supra* note 96, at 381–82.

136. See STEVE FARKAS & ANN DUFFETT, FARKAS DUFFETT RESEARCH GROUP & KETTERING FOUNDATION, *MAZE OF MISTRUST: PARENTS, EDUCATORS, AND THE CHALLENGE OF PUBLIC ENGAGEMENT* (1993) (identifying the steps school districts often take to reduce public intervention in the making of school policy).

and families, especially those of color and without means in urban school districts.¹³⁷

C. Public Democratic Education Reconsidered

Over the last several decades, a number of systemic governance reforms have tried, without success, to transform education systems by shoring up their public democratic nature or by privatizing them out of existence.

1. Privatization

On the privatizing side, a number of states have adopted voucher programs, education savings accounts, and tax credits for privately funded K-12 education, and the Supreme Court has green-lighted a wide range of public funding of parochial schools.¹³⁸ Several states and cities also have long operated small, means-tested voucher programs enabling low-income families to use public dollars to pay for private and parochial education, and some recently have raised the income limit to encompass most or all families while capping the amounts provided at levels well below the state's current per-pupil expenditures on public-school students.¹³⁹ For decades, two related factors have limited the growth of such arrangements. First, only states, not localities, have the legal and financial capacity to create and fund extensive privatization programs.¹⁴⁰ Additionally, large

137. See Liebman et al., *Kryptonite Politics*, *supra* note 96, at 381–82 (“[T]here is no reason to expect union members’ collective interests to coincide with those of the schools’ main clientele: children. On the contrary, shared employee interests are almost always too narrow to drive educational policy that is effective, especially for poor and minority students and families.”).

138. See *supra* notes 23, 46 and accompanying text.

139. Michael R. Ford & Frederik O. Andersson, *Taking Stock and Moving Forward: Lessons From Two-Plus Decades of Research on the Milwaukee Parental Choice Program*, 13 J. SCH. CHOICE 158, 159–162 (2019); *Ohio’s Income-Based Scholarship Program*, ED CHOICE, <https://www.edchoice.org/school-choice/programs/ohio-income-based-scholarship-program/> [<https://perma.cc/WFA4-U9ZG>]; Molly S. Stewart & Jodi S. Moon, *Understanding How School Vouchers Are Funded: Summary of Funding for Ohio’s Cleveland Scholarship and EdChoice Programs*, CTR. EVAL. & EDUC. POL’Y 2 (2016).

140. See, e.g., Liebman, *Voice, Not Choice*, *supra* note 40, at 287 (explaining how financial constraints have kept voucher systems from operating as classic markets); see also Ruth Conniff, *Private School Voucher Costs Rising*, URBAN MILWAUKEE (May 7, 2021), <https://urbanmilwaukee.com/2021/05/07/private-school-voucher-costs-rising/> [<https://perma.cc/T6BT-AX9T>] (describing the rising

swaths of the public have been satisfied enough with their fully funded public schools that they have not willingly supported voucher programs that might require them to supplement public with private funds for their children's education, increase taxes to support equal funding for disadvantaged families, or encourage urban families of color to use their vouchers to gain access to high-performing suburban public schools. Until recently, that is, states and districts interested in voucher programs have faced resistance from devotees of their existing public schools and the fiscally daunting task of funding both private and public systems.¹⁴¹

Starting before and accelerating since the pandemic, however, these trends have shifted as more families forsake public for private schools and more states adopt and expand state-funded education savings accounts and other alternatives to public schools.¹⁴² Most

cost to local governments of Wisconsin's universal voucher program); *How Are School Choice Programs Funded?*, EDCHOICE, <https://www.edchoice.org/school-choice/faqs/how-are-school-choice-programs-funded/> [https://perma.cc/CU2F-AMCW] (comparing voucher, tax deduction, and education savings account mechanisms for funding school choice).

141. See, e.g., Sam Dillon, *For Parents Seeking a Choice, Charter Schools Prove More Popular Than Vouchers*, N.Y. TIMES (July 13, 2005), <https://www.nytimes.com/2005/07/13/education/for-parents-seeking-a-choice-charter-schools-prove-more-popular.html> (on file with the *Columbia Human Rights Law Review*) (stating that the majority of American parents oppose free market in education, preferring charter schools' effort to reform without destroying public education); David Leonhardt, *School Vouchers Aren't Working, but Choice Is*, N.Y. TIMES (May 2, 2017), <https://www.nytimes.com/2017/05/02/opinion/school-vouchers-charters-betsy-devos.html> (on file with the *Columbia Human Rights Law Review*) (contrasting the relative efficacy of charter schools relative to voucher programs); William A. Fischel, *Why Voters Veto Vouchers: Public Schools and Community Specific Social Capital*, 7 ECON. GOVERNANCE, 109, 111 (2006) ("Vouchers would disperse students from their communities and thereby reduce localized social capital.").

142. See, e.g., Evie Blad, *How the Pandemic Helped Fuel the Private School Choice Movement*, EDUC. WEEK (July 2, 2021), <https://www.edweek.org/policy-politics/how-the-pandemic-helped-fuel-the-private-school-choice-movement/2021/07> [https://perma.cc/NF79-RWK6] (discussing twenty states' enactment or expansion of private school voucher or educational savings account programs in early 2021); Ana Ceballos & Colleen Wright, *DeSantis Signs \$200 Million Expansion in Florida for Private School Vouchers*, THE BUZZ ON FLA. POL. (May 11, 2021), <https://www.tampabay.com/news/florida-politics/2021/05/11/desantis-signs-200-million-expansion-in-florida-for-private-school-vouchers/> [https://perma.cc/G65N-F8F4] (reporting on recent voucher program expansion in Florida); Joe Dana, *Arizona School Voucher Law Passes Despite No Accountability Measures*, 12NEWS (June 27, 2022), <https://www.12news.com/article/news/local/>

recently, Arizona, known for its exceptionally low per-capita funding of public schools,¹⁴³ became the first state to offer all families who choose to educate their children at home or in non-public schools debit cards funded at rates approaching what the state spends annually on public-school students.¹⁴⁴ If steps like these spread, they pose a substantial threat to the financial viability of public education and to public schools' ability to attract "enough families" to assure the broad dispersion of liberal democratic values that is needed to enable the country to cohere.

arizona/arizona-school-voucher-law-passes-with-no-accountability-measures/75-a4f59777-e11d-407c-86d1-b3aab8c54e63 [https://perma.cc/ST9C-FLHH] (describing Arizona's passage of legislation giving families opting for private schools a debit card worth about \$7,000/child for educational expenses with few controls on how the money is spent); Erin Einhorn, *Betsy DeVos Fought for Private School Vouchers for Decades. She Might Finally Get Her Wish*, NBC NEWS (Mar. 26, 2022), <https://www.nbcnews.com/news/education/betsy-devos-private-school-vouchers-michigan-rena21384> [https://perma.cc/YQT7-9LV7] ("[In 2021], 22 states launched or expanded voucher programs. [In 2022], 74 bills have been introduced."). *But cf.* Jeff Bryant, *The Bipartisan Rejection of 'School Choice'*, PROGRESSIVE MAG. (June 15, 2022), <https://progressive.org/magazine/bipartisan-rejection-school-choice-bryant/> [https://perma.cc/53MZ-L86D] (highlighting eight Republican-dominated states' rejection of 2022 voucher proposals due to "pushback" from rural, small-town, and Protestant constituencies).

143. See Morgan Fischer, *Arizona Again Near Bottom of States for Per Pupil Spending, Census Says*, AZ MIRROR (May 23, 2022), <https://www.azmirror.com/2022/05/23/arizona-again-near-bottom-of-states-for-per-pupil-spending-census-says/> [https://perma.cc/GGF5-8FTJ] (comparing Arizona's \$8,795/student funding in 2020—forty-eighth highest among fifty states—to \$13,494 national average).

144. Dana, *supra* note 142; Valerie Strauss, *Ignoring Voters, Arizona Approves Nation's Largest School Voucher Scheme*, WASH. POST (June 30, 2022), <https://www.washingtonpost.com/education/2022/06/30/arizona-passes-nation-biggest-voucher-program/> (on file with the *Columbia Human Rights Law Review*). West Virginia recently adopted legislation offering public funding to cover the cost of private and homeschooling for all children, albeit at an amount (about \$4,600/year) well below the \$11,757 the state spends annually on public school students). See Sam Kirk, *How Much Does West Virginia Spend on Education*, 12WBOY (Apr. 27, 2022), <https://www.wboy.com/only-on-wboy-com/wboy-com-lists-and-rankings/how-much-does-west-virginia-spend-on-education/> [https://perma.cc/637P-JJ9Z] (reporting West Virginia's annual per capita spending on K-12 schools); *West Virginia Gov. Justice Signs School Vouchers Bill Into Law*, WCHS 8 EYEWITNESS NEWS (Mar. 29, 2021), <https://wchstv.com/news/local/west-virginia-gov-justice-signs-school-vouchers-bill-into-law> [https://perma.cc/HU5W-HD4A] ("West Virginia Gov. Jim Justice has signed a bill that provides funds for students who leave public schools for private education.").

Meanwhile, publicly chartered and funded schools have offered a somewhat more economically and politically viable alternative to traditional public schools. Charter schools are freer to innovate than district schools given exemptions from collective-bargaining requirements and geographic boundaries on students they may enroll (using lotteries when applicants exceed seats),¹⁴⁵ and greater flexibility over hiring, salaries, school hours, curricula, and programs.¹⁴⁶ In fact, the nation has two different sets of charter school laws, some aiming to increase parental choice for its own sake without concern for school quality, others designed to increase the range of high-quality schools available to underserved communities by enabling families to opt out of poorly performing district schools without opting out of public education as a whole. Charter schools in the former states tend to serve mostly white, suburban, and rural populations and underperform traditional public schools with comparable students on accepted academic measures.¹⁴⁷ Charter schools in the latter states mainly serve students of color from low-income households in cities and on average outperform traditional

145. See, e.g., Kimberly Austin et al., *Newark Enrolls: A Principled Approach to Public School Choice*, CTR. PUB. RES. & LEADERSHIP (Apr. 2018), https://cpri.law.columbia.edu/sites/default/files/content/newark_enrolls_report.pdf [<https://perma.cc/2WQY-ECB4>] (“Newark Enrolls allows families to rank up to eight schools. In the 2016-17 school year, 53% of all applicants received their first-choice school and 73% were matched with one of their top three schools.”).

146. See, e.g., Robin Lake & Bree Dusseault, *How 18 Top Charter School Networks Are Adapting to Online Education*, THE 74 (Apr. 7, 2020), <https://www.the74million.org/article/analysis-how-18-top-charter-school-networks-are-adapting-to-online-education-and-what-other-schools-can-learn-from-them/> [<https://perma.cc/JL3F-M9SR>] (describing charter schools’ more agile and successful response to the pandemic’s dislocations and opportunities for new instructional modalities compared to the response by nearby district schools); Greg Richmond, *Choice, Flexibility, Accountability Drive School Improvement*, EDUC. NEXT (Spring 2022), <https://www.educationnext.org/choice-flexibility-accountability-drive-school-improvement-what-explains-charter-success/> [<https://perma.cc/QXX2-RWQJ>] (“The combination of choice and flexibility provides charter schools with the incentive and the ability to implement practices that lead to better results”); studies cited *infra* notes 324–326 (documenting charter schools’ more flexible responses to pandemic disruptions and associated uptick in enrollment).

147. See Elaine Liu, *Solving the Puzzle of Charter Schools*, 2015 COLUM. BUS. L. REV. 273, 287, 318 (2015) (“Results indicate that charter schools in states that emphasize improving the outcomes of at-risk populations tend to do significantly better than charter schools in states that emphasize having greater parental and local community control in education.”).

public schools serving similar students.¹⁴⁸ The former states are more tolerant of for-profit charter schools, which have historically underperformed traditional public schools by the widest margins; the latter states usually bar or heavily regulate for-profit charter schools.¹⁴⁹ Both sets of schools tend to be racially segregated—the former because they serve families exercising choice in order to preserve cultural homogeneity, the latter because they are deliberately located in highly segregated Black, Latinx, and low-income neighborhoods with the poorest performing traditional public schools.¹⁵⁰

148. See *id.* at 318 (“Charter schools in nearly all (eighty-eight percent) of the gap-closing states outperform traditional public schools in terms of academic growth in both math and reading. The remaining outperform traditional public schools in only one subject (reading)”); see also John N. Friedman, *School Is for Social Mobility*, N.Y. TIMES (Sept. 1, 2022), <https://www.nytimes.com/2022/09/01/opinion/us-school-social-mobility.html> (on file with the *Columbia Human Rights Law Review*) (citing studies documenting certain charter schools’ development of strategies benefiting “some of society’s most disadvantaged students”). Uncommon Schools, which operate in three of the latter states—Massachusetts, New York, and New Jersey (see *id.* at 288)—exemplify some of these traits. Ninety-four percent of Uncommon students are Black or Hispanic; 83% are from low-income families. In each year from 2012 to 2020, Uncommon high school students’ average SAT scores exceeded (often substantially) the SAT’s 1550 college readiness benchmark, compared to 16% of Black, 23% of Hispanic, and 53% of white SAT test takers nationally in 2015. In 2020, 54% of Uncommon high school students took Advanced Placement (AP) courses, with 66% of its Black and 68% of its Hispanic students thereafter passing AP tests. By comparison, only 29% of Black and Latinx students in the small subset of traditional public schools that even offer AP courses took AP courses, and only 29% of those later passed AP tests. As of 2020, 51% of Uncommon graduates had completed college within five years of graduating high school, compared to the 35% national average, and 9% average for low-income students. Forty-two percent of Uncommon teachers identify as of color compared to 3% of teachers in Massachusetts, 18% in New Jersey, and 24% in New York State. *Uncommon|2021 Project Narrative*, UNCOMMON SCHOOLS 9–10, 18–19 <https://oese.ed.gov/files/2019/11/uncommonschsPN.pdf> [<https://perma.cc/BS44-8JFK>].

149. Compare Liu, *supra* note 147, at 314 (dividing states into two categories identified in text; noting which states allow for-profit charter schools), with *50-State Comparison: Charter School Policies*, EDUC. COMM’N OF THE STATES, <https://www.ecs.org/charter-school-policies-08> [<https://perma.cc/5BSV-FN9H>] (cataloguing state policies on for-profit charter schools).

150. See Halley Potter, *Holding Charter Schools Accountable for Segregation*, THE CENTURY FOUND. (July 12, 2018), <https://tcf.org/content/commentary/holding-charter-schools-accountable-segregation/?session=1> [<https://perma.cc/8HRG-SFT3>] (arguing that the academic success on average of the latter type of charter schools occurs *despite*—and would be enhanced if they

Given these differences, only the former states' charter schools belong on the privatization side of the reform ledger. These schools are intended mainly to offer a form of organized and publicly subsidized homeschooling as a safety valve for families seeking settings more attuned to parents' parochial values and less publicly oriented and culturally diverse than traditional public schools. As such, they accept no obligation to promote the liberal democratic values of tolerance for difference, social cohesion, and the broadening of young persons' choice horizons.

2. Reform

By contrast, we locate the latter states' charter school reforms on the public democratic side of the ledger. These schools seek to operate for the public benefit by relieving schools of bureaucratic constraints and proliferating innovative models more suited to the academic needs and wishes of economically disadvantaged families in areas with chronically failing traditional public options.¹⁵¹ At the same time, they promote and model the same liberal democratic values as other public schools.¹⁵² Regrettably, many of these charter schools lack the racial integration we define as an important feature of public democratic schools, though no more so than the traditional public schools from which they draw students.¹⁵³

moderated—their tendency toward racial segregation). For evidence suggesting that the academic weakness on average of the former type of charter schools might at least partly be a result of their prioritization of cultural homogeneity over academic achievement and their resulting sacrifice of the academic benefits of racial and cultural integration, see Liebman, *Desegregating Politics*, *supra* note 13, at 1621–22.

151. See Liu, *supra* note 147, at 273–74 (documenting better learning outcomes, on average, of charter schools in states with regulatory regimes using charter schools to close racial and economic achievement gaps).

152. See, e.g., Bryan Gill et. al, *Can Charter Schools Boost Civic Participation?*, 114 AM. POL. SCI. REV. 1386, 1386 (Nov. 2020) (noting some charter schools' focus on civic engagement).

153. See Halley Potter & Miriam Nunberg, *Scoring States on Charter School Integration*, THE CENTURY FOUND. (Apr. 4, 2019), <https://tcf.org/content/report/scoring-states-charter-school-integration/> [<https://perma.cc/7KUW-AQRG>] (contrasting charter schools' past failure to prioritize racial integration with recent trend toward greater diversity); U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104737, K-12 EDUCATION: STUDENT POPULATION HAS SIGNIFICANTLY DIVERSIFIED, BUT SCHOOLS REMAIN DIVIDED ALONG RACIAL, ETHNIC AND ECONOMIC LINES (2022) (documenting extreme racial segregation of U.S. public schools).

Teachers unions often oppose both categories of charter schools. This opposition is not surprising, given that charter schools usually are non-unionized.¹⁵⁴ Unions and other public education proponents also criticize charter options for their tendency to lower the *aggregate* budgets of traditional district schools by drawing students, and thus state-allocated per-pupil dollars, from those schools.¹⁵⁵ As we demonstrate below, however, charter schools can increase the *per-pupil* funding of district schools as a result of the former schools' ability to provide a more effective education to their own students at lower per-pupil cost.¹⁵⁶

Over the last decade, a number of urban school districts and states have pursued an interesting middle ground between charter and traditional public schools through legislation extending charter-like flexibility to district schools, while requiring them to serve all students from geographically defined attendance zones and participate in districts' collective bargaining agreements.¹⁵⁷ Called

154. See Arianna Prothero, *Where, and Why, Charter School Teachers Unionize*, EDUC. WEEK (Mar. 19, 2019), <https://www.edweek.org/policy-politics/why-and-where-charter-school-teachers-unionize/2019/03> [<https://perma.cc/5QWV-A9MA>] (“[The] vast majority of charter schools are not unionized.”).

155. Jason, *supra* note 132.

156. See *infra* notes 503–505 and accompanying text.

157. See James S. Liebman et al., *Texas Innovation Schools: A Pathway to Success for Autonomous Schools in Texas*, RAISE YOUR HAND TEXAS (2015), https://www.raiseyourhandtexas.org/wp-content/uploads/2015/09/Texas-Innovation-Schools_ResearchReport.pdf [<https://perma.cc/PC9L-5ELM>] (“State Innovation laws, like those in Colorado and Kentucky, that grant waivers from collective bargaining agreements where necessary to achieve the Four Freedoms, tend to maximize the effectiveness of scheduling autonomy.”); Tara Garcia Mathewson, *States Increasingly Extend Charter-Like Flexibility to District Schools*, THE HECHINGER REP. (Aug. 15, 2019), <https://hechingerreport.org/states-increasingly-extend-charter-like-flexibility-to-district-schools/> [<https://perma.cc/J6QZ-GU6K>] (“Massachusetts was one of the first states to extend the flexibilities charter schools enjoy to traditional public schools through an innovation law.”); *State Progress Toward Next Generation Learning*, EXCELINED (June 2019), <https://www.excelined.org/wp-content/uploads/2019/06/ExcelinEd.Innovation.NextGenerationLearning.NationalLandscape.Report.ExecutiveSummary.pdf> [<https://perma.cc/5MWB-EHUW>] (“Thirty three states and Washington, D.C., have established general innovation or pilot programs to explore next generation learning [in schools or districts afforded flexibilities] on par with those available to charter schools.”).

In regard to Camden and Indianapolis, see *infra* notes 162–165 and accompanying text. Cities with substantial numbers of innovation schools include Denver (see, e.g., *2019 Innovation Schools Annual Report*, COLO. DEP'T OF EDUC. 1–9 (Mar. 2019),

Pilot Schools in Boston,¹⁵⁸ Renaissance Schools in New Jersey,¹⁵⁹ Innovation Schools or Districts in Colorado, Indiana, Kentucky, Tennessee and Texas,¹⁶⁰ these schools, like the second category of charter schools, aim to expand options for students of color and from economically disadvantaged backgrounds whose traditional public schools have chronically struggled.¹⁶¹ Some of the largest concentrations of such schools are in Camden, New Jersey¹⁶² and

Innovation-Schools-Annual-Report.html [https://perma.cc/3R49-TKRM]), Memphis (see, e.g., Molly Osborne, *Lessons from an Innovation Zone in Memphis*, NO. CAR. CTR. FOR PUB. POL'Y RES. (July 14, 2017), https://nccppr.org/lessons-innovation-zone-memphis/ [https://perma.cc/U4VA-SX2Y]) and New York City (see, e.g., *New York City Small Schools of Choice Evaluation*, MDRC, https://www.mdrc.org/project/new-york-city-small-schools-choice-evaluation#overview [https://perma.cc/RV3G-9KG9]).

158. *What Is a Pilot School?*, BOSTON PUB. SCHLS., https://www.bostonpublicschools.org/Page/4682 [https://perma.cc/AWY3-N7JX].

159. See John Mooney, *Explainer: Getting Inside the Urban Hope Act—and ‘Renaissance Schools,’* NJ SPOTLIGHT NEWS (Sept. 30, 2014), https://www.njspotlightnews.org/2014/09/14-09-29-explainer-getting-inside-the-urban-hope-act-and-renaissance-schools/ [https://perma.cc/635Y-UVAN] (unlike “traditional charter schools,” Renaissance Schools have higher funding, incentives to build new facilities, and attendance zones tied to neighborhoods, and require local school board approval).

160. *Districts of Innovation*, KY. SCHL BDS ASS'N, https://www.ksba.org/0913DistrictsofInnovation.aspx [https://perma.cc/78T2-82R9]; Trina Pruitt, *What Is a District of Innovation (DOI)?*, GO PUBLIC, https://wegopublic.com/academics/district-of-innovation/ [https://perma.cc/GC8M-W6HV]; *Districts of Innovation*, TEX. EDUC. AGENCY, https://tea.texas.gov/texas-schools/district-initiatives/districts-of-innovation [https://perma.cc/VCH3-H9DR]; *Innovation Schools*, COL. DEPT OF EDUC. (Mar. 24, 2021), https://www.cde.state.co.us/choice/innovationschools [https://perma.cc/3WEF-5K9H]; *Innovation Network Schools*, MYIPS.ORG, https://myips.org/wp-content/uploads/2021/08/Innovation-Explained-SY-21-22_FINAL_External.pdf [https://perma.cc/39GB-TX5P].

161. See sources cited *supra* notes 158–160.

162. See, e.g., Vincent DeBlasio, *Study Shows Camden Schools Making Progress*, TAP INTO CAMDEN (July 9, 2019), https://www.tapinto.net/towns/camden/sections/education/articles/study-shows-camden-schools-making-progress [https://perma.cc/JU5A-Y28V] (Stanford University study “indicat[ing] that students at [Camden’s] renaissance networks surpassed their peers statewide in terms of annual growth” in English and math); Meg Oliver, “A Zip Code Does Not Determine Your Ability”: Educators Turn Failing New Jersey School Into Success Story, CBS NEWS (Sept. 16, 2021), https://www.cbsnews.com/news/camden-prep-new-jersey-success-story/ [https://perma.cc/P2YF-957H] (describing 2014–2019 increase of Camden students at grade level in math from 3 to 60%; in reading from 4 to 50%); David Osborne & Tressa Pankovitz, *In Camden, New Jersey Portfolio Schools, an Important School Board Election and Commitment to Continued Reform*, THE 74 (Jan. 21, 2020) https://www.the74million.org/article/

Indianapolis, Indiana¹⁶³ where they have academically outperformed traditional public schools and have been popular with families.¹⁶⁴

Quality-oriented charter and innovation schools are a growing feature¹⁶⁵ of a broader set of “portfolio” or “autonomy-for-accountability” reforms that arose around the turn of the current century.¹⁶⁶ For the first decade and a half of this century, these schools substantially improved measurable student outcomes in the large city school districts in which the reforms flourished. Those reforms were built in part on the accountability provisions of the No

osborne-pankovits-in-camden-n-j-portfolio-schools-an-important-school-board-election-and-a-commitment-to-continued-reform/ [https://perma.cc/VM9R-9A4C] (describing, with a focus on Camden, New Jersey, the impact of the Urban Hope Act, “which allowed the Newark, Trenton and Camden districts to partner with high-performing, nonprofit charter school operators to take over failing district schools without displacing students”).

163. See, e.g., Analisa Sorrells, *A New Recipe for a School Model: Innovation Network Schools in Indianapolis*, EDNC (Aug. 15, 2019), <https://www.ednc.org/a-new-recipe-for-a-school-model-innovation-network-schools-in-indianapolis/> [https://perma.cc/QS5A-F7AU] (Indianapolis Public School’s (IPS’s) Innovation Schools “can be charter schools or traditional public schools, but they are all granted charter-like flexibility, allowing them . . . to make decisions about all aspects of their school”). The Innovation Schools “are held accountable by IPS, and their tests scores, enrollment numbers, and other academic data are counted in the district’s metrics.” *Id.* Indiana University and Stanford University studies “point to promising initial results for the city’s charter schools and innovation network schools.” *Id.*

164. See *supra* notes 162–163.

165. In Camden, charter and Renaissance schools serve 55% of public students. Osborne & Pankovits, *supra* note 162. In Newark, Washington, and New Orleans charter schools serve, respectively, over 35%, nearly half, and nearly all public students. Patrick Wall, *As Applications Plunge, Newark Schools Face Threat of Lower Enrollment*, NJ SPOTLIGHT NEWS (July 14, 2021), <https://www.njspotlightnews.org/2021/07/newark-schools34-enrollment-drop-4000-students-traditional-charter/> [https://perma.cc/P2AC-FVMS]; D.C. OFFICE OF THE STATE SUPERINTENDENT OF EDUC., AUDIT AND VERIFICATION OF STUDENT ENROLLMENT FOR THE 2020-21 SCHOOL YEAR 4 (2021), https://osse.dc.gov/sites/default/files/dc/sites/osse/page_content/attachments/2020-21%20School%20Year%20Annual%20Enrollment%20Audit%20Report.pdf [https://perma.cc/2C9R-LGMW]; *NOLA by the Numbers*, TEACH NEW ORLEANS, <https://newschoolsforneworleans.org/data-resources/nola-by-the-numbers/> [https://perma.cc/ACK2-5NH8].

166. See, e.g., Liebman et al., *Kryptonite Politics*, *supra* note 96, at 368 (describing the role of charter schools in broader portfolio reforms during the first fifteen years of the current century).

Child Left Behind Act of 2002 (NCLB).¹⁶⁷ Those provisions for the first time required states and school districts receiving federal education funds to administer locally developed tests to measure and compare the average academic “proficiency” levels (i) of students in different districts and schools, and (ii) of categories of students by race, ethnicity, and economic, first-language, and ability status, and to take steps to improve districts and schools with academic outcome deficiencies and disparities among student groups.¹⁶⁸ Conjoining the charter school movement’s school autonomy impulse with the NCLB’s school accountability impulse, the portfolio movement offered district schools greater autonomy from bureaucratic control in return for being held accountable to improve student outcomes.¹⁶⁹ Although best known for their high-stakes accountability features, there is reason to believe that the most important contributor to these reforms’ academic successes were no-stakes uses of the diagnostic information generated by student assessments and qualitative school reviews to identify more and less effective instructional, curricular, programmatic, and developmental techniques for particular students, educators, and schools.¹⁷⁰ Among those successes were sharp improvements in student academic outcomes, graduation levels, and college attendance cutting across all populations but more pronounced among Black, Latinx, low-income, and special education students, causing achievement gaps to shrink.¹⁷¹

167. 20 U.S.C. ch. 28 §1001 et seq. (NCLB, as amended by 2015 Every Student Succeeds Act).

168. Andrew M.I. Lee, *What Is No Child Left Behind (NCLB)?*, UNDERSTOOD, <https://www.understood.org/articles/en/no-child-left-behind-nclb-what-you-need-to-know> [https://perma.cc/WN5U-TMTL].

169. See Liebman et al., *Kryptonite Politics*, *supra* note 96, at 388–89 (providing synopsis of portfolio school reforms); Liebman et al., *Mine the Gap: Using Racial Disparities to Expose and Eradicate Racism*, 30 S. CALIF. REV. L & SOC. CHANGE 1, 39 (2021) [hereinafter, Liebman et al., *Mine the Gap*] (similar).

170. See Liebman et al., *Kryptonite Politics*, *supra* note 96, at 389 (describing reform efforts to enable educators and school leaders to diagnose and to develop, monitor effectiveness of, and gradually improve solutions to instructional failure).

171. See *id.* at 391–92, 397–99, 434 (cataloguing improved student learning outcomes and racial and economic achievement gap closure associated with portfolio reforms); Liebman et al., *Mine the Gap*, *supra* note 169, at 43–59 (similar, with focus on improved learning outcomes of students in New York City relative to those in the rest of New York State and the nation, and gap closure between New York City’s students of color and white students).

Although advocates of the portfolio reforms offered a consistent and convincing negative case against bureaucratic governance, their affirmative case awkwardly braided two alternative governance models: managerialism and evolutionary learning.¹⁷² The former model proceeds from an idealized and, in our view, largely inaccurate understanding of the calculus that enables strong for-profit organizations to succeed and that managerialists believe public-sector organizations should emulate. According to this view of how for-profit firms work: (1) immediate profits are the goal; (2) some managers are better at generating those profits than others; (3) the factors driving managers' success are, however, obscure and cannot be identified *ex ante*; so, (4) effective firms must proceed *ex post* by promoting or firing people based on whether they exceed or miss mainly short-term sales, profit, or other motivational targets.¹⁷³ Analogously, managerialists argue: (1) school systems' goal is student learning measured by standardized tests; (2) the factors driving student learning are largely unknown; but (3) some schools and educators are intrinsically or instinctively better than others at fostering learning; so, (4) to assure success, school systems should promote or fire school leaders and educators based on whether their students on average exceed or miss motivational learning targets.¹⁷⁴

Proponents of evolutionary learning, the other governance model intertwined in the portfolio reforms, agree that transparent learning outcomes should drive public decision making.¹⁷⁵ But rejecting managerialism's assumption that successful teaching and learning are impenetrable black boxes that can be identified only evaluatively *ex post*, evolutionary learning seeks to empower,

172. See Liebman et al., *Kryptonite Politics*, *supra* note 96, at 432 (describing portfolio reforms in New York City and elsewhere as a mixture of managerialist and evolutionary learning governance (the latter referred to in this source as "democratic experimentalist" governance) models).

173. See *id.* at 407–10 (outlining the core tenets of "managerialism," describing its counterproductive influence on the No Child Left Behind Act, and discussing the managerialist connotations of New York City education "reforms' reliance on systems for rating schools and teachers and imposing consequences").

174. See *id.* at 408; see also Eric Hanushek, *Teacher Deselection*, in *CREATING A NEW TEACHING PROFESSION* 165–78 (Dan Goldhaber & Jane Hannaway eds., 2010) (proposing school systems reward or dismiss teachers based on their student's average annual learning growth on standardized tests).

175. See Liebman et al., *Kryptonite Politics*, *supra* note 96, at 433 (elucidating core principle of evolutionary learning governance (or as described in this source, "democratic experimentalist" governance) that "[i]nstitutions can, and to succeed must, make knowledge explicit").

motivate, and train collaborative teams of educators to observe and reach useful hypotheses not only about who succeeds or fails, but also about how and under what circumstances.¹⁷⁶ By treating each instructional encounter as an experiment in teaching and learning, identifying expectations for each experiment, comparing observed results to those expectations, and hypothesizing and testing reasons for discrepancies between expected and actual outcomes, the process aims to expose and iteratively improve the mechanics of success.¹⁷⁷ Although stakes tied to outcomes may occasionally be useful to motivate actors to engage in the iterative learning process, the overarching objective is diagnostic, not evaluative. The raw materials for diagnosis include closely observed teaching and learning processes and interim student and teacher progress and results, supplemented by students' summative outcomes.¹⁷⁸

The portfolio reforms also typically aimed to alter school systems' political dynamics. Concerned that interest groups with the most power did not effectively represent families and students with the greatest needs, districts aimed to tamp down the influence interest groups had long exercised through their symbiotic relationship with school bureaucracies.¹⁷⁹ Dampening mechanisms included substituting mayoral for multi-member board control, appointing charismatic outsiders as school superintendents, diminishing the power of area superintendents beholden to elected officials and interest groups active in the same neighborhoods, and weakening the policy-making roles of school leadership teams dominated by union representatives and local interest groups.¹⁸⁰ Two interlocking theories about how stakeholders prefer to engage politically with school policy drove the choice to sideline those who

176. *See id.* (explaining that under an experimentalist governance framework, "the district's role changes from command and control to motivation, facilitation, and portfolio management, and schools and educators move from rule following to accountable experimentation and innovation").

177. *See id.* at 436 (acknowledging that comparing the impacts of different reforms is difficult but identifying gains in student learning that appear to be associated with experimentalist education models).

178. *See id.* at 435 (providing examples of school districts implementing data-driven diagnostic and improvement techniques and their apparent association with improved learning results and narrowed achievement gaps).

179. *See id.* at 386 (introducing educational reforms designed to address the presence of bureaucracy and special-interest politics in school systems).

180. *See id.* at 387–89 (describing efforts by reforming school districts to dampen the influence of interest groups).

had long exercised political influence, rather than expanding their number and representativeness.¹⁸¹ First, concentrating school politics around mayoral elections was expected to satisfy constituents' transparency and accountability expectations, without need of interest-group representation and oversight, by enabling unhappy voters to boot the mayor out of office every four years and empower a successor to alter school policy.¹⁸² Second, parents were assumed to have little interest in political oversight of schools as long as service, choices, and academic outcomes districts provide were strong and improving.¹⁸³ The reformers accordingly worked hard—often successfully—to provide better service, more choice among schools, and improved academic outcomes.¹⁸⁴ Reformers expected these governance, programmatic, and operational improvements to provide everything parents and other constituents desired—while leaving the direction of the schools to mayors, the energetic outsiders they appointed as school superintendents, and the young technocrats those superintendents hired.¹⁸⁵ Reformers further assumed that constituents would patiently trust technocrats' judgment in the short term, given voters' power to throw them out in the next election if results were unsatisfactory.¹⁸⁶

These calculations proved wrong, and backlash from teachers unions and families largely account for the collapse of what, from a

181. See *id.* at 438–41 (elaborating analysis in text); see also JOEL KLEIN, LESSONS OF HOPE: HOW TO FIX OUR SCHOOLS 198–99, 270–71 (2014) (describing and expressing after-the-fact misgivings about reformers' faith in steps taken to tamp down interest-group politics without being “more strategic” in advancing “retail-level” politics).

182. See Liebman et al., *Kryptonite Politics*, *supra* note 96, at 387–88 (describing some cities' establishment mayoral authority over public school systems in conjunction with broader reforms).

183. See *id.* at 438–41 (describing emergent governance structures that sought to provide more choice, better service, and rising test scores while eliminating avenues for formal community influence over school policy).

184. See Liebman et al., *Mine the Gap*, *supra* note 169, at 54 (documenting reduction of New York City's National Assessment of Educational Progress (NAEP) racial and other score gaps from 2003 to 2013).

185. See Liebman et al., *Kryptonite Politics*, *supra* note 96 at 440 (describing effect of reformers' exclusion of the reforms' intended beneficiaries from their design and implementation, which alienated people who otherwise might have been the reforms' strongest allies).

186. See *id.* at 371–72.

student academic perspective, were promising governance reforms.¹⁸⁷ For starters, teachers unions vehemently opposed both the loosening of collectively bargained constraints on teacher hours and working conditions that accompanied increased school autonomy. They also opposed the imposition of high-stakes consequences for their members whose student learning gains were subpar.¹⁸⁸ The reformers had anticipated these objections, however, and had counted on the improvements they made in services, school choice, and academic outcomes to satisfy other constituents, isolating the unions.¹⁸⁹

What surprised the reformers and ultimately brought down their reforms were demands for more, not tamped down, politics and democracy.¹⁹⁰ No doubt, because their children's futures are precious to them, caregivers and communities continued to expect transparency into their children's schools and lamented the loss of interest-group oversight (as imperfect and tilted as it often had been) and of immediate (even if inequitably available) mechanisms for opposing episodic changes and disruptions in non-election years. Illustrating this dynamic was constituents' opposition to reformers' closure of public schools as a high-stakes consequence of the schools' chronic academic failure and to make room for better schools being created. Although beneficial for many students who attended the newly created schools,¹⁹¹ people whose children were attending, who themselves had attended, who worked in, and whose neighborhoods had long been defined by and often took their names from schools on the chopping block objected to these steps.¹⁹²

187. *See id.* at 439 (“As sensible as it is to shutter schools [with learning outcomes] . . . below anyone’s minimum standard, doing so has sparked fierce opposition . . . from unions and community boards that stand to lose members and patronage . . . [and] students and parents the schools directly harm.”).

188. *See, e.g.,* KLEIN, *supra* note 181, at 137–38 (describing unions’ reactions to New York City reforms).

189. *See, e.g., id.* at 143–47 (describing steps to enhance constituent services, provide more school choice, and improve student outcomes); source cited *supra* note 183.

190. *See* Liebman et al., *Kryptonite Politics*, *supra* note 96, at 436–43 (elaborating the analysis in text).

191. *See id.* at 439 (quoting Philissa Cramer & Rachel Cromidas, *Among 24 Schools City Says It Could Close, Some Familiar Names*, CHALKBEAT (Nov. 26, 2012), <https://ny.chalkbeat.org/2012/11/26/21098476/among-24-schools-city-says-it-could-close-some-familiar-names> [<https://perma.cc/6CBZ-9L9W>]) (quoted *supra* note 187).

192. *See id.* at 440.

Although constituents eventually did vote out a number of reform mayors and their reform school superintendents, being forced to wait four years to obtain some degree of transparency and to exercise effective electoral accountability clearly was unacceptable to many of them.¹⁹³ Prodded by interest groups anxious to regain their prior influence, members of the public were not assuaged by better service, more choice, and stronger academic outcomes, which, perforce, were patchy, slow to manifest, and contestable by disaffected interest groups.¹⁹⁴ Nor did it help to ask for patience with and trust in the earnest technocrats who labored away to good effect in some cases, but in cloistered, elitist fashion.¹⁹⁵ Contrary to reformers' predictions, it turned out that families and other constituents want *public* schools to be truly *democratic* schools. As faulty as interest-group democracy may be, voters clearly preferred it to no democracy at all and that the absence of democracy was too high a price to pay even for what turned out to be better schools for most families, particularly for families of color and low-income families.¹⁹⁶ Academically, that outcome was a tragedy. After fifteen years of big-city reforms, learning growth, and achievement-gap closure, districts' return to their bureaucratic status quo ante rapidly led to achievement gaps' return to their wider, late twentieth century levels.¹⁹⁷

In the last half decade or so, reform advocates and opponents have found common ground on some of the softer-edged innovations developed during the reforms, especially "formative," data-driven efforts to first identify, then leverage or redress, the instructional and learning strengths and weaknesses of individual teachers and students.¹⁹⁸ This uneasy detente has generated initiatives focused on improved socio-emotional learning, adoption of high-quality instructional materials and associated professional training, creation of networks for improving K-12 schools and community colleges, recruitment of more teachers of color, adoption of restorative justice

193. *See id.* at 439–41.

194. *See id.* at 438–39.

195. *See id.* at 438–40.

196. *See* sources cited *supra* note 181.

197. *See* Liebman et al., *Mine the Gap*, *supra* note 169, at 57–59.

198. *See, e.g.*, Robert Slavin, *Evidence-Based Practice Meets Improvement Science*, 11 *ÉDUCATION & DIDACTIQUE* 45–48 (2017), <https://journals.openedition.org/educationdidactique/2722?lang=en> [<https://perma.cc/9S4U-LT57>] (interpreting and evaluating the practical application of Anthony Bryk's "third paradigm" for school improvement).

approaches to student discipline, efforts to address the effects of personal, family, and neighborhood trauma, and steps to bridge the gap between finishing high school and obtaining good jobs.¹⁹⁹ Although such initiatives have promise, they frequently are stymied by school districts organized as bureaucracies, driven by interest-group competition and negotiation, and unable as a result to commit to and effectively implement sustained initiatives to improve teaching and learning along any of these lines.²⁰⁰ Absent governance and political change, even promising policy initiatives falter.

An enduring political feature of publicly oriented reforms, whether comprehensive or targeted, is their imagination and implementation by experts and elites.²⁰¹ To be sure, families often have exercised substantial influence over the reforms via, for example, their preference for charter schools over voucher programs,²⁰² their resistance to Common Core curricula,²⁰³ and their votes to remove “education reform” mayors from office.²⁰⁴ But families’ after-the-fact reactions to reforms in which they figure as objects, not subjects, are a far cry from the power to help initiate, implement, evaluate, and improve education policy affecting their and other children that a more fully democratic system might offer.

199. See, e.g., BROOKINGS INST., TASKFORCE FOR THE NEXT GENERATION COMMUNITY SCHOOLS, ADDRESSING EDUCATION INEQUALITY WITH A NEXT GENERATION OF COMMUNITY SCHOOLS: A BLUEPRINT FOR MAYORS, STATES AND THE FEDERAL GOVERNMENT 5 (Feb. 2021) (proposing reforms that the pandemic gave schools a “once-in-a-century opportunity” to adopt); *K-12 Education*, BILL & MELINDA GATES FOUND., <https://www.gatesfoundation.org/our-work/programs/us-program/k-12-education> [<https://perma.cc/X2MT-5GSZ>] (highlighting various Gates Foundation initiatives to address inequity in education).

200. See Liebman et al., *Kryptonite Politics*, *supra* note 96, at 373–86.

201. See, e.g., Rick Hess, *The Kind of School Reform That Parents Actually Want*, EDUC. WEEK (Oct. 25, 2021), <https://www.edweek.org/policy-politics/opinion-the-kind-of-school-reform-that-parents-actually-want/2021/10> [<https://perma.cc/4YYA-GVP3>] (“[M]ost parents and communities have had less-than-great experiences with ‘school reform’ and the reformers who pursue it . . . [because it] has often felt like something that the comfortable denizens of Silicon Valley or Washington visit upon local parents and educators—whether they want it or not.”).

202. See *supra* notes 141–142.

203. See, e.g., Elaine McArdle, *What Happened to the Common Core?*, HARV. ED. MAG. (2014), <https://www.gse.harvard.edu/news/ed/14/09/what-happened-common-core> [<https://perma.cc/7H6Z-L2SQ>] (describing parents’ opposition to federal standards and testing associated with Common Core).

204. See *supra* note 193 and accompanying text.

3. Decline

Nearly two decades into the new century on the eve of a deadly worldwide pandemic, U.S. public education was at a perilous standstill. Student learning was largely static at levels well below those in other advanced and some developing countries—with deficits characterizing students in the lowest to the highest quartiles of achievement.²⁰⁵ Racial achievement gaps had leveled off nationally and grown substantially in places like New York City after more than a decade of substantial improvement, cut short by voter backlash against misbegotten efforts to replace interest-group politics with no politics at all.²⁰⁶ Meanwhile, a disturbing nationwide pattern of increasing learning gaps based on socio-economic status had emerged, while schools remained extremely segregated by race.²⁰⁷

Faced with these problems, families across communities were starting to pursue alternatives inside and outside the public system, exacerbating racial, economic, and cultural segregation and enrolling more children in schools that reject and promote values antithetical to liberal democracy and social cohesion.²⁰⁸ Worst of all, the stewards

205. See, e.g., Drew DeSilver, *U.S. Students' Academic Achievement Still Lags That of Their Peers in Many Other Countries*, PEW RES. CTR (Feb. 15, 2017), <https://www.pewresearch.org/fact-tank/2017/02/15/u-s-students-internationally-math-science/> [<https://perma.cc/8UW8-PYZS>] (noting that U.S. students in all socio-economic bands perform at lower levels than comparable students in other prosperous countries); *Fast Facts, International Comparisons of Achievement*, NAT'L CTR. FOR EDUC. STATS. <https://nces.ed.gov/fastfacts/display.asp?id=1> [<https://perma.cc/YU3B-FPZR>] (analyzing the achievement levels of American students through the results of international comparative assessments: Progress in International Reading Literacy Study (PIRLS), which “has measured trends in mathematics and science achievement at the 4th and 8th grade every 4 years”; and the Program for International Student Assessment (PISA), which “[measures] the performance of 15-year-old students in reading, mathematics, and science literacy every 3 years.”).

206. See Liebman *et al.*, *Mine the Gap*, *supra* note 169, at 26.

207. See, e.g., MICHAEL HANSEN ET AL., *THE 2018 BROWN CENTER REPORT ON AMERICAN EDUCATION*, BROWN CTR. ON EDUC. POLICY 6–7 (June 2018), https://www.brookings.edu/wp-content/uploads/2018/06/2018-Brown-Center-Report-on-American-Education_FINAL1.pdf [<https://perma.cc/5JQN-KU3P>] (examining trends in students' scores on the National Assessment of Educational Progress, including gaps by race, ethnicity, and family income).

208. See, e.g., Ruth Graham, *Christian Schools Boom in a Revolt Against Curriculum and Pandemic*, N.Y. TIMES (Oct. 19, 2021), <https://www.nytimes.com/2021/10/19/us/christian-schools-growth.html#commentsContainer> (on file with the *Columbia Human Rights Law Review*) (noting that even before the pandemic,

of the public schools remained mired in bureaucratic structures steered by interest-group politics that counterproductively elide public with uniform schools, impervious to the divergent resources, needs, and aspirations of different students, families, and communities.

Starting in the 2019–20 academic year, the COVID-19 virus superimposed an immense public health crisis on top of the governance and political problems threatening public schools' capacity to achieve their democratic and cohesive functions and bringing the problem of enforced uniformity into sharper relief. How could bureaucratic and interest-group-influenced public systems respond effectively to fundamental disruptions of all the attributes of public schooling-as-usual—conducted at prescribed times, in brick-and-mortar schoolhouses, with students and educators neatly parceled among classrooms, with instruction largely a matter of face-to-face interaction, and with parents held largely at bay by routinized drop-off, pick-up, sparsely attended school board and PTA meetings, and twice-annual, fifteen-minute parent-teacher conferences? Would families like what they saw when the transparency of public education-as-usual and their role in public education-at-home suddenly expanded? Would families' reactions to the pandemic dampen or accelerate the critique of bureaucratic governance and interest-group influence and consideration of alternative, more privatized, more managerialist, or more iterative, improvement-oriented governance and political arrangements? The next Part addresses these questions.

II. Public Pandemic Education

An array of evidence of how families perceived their children's education during the pandemic and the moves they made in response augur two very different possible futures for public education: a short-term recrudescence of old norms, escalating the system's long-term demise in favor of private, mainly segregated and socially destabilizing options, or a reformation in the direction of the innovations that families and educators improvised of necessity during the pandemic.

non-Catholic Christian schools bucked other private and religious schools' downward trend in proportion of U.S. students they enroll).

A. Family Views

The COVID-19 pandemic greatly increased families' visibility into their children's school systems and schools. The sudden need for systems and schools to make, implement, and inform families of ever-changing daily decisions about the where, when, and how of instruction exposed the flexibility and responsiveness of some (often smaller suburban, charter, and private) school systems and the rigidity of others (often larger, urban, interest-group-dominated public-school bureaucracies).²⁰⁹ The opportunity online modalities gave parents to observe their children's education revealed similar contrasts at the classroom level. In many cases, families were inspired by and grateful for the immense efforts teachers made to use technology and instructional materials to connect students and families to academic and social-emotional supports and to each other and to increase the frequency and diversify the means of two-way communication between school and home.²¹⁰ In other cases, however,

209. Below is one parent's account:

So many times, I got an email [from child's school] one day with one set of instructions and then an email the next day with opposite directions. And then on top of that, I never know who at the school to go to with my questions. When I call, it feels like I get transferred for an hour—and I have my own work to do so eventually I do what any sane person would do. I hang up.

Colum. Ctr. Pub. Res. & Leadership (CPRL) Interview with Connecticut middle and high school parent (Nov. 16, 2020). This statement and others below are from spring 2020 and fall/winter 2020–21 interviews and focus groups CPRL researchers (including two of the Article's authors) conducted with several hundred students, family members, educators, and leaders of family support organizations across the country about their public education experiences during the pandemic. Research methodology, findings, and resulting proposals are described in Chu et al., *Fundamental 4*, *supra* note 78, at 7–10, and Chu et al., *Rise to Thrive*, *supra* note 73, at 3.

210. In CPRL's interviews, *see supra* note 209, families expressed the greatest satisfaction with systems and schools—district and charter—that focused on students' individualized needs and prioritized continuity of learning and school-family communication. Those services most often were provided by systems and schools with prior experience treating each student and family as the unit of strategic concern and implementing flexible student-centered practices for rethinking instructional strategies as each student's capacities and needs manifested themselves and changed. Interviewees most often praised flexible staffing models and daily and weekly schedules, frequent communication and partnering with caregivers, and individual instructional plans for students. At one charter school network serving low-income, mainly Black and Latinx K-8 students in the Northeast, which particularly stood out in these regards, families cited

families experienced a default to ineffective asynchronous instruction without meaningful oversight or feedback, breakdowns in communication, and what families perceived as manifestly poor instruction and unequal attention and cultural responsiveness to different children.²¹¹

Mid-pandemic (spring–summer 2021) surveys indicated that this new transparency substantially changed, in many cases souring, families’ perception of their children’s education. On Gallup Poll’s measure of parent satisfaction with their child’s education, 2019–2020 saw this century’s largest single-year drop in parents’ complete or partial satisfaction (from 82% to 72%, rising only to 73% in 2021).²¹² The poll’s measure of the general public’s view of “the

clear and frequent communication, starting with “family chats” convened before the school year began focusing not on the usual administrative expectations but on how the school partners with families in providing instruction—enabling parents and caretakers to advocate for their children’s needs and actively participate in designing, implementing, and monitoring their children’s learning plans. *See, e.g.*, CPRL Interview with New York elementary school parent (Feb. 23, 2021) (“My principal always says families are the first teachers. The minute I started here I participated in a family chat where I could share my expectations and I got the feeling right away that I had a seat at the table when it comes to my child.”).

211. Asynchronous instruction occurs when students engage in classwork without real-time supervision of a teacher. Typical concerns include:

Families need two-way communication. It was never perfect [in the past]—far from it—but this year is really shining a spotlight on the impact of poor communication on student learning. For open school night, there was no discussion. Teachers did a pre-recorded video. It was horrible—really horrible. At the same time, there’s a lot of survey fatigue. Parents are tired of answering the same questions over and over and over again—and yet, nothing happens, nothing changes. Parents at my kid’s school are fed up.

CPRL Interview with Connecticut middle and high school parent (Nov. 16, 2020).

My two kids go to the same school but have different teachers. My younger one’s teacher is doing great. She’s building in time to check for understanding and [my son] is loving remote school . . . But with my older son, I’m confused by what has been taking place. The sense I get is that he is watching mostly pre-recorded videos and he’s falling behind . . .

CPRL Interview with New York elementary school parent (Dec. 7, 2020). *See infra* note 228.

212. Megan Brenan, *K-12 Parents Remain Largely Satisfied With Childrens’ Education*, GALLUP (Aug. 26, 2021), <https://news.gallup.com/poll/354083/parents-remain-largely-satisfied-child-education.aspx> [<https://perma.cc/>

quality of education students receive in kindergarten through grade 12 in the U.S. today” registered the century’s largest two-year rise in dissatisfaction (from 2019’s 47% to 2021’s 54%).²¹³ On a June 2021 National Parent Union survey of its mainly Black, Latinx, and low-income members, 80% agreed or strongly agreed that the pandemic “was an eye-opening experience that showed me a lot about my child’s education I didn’t know.”²¹⁴ Fifty-five percent hoped schools would focus on “rethinking education rather than going back to the way things were before the pandemic,” and 62% hoped schools would seek more parent feedback.²¹⁵ On a third, March 2021 national survey, 78% of parents said they planned to “be more active in shaping my child’s educational experience” than before the pandemic, and 72% agreed or strongly agreed that their “expectations for the quality of my child’s educational experience will be greater after COVID-19 than they were before.”²¹⁶ Survey results from a year later indicate that parents followed through on their disposition to stay more engaged in their children’s education in 2021–22 and plan to continue doing so in the future.²¹⁷

32JC-S59D] (noting drop in parent satisfaction in 2020, with no improvement in 2021).

213. *Id.*

214. *New Poll: Majority of Parents Expect Children to Have Challenges With Learning & School Routine Readjustment Next Year*, NATIONAL PARENTS UNION (June 2021), <https://nationalparentsunion.org/2021/06/29/majority-of-parents-expect-children-to-have-challenges-with-learning-school-routine-readjustment-next-year/> [<https://perma.cc/6XAF-7DLF>]; see CPRL interview with New York elementary school parent (Feb. 23, 2021) (“I think a lot of folks in our community are really questioning not just the schooling quality this year, which is rough, but what was really going on in prior year[s], too.”).

215. ECHELON INSIGHTS, NATIONAL PARENTS UNION SURVEY JUNE 11-20, 2021, at 13 (2021) <https://nationalparentsunion.org/wp-content/uploads/2021/10/NPU-Topline-June-2021.pdf> [<https://perma.cc/NG4T-YVH3>].

216. TYTON PARTNERS, SCHOOL DISRUPTED PART 2: THE DURABILITY AND PERSISTENCE OF COVID-19-DRIVEN SHIFTS IN THE K-12 ECOSYSTEM 22 (July 2021), https://d1hzkn4d3dn6lg.cloudfront.net/production/uploads/2021/07/School-Disrupted_Phase-II_TytonPartners.pdf [<https://perma.cc/76RX-KMMM>] [hereinafter SCHOOL DISRUPTED PART 2].

217. LEARNING HEROES, HIDDEN IN PLAIN SIGHT: A WAY FORWARD FOR EQUITY-CENTERED FAMILY ENGAGEMENT 10 (2022), <https://bealearninghero.org/wp-content/uploads/2022/06/Parents22-Research-Deck-1.pdf> [<https://perma.cc/XK35-V3BV>] (stating that on national survey, over 80% of parents reported that during 2021–22 they did, and during 2022–23 plan to, find more time than before to talk to their children about everyday assignments and learning expectations and results—with large majorities also reporting they did (from 2021–22) and

Using spring and summer 2021 survey data on what families learned and did when forced collectively “for the first time in modern history . . . to consider different educational settings for their children,” Bellwether Education found that “parents of an estimated 11.3 million students, or nearly one in five of the nation’s schoolchildren, did not get what they wanted from their child’s school.”²¹⁸ In response, parents of an estimated 8.7 million students moved their children from their preexisting school to a new school, and parents of an additional 1.5 million students expressed frustration at the unsatisfactory options their children had and their lack of preferred alternatives.²¹⁹ Over a million students “disengaged from the system entirely.”²²⁰

A year later, parents responding to an NPR/Ipsos survey ranked education behind only inflation and crime as the most important public issues.²²¹ Although most parents expressed optimism that their children’s schooling was improving, 32% said, “my child has fallen behind in school due to the pandemic,” and 29% said, “my child dislikes school more now than before the Covid-19 pandemic.”²²² Parents spread blame for their children’s difficulties across state education officials (25% of dissatisfied parents), local school districts (22%), school administrators (20%), and teachers (17%).²²³

A review of these studies and of anecdotal evidence identifies a number of recurring concerns among parents. In many cases these

plan to (in 2022–23) develop a stronger relationship with their children’s teachers, including by telling teachers what they notice about their children’s learning); LEARNING HEROES, WHAT PARENTS, TEACHERS AND PRINCIPALS REALLY WANT 18 (2021), https://media.carnegie.org/filer_public/4c/80/4c8060da-a395-4771-a307-8eae283865ac/parents-2021.pdf (stating that 93% of parents responding to a Fall 2021 national survey said they would be as or more involved in their child’s education in 2021–22 compared to the previous year when students learned at home).

218. ALEX SPURRIER ET AL., BELLWETHER EDUC. PARTNERS, THE OVERLOOKED 1 (2021), <https://bellwether.org/wp-content/uploads/2021/08/The-Overlooked-Bellwether-Education-Partners-FINAL-August-31-2021-CORRECTED.pdf> [<https://perma.cc/38PP-GTAH>].

219. *Id.* at 2.

220. *Id.* at 1.

221. Anya Kamenetz, *The Education Culture War Is Raging. But for Most Parents, It’s Background Noise*, NPR (Apr. 29, 2021), <https://www.npr.org/2022/04/29/1094782769/parent-poll-school-culture-wars> [<https://perma.cc/Q7WJ-3AKF>].

222. *Id.*

223. *Id.*

concerns were substantial enough to convince families (1) that they could not rely on public-school systems to provide even the basics of an education during the pandemic; (2) that they probably had overestimated the quality of the instruction, resources, and support public schools had provided their children in the past; and (3) that longstanding disparities in public educational inputs and outcomes were likely to persist or widen in the future.²²⁴ Family concerns include:

- clumsy, poorly communicated, last-minute decisions made without seeking or listening to parents' views and preferencing those of teachers unions;²²⁵

224. See, e.g., Sonja Brookins Santelises, *Parents Are Watching Like Never Before. 'Trust Us' Isn't Enough*, EDUC. WEEK (Dec. 1, 2020), <https://www.edweek.org/teaching-learning/opinion-parents-are-watching-like-never-before-trust-us-isnt-enough/2020/12> [https://perma.cc/S76C-SY8F] (reporting Baltimore school superintendent's warning that parents "cannot see" the inequities and instructional failings they "witnessed so vividly in their own living rooms" during the pandemic, so districts must "make our 'new normal' better than the old, engaging parents as the partners they are"); see also *infra* note 449 (Baltimore's family-centered reforms adopted to create that better "new normal").

225. See, e.g., Rachel Alexander, *Some Oregon Superintendents, Parents Report 'Whiplash' as State School Reopening Rules Change Again*, THE OREGONIAN (Aug. 13 2020), <https://www.oregonlive.com/education/2020/08/some-oregon-superintendents-parents-report-whiplash-as-state-school-reopening-rules-change-again.html> [https://perma.cc/5XXV-EZUL] (describing last-minute changes in school reopening guidelines and plans and superintendents' struggle to keep parents advised); Erica Bruenlin, *"They Silenced Us": Colorado Parents-Turned-Teachers Want Schools, Lawmakers to Give Them a Voice*, COLO. SUN (Oct. 19, 2020) <https://coloradosun.com/2020/10/19/colorado-education-schools-parents-students-coronavirus-covid-19/> [https://perma.cc/6Y54-7M3Z] (reporting parent anger at being frozen out of planning for 2020–21 school reopening); Sophia Chang et al., *"Just Cancel The Whole School Year": NYC Parents, Students, And Teachers React To Delayed In-Person School Start*, GOTHAMIST (Sept. 18 2020), <https://gothamist.com/news/just-cancel-whole-school-year-nyc-parents-students-and-teachers-react-delayed-person-school-start> [https://perma.cc/L3MH-LWKR] (reporting parent confusion at last-minute changes in New York state school-reopening guidelines); CPRL Interview with Connecticut elementary student parent (Nov. 16, 2020) ("The communication and specifically the why behind decisions just isn't reaching us. Is school open? Is it not? Where can my kid go if I need childcare? It's clear there just isn't a decision-making framework."); Morgan Polikoff, *Parent Dissatisfaction Shows Need to Improve School Communication During Coronavirus Pandemic*, BROWN CTR. CHALKBOARD (July 23, 2020), <https://www.brookings.edu/blog/brown-center-chalkboard/2020/07/23/parent-dissatisfaction-shows-need-to-improve-school->

- resistance to and delays in implementing in-person options after public health authorities approved and many non-urban, private, parochial, and charter schools offered them;²²⁶
- failure to serve students who lacked the devices and internet access, study spaces, and adult supervision needed for remote learning;²²⁷

communication-during-coronavirus-pandemic [https://perma.cc/SDN7-2WYG] (discussing results of a survey of parents whose children attend New Mexico public schools, in which parents express dissatisfaction with school communication).

226. See, e.g., Perry Stein, *As Public Schools Go All Virtual in Fall, Parents Eye Private Schools That Say They Will Open Their Campuses*, WASH. POST (July 26, 2020), https://www.washingtonpost.com/local/education/as-public-schools-go-all-virtual-in-fall-parents-eye-private-schools-that-say-they-will-open-their-campuses/2020/07/26/1e446ab0-cc5b-11ea-b0e3-d55bda07d66a_story.html [https://perma.cc/UEL5-C5W6] (detailing parents' desire to have their children return to in-person learning, even if that means moving their children from public to private schools offering an in-person option).

227. Families and students (nationwide) reported difficulties sharing a single device among multiple children and navigating unfamiliar learning platforms and studying in the parking lot of fast-food restaurants with WiFi access (Jack Thurston, *McClassroom, Where Vt. Student Accesses WiFi, Highlights Broadband Gap*, NECN (Apr. 7, 2021) <https://www.necn.com/news/coronavirus/mcclassroom-where-vt-student-accesses-wifi-highlights-broadband-gap/2442120/> [https://perma.cc/3X7F-T2BZ]); reluctance of undocumented families to sign up for broadband assistance programs requiring social security numbers (Jenny Brundin, *Some Undocumented Families Don't Feel Safe Applying For Free Internet*, CPR NEWS (Apr. 14, 2020), <https://www.cpr.org/2020/04/14/some-undocumented-families-dont-feel-safe-applying-for-free-internet-making-remote-learning-even-more-difficult/> [https://perma.cc/69F6-CBJM]); and waiting a full semester for the district to provide promised broadband and computers (Bill Zeeble, *When Schools Went Online, These Dallas Families Had No Internet. Now They're Home Schooling*, KERA NEWS (Sept. 10 2020), <https://www.keranews.org/education/2020-09-10/when-schools-went-online-these-families-lacked-internet-access-theyre-still-seeking-satisfaction> [https://perma.cc/64G7-EVEE]). See also Michelle Fox, *Coronavirus Has Upended School Plans*, CNBC (Aug. 12, 2020), <https://www.cnbc.com/2020/08/12/impact-of-covid-19-on-schools-will-worsen-racial-inequity-experts-say.html> [https://perma.cc/5HXC-NN4E] (reporting difficulty disadvantaged students faced in finding quiet learning spaces at home); Zoe Kirsch, *When Siblings Become Teachers*, THE 74 (Apr. 10, 2020), <https://www.the74million.org/article/when-siblings-become-teachers-its-not-just-parents-who-find-themselves-thrust-into-the-demanding-role-of-at-home-educators/> [https://perma.cc/VYZ8-N35W] (explaining how older siblings sacrificed their own remote classwork to supervise younger siblings' learning); Samantha Schmidt & Tara Bahrapour, *Single Parents Struggle to Home-School and Work*

- insufficient synchronous instructional time and low-quality asynchronous modules;²²⁸
- instructional materials that parents, students, and teachers could not use effectively;²²⁹
- elimination of assessments of student learning growth and mastery and of other feedback on students' work;²³⁰

as *Their Support Systems Disappear*, WASH. POST (Mar. 27, 2020), <https://www.washingtonpost.com/dc-md-va/2020/03/27/single-parents-struggle-homeschool-work-their-support-systems-fall-apart/> [<https://perma.cc/2YW6-C76F>] (reporting on the difficulties single-parent households faced as a result of online education, including lack of childcare, difficulty managing work and supervising children, and fears of getting COVID).

228. See, e.g., Bracey Harris & Caroline Preston, *When Schools Are Open Amid COVID Pandemic, Online Learners Feel Shortchanged*, USA TODAY (Nov. 22, 2020, 10:45 AM), <https://www.usatoday.com/story/news/education/2020/11/22/covid-schools-online-class-remote-learning/6267726002/> [<https://perma.cc/K2ZQ-E27N>] (reporting tendency of districts to provide remote learners with asynchronous instruction “consist[ing] largely of watching pre-recorded videos from teachers and pacing through classwork by [themselves]”); Betty Márquez Rosales, *Independent Study Frustrates California Parents Who Enrolled Children*, EDSOURCE (Sept. 10, 2021), <https://edsource.org/2021/independent-study-frustrates-california-parents-who-enrolled-children/661009> [<https://perma.cc/MMK9-B4T4>] (“Weeks after most districts began the school year, some students who enrolled in independent study—the only option for those opting out of in-person learning—have yet to begin instruction, be assigned a teacher or be enrolled in all required courses.”); see *supra* note 211 (defining asynchronous education and quoting critiques by parents whose children experienced it during the pandemic); see also U.S. GOV’T ACCOUNTABILITY OFF., AS STUDENTS STRUGGLED TO LEARN, TEACHERS REPORTED FEW STRATEGIES AS PARTICULARLY HELPFUL TO MITIGATE LEARNING LOSS, at i, vi, 16–17 (2022), <https://www.gao.gov/assets/gao-22-104487.pdf> [<https://perma.cc/9G6F-FN49>] (reporting that schools widely used asynchronous learning during the pandemic, though most teachers using it lacked confidence that it served students’ learning needs).

229. See, e.g., KATIE TOSH ET AL., RAND CORP., DID EXPERIENCE WITH DIGITAL INSTRUCTION MATERIALS HELP TEACHERS IMPLEMENT REMOTE LEARNING DURING THE COVID-19 PANDEMIC? 4 (2021), https://www.rand.org/pubs/research_reports/RRA134-8.html [<https://perma.cc/J542-S4XR>] (reporting that most teachers engaging in remote instruction during the pandemic found that their curriculum and available digital materials did not align).

230. See, e.g., David Cruz, *Overwhelmed Teachers and Overcrowded Virtual Classes: Some Parents Say Remote Learning Is Failing Their Kids*, GOTHAMIST (Sept. 28, 2020), <https://gothamist.com/news/overwhelmed-teachers-and-overcrowded-virtual-classes-some-parents-say-remote-learning-failing-their-kids> (on file with the *Columbia Human Rights Law Review*) (“I’m not going to

- lack of support for multilingual learners and special education students;²³¹
- poor or no mental health services in the midst of a deadly pandemic, social isolation, and a national reckoning over police violence against Black Americans;²³² and

have time to give you notes or give you feedback, because I have [too many] other students, all I can tell you is that I'm reading what you're writing.” (quoting parents' report of teacher communication)); Laura Jimenez, *Student Assessment During COVID-19*, CTR. FOR AM. PROG. (2020) <https://www.americanprogress.org/article/student-assessment-covid-19/> [<https://perma.cc/U6BX-EYVB>] (reporting negative academic effects of drastic curtailment of student assessment during pandemic).

231. See, e.g., Kate Henley Averett, *Remote Learning, COVID-19, and Children With Disabilities*, 7 AERA OPEN 1 (Jan. 1, 2021), <https://journals.sagepub.com/doi/10.1177/23328584211058471> (on file with the *Columbia Human Rights Law Review*) (documenting particular difficulties parents of children with disabilities faced with remote learning); Morgan Radford et al., *Remote Learning a Major Challenge for Students Learning English as a Second Language*, NBC NEWS (Aug. 12, 2020), <https://www.nbcnews.com/news/latino/remote-learning-major-challenge-students-learning-english-second-language-n1236532> [<https://perma.cc/9MHK-FDZG>] (reporting on how remote learning is particularly ill-suited to children learning English).

232. Asked to identify their greatest areas of concern during remote learning in Fall 2020, the vast majority of families participating in CPRL interviews named students' mental health. See, e.g., Elizabeth Chu et al., *Remote and Hybrid Learning Have Been Difficult for HS Students*, THE 74 (May 2, 2021), <https://www.the74million.org/article/analysis-remote-and-hybrid-learning-have-been-difficult-for-hs-students-8-steps-they-say-teachers-can-take-to-keep-them-motivated/> [<https://perma.cc/4R82-M43Y>] (reporting research finding of “grave toll” hybrid learning exacted on high schoolers in underserved communities who “believe they are learning less, are worried about their postgraduation plans and struggle to stay motivated”); Carolyn Jones, *Student Anxiety, Depression Increasing During School Closures, Survey Finds*, EDSOURCE (May 13, 2020), <https://edsources.org/2020/student-anxiety-depression-increasing-during-school-closures-survey-finds/631224> [<https://perma.cc/VC2Z-L2FW>] (reporting on negative impact of suspension of student counseling during pandemic and students' inability to confide in counselors online in earshot of family members); Jonetta J. Mpfu et al., *Perceived Racism and Demographic, Mental Health, and Behavioral Characteristics Among High School Students During the COVID-19 Pandemic—Adolescent Behaviors and Experiences Survey, United States, January–June 2021*, 71 *Morbidity & Mortality Weekl. Rep. (Supplement)* 22, 26 (2022) (associating perception of racism with poor mental health and attributing increased perception of racism to health inequalities during the COVID-19 pandemic as well as “[other] events in 2020, such as the killings of Ahmaud Arbery and George Floyd and the Black Lives Matter movement.”); Matt Richtel, *“It’s Life or Death”: The Mental Health Crisis Among U.S. Teens*, N.Y. TIMES

- learning loss.²³³

In the last-mentioned regard, the most comprehensive study to date of the pandemic's effects found "devastating impacts on learning."²³⁴ Tracking changes in achievement test scores of 5.4 million U.S. third through eighth graders during the first two years of the pandemic, researchers found that:

Average fall 2021 math test scores in grades were .20-.27 standard deviations (SDs) lower relative to same-grade peers in fall 2019, while reading test scores decreased by .09-.18 SDs. Achievement gaps between students in low-poverty and high-poverty

(Apr. 23, 2022). <https://www.nytimes.com/2022/04/23/health/mental-health-crisis-teens.html> (on file with the *Columbia Human Rights Law Review*) (reporting on increasing depression, anxiety, self-harm, and suicide attempts among teens and children, particularly in prior decade).

233. See, e.g., CURRICULUM ASSOCIATES, ACADEMIC ACHIEVEMENT AT THE END OF THE 2020-2021 SCHOOL YEAR (2021) <https://www.curriculumassociates.com/-/media/mainsite/files/i-ready/i-ready-understanding-student-needs-paper-spring-results-2021.pdf> [https://perma.cc/WF6F-XC4K] (presenting empirical evidence of pandemic-related learning loss and disproportionately negative effects on students of color); Emma Dorn et al., *COVID-19 and Student Learning in the United States: The Hurt Could Last a Lifetime*, MCKINSEY & CO. (June 1, 2020), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime> (on file with the *Columbia Human Rights Law Review*) [hereinafter, Dorn et al., *COVID-19 and Student Learning*] (describing evidence of disproportionate learning losses by students of color and rising dropout rates); Emma Dorn et al., *COVID-19 and Learning Loss—Disparities Grow and Students Need Help*, MCKINSEY & CO. (Dec. 8, 2021), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-learning-loss-disparities-grow-and-students-need-help#> (on file with the *Columbia Human Rights Law Review*) [hereinafter, Dorn et al., *COVID-19 and Learning Loss*] (documenting ways the pandemic could make achievement gaps permanent); see *supra* notes 29–30 and accompanying text & *infra* notes 234, 273, 271–283 (collecting sources documenting learning loss and expanding achievement gaps during the pandemic).

234. Megan Kuhfeld et al., *The Pandemic Has Had Devastating Impacts on Learning*, BROWN CTR. CHALKBOARD (Mar. 3, 2022), <https://www.brookings.edu/blog/brown-center-chalkboard/2022/03/03/the-pandemic-has-had-devastating-impacts-on-learning-what-will-it-take-to-help-students-catch-up/> [https://perma.cc/9NHM-C6J2] (reporting that nationwide learning loss among students of color and in poverty during the pandemic is comparable to that suffered by New Orleans students displaced by Hurricane Katrina).

elementary schools grew by .10-.20 SDs, primarily during the 2020-21 school year.²³⁵

The pandemic exposed other severe systemic problems with public education that weigh especially heavily on families and students of color and in low-income communities. These include school-to-school and classroom-to-classroom disparities in teacher quality and the rigor of instructional materials,²³⁶ unconscious or overt racism reflected in over-disciplining of students, and culturally biased and exclusionary instructional materials and classroom discussions.²³⁷

235. Megan Kuhfield et al., *Test Score Patterns Across Three COVID-19-Impacted School Years* (Annenberg Inst. Brown Univ. Ed Working Paper No. 22-5421), <https://edworkingpapers.com/sites/default/files/ai22-521.pdf> [<https://perma.cc/KRC8-VZTG>]. These data track results on standardized tests administered by states. For equally disturbing results on national assessments, see *supra* notes 29–30 and accompanying text; *infra* notes 271–283 and accompanying text.

236. See, e.g., VANESSA COLMAN ET. AL, AM. VOICES PROJ., BEHIND THE SCREEN 4 (2021) <https://inequality.stanford.edu/sites/default/files/research/articles/covid-online-learning.pdf> [<https://perma.cc/6KVN-7QGP>] (reporting parent distress at low quality of instruction and instructional materials in high-poverty schools during the pandemic); JULIA KAUFMAN & MELISSA KAY DILIBERTI, RAND CORP., DIVERGENT AND INEQUITABLE TEACHING AND LEARNING PATHWAYS DURING (AND PERHAPS BEYOND) THE PANDEMIC (2021), https://www.rand.org/pubs/research_reports/RRA168-6.html [<https://perma.cc/V8RE-DKGQ>] (examining ways remote learning particularly harmed children of families with limited financial resources); Donna St. George, *In Montgomery County, Schools and Parents Clash Over How Much Teachers and Students Are Connecting*, WASH. POST (May 19, 2020), https://www.washingtonpost.com/local/education/montgomery-county-online-learning/2020/05/19/d98f0ed2-9390-11ea-82b4-c8db161ff6e5_story.html [<https://perma.cc/P55A-RU37>] (discussing anger over uneven instruction generated by parents' comparisons of effective and ineffective instruction provided to siblings by different teachers or schools); see also Matt Barnum, *New Teachers Often Get the Students Who Are Furthest Behind*, CHALKBEAT (Mar. 20, 2019), <https://www.chalkbeat.org/2019/3/20/21107090/new-teachers-often-get-the-students-who-are-furthest-behind-and-that-s-a-problem-for-both> [<https://perma.cc/9Y53-NVUS>] (explaining how learning gaps are exacerbated by the fact that new teachers often end up in schools with “more struggling students and . . . fewer experienced colleagues”).

237. See, e.g., Christine Fernando, *Some Black Parents Say Remote Learning Gives Racism Reprieve*, AP NEWS (May 4, 2021), <https://apnews.com/article/lifestyle-race-and-ethnicity-health-coronavirus-education-c41c99db0f325bf6d0a7fc6c527e1ea9> [<https://perma.cc/S2SF-MRW6>] (discussing Black parents' resistance to returning their children to in-person schools given racist classroom policies witnessed while observing children's classes online); Casey Parks, *The Rise of Black Homeschooling*, NEW YORKER (June 21, 2021),

Given parents' high expectations for their children's public education, their occasional dissatisfactions with it will range across a wide spectrum in the best of times. The pandemic, however, heightened parents' insight into and responsibility for their children's education. The doubts they expressed about what they saw indicate that the pandemic put far more at stake than usual for public schools. Family moves—actual changes in their educationally oriented behaviors in the wake of the pandemic—provide a good measure of whether that is so.

B. Family Moves

1. Declining enrollment

The pandemic caused millions of people to alter their living locations and conditions to escape high population densities associated with a risk of infection, social-distancing burdens, and other public health precautions; to care for sick family members or separate family members facing greater and lesser infection risks; and to land in locations of their dreams once freed from the constraints of in-person work.²³⁸

<https://www.newyorker.com/magazine/2021/06/21/the-rise-of-black-homeschooling> [<https://perma.cc/TL5E-U9LW>] (reporting that some Black parents' embrace of homeschooling during the pandemic was motivated by observation of low-quality instruction and harsh treatment of their children during online instruction); *see also* Elizabeth Miller, *For Some Black Students, Remote Learning Has Offered A Chance To Thrive*, NPR (Mar. 1, 2021), <https://www.npr.org/2021/03/01/963282430/for-some-black-students-remote-learning-has-offered-a-chance-to-thrive> [<https://perma.cc/6BNN-4E6K>] (discussing some Black students' preference for online learning because it spares them from unsupportive in-school environments); Aziza Shuler, *Black Parents Opt for Online Learning to Avoid Racial Bias in the Classroom*, SPECTRUM NEWS 1 (July 15, 2021), <https://spectrumnews1.com/ca/la-west/education/2021/07/16/black-parents-opt-for-online-learning-to-avoid-racial-bias-in-the-classroom> [<https://perma.cc/92YQ-6NV7>] (reporting the results of a study finding that nearly two thirds of Los Angeles Black families surveyed preferred online schooling, including because it mitigates in-school bullying, racism, and poor grades); *see sources cited infra* note 296–298 (describing impact of Black families' experience of racism and disparate and excessive discipline in public schools on their increasing tendency to leave those schools and homeschool their children).

238. Debra Kamin, *The Market Tectonics of California Real Estate*, N.Y. TIMES (May 28, 2021), <https://www.nytimes.com/2021/05/28/realestate/california-real-estate.html> (on file with the *Columbia Human Rights Law Review*) (discussing movement of families out of cities during the pandemic).

Schooling played a major role in these decisions. Many families, some with income to spare and others priced out of city markets, left overpopulated urban centers in search of more space for children and adults to work at home.²³⁹ The rapid shift of white-collar jobs from in-person to remote modalities enabled those families to choose locations based on schooling rather than proximity to work.²⁴⁰ As many urban school systems extended periods of remote learning, their families moved temporarily or permanently to suburban, exurban, and rural school districts that never suspended or quickly returned to in-person learning.

Pandemic-associated dissatisfaction with particularly urban public schools also motivated family moves. Faced with the prospect of low-quality virtual programming or a return to in-person learning that failed to meet many families' expectations for health and safety, academic rigor, cultural responsiveness, or cultural conformity, many families withdrew their children from their preexisting learning environments and tried alternatives.²⁴¹

These forces generated big changes in U.S. public-school enrollment. In 2020–21, 2.9 million fewer students enrolled in public schools than in 2019–20, resulting in a 4.6% drop—the largest one-year decline since the federal government began collecting data in the 1870s.²⁴² Declines in public-school enrollment during the period occurred in all fifty states, ranging from 0.3% in South Dakota and

239. *Id.*

240. See, e.g., Derek Thompson, *The Workforce Is About to Change Dramatically*, THE ATLANTIC (Aug. 6, 2020), <https://www.theatlantic.com/ideas/archive/2020/08/just-small-shift-remote-work-could-change-everything/614980/> [<https://perma.cc/X2MP-EDTW>] (speculating as to the ways remote work may change the workforce as more big companies signal willingness to allow remote work indefinitely); Kim Parker et al., *COVID-19 Pandemic Continues to Reshape Work in America*, PEW RES. CTR. (Feb. 16, 2022), <https://www.pewresearch.org/social-trends/2022/02/16/covid-19-pandemic-continues-to-reshape-work-in-america/> [<https://perma.cc/CKV7-LT35>] (“most teleworkers say they are working from home by choice rather than necessity”).

241. See *infra* notes 285–348 and accompanying text (detailing the pandemic-era shift away from public schools and towards alternative forms of education, such as private schools, charter schools, learning pods, and microschoools).

242. *Census Bureau Data Reveal Decline in School Enrollment*, U.S. CENSUS BUR. (Oct. 19, 2021), <https://www.census.gov/newsroom/press-releases/2021/decline-school-enrollment.html?linkId=100000076275539> [<https://perma.cc/QUH8-QKBJ>]; see *supra* notes 52–59 and accompanying text & sources cited *supra* note 52.

0.6% in Utah to 5% or more in Mississippi and Vermont.²⁴³ The declines were concentrated in lower grades, potentially affecting enrollment in higher grades for years to come.²⁴⁴

Large city systems saw particularly sharp declines, starting in 2020–21.²⁴⁵ That year, New York City, the nation’s largest public-school system, lost roughly 43,000 students—4% of its enrollment.²⁴⁶ Rural schools and schools with high populations of Hispanic students that operated mostly remotely also suffered large enrollment declines.²⁴⁷ Socio-economically, the greatest enrollment declines occurred on both ends of the spectrum, with schools in high- and low-

243. See, e.g., Oriana Gonzalez, *U.S. Public School Enrollment Drops As Pandemic Persists*, AXIOS (Nov. 28, 2020), <https://www.axios.com/public-school-enrollment-drops-covid-pandemic-1a3fbb3b-0a9e-4d48-80c4-c798a1e4759d.html> [<https://perma.cc/X655-TH8K>] (providing statistics for enrollment drops in Massachusetts, New York, California, Wisconsin, and Fairfax County, Virginia, and listing some of the factors leading to enrollment drops during the pandemic); Kevin Mahnken, *New Federal Data Conforms Pandemic’s Blow to K-12 Enrollment*, THE 74 (June 28, 2021), <https://www.the74million.org/article/public-school-enrollment-down-3-percent-worst-century/> [<https://perma.cc/7KU8-H8YS>] (reporting a “startling” 2021–22 “decline in the number of American children attending public schools”); Eesha Pendharkar, *More Than 1 Million Students Didn’t Enroll During the Pandemic*, EDUC. WEEK (June 17, 2021), <https://www.edweek.org/leadership/more-than-1-million-students-didnt-enroll-during-the-pandemic-will-they-come-back/2021/06> [<https://perma.cc/4BTX-8HXQ>] (analyzing state enrollment data and finding not only that the country’s public schools lost 1.3 million students on the whole, but also that “every state lost students in the 2020-21 school year”).

244. Pendharkar, *supra* note 243 (describing national 2020–21 declines of 8% in pre-kindergarten and 5% in kindergarten enrollment); see, e.g., Dana Goldstein & Alicia Parlapiano, *The Kindergarten Exodus*, N.Y. TIMES (Aug. 7, 2021), <https://www.nytimes.com/2021/08/07/us/covid-kindergarten-enrollment.html> (on file with the *Columbia Human Rights Law Review*) (analyzing data collected by the New York Times and Stanford University, showing in “33 states, 10,000 local public schools lost at least 20 percent of their kindergarteners”).

245. SCHOOL DISRUPTED PART 2, *supra* note 216, at 8.

246. Alex Zimmerman & Gabrielle LaMarr, *Enrollment in NYC Schools is Down 4% Amid the Pandemic*, CHALKBEAT NY (Jan. 27, 2021), <https://ny.chalkbeat.org/2021/1/27/22252172/nyc-school-enrollment-decline> [<https://perma.cc/ZH7E-9227>].

247. Kevin Mahnken, *Kids Left Schools Last Year Because of the Switch to Remote Classes; Early Numbers Suggest They May Not be Coming Back Soon*, THE 74 (Oct. 16, 2021), <https://www.the74million.org/kids-left-schools-last-year-because-of-the-switch-to-remote-classes-early-numbers-suggest-they-may-not-be-coming-back-soon/> [<https://perma.cc/PDG8-4CD4>].

income neighborhoods experiencing larger enrollment declines than schools in middle-income neighborhoods.²⁴⁸

Although public-school systems expected enrollment to rebound in 2021–22,²⁴⁹ in many systems it did not. Full data were not yet available when this Article went to press, but it is clear that many of the nations’ largest school districts experienced 2021–22 declines below already epochally diminished 2020–21 levels—including New York City, Los Angeles, Chicago, Dallas, Washington, Boston, Rochester (NY), and Jackson (MS).²⁵⁰ New York City’s 2021–22 public

248. Goldstein & Parlapiano, *supra* note 244.

249. See, e.g., Heather Hollinsworth & Cedar Attanasio, *Schools Across US Brace for Surge of Kindergarteners in Fall*, AP NEWS (June 13, 2021), <https://apnews.com/article/coronavirus-pandemic-kindergarten-preschool-surge-enrollment-95d6ce871622f527f16588c68dff3371> [<https://perma.cc/7SQK-X6U6>] (discussing school districts’ actions in anticipation of what they expected to be “the largest kindergarten class ever as enrollment rebounds following the coronavirus pandemic.”).

250. See, e.g., Tamara Gilkes Borr, *Public-School Enrolment in America Is Unlikely to Return to Normal*, ECONOMIST (Nov. 8, 2021), <https://www.economist.com/the-world-ahead/2021/11/08/public-school-enrolment-in-america-is-unlikely-to-return-to-normal> [<https://perma.cc/84A9-M9MJ>] (“COVID-19 sparked the largest decline in [U.S.] public-school enrolment since the second world war.”); Linda Jacobson, *‘Those Kids Did Not Come Back’: Exclusive Enrollment Data Shows Students Continue to Flee Urban Districts as Boom Town Schools and Virtual Academies Thrive*, THE 74 (Apr. 6, 2022), <https://www.the74million.org/article/covid-school-enrollment-students-move-away-from-urban-districts-virtual/> [<https://perma.cc/FU86-U3KT>] (considering the impacts of a continuation of the 2020–21 “historic decline in enrollment,” and concluding that one such impact will likely be “major layoffs and closures if districts don’t recover by 2024”); Linda Jacobson, *Nashville’s ‘Navigator’ Tries to Keep Students in Remote Learning From Getting Lost in the System*, THE 74 (Dec. 20, 2021), <https://www.the74million.org/article/nashvilles-navigator-tries-to-keep-students-in-remote-learning-from-getting-lost-in-the-system/> [<https://perma.cc/9ETJ-P787>] [hereinafter Jacobson, *Nashville’s ‘Navigator’*] (highlighting some of the deeper, socioeconomic issues (e.g., unstable housing) underlying parents’ decision to disenroll their children during the COVID-19 pandemic, as revealed by the “Navigator” program in Nashville for tracking missing students); Anya Kamenetz et al., *Where Are the Students?*, NPR (Dec. 15, 2021), <https://www.npr.org/2021/12/15/1062999168/school-enrollment-drops-for-second-straight-year> [<https://perma.cc/S2WT-4M3A>] (investigating some of the reasons behind massive disenrollment in public schools during the COVID-19 pandemic, including failure to enroll at all (among the youngest students), shifts to private and charter schools, homeschooling, and high school students dropping out to work); Matt Masterson, *Student Enrollment Down Across Illinois, Education Officials Say*, WTTW NEWS (Oct. 29, 2021), <https://news.wttw.com/2021/10/29/student-enrollment-down-across-illinois->

non-charter school enrollment dropped 5% from 2020–21 to the start of 2021–22 and lost more students during the latter year, ending up 83,000 students—over 8 percent—lower than its 2019–20 level.²⁵¹ Boston’s public-school enrollment fell by 4% in 2021–22 on top of a 4.7% drop the year before.²⁵² Los Angeles’s 27,000-student decline in 2020–21 was even larger than the previous year’s drop.²⁵³ Rochester’s enrollment fell by 12% over the two years.²⁵⁴ After years of enrollment increases, even affluent Montgomery County Maryland’s public schools lost 4.2% of its students between 2019–20 and 2021–22.²⁵⁵ Faced with the loss of over 250,000 students since

education-officials-say [<https://perma.cc/2T6Q-6CHE>] (discussing the Illinois State Board of Education’s annual report card, which shows that “statewide enrollment fell from 1,957,018 students last year down to 1,887,316 students.”); Hannah Natanson et al., *D.C.-Area Public School Enrollment Fails to Rebound From Pandemic-Era Drops*, WASH. POST (Nov. 14, 2021), https://www.washingtonpost.com/local/education/dc-maryland-virginia-enrollment-funding/2021/11/13/c0f50304-43d9-11ec-9ea7-3eb2406a2e24_story.html [<https://perma.cc/9AR2-25W3>] (noting that the stagnant or dropping enrollment numbers in Washington, D.C.-area public schools may have negative implications for school funding).

251. Cayla Bamberger, *Enrollment at NYC Public Schools Continues Startling Plummet, Data Shows*, N.Y. POST (June 15, 2022), <https://nypost.com/2022/06/15/nyc-public-schools-enrollment-continues-to-decline/> [<https://perma.cc/H4XK-NFVW>]; Raedah Wahid & Jon Dominick Querolo, *New York City School Enrollment Shrinks to Lowest in Years as Pandemic Drags On*, BLOOMBERGQUINT (Jan. 28, 2022), <https://www.bloombergquint.com/onweb/nyc-school-enrollment-drops-10-after-two-years-of-covid-pandemic> [<https://perma.cc/CL5G-HRAJ>]; see also *supra* note 59 (reporting U.S. Department of Education’s 2021 public-school enrollment estimates).

252. *BPS 2021-22 Enrollment Analysis*, BOSTON SCH. FUND (2022), <https://www.bostonschoolsfund.org/enrollment> [<https://perma.cc/VW7C-JA53>] (“Enrollment [in Boston public schools] did not ‘bounce-back’ or stabilize this year [2021–22], but rather declined another 4% [on top of] last year’s 4.7% decline.”).

253. Howard Blume, *L.A. Unified Enrollment Drops by More than 27,000 Students, Steepest Decline in Years*, YAHOO! NEWS (Sept. 28, 2021), <https://www.yahoo.com/news/l-unified-enrollment-drops-more-120044351.html> [<https://perma.cc/6M2E-FH9U>].

254. Kamenetz et al, *supra* note 250 (“In the Rochester, N.Y., public schools, enrollment has fallen from 25,000 before the pandemic to around 22,000 this year, says [superintendent] Lesli Myers-Small . . . [who added,] ‘We have to make our schools attractive again.’”).

255. Caitlynn Peetz, *MCPS Enrollment Declines for Second Consecutive Year After Decade of Growth*, BETHESDA MAGAZINE (Oct. 25, 2021), <https://bethesdamagazine.com/bethesda-beat/schools/mcps-enrollment-declines-for-second-consecutive-year-after-decade-of-growth/> [<https://perma.cc/J4KC-GQ26>].

2019,²⁵⁶ California districts are bracing for big declines in state education funding, which the state, like most others, allots mainly on a per-pupil basis.²⁵⁷

The most comprehensive analysis to date—an April 2022 study of data available on 12,000 school district websites (87% of all U.S. districts)—found that in 2021–22, enrollment began to rebound in some districts, which together added about 532,000 students compared to 2020–21, but continued dropping in other districts by roughly 623,000 students.²⁵⁸ As summarized in a news report, the study found that between 2020–21 and 2021–22, “[p]ublic school enrollment dropped more sharply in school districts that remained remote longer compared to those that reopened for in-person learning sooner.”²⁵⁹ Between 2019–20 and 2021–22, districts remaining remote the longest lost one of every 22 students, while districts offering the most in-person instruction lost only one of 93 students.²⁶⁰ The former districts “tended to be some of the biggest and lowest-income in the country, enroll[ing] large numbers of Black and Hispanic students,” meaning in political terms that enrollment declines were decidedly greater in counties voting for Joseph Biden for President than in ones voting for Donald Trump.²⁶¹

256. Shawn Huber, *With Plunging Enrollment, a ‘Seismic Hit’ to Public Schools*, N.Y. TIMES (May 17, 2022), <https://www.nytimes.com/2022/05/17/us/public-schools-falling-enrollment.html> (on file with the *Columbia Human Rights Law Review*).

257. See Joe Hong, *California Schools Risk ‘Colossal’ Loss of Dollars as Enrollment Drops*, CAL MATTERS (Jan. 5, 2022), <https://calmatters.org/education/2022/01/california-schools-budgets/> [<https://perma.cc/VD4A-YPXR>].

258. *Return to Learn 2020-2022 Enrollment Tracker*, AM. ENTERP. INST., <https://www.returntolearntacker.net/2020-22-enrollment-changes/> [<https://perma.cc/RNA5-EMXT>]; see Nat Malkus, *Pandemic Enrollment Fallout: School District Enrollment Changes Across COVID-19 Responses*, AM. ENTERP. INST. 1, 14 (July 2022), <https://www.aei.org/wp-content/uploads/2022/07/Pandemic-Enrollment-Fallout.pdf?x91208> [<https://perma.cc/GVW5-H96H>] (confirming, based on 48 states’ 2019–2022 enrollment data, that the pandemic caused the “largest enrollment declines in the history of American public schools”).

259. Lauren Camera, *Enrollment Declines Haunt School Districts that Stayed Remote Longer, Enforced Masking*, U.S. NEWS (Apr. 27, 2022), <https://www.usnews.com/news/education-news/articles/2022-04-27/enrollment-declines-haunt-school-districts-that-stayed-remote-longer-enforced-masking> (on file with the *Columbia Human Rights Law Review*).

260. AM. ENTERP. INST., *supra* note 258.

261. Camera, *supra* note 259.

Diminishing participation in public education is even greater than these numbers suggest, given large increases in students enrolled in public schools who simply stopped attending remotely, then in person.²⁶² With parents taking care of ill family members, losing jobs, moving, or dying, and with households lacking the internet connections, devices, physical space, and adult supervision needed to keep children and youth virtually connected to schools, their children fell through the cracks in many school systems.²⁶³ Despite educators' extraordinary efforts to locate them, school systems lost contact with large numbers of students.²⁶⁴ "[I]n North Carolina, a state education official told state lawmakers in December [2020] that more than 10,000 students had not been accounted for. New Mexico could not account for more than 12,000 students at the

262. See, e.g., Jacey Fortin, *More Pandemic Fallout: The Chronically Absent Student*, N.Y. TIMES (Apr. 20, 2022), <https://www.nytimes.com/2022/04/20/us/school-absence-attendance-rate-covid.html> (on file with the *Columbia Human Rights Law Review*) ("Chronic absence has 'skyrocketed' during the pandemic."); Dana Goldstein & Kate Taylor, *States and Cities Across the U.S. Debate the Future of Online Learning*, N.Y. TIMES (May 24, 2021), <https://www.nytimes.com/2021/05/24/us/schools-reopening-remote-learning-covid.html> (on file with the *Columbia Human Rights Law Review*) (describing an uptick in the number of teenagers who stopped going to school in order to work); Kamenetz et al., *supra* note 250 ("Superintendents say they are often losing students to paid jobs."); Eli Saslow, *The Missing Students of the Pandemic*, WASH. POST (Mar. 21, 2021), https://www.washingtonpost.com/nation/2021/03/21/students-absenteeism-california-indio/?itid=ap_elisaslow [<https://perma.cc/G5PL-EZPS>] (describing a 20% decline in virtual attendance at a California high school, as absent students struggled with sick relatives, depression, anxiety, and housing, and food insecurity).

263. See *infra* notes 346–349 and accompanying text.

264. See, e.g., Robbie Feinberg, *Teachers Knock on Doors Looking for Students Who've Disappeared From Online Learning*, NPR (Feb. 9, 2021), <https://www.npr.org/2021/02/09/963669522/teachers-knock-on-doors-looking-for-students-who've-disappeared-from-online-learn> [<https://perma.cc/N5LX-6J9N>] ("In response, some schools have been calling, texting and even knocking on doors to try to connect with students."); Jacobson, *Nashville's 'Navigator'*, *supra* note 250 ("The program, tracked through weekly phone and video calls, is an ambitious effort to keep students and families from slipping out of reach as distance learning extends into next year."); Veronica Zaragovia, *Meet One Woman on a Mission to Find Hundreds of Kids, Lost to Their Schools*, CLASS OF COVID 19 (Feb. 8, 2021), <https://classofcovid.org/story-meet-one-woman-on-a-mission-to-find-hundreds-of-kids> [<https://perma.cc/3DC7-GP5Y>] (describing efforts by a social worker to find more than 800 students who had stopped coming to school).

start of the [2020–21] school year.”²⁶⁵ A detailed mid-2021 analysis of absenteeism in five school districts serving nearly 450,000 students in the South, Southwest, and West, including substantial proportions of low-income students, documented a seven-fold increase in the number of students missing more than half of their classes.²⁶⁶ Chronic absences were twenty times greater for Black than for white students.²⁶⁷

Matters improved some at the start of the 2021–22 school year, but many enrolled students remained lost to their school systems. “We think we found most of them, but there are still probably a thousand kids out there, we just don’t know what happened to them,” Dallas’s Superintendent told NPR in late Fall 2021, noting that “[o]ther urban superintendents are telling me they have significantly higher numbers of students that they’re really worried about.”²⁶⁸ Around the same time, “chronic absenteeism” among Illinois’ Black students and students learning English as a second language was 39% and 24%, respectively.²⁶⁹ Cleveland reported that nearly half of its students were on track to be chronically absent in 2021–22, down from 2020–21, but far above pre-pandemic levels.²⁷⁰

Providing a powerful academic explanation for why families in the public school systems that remained remote the longest were

265. Moriah Balingit, *Unprecedented Numbers of Students Have Disappeared During the Pandemic*, WASH. POST (Feb. 25, 2021), https://www.washingtonpost.com/education/pandemic-schools-students-missing/2021/02/25/f0b27262-5ce8-11eb-a976-bad6431e03e2_story.html [https://perma.cc/58ZD-A5J2].

266. Phyllis W. Jordan, *Present Danger: Solving the Deepening Student Absenteeism Crisis*, FUTUREED (May 1, 2021), https://live-fe-future-ed.pantheonsite.io/wp-content/uploads/2021/05/REPORT_Present_Danger_Final.pdf [https://perma.cc/S4ZK-35R7].

267. *Id.* (Black students’ absenteeism climbed nearly 20 percentage points, compared to 1 percentage point for white students).

268. Kamenetz et al., *supra* note 250.

269. Jonathan Fagg, *Data Shows COVID-19 Led to Significantly Diminished Learning, Attendance Across IL Last Year*, ABC7 CHICAGO (Oct. 29, 2021), <https://abc7chicago.com/illinois-state-board-of-education-covid-chicago-public-schools-cps/11180134/> [https://perma.cc/JB3N-BKJX].

270. Patrick O’Donnell, *Schools are Open, But Cleveland Kids Keep Cutting Class: Chronic Absenteeism is More Than Double Pre-Pandemic Levels*, THE 74 (Oct. 26, 2021), <https://www.the74million.org/article/schools-are-open-but-cleveland-kids-keep-cutting-class-chronic-absenteeism-is-more-than-double-pre-pandemic-levels/> [https://perma.cc/Y8MW-MHVK].

most likely to decamp those systems is the disproportionate learning loss suffered by students there—with the largest effect on the Black, Latinx, and low-income students concentrated in those schools.²⁷¹ As described by an author of a May 2022 Harvard study of declines in expected learning growth in mathematics during the pandemic, the result of the racially and socio-economically uneven patterns of learning loss during the pandemic is likely “the largest increase in educational inequity in a generation.”²⁷² During 2021–22, Black and Hispanic students’ learning fell about one and one-half times further below their expected learning gains in math than their white counterparts.²⁷³ Crucially, controls the researchers introduced suggest that “much of the increased [racial] gap in test scores” results from “school-level shocks rather than differential effects of the pandemic on [members of] racial/ethnic subgroups within schools.”²⁷⁴ In other words, the learning losses were mainly associated not with Black and Latinx students but with schools to which our education system relegates them—which in turn were the ones that responded less flexibly to the pandemic. The study likewise found a stark

271. See, e.g., Kate Royals, *These Mississippi Schools Never Returned to In-Person Learning*, MISS. TODAY (June 9, 2021), <https://mississippitoday.org/2021/06/09/these-mississippi-schools-never-returned-to-in-person-learning-heres-what-happened/> [<https://perma.cc/D8QN-YS42>] (showing that most Mississippi schools that never returned to in-person learning during 2020–21 served majority Black populations and had previously been graded “D” or “F” by the state).

272. David Leonhardt, ‘Not Good for Learning’, N.Y. TIMES (May 5, 2022), <https://www.nytimes.com/2022/05/05/briefing/school-closures-covid-learning-loss.html> (on file with the *Columbia Human Rights Law Review*) (quoting author of a Harvard study on the topic).

273. DAN GOLHABER ET AL., HARV. CTR. EDUC. POL’Y RES., THE CONSEQUENCES OF REMOTE AND HYBRID INSTRUCTION DURING THE PANDEMIC 12 (2022), <https://cepr.harvard.edu/files/cepr/files/5-4.pdf?m=1651690491> [<https://perma.cc/58M8-NAY2>]; see also Dorn et al., *COVID-19 and Learning Loss*, *supra* note 233, at 6 (estimating that students of color lost the equivalent of five months of learning during the pandemic compared to three months for white students); Laura Meckler & Hannah Natanson, ‘A Lost Generation’: Surge of Research Reveals Students Sliding Backward, WASH. POST (Dec. 6, 2020), https://www.washingtonpost.com/education/students-falling-behind/2020/12/06/88d7157a-3665-11eb-8d38-6aea1adb3839_story.html [<https://perma.cc/8C4V-PX5P>] (citing studies showing that students of color lost the equivalent of several more months of learning than white peers).

274. GOLHABER ET AL., *supra* note 273, at 14; see KAUFMAN & DILIBERTI, *supra* note 236, at 1–2 (schools with higher non-white and low-income populations were more likely to operate on a hybrid or remote basis in 2021, and thus were more likely to experience shortened days, lenient grading, increased absenteeism, and failing grades).

association between attending schools with mostly high-poverty students and the harmful effect of time spent in remote learning: high- and low-poverty schools that mostly remained open during the pandemic experienced about the same modest levels of learning loss.²⁷⁵ But learning loss in schools that were remote over half the time was twice as great in high-poverty as in low-poverty schools, and increased more substantially as the time spent in remote learning increased.²⁷⁶

Simply put, school districts' failed response to the pandemic in locales where constituents—disproportionately, families of color and in poverty—traditionally have most strongly supported public education wreaked the greatest academic harms on their students and, not surprisingly then, suffered the greatest enrollment losses during the pandemic. A strategy more disruptive of public schools' compellingly important job of cementing “enough” free individuals' commitment to each other and to our nation's liberal democratic values to enable it politically and socially to cohere is hard to imagine.

Confirming these results, the National Center for Education Statistics (NCES) announced in September 2022 that, for the first time during the half century in which the NAEP tests²⁷⁷ have been given, learning levels of the nation's 9-year-olds in math dropped during the pandemic compared to levels in the next previous test administration.²⁷⁸ Reading scores fell by the largest margin in over 30 years.²⁷⁹ The average performance of students of all races and income levels dropped in math, but scores of the lowest-performing students dropped four times more (representing roughly 36 weeks of learning loss) compared to the scores of the highest-performing students (who lost about nine weeks of learning).²⁸⁰ Black students lost two and one-

275. Leonhardt, *supra* note 272 (reporting study findings).

276. GOLHABER ET AL., *supra* note 273, at 16–17.

277. See *supra* notes 29–30 and accompanying text (describing nation's large NAEP test score declines and growth of achievement gaps just before the pandemic).

278. Sarah Mervosh, *The Pandemic Erased Two Decades of Progress in Math and Reading*, N.Y. TIMES (Sept. 1, 2022), <https://www.nytimes.com/2022/09/01/us/national-test-scores-math-reading-pandemic.html> (on file with the *Columbia Human Rights Law Review*).

279. *Id.*

280. *Id.* (explaining that a top-performing student who lost three points in math can catch up in nine weeks, while a low-performing student who lost 12 points would need 36 weeks to catch up).

half times more learning on average (about 39 weeks) than white students (about 15 weeks).²⁸¹ One report on the data attributed the vast economic and racial achievement gaps in part to “the profound effect school closures had on low-income and on Black and Hispanic students, in part because their schools were more likely to continue remote learning for longer times.”²⁸² NCES Commissioner Peggy G. Carr declared herself “taken aback by the scope and magnitude” of learning loss and by the widening of achievement gaps.²⁸³

The remainder of this section traces the types and direction of family moves away from public schooling as it existed as of the beginning of the pandemic in early 2020.²⁸⁴ Our analysis cannot fully identify the causes and future patterns of family moves, but there is considerable evidence that longstanding features of public education governance contributed to the moves and will stymie public schools’ efforts to stem the tide.

2. Switching schools

The pandemic coincided with a large uptick in families moving children from one school to another. According to one survey, 15% of families changed their child’s school for the 2020–21 academic

281. *Id.*

282. *Id.*

283. *Id.*

284. The table below, reporting estimates from a national survey of parents, presents the most comprehensive comparison we have found of enrollment changes by school type between 2019–20 and 2020–21:

School Type	Fall 2019 enrollment (in millions)	Change as of Fall 2020
Traditional public	47.1	-3.4%
Private	5.3	-20.8%
Charter	3.5	+17.1%
Homeschooling	1.9	+63.2%
Learning pods, microschools	1.0	+34.3%

TYTON PARTNERS, SCHOOL DISRUPTED PART 1: THE IMPACT OF COVID-19 ON PARENT AGENCY AND THE K-12 ECOSYSTEM 8 (May 2021), <https://d1hzkn4d3dn6lg.cloudfront.net/production/uploads/2021/05/School-Disrupted-04.21-FINAL.pdf> [<https://perma.cc/3BDN-PS2V>].

year, 50% higher than in pre-pandemic years.²⁸⁵ Urban areas, with the lowest rates of in-person schooling, had the highest rates of families switching schools.²⁸⁶ The survey associated switching schools during the pandemic with higher levels of parent satisfaction with their children’s new schools²⁸⁷—consistent with surveys on which private school, homeschool, and charter school parents reported higher levels of satisfaction with “academic,” “emotional,” and “social learning” in their schools during the pandemic than did families with children in traditional public schools.²⁸⁸ As we develop below, many of these moves took children out of or kept them from entering *public* schools.

i. Homeschools

All states allow homeschools as an exception to compulsory attendance laws, most requiring it to be provided in the home by adult family members, but others permitting informal multifamily efforts to educate children together and even commercial microschools (described below).²⁸⁹ Although in forbidding states to bar

285. *Id.* at 5 (fifteen percent of families changed schools during the 2020–21, compared to an estimated 10% in prior years).

286. Jessica Dickler, *During Covid, More Families Switch to Private School From Public Education*, CNBC (May 7, 2021 10:27 AM), <https://www.cnbc.com/2021/05/07/during-covid-more-families-switch-to-private-school-from-public.html> [<https://perma.cc/RLX4-SNQT>].

287. *School Disrupted Part 1*, *supra* note 284 at 5.

288. MORNING CONSULT, EDCHOICE, THE PUBLIC, PARENTS, AND K-12 EDUCATION: A NATIONAL POLLING REPORT 17–18 (2021) <https://edchoice.morningconsultintelligence.com/assets/118130.pdf> [<https://perma.cc/8PMP-C3QN>] (reporting that 26% of public-school parents, compared to 39% of homeschool and 50% of private school parents, felt their children were progressing “very well” in 2020–21; 41% of district school parents, compared to 51% of homeschool, 54% of public charter school, and 66% of private school parents, were “very satisfied” with their children’s school experiences).

289. *See Statutory Exemptions to Compulsory Education*, FINDLAW (June 20, 2016), <https://www.findlaw.com/education/education-options/statutory-exemptions-to-compulsory-education.html> [<https://perma.cc/V8EW-J3KQ>] (all states exempt children “from compulsory attendance requirements if they receive equivalent education” via “homeschooling by the child’s parents, or instruction by a private tutor”); *What is Homeschooling and How Does it Work*, HOME SCH. LEGAL DEF. ASS’N (Jan. 10, 2020), <https://hsllda.org/post/what-is-homeschooling> [<https://perma.cc/8YRG-4DQ7>] (providing information on each state’s homeschooling requirements); *see also* Pendharkar, *supra* note 243 (Maine’s students homeschooling either alone or in learning pods grew 32% during pandemic).

families from accessing private school and other non-public options, the Supreme Court invited states to “regulate” them, including by mandating “certain studies plainly essential to good citizenship,” the Court has not required States to do so, and many do not.²⁹⁰ Whereas some states require homeschools to report to their local districts on the instruction they provide and its coverage of mandated subjects, most states exercise only modest or no curricular or other oversight and have no reporting requirements.²⁹¹ For these and for privacy and practical reasons, the assurance that schooling instills tolerance of

290. *Compare* *Pierce v. Society of Sisters*, 268 U.S. 501, 534 (1925) (expressing approval for state regulation of private and parochial schools), *with* *Carson v. Makin*, 142 S. Ct. 1987, 1999 (2022) (discussing Maine’s exemption of religious schools from requirements imposed on public schools to meet instructional standards in a range of academic subjects).

291. The Home School Legal Defense Association (HSLDA) divides state statutory regimes governing homeschooling into four categories based on how substantially they regulate homeschools: No notice, Low regulation; Low regulation; Moderate regulation; High regulation. *Homeschool Laws by State*, HOME SCH. LEGAL DEF. ASS’N, <https://hsllda.org/legal> (last visited Nov. 20, 2022). Only Massachusetts, New York, Pennsylvania, Rhode Island, and Vermont fall in the “High Regulation” category, requiring, for example, instruction in English in specified subjects by a parent with a high school diploma, written notice of intent to homeschool, standardized testing; periodic reporting on curricula and students’ days and hours of attendance, and filing of work portfolios. *Id.* Thirty-three states fall into two “Low Regulation” categories, differentiated by whether homeschoolers must report on their compliance with limited requirements that apply. Seventeen states do not specify subjects homeschoolers must cover. *Id.* States that do mandate subject matter coverage usually limit those to some combination of English, math, science, and social studies. Many lack any reporting, testing, or other mechanisms for enforcing their requirements. Oklahoma imposes no requirements on homeschooling other than that it include 180 days of instruction, and has no mechanism for enforcing that requirement. *How to Comply With Oklahoma’s Homeschool Law*, HOME SCH. LEGAL DEF. ASS’N (June 18, 2020), <https://hsllda.org/post/how-to-comply-with-oklahomas-homeschool-law> [<https://perma.cc/Y7KT-RL8V>]. Utah law gives homeschooling parents total control of curricular choices, evaluation, and “the time, place, and method of instruction” and forbids education officials to require parents to maintain records, obtain credentials, and give standardized tests. Utah Code Ann. § 53G-6-204(2). Only a small number of states require private-school instruction in “good citizenship.” *See, e.g., How to Comply with Texas’s Homeschool Law*, HOME SCH. LEGAL DEF. ASS’N (Nov. 30, 2020), <https://hsllda.org/post/how-to-comply-with-texas-homeschool-law> [<https://perma.cc/D928-6WN3>] (at 1:22) (explaining that Texas has no requirements for days and hours for homeschooling but does require a course in good citizenship). For a comprehensive but somewhat outdated state-by-state analysis of homeschooling laws, see U.S. DEPT OF EDUC., OFF. OF NON-PUBLIC EDUC. STATE REGULATION OF PRIVATE SCHOOLS (2009)).

difference and other liberal democratic values is likely weaker in homeschools than in other alternatives to public schools discussed here.

During the first seven months of the pandemic, the percentage of school-aged children being homeschooled nationally more than doubled from 5.4% to 11.1%, according to the Census Bureau—a trend that continued the next school year.²⁹² Consistent with the longstanding association between homeschooling and families’ religious and right-of-center ideological dispositions, some of the increase in homeschooling occurred in rural and politically conservative areas.²⁹³ As public schools closed and operated only remotely for long periods of time, however, public perceptions of homeschooling became more positive across the board, giving it a foothold among families and communities not traditionally interested in it.²⁹⁴ In surveys, parents reported switching to homeschooling

292. Casey Eggleston & Jason Fields, *Census Bureau’s Household Pulse Survey Shows Significant Increase in Homeschooling Rates in Fall 2020*, U.S. CENSUS BUR. (Mar. 22, 2021), <https://www.census.gov/library/stories/2021/03/homeschooling-on-the-rise-during-covid-19-pandemic.html> [https://perma.cc/WSG8-LVXP]; see Valeria Bauerlein, *Covid-19 Pandemic Pushes More Parents to Go All-In for Homeschooling*, WALL ST. J. (Jan. 31, 2021), <https://www.wsj.com/articles/covid-19-pandemic-pushes-more-parents-to-go-all-in-for-home-schooling-11612089000> [https://perma.cc/7KH6-NTRE]; PUBLIC IMPACT, SUMMARY OF PARENT POLLING ON EDUCATION 5 (2021) (on file with the *Columbia Human Rights Law Review*) (reporting on national survey in which 11% of parents did not expect their children to return to their pre-pandemic school in fall 2021, with homeschooling the preferred alternative).

293. See Andrew Marra, *This School Lost 10% of its Students to Home Schooling?*, PALM BEACH POST (June 14, 2021), <https://www.palmbeachpost.com/story/news/education/2021/06/14/jupiter-farms-elementary-lost-10-its-students-home-schooling/5165804001/> [https://perma.cc/8E73-WDD4] (documenting increases in homeschooling and declines in public enrollment in rural, politically conservative areas); Parks, *supra* note 237 (tracing beginning of “modern homeschooling movement in America” to objections to public schools’ prohibition on Christian prayer and to racial integration; “by the nineteen-eighties [homeschooling’s] most vocal and influential supporters were white Christian conservatives,” and the “earliest homeschooling textbooks were written from a Christian perspective, and some were racist”).

294. See Bauerlein, *supra* note 292 (in 2020–21, Connecticut’s homeschooling numbers quintupled to 3,500; North Carolina’s doubled to 18,800; Nebraska’s increased 56% to 13,426); *The Public, Parents, and K-12 Education*, *supra* note 288, at 15 (on national survey, 64% of parents reported that pandemic gave them more favorable view of homeschool); Arianna Prothero & Christina Samuels, *Home Schooling Is Way Up with COVID-19*, EDUC. WEEK (Nov. 9, 2021), <https://www.edweek.org/policy-politics/home-schooling-is-way-up-with-covid-19->

mainly because their children performed poorly when their school tried to teach them remotely at home, and most thought their children performed better when family members took over home instruction.²⁹⁵

Chief among the new participants in homeschooling are Black families, with support from organizations like the African American Homeschool Network, My Reflection Matters Village, National Black Home Educators, and community-based organizations.²⁹⁶ According to

will-it-last/2020/11 [https://perma.cc/H84A-DWM2] (reporting on national survey in which 9% of parents said they planned to homeschool, despite not having done it before).

295. See, e.g., Pia Ceres, *They Rage-Quit the School System- and They're Not Going Back*, WIRED (June 3, 2021), <https://www.wired.com/story/pandemic-homeschoolers-who-are-not-going-back/> [https://perma.cc/Q36D-RDZH] (reporting on parents who homeschooled during pandemic and decided to continue doing so thereafter); Shayla Gaulding, *Homeschooling Boomed in the Pandemic—and Many Parents Aren't Sending Their Kids Back to Class*, KAN. CITY MAG. (Nov. 4, 2021), <https://kansascitymag.com/news/homeschooling-boomed-in-the-pandemic/> [https://perma.cc/3GUJ-SSW3] (noting homeschooling surge driven by parents' frustration with online schooling they observed and better results at home).

296. See, e.g., Lisa Buie, *Black Homeschool Families Quintuple During Pandemic*, REDEFINED, <https://www.reimaginedonline.org/2021/06/black-homeschool-families-quintuple-during-pandemic-but-what-will-happen-this-fall/> [https://perma.cc/95KS-JWSD] (June 8, 2021) (interviewing various Black homeschooling advocates); Camille Kirksey, *14 Facebook Groups Every Black Homeschooler Should Know About*, MATER MEA (Mar. 2, 2021), <https://matermea.com/facebook-groups-for-black-homeschoolers/> [https://perma.cc/P6FZ-9VU8] (resources provided by National Black Home Educators and Black Homeschool Society Facebook groups); EUPHA JEANNE DARAMOLA, CTR. ON REINVENTING PUB. EDUC., *PROGRESS AND POTENTIAL: THE INNOVATIONS OF PANDEMIC LEARNING COMMUNITIES LED BY LEADERS OF COLOR* 1, 3, 5, 7, 10, 12, 14 (June 15, 2022), <https://crpe.org/wp-content/uploads/final-Pods-leaders-of-color-paper.pdf> [https://perma.cc/BT8N-QVQK] (describing support for families of color newly pursuing homeschooling options provided by My Reflection Matters Village, “a nationwide, virtual network of parents, students, and educators,” and Engaged Detroit, which “help[s] Black families take control of their children’s learning”); Kyra Miles, *More Black Families Are Homeschooling Their Children, Citing the Pandemic and Racism*, NPR (Dec. 13, 2021), <https://www.npr.org/2021/12/13/1061787233/more-black-families-are-homeschooling-their-children-citing-the-pandemic-and-rac> [https://perma.cc/D699-ZRGV] (reporting that new Black homeschooling parents see homeschooling as protecting their children from educational racism and providing freedom to teach their children about race); Elizabeth Booze, *Three Things We're Learning About Liberatory Podding From The Black Homeschool Society*, REMAKE LEARNING, <https://remakelearning.org/blog/2020/12/10/black-homeschool-society/>

the Census Bureau, Black homeschooling rates rose from 3.3% in 2019–20 to 16.1% in 2020–21.²⁹⁷ The pandemic played a role in these changes by exposing Black parents, watching their kids’ public-school instruction taking place in real time online, to classroom environments characterized by substandard instruction, excessive discipline and bullying disproportionately wielded against their children, and what they perceived as transparent racism.²⁹⁸

Although sparse, the research on this trend suggests the extent to which the motivating forces are eroding support for public schools among one of its historically strongest constituencies. Black families report that switching from public to homeschooling has been

[<https://perma.cc/KHW8-737E>] (discussing homeschooling pods for Black communities).

297. Lexi Lonas, *More Parents Pick Home-Schooling After Pandemic*, THE HILL (May 17, 2021), <https://thehill.com/homenews/state-watch/553140-more-parents-pick-homeschooling-after-pandemic/> [<https://perma.cc/VY7F-45C5>] (reporting census data).

298. See, e.g., Eveline Chao, *As Schools Reopen, Will Black and Asian Families Return?*, PBS NEWS HOUR (July 5, 2021), <https://www.pbs.org/newshour/education/as-schools-reopen-will-black-and-asian-families-return> [<https://perma.cc/9DLN-GCXR>] (reporting that Black families switched to homeschooling during pandemic because of frustrations with public schools and excessive punishment of students struggling with remote learning); Loretta Hickman, *Why Black Families Have Found Some Benefits in Distance Learning*, THE HECHINGER REP. (July 15, 2021), <https://hechingerreport.org/opinion-why-black-families-have-found-some-benefits-in-distance-learning/> [<https://perma.cc/A8GH-DJ4W>] (listing factors motivating Black families’ turn to remote and homeschooling during pandemic, including Black children’s ongoing struggles in public schools, more limited access to grade-level content, and harsher and more frequent discipline than white peers, and their enhanced access to technology and improved communication with teachers when they learned at home); Miles, *supra* note 296 (“We are overcoming racism through homeschooling.” (quoting University of Georgia professor studying Black homeschooling)); Parks, *supra* note 237 (quoting mother telling Detroit school superintendent, “[p]arents are not deciding to take their children out [of school] because of COVID [but] because education has failed children in this city forever”; if public “school won’t reinvent education, we have to reinvent it ourselves”); Katie Reilly, *For Black Parents Resisting White-Washed History, Homeschooling Is an Increasingly Popular Option*, TIME (Feb. 28, 2022), <https://time.com/6151375/black-families-homeschooling/> [<https://perma.cc/B58E-C5NW>] (“While COVID-19 was a catalyst, many Black parents, concerned about racism in schools and frustrated by the prevalence of white-washed history lessons, have also turned to homeschooling as a way to take control of their children’s education.”); sources cited *supra* note 296 (describing instruction, discipline, and other conditions Black families observed in public schools during pandemic that prompted them to switch to homeschooling).

“wrenching”—“a slap in the face” to the civil rights movement and its promise of access to public education and potentially “harm[ful to] neighbors’ children” whose “public schools rely on per-pupil funding from state governments.”²⁹⁹ Black parents made the switch nonetheless, concluding they “had no choice, with eighty per cent citing pervasive racism and inequities” in public schools.³⁰⁰

It is not at all certain that homeschooling provides students with a reliable alternative to public education. With most states exercising essentially no oversight, there is little assurance that homeschooling will provide children with a sound education or provide parents and the public with the transparency as to inadequate results that public education—whatever its other failings—provides. Additionally, given the deep political cleavages separating white and Black adherents of homeschooling—most especially on questions of race itself—there is every reason to fear that homeschooling will increase racial dissonance and segregation. To date, for example, most of the existing curricula and instructional materials that have grown up around homeschooling for mainly white students are anathema to Black parents who are developing their own materials.³⁰¹ Homeschooling also contributes to class cleavages, given the disposition of most affluent families that opt out of public schools to enroll their children in organized private schools.³⁰² Worse, isolating children from ideas that are unwelcome to their parents—be it the nation’s history of racism, gay or interracial marriage, tolerance for people different from themselves, or values and careers parents deem “too Black” or “too white”—undermines the most basic public goods that public schools provide a diverse and democratic polity.³⁰³

To date, only a relatively small minority of Black families have turned to homeschooling, and their long-term commitment to that option remains unclear.³⁰⁴ But their dramatically increased

299. Parks, *supra* note 237.

300. *Id.*

301. See *supra* note 293 and accompanying text.

302. Cf. *School Disrupted Part 1*, *supra* note 284, at 10 (“Fifty-five percent of lower-income parents who switched to homeschooling during the pandemic . . . are not spending any money to support it [versus] only seven (7) percent of higher-income parents . . . Fifty-one percent of [high-income] parents spend more than \$500 . . . and almost a third report spending more than \$2,000 per month [on homeschooling].”).

303. See *supra* note 13 and accompanying text.

304. See, e.g., Reilly, *supra* note 298 (noting various forces, accelerated by transparency of public education during pandemic driving Black families to

uptake of homeschooling is important in explaining Black families' share of the declines in public-school enrollment, disproportionately large share of charter school enrollment,³⁰⁵ resistance during the 2021–22 school year to requiring their children to return to in-person learning—even though their children suffered the brunt of remote learning's instructional deficiencies³⁰⁶—and agitation for public post-COVID remote-learning options,³⁰⁷ desire for community-staffed learning pods,³⁰⁸ and greater tendency during the pandemic to give up on schooling entirely.³⁰⁹

ii. Private schools

Depending on size and location, many private schools experienced enrollment gains at least early in the pandemic (Utah's private school enrollment, increased 25% in 2020–21, for example³¹⁰), while other private schools lost enrollment (especially larger, more

homeschool their children, while cautioning that “not all problems can be solved by removing children from schools that aren't serving them”).

305. See *School Choice in the United States: 2019*, NAT'L CTR. FOR EDUC. STATS. (“In fall 2016, a higher percentage of public charter school students than of traditional public school students were Black (26 vs. 15 percent) . . .”).

306. See sources cited *supra* notes 233–236.

307. See RiShawn Biddle, *Don't Kill Remote Learning. Black and Brown Families Need It*, N.Y. TIMES (June 7, 2021), <https://www.nytimes.com/2021/06/07/opinion/remote-learning-nyc.html> (on file with the *Columbia Human Rights Law Review*) (reporting survey data showing that 59% of non-white parents want remote options); HEATHER SCHWARTZ ET AL., RAND CORP., WILL STUDENTS COME BACK? SCHOOL HESITANCY AMONG PARENTS AND THEIR PREFERENCES FOR COVID-19 SAFETY PRACTICES IN SCHOOLS 3 (2021), https://www.rand.org/pubs/research_reports/RRA1393-1.html (on file with the *Columbia Human Rights Law Review*) (claiming that only 72% of Black parents planned to send their children to school in fall 2021, compared to 90% of white parents); sources cited *supra* notes 237, 296–298 (documenting Black families' observation of poor instruction, disparate discipline, and indicia of racism during pandemic). Ironically, the urban districts most Black children attend inflexibly kept schools closed for longer than other districts but have been least willing to allow remote options once schools reopened. See *infra* note 369 and accompanying text.

308. See *infra* note 341.

309. See *supra* notes 262–267 and accompanying text.

310. Brittany Glas, *New Utah Data Points to Growing Homeschool, Private School Enrollment During COVID-19*, KSL TV (Nov. 10, 2020), <https://ksltv.com/448235/new-utah-data-points-to-growing-homeschool-private-school-enrollment-during-covid-19/> [<https://perma.cc/Y8AJ-PX2C>].

expensive ones in big cities).³¹¹ Although both tendencies receded somewhat as schools returned to in-person learning,³¹² our reading of available data and anecdotal reports is that, overall, private school enrollment increased during COVID-19.³¹³

Similar factors caused mixed patterns of enrollment change among parochial schools. Enrollment increased on average in small Protestant parochial schools in non-urban settings catering to families opposed to mask and vaccine mandates, LGBTQ rights, and curricula exploring the history of American racism.³¹⁴ Jewish day

311. Compare Damian Kavanaugh & Benjamin Scafidi, *One Sector Is Flourishing During the Pandemic: K-12 Private Schools*, THE HILL (Nov. 29, 2020), <https://thehill.com/opinion/education/527623-one-sector-is-flourishing-during-the-pandemic-k-12-private-schools> [<https://perma.cc/8XG6-RFNV>], and Kerry McDonald, *Public School Enrollment Plummets as Private Schools See Gains*, FOUND. FOR ECON. EDUC. (Nov. 9, 2020), <https://fee.org/articles/public-school-enrollment-plummets-as-private-schools-see-gains/> [<https://perma.cc/3T8K-5MA4>], and sources cited *infra* note 313 (noting private school enrollment gains during pandemic) with Ricardo Cano, *California Public Schools Suffer Record Enrollment Drop*, CAL MATTERS (Jan. 26, 2021), <https://calmatters.org/education/2021/01/california-schools-record-enrollment-drop/> [<https://perma.cc/X9QT-QTVE>] (highlighting a 6% drop in California private school enrollment during pandemic), and Juliet Squire, *In Pandemic, Private Schools Face Peril*, EDUC. NEXT (Aug. 12, 2020), <https://www.educationnext.org/pandemic-private-schools-face-peril-policy-choices-may-help-preserve-options/> [<https://perma.cc/XC8Y-39EW>], and sources cited *infra* note 317 (discussing private school closures during pandemic due to enrollment loss), and Leslie Brody, *Some Private Schools Win Families, Other Lose Them in Coronavirus Pandemic*, WALL ST. J. (Aug. 15, 2020), <https://www.wsj.com/articles/some-private-schools-win-families-others-lose-them-in-coronavirus-pandemic-11597503601> (on file with the *Columbia Human Rights Law Review*).

312. See sources cited *supra* note 311.

313. See Kamenetz et al., *supra* note 250 (“[P]rivate, non-parochial schools . . . report a net enrollment growth of 1.7% over the two pandemic years.”); Neal McCluskey, *Private Schools Appear to See Rising Enrollment, This Year and Last*, CATO INST. (Oct. 28, 2021), <https://www.cato.org/blog/survey-private-schools-appear-see-rising-enrollment-year-last> [<https://perma.cc/B9YF-WW44>] (“[P]rivate schools gained students between the end of the 2020–21 academic year and the start of 2021–22.”).

314. See, e.g., Graham, *supra* note 208 (citing a 12% growth in “conservative Christian schooling” between 2019–20 and 2020–21 school year, caused in part by what the pandemic “brought to light to families of what’s going on inside the schools, inside the classroom, and what teachers are teaching” (quoting a Christian school leader)).

schools also saw enrollment increases.³¹⁵ Catholic schools experienced an influx of higher-income students seeking in-person options³¹⁶ but not enough to offset losses among families who could no longer afford tuition, fled urban areas Catholic schools often serve, or delayed enrolling their young children in school.³¹⁷ Nationally, Catholic school enrollment dropped 6.4% between the 2019–20 and 2020–21 school years, with a 26.6% decline in preschoolers.³¹⁸ The 200 Catholic school closures during the period accelerated a long-term trend.³¹⁹

iii. Charter schools

Charter schools more clearly gained enrollment during the pandemic. A comprehensive state-by-state analysis by the National

315. See *Enrollment Pulse Survey Report*, PRIZMAH ORG. (Oct. 20, 2021), <https://prizmah.org/knowledge/resource/enrollment-pulse-survey-report-october-2021> [https://perma.cc/ZM9Z-5LAD].

316. Alexander Thompson, *A Deeper Look at Catholic Schools' Pandemic Enrollment Plunge*, NAT'L CATH. REP. (Mar. 12, 2021), <https://www.nconline.org/news/coronavirus/deeper-look-catholic-schools-pandemic-enrollment-plunge> [https://perma.cc/UMN8-E4CW] (stating that during the pandemic, Catholic schools gained high-income students and lost low-income students, generating Catholic school closures in Black and low-income neighborhoods).

317. See e.g., Squire, *supra* note 311 (describing private schools' financial struggles and closures); *COVID-19 Permanent Private School Closures*, CATO INST., <https://www.cato.org/private-schooling-status-tracker> [https://perma.cc/87XW-ZXLZ] (tracking closures of private religious schools during COVID-19); David Crary, *US Catholic School Association Seeks Rebound From Grim Year*, FOX45 NEWS (June 29, 2021), <https://www.foxbaltimore.com/news/nation-world/us-catholic-school-association-seeks-rebound-from-grim-year> [https://perma.cc/3UGG-LNG6] (stating more than 200 Catholic schools closed during pandemic, mainly in big cities).

318. See Luis Andres Henan, *Enrollment in US Catholic Schools Rebounds After Sharp Drop*, USNEWS (Feb. 14, 2022), <https://www.usnews.com/news/us/articles/2022-02-14/enrollment-in-us-catholic-schools-rebounds-after-sharp-drop> (on file with the *Columbia Human Rights Law Review*) (“Pre-kindergarten programs saw the steepest drop, 26.6%[,] [in Catholic school enrollment between 2019–20 and 2020–21]”); Yonat Shimron, *Facing Enrollment Declines, Some Catholic Dioceses are Betting on Online Schools*, RELIGIOUS NEWS SERV. (June 9, 2021), <https://religionnews.com/2021/06/09/facing-enrollment-declines-catholic-dioceses-take-a-bet-on-online-schools/> [https://perma.cc/FD32-SCLT] (“Catholic schools saw a 6.4% decline in enrollment at the start of the 2020-2021 school year.”).

319. See, e.g., Thompson, *supra* note 316 (“The pandemic added new pressures to long-existing ones like declining birthrates and increasing disaffiliation with the church.” (quoting the director of the education secretariat at the U.S. Conference of Catholic Bishops)).

Association of Public Charter Schools reports more charter school enrollment growth in the 2020–21 school year than in any of the previous six years—rising 7.1% nationally, adding 237,000 students, and climbing in 39 of the 42 states for which data were available.³²⁰ In a number of states, for-profit online charter schools drove statewide enrollment gains as they drew on their expertise in remote-learning modalities that public schools were just trying out, while downplaying their history of financial scandals and low student engagement and achievement.³²¹ Even in states that do not allow or have many for-profit charter schools, however, 2020–21 charter school gains were substantial—with charter school enrollment gains equivalent to 13.1% of enrollment losses in New York State’s traditional public schools, 14.3% in Colorado, 14.7% in Rhode Island, 19.2% in Texas, and 37.0% in the District of Columbia.³²² Charter schools thus were “the only segment of the public education sector to grow” during the three pandemic years.³²³

320. DEBBIE VENEY & DREW JACOBS, NAT’L ALLIANCE PUB. CHARTER SCHS., VOTING WITH THEIR FEET: A STATE-LEVEL ANALYSIS OF PUBLIC CHARTER SCHOOL AND DISTRICT PUBLIC SCHOOL TRENDS 1–2, 4 (2021), https://www.publiccharters.org/sites/default/files/documents/2021-09/napcs_voting_feet_rd6.pdf [<https://perma.cc/5FPM-6MSV>]; see also Troy Closson, *As New York City Schools Face a Crisis, Charter Schools Gain Students*, N.Y. TIMES (Nov. 21, 2022) (“As traditional public schools in the nation’s largest system endure a perilous period of student loss and funding shortfalls, New York City’s charter schools are on an upward trajectory.”).

321. See, e.g., Benjamin Herold, *Full-Time Virtual Schools: Still Growing, Still Struggling, Still Resisting Oversight*, EDUC. WEEK (May 6, 2021), <https://www.edweek.org/policy-politics/full-time-virtual-schools-still-growing-still-struggling-still-resisting-oversight/2021/05> [<https://perma.cc/6J2D-Y4ZL>] (explaining expansion of for-profit virtual schools expansion during the pandemic notwithstanding their history of fraud and poor academic results); Perry Stein, *Enrollment in Virtual Schools is Exploding*, WASH. POST (Feb. 19, 2022), <https://www.washingtonpost.com/education/2022/02/19/virtual-school-enrollment-increase/> (on file with the *Columbia Human Rights Law Review*) (“In many states, virtual charter schools drove the outsize growth in charter school enrollment [during the pandemic] even as the quality of them has come under scrutiny.”).

322. VENEY & JACOBS, *supra* note 320, at 3, 11; see, e.g., NYC Public Charter Schools See Sixth Straight Year of Growth, NYC CHARTER SCH. CTR. (Jan. 31, 2022), <https://nyccharterschools.org/press-releases/nyc-public-charter-schools-see-six-straight-year-of-growth/> [<https://perma.cc/3BU5-ARAQ>] (describing 9% growth in New York City public charter school enrollment in 2019–20 to 2021–22, compared to a 9% drop in district school enrollment during same period).

323. VENEY & JACOBS, *supra* note 320, at 1.

Charter schools' recent expansion compounds a quarter century of rapid growth from the early 1990s through 2015 and ended a plateauing of charter school enrollment from 2016 to 2019.³²⁴ Whether these increases will persist is unclear, but charter advocates offer reason to think they will:

[F]amilies chose to leave their district schools in record-high numbers [during the pandemic] and polling from parents suggests this wasn't a temporary change. According to National Parents Union [made up primarily of Black and Latinx parents], 80% of the parents they surveyed said the 2020-21 school year was an eye-opening experience that also resulted in a demonstrable shift in parental involvement when it comes to their child's education and parents' desire to engage schools with more input and feedback. A majority of parents want more options for their students following the pandemic and they have no plans to return to the way things were.³²⁵

Citing studies showing that during the pandemic "charter schools leveraged their flexibility and autonomy to better meet the needs of students" than traditional public schools, Bloomberg Philanthropies recently committed \$750 million to support charter school growth.³²⁶ Also noted by Bloomberg Philanthropies was a

324. M. Danish Shakeel & Paul E. Peterson, *Charter Schools Show Steeper Upward Trend in Student Achievement Than District Schools*, 21 EDUC. NEXT 40–47 (Winter 2021), <https://www.educationnext.org/charter-schools-show-steeper-upward-trend-student-achievement-first-nationwide-study/> [<https://perma.cc/K474-L8S9>] (tracking charter school enrollment patterns).

325. VENEY & JACOBS, *supra* note 320, at 1 (citing *National Parents Union Survey of Public School Parents—April 2021*, NAT'L PARENTS UNION (May 4, 2021), <https://nationalparentsunion.org/npu-polling/> [<https://perma.cc/H3Q3-J7VT>]).

326. *Bloomberg Philanthropies Launches Historic \$750 Million National Effort to Advance Public Charter Schools as Traditional District Schools Fail Children During COVID-19 Pandemic*, BLOOMBERG PHILANTHROPIES (Dec. 1, 2021), <https://www.bloomberg.org/press/bloomberg-philanthropies-launches-historic-750-million-national-effort-to-advance-public-charter-schools-as-traditional-district-schools-fail-children-during-covid-19-pandemic/> [<https://perma.cc/TBP9-5R5P>] (citing Lyria Boast et al., *Learning in Real Time: How Charter Schools Served Students During COVID-19 Closures*, NAT'L ASS'N PUBL. CHARTER SCHS. (Aug. 2020), https://www.publiccharters.org/sites/default/files/documents/2020-10/napcs_pi_report_rd8.pdf [<https://perma.cc/6JMR-RDBJ>]); GREGG VANOUREK, FORDHAM INST., *SCHOOLING COVID-19: LESSONS FROM LEADING CHARTER NETWORKS FROM THE TRANSITION TO REMOTE LEARNING*

recent academic study finding that, from 2005 to 2017, controlling for demography, student cohorts in the charter sector outperformed their peers in district schools on NAEP reading and math assessments by about a third of a year's worth of learning, with Black and economically disadvantaged students making the biggest gains.³²⁷ As we note above, charter schools oriented toward providing higher-quality schooling for traditionally underserved student populations have experienced greater academic gains than charter schools oriented toward preserving cultural homogeneity.³²⁸

iv. Learning pods and microschoools

Small informal learning groups and neighborhood arrangements to supplement in-class learning predate the pandemic, but COVID-19 vastly expanded their prominence and gave them a new name: "learning pods."³²⁹ Learning pods uniquely accommodate multiple learning modalities and facilitate social distancing, contract tracing, and in-person supervision of students receiving online lessons or completing assignments on their own.³³⁰ Parents particularly valued pods as full-time options for children in

(2020), <https://fordhaminstitute.org/sites/default/files/publication/pdfs/2020825-schooling-covid-19-lessons-leading-charter-networks-their-transition-remote-learning.pdf> [<https://perma.cc/6Y78-JRMZ>]).

327. *Bloomberg Philanthropies Launches Historic \$750 Million National Effort*, *supra* note 326 (citing Shakeel & Peterson, *supra* note 324).

328. *See supra* notes 147–150 and accompanying text.

329. *See, e.g.*, Dani Blum & Farah Miller, *What Parents Need to Know About Learning Pods*, N.Y. TIMES (Aug. 18, 2020), <https://www.nytimes.com/article/learning-pods-coronavirus.html> (on file with the *Columbia Human Rights Law Review*) (describing pods as "small groups of children who learn together at home").

330. *See, e.g., id.* (providing reasons such as seeking safety from coronavirus and wanting children to have social interaction for parents' and teachers' turn to pods); Amy Feiereisel, *What North Country 'Social Pods' Have Looked Like, from Canton to Saranac Lake*, NCPR (Aug. 11, 2020), <https://www.northcountrypublicradio.org/news/story/42102/20200811/what-north-country-social-pods-have-looked-like-from-canton-to-saranac-lake> [<https://perma.cc/6LGZ-NW5M>] (explaining families' use of "social pods" for schooling, play, and childcare, limiting COVID-19 exposure while helping parents balance job and other obligations); Jessica Mensch, *California Parents Are Forming 'Pandemic Pods,' 'Micro-Schools'*, FOX40 (July 20, 2020), <https://fox40.com/news/local-news/california-parents-are-forming-pandemic-pods-micro-schools/> [<https://perma.cc/73SW-5DU5>] (describing the growing use of pods by families agreeing to COVID-19 safety measures, to rotate childcare duties, and to invest in tutoring).

kindergarten to second grade and as supplements to remote learning in higher grades.³³¹ The variety of arrangements, many fleeting, ad-hoc, and focused more on childcare than learning,³³² make pod use difficult to quantify, but one national survey found that 22% of parents participated in a learning pod and another 20% were looking to form them during the 2020–21 school year, with some of the strongest interest among parents identifying as Black, Hispanic, urban, or Democrats.³³³

Parents sometimes led learning pods themselves, but many pods operated with outside help. Of 330 learning pods studied by the Center for Reinventing Public Education in 2020–21, non-profit organizations facilitated 44%, while for-profit businesses operated 17%, school districts operated 7%, and partnerships of community groups, municipalities, and school districts operated 12.5%.³³⁴ A fifth of the pods met in schools.³³⁵ Learning pods also likely accounted for some of the exponential growth in use of virtual educational supplements, such as Outschool, an online company connecting

331. See *The Public, Parents, and K-12 Education*, *supra* note 288, at 24 (reporting that 76% of surveyed learning pod parents used them as supplements to, the rest as substitutes for, online learning); *School Disrupted Part 1*, *supra* note 284, at 8, 12 (reporting survey data indicating greater use of learning pods for young children).

332. See Pavithra Mohan, *How 3 Sets of Parents Found Childcare Workarounds During COVID-19*, FAST COMPANY (June 30, 2020), <https://www.fastcompany.com/90521204/how-3-sets-of-parents-found-childcare-workarounds-during-covid-19> (on file with the *Columbia Human Rights Law Review*) (describing the use of learning pods as a childcare solution during the pandemic); Zaidee Stavely, *Low-Income Parents Turn to Neighbors, Family for Help with Distance Learning*, EDSOURCE (Aug. 28, 2020), <https://edsources.org/2020/low-income-parents-turn-to-neighborhood-networks-for-help-with-distance-learning/639061> [<https://perma.cc/T4TU-X52Z>] (“Instead of the small learning groups and private tutors some wealthy parents are arranging for their children this school year, many low-income parents are turning to family members, neighbors and friends for child care and help navigating distance learning.”).

333. *The Public, Parents, and K-12 Education*, *supra* note 288, at 20–21; see also *School Disrupted Part 1*, *supra* note 284, at 8, 12 (finding that 12% of surveyed parents reported using learning pods during pandemic; estimating national Fall 2020 learning pod enrollment of .72 million compared to .58 million pre-pandemic).

334. Alice Opalka & Ashley Jochim, *It Takes a Village: The Pandemic Learning Pod Movement, One Year In*, CTR. FOR REINVENTING PUB. EDUC. (Feb. 11, 2021), <https://www.crpe.org/thelens/it-takes-village-pandemic-learning-pod-movement-one-year> [<https://perma.cc/W82W-J25C>].

335. *Id.*

students to part-time teachers for synchronous learning support, which grew from 1,000 teachers in 2019 to 7,000 in 2021,³³⁶ and Khan Academy, which saw a nearly 300% spike in the use of the online site's asynchronous materials in the first months of the pandemic.³³⁷

Given costs pods impose on families, the extent of their post-pandemic use likely will depend on whether public-school systems choose to fund and make them a part of their ongoing programs.³³⁸ A Tyton Partners survey found that pod use was far more common among high-income parents (25% of surveyed parents in this cohort) than middle-income (11%) and low-income parents (5%).³³⁹ Sixty-two percent of higher income families reported paying certified teachers to run their pods, versus 31% of lower income families.³⁴⁰ Demand among low-income families and community-based advocates for access to learning pods during the pandemic—and concerted efforts of “pandemic learning communities led by leaders of color” to provide

336. Emily Tate Sullivan, *Edtech Unicorn Outschool Exploded During the Pandemic*, EDSURGE (Oct. 14, 2021), <https://www.edsurge.com/news/2021-10-14-edtech-unicorn-outschool-exploded-during-the-pandemic-what-happens-next> [<https://perma.cc/2LQS-84PZ>].

337. Nilay Patel & Sophie Erickson, *Remote Learning Is Here to Stay*, THE VERGE (Nov. 17, 2020), <https://www.theverge.com/21570482/remote-learning-khan-academy-interview-decoder-podcast> [<https://perma.cc/CW73-YM96>].

338. See, e.g., Erica Breunlin, *Facing ‘Seismic Shift’ This Year, Colorado Educators Pioneer Through Permanent Changes to Schooling*, THE COLO. SUN (Nov. 17, 2021), <https://coloradosun.com/2020/11/17/facing-a-seismic-shift-this-year-educators-pioneer-their-way-through-permanent-changes-to-schooling/> [<https://perma.cc/G72U-48HK>] (discussing Colorado public-school learning pods for students with working parents, with disabilities, and learning English); Kim Haas, *Learning Pods Expanded to New Hampshire Through Grant Program with DOE*, PATCH.COM (Apr. 24, 2021), <https://patch.com/new-hampshire/merrimack/learning-pods-expanded-new-hampshire-through-grant-program-doe> [<https://perma.cc/FX7L-TESE>] (discussing state funding for school districts to hire private micro-schooling company to create learning pods); Kristen Hampshire, *Cleveland Educators Share the Unexpected Benefits of Learning Pods*, CLEVELAND MAG. (Mar. 19, 2021), <https://clevelandmagazine.com/education/articles/cleveland-educators-share-the-unexpected-benefits-of-learning-pods> [<https://perma.cc/F9GG-AVRG>] (discussing Cleveland schools partnership with community organizations to provide pods); Jenna Schiferl, *Charleston Schools Launch Learning Pods for Low-Income Students to Aid Virtual Instruction*, THE POST & COURIER (Nov. 15, 2021), https://www.postandcourier.com/news/charleston-schools-launch-learning-pods-for-low-income-students-to-aid-virtual-instruction/article_7a2edb34-ff47-11ea-b920-33ad469978b5.html [<https://perma.cc/QS6L-EHXT>] (discussing partnership between a school district, a local church, and nonprofits to host pods).

339. *School Disrupted Part 1*, *supra* note 284, at 12–13.

340. *Id.* at 15.

such access—suggest that these discrepancies stem from differences in resources, not preferences.³⁴¹

As in the case of learning pods, microschools predated the pandemic and surged in popularity during it, enrolling an estimated 600,000 students in 2020–21.³⁴² Microschools serve small numbers of students, exhibiting some features of full-time, substitutive (as opposed to supplementary) learning pods and qualifying as homeschools in some states.³⁴³ Mirroring private schools, microschools often are run by for-profit companies like Prenda, provide their teachers with a set curriculum and portfolio of learning tools, and are funded largely through state voucher and educational savings account (ESA) programs.³⁴⁴ Given its established ESA system, Arizona saw particularly significant increases in students

341. DARAMOLA, *supra* note 296, at 3–75 (describing creation of learning pods in Black and Latinx communities by Boston Community Learning Collaborative, Equity Pods in Brooklyn (NY), and Latinx parents in Denver to provide children of color with access to learning pods like those that “wealthy and white” parents were creating in their neighborhoods); *see also* EUPHA JEANNE DARAMOLA, CTR. ON REINVENTING PUB. EDUC., PODS IN ACTION: THE OAKLAND REACH (2022), <https://crpe.org/wp-content/uploads/final-Oakland-REACH-case-study.pdf> [<https://perma.cc/8FBT-JS89>] (describing parent-run advocacy group’s operation of pods to address needs of Oakland’s Black and Latinx communities).

342. *School Disrupted Part 1*, *supra* note 284, at 8.

343. *Id.* at 6 (“Microschool: Small independent K-12 schools often characterized by size and structure—class sizes of typically 20 or fewer children, mixed-aged level groupings, innovative and/or active teaching models, and personalized approach and attention.”); Andy Smarick, *Microschooling and Policy*, MANHATTAN INST. (Feb. 24, 2022), <https://www.manhattan-institute.org/smarick-microschooling-and-policy> [<https://perma.cc/L3HC-VW3A>] (noting that states may categorize microschools as homeschooling or small private schools, depending on their structure); Andrew Bauld, *What Is a Microschool?*, U.S. NEWS (Apr. 7, 2022), <https://www.usnews.com/education/k12/articles/what-is-a-microschool> (on file with the *Columbia Human Rights Law Review*) (noting absence of accepted national standards for defining or accrediting microschools, states’ struggle to define them, and wide variation in how states treat them).

344. *See, e.g., Prenda in Arizona*, PRENDA, <https://www.prenda.com/primary-states/arizona> [<https://perma.cc/7K2U-89XB>] (describing, from the for-profit organization’s viewpoint, the “small,” “safe,” “flexible,” “personalized” and “community-centered” environment of Prenda and similar tuition-free microschools). Prenda’s Arizona website encourages parents to apply to receive state ESA funds that can be used for several educational purposes, including Prenda. *Id.*

enrolled in microschoools, presaging growth elsewhere as vouchers and ESAs expand there.³⁴⁵

3. Leaving school

As we note above, public-school enrollments have declined in part because older students—especially economically disadvantaged youth of color buffeted by family financial difficulties and flagging grades—have chosen to leave school entirely to support siblings or find jobs.³⁴⁶ Although parents rarely acknowledge keeping children out of school for these reasons,³⁴⁷ 18% of respondents on a National Parents Union survey said their children in grades 9–12 needed to find work or work longer hours during the pandemic due to the family’s financial situation.³⁴⁸ Students’ and parents’ doubts about the value of the education being offered³⁴⁹ also may have figured into the calculus leading students to leave school in favor of other occupations.

345. Mike McShane, *Microschooling’s Growth in Arizona Is No Surprise*, FORBES (Dec. 16, 2021), <https://www.forbes.com/sites/mikemcshane/2021/12/16/microschoolings-growth-in-arizona-is-no-surprise/?sh=ab0f5ec37e62> [https://perma.cc/F32B-YRCF].

346. See *supra* notes 262–267 and accompanying text.

347. See SCHWARTZ ET AL., *supra* note 307 (reporting survey responses indicating that some parents did not plan to send one or more child to school in person in Fall 2021 so child could hold down a job).

348. *Majority of Parents Expect Children to Have Challenges With Learning & School Routine Readjustment Next Year*, NAT’L PARENTS UNION (June 29, 2021), <https://nationalparentsunion.org/2021/06/29/majority-of-parents-expect-children-to-have-challenges-with-learning-school-routine-readjustment-next-year/> [https://perma.cc/7GHU-F2RV]; see also Rachel Martin, *NYC Schools Chancellor Says Her Message to Parents is Simple: Schools Are Safe*, NPR (May 25, 2021), <https://www.npr.org/sections/coronavirus-live-updates/2021/05/25/1000107093/nyc-schools-chancellor-says-her-message-to-parents-is-simple-schools-are-safe> [https://perma.cc/5UGE-E696] (quoting New York City schools chancellor acknowledging that some parents’ economic reality leads them to encourage teenagers to work instead of attend school); Elizabeth Romanov, *Addressing Chronic Absence During Covid-19*, NAT’L CONF. OF STATE LEGISLATURES (Feb. 2, 2021), <https://www.ncsl.org/blog/2021/02/02/addressing-chronic-absence-during-covid-19-a-conversation-with-bellwether-education-partners.aspx> [https://perma.cc/D3RY-LKSY] (describing family pressures on older students to work during pandemic).

349. See *supra* notes 209–237 and accompanying text.

4. Advocating better schools

In the midst of the pandemic and school systems' efforts to address the May 2020 killing of George Floyd and what it revealed about the past and present of American racism, families acted collectively as well as individually, adding voice to choice in response to rising doubts about public schools. Most attention given to this new parents' movement has focused on angry, even violent, objections regarding the right to masking and vaccination requirements, arrangements for LGBTQ students, anti-bias training for school staff, and curricula on U.S. race relations characterized as "critical race theory."³⁵⁰ These forces no doubt threaten public schools, fueling the campaign to delegitimize full public subsidization of only public schools and increase public funding for private schools, while driving families who otherwise would prefer public schools away from the churn of public-school controversies.³⁵¹

350. See, e.g., Ashleigh Panoo, *Clovis Student Booed by Adults at School Meeting*, FRESNO BEE (Oct. 21, 2021), <https://www.fresnobee.com/news/local/education-lab/article255177182.html> (on file with the *Columbia Human Rights Law Review*) (reporting how an immunocompromised student who attended a school board meeting in support of a mask mandate was rebuked by parents in attendance); Juan Perez Jr., *Garland Taps FBI in Response to 'Disturbing Spike' in Threats Against Educators*, POLITICO (Oct. 4, 2021), <https://www.politico.com/news/2021/10/04/garland-fbi-educator-threats-515104> [<https://perma.cc/SED8-Q6SA>] (describing the U.S. Attorney General's creation of FBI task force to prevent violence against school board members over COVID restrictions); GREG TOPPO ET AL., FUTUREED, LEANING IN: THE NEW POWER OF PARENTS IN PUBLIC EDUCATION 4, 10–11 (2022), https://www.future-ed.org/wp-content/uploads/2022/04/FutureEd-Report_Leaning-in.pdf [<https://perma.cc/8UYZ-554W>] (describing the rapid growth of pandemic-spawned "new conservative parent organizations opposed to mask mandates, vaccines, and district attempts to confront issues of race, gender and sexuality in schools," which "have turned more than a few school board meetings into civic punch-ups"); Ian Walniuk & Katie MacKinnon, *OCS Board of Education to Meet Virtually After Proud Boys Interrupt Session*, THE DAILY TAR HEEL (Oct. 18, 2021), <https://www.dailytarheel.com/article/2021/10/city-proud-boys-at-ocs> [<https://perma.cc/2MFU-A234>] (providing firsthand account of racist threats to school board members and disruption of their meetings during mask-mandate protests).

351. See, e.g., Sarah Gibson, *Why Some NH Parents Are Homeschooling Their Kids for a Second Year*, N.H. PUB. RADIO (Oct. 18, 2021), <https://www.nhpr.org/nh-news/2021-10-18/homeschooling-nh-parents-covid> [<https://perma.cc/T32G-QRGN>] (quoting a mother's explanation for pulling her children out of public schools: "I'm really questioning: Do we even want to go back to this community that is so—almost nasty about masks, no masks? . . . Everything is political."); *supra* notes 21–24 and accompanying text

Less remarked but potentially even more of a challenge to the public education establishment is pandemic-triggered activism by parents who in the past have supported and happily taken advantage of fully subsidized public schools.³⁵² During the pandemic, public schools faced angry backlash from their core constituencies, supported in part by a new generation of community-based organizations in Black and Latinx neighborhoods supported by philanthropic funding.³⁵³ Citing schools remaining remote after public health officials deemed in-person education safe and public life

(describing broad range of critiques of public education that emerged during the pandemic).

352. See, e.g., ‘A Breach of Trust’: Three Parents on Why They Became School Activists, N.Y. TIMES (Sept. 1, 2022), <https://www.nytimes.com/interactive/2022/09/01/opinion/us-school-parents.html> (on file with the *Columbia Human Rights Law Review*) (“America’s schools have emerged as a battleground for the country’s most fervent cultural disagreements, and in many places, parents are finding themselves on the front lines . . . [as part of a] new era of parental activism”); Dana Goldstein, *As School Closures Near First Anniversary, a Diverse Parent Movement Demands Action*, N.Y. TIMES (Feb. 28, 2021), <https://www.nytimes.com/2021/02/28/us/schools-reopening-philadelphia-parents.html> (on file with the *Columbia Human Rights Law Review*) [hereinafter, Goldstein, *Diverse Parents Movement*] (describing prominence in new activism focused on school quality during pandemic of parents in both middle class white and economically disadvantaged Black and Latinx neighborhoods); TOPPO ET AL., *supra* note 350, at 5–6 (describing a “new generation of far more activist parent organizations” that is “pushing policymakers and local education leaders for better schools, greater transparency, resource equity, teacher diversity, [and] more school options” — activism that “[t]he pandemic intensified . . . [by] stoking parents’ frustrations with school closings and online learning”).

353. TOPPO ET AL., *supra* note 350, at 5–6, 7–14 (describing pandemic-driven advocacy by community-based organizations of low-income Black and Latinx parents in Atlanta, Los Angeles, Memphis, Oakland, and Washington, D.C.—supported by national organizations such as Brightbeam (blogging network of parent and local activists demanding improved public schools), Learning Heroes (training parents to become effective education advocates for their children), and National Parents Union (described *infra* note 421) and an array of new philanthropic funders—to “[forge] a sense of agency among low-income parents and parents of color traditionally excluded from their children’s educational lives” via school board elections, school-district agenda-setting exercises, and lobbying of “policymakers and local education leaders for better schools, greater transparency, resource equity, teacher diversity, [and] more school options”); see *supra* notes 296, 341 & *infra* note 487 (providing examples of education-focused activism by Black- and Latinx-led community organizations in Boston, Brooklyn, Denver, and Detroit).

otherwise resumed functioning,³⁵⁴ as well as children’s lack of interest, poor grades, and flagging mental health, and targeting teachers unions in particular,³⁵⁵ parents flooded school officials’

354. See, e.g., Howard Blume, *LA Parents Demand Schools Reopen, Saying Science and Improved Conditions Are on Their Side*, L.A. TIMES (Feb. 23, 2021), <https://www.latimes.com/california/story/2021-02-23/parents-protest-covid-closures-demand-la-schools-reopen> (on file with the *Columbia Human Rights Law Review*) (quoting parent activist identifying as a “big turning point for a lot of us parents” when “L.A. County Health Department gave [schools] the clear” to open, but “LAUSD and UTLA [the local teachers union] said: Oh no, but it’s still not safe”); Goldstein, *Diverse Parent Movement*, *supra* note 352 (providing numerous examples across racial, economic, and urban/suburban lines of parents “angry about shuttered schools” and taking action that may “rejigger the politics of public education”—“ask[ing] questions’ of local school officials” that they “didn’t ask” before; “distrust[ing] . . . teachers’ unions that are slowing reopening timelines”; and switching from “believ[ing] in the value of public education” to exercising “options the unions oppose, like private school vouchers or non-unionized charter schools” because “[t]he more we see, the more faith we lose in our system”).

355. News articles and analyses documenting criticism of teachers unions during the pandemic, much of it from former allies, include Rebecca Bodenheimer, *How School Closures Made Me Question My Progressive Politics*, POLITICO (Jan. 11, 2022), <https://www.politico.com/news/magazine/2022/01/11/oakland-lefty-my-whole-life-school-closures-triggered-an-identity-crisis-526860> [<https://perma.cc/PVE9-7H58>]; Lauren Camera, *Angry White Parents vs. The Public School System*, U.S. NEWS (May 12, 2021), <https://www.usnews.com/news/education-news/articles/2021-05-12/angry-white-parents-and-the-new-realities-of-public-school> (on file with the *Columbia Human Rights Law Review*); Jonathan Chait, *Remote Learning Is a Catastrophe. Teachers Unions Share the Blame*, N.Y. MAG. (Oct. 7, 2020), <https://nymag.com/intelligencer/2020/10/remote-education-distance-learning-schools-teacher-unions-red-for-ed.html> [<https://perma.cc/AQ7G-VJSQ>]; Dana Goldstein & Noam Schrieber, *As More Teachers’ Unions Push for Remote Schooling, Parents Worry. So Do Democrats*, N.Y. TIMES (Jan. 8, 2022), <https://www.nytimes.com/2022/01/08/us/teachers-unions-covid-schools.html> (on file with the *Columbia Human Rights Law Review*); Kris Maher & Jennifer Calfas, *School Reopening Pits Parents Against Teachers*, WALL ST. J. (Feb. 16, 2021), <https://www.wsj.com/articles/school-reopening-covid-classroom-cdc-parents-teachers-union-students-11613512932> (on file with the *Columbia Human Rights Law Review*); Bill Morris, *Teachers Unions’ Other Foes: Liberal Parents*, REALCLEARINVESTIGATIONS (Apr. 12, 2022), https://www.realclearinvestigations.com/articles/2022/04/12/teachers_unions_other_foes_liberal_parents_826301.html [<https://perma.cc/374V-DWPB>] (resistance to public education by “blue state parents” who previously “championed teacher unions and progressive school boards”); Madeline Will, *Has the Public Turned on Teachers?*, EDUC. WEEK (Jan. 25, 2021), <https://www.edweek.org/teaching-learning/has-the-public-turned-on-teachers/2021/01> [<https://perma.cc/8TUN-BGHJ>]; Mariah Woelfel, *With Schools Shuttered, Chicago Mayor Lori Lightfoot Blames Union Leaders for ‘Chaotic Conduct’*, WBEZ CHICAGO (Jan. 5, 2021), <https://www.wbez.org/stories/>

inboxes with complaints, circulated petitions, formed Facebook and political action groups, ran for school board positions, publicly announced decisions to leave public schools,³⁵⁶ and filed lawsuits.³⁵⁷

chicago-mayor-lori-lightfoot-blames-teacher-union-leaders-for-chaos/387bfde3-3403-4be8-930f-6ff7378bc8e0 [https://perma.cc/SCY4-6C48]; see also Kamenetz, *supra* note 21 (quoting critic of public schools who credits “teachers unions’ influence on keeping the schools closed for so long” during the pandemic with “open[ing] the door” to proposals to privatize education by parceling out “taxpayers funds . . . directly to families to spend as they wish, with no public school ‘monopoly’”).

356. See e.g., Howard Blume, *Parents Frustrated by Pandemic Education Launch Activist Group to Raise Their Voices*, L.A. TIMES (June 2, 2021), <https://www.latimes.com/california/story/2021-06-02/california-parents-form-post-covid-education-activist-group> (on file with the *Columbia Human Rights Law Review*) [hereinafter, Blume, *Parents Frustrated*] (formation of parent group protesting delayed return to in-person learning because “parents need a louder voice—distinct from the unions” to keep “[p]arent voices and student interests [from being] ignored or deprioritized . . .”); ‘A Breach of Trust’, *supra* note 352 (documenting agreement among leaders of three newly former parent groups focused, respectively, on racial injustice in North Carolina schools, excessively long school closures during the pandemic in San Francisco, and removing “ideological agendas from the classroom” in Illinois that parents’ “becom[ing] more aware of what’s going on” inside public schools during the pandemic led to “a breakdown in trust between the parent community and the institutions that are running our public schools”); Goldstein, *Diverse Parent Movement*, *supra* note 352 (“A year into the pandemic, . . . parents are beginning to rebel, frustrated with the pace of reopening and determined to take matters into their own hands[,] . . . making contingency plans to relocate, home-school or retreat to private education[,] . . . filing lawsuits, agitating at public meetings, creating political action committees, or running for school board seats.”); TOPPO ET AL., *supra* note 350, at 6 (“[A] new generation of far more activist parent organizations are springing up across the country . . . [propelled] by [pandemic’s] turning [of] kitchen tables into classrooms, stoking parents’ frustrations with school closings and online learning . . .”); Meg Woolhouse, *Many Parents Are Demanding That Schools Return to In-Person Learning*, GBH NEWS (Feb. 8, 2021), <https://www.wgbh.org/news/education/2021/02/08/many-parents-are-demanding-that-schools-return-to-in-person-learning> [https://perma.cc/T54A-F5WF] (describing Massachusetts parent groups created during pandemic to advocate “safe opening” of schools, support school board nominees, circulate petitions, organize Facebook groups, and support families leaving public for private schools); Jill Tucker, *High-Profile S.F. Parent Advocate Abandons Public Schools Over Son’s Pandemic Learning Loss*, S.F. CHRON. (June 24, 2021), <https://www.sfchronicle.com/education/article/High-profile-S-F-parent-advocate-abandons-public-16269608.php> (on file with the *Columbia Human Rights Law Review*) (describing decision of a San Francisco mother, a former PTA president, to move her son to private school).

Although many public-school systems ignored or were too overwhelmed to respond effectively to family concerns and consequent family moves, individual educators, schools, and some publicly oriented charter management organizations and traditional public systems took the opportunity created by pandemic disruptions and parent dissatisfaction to innovate. The next section highlights what they learned.

C. Educator Responses

Prompted by family advocacy and exempted by necessity from the usual rules and conventions, individual teachers, schools, and systems broadly experimented during the pandemic with supplements and alternatives to public schooling as previously practiced.³⁵⁸ In the words of the director of a broad study of these

357. See, e.g., Howard Blume, *Less Distancing, No COVID Tests; LAUSD Parents Seek Court Order to Force Wider Reopening*, L.A. TIMES (Apr. 8, 2021), <https://www.latimes.com/california/story/2021-04-08/parents-sue-laUSD-push-wider-reopening-no-covid-tests> (on file with the *Columbia Human Rights Law Review*) (describing a lawsuit to reopen L.A. schools and eliminate distancing and testing requirements said to subordinate student to union interests); Howard Blume et al., *Teachers Face Pressure to Return Even Before COVID-19 Vaccinations Complete*, L.A. TIMES, (Feb. 4, 2021), <https://www.latimes.com/california/story/2021-02-04/california-debates-teacher-vaccines-reopening-schools> (on file with the *Columbia Human Rights Law Review*) (detailing San Francisco officials' "unusual step of suing their own school system for not ramping up in-person services"); Leslie Brody, *New Jersey Parents Sue to Reopen Schools After Covid-19 Closures*, WALL ST. J. (Mar. 27, 2021), <https://www.wsj.com/articles/new-jersey-parents-sue-to-reopen-schools-after-covid-19-closures-11616857201> (on file with the *Columbia Human Rights Law Review*) (reporting on three parent lawsuits against New Jersey school districts); Ashley McBride, *Distance Learning Lawsuit Against California Involving Oakland Families Moves Forward*, THE OAKLANDSIDE (June 17, 2021), <https://oaklandside.org/2021/06/17/california-oakland-students-distance-learning-lawsuit/> [https://perma.cc/54PL-92RT] (describing lawsuit against the state education department for failing to provide adequate remote education to low-income minority families).

358. See Peggy Barmore, *Schooling Has Changed Forever. Here's What Will Stay When Things Go Back to 'Normal'*, THE 74 (May 31, 2021), <https://www.the74million.org/article/schooling-has-changed-forever-heres-what-will-stay-when-things-go-back-to-normal/> [https://perma.cc/DN3F-BRGD] (summarizing a national panel survey of 375 school district and charter school leaders finding that "[i]n many districts, educators are reconsidering old norms about schedules"; "get[ting] more proactive about communicating with families," and "listening more closely to student and parent voices"; "placing greater weight on [students' and educators'] emotional well-being"; and, "[f]orced by necessity to be more flexible to individual student needs," rethinking how better to "design

innovations, “[t]he ability to be unbounded by the offerings that are in a school building and the kind of one-size-fits-all approach has been liberating for people.”³⁵⁹ Energized by the surprising successes some of these experiments achieved, educators, schools, and systems have used the reopening of schools to build on innovations, expand and diversify services to students, and address longstanding inequities.

The most consistent change the pandemic caused was the shift from on-site to remote learning.³⁶⁰ Most families experienced this change negatively, particularly early in the pandemic when schools and educators struggled with the logistical, technological, curricular, and social-emotional challenges effective online synchronous instruction presents.³⁶¹ Over time, however, the necessary ingredients turned out to be available for effective remote learning in many contexts and superior learning in some.

learning around kids’ interests and passions”); Jenny Curtin et al., *Not Just Recovery, But Reinvention*, THE 74 (Nov. 2, 2021), <https://www.the74million.org/article/commentary-not-just-recovery-but-reinvention-3-lessons-from-schools-where-covid-innovations-offer-new-solutions/> [<https://perma.cc/GP62-ZCC7>] (“The sudden onset of COVID-19 forced schools and systems to change on the fly, required teachers, families and students to develop new ways of teaching and learning, and proved schools are capable of rapid and significant change.”); Chelsea Waite, *Not a Lost Year: K-12 Innovation During 2020-21 and How to Nurture it Post-Pandemic*, CHRISTENSEN INST. (July 2021), <https://www.christenseninstitute.org/wp-content/uploads/2021/07/Not-a-lost-year-2021-Canopy-report.pdf> [<https://perma.cc/2ULS-L2MH>] (describing K-12 innovation during the pandemic, including new uses of “blended learning” and “family and community support services”).

359. Barmore, *supra* note 358.

360. See, e.g., Nancy Leech et al., *The Challenges of Remote K-12 Education During the COVID-19 Pandemic: Differences by Grade Level*, 26 ONLINE LEARNING 245, 246 (2022) (reporting on a survey-based mixed-methods study examining teachers’ experiences with remote learning during the pandemic).

361. See, e.g., Chu et al., *Fundamental 4*, *supra* note 78, at 12 (describing challenges teachers faced during emergency pivot to remote learning in 2020); David T. Marshall et al., *How Teachers Experienced the Covid-19 Transition to Remote Instruction*, PHI DELTA KAPPAN (Sept. 2, 2020), <https://kappanonline.org/how-teachers-experienced-covid-19-transition-remote-instruction-marshall-shannon-love/> [<https://perma.cc/99P4-LJTR>] (surveying the difficulties teachers faced shifting to online instruction in 2020); LAURA STELITANO ET AL., RAND CORP., THE DIGITAL DIVIDE AND COVID-19: TEACHERS PERCEPTIONS OF INEQUITIES IN STUDENTS’ INTERNET ACCESS AND PARTICIPATION IN REMOTE LEARNING (2020), https://www.rand.org/pubs/research_reports/RRA134-3.html [<https://perma.cc/A8RU-47VX>] (describing instructional difficulties teachers encountered due to internet and equipment problems in high-poverty schools).

Technologically, the pandemic went a long way toward closing many communities' digital divide.³⁶² Programmatically, a subset of students found virtual modalities in home settings more conducive to learning than traditional schooling.³⁶³ So did many families of color, preferring schooling at home to their children's exposure to bullying, excessive discipline, and culturally insensitive instruction in class.³⁶⁴ Educators also came to value virtual and live-streamed programming and libraries to broaden access to advanced, foreign language, remedial and other coursework not otherwise available to students in their district schools; expand the range of digital tools students could

362. See, e.g., *Affordable Connectivity Program*, FCC (May 9, 2022), <https://www.fcc.gov/acp> [<https://perma.cc/XXL8-9GP5>] (outlining new federal program securing low internet rates for qualifying households); Dorn et al., *COVID-19 and Learning Loss*, *supra* note 233, at 4 (reporting survey quantifying frequency of school districts' distribution of Chromebooks, hotspots, tablets, and laptops; negotiation of lower internet rates for students; and subsidized home internet access); Alice Opalka et al., *Rural School Districts Can Be Creative in Solving the Internet Connectivity Gap—But They Need Support*, BROWN CTR. CHALKBOARD (Aug. 10, 2020), <https://www.brookings.edu/blog/brown-center-chalkboard/2020/08/10/rural-school-districts-can-be-creative-in-solving-the-internet-connectivity-gap-but-they-need-support/> [<https://perma.cc/JG7J-T9MD>] (describing similar steps in rural districts); Austin Reid & Jocelyn Salguero, *States Use CARES Act Funds to Address Digital Divide*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 28, 2021), <https://www.ncsl.org/ncsl-in-dc/publications-and-resources/states-use-cares-act-funds-to-address-digital-divide-magazine2020.aspx> [<https://perma.cc/CC8U-VLLS>] (describing use of federal funding to distribute devices and hotspots, equip school buses with Wi-Fi, purchase internet for families, and expand broadband infrastructure and teacher and family access to online platforms).

363. See, e.g., Nora Fleming, *Why Are Some Kids Thriving During Remote Learning?*, EDUTOPIA (Apr. 24, 2020) <https://www.edutopia.org/article/why-are-some-kids-thriving-during-remote-learning> [<https://perma.cc/6W6V-JZUP>] (describing remote learning's benefits to some students, including looser learning structures, diminished anxiety related to bullying, and amenability to differentiated learning styles); Azure Gilman, *Remote Learning Has Been a Disaster for Most Students. But Some Kids Have Thrived*, THE HECHINGER REP. (Oct. 3, 2020), <https://hechingerreport.org/remote-learning-has-been-a-disaster-for-many-students-but-some-kids-have-thrived> [<https://perma.cc/WKV7-PNSW>] (describing favorable responses to remote learning by children with atypical learning needs in home environments free of distractions and offering greater flexibility); Samantha Murphy Kelly, *Some Parents Are Seeking a Permanent Virtual School for the Fall*, INNOVATE (June 16, 2021), <https://www.cnn.com/2021/07/16/tech/online-school-permanent/index.html> [<https://perma.cc/MUV3-DTW9>] (describing parent agitation for continued remote learning for children who learn more in remote settings).

364. See sources cited *supra* notes 237, 296–298.

access in school; and avoid interruptions due to inclement weather and students' medical needs—opportunities and knowledge teachers vowed to carry into the future.³⁶⁵ Virtual modalities also expanded access to healthcare, counseling, special education, and other social services that schools have long strived but often failed to provide students on any or an individual basis.³⁶⁶

In response, many states gave school districts discretion to offer virtual modalities during the 2021–22 school year, and by one count, 128 of the 200 largest school districts in the country created virtual programs during the 2021–22 school year designed to outlast the virus.³⁶⁷ States also granted virtual charter schools legislative

365. See, e.g., Emily Brindley, *Will Remote Learning in Connecticut Become the Wave of the Future, or a Relic of the Coronavirus Pandemic Past?*, HARTFORD COURANT (May 17, 2021), <https://www.courant.com/coronavirus/hc-news-coronavirus-connecticut-school-remote-learning-continues-20210517-g7hf4lz4urd6xjgix4uad7wny-story.html> [<https://perma.cc/WJ6M-5MQZ>] (describing continued use of remote modalities on snow days and when children are injured or sick); Sydney Johnson, *Distance Learning Changed California Education*, EDSOURCE (Mar. 15, 2021), <https://edsource.org/2021/distance-learning-changed-california-education-whats-here-to-stay/651179> [<https://perma.cc/W8UK-GNFH>] (discussing teachers' desire to continue using educational supplements and tools that improved teaching and grading policies during pandemic); Carrie Jung, *For Some Rural Students, Taking More AP Courses Means More Online Learning*, WBUR (June 15, 2021), <https://www.wbur.org/edify/2021/06/15/rural-students-ap-courses-online> [<https://perma.cc/Q7CQ-Z67Y>] (explaining how remote learning has enabled students in rural areas to take AP classes otherwise not available at their schools); Stefan Lallinger, *Lessons from the Nation's Three Largest School Districts on COVID-19 Response*, CENTURY FOUND (June 24, 2020), <https://tcf.org/content/commentary/lessons-nations-three-largest-school-districts-covid-19-response/?session=1&session=1> [<https://perma.cc/93DR-E54S>] (describing continued use of TV broadcasts in Los Angeles, virtual libraries in Chicago).

366. See, e.g., Barmore, *supra* note 358 (describing educators' improved “view into students' home lives” during remote learning, driving mental health and social service innovations); Lallinger, *supra* note 365 (describing Los Angeles district's use of telehealth to serve students with disabilities); *Virtual School-Based Therapy Provides Kids With Access to Mental Health Support*, ATRIUM HEALTH (April 2022), <https://atriumhealth.org/dailydose/2022/04/21/virtual-school-based-therapy-provides-kids-with-access-to-mental-health-support> [<https://perma.cc/QC8R-P7NG>] (describing virtual program allowing school guidance counselors with parental permission to refer students to virtual therapy).

367. HEATHER SCHWARTZ ET AL., RAND CORP., REMOTE LEARNING IS HERE TO STAY (2020), https://www.rand.org/pubs/research_reports/RRA956-1.html [<https://perma.cc/2Q8P-YL78>]; see Benjamin Herold, *'No Going Back' From Remote and Hybrid Learning, Districts Say*, EDUC. WEEK (Jan. 7, 2021), <https://www.edweek.org/technology/no-going-back-from-remote-and-hybrid->

waivers from preexisting restrictions or authorized them to extend their enrollment across districts, generating large surges in enrollment in the past two years.³⁶⁸ State and local school systems that required all or nearly all public school students to return to in-person schooling during 2021–22—some handcuffed by union contracts barring the livestreaming of classes, the most cost-efficient remote option—faced parent protests and large increases in absenteeism as parents kept their children home.³⁶⁹

learning-districts-say/2021/01 [https://perma.cc/NW6S-HH9F] (describing entrenchment of new uses of remote instruction in school budgets); Christine Pitts & Cara Pangelinan, *School Reopening by the Numbers*, THE 74 (Sept. 26, 2021), <https://www.the74million.org/article/school-reopening-by-the-numbers-how-100-top-districts-are-and-arent-adapting-huge-new-demand-for-remote-learning-rethinking-bans-on-virtual-options-more/> [https://perma.cc/Q8L7-BNN9] (“[D]istricts across the country are pivoting to create remote options for families facing complicated health decisions and not yet comfortable sending their unvaccinated children back to school.”); Natasha Singer, *Online Schools Are Here to Stay, Even After the Pandemic*, N.Y. TIMES (May 11, 2021), <https://www.nytimes.com/2021/04/11/technology/remote-learning-online-school.html?action=click&module=Top%20Stories&pgtype=Homepage> [https://perma.cc/58X4-7BKT] (describing school districts’ acceleration of post-pandemic use of virtual learning).

368. See sources cited *supra* note 321 and accompanying text.

369. For state and district in-person mandates, see, e.g., Susie An, *Illinois Mandates In-Person Learning This Fall in Public Schools*, WBEZ CHICAGO (May 19, 2021), <https://www.wbez.org/stories/illinois-mandates-in-person-learning-this-fall-in-public-schools/f54c0f55-0165-446a-bad6-c71d512efe5e> [https://perma.cc/KJ8C-JCQC] (describing Illinois’ mandate of in-person classes for the 2021–22 school year); Rachel Martin, *NYC Schools Will Return to Normal in September, Mayor De Blasio*, NPR (May 25, 2021), <https://www.npr.org/2021/05/25/1000043014/nyc-schools-will-return-to-normal-in-september-mayor-de-blasio-says> [https://perma.cc/MUV3-DTW9] (describing New York City’s planned September 2021 return to in-person classes with no option for remote learning). For parent protests against in-person mandates and resulting student absenteeism, see P. Kenneth Burns, *N.J. Parent Group Continues to Press Murphy on Virtual School Option*, PBS (Oct. 21, 2021), <https://why.org/articles/n-j-parent-group-continues-to-press-murphy-on-virtual-school-option/> [https://perma.cc/K85B-ZVQ6]; Dialynn Dwyer, *This Literally Scares the Hell Out of Me: Parents Call on Massachusetts Officials to Make Remote Learning Options Available*, BOSTON.COM (Sept. 20, 2021), <https://www.boston.com/news/schools/2021/09/20/this-literally-scares-the-hell-out-of-me-parents-call-on-state-officials-to-make-remote-learning-options-available/> [https://perma.cc/29MZ-FUXN]; Eliza Shapiro et al., *Mayor Adams Says He Is Weighing a ‘Temporary’ Remote Learning Option*, N.Y. TIMES (Jan. 13, 2022), <https://www.nytimes.com/2022/01/13/nyregion/mayor-adams-says-he-is-weighing-a-temporary-remote-learning-option.html> [https://perma.cc/BJA4-3BCL] (noting teachers union’s refusal to alter

At parents' insistence, schools and districts absorbed into their regular programs other remote expedients that had become popular with families during the pandemic. Prompted by family demand for supplemental learning pods, schools are partnering with companies and community organizations to continue providing small-group instruction outside the classroom, often focused on students with particular learning needs or ones with working parents.³⁷⁰ Replicating other steps families had taken together during the pandemic, one online charter school network operating in Arizona and Texas has begun providing in-person microschools to its students once a week, generating a new form of blended learning.³⁷¹

Perhaps the most important pandemic-inspired expedient some schools and districts came to consider essential is increased communication with families about students' daily learning needs and plans—moving from a few parent-teacher nights each year, with communications in between limited to urgent student disciplinary issues,³⁷² to weekly opportunities to reflect on and refine ongoing

collective bargaining agreement barring livestreamed in-classroom lessons—the most efficient way to provide a remote option—when mayor reconsidered remote-option ban in response to district's 25% absenteeism rates fueled by parents' preference for remote learning).

370. See Haas, *supra* note 338 (discussing state funding for school districts to hire private micro-schooling company to create learning pods); Michael Horn, *Some Pods Will Outlast the Pandemic*, EDUC. NEXT (Fall 2021), <https://www.educationnext.org/some-pods-will-outlast-pandemic-students-parents-appreciate-support/> [<https://perma.cc/R9MT-2TLL>] (describing continuing support for small-group learning pods that emerged during the pandemic).

371. Beth Hawkins, *Great Hearts Hopes In-Person Pods + Online Teaching = New Type of Hybrid School*, THE 74 (June 8, 2022), <https://www.the74million.org/article/great-hearts-hopes-in-person-pods-online-teaching-new-type-of-hybrid-school/> [<https://perma.cc/UY32-5CJR>]; see also *Chancellor Banks Announces Virtual High School Programs*, N.Y.C. DEP'T OF EDUC. (June 23, 2022), <https://www.schools.nyc.gov/about-us/news/announcements/contentdetails/2022/06/23/chancellor-banks-announces-virtual-high-school-programs> [<https://perma.cc/BGP6-A5CQ>] (describing pandemic-inspired program providing “independence of remote learning” plus “individualized, interdisciplinary, project-based learning and internship opportunities”).

372. See, e.g., *Hidden in Plain Sight*, *supra* note 217, at 11, 19 (describing survey and interview results documenting typically thin public-school and teacher communications to parents on important matters of pedagogy, “with the exception of when [my child] does something bad”).

learning plans.³⁷³ Although adopted out of necessity, frequent virtual meetings with parents turned out to be quicker and easier on both ends than preexisting parent-teacher communication modalities; they also increase parents' usage, in between, of email, calls, and texts.³⁷⁴ More importantly, when bolstered by strong instructional materials accessible alike to teachers, parents, and students, regular and frequent communication about instruction greatly improved what families learned from teachers and teachers learned from families about students' progress and preferred learning styles, and what students learned overall.³⁷⁵

Schools and districts also found better ways to communicate collectively with families. Virtual family nights and board meetings often generated more participation than previously in-person events.³⁷⁶ Tapping into existing community and new social networks and hiring parents to coordinate family responses helped maximize the reach and effect of more frequent communication.³⁷⁷

With crisis conditions as the mother of invention and regulatory waivers and flexibility as midwives, districts and schools also experimented with new ways of conceptualizing schooling. Nowhere was this truer than in the use of time and staff. Granted scheduling flexibility, often for the first time ever, some districts

373. See, e.g., Barmore, *supra* note 358 (listing ways distance learning improved communications with families); Lallinger, *supra* note 365 (noting increased communication between districts and families and among staff and administrators during pandemic); sources cited *infra* note 449 and accompanying text (discussing learning-plan-based innovations).

374. Anya Kamenetz, *5 Things We've Learned About Virtual School in 2020*, NPR (Dec. 4, 2020), <https://www.npr.org/2020/12/04/938050723/5-things-weve-learned-about-virtual-school-in-2020> [https://perma.cc/X33T-2VJP] ("Educators [learned during pandemic to] communicate expectations to parents and teachers by email, calls, texts, over social media, YouTube videos and podcasts.").

375. See Chu et al, *Fundamental 4*, *supra* note 78, at 10 (describing student- and family-based instructional planning during pandemic, which enabled schools to stave off learning losses and even exceed prior learning levels).

376. See *Remote Learning Recommendations During COVID-19 Emergency*, ILL. STATE BD. OF EDUC. (Mar. 27, 2020), <https://www.isbe.net/Documents/RL-Recommendations-3-27-20.pdf> [https://perma.cc/3B76-YVL4].

377. Deke Farrow, *Modesto City Schools to Hire Parent Ambassadors*, MODESTO BEE (June 16, 2021), <https://www.modbee.com/news/local/education/article252104478.html> (on file with the *Columbia Human Rights Law Review*) (reporting on district's plan to hire parents to connect other parents with resources and inform them of school activities, to overcome Black and other parents' disengagement and lack of trust in school systems).

extended the length of the school year to make up for lost instructional time, taking advantage of new legislation allowing schools to make their own calendars. Other systems changed start times and allowed students to attend school at extended hours.³⁷⁸ Freed from laws, regulations, and accepted routines dictating otherwise, schools experimented with new ways to allocate the school day and available staff—jettisoning the longstanding middle and high school rule of 45 minutes and one teacher per class period in order to increase the time individual and groups of students spent working on areas of particular need or interest, giving students greater agency over their learning, and using longer-and-larger-than-usual group instruction when appropriate to free up staff for more individualized instruction.³⁷⁹ During 2020–21 and 2021–22, many states waived

378. See, e.g., Jodi Fortino, *A Kansas City School Adopts Year-Round Learning to Help Combat COVID Learning Loss*, NPR (May 4, 2022), <https://www.kcur.org/education/2022-05-04/a-kansas-city-school-adopts-year-round-learning-to-help-combat-covid-learning-loss> [<https://perma.cc/X6DB-8BJ9>] (reporting on school's addition of 31 days of mandatory instruction starting June 2022); Lisa Lewis, *The State Finally Letting Teens Sleep In*, ATLANTIC (June 8, 2022), <https://www.theatlantic.com/family/archive/2022/06/american-high-school-later-start-time/661211/> [<https://perma.cc/V7FF-2J3C>] (describing new California law moving middle and high school daily start times later and schools' retention of later start times for remote instruction during pandemic when they return to in-person learning); Siobhan McGirl, *New London Launches Year-Round School Option for Kindergarten and First Grade*, NBC CONN. (July 22, 2021), <https://www.nbcconnecticut.com/news/local/new-london-launches-year-round-school-option-for-kindergarten-and-first-grade/2535300/> [<https://perma.cc/DB8N-GFK2>] (describing New London's optional year-round school program for kindergarteners and first graders); Perry Robinson, *EBR School Board Decides on Start Date for Students, Other Calendar Dates*, WAFB (Apr. 22, 2021), <https://www.wafb.com/2021/04/22/ebr-school-board-decides-start-date-students-other-calendar-dates/> [<https://perma.cc/J8QG-PQHP>] (reporting on district starting school year several weeks early and limiting holidays).

379. See, e.g., Barmore, *supra* note 358 (describing school district scheduling changes during pandemic suited to student needs and choices and more flexible definitions of teacher work hours and teacher-allocation rules); 5 *"Power Strategies" (and Real Life Examples) to Accelerate Equity-Focused Recovery and Redesign*, ERS (Mar. 9, 2021), https://www.erstrategies.org/tap/start_here [<https://perma.cc/6M7T-5M5H>] (describing greater concentration and dispersal of staff along with just-in-time and other scheduling adjustments to address student needs as they arise); Donna St. George et al., *How the Pandemic Is Reshaping Education*, WASH. POST (Mar. 15, 2021), <https://www.washingtonpost.com/education/2021/03/15/pandemic-school-year-changes/> [<https://perma.cc/E54G-J28R>] (describing pandemic-inspired changes to education); Tom Whisninand, *How Co-Teaching Helped Our New Teachers Support Students, In-Person and Online*, VOICES (Mar. 11, 2021),

“seat time” requirements specifying how much time students must spend each day on-site engaged in classroom activities, and states now face opposition to the restoration of those requirements because they impede innovation and experiential learning and are poor proxies for how much learning actually occurs inside and outside school.³⁸⁰

States, districts, and schools also (1) developed new responses to the suddenly burgeoning problem of student absenteeism;³⁸¹ (2) expanded distribution of food and other necessities using drive-through food banks and home delivery and replacing means-tested

<https://www.edsurge.com/news/2021-03-11-how-co-teaching-helped-our-new-teachers-support-students-in-person-and-online> [<https://perma.cc/G29E-S5N2>] (describing seven co-teaching strategies fine-tuned for use during the pandemic); Madeline Will, *4 Ways Districts Are Giving Teachers More Flexibility in Their Jobs*, EDUC. WEEK (May 5, 2021), <https://www.edweek.org/teaching-learning/4-ways-districts-are-giving-teachers-more-flexibility-in-their-jobs/2021/05> [<https://perma.cc/5BW8-V8JQ>] (highlighting ways school districts were offering more flexibility in the workplace in the wake of the pandemic: (1) allowing teachers to work remotely, (2) making more efficient use of teachers teams, (3) aligning teacher assignments to teachers’ particular strengths, and (4) offering flexibility in teachers’ daily start and end times).

380. See, e.g., Jonathan Alfuth, *A Post-Pandemic Opportunity to Think Differently About Instructional Time*, EDUC. NEXT (July 8, 2021), <https://www.educationnext.org/post-pandemic-opportunity-to-think-differently-about-instructional-time-seat-time-mastery/> [<https://perma.cc/XW55-ALR2>] (arguing that seat-time policies stifle educator creativity and are poor learning measures and cataloguing alternatives adopted during pandemic); *Evidence of Learning: How States Are Rethinking Instructional Time and Attendance Policies in the COVID-19 Era*, KNOWLEDGE WORKS (June 28, 2021), <https://knowledgeworks.org/resources/evidence-learning-states-instructional-time-attendance-policies/> [<https://perma.cc/DD5P-MYQC>] (describing proposed legislation letting local schools set their own start and end times (Arizona), expanding schools’ ability to innovate (Florida), broadening definitions of what counts as instruction (Minnesota, Montana, Utah), clarifying availability of alternative programs (New Hampshire), and expanding innovation schools and competency-based schools where students progress as they master subjects (South Carolina, Washington)).

381. See TNTP, *RIISING TOGETHER: HOW FOUR DISTRICTS ARE BUILDING COMMUNITY DURING THE COVID-19 PANDEMIC* (2021), <https://tntp.org/assets/documents/TNTP-Rising-Together-Final.pdf> [<https://perma.cc/LKD5-65NW>] (describing steps Hartford district took to find 90% of its missing students); sources cited *supra* note 250 (describing new methods of tracking attendance to pinpoint and support missing students, including use of family liaisons and door-to-door campaigns; connecting students to internet, handing out laptops, and explaining online platforms; and providing struggling students with tutors and counselors).

reduced and free breakfast and lunch programs with universal ones;³⁸² (3) worked with libraries and local news networks to create textbook banks and broadcast educational materials;³⁸³ (4) experimented with new means of measuring, and new assumptions about expected, student progress, allowing parents to determine whether students should be held back a year,³⁸⁴ adopting “mastery learning” through which students exercise greater control over how they intend, and how long it will take, to demonstrate mastery over particular educational skills and content, and eliminating grade levels so students could progress through mandated learning standards more quickly or slowly than permitted

382. See, e.g., Jamie Bussel, *How School Meals Help Families Impacted by the Pandemic*, CULTURE OF HEALTH BLOG (Mar. 16, 2021), <https://www.rwjf.org/en/blog/2021/03/how-school-meals-help-families-impacted-by-the-pandemic.html> [<https://perma.cc/8TBY-736K>] (reporting on school district’s successful experiment with wraparound services to address food insecurity); Nadra Nittle, *What New York City Schools Learned Feeding Millions During the Pandemic*, CIVIL EATS (Mar. 18, 2021), <https://civileats.com/2021/03/18/what-new-york-city-schools-learned-feeding-millions-during-the-pandemic/> [<https://perma.cc/6XDJ-NASD>] (outlining ways to use what New York City did well in addressing students’ food insecurity during pandemic to expand post-pandemic food services).

383. See, e.g., Gregory Gilpin, *Public Libraries Continue to Adapt, Enriching Communities Across America*, BROWN CTR. CHALKBOARD (June 1, 2021), <https://www.brookings.edu/blog/brown-center-chalkboard/2021/06/01/public-libraries-continue-to-adapt-enriching-communities-across-america/> [<https://perma.cc/V8ZD-5YJY>] (describing libraries’ provision during pandemic of academic support to students struggling to learn outside school); Lauren J. Young, *Librarians Help Pandemic Era Students Stay on Track for College*, SCHOOL LIBRARY J. (May 26, 2022), <https://www.slj.com/story/librarians-help-pandemic-era-students-stay-on-track-for-college> [<https://perma.cc/2UCD-TF6R>] (reporting on the creation of librarian-teacher-counselor partnerships during pandemic to ensure high-school seniors remained on track for college).

384. See, e.g., Melissa Rose Cooper, *New NJ Law Allows Parents to Request That Their Child Repeat a Grade*, NJ SPOTLIGHT NEWS (July 7, 2021), <https://www.njspotlightnews.org/video/new-nj-law-allows-parents-to-request-that-their-child-repeat-a-grade/> [<https://perma.cc/Z76L-MW7J>] (describing a New Jersey law permitting parents of students in kindergarten through 8th grade to hold back their kids a year); Phyllis W. Jordan & Brooke LePage, *With an Influx of Covid Relief Funds, States Spend on Schools*, FUTUREED (Jan. 3, 2021), <https://www.future-ed.org/with-an-influx-of-covid-relief-funds-states-spend-on-schools/> [<https://perma.cc/28EH-ZTK5>] (describing innovative ways of measuring learning loss); *Measuring Forward: Emerging Trends in K-12 Assessment Innovation*, KNOWLEDGEWORKS (Nov. 8, 2021), <https://knowledgeworks.org/resources/emerging-trends-k12-assessment-innovation/> [<https://perma.cc/S8YY-NE9R>] (outlining states’ pandemic-inspired rethinking of assessments).

by the usual clumping of work by year;³⁸⁵ (5) broke the previously iron law basing students' assignment to school on their place of residence through statewide or regional open-enrollment policies;³⁸⁶ and (6) rethought school and classroom architecture.³⁸⁷

Central to all of these innovations is a crucial insight: public schools need not be uniform and static and instead can facilitate more and better learning by working with parents and students to accommodate the variegated and constantly evolving resources and needs of each child. Building on that insight and patchy but promising instantiations of it during the pandemic, the next Part proposes ways public education can systematize flexibility and enhance the diversity of services sufficiently to attract and expose

385. See, e.g., Barmore, *supra* note 358 (describing Tulsa School District's plan to "invest heavily" in future in beneficial arrangements pioneered during the pandemic that enabled students to exercise "independence, time management and decision-making autonomy that a traditional school usually doesn't afford"); Patrick O'Donnell, *Helping Students Learn at Their Own Pace: Why Some Ohio Schools Are Adopting a "Mastery" Approach in Hopes of Closing COVID Learning Gaps*, THE 74 (July 19, 2021), <https://www.the74million.org/article/helping-students-learn-at-their-own-pace-why-some-ohio-schools-are-adopting-a-mastery-approach-in-hopes-of-closing-covid-learning-gaps/> [https://perma.cc/P4VQ-9Z8T] (describing a growing "mastery" learning strategy that "lets students learn at their own pace, making sure they fully understand key skills before moving on"); see also Chris Berdik, *What's School Without Grade Levels?*, THE HECHINGER REP. (July 20, 2018), <https://hechingerreport.org/whats-school-without-grade-levels/> [https://perma.cc/2VP3-XDR5] (describing North Dakota district's jettisoning grade levels and letting students pace their own learning).

386. See, e.g., Jude Schwalbach, *Three States Are Rethinking the Relationship Between Housing and Education Quality*, REALCLEAR EDUCATION (Apr. 8, 2022), https://www.realcleareducation.com/articles/2022/04/08/three-states-are-rethinking-the-relationship-between-housing-and-education-quality_110722.html [https://perma.cc/5DKK-5TFK] (describing six states' recent adoption or consideration of laws allowing open public enrollment across district lines).

387. Laura Fay, *From an Outdoor Classroom to a STEM Club: How Arizona is Supporting Innovative School Programs During the Pandemic*, THE 74 (Apr. 13, 2021), <https://www.the74million.org/article/from-an-outdoor-classroom-to-a-stem-club-how-arizona-is-supporting-innovative-school-programs-during-the-pandemic/> [https://perma.cc/DVN6-DDGF]; Jeff Pack, *Temecula's Wi-Fi Gardens Off to a Good Start*, VALLEY NEWS (Nov. 13, 2020), <https://myvalleynews.com/blog/2020/11/13/temeculas-wi-fi-gardens-off-to-a-good-start/> (on file with the *Columbia Human Rights Law Review*) (describing city/schools partnership on outdoor learning spaces); Wylie Wong, *Reimagining Post-Pandemic Classrooms for Today's Learners*, EDTECH (June 22, 2021), <https://edtechmagazine.com/k12/article/2021/06/reimagining-post-pandemic-classrooms-todays-learners> [https://perma.cc/9TXU-C95N].

“enough people” to liberal democratic values essential to the republic’s coherence and survival.

III. Public Democratic Education Regained

A. The Post-Pandemic Choice Environment for Families and Systems

1. Family choices

All U.S. families have choices to make about their children’s preK-12 education—the school district and attendance zone within it in which to reside; whether to enroll their children in charter, magnet, private, or parochial schools or educate them at home; how hard to work to get their child assigned to a particular teacher, educational “track,” or elective subject; and what supplemental educational opportunities they should provide. At times, however, non-educational factors make these choices *for* families. Limited resources for housing, job location, and other matters of necessity and convenience may lead parents, by default, to enroll their children in the public-school district in which and neighborhood school near which they have chosen or been forced for other reasons to live and accept on faith the teacher, academic track, and subjects to which that district and school assign their child.

The pandemic disrupted this choice environment, causing more families to question the default option and consider disinvesting in public schools. The pandemic did so in part by making transparent disturbing features of public education systems that previously had been opaque: highlighting maladroit decision making processes and distortive interest-group influences; exposing caregivers as they monitored their children’s remote instruction on home computers to disparities among children in instructional attention given, learning occurring, and cultural responsiveness exhibited; and confronting parents with assigned instructional materials that they, along with their children and their children’s teachers, struggled to understand and use effectively.³⁸⁸

The pandemic also expanded families’ choice horizons, motivating them to explore alternatives to the public-school default by moving out of cities to temporary residences in suburbs and exurbs

388. See *supra* notes 209–237 and accompanying text.

that they then decided to make permanent; opting for private, parochial, charter, or home schools that were more reliable, quicker to return to in-person instruction, and more children- and family-friendly than traditional public options; experimenting with new forms of full-time and supplemental education through learning pods, micro-schools, and various online options; and acquiescing in their children's conclusion that they had better things to do than attend school at all.³⁸⁹

2. System choices

Public-school systems also have post-pandemic choices. Most fundamentally, they must decide where to locate themselves along a continuum between two starkly different possibilities: returning to the status quo ante, or pursuing comprehensive change responsive to the motivations for current and prospective family moves and informed by innovations the pandemic inspired families and educators to develop on the fly.³⁹⁰

Some innovations that systems and schools made will remain in place, even in systems determined to return to normal. By themselves, however, such pandemic residua will not sufficiently alter the governance and political structures that must change if public education is to transform. For one thing, public systems' focus on enlarging and divvying up the aggregate funding pie in service of their members' shared material interests³⁹¹ will likely deflect them from thoughtfully retooling their governance and operations in service of students', families', and public interests. Also impeding change are myriad statutes, regulations, contractual provisions, and standard operating procedures that, at best, were only temporarily suspended during the pandemic, including fixed annual and daily start and end dates and times, "seat time" requirements, rigid role definitions and pupil-teacher ratios, and student assignments to grade by age and to school by residence.³⁹² School systems' use of the vast majority of pandemic-triggered federal dollars to fund HVAC equipment, technology upgrades, transportation, and "high-dosage tutoring" for a small number of badly struggling students illustrates

389. *See supra* notes 285–348 and accompanying text.

390. *See supra* notes 358–387 and accompanying text.

391. *See supra* notes 132–133 and accompanying text.

392. *See supra* notes 128–131 and accompanying text.

the limited imagination most systems have exhibited when it comes to reshaping public education in the wake of the crisis.³⁹³

Ranged against these inertial forces are serious risks to public schools from family moves in response to public-school systems' foibles and to non-public options the pandemic exposed. Foremost, is the threat to public schools' fulfilment of their compelling important role of inuring "enough" of the citizenry to the liberal democratic values to enable our polity to cohere and prosper.³⁹⁴ Even if that apocalyptic prospect is not sufficient to break the public-education establishment's inertia, perhaps the risks family moves pose to public-school systems' financial viability and that of their most powerful interest group—teachers unions—can motivate change.

Our most fundamental worry is that public education will lose a central aspect of its constitutionally favored status as a public utility or local branch of government performing an essential public

393. See Benjamin Herold, *Schools Are Flush With Stimulus Money. Will They Waste it on Unproven Technology?*, EDUC. WEEK, Apr. 21, 2021, <https://www.edweek.org/technology/schools-are-flush-with-stimulus-money-will-they-waste-it-on-unproven-technology/2021/04> [https://perma.cc/PD9C-JU44] (noting poorer school districts' rush to spend money on technology they cannot use effectively); *ESSER III Spending Tracker*, BURBIO, <https://info.burbio.com/esseri-iii-spending/> [https://perma.cc/NHF3-HWQW] (cataloging districts' expenditures of \$122 billion in federal relief funds allocated in spring 2021, about 70% of which were in categories noted in text); Kevin Mahnken, *As Schools Push for More Tutoring, New Research Points to its Effectiveness—and the Challenges of Scaling it to Combat Learning Loss*, THE 74, Feb. 1, 2022, <https://www.the74million.org/as-schools-push-for-more-tutoring-new-research-shows-challenges-of-scaling-up-programs-to-combat-pandemic-learning-loss/> [https://perma.cc/GG38-4VC5] (discussing Education Secretary's call for "every student who has lost ground during the pandemic [to] receive 90 minutes of tutoring each week" and states' use of "millions of dollars in public and philanthropic money" for tutoring initiatives). Expressing concerns about tutoring as the singular response to learning loss are, e.g., Chu et al., *Rise to Thrive*, *supra* note 73 (arguing that although helpful in the short run, tutoring to combat learning loss "leave[s] fully intact the foundational system flaws that keep tens of millions of Black, Latinx, and economically disadvantaged students from learning"); Friedman, *supra* note 148 (noting ineffectiveness of post hoc remediation programs); Matthew A. Kraft & Michael Goldstein, *Getting Tutoring Right to Reduce COVID-19 Learning Loss*, BROWN CTR. CHALKBOARD (May 21, 2020), <https://www.brookings.edu/blog/brown-center-chalkboard/2020/05/21/getting-tutoring-right-to-reduce-covid-19-learning-loss/> [https://perma.cc/3NRQ-VCAK] ("[The] federal government spent billions of dollars on [tutoring] programs as part of the 2001 No Child Left Behind Act, . . . [with] little evidence that they resulted in learning gains.").

394. See *supra* notes 9–20 and accompanying text.

service that private alternatives cannot be expected to deliver.³⁹⁵ Absent that service, it is unclear how we can prepare the nation's people, at the least, to acquiesce in and, at best, energetically to support and maintain a liberal democratic polity characterized by immense racial, ethnic, religious, gender-oriented, cultural, economic, geographic, and ideological differences ever threatening to pull it apart.³⁹⁶ As we note above, however, public schools' favored status depends both on (1) their monopoly on full public subsidization³⁹⁷ and, at least equally, on (2) their ability to provide services that meet the developmental needs of families' most precious goods: their children.³⁹⁸ The former of these two prerequisites is supported by provisions in all fifty state constitutions requiring states to provide all resident children with a "free" education in public schools and by *Brown's* recognition of the country's compelling interest in public schools' socially centripetal propagation of liberal democratic values across all of the nation's populations.³⁹⁹ The latter prerequisite, however, depends on the capacity of public schools to service the differentiated educational needs of children across all those populations.

The reason public education systems cannot rely entirely on state constitutions, compulsory education laws, and federal equality principles to assure that families across all populations come together in their schools is that the States allow families not just to supplement (as Supreme Court precedent requires⁴⁰⁰) but to supplant public with private and parochial schools. And the States for the most part do not—and in the case of schools committed to religious and other conscientious principles probably *may* not—require private and home schools to adhere to and promote liberal democratic values and teach tolerance of difference.⁴⁰¹ In other words, state law simultaneously enshrines and undermines public schools' favored or utility status—mirroring the tension and delicate balance between simultaneously mandating free public schools designed to inculcate

395. *See supra* notes 31–36 and accompanying text.

396. *See supra* notes 7–20 and accompanying text.

397. *See supra* notes 21, 35, 62 and accompanying text. *But cf. supra* notes 143–144 and accompanying text (summarizing recent Arizona legislation authorizing state-funded debit cards families can use for private education in amounts approaching what state spends per-student on public schools).

398. *See supra* notes 17–20 and accompanying text.

399. *See supra* notes 7–20 and accompanying text.

400. *See supra* notes 38–40 and accompanying text.

401. *See supra* notes 41–43, 291, 312 and accompanying text.

acceptance of non-neutral liberal democratic values while otherwise requiring public actors to remain neutral with regard to the values to which individuals choose to adhere.⁴⁰² These precarious balances are the fate of a nation simultaneously committed to promoting free individual choice among values, yet dependent for its survival on having “enough people” accept the particular set of values that justify that freedom and the diversity of competing values it generates.

The partial and ambivalent legal protection of free universal education in public schools that these tensions and balances have allowed reveal both the necessity and difficulty of satisfying the second prerequisite for public schools’ favored status—their capacity to attract “enough” families to participate in instruction promoting liberal democratic values, given the range and quality of developmental services it provides. For 150 years, “free public schools” have convinced roughly 90% of families to enroll their children in public schools.⁴⁰³ Doing so has provided much of the civic glue holding the country together and enabled it to prosper, even as its diversity, commitment to equality across populations, and material empowerment of individuals’ liberty to choose their own values and plans have expanded more than ever before.⁴⁰⁴

Shaking this foundation, however, is a trend commencing in 2011 and supercharged by the COVID-19 pandemic’s exposure of public schools’ failings and alternatives toward declining participation in public schools. While still high, that participation has fallen more in the last several years than in any previous period.⁴⁰⁵ By disposing more families to use their own income to pay for non-public options, by diminishing those families’ willingness to pay taxes so other families’ children can attend effective public schools, and by expanding support for laws and practices that divert public funds to private options via vouchers, ESAs, tax credits, and choice-oriented charter options,⁴⁰⁶ these family moves erode the public subsidy advantage that for many decades has helped public schools attract participation and hold the nation and its people together.

By ruthlessly redistributing students and funding by race, religion, economic status, and cultural and political affinities, these

402. *See supra* notes 13–20 and accompanying text.

403. *See supra* notes 52–56 and accompanying text.

404. *See supra* notes 90–92 and accompanying text.

405. *See supra* notes 57–59, 242–270 and accompanying text.

406. *See supra* notes 285–348 and accompanying text.

forces particularly threaten the feature of liberal democratic education that *Brown* prioritized: the (to be sure, imperfect) ways in which the public subsidy for schools helps *integrate* students across racial, religious, economic, cultural, and ideological lines.⁴⁰⁷ As a result of this sorting and rising concentrations of underserved students in schools ill-equipped to serve them,⁴⁰⁸ children of color and without economic means stand to suffer the worst effects of the segregative flight from public schools that family moves during the pandemic augur.

These deeply destabilizing forces in the realm of preK-12 schooling come at a time of, and no doubt have both cause-and-effect relationships with, growing regional and urban/nonurban cleavages in the nation's population along ideological lines. Those cleavages frighteningly correlate with racial, ethnic, and religious differences, are triggering anger and violence across those lines at levels unseen for decades, and are keeping the nation's law-making institutions from functioning for the benefit of the public at large—or in some cases at all.⁴⁰⁹ At the very moment the nation most needs to bolster public schools' centripetal powers, those schools' failings are generating deeply disintegrative centrifugal forces—putting at risk the nation's capacity to cohere as a polity committed to both liberty and equality across a diverse population.

407. See Liebman, *Voice, Not Choice*, *supra* note 40 at 284.

408. See, e.g., John C. Boger, *Education's "Perfect Storm"? Racial Resegregation, High Stakes Testing, and School Resource Inequities*, 81 U.N.C. L. REV. 1375, 1412–23 (2003).

409. For interchanges between *New York Times* columnist Thomas Edsall and researchers documenting these phenomena, see, for example, *America Has Split, and It's Now in 'Very Dangerous Territory'*, N.Y. TIMES (Jan. 26, 2022), <https://www.nytimes.com/2022/01/26/opinion/covid-biden-trump-polarization.html> (on file with the *Columbia Human Rights Law Review*) (discussing polarization provoked by the pandemic); *America, We Have a Problem: The Rise of 'Political Sectarianism' Is Putting Us All in Danger*, N.Y. TIMES (Dec. 16, 2020), <https://www.nytimes.com/2020/12/16/opinion/trump-political-sectarianism.html> (on file with the *Columbia Human Rights Law Review*) (discussing the rise of "political sectarianism"); *No Hate Left Behind: Lethal Partisanship is Taking Us Into Dangerous Territory*, N.Y. TIMES (Mar. 13, 2019), <https://www.nytimes.com/2019/03/13/opinion/hate-politics.html> (on file with the *Columbia Human Rights Law Review*) (discussing American partisanship leading up to the November 2020 election); *When It Comes to Eating Away at Democracy, Trump Is a Winner*, N.Y. TIMES (Aug. 24, 2022), <https://www.nytimes.com/2022/08/24/opinion/us-democracy-trump.html> (on file with the *Columbia Human Rights Law Review*) (commenting on Donald Trump's "drive to undermine American democracy").

The threats family moves pose to public schooling are dire, even on the public-education establishment's own narrow terms.⁴¹⁰ Together with declining birth rates,⁴¹¹ the loss of enrollment and associated funding to newly attractive private, parochial, and home options⁴¹²—and the increasing allocation of public funds to voucher and related mechanisms for financing private options⁴¹³—risk diminishing the *aggregate* public-school budgets that existing systems and their codependent interests work so hard to expand.⁴¹⁴ Less funding, in turn, will make it difficult to meet the nation's urgent need to increase teacher salaries (by far districts' largest expenditures) in response to a pandemic-accelerated increase in the number of teachers leaving the profession prematurely, on top of a national teacher shortage as the vast core of Baby Boomer teachers reaches retirement age.⁴¹⁵ Particularly at risk are school systems' efforts to hire and retain teachers of color⁴¹⁶ just as doubts among

410. See *supra* notes 128–133 and accompanying text.

411. See Charlotte Morabito et al., *Why the Birth Rate in the U.S. Is Falling*, CNBC (July 20, 2022), <https://www.cnn.com/video/2022/07/20/americans-fewer-children-financial-stress.html> [<https://perma.cc/6X2D-QTKL>].

412. See *supra* notes 57–59, 242–270 and accompanying text.

413. See *supra* notes 141–142 and accompanying text.

414. See *supra* notes 132–133 and accompanying text.

415. See, e.g., Lauren Camera, *Cardona: Americans Shouldn't be Surprised by Teacher Shortage*, U.S. NEWS (June 9, 2022), <https://www.usnews.com/news/education-news/articles/2022-06-09/cardona-americans-shouldnt-be-surprised-by-teacher-shortage> (on file with the *Columbia Human Rights Law Review*) (summarizing Education Secretary's remarks on need to increase teacher salaries to address teacher-shortage “crisis”); Kathryn Dill, *School's Out for Summer and Many Teachers Are Calling it Quits*, WALL ST. J. (June 21, 2022), <https://www.wsj.com/articles/schools-out-for-summer-and-many-teachers-are-calling-it-quits-11655732689> (on file with the *Columbia Human Rights Law Review*) (finding a large uptick in teacher resignations aggravated by the pandemic, understaffed schools, and political turmoil in school governance); ELIZABETH D. STEINER & ASHLEY WOO, RAND CORP., *JOB-RELATED STRESS THREATENS TEACHER SUPPLY* 2, 16 (2021), https://www.rand.org/pubs/research_reports/RRA1108-1.html [<https://perma.cc/D6R3-RTEJ>] (noting that in a 2021 nationally representative survey of K-12 teachers, nearly one in four said they were likely to leave their jobs in near future, aggravating pre-existing shortages).

416. See, e.g., Sarah Carr, *Public Schools Are Struggling to Retain Black Teachers*, TIME (Jan. 5, 2022), <https://time.com/6130991/black-teachers-resigning/> [<https://perma.cc/555H-39QA>] (discussing the pandemic's acceleration of nation's “teacher diversity problem”: barely 20% of public-school teachers “identify as people of color, compared with more than half of students”); STEINER & WOO, *supra* note 415, at 2, 5 (“Nearly half of teachers who identified as Black or African

families of color about public-school systems' sensitivity to their children's needs are leading more of them to leave those systems.⁴¹⁷

These circumstances threaten public-school unions, as well, given impending declines in dues-paying membership as fewer children enroll in public schools, large numbers of teachers resign and cannot easily be replaced, and public-school funding recedes. Because few private, parochial, for-profit, and charter schools and no home schools are unionized, increased enrollment in those options will not make up the difference—even as a 2018 Supreme Court ruling exempting non-union public employees from paying previously mandatory “non-union agency fees”⁴¹⁸ has required unions to work harder to attract fee-paying members among staff public schools employ.⁴¹⁹

An even bigger, if more subtle, problem for unions is the threat to their influence on public elections, officials, and district and school operations posed by parents' angry rejection during the pandemic of unions' claims that their interests align with those of students and families.⁴²⁰ In lieu of relying on unions as their virtual representatives, parents are now organizing on their own behalves to achieve influence commensurate with their numbers as a “counterweight” to teachers unions.⁴²¹ Underpinning parents'

American reported that they were likely to leave their jobs by the end of the school year and were more likely to say [so] than were teachers of other races.”).

417. See *supra* notes 237, 296–298 and accompanying text.

418. *Janus v. AFSME*, 138 S. Ct. 2448 (2018).

419. See Ian Kullgren & Aaron Kessler, *Unions Fend Off Membership Exodus in 2 Years Since Janus Ruling*, BLOOMBERG LAW (June 26, 2020), <https://news.bloomberglaw.com/daily-labor-report/unions-fend-off-membership-exodus-in-2-years-since-janus-ruling> [<https://perma.cc/Z6L9-PH4X>].

420. See sources cited *supra* note 132, 355.

421. Rebecca Klein, *The Other Angry Parents: What a New 'Parents Union' Is Demanding (It Has Nothing to Do With CRT)*, THE HECHINGER REP. (Jan. 15, 2022), <https://hechingerreport.org/the-other-angry-parents-what-a-new-parents-union-is-demanding-it-has-nothing-to-do-with-crt/> [<https://perma.cc/7KUZ-HC7L>] (explaining that the new National Parents Union's aim “to carry the torch of underrepresented parents,” mainly of color and without means, “as a counterweight to powerful teachers unions, which [organization's leader] says don't speak for families and represent their own separate interests”); see, e.g., Blume, *Parents Frustrated*, *supra* note 356 (“Leaders of OpenSchoolsCA announced . . . that they intend to continue their activism through a nonprofit to promote direct parent influence in the state's highly political education landscape.”); Woelfel, *supra* note 355 (quoting Chicago Mayor Lori Lightfoot characterizing Chicago Teacher Union's decisions as “disrespect[ful] of our parents”).

objections is the unions' misguided elision of public with uniform education in the face of children's need and families demands for differentiation.⁴²² Illustrating this point is unions' staunch insistence as the pandemic wore on that schools remain closed for *all* students despite many families' and education and public health experts' belief that willing children could be safely and effectively instructed in person,⁴²³ followed by unions' insistence, once schools reopened with their blessing, on rules requiring *all* students to be educated in person in the face of requests—disproportionately from families of color⁴²⁴—for remote options better meeting their children's needs.⁴²⁵

B. Design Features for New Public Democratic Education

What better futures are there for public democratic education? What transition paths to those futures can public-school systems take? This section proposes design criteria answering both questions.

1. End states

We begin with five key end-state features of effectively differentiated public schooling that we base on “evolutionary learning” principles developed in our prior writings.⁴²⁶

422. See *supra* notes 128–134, 296–305, 322, 352–357.

423. See sources cited *supra* notes 226, 354.

424. See sources cited *supra* notes 237, 296–298.

425. See Eliza Shapiro, *N.Y.C. Will Eliminate Remote Learning for Next School Year*, N.Y. TIMES (May 24, 2021), <https://www.nytimes.com/2021/05/24/nyregion/nyc-schools-reopening-remote-learning.html> (on file with the *Columbia Human Rights Law Review*) (contrasting New York City teachers union's 2020–21 insistence, over parent objections, on keeping schools closed, with union's 2021–22 insistence, also over parent objections, on educating all students in person because “[t]here is no substitute for in-person instruction,” and teachers “want their students physically in front of them”); Shapiro et al., *supra* note 369 (describing New York City teachers union's refusal to alter collective-bargaining provision barring most efficient remote option—livestreamed in-classroom lessons—when the mayor, faced with 25% absenteeism rates fueled by parents' preference for remote learning, proposed reconsidering district policy barring remote schooling).

426. See, e.g., Chu et al., *Rise to Thrive*, *supra* note 73, at 4 (listing key features of evolutionary learning governance of school systems); Liebman et al., *Kryptonite Politics*, *supra* note 96, at 462 (describing logic and features of evolutionary learning (also known as democratic experimentalist) governance of organizations generally and of school systems).

1. End-state frameworks and policies they generate are consistent with and productive of the values of public democratic education.⁴²⁷
2. The end state consists of new governance and democratic frameworks—new ways of choosing, implementing, and improving policy and customizing it to different contexts and needs. The focus thus is on the governance and democratic methods of deciding upon, implementing, and improving policy rather than on any particular policies themselves.⁴²⁸
3. The governance frameworks enable actors to proliferate, carefully observe, and transparently report the process rigor and results of different ways of providing public democratic education and of meeting students' and families' diverse needs, and actors use that information to inform adjustments.⁴²⁹ Flexibility and differentiation dictated by context and by students' and families' diverse assets and needs replace uniformity as the default way of pursuing the public good.
4. End-state democratic frameworks empower families and educators and give them the influence and flexibility needed to match policy to each student, classroom, and school.⁴³⁰
 - a. The resources families and students bring to students' education, and families' and students' understanding of what they need from and how they are affected by public schools, control and contextualize policy choices.⁴³¹
 - b. School systems give students and families fulsome opportunities to reveal those resources and understandings and to participate in developing responsive

427. See *supra* notes 7–20 and accompanying text.

428. Liebman et al., *Kryptonite Politics*, *supra* note 96, at 462.

429. *Id.* at 446.

430. *Id.* at 432.

431. *Id.* at 451–52.

strategies, implementing and evaluating them, and revising them in light of results.⁴³²

5. To the extent possible, democratic interactions occur through deliberative planning and problem-solving in which all parties affected by or likely to be part of addressing the instructional issues at hand may participate. In turn, those parties' deliberation is centered on serving, and decisions are evaluated by and revised based on observed success addressing, the needs and desires of affected parties.

2. Transition paths

Transition paths matter. For example, whatever one thinks of voucher proposals that seemed about to take off in the early 1990s,⁴³³ they did not prosper then or for years after due to the absence of a workable transition path. As is noted above, voucher proponents never explained how simultaneously to finance fully funded voucher options for all takers and the traditional public-school systems that remained popular with large swaths of the middle class. Voucher advocates, in other words, had no “meantime” solution for the fiscal demands imposed by the transition they sought. Recently, however—propelled by pandemic-driven unhappiness with public schools—states have found ways to make transitioning from solely public to “dual” public and private school systems financially feasible. Florida’s tax-credit-financed scholarship programs, for example, offer tuition support for private and homeschooling for all low-income and most middle-income families and families of children with special needs.⁴³⁴ As we note earlier, Arizona has gone even farther, offering every family a debit card for each of its school-aged children worth about 80% of the state’s per-pupil spending on public schools to use however the family likes for their children’s education.⁴³⁵

432. *Id.* at 437.

433. *See* sources cited *supra* note 51 and accompanying text.

434. *See* Ceballos & Wright, *supra* note 142; *see also supra* notes 143–144 and accompanying text (describing Arizona legislature’s financial starvation of public schools as prelude to establishing universal program providing parents’ private-schooling debit cards in amounts nearly equal to state’s low per-pupil public-school funding).

435. *See supra* notes 142–144 and accompanying text (noting Arizona’s per-pupil spending on public schools—\$8,795—and debit card value of roughly \$7,000, or 80% of per-pupil spending on public schools).

Charter schools of both sorts described above⁴³⁶ have likewise failed to scale for lack of a “meantime” strategy. Charter schools grew rapidly from very small numbers in the late 1990s to high-single-digit proportions of school district enrollments by the end of the first decade of the twenty-first century. Thereafter, however, their growth slowed⁴³⁷ for lack of an answer to the claim that siphoning off double-digit proportions of districts’ enrollment would diminish districts’ aggregate budgets to the point that they no longer could serve the students left in failing district schools whom charter schools could not yet accommodate. Below, we propose a transition strategy that addresses this issue.

As we develop above,⁴³⁸ a different kind of transition problem stymied the portfolio reforms of the first decade and a half of the current century. As noted, those reforms aimed to provide schools with greater flexibility to customize policies and practices to individual schools, classrooms, and students. Those reforms also sought to encourage schools to use more rigorous learning standards and student-outcome measures in relation to those standards to understand better which schools, teachers, programs, and students were succeeding and why. The reformers’ efforts to keep interest-group politics from impeding the transition by tamping down *all* political interaction with stakeholders turned out, however, to be an exceptionally counterproductive way to disentrench bureaucracy and install systems designed to promote bottom-up flexibility, creativity, and adult learning.

These considerations inform the following transition design features:

1. The transition path is consistent with and productive of the values of public democratic education set out above.⁴³⁹
2. The transition plan is
 - a. comprehensive in its capacity to achieve the desired end state;

436. See *supra* notes 147–149 and accompanying text (discussing differences between rural, predominantly white charter schools and urban, predominantly Black and Latinx charter schools).

437. See *supra* notes 324 and accompanying text.

438. See Liebman et al., *Kryptonite Politics*, *supra* note 96, at 389.

439. See *supra* notes 7–20 and accompanying text.

- b. clear to stakeholders, including as it is adjusted along the way; and
 - c. immunized to the extent possible from competing or unrelated initiatives or priorities.
3. To the extent possible, transition steps model the desired end-state governance and political frameworks, enabling families and educators impactfully to participate in designing, implementing, observing, and improving transition steps and customizing them to diverse conditions and needs.
4. The transition process acknowledges the expectations of previously influential interest groups to maintain their influence and includes them in planning and problem-solving exercises subject to the principle that influence derives from the quality of their contributions to maintaining and advancing public democratic education; to meeting students' and families' diverse needs; and to solving the problem at hand.
5. The transition includes steps to acculturate the public to the inevitability of adjustments in the plan in response to unexpected results or conditions and to see those adjustments as evidence not of failure but of success learning from experience how to remedy imperfect foresight.

C. Illustrative Designs for New Public Democratic Education

This section describes the governance and democratic contours of and transition paths to three public education redesigns that maintain school systems' public status, while differentiating services based on students' and families' diverse assets, needs and desires. The objective in each case is for the redesigned system to deserve in the liberal democratic sense, and to earn in actual practice, the trust of "enough" families to justify and achieve the desired incentivizing effect of the system's exclusive access to full public subsidization. More fundamentally, the objective in each case is the survival of public schooling and of a nation that depends on public

schools as a centripetal counterweight to its strongly centrifugal libertarian commitments.⁴⁴⁰

Although each design can stand on its own, combinations of them might succeed best. As such, we present them in additive fashion, starting with a design that differentiates services by student and family, followed by a design that uses choice among schools to differentiate services at that level, and ending with a design focused on systems for coordinating the broadest array of service choices to which students, families, and schools have efficient access. In keeping with our design criteria of impactful family and educator participation in, and contextualization and structured testing and revision of, policy decisions, actual end states and transition paths would vary from place to place.

1. Student/family-focused design

We assume here that, everything else equal, most parents and caregivers want their children to receive the benefits of a public democratic education, including exposure to life possibilities broader than those that constrain their own lives and the ability to thrive in work, political, residential, and other social settings populated by diverse others. But what most families want more than anything else—even if accomplishing it rules out key features of public democratic education—is instruction suited to their children’s own capacities, learning styles, needs, and wants that prepares them for fulfilment as adults. As doubts about public democratic schools on those dimensions accumulate, this desire adds to the attraction of homeschools, micro-schools, choice-oriented charter schools, and other small-scale—hence more predictably “suitable”—private and parochial options, despite their features in conflict with public democratic education.

There are, of course, families who want to educate their children in racially, religiously, culturally, economically, or otherwise homogenous schools, even if those narrowing features are inconsistent with their children’s pedagogical and developmental well-being and futures as happy, productive, and civically engaged adults. But for most families, we expect, the ideal includes both the broadening aspects of public democratic education and instructional, programmatic, and social-emotional services suited to their child. The

440. *See id.*

question this section poses is whether it is possible for public systems to broaden socially, while better targeting and contextualizing their pedagogical and developmental services.

For reasons laid out above, the disposition of most U.S. public-education systems toward uniformity and standardization in accordance with the small set of material interests that maximize solidarity among members of adult-centered interest groups work powerfully against the child-specific contextualization that families want.⁴⁴¹ Even in the special education context, where the Individuals with Disabilities Education Act (IDEA) obliges schools to provide individual education plans suited to each child's special needs,⁴⁴² the law itself and its bureaucratic and hyper-legalized implementation promote uniformity and inflexibility.⁴⁴³ Only some students qualify (and as a result are stigmatized); available treatment options often are limited to routinized lists; plans are difficult to revise as conditions change; and reliable enforcement is available only to families with access to lawyers, experts, and other privileges that operate through legal channels that add more inflexibility and inequity to how special-needs dollars are spent.⁴⁴⁴

Still, some public education systems achieve both broad socialization to liberal democratic norms and developmental

441. See *supra* notes 61–64, 77–78, 114–115 and accompanying text.

442. See *Endrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988, 991 (2017) (enforcing IDEA's requirement that states give children with disabilities "free appropriate public education" effectuated by a uniquely tailored "individualized education program" (quoting 20 U.S.C. §§ 1401(9)(D), 1412(a)(1))).

443. See, e.g., Logan Gowdey, *Disabling Discipline: Locating a Right to Representation of Students With Disabilities in the ADA*, 115 COLUM. L. REV. 2265, 2281–86 (2015) ("Special education law protections are inadequate in the disciplinary context because they come too late, kicking in only after the school makes a finding that the covered student misbehaved."); Claire S. Raj, *Rights to Nowhere: The IDEA's Inadequacy in High-Poverty Schools*, 53 COLUM. HUM. RTS. L. REV. 409, 415 (2022) ("The high cost of attorneys and experts, unequal bargaining power between parents and schools, and a hesitancy to disrupt a child's school-based relationships all undermine low income families' ability to leverage the IDEA."); Lydia Turnage, *Out of Sight, Out of Mind: Rural Special Education and the Limits of the IDEA*, 54 COLUM. J.L. & SOC. PROBS. 1, 26 (2020) ("[M]any rural students are denied much-needed services and supports because they do not satisfy all of the IDEA's eligibility requirements, despite the fact that rural students often face the same educational challenges as students with officially diagnosed disabilities.").

444. See sources cited *supra* note 443.

contextualization.⁴⁴⁵ An example is Finland’s, which outperforms nearly all other national school systems in the West on international comparisons of student learning outcomes—including those in the United States and in other Nordic nations.⁴⁴⁶ It does so precisely because its commitments to social integration, developmental individualization, and (unlike in the other Nordic nations) governance structures that maximize transparent adult learning and system improvement through close observation of each student’s differentiated case enable the bottom quintile of Finnish students to outlearn their peers elsewhere in the world by a wide margin.⁴⁴⁷

Drawing on the Finnish example, and on observations of hundreds of U.S. students, families and educators who avoided or minimized learning loss during the pandemic,⁴⁴⁸ two of this article’s

445. For U.S. examples, see *supra* notes 210, 358; *infra* notes 448–449.

446. See Arto Akhonen, *Finland: Success Through Equity: The Trajectories in PISA Performance*, in *IMPROVING A COUNTRY’S EDUCATION: PISA 2018 RESULTS IN 10 COUNTRIES* 121, 123–24 (N. Crato ed. 2021); Hannele Niemi, *The Finnish Educational Ecosystem*, in *FINNISH INNOVATIONS & TECHNOLOGIES IN SCHOOLS* 5–6 (2014); Charles F. Sabel et al., *Individualized Service Provision in the New Welfare State: Lessons from Special Education in Finland*, *SITRA* 2 (Dec. 2011) (“Some 30 percent of Finnish comprehensive school students receive special education services, by all accounts a much higher fraction of the school population than in other OECD countries.”).

447. See, e.g., Sabel et al., *supra* note 446, at 3 (attributing the success of Finnish schools to, among other factors, “a homogenous society that values education” and a curriculum that leaves room for adjustment to local needs); Weishart, *supra* note 1, at 63 (“All Finnish children have ‘the right to have personalized support . . . as a normal part of schooling.’ Individualized schooling is not special, it is the norm.” (quoting Pasi Sahlberg, *FINNISH LESSONS 2.0: WHAT CAN THE WORLD LEARN FROM EDUCATIONAL CHANGE IN FINLAND* (2015))).

448. The passage below summarizes the results of these observations:

[I]n all [studied] sites, teachers and leaders perceived that students [supported during the pandemic by strategies like the one proposed here] were learning about the same—and sometimes more—than they would have in a more “typical” year. One third-grade teacher from Hartford Public Schools in Connecticut, put it simply, “I feel that my students are actually doing better in math this year. The reason is parent involvement.”

Across sites and grade levels, in urban and rural locations, in traditional district schools and charter schools, the families we spoke to—including families whose primary language is not English—nearly unanimously reported that their children were either staying on track with their learning, or in some cases, growing this year. To make these claims, families relied on a

authors have imagined a set of “new democratic, governance and operational practices” designed to “adapt[] all available instructional and support strategies to students’ individualized strengths and needs.”⁴⁴⁹ Several guiding principles apply: (1) “difference matters,”

number of sources, including their children’s grades on assessments (e.g., district- or school-created assessments), reading levels, direct observation of their children’s participation in class, direct review of reading and writing assignments, and the extent to which their children participated in academic activities in their free time.

Chu et al., *Fundamental 4*, *supra* note 78 at 10; see Jim Cowen, *A Bright Spot from the Virtual Learning Experience*, FORBES (Nov. 1, 2021), <https://www.forbes.com/sites/jimcowen/2021/11/01/a-bright-spot-from-the-virtual-learning-experience/?sh=6efe6ecf4160> [https://perma.cc/9YX8-2VLS] (summarizing findings from *Rise to Thrive*, *supra* note 73 and *Fundamental 4*, *supra* note 78, that during the pandemic, by combining steps giving parents “increased vision into student instruction” and new forms of “family engagement with digitally-accessible, high-quality instructional materials,” school systems avoided student learning loss and enabled “students [to] learn about the same—or sometimes even more—than a typical year”).

449. Chu et al., *Rise to Thrive*, *supra* note 73, at 3, 5 n.1; see also Kara Arundel, *3 Ways K-12 Schools Can Evolve Post-Pandemic*, K-12 DIVE (Nov. 17, 2020), <https://www.k12dive.com/news/how-k-12-schools-can-be-better-evolve-post-pandemic-covid-19/588965/> [https://perma.cc/Y3HM-BFVF] (offering a similar proposal); Eyal Berman, *Unlocking the “How”: Designing Family Engagement Strategies That Lead to School Success*, LEARNING HEROES 17 (Mar. 2022) (describing Baltimore City Public Schools’ pandemic-recovery strategy for empowering teachers, students, and families to “co-create” Student Learning Plans for every student and meet “multiple times [annually] to build relationships, share data, and elicit families’ views on the way forward for their child”); *Hidden in Plain Sight*, *supra* note 217 (offering a similar proposal from family advocates); Friedman, *supra* note 148 (“Educators also displayed extraordinary creativity [during the pandemic] in finding new methods to teach students . . . [including by] using technology to support kids by prioritizing learning acceleration over remediation.”); KIPP PUB. SCHLS., SUPPORTING STUDENTS TO FIND THEIR MATCH (2020), <https://www.kipp.org/wp-content/uploads/2020/10/KIPPMatchPlaybook.pdf> [https://perma.cc/AJ34-7NNT] (providing a “playbook” KIPP charter schools use to identify and develop differentiated plans to achieve each students’ career goals); *Meet Every Student’s Needs*, MODERN CLASSROOMS PROJ., <https://www.modernclassrooms.org> [https://perma.cc/SL4N-UWAQ] (providing mechanisms for “re-engineer[ing] classrooms” to give every student the support they need); *What Is the Next Education Workforce?*, ARIZ. ST. UNIV. NEXT EDUC. WORKFORCE, <https://workforce.education.asu.edu/collection/framing> [https://perma.cc/9P4K-HLBG] (describing a program preparing educators for and networking schools practicing teacher and staff teaming around students’ differentiated goals and plans). For similar proposals in the legal literature, see MARK KELMAN & GILLIAN

especially students' "different starting places," so "[c]ustomization to context and need, not uniformity" drive improved, more equitable outcomes;⁴⁵⁰ (2) "effective, not best, practices drive student learning," so what works well at one place and time is not "applied uniformly" at other places and times;⁴⁵¹ (3) student and adult "[l]earning is the constant," while "operations, instruction, and time are the variables"⁴⁵² actors manipulate to achieve better learning outcomes in each case—reversing the usual, bureaucratic formula; (4) the knowledge, thus the "consequential" participation, of students, families, community members, educators, and school and system staff and leaders are essential to inform solutions and build trust;⁴⁵³ (5) resources and students move freely across attendance zones, district lines, and grades, affording opportunities otherwise thwarted by the "traditional 'givens'" of either a single assigned school, grade, and teacher or of "convenience, convention, contract, and geography."⁴⁵⁴

Also tracking the Finnish example, the operational core of these governance and democratic changes is a school-level team consisting of each student and the student's family and teachers, a community and family support coordinator who engages other social-service professionals as necessary, and a master scheduler.⁴⁵⁵ After

LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH DISABILITIES 157 (1997) (recommending the "individualization of educational plans and intervention packages for all low-achieving pupils, regardless of disability status"); Stephen A. Rosenbaum, *Full Sp[[Ed Ahead: Expanding the IDEA Idea to Let All Students Ride the Same Bus*, 4 STAN. J. CIV. RTS. & CIV. LIBERTIES 373, 385 (2008) ("Doesn't every child deserve an individualized learning plan that charts a course for obtaining an appropriate education and measuring her progress?"); Weishart, *supra* note 1, at 21, 38–42, 52–64 (proposing to address flaws in current "one-size-fits-all schooling" by recognizing a constitutional "IEP for all" right to education in service of democratic principles reflected *inter alia* in state constitutions' education provisions).

450. Chu et al., *Rise to Thrive*, *supra* note 73, at 4.

451. *Id.*

452. *See id.* (referencing "[c]lass schedules, staffing structures, learning supports, instructional materials, assessment practices, and enrichment opportunities" as factors that set students up for growth and achievement).

453. *Id.*

454. *Id.*

455. Chu et al., *Rise to Thrive*, *supra* note 73, at 5. For plan-based public service systems with similar features, see Charles F. Sabel et al., *Transforming the Welfare State, One Case at a Time: How Utrecht Makes Customized Social Care Work*, POL. & SOC'Y (forthcoming 2023), available at

consultation with each other and with other knowledgeable actors about the student's current state, needs, and preferences, team members "craft academic and social-emotional goals for the year, detail an educational program that works for the student and family, and agree upon interim milestones to help mark and monitor progress."⁴⁵⁶ Plans assume flexibility as to how many days and hours each student will attend school in person each week and when and from where (home or school) the student will access remote or offsite programming, including from "local, state, or national museums, businesses, cultural sites, or institutions of higher education," which may "combine students from various schools in the school system, region, or beyond."⁴⁵⁷ Meetings during the year aligned to plan milestones assess the student's progress and update the plan based on success or difficulty meeting goals and team members' causal observations.⁴⁵⁸

New governance and democratic practices assign new roles to teachers and school and system leaders. In the envisioned system, teachers choose among a wealth of available technology-enabled and other curricular materials, and qualitative, project-based, and standardized assessments, all aligned to state learning standards, to "personaliz[e] learning across remote and in-person modalities, and across geographies."⁴⁵⁹ As the coordinator of multiple students'

<https://charlessabel.com/papers/One-Case-at-a-Time-paper-revised-clean.pdf>; see also Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 829, 861 (2000) (discussing emerging forms of drug treatment for individuals charged with crimes in which convictions and criminal sentences are replaced by guilty pleas and successful completion of treatment plans that are customized to individual needs (including mental health, housing, vocational training, and child welfare services) and are routinely monitored and modified to reduce relapses); Kathleen Noonan et al., *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, 34 L. & SOC. INQ. 523, 533–48, 564 (2009) (describing measurably successful child welfare administration models in Alabama and Utah, which are "readily generalizable to other service-based welfare programs," that engage families and social service and community support providers in developing and monitoring plans to protect children in stressed family situations without removing them from their biological families).

456. Chu et al., *Rise to Thrive*, *supra* note 73, at 5.

457. *Id.*

458. *Id.*

459. *Id.* at 5–6; see also *id.* at 9 for a description of available instructional materials, assessments, and other resources; Chu et al., *Fundamental 4*, *supra* note 78, at 10–23 (describing the expanded instructional core model and the

planning and implementation teams, each individual teacher participates “in the development and monitoring of students’ annual plans” and helps “solv[e] challenges and improv[e] upon services throughout the year.”⁴⁶⁰ As members of cross-cutting teams of school professionals responsible for particular cohorts of students, teachers flexibly divide responsibilities among themselves “by subjects, by student learning levels, [or] by instructional modality,” enabling them collectively and efficiently to meet the requirements of the various individual plans they all are coordinating and to support problem-based professional learning and coaching.⁴⁶¹ Unions change along with teachers, retooling collective bargaining agreements to foster new flexibilities, including ones teachers requested and appreciated during the pandemic.⁴⁶²

School leaders focus principally on securing access to wide varieties of instructional modalities, materials, measures, and professional-learning resources from which student teams can select appropriate combinations aligned to each student’s needs. Leaders additionally may arrange for their schools to serve as providers themselves when economies of scale permit. Instead of prescribing

beneficial impacts on virtual learning environments of “high-quality instructional materials that include digital features”).

460. Chu et al., *Rise to Thrive*, *supra* note 73, at 6.

461. *Id.*

462. *Id.*; see *supra* notes 358–387 and accompanying text (cataloguing flexibilities educators sought and obtained during the pandemic in order to improve and innovate effective instructional responses to the pandemic). Toward the end of his life, labor leader Albert Shanker, the architect of the massively detailed rule-based collective bargaining agreements now governing many school systems, envisioned much shorter, standards-based agreements designed to professionalize public-school teaching. See Albert Shanker, *The Making of a Profession*, 55 J. NEGRO EDUC. 405 (1986) (“[U]nless we go beyond collective bargaining to the achievement of true teacher professionalism, we will fail in our major objectives: to preserve public education in the United States and to improve the status of teachers economically, socially, and politically.”); Am. Fed’n of Teachers, *The Power of Ideas: Al [Shanker] in his Own Words*, AM. EDUCATOR (Special Issue: Spring/Summer) 33–34, 108–09 (1997) (urging school systems to consider switching to cooperative and learning-based, rather than adversarial, arrangements that were being pioneered in the U.S. by General Motors and the United Auto Workers and was generating “a new,” more successful, “model of automobile production”); Madeline Sims, *The Business of Teaching: Can a New Contract Change the Culture*, 48 COLUM. J.L. & SOC. PROBS. 605, 608–09 (2015) (discussing Albert Shanker’s 1985 speech before the Representative Assembly of the New York State United Teachers proposing changes to teachers union’s collective bargaining strategies).

daily schedules, curricula, sequences for delivering curricula, instructional materials, and work rules, school leaders propagate criteria-guided standards for all such decisions that advance the deep principles of public education. Then, they “formatively” (i.e., with an eye on helping teams identify causes and improve effects) evaluate and assure “transparency as to the cumulative results” of the personalized planning and implementation process by subject matter, student cohorts, classrooms, and school.⁴⁶³

In turn, the districts and charter management organizations within which schools are nested provide schools with broader access to services, improvement-oriented facilitators, and data-management tools, while also aggregating, formatively evaluating, and informing families and the public about schools’ learning results. System leaders thus take responsibility for defining, developing a common terminology to describe, and aligning services around the emerging culture of differentiated service to individual families and students, close observation and improvement of results, and learning within and across teams and schools.⁴⁶⁴

Accountability is shared and enforced across all roles. Top down, school, system, and state actors, iterating on existing accountability systems, can use “both process and outcome indicators to measure when and to diagnose why schools are achieving their outcome targets or appear to be falling short” and to “reward schools and systems not only for supporting learners enrolled at their home school but also learners in other communities.”⁴⁶⁵ Laterally, the transparency and interdependence of actions school professionals on each student’s team and on cross-cutting support teams incentivizes members to live up to their obligations to each other and support each other’s improvement. Most importantly, bottom-up, families’ consequential participation on their child’s planning/implementation teams lets them observe and redirect school professionals’ efforts to “meet each child’s needs and preference, and improve internal practices.”⁴⁶⁶ Drawing on a feature of our second, schools-focused design below, open-enrollment mechanisms enabling families to choose new schools outside their public-school attendance zone and

463. Chu et al., *Rise to Thrive*, *supra* note 73, at 7.

464. *Id.*

465. *Id.* at 8.

466. *Id.*

district lines⁴⁶⁷ can enhance bottom-up accountability to families if their school “fail[s] to deliver high-quality, student-centered learning.”⁴⁶⁸ Backing up all those systems is the disciplining prospect of continued migration of families from public to private options should public systems fail them.

Supporting the proposal are staged sets of activities along what we have imagined as a three-year transition path.⁴⁶⁹ Along that path, States, foundations, intermediary organizations, networks of school systems, and individual systems work with outside providers and initiate pilots to motivate, inform, design, test, and phase-in the various components of the student-plan-based system.⁴⁷⁰

This approach aims in the most direct way possible to use families’ interaction with schools to accomplish three key objectives:

- Model and engage the wide swaths of the public made up of students and their families in consequential democratic decision making, in concert with public servants on matters of deep importance to those actors.
- Attract families to that democratic exercise and their children to schools that acculturate them to the logic of liberal democratic values in sufficient numbers to provide a stable foundation for a polity that simultaneously and uneasily values both free choice among values and life plans and respect, or at least tolerance for, the diversity of views and choices that freedom engenders.
- Use schools’ reasonable action to help families achieve what matters most to them—their own child’s development—to dispose them to trust and accept as also reasonable the steps the schools take, with their deeply participatory input, to address fraught issues, even if the steps are not ideal from a given family’s perspective. Such issues may include how to study race in America, demonstrate cultural responsiveness to diverse

467. See *supra* note 386 and accompanying text; *infra* notes 485–488 and accompanying text.

468. Chu et al., *Rise to Thrive*, *supra* note 73, at 8.

469. *Id.* at 11–14.

470. *Id.*

populations, and accommodate gender-nonconforming students.

An important logistical question the approach raises is: how can currently overburdened teachers find the time to join with families in planning, implementing, observing, and adjusting learning strategies for each child? Research on school systems that took these steps during the pandemic found that, “[a]s engaging families took up increasingly more of teachers’ workload,” their use of technology-assisted “high-quality instructional materials” allowed them to devote less time to developing their own materials, enabling them, as one teacher reported, to “take what could be a 100-hour work week and turn it into a 50-hour week.”⁴⁷¹ Other time-saving steps school systems used include (1) deploying teachers more efficiently—for example, having one teacher introduce many more than the usual class of 30 students to a subject, freeing other teachers to provide more individualized support;⁴⁷² (2) using time more flexibly and efficiently—for example, replacing fixed 45-minute class periods with longer and shorter ones as needed to cover material;⁴⁷³ and (3) more broadly, enabling educators to “prioritize[e] learning acceleration over remediation”—in some cases, for example, “cover[ing] twice as much ground” as usual, because students “keep moving forward, completing targeted review as needed to master new material, rather than simply repeating lessons.”⁴⁷⁴

This analysis also addresses a related question the proposal begs: whether privileged families will resist enhanced individual attention to traditionally underserved families and children for fear of diminishing the higher levels of attention schools and systems

471. Chu et al., *Fundamental 4*, *supra* note 78, at 12.

472. See *supra* note 379 and accompanying text.

473. See, e.g., Chu et al., *Rise to Thrive*, *supra* note 73, at 9 (describing use of flexible scheduling to “creat[e] more time for teacher collaboration and planning”); *supra* notes 378–379 and accompanying text.

474. See Friedman, *supra* note 148; TNTP, UNLOCKING ACCELERATION 1 (2022), https://tntp.org/assets/documents/Unlocking_Acceleration_8.16.22.pdf [<https://perma.cc/5M6B-NY7Y>] (concluding based on observations during the pandemic “that when students fall behind, providing access to grade-level work with appropriate support (learning acceleration) is the best way to help them catch up—and that delaying access to grade-level work (remediation) practically guarantees they will fall even farther behind”); see also Chu et al., *Rise to Thrive*, *supra* note 73, at 4 (noting that in systems like the one proposed, “[l]earning is the constant,” and “operations, instruction, and time are the variables” to be altered as needed to afford educators and families the ability to accelerate learning effectively and efficiently within the time realistically available).

already give their children, or will find ways to divert higher proportions of newly available individual attention to their, as opposed to underserved, families and children.⁴⁷⁵ The strategy's ability to provide better services more efficiently, at no great expense in teacher time and other resources, will help moderate any sense that a benefit to underserved students and families must come at the expense of more privileged constituents. In that event, more fully systematizing the provision of individualized services to all students and making them more transparent and accountable to all families should count as a gain for all.

A yet deeper question this proposal poses is whether there is a realistic transition path to it. The strategy's success in Finland and use by some U.S. school systems,⁴⁷⁶ its kinship with the Individual Education Plans in the IDEA,⁴⁷⁷ its similarity to effective social-service provision in other public contexts,⁴⁷⁸ the U.S. Education Department's creation of a National Parents and Families Engagement Council "to help ensure [pandemic] recovery efforts meet students' needs,"⁴⁷⁹ and Americans' sudden bipartisan taste for systemic change in public institutions⁴⁸⁰ provide foundations for its acceptance. But its deviation from the longstanding assumption that public education requires uniform education, and from the associated bureaucratic logic of one school building, one grade, one classroom, one teacher, one curriculum, one textbook, one assessment system, and one central governing authority through which established interest groups exercise influence likely leaves some readers doubtful

475. See *supra* notes 73, 107 and accompanying text.

476. See sources cited *supra* notes 210, 447–449 & *infra* note 483 and accompanying text.

477. See *supra* note 443 and accompanying text.

478. See sources cited *supra* note 455.

479. U.S. Department of Education Creates National Parents and Families Engagement Council, U.S. DEP'T OF EDUC. (June 14, 2022), <https://www.ed.gov/news/press-releases/us-department-education-creates-national-parents-and-families-engagement-council-help-ensure-recovery-efforts-meet-students%E2%80%99-needs> [<https://perma.cc/4BYP-9786>].

480. See Reid J. Epstein, *As Faith Flags in U.S. Government, Many Voters Want to Upend the System*, N.Y. TIMES (July 13, 2022), <https://www.nytimes.com/2022/07/13/us/politics/government-trust-voting-poll.html> (on file with the *Columbia Human Rights Law Review*) ("A majority of American voters across nearly all demographics and ideologies believe their system of government does not work, with 58 percent of those interviewed for a New York Times/Siena College poll saying that the world's oldest independent constitutional democracy needs major reforms or a complete overhaul.").

that the transition could succeed. Working against a successful transition are public-education insiders' likely resistance to upending their routines and influence, public-school antagonists' likely objection to planning and improvement structures as more government overreach, and the opportunities to use against the strategy its own transparency as to how plans initially fall short of expectations.

Still, changes of something like this magnitude with the objective of replacing bureaucratic strategies with more differentiated and self-improving ones have occurred in public education and other public domains such as welfare services, public health, land use, and law enforcement.⁴⁸¹ Features characteristic (if not present in every example) of successful transitions include (1) a disruptive event, such as a natural disaster, lawsuit, or legislated "penalty default" motivating an urgent search for alternative modes of action; (2) concerted public-information efforts to replace the expectation of organizational omniscience and omnipotence with the reality of uncertainty and the pressing need to access local knowledge and to learn together through judicious trial and error; (3) empowering insurgent or otherwise willing forces inside the system to experiment with new approaches to "wicked" problems, while taking steps to interest others in supporting the experiments, receiving similar flexibilities, and achieving the greater agency and success in their work that experiments reveal is possible; (4) engaging broader constituencies (and potential allies) in these innovative processes, especially clients whose lives the organization and experiments most directly affect and public and private service-providers with experience serving those populations; (5) deliberately using innovations generated by (3) and (4) gradually to call into question existing "meta-norms" (assumptions about how things generally operate in world or organization) and replace them with new norms the innovations reveal to be more congruent with the way the world

481. See, e.g., CHRISTOPHER K. ANSELL, PRAGMATIST DEMOCRACY 43–62 (2011) (describing transition paths used in successfully generating "large-scale institutional change" from bureaucracy to organizational learning; citing as examples World Health Organization's treatment of infectious diseases, community policing experiments, and environmentally sensitive land-use practices); see also ARCHON FUNG, EMPOWERED PARTICIPATION: REINVENTING URBAN DEMOCRACY 173–219 (2004) (describing successful transition pathway in community policing context); ERIC NADELSTERN, 10 LESSONS FROM NEW YORK CITY SCHOOLS (2013) (describing same in New York City school reform); sources cited *supra* note 456 (describing same in welfare services, drug treatment).

actually works; and (6) internally and externally celebrating successes, focusing on both process and product.⁴⁸²

As we detail above, pandemic exigencies made insurgents-by-necessity of many conscientious educators. Working to serve students without recourse to the usual uniformities of place, time, staffing, and manner of instruction, teachers, schools, and districts demanded or simply exercised previously forbidden flexibilities. Doing so enabled them to locate each student, accommodate or improve the student's available modes of participation, and work with the student and responsible family members week to week to understand how the student was responding to available instructional modalities and materials and adjust accordingly. The result was a raft of new remote and mixed modalities, staffing arrangements, methods and levels of communication, supplementary offsite learning resources, and opportunities to evaluate and build teacher-student-family connections through higher-quality instructional materials.⁴⁸³

All this experimentation provides the dispositional and practical raw material, but not yet the institutional structure and support, for motivating and building new systems based on what was learned and how adult and student learning itself changed during the pandemic. Without new organizational structures and supports, insurgents' promising innovations for particular students or systems likely will falter in the face of rules and practices designed to assure uniformity. If innovations succeed, they likely will go unnoticed and unused elsewhere. And if success in one context is recognized, the system may prescribe that solution, rather than treating it as merely suggestive, for all other contexts, propagating the next silver-bullet solution that comes to nothing when mandated uniformly across divergent sites.

In the wake of the pandemic, however, educators and school systems have begun building the necessary new structures and support systems and exploring how to meet the practical challenges of replacing uniformity with closely observed student differentiation.⁴⁸⁴

482. These criteria are distilled from ANSELL, *supra* note 481, at 43–62.

483. See *supra* notes 358–387 and accompanying text for discussion of different ways schools have been affected by and adapted because of remote learning.

484. See, e.g., Chelsea Waite, *From a Lakota-Focused Microschool to Service Opportunities for Kids With Disabilities, Innovations from 161 Schools to Aid Marginalized Students*, THE 74 (Apr. 19, 2022), <https://www.the74million.org/article/analysis-from-a-lakota-focused-microschool-to-service-opportunities-for->

Among these is a network of school districts and charter organizations in an Atlantic seaboard state that some of the authors are helping both individually to redesign their systems around student-based planning and service delivery and collectively to change state laws and regulations impeding their innovations.

2. Schools-focused design

Innovators worried about the difficulty of treating each student as a school of one while maintaining enough continuity across all of them to serve the horizon-broadening, diversity-valuing social-coherence benefits of public democratic education might instead, or additionally, consider diversifying at the school level. Combined with full and free family choice among schools, differentiation at the school level could provide most families with the desired predictability in regard to the instructional and developmental steps available to meet their child's needs either without or in service of differentiated plans for their children.

Here, too, we draw on precedents and analogies, including for caveats they raise. A starting point is the subset of states that promote and regulate charter schools to broaden high-quality opportunities for underserved populations.⁴⁸⁵ The portfolio school reforms of this century's first decade and a half provide a broader framework, as operationalized in Denver, Newark, New Orleans, New York City, and most broadly in Camden, New Jersey's combination of charter, Renaissance, and traditional public schools and Indianapolis's wide variety of Innovation and district schools.⁴⁸⁶ Providing a still newer analogy that explicitly draws on innovations

kids-with-disabilities-innovations-from-161-schools-to-aid-marginalized-students/ [https://perma.cc/K5GS-57MX] (discussing Canopy Project's collaboration of district, charter, independent, micro-, virtual, and home schools to share examples of innovative learning environments); *Essential Actions*, BUILDING EQUITABLE LEARNING ENVIRONMENTS NETWORK, https://belenetwork.org/wp-content/plugins/pdfjs-viewer-shortcode/pdfs/web/viewer.php?file=https://belenetwork.org/wp-content/uploads/2021/05/BELE-Essential-Actions_05.05.21.pdf (on file with the *Columbia Human Rights Law Review*) (describing a collaborative of organizations committed to partnering with families to set goals and co-create solutions for different students in systems in which "adults also engage as learners and work to create adaptive learning systems"); see examples cited *supra* notes 210, 449.

485. See *supra* notes 147–149 and accompanying text for discussion of different state approaches to regulating charter schools.

486. See *supra* notes 157–163 and accompanying text for explanation and evaluation of these school reforms.

during the pandemic are six districts nationwide that, with support from two school-design organizations and \$1 million in foundation grants, are creating new “learning hubs” that are “more geographically accessible than traditional campuses, offer more flexible schedules, and better integrate” a range of educational services.⁴⁸⁷ Implementing arrangements like these, states authorize or require school districts to function as organizers of a diverse portfolio of public schools or “learning hubs,” rather than as operators of schools themselves. Portfolios might include traditional public, magnet, charter, Renaissance, micro, career and technical performing arts, dual language, humanities- or STEM-oriented, International Baccalaureate, early college, and other specialty schools, as well as learning hubs amassing a variety of services.⁴⁸⁸

To maintain the public democratic character of all schools, public systems of this sort include only schools or hubs supported mainly by public funding, with all family contributions above a modest level going into a fund divided among all schools. States and districts accord all schools a substantially broader range of flexibilities over staffing, scheduling, curriculum, programming, class

487. Robin Lake & Dan Weisberg, *Announcing a New Initiative to Support District- and Community-led Innovation Through Learning Hubs*, CTR. FOR REINVENTING PUB. EDUC. (Mar. 2021), <https://crpe.org/announcing-a-new-initiative-to-support-district-and-community-led-innovation-through-learning-hubs/> [<https://perma.cc/9ELN-QQ2W>] (discussing learning hub designs by school districts in Central Falls (RI), DeKalb County (GA), Edgemont and Guilford Counties (NC), Indianapolis, Oakland); see DARAMOLA, *supra* note 296, at 11–14 (describing learning hub operated by community-based Oakland REACH).

488. Instantiating some of the reform features discussed in text is Louisiana’s 2016 legislation returning New Orleans schools to local control post-Katrina and transforming the district from top-down operator of city schools to “lean” manager of autonomous schools that district can renew or close based on student outcomes. See ASHLEY JOCHIM & TRAVIS PILLOW, CTR. FOR REINVENTING PUB. EDUC., *SUSTAINING IMPROVEMENT AFTER STATE TAKEOVERS: LESSONS FROM NEW ORLEANS* 3 (2019) (quoting Louisiana Schools Superintendent: “[t]he reconceiving of power in education, now codified in Louisiana law, offers hope to the nation that the urban school district’s central office, long an immovable instrument of politics, can be reimagined for the sake of those children who most need a good education”). For a detailed and compelling analysis and evaluation of the development and the governance and academic successes of New Orleans’ nearly all-charter system, with many affinities to and lessons for systems interested in adopting the kinds of reforms proposed here, see DOUGLAS N. HARRIS *CHARTER SCHOOL CITY* (2020). For a broader examination of allied reforms in Denver, Indianapolis, Memphis, and Washington, D.C., as well as New Orleans, see DAVID OSBORNE, *REINVENTING AMERICA’S SCHOOLS* (2017).

size, professional development, etc., than state laws and regulations, collective bargaining agreements, and standard operating procedures have traditionally given public schools.

Students and families may apply to all schools and are provided transparent comparable information on all schools' student academic and social-emotional outcomes, peer reviews of school quality, parent-student-teacher surveys, and other indicators of students' in-school and post-graduate success and their and their families' levels of authentic participation and satisfaction.⁴⁸⁹ Seats are allocated through blind lotteries that maximize family choice among schools subject only to algorithmic weighting to assure that children who are low-income, multilingual learners, and special education are not concentrated in particular schools and to provide sibling and geographic proximity preferences as needed.⁴⁹⁰ Free or subsidized transportation is available to all families or on a means-tested basis.⁴⁹¹ When schools are oversubscribed, systems engage families lotteried out of those school in designing new schools providing the features families want.⁴⁹²

Rather than operate schools themselves, school districts mobilize educators and families to help design or review the results of requests for proposal for new or proven school models; provide support and resources for innovators chosen to realize the models; train leaders and educators to use their operational and instructional autonomies, in partnership with families, to improve learning outcomes; oversee the school lottery; collect and publish comparative data on schools; and operate programs and schools where economies of scale apply, for example, for students who are severely disabled, suffering the effects of trauma, or incarcerated.

Schools-focused post-pandemic designs must address two important transition-path questions. First, how can schools earn

489. See, e.g., Austin, *supra* note 145 (discussing and proposing improvements to Newark, New Jersey's school lottery system).

490. See, e.g., *id.* (describing such improvements in New Jersey).

491. See THE MIND TRUST, DRIVING CHANGE: HOW TRANSPORTATION INNOVATION GIVES FAMILIES POWER TO CHOOSE 14 (2021), <https://i3xu33ytdf41y2wui4cgumrs-wpengine.netdna-ssl.com/wp-content/uploads/Community-Report-Transportation-2021.pdf> [https://perma.cc/C44R-3N2P] (describing the difficulties small schools such as charter schools have faced in Indiana in providing transportation to students and offering recommendations).

492. See *infra* note 499 and accompanying text (describing and proposing democratic reforms for schools aimed at increasing parent participation).

students', families', and communities' trust as creators—not closers—of valued schools?⁴⁹³ And how adequately and simultaneously to fund schools that are phasing in and phasing out of existence? An answer to the first question is to bring families themselves into the portfolio process by creating collaborative and integrative structures through which they work together to codesign the schools they want. A step in this direction was foreshadowed by the process District 15, one of the New York City school system's thirty-two geographic subdivisions, used to revise how it assigns students to middle schools. Previously, the district was riven with conflict over a “selective schools” process inviting families to apply for middle schools of their choice, which then selected among applicants based on students' test scores, grades, attendance histories, and family interviews.⁴⁹⁴ The result was that upper middle class families in the middle part of the district competed with each other for slots in the few, mainly white, middle schools thought to be academically superior, while Latinx and Asian families in the southern part of the district and Black families to the north largely enrolled their children in middle schools with lower average performance levels in their neighborhoods.

After many false starts, District 15 engaged private mediators to organize an extended process through which families from throughout the district discussed their aspirations for their children, the varying options available to them given their different economic circumstances, and alternative admissions strategies.⁴⁹⁵ The discussions eventually generated a plan to conduct a single, annual,

493. For discussion of transition-path problems associated with closing schools that patrons value despite poor learning outcomes, see Liebman et al., *Kryptonite Politics*, *supra* note 96, at 439–40; *supra* note 191 and accompanying text.

494. Chana Joffe-Walt, *Episode Five: 'We Know It When We See It,' Nice White Parents*, N.Y. TIMES PODCASTS, at 08:13 (Aug. 20, 2020), <https://www.nytimes.com/2020/08/20/podcasts/nice-white-parents-school.html?> (on file with the *Columbia Human Rights Law Review*) (describing District 15 middle schools' previously “complex and ever-changing” admissions criteria, including interviews aimed at identifying “nice” families).

495. *Mayor de Blasio and Chancellor Carranza Announce District 15 Middle School Diversity Plan and Launch \$2M School Diversity Grant Program*, OFF. OF THE MAYOR—CITY OF N.Y. (Sept. 20, 2018), <https://www1.nyc.gov/office-of-the-mayor/news/478-18/mayor-de-blasio-chancellor-carranza-district-15-middle-school-diversity-plan-and/#/0> [<https://perma.cc/R723-ZYKF>] (describing urban planning firm's convening of working group to conduct public workshops and outreach and to create design plan for high-quality integrated middle schools).

district-wide middle school lottery that assigned students to schools based only on their families' informed choices among schools and a commitment to have every school devote 52% of enrollment space to students living in low-income households or temporary housing or learning English.⁴⁹⁶ Despite predictions that the system would generate massive middle-class flight or take years to overcome families' prejudices toward certain options, the system generated no discernible demographic repercussions⁴⁹⁷ and achieved the desired distribution of low-income families in less time than was projected.⁴⁹⁸

Although focused on distributing access to existing schools, this democratic and participatory decisional process can also serve as a facilitated structure through which families interested in new and

496. *Id.*

497. Jessica Gould, *One Year into Brooklyn Middle School Integration, Signs of Success*, GOTHAMIST (Nov. 15, 2019), <https://gothamist.com/news/one-year-brooklyn-middle-school-integration-signs-success> [https://perma.cc/8DRE-AVZ8] (“Despite talk of ‘white flight,’ the total percentage of white students in the District—31 percent—stayed the same.”).

498. Michael Elsen-Rooney, *New Admissions Plan Improves Diversity in Brooklyn School District, New NYC Data Shows*, N.Y. DAILY NEWS (Nov. 14, 2019), <https://www.nydailynews.com/new-york/education/ny-diversity-integration-brooklyn-district-15-20191114-pnykcguo5fcpnifex5bamstl6i-story.html> [https://perma.cc/C6BL-KL3G] (“Eight of the district’s 11 middle schools now enroll sixth grade classes that are between 40 and 75 percent needy students, compared to only three schools in that range last year.”); *D15 Diversity Plan—Final Report 2018*, WXY STUDIO (July 2018), http://d15diversityplan.com/wp-content/uploads/2019/06/190620_D15DiversityPlan_FinalReport.pdf [https://perma.cc/949C-RMHA] (announcing goal for “all D15 middle schools” to enroll “40%–75% for low-income students”). True to bureaucratic form, the New York City Department of Education treated the plan’s success in the community school district that adopted it as sufficient reason to extend it, wholesale, to middle-school choice programs citywide, only to suspend the plan’s citywide application a year later in response to objections from families elsewhere in the city, where no similar process of tailoring the plan to local needs had occurred. Compare Eliza Shapiro, *New York City Will Change Many Selective Schools to Address Segregation*, N.Y. TIMES (Sept. 15, 2021), <https://www.nytimes.com/2020/12/18/nyregion/nyc-schools-admissions-segregation.html> (on file with the *Columbia Human Rights Law Review*) (discussing September 2021 decision to replace middle-school admission “metrics like grades, attendance and test scores” with “random lottery,” extending District 15 plan across city’s selective middle schools), with Troy Closson, *In a Reversal, New York City Tightens Admissions to Some Top Schools*, N.Y. TIMES (Sept. 29, 2022), <https://www.nytimes.com/2022/09/29/nyregion/nyc-schools-admissions.html> (on file with the *Columbia Human Rights Law Review*) (discussing September 2022 decision to allow New York City schools to replace lottery-based middle-schools admissions with admissions based on grades).

different options for their children come together to identify and develop preferred designs. To succeed, the structure must be open to all families in the area, defined as the set of proximate neighborhoods with the greatest manageable degree of social and economic integration up to—and perhaps even beyond—the boundaries of the school district in question. Districts organize information sessions, then requests for proposal, to present collaborating families with multiple options from which to choose; support families in identifying school creators or leaders to realize the desired design; and support the schools’ development, perhaps with an admissions preference for families that participated in the development process. Strategies like these can help assure families that the school creation and closure process aims not to shut their school to make way for someone else’s, and instead to enable them to create schools they want their child to attend.⁴⁹⁹

A transition path quietly forged by the subset of states that focus their charter schools on expanding options for previously underserved students⁵⁰⁰ helps answer the question of how simultaneously to fund phasing-in and phasing-out schools. To date, arguments based on aggregate rather than per-pupil funding of district schools losing students to generally higher-performing charter schools have obscured the benefits of this transition strategy.⁵⁰¹ We discount these adverse fiscal impact claims for a variety of reasons laid out below. Although in doing so we focus on public charter schools, our analysis applies as well to innovation schools and learning hubs, which typically engender less rancor from organized interests because they fall under the district’s collective bargaining agreements.

To begin with, *per-pupil* funding—the financial metric most states and school systems use—need not automatically decrease when enrollment declines. As the New Jersey Supreme Court recently held,

499. See Liebman et al., *Kryptonite Politics*, *supra* note 96, at 450–54 (exploring steps districts have used to give families agency in various district operations, including improving failing and designing new schools).

500. Our analysis applies, at the least, to the charter school laws and practices of California, Colorado, Illinois, New Jersey, New York, Rhode Island, and Texas.

501. See, e.g., Zachary Jason, *The Battle Over Charter Schools*, HARV. ED. MAG., <https://www.gse.harvard.edu/news/ed/17/05/battle-over-charter-schools> [<https://perma.cc/L42Z-H5HR>] (discussing common claim by opponents of pro-charter school ballot initiative in Massachusetts that charter schools “rob” funding from district schools).

for example, a district's showing of the loss of *aggregate* funding, staffing, and programs that is roughly proportional to its loss of students and their per-capita funding to newly authorized charter schools is insufficient to establish the fiscal harm to district schools that would justify denying applications for charter growth. Instead, districts must show with specificity the adverse impact the creation of new schools will have on their existing schools' ability to provide students with their state constitutional right to a "thorough and efficient education," which no New Jersey district has ever been able to show.⁵⁰² To be sure, school districts have fixed costs (e.g., pension obligations) and transitional costs (e.g., the inability immediately to downsize staffs, facilities, and programs) that can turn aggregate into per-pupil funding declines as a result of charter school growth. But the state charter systems designed to improve access to high-quality schools account for these distortions through a variety of mechanisms. Most such systems fund charter schools at lower per-pupil rates than traditional schools—New Jersey, for example, funds charter schools at 90% of the per-pupil rate for traditional public schools—while allocating the remainder back to students in district schools.⁵⁰³ Many such systems also hold districts harmless for enrollment loss for a year or two following the loss of students to charter schools or directly reimburse districts for specified fixed and transitional costs that are not sensitive to actual enrollment levels.⁵⁰⁴

502. *In re* Renewal Application, 247 N.J. 46, 53–54 (2021); *see also* Board of Educ. v. Illinois State Bd. of Educ., 965 N.E.2d 13, 18 (Ill. App. 2011) (upholding state board finding that charter proposal with 6% impact on district's total budget was economically sound); *In re* Amendment Request to Increase Enrollment, 2020 WL 1294664 at 6–7 (N.J. Super. Ct. Mar. 18, 2020) (rejecting challenge to New Jersey Commissioner of Education's approval of a charter school's application to increase enrollment); Board of Educ. v. Board of Trust., 282 A.D.2d 166 (N.Y. App. Div. 2001) (rejecting challenge to approval of charter school creating 13% gap in district budget).

503. Charter School Program Act of 1995, N.J.S.A. 18A:36A-12(b) (2011); *see also* 105 I.L.C.S. 5/27A-11 (establishing the funding of Illinois charter schools at per-pupil rates as low as 75% of those for district schools).

504. *See, e.g.*, 105 I.L.C.S. 5/27A-11 (providing districts with "transition impact aid" to moderate effect of charter creation); NAT'L ALL. FOR PUB. CHARTER SCHS., 'FISCAL IMPACT' AS A FACTOR IN CHARTER GROWTH IN RHODE ISLAND 11–12 (2021), https://www.publiccharters.org/sites/default/files/documents/2021-04/napcs_ri-fiscal-impact_rd4.pdf [<https://perma.cc/JJL3-JBMR>] (listing Rhode Island laws allowing public school districts (1) for each student educated in a charter school, to retain for use by the district's non-charter-school students 100% of per-pupil operating cost in a student's first year in a charter school; thereafter,

Charter school authorizers in these states assess the impact of charter growth based not only on funding but also on changes in actual or likely student academic outcomes if they attend charter schools, *i.e.*, on demonstrated academic returns on investment.⁵⁰⁵ The result (still focusing on states with charter schools designed to increase high-quality school options for underserved populations⁵⁰⁶) are findings that students in charter schools—especially students of color, in poverty, learning English, and with disabilities—who lottery into charter schools tend to have better learning outcomes than statistically similar students who apply to but are lotteried out of charter schools.⁵⁰⁷ Indeed, a close look at the effect of increased charter school enrollment in these states tends to show improved academic outcomes for students in *all* schools in the district. For example, academic achievement for all Newark Public Schools (NPS) students improved substantially during a period of substantial charter growth from 2006 to 2018, with improvement climbing as the rate of charter growth accelerated.⁵⁰⁸ During that period, combined

7% of the state share and 5% of the local share of the district's per-pupil operating cost; 100% of demonstrable fixed per-pupil costs above 7%; and an additional \$1000 if the charter school the student attends does not contribute to a public pension system; (2) in years of substantial charter growth, to receive supplemental state aid of \$108 per pupil educated in a charter school; and (3) to retain 100% of the state facilities aid).

505. *See, e.g.*, 105 Ill. Comp. Stat. Ann. 5/27A-9(c) (factoring charter schools' "progress" in meeting educational "standards" into charter growth decisions unless the district can place charter students "in schools that are higher performing than the charter school"); N.Y. Educ. L. 56 N.Y. §§ 2852(2)(a)–(c) (basing charter decisions in part on whether "granting the [charter] application is likely to improve student learning and achievement"); R.I. Gen. Laws §§ 16-7.1-1(a)(iii), 16-7.1-1(b) (requiring state education commissioner's charter decisions to "[t]arget investments to improve student and school performance").

506. *See supra* notes 147–148 and accompanying text for discussion of state charter school laws that effectively enhance the learning opportunities and outcomes of disadvantaged students and of diversity in charter schools generally.

507. *See Liu, supra* note 147, at 318–22 (dividing states into those with charter laws that are "gap-closing" or "libertarian" and finding that charter schools in former but not latter states "outperform traditional public schools in terms of academic growth in both math and reading").

508. Jesse Margolis & Eli Groves, MARGRADY RESEARCH, A NEW BASELINE: PROGRESS IN NEWARK'S DISTRICT AND CHARTER SCHOOLS FROM 2006 TO 2018, at 7 (June 2019); *see id.* at 3 (comparing scores and outcomes in Newark schools to performance in other demographically similar cities, indicating that results reflect real academic improvement rather than demographic changes); *see also* Sarah A. Cordes, *The Spillover Effects of Charter Schools on Public School Students in New York City*, 13 EDUC. FINANCE & POL'Y 484 (2018) (finding that

academic performance on state Math and ELA tests for NPS as a public-school *system*—including students in both district and charter schools—rose from the thirty-ninth to the seventy-eighth percentile among students in similar low-income New Jersey cities, with even steeper improvements when considering only students in NPS’s district schools.⁵⁰⁹

Overall, the referenced states have found ways to assure that innovative new schools pay their own transition costs by improving the expected learning outcomes of the underserved populations they mainly educate, while modestly increasing the per-pupil funding and learning results of students remaining in traditional public schools, and attracting more students, families, and associated funding to public schools as a whole. By expanding these arrangements beyond charter to innovation schools and learning hubs, giving families access to all schools through a lottery that distributes students more evenly among schools by economic and other relevant circumstances, and involving willing families in the processes by which new school and other portfolio decisions are made, states and districts can assure that overall benefits are equitably distributed to all. By extending their schoolwide innovations to include the plan-based differentiation by student and family that we recommend in our first proposed design above, innovative schools can also reap the benefits and increase the efficiency of our prior reform proposal.⁵¹⁰

district schools’ proximity to a charter school correlates with increases in the district schools’ reading and math outcomes); David Griffith, FORDHAM INST., *Rising Tide: Charter School Market Share and Student Achievement* 5 (Sept. 2019), https://fordhaminstitute.org/national/research/rising-tide-charter-market-share_ [<https://perma.cc/GP9W-Q89E>] (finding positive correlation between size of districts’ charter market and academic achievement levels for Black and Hispanic students in districts’ non-charter schools).

509. JESSE MARGOLIS, MARGRADY RESEARCH, MOVING UP—PROGRESS IN NEWARK’S SCHOOLS FROM 2010 TO 2017, at 22 (2017), <http://margrady.com/wp-content/uploads/2017/10/Moving-Up-Progress-in-Newarks-Schools.pdf> [<https://perma.cc/GP9W-Q89E>].

510. To be clear, we are not proposing to scale up charter schools alone, especially given political and other potential obstacles to charter growth. For a discussion of those obstacles, see Steven Williams, *The Main Barriers to Scaling Successful Charter Schools Are Political, Not Substantive*, CTR. FOR REINVENTING PUB. EDUC. (Feb. 2020), <https://crpe.org/the-main-barriers-to-scaling-successful-charter-schools-are-political-not-substantive/> [<https://perma.cc/T75X-JN4Z>]. Instead, we use the charter school experience to instantiate a financially and academically feasible transition path to broad portfolios of new-school options, many of which avoid union and other objections to charter schools. *See supra*

Qualifying the potential of this second proposal are doubts about the generalizability of the proof of concept provided by the success of one category of charter schools. The strategy also may be both too constrained (limited as it is to a particular location, building, and collection of individuals definitive of a “school”) and too elastic (allowing family choices over time to undermine schools’ commitment to enhanced learning for underserved populations in favor of the parochial, segregative, and learning-resistant tendencies of home, private, and unregulated charter options at the other end of the spectrum). Our only response to these concerns is the ability of charter and innovation schools to improve the educational outcomes of underserved populations in different locations for a quarter century despite vast difference in their instructional models, suggesting the value of focusing on more flexible school governance and democratic structures, rather than particular school policies. That confidence increases insofar as schools in each system’s portfolio hold themselves accountable to families not only through choice mechanisms and publicly enforced commitments to serve the underserved, but also through our first proposal’s family-empowering plan-based mechanisms.⁵¹¹

3. System-focused design

Devolving decision making to the student or school level likely will enhance districts’ and schools’ disposition to change. So will turning districts’ and schools’ attention outward in search of flexibly customizable services, curricular and programmatic content, school models, students, and staff—and also the facilitated professional learning needed to leverage and iteratively improve combinations of these resources.⁵¹² Systems and schools might secure these resources from other educational entities (e.g., community and four-year colleges), other government agencies (e.g., ones providing physical or mental health, nutrition, and youth-development services), as well as community-based, non-profit, and market providers and through connections with students and educators different from their own.

notes 157–164 and accompanying text (describing varieties of innovation schools that avoid most objections to charter schools).

511. See *infra* Section III.C.2.

512. See Chu et al., *Fundamental 4*, *supra* note 78, at 25 (describing the benefits of having teachers work in conjunction with parents to improve learning).

Differentiation of services—whether by student (Design 1), by school (Design 2), on a broader basis (as encompassed by this Design 3), or through some combination—and widening of available services requires more access to service options, training in their use, and means of appraising and spreading information about their effectiveness than any family-educator team or school can likely provide and use effectively on its own. Identifying the entity with the efficient ability and responsibility to coordinate the necessary access, facilitation, and accountability for multiple school teams and schools is the focus of this third, more schematic, design proposal.

School districts are an obvious candidate for this role, but the vast majority of them in the U.S. have only a handful of schools,⁵¹³ making it difficult for them to secure effective access to services at the scale and scope imagined here. Larger districts, on the other hand—e.g., New York City’s, with nearly 2000 schools and 1 million students—face the opposite problem: diseconomies of scale that strongly dispose them to the hierarchically enforced uniformity that our designs aim to jettison. Because all districts are rooted in place, they also invite social segregation and funding disparities correlated with students’ race and economic status. Proposals to address these problems at the district level have long maintained the assumption of fixed territories, aiming to consolidate or regionalize smaller districts or break up larger ones in search of the right unit of uniform application across students and schools.⁵¹⁴ Through most of the twentieth century, consolidation was in order, until critiques of bureaucratic governance associated with larger districts and opposition to the racial integration and wealth sharing turned influential publics against aggregation as of the 1990s.⁵¹⁵ Today,

513. Excluding the ten largest districts, the nation’s 16,800 public school districts—operating 98,469 schools— average under 5.5 schools/district. See Imed Bouchrika, *101 American School Statistics: 2021/2022 Data, Trends, Predictions*, RESEARCH.COM (Oct. 17, 2022), <https://research.com/education/american-school-statistics> [<https://perma.cc/99MP-K7FN>]; Nicole Johnson, *11 Largest School Districts in the Country—and How They’re Responding to COVID-19*, HEYTUTOR, <https://heyttutor.com/resources/blog/11-largest-school-districts-in-the-country-and-how-theyre-responding-to-covid-19/> [<https://perma.cc/7Z34-VENL>].

514. See DONALD PARKERSON & JO ANN PARKERSON, *ASSESSMENT, BUREAUCRACY, AND CONSOLIDATION* 3–44, 91–126 (2016) (describing and criticizing twentieth century trend toward consolidating, as means of extending bureaucratic control over, school districts).

515. See, e.g., *id.* at 91–131 (critiquing bureaucratizing effects of consolidation and proposing alternatives); John Finnerty, *Merging Schools:*

proposals more often run in the direction of segregative and wealth-protecting “deannexation” of middle-class enclaves from districts struggling to serve large populations of less advantaged students of color.⁵¹⁶

School districts thus are an anachronism. Established to be administrative units small enough to enable transparent community control and large enough to achieve economies of programmatic scale, their modern, often bureaucratized and interest-group-influenced forms leave many of them, especially in the nation’s cities, too big and centralized to function very democratically, while their geographic and brick-and-mortar confines leave even the largest of them too restricted to mobilize the range of resources students need. More to the point, the abiding connection between the twentieth century school district and the bureaucratic governance and interest-group influences responsible for public schools’ debilitating elision of “public” and “uniform,”⁵¹⁷ make districts an unsuitable agent of differentiation and service innovation.

For these reasons, we propose a search for supplemental structures that gradually wean districts from bureaucracy, interest-group politics, and uniformity. We content ourselves for now with supplementary and gradual steps because of the deep transition-path problem that districts present: although they need to change, the broad assumption by friend and foe alike of their immutably bureaucratic and interest-group-influenced structures means that

Despite Decades of Discussion, School Consolidations Are Rare and Issue Lacks Political Traction, TRIBUNE-DEMOCRAT (July 28, 2022), https://www.tribdem.com/pennsylvania/merging-schools-despite-decades-of-discussion-school-consolidations-are-rare-and-issue-lacks-political-traction/article_987c5c1c-a0b0-11e8-bb1a-5fa35eb8b84f.html [<https://perma.cc/6UXU-U7J3>] (noting Pennsylvania’s recent history of failed school consolidation efforts); Casey Jakubowski & Lisa Kulka, *Overcoming State Support for School Consolidation: How Schools in the Empire State React*, 8 J. INQ. & ACTION EDUC. 66 (2016) (arguing that consolidation of rural New York school districts decreases flexibility needed to address rural education challenges).

516. Studies demonstrating the racially and economically segregative effects of recent school-district secessions include *Fractured: The Breakdown of America’s School Districts*, EDBUILD (June 2017), <https://edbuild.org/content/fractured/fractured-full-report.pdf> [<https://perma.cc/84C5-2H63>]; Meredith P. Richards, *The Racial/Ethnic and Socioeconomic Dynamics of Public School Districts Secession, 1995–2015*, TEACHERS COL. REC. 1 (May 1, 2020).

517. See *supra* notes 113–137 and accompanying text (describing the connections political scientists have drawn between bureaucratic governance and interest-group politics).

they will have to surprise everyone by changing themselves. Yet, those very structures prevent them from knowing how to do so. The steps we suggest here are designed to help them gradually acquire that knowledge through incremental practical steps to solve pressing, immediate problems of daily practice.

A starting point is a variety of multi-district cooperative arrangements in which districts have willingly engaged for decades, often as their best defense against proposals to alter their boundaries or political structures to serve students better.⁵¹⁸ These arrangements include districts (1) allowing or requiring their students to attend regional schools of a type the district cannot afford to provide itself, as in the case of elementary and middle school districts that share a single comprehensive high school⁵¹⁹ and districts that send their students to regional career and technical high schools⁵²⁰ or statewide schools for hearing and visually impaired students;⁵²¹ (2) permitting students to transfer to other districts or regionally operated magnet programs using lottery-based admissions algorithms to achieve greater social integration while expanding access to academic programming;⁵²² (3) sharing buildings, teachers, administrative staff,

518. See Jakubowski & Kulka, *supra* note 515, at 75–76 (advocating flexible arrangements like those proposed in text in lieu of school consolidation).

519. See, e.g., Joseph Patrick Cullen, *A Comparison of the Academic Performance of College Bound High School Students in Regional vs. Community High Schools in Connecticut*, 13 CURRENT ISSUES IN EDUC. (June 2010), <https://cie.asu.edu/ojs/index.php/cieatasu/article/view/399/116> [<https://perma.cc/E5B7-ANYR>] (comparing academic results of Connecticut students in consolidated regional high schools to those of comparable students in smaller community high schools).

520. See, e.g., *Courses and Programs*, CAPITAL REGION BOCES, <https://www.capitalregionboces.org/career-technical-education/courses-programs/> (on file with the *Columbia Human Rights Law Review*) (explaining a cooperative arrangement under which high school students from 24 Albany-area districts may enroll in 40 career and technical programs at three regional campuses); AM. INST. RES., CCRS CNTR., *HOW CAREER AND TECHNICAL EDUCATION CAN HELP STUDENTS BE COLLEGE AND CAREER READY: A PRIMER* 1–2, 4–5 (2013) (describing various, including multi-district cooperative, arrangements for providing “academically rigorous, integrated and sequenced” career and technical programs).

521. See, e.g., *Schools and Agencies for the Blind in Each State*, COUNCIL OF SCHLS. & SERV. FOR THE BLIND, <https://cosbvi.org/schools-for-the-blind/> [<https://perma.cc/5GCJ-Y2BR>] (providing a list of schools and agencies in each state that have served blind or visually impaired children).

522. See, e.g., Mark Pazniokas, *Sheff v. O’Neill Settlement Would Expand Magnet Schools, ‘Open Choice’*, CONN. MIRROR (Jan. 27, 2022),

and programs with other districts that, like their own, need resources they cannot fully afford, utilize at full capacity, or employ full time;⁵²³ and (4) electronically accessing courses offered in other districts or private schools that schools cannot efficiently field themselves—arrangements that, in this case, are not bounded geographically or by the public/private divide.⁵²⁴ In some cases—for example, state “schools for the blind” and regional technical high schools—legislatures define student eligibility and the services to be provided, and state officials run the program, reinforcing dispositions toward uniformity.⁵²⁵ In other more promising cases, however, legislation or regulations simply authorize agreements between local entities (schools or districts) and with public or private providers, letting those parties contractually develop partnerships and designs as needed.

Taking a further step, schools, districts, and charter management organizations recently have formed voluntary “improvement networks” that often cut across jurisdictional and other formal lines and engage skilled non-profits as a “hub” to facilitate

<https://ctmirror.org/2022/01/27/sheff-v-oneill-settlement-would-expand-magnet-schools-suburban-open-choice/> [<https://perma.cc/5Z75-2HE7>] (describing a settlement agreement expanding court-ordered program of state-funded, regionally operated magnet schools and interdistrict student transfer program open to students from Hartford and surrounding districts, using lottery algorithms to achieve social integration).

523. See, e.g., OHIO SCHOOL BOARDS ASS’N, *SCHOOL CONSOLIDATION 4* (2011) (reporting on Ohio districts’ sharing of buildings, transportation, technology, attendance tracking, special needs programs, and district administrators and districts’ cooperative purchase of liability and worker’s compensation insurance and utility services); Emilia Otte, *Shoreline Schools Plan Language Learning Partnership*, CONN. EXAMINER (May 6, 2021), <https://ctexaminer.com/2021/05/06/shoreline-schools-plan-language-learning-partnership/> [<https://perma.cc/RT8Z-DHHV>] (explaining a Connecticut school district partnership to offer language classes using remote-learning capabilities developed during pandemic).

524. See, e.g., Louisiana Dep’t of Educ., *Supplemental Course Academy*, LA. BELIEVES, <https://www.louisianabelieves.com/courses/supplemental-course-academy> [<https://perma.cc/Y7NR-AX4V>] (explaining program providing state funding for Louisiana high school students enrolling in credit-bearing online courses offered by other Louisiana school districts, colleges, and private providers in variety of subjects not available locally); Shimron, *supra* note 318 (reporting on a Catholic Virtual program offering online elective and advanced classes to Catholic schools nationwide).

525. See *supra* notes 520–521.

cross-jurisdictional cooperation.⁵²⁶ Such networks share our goal of “transform[ing] partner schools’ systems into learning institutions that continuously improve their designs and delivery of services, accelerating equitable access to high-quality education.”⁵²⁷ To develop the “improvement mindsets” that learning institutions require, participants engage in structured system disruption or insurgency of just the sort described in our discussion of transition paths.⁵²⁸ Facilitated by the hub in focusing on one or a succession of jointly defined “equity-centered” aims—say, better assisting underserved high schools students to choose among and achieve college or career goals—network participants use continuous-improvement methods in collaboratively articulating a shared problem of practice; conducting causal analysis; rapidly testing, evaluating, and adjusting shared improvement ideas that emerge; and codifying, spreading, and adapting the network’s learning across and beyond network participants.⁵²⁹ Because these arrangements have no legislatively mandated, geographic or even contractual indicia of permanence, they offer substantial flexibility. For the same reasons, they do not formally impinge on district sovereignty even to the extent that contracts do. And the opportunity to join with other actors to address shared problems of practice incentivizes participation even absent an initial commitment to the broader goal of systematic change.

In the wake of the pandemic, families and educators are demanding that districts and schools look outward for content, curriculum, technology, internships, professional learning, supplemental programs, and groups of students seeking similar services—just as all did on the fly during the crisis but now at sufficient scale to make them cost-effective. Families and educators also seek new ways of collaborating to identify problems and the solutions made available by expanded service options. To meet these demands and promote differentiation and service innovation, we propose that state legislatures and education departments create

526. See AYEOLA KINLAW ET AL., *MANAGING FOR CHANGE: ACHIEVING SYSTEMIC REFORM THROUGH THE EFFECTIVE IMPLEMENTATION OF NETWORKS FOR SCHOOL IMPROVEMENT*, CTR. FOR PUB. RES. & LEADERSHIP 14, 19–26 (2020), <https://cprl.law.columbia.edu/sites/default/files/content/docs/ManagingforChangevF.pdf> [<https://perma.cc/ZW4U-89HB>] (describing “networks for school improvement” formed to facilitate collaborative innovation and problem-solving across schools).

527. *Id.* at 13.

528. *Id.*; see *supra* notes 481–484 and accompanying text.

529. KINLAW ET AL., *supra* note 526, at 13, 19–26.

transition paths through funding and (de)regulatory incentives for the formation of

- contractually organized regional or other groupings of districts, charter management organizations, and schools seeking procurement and operational efficiencies;
- even more fluid networks of those entities convened to solve shared problems of practice, in the process exploring system-focused governance change; and
- concentrations of public and private (perhaps limited to non-profit) service providers, school designers and operators, and network and professional-learning facilitators.

The problem- or subject-matter-based groupings within which these partnerships operate should be as racially and economically diverse as is logistically possible. The arrangements should replace bureaucratic and geographic mandates in the process of maximizing school teams', schools' and districts' capacity for differentiation, access to services, and ability to adjust services rapidly in response to changing conditions or evidence that existing plans are not working. And the arrangements should include robust mechanisms for enabling families and other constituents of the various partners to help identify and decide among the possibilities.

The hope is that, through both contractual arrangements maximizing access to services and participation in improvement networks addressing shared problems of practice, districts and schools will gradually broaden their horizons, absorbing new service- and improvement-oriented mindsets. Focal points would be new structures beyond bureaucratic ones, new resources beyond local boundaries, and new sources of authority and expertise beyond central staffs and including client populations. The hope, as well, is that as districts and schools free themselves from the iron constraints of administrative jurisdiction, location, brick and mortar buildings, fixed schedules, and in-person interactions among a finite number of staff in predetermined roles, they will discover new ways of integrating their students with others different from themselves, financing services through means other than local taxation, and staffing activities by need not role. Over time, contractual and informal networking relationships may displace whole categories of bureaucratic activity and create new nodes of decision making that cross lines between jurisdictions, between people providing and

receiving services, and—through the instrumentality of facilitative network hubs—between civil society’s public and private domains.⁵³⁰

Efforts to create arrangements of these sorts face many obstacles. Bureaucratic districts have many flexibility-slaying ways of enforcing contracting and procurement procedures and provisions, as do courts that enforce them.⁵³¹ Our own research demonstrates, as well, that participation in improvement networks, as voluntary as it is in theory, succeeds best only if participating districts and schools, guided by the hub, adhere to data-focused and collaborative mindsets and behaviors, employ rigorous continuous-improvement methodologies (disciplined testing and adjustments of change ideas and examination of network data to identify implementation failures), and meaningfully integrate system leaders into the network’s activities and engage them in substantial ways with frontline actors—all steps that are “countercultural” and “unsettling” to “traditional modes of working in . . . bureaucratic, hierarchical, departmentally siloed, competitive, and [compliance-] driven” systems.⁵³² Manifestly, not every system will bend its mindsets and behaviors in the new directions flexible contracting and improvement networks allow in order to differentiate and proliferate services. Some surely will bend the arrangements back in the direction of mandated uniformity. The hope remains, however, that—motivated by the threat of declining enrollment and associated funding⁵³³—enough

530. Teachers unions must evolve along with their district partners for the same reasons and via similar incremental shifts in mindsets and governance. *See* Chu, *supra* note 463 and accompanying text.

531. *See, e.g.*, TRICIA MAAS & ROBIN LAKE, CTR. FOR REINVENTING PUB. EDUC., *A BLUEPRINT FOR EFFECTIVE AND ADAPTABLE SCHOOL DISTRICT PROCUREMENT* 3–4 (2015), <https://files.eric.ed.gov/fulltext/ED558568.pdf> [<https://perma.cc/D2V4-3F2N>] (describing “outdated procurement policies” and “risk-averse cultures and habits of central office staff” that create “barriers to school change and improvement”).

532. KINLAW ET AL., *supra* note 526, at 29–36.

533. *See, e.g.*, Sarah Matusek, *Why School Enrollment Matters to District Bottom Lines*, CHRISTIAN SCI. MONITOR (Mar. 15, 2021), <https://www.csmonitor.com/USA/Education/2021/0315/Why-public-school-enrollment-matters-to-district-bottom-lines> [<https://perma.cc/SS95-2W42>] (describing the “looming ‘crisis’” from pandemic enrollment and associated funding losses); *Declining School Enrollment Spells Trouble for Education Funding*, URBAN INST. (Oct. 6, 2020), <https://www.urban.org/urban-wire/declining-school-enrollment-spells-trouble-education-funding> [<https://perma.cc/NL6T-6H5C>] (addressing the consequences of declining enrollment and district

public-school systems will bend towards a family-focused future to enable them to attract “enough people” into the shared liberal democratic venture of public education to enable our diverse and individualistic nation to cohere.

D. Public Democratic Education in a New Age of Book Banning

What, then, is public and what is democratic about the revitalized school systems that this Part illustrates? In none of our three redesigns does a public body selected by voters specify a set of educational services that all students receive in common for the collective benefit of all of the nation’s people. On the contrary, each arrangement gives families a substantial say in what happens to their children, with the assumption that each family will exercise that influence in their own interest and that different children will receive different services. From this perspective, all three designs withhold the equal treatment that might be thought essential to both the public and democratic character of education. All three, it might be said, validate individual family choice—individual liberty—that threatens the equal and thus the public and democratic character of education.

Equality, however, has two requirements that belie the assumption to which bureaucracies adhere that “equal” always means “same.” Together, these two features of equality require an uneasy collaboration between publicness, democracy, liberty, and the public good. Just as equality requires the state to treat like people alike, it also requires the state to treat different people differently.⁵³⁴ People—families in the education context—typically perceive violations of the second principle as violating their liberty, forcing them either to be someone they are not or to tolerate actions ill-suited to their wants and needs. Such actions also, however, violate other principles. They treat people *inequitably* by enabling some but not others to thrive; they *undemocratically* hamper individuals’ ability to shape government actions, and they generate outcomes *inconsistent*

funding levels); *supra* notes 57–59, 242–270 and accompanying text (describing the magnitude of recent public education enrollment declines).

534. See generally Strauss, *supra* note 67, at 9 (critiquing legal principle that “likes be treated alike,” including because rules used to “increase[e] the chance that like cases will be treated alike . . . notoriously, force unlike cases to be treated alike”).

with the public (collective) good. The trick, then, is not to see democratic and public action as defining a single “good” to which all must adhere but rather to build some substantial component of public-mindedness or “virtue” into decisions individuals make collectively with an eye, as well, on their individual needs.

Each of our illustrative system redesigns aims for that fusion in three ways. First, each operates through a public structure, obligating the actors elected by the public or selected by elected officials to create a fair process within which each family’s individual choices interact with the choices of others. One might damn this feature by association with our “free market,” which some describe in similar terms. The difference, however, is that in each of the redesigns, the system’s public shepherds—unlike those responsible for economic markets—are obliged to regulate that process to assure full participation by all and thus actively to overcome, not accentuate, differences imposed by different levels of economic power.

In our first redesign, for example, school systems create structures through which all families and students exercise agency over students’ differentiated instructional plans—structures that of necessity must account for the different levels of resources, time, and problem-solving experience each family brings to bear. In the second redesign, school systems create a structure through which families exercise choice among only publicly validated schools that must successively prove their public worth over time; which all families are invited and enabled to participate in developing; about which all families have equal access to the same information; among which all families have equal power to choose in a public lottery; and through each of which the families that make up the school act as a collective influence on the school and school system as a whole. In the third redesign, these same features operate across a broader geographic or networked terrain and include not only individual families and schools but also the collection of families served by each partner school district, charter management organization, social service agency, and the like as another developmental and choice-making participant.

Second, each illustrative redesign makes racial and economic integration of families a required objective of its collective decision making and implementation structures. Doing so fosters families’ public-regarding habits as they serve and advocate for the interests of their own child and the child’s education plan, classroom, and school, to think sympathetically and pragmatically, as well, about the needs

and interest of the diverse other students who share their child's fate. As educators and others active in the process of educating children know, most parents will never subordinate the interest of their children to other interests, even if they at times will subordinate their own interests to the common good. Only, therefore, by structurally and visibly aligning other children's interests with those of their own children can their actions be nudged in a public-regarding direction. And integration is by far the best way to accomplish that goal—not mainly because children learn better when they attend school with students of different races and from different social and cultural backgrounds (although evidence suggests that all children do learn better in such situations), but because all children learn better if their families' public advocacy and support benefits not only their children, but also their children's peers.⁵³⁵

Third, each illustrative redesign has important collaborative problem-solving mechanisms that bring families together to improve education generally, be it in developing individual student plans, developing new or reinvigorating existing schools, or creating inter-district, interdisciplinary, and public-private partnerships. Particularly in an era in which individuals' political priors make cooperation that requires pre-agreement on broad objectives impossible, the only way past tribal, conflictual, even violent political interactions is to "pin disputes about knowledge, principles, and values down to [the] particulars" of the problem and solution that are under close consideration and direct observation.⁵³⁶ All families will never agree on whether the primary objective of public education is their own and their children's economic well-being, the nation's, or something individually or collectively more encompassing than either of those ends. But most can agree that enabling their children more effectively to read, cipher, conduct and evaluate experiments, get along with each other, effectively exercise executive functions and determination, and experience happiness *is* worthwhile and that it is worth cooperating with each other to remove obstacles to their children's next step in those directions. Each of the imagined systems takes advantage of this crucial capacity for participatory, socially cohesive improvement efforts by creating structures that enable families to check their broader disagreements at the door, get down to particulars, and let the question whether proposed strategies work

535. See Liebman, *Desegregating Politics*, *supra* note 13, at 1614–35.

536. ANSELL, *supra* note 481, at 11.

according to collectively chosen success measures guide their cooperation. After doing so, moreover, participants may come to see what they have and believe in common in the midst of their broader disagreements. Democratic in the breadth of participation and deliberation it imagines, public in the capacity it gives people to act, create, and solve problems in concert, these mundane mechanisms may be the new systems' most important contributions to the restoration of public education and of public life in general.

CONCLUSION

Public democratic education is disintegrating in the United States, and family moves prompted by the pandemic are accelerating the process. Central to the deterioration is an unfortunate acceptance on the part of many of public schooling's advocates and opponents that to be public and democratic, education requires uniformity and family passivity as to the where, when, what, and how of public instruction—i.e., that education must be substantially centralized, mandatory, and monochrome. During the pandemic, however, school systems found it difficult to settle upon, much less to mandate and implement, clear, centralized, and standardized practices apart from prescribing under pressure from public health officials early on and public teachers unions thereafter that public education would not for the most part take place where, when, and how it always had taken place in the past. In default of sensible and predictable public mandates, public-school systems left families and educators on their own to make do as best they could, removing as viable options family passivity and uniformity as to students' education. To varying but significant degrees, public schooling as thus understood by its proponents and opponents ceased to exist during the pandemic.

Public schools' competitors and opponents took advantage of the situation, operating—often in person—with greater flexibility and responsiveness to rapidly changing circumstances than public schools and systems. Even public schools' staunchest parent allies found themselves giving up on public schools, as they so transparently struggled to operate and educate kids absent the old or any workable uniformities, choosing privatized educational services more suited to children's needs and the demands of the public-health crisis.

Now, in the wake of the pandemic, many public-school systems are reestablishing mandates and demanding uniformity by forbidding families, educators, and schools to maintain or build on the

flexibilities and innovations that online, hybrid, and out-of-school options provided. In hopes of restoring family passivity on these and other aspects of the where, when, what, and how of education, school systems are reverting to the accepted narrative about what public democratic education is, reenforcing privatizers' critique of public schools and invitation to families to abandon them in favor of alternatives more attuned to their children's differentiated needs and more consistent with parents' racial, religious, cultural, and ideological identities.

As we have shown, however, mandated standardization and family passivity are not necessary ingredients of public democratic education. The view that they are proceeds from a fallacy: that education succeeds mainly by treating likes alike through mandated uniformity. If that proposition were true, then families' instinctive recognition—deeply underscored by the pandemic—that their children have interests and needs different from those of many other children would leave them with little choice but to segregate their children into schools with the smaller number of other children who are like them, even if those turn out to be schools with only children who are racially, religiously, and culturally like their own—including schools that work hard to preserve that separate and separatist identity.

A modernized version of public democratic education recognizes that equality, as well as liberty and the public good, depend more these days on treating children with different strengths and needs differently than on treating all children alike. Central structures must aim more for diversification and family and educator agency than for uniformity and central mandates. This Article offers three designs for structurally diversified public systems that individually or collectively would help reverse public education's disintegration—one diversified to the student level, another to the school level, and another across the variety of resources broadly cooperative systems and service provision can bring to bear. By adopting governance and political structures that maximize family agency and choice, socially integrating schools, and engaging in deeply participatory and deliberative co-creation and problem-solving, systems like these can turn the dramatic new forces—the family moves—the pandemic has loosed from centrifugal ones that divide and disconnect people into centripetal ones that operate collectively and help the nation cohere. New structures like these can revamp and revitalize the public and democratic features that once made

education the engine of the nation's and its peoples' expanded horizons, growth, and solidarity.

What remains to be seen is whether post-pandemic relief at students' ability to go back to school, together with school systems' fear of further exposing families to how bad the situation is, mutes efforts for change—or whether, on the other hand, stock-taking about newly revealed family desires and the value of family agency, and consolidation and continuation of pandemic-necessitated improvisation, motivate change efforts. In the answer to that question may lie the revival or last gasps of the nation's once mighty system of public democratic education.