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## Post-Accountability Accountability

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## POST-ACCOUNTABILITY ACCOUNTABILITY

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Nicole Stelle Garnett\*

*“[W]e think reformers would do well to entertain the notion that choice is a panacea . . . . It has the capacity all by itself to bring about the kind of transformation that, for years, reformers have been seeking to engineer in myriad other ways.”*

*John E. Chubb & Terry M. Moe,  
Politics, Markets, and American  
Schools, 1990*

*Over the past few decades, parental choice has exploded in the United States. Yet, despite early proponents’ hopes that parental choice would eliminate the need to regulate school quality—since parents’ choices would serve an accountability function—demands to use the law to hold chosen schools accountable for their academic performance are central features of education-reform debates today. This is an opportune time to consider the issue of academic accountability and parental choice. Parental choice has gained a firm foothold in the American educational landscape. As it continues to expand, debates about accountability for chosen schools will only intensify. The questions of whether, when, and how the law ought to regulate the quality of the schools participating in parental-choice programs are important and vexing ones for the law of education. This Article examines these questions and proposes principles to guide regulatory design efforts.*

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#### INTRODUCTION

For decades, advocates assumed that parental choice was the ultimate accountability device—a proverbial magic bullet that would improve the academic outcomes of *all* students in *all* schools. At least since the publication of Nobel Laureate Milton Friedman’s seminal 1955 essay, *The Role of Government in Education*, proponents have argued that empowering parents to select their children’s schools will improve the academic achievement of students in both the public and nonpublic educational sectors.<sup>1</sup> Friedman was not the first to argue that the financing and operation of elementary and secondary schools should be decoupled, and that the government should fund private schools.<sup>2</sup> However, he was the first to articulate the case for giving parents publicly funded scholarships or “vouchers” redeemable at both public and private schools.<sup>3</sup> And Friedman’s case for parental choice flowed from an assumption about the desirability of subjecting the public schools to market forces. “The interjections of competition,” he argued, would “stimulate the development” of alternatives to public schools, “promote

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1. Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* (1955), <http://la.utexas.edu/users/hcleaver/330T/350kPEEFriedmanRoleOfGovtable.pdf>.

2. See *infra* note 39 and accompanying text.

3. See MILTON FRIEDMAN ON ECONOMICS: SELECTED PAPERS 185 (Gary S. Becker, ed. 2007) (“According to his article, which shocked many when it was first published in 1955, the government should continue to fund kindergarten through grade 12 education, but they should provide parents with vouchers that they could spend on the public or private schools of their choice.”).

a healthy variety of schools,” and “introduce flexibility into school systems.”<sup>4</sup>

Friedman’s then-radical argument for vouchers languished for decades before finally gaining political traction with the Reagan administration, which proposed several modest federal voucher proposals and justified them by the need to promote, in the words of then-Education Secretary William Bennett, a “healthy rivalry” between and among public and private schools.<sup>5</sup> It gained further intellectual credibility with the publication in 1990 of John Chubb and Terry Moe’s influential book, *Politics, Markets, and American Schools*. Chubb and Moe argued that interjecting choice and competition into the monopolistic American education system would prove so transformational as to obviate the need for all other education reforms, including regulations holding schools accountable for the academic performance of their students. Indeed, Chubb and Moe argued that, “if choice is to work to greatest advantage, it must be adopted *without* these other reforms, since the latter are predicated on democratic control and are implemented by bureaucratic means. The whole point of a thoroughgoing system of choice is to free the schools from these disabling constraints.”<sup>6</sup>

Over the past few decades, parental choice has exploded in the United States. Today, forty-four states and the District of Columbia permit charter schools, and over half of all states have at least one program in place that subsidizes (directly or indirectly) students attending private schools. In the current school year, approximately six percent of all public-school children in the United States (nearly three million) attend a charter school,<sup>7</sup> and around three hundred thousand attend a private school with the assistance of a private-school-choice program.<sup>8</sup> Yet despite early proponents’ hopes that parental choice would eliminate the need to regulate school quality, demands to use the *law*—in addition to parents’ choices—to hold chosen schools “accountable” for their academic

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4. Friedman, *supra* note 1.

5. Robert Pear, *Reagan Proposes Vouchers to Give Poor a Choice of Schools*, N.Y. TIMES, Nov. 14, 1985, at A20.

6. JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS AND AMERICA’S SCHOOLS* 217 (1990).

7. NAT’L ALLIANCE FOR PUBLIC CHARTER SCHOOLS, *A GROWING MOVEMENT: AMERICA’S LARGEST CHARTER PUBLIC SCHOOL COMMUNITIES AND THEIR IMPACT ON STUDENT OUTCOMES 2* (11th ed. 2016) [hereinafter *A GROWING MOVEMENT*], <http://www.publiccharters.org/wp-content/uploads/2016/11/CharterSchoolEnrollmentShareReport2016.pdf>.

8. MATT FRENDEWEY ET AL., *AM. FED’N FOR CHILDREN GROWTH FUND, SCHOOL CHOICE YEARBOOK 2015–16*, at 11 (2016) [hereinafter *SCHOOL CHOICE YEARBOOK*], [http://afcgrowthfund.org/wp-content/uploads/2016/04/2015-16-School-Choice-Yearbook-4\\_27.pdf](http://afcgrowthfund.org/wp-content/uploads/2016/04/2015-16-School-Choice-Yearbook-4_27.pdf).

performance are central features of education-reform debates today.<sup>9</sup>

The current focus on accountability flows in part from the fact that the core justifications for parental-choice policies have shifted over the past twenty-five years. Somewhat ironically—since researchers consistently find that subjecting traditional public schools to competition does improve their academic performance<sup>10</sup>—parental-choice policies are no longer primarily justified by the need to subject government-operated schools to competition, but rather by the imperative of giving disadvantaged students alternatives to failing public schools. As parental-choice advocate Howard Fuller has observed, the goal of parental choice is today “more of a rescue mission than a fight for broad societal change.”<sup>11</sup>

This shift in justification has significant implications for debates about accountability and parental choice. If the goal of parental-choice policy is to inject competition into the previously monopolistic American education markets, then regulators can, per Friedman, stand back and let competitive forces work their magic. On the other hand, if the goal is to ensure that as many children as possible attend high-quality schools as soon as possible, the partici-

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9. See, e.g., THOMAS B. FORDHAM INST., PUBLIC ACCOUNTABILITY & PRIVATE SCHOOL CHOICE (Jan. 2014), <https://edex.s3-us-west-2.amazonaws.com/publication/pdfs/Public-Accountability-and-Private-School-Choice.pdf>; NAT'L CONFERENCE OF STATE LEGISLATURES, IMPROVING SCHOOL CHOICE IN THE STATES (Dec. 2014), <http://www.ncsl.org/documents/educ/AccountabilityInPrivateSchoolChoice.pdf>; Arianna Prothero, “*There Is No Oversight*”: *Private-School Vouchers Can Leave Parents on their Own*,” EDUCATION WEEK (Nov. 14, 2017), <https://www.edweek.org/ew/articles/2017/11/15/there-is-no-oversight-private-school-vouchers-can.html>; Dylan Peers McCoy, *How Indiana Holds Private Schools Accountable*, ATLANTIC MONTHLY (May 12, 2017), <https://www.theatlantic.com/education/archive/2017/05/how-indiana-holds-private-schools-accountable/526461/>.

10. Studies of private-school-choice programs have found that public school performance improved, at least marginally, a result of competition or the threat of competition resulting from parental choice. See, e.g., ANNA J. EGALITE, EDUC. RES. ALL. FOR NEW ORLEANS, THE COMPETITIVE EFFECTS OF THE LOUISIANA SCHOLARSHIP PROGRAM ON PUBLIC SCHOOL PERFORMANCE 4 (2016); Anna J. Egalite, *Competitive Impacts of Means-Tested Vouchers on Public School Performance: Evidence from Louisiana and Indiana* (Prog. On Educ. Pol’y and Governance, PEPG 14-05, 2014); David N. Figlio & Cassandra M.D. Hart, *Competitive Effects of Means-Tested School Vouchers*, 6 AM. ECON. J.: APPLIED ECON. 133 (2014); Cecilia E. Rouse et al., *Feeling the Florida Heat? How Low-Performing Schools Respond to Voucher and Accountability Pressure*, 5 AM. ECON. J.: ECON. POL’Y 251 (2013); Rajashri Chakrabarti, *Vouchers, Public School Response, and the Role of Incentives: Evidence from Florida*, 51 ECON. INQ. 500, 500–26 (2013); JAY GREENE, PROG. ON EDUC. POL’Y & GOVERNANCE, AN EVALUATION OF THE FLORIDA A-PLUS ACCOUNTABILITY AND SCHOOL CHOICE PROGRAM (2001); Caroline M. Hoxby, *Rising Tide*, 1 EDUC. NEXT 68 (2001); JAY GREENE & RYAN H. MARSH, SCHOOL CHOICE DEMONSTRATION PROJECT, THE EFFECT OF MILWAUKEE’S PARENTAL CHOICE PROGRAM ON STUDENT ACHIEVEMENT IN MILWAUKEE PUBLIC SCHOOLS (2009); Rajashri Chakrabarti, *Can Increasing Private School Participation and Monetary Loss in a Voucher Program Affect Public School Performance? Evidence from Milwaukee*, 92 J. PUB. ECON. 1371 (2008).

11. Larry Miller, *No Principles, No Progress*, RETHINKING SCHS., [http://rethinkingschools.aidcvt.com/restrict.asp?path=archive/29\\_02/29-2\\_miller.shtml](http://rethinkingschools.aidcvt.com/restrict.asp?path=archive/29_02/29-2_miller.shtml) (last visited Nov. 20, 2018).

pation of subpar schools in choice programs is deeply problematic. And, unfortunately, market forces alone have proven ineffective at weeding all poorly performing schools out of charter school and private-school-choice programs. As even the most fervent parental-choice proponents acknowledge, while many excellent schools participate in these programs, some dreadful ones do as well.<sup>12</sup>

This is an opportune time to consider the question of academic accountability and parental choice.<sup>13</sup> Parental choice has gained a firm foothold in the American educational landscape. As it continues to expand, debates about holding participating schools accountable will only intensify. The questions of whether, when, and how the law ought to regulate the quality of the schools participating in parental-choice programs are important and vexing ones for the law of education. As the troubled experience with efforts to hold *public* schools accountable for student performance demonstrate, a host of public-choice, selection-bias, and institutional-design challenges haunt efforts to use the law to regulate school quality. Arguably, each of these challenges is compounded in the parental choice context for a number of interrelated reasons discussed below.

This Article, which examines these questions, proceeds as follows: Part I provides a brief overview of the landscape of parental choice in the United States. Part II canvasses the research on the academic effects of parental choice and charter schools on student performance—effects that undoubtedly are driven to a large extent by the quality of participating schools. Part III examines the cur-

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12. See *infra* notes 89–92 and accompanying text.

13. This Article focuses solely on the *academic performance* of chosen schools. I leave to another day and other scholars the treatment of other contested *accountability* questions—including governance, financial transparency, teacher qualifications, terms of service and retention, admission criteria, retention and expulsion rates, racial demographics, special education and inclusion, and nondiscrimination. I do so not because these issues are unimportant, but rather that they are important enough to deserve their own treatment. For some useful sources covering these issues, see ANNEBERG INSTITUTE FOR SCHOOL REFORM, PUBLIC ACCOUNTABILITY FOR CHARTER SCHOOLS: STANDARDS AND POLICY RECOMMENDATIONS FOR EFFECTIVE OVERSIGHT (Brown Univ. 2014), <http://www.annenberginstitute.org/sites/default/files/CharterAccountabilityStds.pdf>; Marcus A. Winters, *What Underlies the So-Called Charter School 'Special Education Gap'*, REALCLEAR EDUCATION (June 20, 2014), [http://www.realcleareducation.com/articles/2014/06/20/charter\\_school\\_special\\_education\\_gap\\_1025.html](http://www.realcleareducation.com/articles/2014/06/20/charter_school_special_education_gap_1025.html); ERICA FRANKENBERG ET AL., CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS (Jan. 2012), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/>; GROVER J. WHITEHURST ET AL., CTR. ON CHILDREN & FAMILIES, SEGREGATION, RACE AND CHARTER SCHOOLS: WHAT DO WE KNOW? (Oct. 2016), [https://www.brookings.edu/wp-content/uploads/2016/10/ccf\\_20161021segregation\\_version-10\\_211.pdf](https://www.brookings.edu/wp-content/uploads/2016/10/ccf_20161021segregation_version-10_211.pdf); LINDA DARLING-HAMMOND ET AL., LEARNING POLICY INST., PATHWAYS TO NEW ACCOUNTABILITY THROUGH THE EVERY STUDENT SUCCEEDS ACT (Apr. 2016), <https://learningpolicyinstitute.org/product/pathways-new-accountability-through-every-student-succeeds-act>.

rent state of accountability regulations in K-12 education policy, with a particular focus on charter and private-school-choice programs. Part IV explores the public-choice and institutional-design challenges plaguing efforts to hold chosen schools accountable.

The Article concludes by recommending principles to guide accountability regulations in the parental-choice context. These recommendations reflect the belief that the goal of accountability in this context should be to empower parents to make good choices for their children. Regulations promoting this goal should satisfy two criteria: First, they must provide parents the information that they need to make wise choices for their kids, which means that information about school quality must be readily available, transparent, easy to interpret, and reflective of the school-quality criteria that matter most to parents. Arming parents with information will enable them to serve an accountability function by making informed decisions in school-choice markets. Second, accountability regulations ought to advance the goal of providing parents with access to more and better schools. In most cases, this latter goal is better advanced by attracting good schools to choice markets than by punishing bad ones. The exclusion of persistently failing schools from choice markets is perhaps a necessary element of an accountability regime, but it should not be the primary element. The long history of academic accountability efforts in the United States demonstrates both that punitive government regulations rarely drive school improvement and that closing bad schools works as a reform only when better options are available.

## I. THE PARENTAL-CHOICE LANDSCAPE

Today, parents in many jurisdictions can choose from a range of schooling options across multiple educational sectors. Many districts permit students to attend a public school other than the one geographically assigned to them, including magnet schools.<sup>14</sup> And, as noted previously, forty-four states and the District of Columbia authorize charter schools,<sup>15</sup> and more than half of all states and the District of Columbia have at least one publicly funded private-school-choice program (although many of these programs are

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14. See, e.g., MICHAEL DEARMOND ET AL., CTR. FOR REINVENTING PUB. EDUC., MAKING SCHOOL CHOICE WORK 2-3 (July 2014), [http://www.crpe.org/sites/default/files/CRPE\\_MakingSchoolChoiceWork\\_Report.pdf](http://www.crpe.org/sites/default/files/CRPE_MakingSchoolChoiceWork_Report.pdf); James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2063-73 (2002).

15. See *50-State Comparison: Charter School Policies*, EDUC. COMMISSION STATES (June 2014), <https://www.ecs.org/charter-school-policies/>.

quite modest).<sup>16</sup> This multi-sector education policy represents a dramatic—indeed, seismic—shift away from historical practices in the United States. Although parents with the financial means to do so have long chosen their children’s schools, either by moving to school districts with high-performing schools or by financing private education,<sup>17</sup> the idea of publicly funding educational options other than government-operated schools is a deeply contested one in American history. While debates about parental-choice policy arguably date at least to the mid-nineteenth century,<sup>18</sup> education policies that funded parents’ decisions to select *any* school other than the public school assigned to them by either geography or—in the post-desegregation world—federal court order<sup>19</sup> were virtually nonexistent until recent decades.<sup>20</sup>

### A. Charter Schools

Parental choice within the traditional public-school sector arguably began as a result of the Supreme Court’s 1974 decision in *Miliken v. Bradley*, which dramatically constrained the power of federal courts to structure compulsory desegregation remedies that crossed school district boundaries.<sup>21</sup> The decision prompted urban

16. See generally SCHOOL CHOICE YEARBOOK, *supra* note 8.

17. See Nicole Stelle Garnett, *Affordable Private Education and the Middle Class City*, 77 U. CHI. L. REV. 201, 212–14 (2010) (reviewing data). In 2007, the parents of twenty-seven percent of public school children reported that they moved to their current neighborhood so that their child could attend his or her school. *Fast Facts: Public School Choice Programs*, NAT’L CTR. FOR EDUC. STATS., <http://nces.ed.gov/fastfacts/display.asp?id=6> (last visited Oct. 23, 2018). This kind of residential sorting increases as parents’ educational attainment rises. Jack Buckley & Mark Schneider, *School Choice, Parental Information, and Tiebout Sorting: Evidence for Washington, D.C.*, in *THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATS 101, 104* (William A. Fischel ed., 2006).

18. See, e.g., MARGARET F. BRINIG & NICOLE STELLE GARNETT, *LOST CLASSROOM, LOST COMMUNITY* 16–18 (2014); PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 221–29 (2002); JOHN T. MCGREEVY, *CATHOLICISM AND AMERICAN FREEDOM* 111–21 (2003).

19. In the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954), and especially *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), federal courts routinely ordered “busing” as a remedy for past discriminatory student assignment. See, e.g., David Armor, *Bringing Back Busing: Do Benefits Outweigh Cost?*, BROWN CENTER CHALKBOARD (Aug. 23, 2016), <https://www.brookings.edu/blog/brown-center-chalkboard/2016/08/23/bringing-back-busing-do-benefits-outweigh-cost/>; Matthew Delmont, *The Lasting Legacy of the Boston Busing Crisis*, ATLANTIC (Mar. 26, 2016), <https://www.theatlantic.com/politics/archive/2016/03/the-boston-busing-crisis-was-never-intended-to-work/474264/>.

20. Maine and Vermont have had “town tuitioning programs” that enable students residing in districts without high schools to attend the public or private schools of their choice for over a century. See FRIEDMAN FOUND. FOR EDUC. CHOICE, *THE ABCs OF SCHOOL CHOICE: 2016 EDITION* 59, 111 (2016). Minnesota has permitted parents to deduct a portion of private-school tuition from state income taxes since 1955. *Id.* at 37, 43, 61–63.

21. 418 U.S. 717 (1974); see also Nicole Stelle Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 VAND. L. REV. 1, 10–11 (2017) (reviewing constitutional history).



districts to experiment with strategies that sought to achieve integration by other means, including magnet schools and public-school-choice programs that allow students to choose to attend a traditional public school other than one geographically assigned to them. In 1977, the Supreme Court approved these “compensatory” strategies,<sup>22</sup> and, since then, magnet schools and public-school choice has proliferated.<sup>23</sup> Many Americans continue to select their children’s school by selecting a residence.<sup>24</sup> While attendance at a traditional, geographically assigned public school remains the norm for a majority of American school children, the number of students attending a chosen public school continues to rise steadily. In 2007, over fifteen percent of all public-school students reported attending a school other than the one geographically assigned to them, and forty-six percent of parents reported that public-school choice was an option for them.<sup>25</sup> The availability of public-school-choice options is even higher in urban school districts, many of which offer (in theory) universal public-school choice.<sup>26</sup> A number of states also permit inter-district school choice, although the extent of choices available for low-income urban students is often dramatically constrained by available space and the public-choice reality that more affluent, higher-performing public schools are often not particularly welcoming of transfers.<sup>27</sup>

As chosen (and sometimes semi-autonomous) public-school-choice options, often with a specific curricular theme (such as

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22. Milliken v. Bradley (Milliken II), 433 U.S. 267 (1977).

23. See, e.g., Christine H. Rossell, *Magnet Schools: No Longer Famous, but Still Intact*, 5 EDUC. NEXT 44 (2005), <https://www.educationnext.org/magnetschools/>; Donald Waldrip, *A Brief History of Magnet Schools*, MAGNET SCHOOLS AM. <http://magnet.edu/brief-history-of-magnets> (last visited Sept. 25, 2018).

24. In 2007, the parents of twenty-seven percent of public school children reported that they moved to their current neighborhood so that their child could attend his or her school. *Fast Facts: Public School Choice Programs*, NAT’L CTR. FOR EDUC. STATS., <http://nces.ed.gov/fastfacts/display.asp?id=6>. This kind of residential sorting increases as parents’ educational attainment rises. Jack Buckley & Mark Schneider, *School Choice, Parental Information, and Tiebout Sorting: Evidence from Washington, DC*, in *THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATS* 101, 104 (William A. Fischel ed. 2006).

25. *Fast Facts: Public School Choice Programs*, NAT’L CTR. FOR EDUC. STATS., U.S. DEP’T OF EDUC., <https://nces.ed.gov/fastfacts/display.asp?id=6> (last visited May 15, 2018).

26. In practice, neighborhood schools favor residents of their geographic attendance zones, leaving limited space in high-performing schools for nonresident students. See Ryan & Heise, *supra* note 14, at 2064–65 (explaining that, even in districts with intra-district choice, “the default . . . is that students are assigned to neighborhood schools”). Most seats in magnet schools are allotted by lottery, test scores, or both. See *Magnet Schools: By the Numbers*, MAGNET SCHOOLS AM., [https://smartchoicetech.com/wp-content/uploads/2013/07/MSA\\_Infographic.pdf](https://smartchoicetech.com/wp-content/uploads/2013/07/MSA_Infographic.pdf) (showing that preference lottery or blind lottery accounts for seventy-four percent of student selection, and academic criteria accounts for seventeen percent of student selection) (last visited Oct. 23, 2018).

27. Ryan & Heise, *supra* note 14, at 2066–73.

STEM or the arts) magnet schools arguably paved the way for charter schools—which are, without question, the single most significant factor fueling a parental-choice revolution in the United States.<sup>28</sup> Until Minnesota enacted the first charter-school law in 1991, not a single charter school existed in the United States; today, there are seven thousand.<sup>29</sup> In the past decade, the number of students enrolled in charter schools has increased by two hundred and fifty-five percent. In 2013 alone, six hundred charter schools opened, and an additional 288,000 students enrolled in charter schools—a thirteen percent increase over the previous school year.<sup>30</sup> And, while charter schools enroll only about six percent of public-school students nationwide, charter schools enroll much larger shares of students in many urban areas. In 2015, charter schools enrolled more than fifty percent of all students in three public-school districts, more than forty percent in six districts, more than thirty percent in seventeen districts, more than twenty percent in forty-four districts, and more than ten percent in one hundred and ninety districts.<sup>31</sup>

No one at the time that Minnesota began the charter-school experiment could have anticipated the extent to which charter schools would revolutionize K-12 education in the United States. At their inception, charter schools were viewed as a means of injecting curricular diversity into the public education sector and were promoted as a public-school choice device that offered a modest, secular alternative to school voucher proposals.<sup>32</sup> Over time, however, charter schools have morphed into an entirely new, quasi-private, school sector that operates autonomously from and in competition with traditional public schools. Charter-school laws authorize the creation of new public schools through an agreement (the charter) between a charter “authorizer” (which in some states includes a range of public and private entities) and a private-school operator. Proponents (and all charter-school statutes) consistently refer to charter schools as “public charter schools,” and they continue to

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28. See CHESTER E. FINN ET AL., *CHARTER SCHOOLS IN ACTION: RENEWING PUBLIC EDUCATION* 17 (2000) (“[C]harter schools have cousins in the K-12 family. Their DNA looks much the same under the education microscope as that of lab schools, magnet schools, privately managed schools and special focus schools.”).

29. See Richard D. Kahlenberg, *The Charter School Idea Turns 20*, *EDUC. WK.* (Mar. 25, 2008), [https://www.edweek.org/ew/articles/2008/03/26/29kahlenberg\\_ep.h27.html](https://www.edweek.org/ew/articles/2008/03/26/29kahlenberg_ep.h27.html); *Charter School Facts*, NAT’L ALLIANCE FOR PUB. CHARTER SCH. <https://data.publiccharters.org/> (last visited Sept. 25, 2018).

30. See *Charter School Enrollment Up 13 Percent This Year*, NAT’L ALLIANCE FOR PUB. CHARTER SCH. (Feb. 2, 2014), <http://www.publiccharters.org/press/charter-school-enrollment-13-percent-year/> (discussing statistics regarding the increase in public charter-school enrollment).

31. See A GROWING MOVEMENT, *supra* note 7, at 2–3.

32. See Garnett, *supra* note 21, at 14

have several attributes of public schools. Charter schools are tuition free, secular, and are open to all who wish to attend.<sup>33</sup> On the other hand, they are privately operated (increasingly by “charter management organizations” (CMOs) which operate multiple schools within and across jurisdictions), have wide-ranging autonomy over staffing, curriculum, budget, internal organization, and often depend heavily on supplemental funds provided by philanthropists and other private donors. And, like private schools, they are schools of choice—that is, parents select them for their children and public funding “follows the child” to the school, as with students attending a private school through a private-school-choice program.<sup>34</sup>

The animating goals of the charter-school movement also have shifted over time. While charter-school proponents continue to emphasize the need to diversify the public education landscape, the dominant justification for charter schools has become the need to close the achievement gap by giving disadvantaged students an alternative to failing public schools.<sup>35</sup> A majority of charter-school students today are minorities,<sup>36</sup> and a growing body of evidence suggests that urban charter schools excel overall at the challenging task of educating vulnerable young people.<sup>37</sup> These results, combined with frustration with stalled efforts to reform urban public schools from within, have begun to lead some public education officials to enlist charter operators to assume control of failing public schools after other school “turn around” efforts have failed.<sup>38</sup>

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33. *Id.* at 13; Valerie Strauss, *How Charter Schools Choose Desirable Students*, WASH. POST (Feb. 16, 2013), [https://www.washingtonpost.com/news/answer-sheet/wp/2013/02/16/how-charter-schools-choose-desirable-students/?utm\\_term=.8fc373b11296](https://www.washingtonpost.com/news/answer-sheet/wp/2013/02/16/how-charter-schools-choose-desirable-students/?utm_term=.8fc373b11296).

34. Several federal and state courts have held that, for constitutional purposes, charter schools are private. *See, e.g.*, *Caviness v. Horizon Comm. Learning Ctr.*, 590 F.3d 806 (9th Cir. 2010) (holding that an Arizona charter school was not a “state actor” for federal constitutional purposes); *League of Women Voters v. State*, 355 P.3d 1131 (Wash. 2015) (invalidating charter-school law because charter schools are not “common schools” for state constitutional purposes).

35. Tremendous diversity continues to characterize the charter sector. *See* MICHAEL Q. MCSHANE & JENN HATFIELD, *MEASURING DIVERSITY IN CHARTER SCHOOL OFFERINGS* 4–5 (2015), <https://www.aei.org/publication/measuring-diversity-in-charter-school-offerings/>.

36. This fact has led to contested claims that charter schools are more racially isolated than traditional public schools. *See* ERICA FRANKENBERG ET AL., *CHOICE WITHOUT EQUITY* (Jan. 2012), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report>; GROVER J. WHITEHURST ET AL., *SEGREGATION, RACE AND CHARTER SCHOOLS: WHAT DO WE KNOW?* (Oct. 2016), [https://www.brookings.edu/wp-content/uploads/2016/10/ccf\\_20161021segregation\\_version-10\\_211.pdf](https://www.brookings.edu/wp-content/uploads/2016/10/ccf_20161021segregation_version-10_211.pdf).

37. *See infra* notes 66–70 and text accompanying notes.

38. During the 2012–2013 school year, eleven percent of charter schools were converted traditional public schools, including schools that have been removed from local control and placed under the authority of a special statewide “turnaround” district. *See* Nelson Smith, *Turnaround School Districts: States Try Managing Lowest-Performing Schools*, EDUC. NEXT (Apr. 1, 2015), <https://www.educationnext.org/turnaround-school-districts/>

### B. *Private-School Choice*

The fact that charter schools, rather than private-school choice, would drive the parental-choice revolution is arguably one of the most unexpected domestic policy developments in recent history. In contrast to charter schools, which were, in 1991, little more than an amorphous idea that required the establishment of new schools, voucher policies had an older, more refined intellectual pedigree, a committed ideological base of support, and promised to enlist existing schools with a proven track record of educating disadvantaged kids, especially urban Catholic schools.<sup>39</sup> The case for private-school choice dates in the United States to the mid-nineteenth century, when Catholic bishops vigorously but unsuccessfully demanded public funds for students enrolled in Catholic schools on equality grounds.<sup>40</sup> As discussed in the introduction, Milton Friedman revived the debate about education funding in his 1955 article, *The Government and Education*,<sup>41</sup> and the Reagan administration championed school vouchers as an alternative to the federal programs funding remedial instruction.<sup>42</sup>

Vouchers proposals languished for both legal and political reasons, discussed in more detail below. Two events in 1990, however, catalyzed the modern parental-choice movement. The first was the publication of John Chubb and Terry Moe's enormously influential book, *Politics, Markets, and American Schools*, discussed in the introduction.<sup>43</sup> The second was the emergence of a successful if unusual political coalition in Wisconsin between African-American leaders in Milwaukee and Republican Governor Tommy Thompson, which ultimately secured the passage of the nation's first

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39. Beginning with the groundbreaking research of James Coleman and Andrew Greeley, numerous scholars have found that Catholic school students—especially poor, minority, students—tend to outperform their public school counterparts. See ANDREW GREELEY, *CATHOLIC HIGH SCHOOLS AND MINORITY STUDENTS* 108 (1982); JAMES S. COLEMAN ET AL., *HIGH SCHOOL ACHIEVEMENT* (1982); see also Derek Neal, *The Effect of Catholic Secondary Schooling on Educational Attainment*, 15 J. LAB. ECON. 98 (1997) (finding that Catholic school attendance increased the likelihood that a minority student would graduate from high school from sixty-two percent to eighty-eight percent, and more than doubled the likelihood that a similar student would graduate from college).

40. See GARNETT & BRINIG, *supra* note 18, at 16–17.

41. See *What is School Choice?*, FRIEDMAN FOUND. FOR SCH. CHOICE, <http://www.friedmanfoundation.org/schoolchoice/> (“In 1955, Dr. Milton Friedman proposed the idea of school vouchers, which would separate the financing and administration of schools, effectively jumpstarting the modern school choice movement.”) (last visited Oct. 23, 2018).

42. Robert Pear, *Reagan Proposes Vouchers to Give Poor A Choice of Schools*, N.Y. TIMES, Nov. 15, 1985, at A20.

43. JOHN E. CHUBB & TERRY MOE, *POLITICS, MARKETS AND AMERICA'S SCHOOLS* 217 (1990).

modern school voucher program.<sup>44</sup> Initially, the Milwaukee Parental Choice Program entitled poor public-school children in the city of Milwaukee to spend a portion of their public education funds at secular private schools. The program was expanded to include religious schools in 1995.<sup>45</sup> Ohio followed suit in the same year, enacting a private-school-choice program for disadvantaged children in Cleveland, most of whom opted to attend religious schools.<sup>46</sup>

Despite these initial inroads, private-school choice faced major legal and political obstacles. Legally, the question of whether the First Amendment's Establishment Clause permitted the government to expend public resources at religious schools remained unsettled until 2002. Even after the U.S. Supreme Court settled the federal constitutional question in *Zelman v. Simmons-Harris*,<sup>47</sup> significant state constitutional hurdles to parental choice remained. Thirty-seven state constitutions contain provisions, commonly known as "Blaine Amendments," that prohibit the public funding of private and/or "sectarian" schools.<sup>48</sup> Following *Zelman*, many commentators predicted that these provisions represented major impediments to the expansion of private-school choice.<sup>49</sup> While state constitutional hurdles have not proven to be as significant an obstacle to the expansion of parental choice as predicted,<sup>50</sup> state constitutional challenges still inevitably follow the enactment of a new parental-choice program.<sup>51</sup>

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44. Since the mid-nineteenth century, Maine and Vermont both have maintained "town tuitioning" programs, which permit students in towns without public high schools to use public dollars to attend other public or private, secular schools. Illinois and Minnesota have very modest non-refundable parental tax credit programs. See EDCHOICE, THE ABCS OF SCHOOL CHOICE: 2018 EDITION 55–57, 95–97 (2018), <http://www.edchoice.org/School-Choice/The-ABCs-of-School-Choice/2015-ABCs-of-School-Choice-WEB>.

45. See *State ex rel. Jackson v. Benson*, 578 N.W.2d 602, 608–10 (Wis. 1998) (summarizing history of Milwaukee Parental Choice Program).

46. See Garnett, *supra* note 21, at 23.

47. 536 U.S. 639 (2002).

48. These provisions, called "Blaine Amendments" for Senator James Blaine of Maine, who attempted as Speaker of the House in 1875 to amend the federal constitution to prohibit the public funding of sectarian schools, reflect a lingering legacy of America's historical anti-Catholic bias. See AM. LEGISLATIVE EXCH. COUNCIL, SCHOOL CHOICE AND STATE CONSTITUTIONS: A GUIDE TO DESIGNING SCHOOL CHOICE PROGRAMS 4 (2007), <http://www.alec.org/docs/IJ-ALEC-school-choice.pdf>; Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 FIRST AMEND. L. REV. 45 (2003).

49. See, e.g., Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151 (2003); Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917 (2003).

50. While a number of lower state courts have relied upon Blaine Amendments to invalidate private-school-choice programs, only two state supreme courts have done so. See *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009) (invalidating voucher program); *Taxpayers for Public Education v. Douglas County School District*, 351 P.2d 461 (Colo. 2015) (same).

51. Blaine Amendment challenges to private-school-choice programs have been rejected by the highest court in Indiana, Wisconsin, Ohio, Alabama and, most recently, North

The political hurdles to private-school choice have proven even more substantial than the legal ones. For a variety of reasons, including but not limited to political power and opposition of teacher unions, private-school choice has proven the proverbial “third rail” of education policy.<sup>52</sup> Indeed, opposition to voucher proposals arguably fueled the movement to enact charter laws, which in turn took the wind out of the sails of the private-school-choice movement. Charter schools were promoted as a “safer” and more “constrained” version of parental choice—one that is both “public” and “secular.” Within debates about educational finance, many moderate reformers traditionally advocated for charter schools as an alternative to private-school-choice programs such as tax credits or vouchers.<sup>53</sup> For example, Michael Heise has demonstrated that the likelihood that a state enacted or expanded a charter program increased along with the “threat” of publicly funded private-school choice.<sup>54</sup>

In recent years, proponents of private-school choice have begun to overcome these political barriers and secure the enactment of new programs. Today, more than half of states and the District of Columbia have publicly funded private-school-choice programs.<sup>55</sup> Participation in private-school-choice programs has more than tripled in the last decade. That said, since most programs are modest in scope and limited in eligibility—serving only low-income and/or disabled students—the number of students enrolled in private schools through one of these programs (approximately 300,000) remains only about a tenth of total charter-school enrollment.<sup>56</sup>

The movement for private-school choice has gained momentum for several related reasons. First, the exponential growth of charter schools has resulted in millions of children moving from publicly to privately operated schools. Ironically, charter schools, which initially were promoted as an alternative to vouchers, may have un-

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Carolina. *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 525 U.S. 997 (1998); *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999); *Magee v. Boyd*, 175 So.3d 79 (Ala. 2015); *Hart v. State of North Carolina*, 368 N.C. 122 (2015).

52. See, e.g., TERRY M. MOE, SPECIAL INTEREST: TEACHERS UNIONS AND AMERICAN'S PUBLIC SCHOOLS 327–29 (2011) (discussing teacher-union opposition to private-school choice); Michael Heise, *Law and Policy Entrepreneurs: Empirical Evidence on the Expansion of School Choice Policy*, 87 NOTRE DAME L. REV. 1917, 1932 (2012) (“Understandably, and with considerable justification, school choice supporters reflexively blamed teachers’ unions for school voucher initiative losses.”)

53. JACK BUCKLEY & MARK SCHNEIDER, CHARTER SCHOOLS: HOPE OR HYPE 3 115–70 (2007).

54. Michael Heise, *Law and Policy Entrepreneurs: Empirical Evidence on the Expansion of School Choice Policy*, 87 NOTRE DAME L. REV. 1917, 1929–30 (2012).

55. See THE ABCS OF SCHOOL CHOICE, *supra* note 44, at 33, 55, 57–59, 95.

56. See SCHOOL CHOICE YEARBOOK, *supra* note 8, at 14–15.

dermined the argument that private-school-choice is “radical” by normalizing the idea of parental choice.<sup>57</sup> Moreover, and relatedly, opponents of parental choice today have had bigger battles to fight, including charter schools, which historically enjoyed broad bipartisan support but pose a serious competitive threat to urban school districts today.<sup>58</sup> Second, beginning with Arizona in 1997, more than a dozen states have adopted a new private-school-choice device, the “scholarship tax credit,” which does not directly fund private-school scholarships, but rather incentivizes donations to private scholarship organizations.<sup>59</sup> Scholarship tax credits are arguably more politically palatable than vouchers.<sup>60</sup> They also offer a way around the state constitutional restrictions on the public funding of private schools because state supreme courts appear inclined to follow the U.S. Supreme Court’s holding in *Arizona Christian School Tuition Organization v. Winn* that taxpayers lack standing to challenge these programs because scholarship funds raised through tax credit programs are not public dollars.<sup>61</sup> More recently, six states—Arizona, Florida, Mississippi, Nevada, North Carolina, and Tennessee—have adopted “education savings account” programs that empower parents to spend state education funds on a range of educational expenses, including private-school tuition.<sup>62</sup>

Finally, and perhaps most importantly, as previously discussed, the political coalition supporting private-school choice has ex-

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57. JACK BUCKLEY & MARK SCHNEIDER, CHARTER SCHOOLS: HOPE OR HYPE 3 (2007).

58. In recent years, the truce between charter schools and public schools has unraveled as charter market share has grown, and public schools have faced enrollment declines as a result. See, e.g., Richard D. Kahlenberg & Halley Potter, *Restoring Shanker’s Vision for Charter Schools*, AMERICAN EDUCATOR, Winter 2014–15, at 4, 5 (“Proposed to empower teachers, desegregate students, and allow innovation from which the traditional public schools could learn, many charter schools instead prized management control, reduced teacher voice, further segregated students, and became competitors, rather than allies, of regular public schools.”); Richard Whitmire, *Charter School War could go National: Governor Andrew Cuomo is Winning the Battle in New York, But What About Your State?*, USA TODAY, (Apr. 1, 2014), <http://www.usatoday.com/story/opinion/2014/04/01/bill-de-blasio-cuomo-charter-schools-new-york-column/7158071/>.

59. The nation’s three largest private-school-choice programs (in terms of enrollment)—in Arizona, Florida, and Pennsylvania—are all scholarship tax credit programs. SCHOOL CHOICE YEARBOOK, *supra* note 8.

60. A 2014 poll conducted by *Education Next* found that support for tax incentive programs, such as scholarship tax credits, was actually higher than support for charter schools, with sixty percent of respondents supporting tax credit policies but only fifty-four percent supporting charter schools. Michael B. Henderson, Paul E. Peterson & Martin R. West, *No Common Opinion on the Common Core*, 15 EDUC. NEXT 8 (2015), <http://educationnext.org/2014-ednext-poll-no-common-opinion-on-the-common-core/>.

61. 563 U.S. 125 (2011); see also, Travis Pillow, *Judge Dismisses Lawsuit Challenging Florida Tax Credit Scholarships*, REDEFINED (May 18, 2015), <https://www.redefinedonline.org/2015/05/judge-plaintiffs-lack-standing-to-challenge-florida-tax-credit-scholarships/>.

62. See *What is an Education Savings Account?*, EDCHOICE, <https://www.edchoice.org/school-choice/types-of-school-choice/education-savings-account/> (last visited Oct. 22, 2018).

panded and diversified, and the arguments offered in favor of it have shifted from free market to social justice rhetoric.<sup>63</sup> In this sense, the once-disparate arguments for charter schools and private-school choice have converged to focus on the imperative of increasing the supply of high-quality educational options available to disadvantaged children. As Terry Moe has observed, “The modern arguments for vouchers have less to do with free markets than with social equity. They also have less to do with theory than with the commonsense notion that disadvantaged kids should never be forced to attend failing schools and that they should be given as many attractive options as possible.”<sup>64</sup>

## II. THE PERFORMANCE DEBATE

As previously discussed, proponents initially justified parental choice as a means of injecting competition into education markets and holding public schools accountable for their performance. And, in fact, the available empirical evidence suggests that parental-choice policies do serve the “accountability” function that Friedman predicted they would: That is, numerous studies find that competition from private and charter schools improves public schools’ performance.<sup>65</sup> These findings, however, play little role in the ongoing debates about parental choice, in large part because the dominant case for parental choice today is no longer about free markets but rather about the social justice imperative of rescuing children from failing public schools. This argument inevitably raises questions about the quality of the schools participating in parental-choice programs. If the goal of parental choice is to give kids the option of exiting bad schools for good ones, then logically the choices available to exiting children ought to be good, not bad, ones. The question whether students participating in choice programs outperform their public-school peers therefore is not surprisingly at the center of debates about the wisdom and efficacy of parental choice. The record provides ammunition for both sides of those debates. The answer to the question “do students do better in chosen schools?” appears to be “usually (over time), but not always.”

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63. See MOE, *supra* note 52, at 329.

64. *Id.*

65. See studies cited *supra* note 10 (each examining effect of competition on public schools’ academic performance).



## A. Charter Schools

The question of whether charter schools, on average, outperform traditional public schools remains contested.<sup>66</sup> The emerging consensus position among education scholars is that even if charter schools do not perform better *overall* than traditional public schools, they do a better job—in some cases, a *much better* job—at educating disadvantaged urban students.<sup>67</sup> While tremendous regional variations persist, a growing body of evidence confirms that, on average, disadvantaged minority students perform significantly better across a range of measures when they attend charter, rather than traditional, public schools.<sup>68</sup> Most recently, the 2015 *Stanford Urban Charter School Report*, which compared the performance of charter- and public-school students in forty-one urban communities, found that urban charter-school students achieved, on average, forty additional days of learning growth in math and twenty-eight days in reading compared to their peers in district schools.<sup>69</sup> These findings are heartening since a majority of charter schools are located in urban areas and serve minority students.<sup>70</sup>

Critics frequently assert that charter-school gains result from the “cream skimming” of the best students from the pool of available applicants (and also from the expulsion of underperforming stu-

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66. A high-profile study conducted in 2009 by Stanford University’s Center for Research on Educational Outcomes (CREDO), found that charter schools do not outperform their public school counterparts (and, in fact, sometimes perform worse). CTR. FOR RESEARCH ON EDUC. OUTCOMES, MULTIPLE CHOICE: CHARTER SCHOOL PERFORMANCE IN 16 STATES, [http://credo.stanford.edu/reports/MULTIPLE\\_CHOICE\\_CREDO.pdf](http://credo.stanford.edu/reports/MULTIPLE_CHOICE_CREDO.pdf). More recent studies, including the 2013 update to the earlier CREDO study, find that charter schools outperform public schools among certain demographic groups and age ranges and in certain subject areas, although tremendous demographic and regional variations persist. See CTR. FOR RESEARCH ON EDUC. OUTCOMES, NATIONAL CHARTER SCHOOL STUDY (2013), <http://credo.stanford.edu/documents/NCSS%202013%20Final%20Draft.pdf>.

67. See CTR. FOR RESEARCH ON EDUC. OUTCOMES, NATIONAL CHARTER SCHOOL STUDY (2013), <http://credo.stanford.edu/documents/NCSS%202013%20Final%20Draft.pdf>; NAT’L CTR. FOR EDUC. EVALUATION AND REG’L ASSISTANCE, NCEE STUDY SNAPSHOT: THE EVALUATION OF CHARTER SCHOOL IMPACTS (June 2010), <http://ies.ed.gov/ncee/pubs/20104029/pdf/20104031.pdf>; NEW YORK CITY CHARTER SCH. EVALUATION PROJECT, HOW NEW YORK CITY’S CHARTER SCHOOLS AFFECT ACHIEVEMENT (Sept. 2009), [http://users.nber.org/~schools/charterschoolseval/how\\_NYC\\_charter\\_schools\\_affect\\_achievement\\_sept2009.pdf](http://users.nber.org/~schools/charterschoolseval/how_NYC_charter_schools_affect_achievement_sept2009.pdf); HARVARD CTR. FOR EDUC. POL’Y RESEARCH, STUDENT ACHIEVEMENT IN MASSACHUSETTS CHARTER SCHOOLS (Jan. 2011), <http://economics.mit.edu/files/6493>.

68. CTR. FOR RESEARCH ON EDUC. OUTCOMES, URBAN CHARTER SCHOOL STUDY REPORT ON 41 REGIONS (2015), <https://urbancharters.stanford.edu>.

69. *Id.* at 11.

70. In 2013–14, fifty-two percent of charter schools were located in urban areas, and sixty percent of charter-school students were racial minorities. *Data Dashboard*, NAT’L ALLIANCE FOR PUB. CHARTER SCHOOLS [www.publiccharters.org/dashboard/schools/year/2014](http://www.publiccharters.org/dashboard/schools/year/2014).

dents).<sup>71</sup> The methodology used in the Stanford report described above, which matched charter-school students to demographically similar students in traditional public schools, cannot completely address this issue since students enrolled in charter schools may have characteristics that increase the likelihood that they will succeed, such as more motivated parents. Random-assignment studies of students in oversubscribed charter-school lotteries represent the only methodological approach that eliminates the risk of selection bias because researchers focus exclusively on students who apply for charter-school admission, some of whom are admitted and others rejected. All of the available random-assignment studies of charter schools have found statistically significant, in some cases substantial, gains in reading and/or math for urban (but not suburban) charter schools.<sup>72</sup> These studies cannot, however, definitively resolve the question of whether charter schools outperform their public counterparts. While random-assignment studies represent the “gold standard” of educational research, these studies are not without problems: Importantly, since only over subscribed schools can be included, the sample sizes tend to be small.<sup>73</sup> Some random-assignment studies are of single schools or school networks,<sup>74</sup> others cover entire cities or states.<sup>75</sup> The only nationwide study, which

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71. See, e.g., Kaitlin P. Anderson, *Evidence on charter school practices related to student enrollment and retention*, 11 J. OF SCH. CHOICE 527-545 (2017).

72. See, e.g., CTR. FOR REINVENTING PUB. EDUC., *THE EFFECTS OF CHARTER SCHOOL STUDENTS ON STUDENT ACHIEVEMENT: A META-ANALYSIS OF THE LITERATURE* (Oct. 2011), <http://www.crpe.org/publications/effect-charter-schools-student-achievement-meta-analysis-literature> (analyzing randomized assignment studies and concluding that charter elementary schools outperform traditional public schools in both reading and math, but charter high schools have no effects and that urban charter schools perform better than suburban and rural charter schools).

73. Moreover, it is possible that the oversubscribed schools are the best, most effective schools.

74. Caroline Hoxby & Jonathan Rockoff, *The Impact of Charter Schools on Student Achievement* (2004), <https://www0.gsb.columbia.edu/faculty/jrockoff/hoxbyrockoffcharters.pdf> (finding significant gains in reading and math at Chicago International Charter School); Larry McLure & J. Cesar Morales, *School Characteristics and Student Achievement* (2005), [https://create.ucsd.edu/\\_files/publications/PreussReportJune2004.pdf](https://create.ucsd.edu/_files/publications/PreussReportJune2004.pdf) (finding, for Preuss Charter school, that test scores remained unchanged by college-enrollment rates increased by twenty-three percent); Joshua D. Angrist, *Inputs and Impacts in Charter Schools: KIPP Lynn*, 100 AM. ECON. REV.: PAPERS AND PROCEEDINGS 1 (2010) (finding achievement gains of 0.12 standard deviations in reading and 0.35 in math after a single year); Justine Hastings, *The Effects of School Choice on Intrinsic Motivation and Academic Outcomes* (Nat'l Bur. of Econ. Research, Working Paper No. 18,324, 2012), <http://www.nber.org/papers/w18324.pdf> (study of unnamed charter network in unnamed city, finding no visible math gains but significant reading and writing gains), <http://www.nber.org/papers/w18324.pdf>.

75. ATILA ABDULKADIROGUL ET AL., *INFORMING THE DEBATE: COMPARING BOSTON'S CHARTER, PILOT AND TRADITIONAL SCHOOLS* (2009), [http://scholar.harvard.edu/files/cohodes/files/informingthedebate\\_final.pdf](http://scholar.harvard.edu/files/cohodes/files/informingthedebate_final.pdf) (finding after one year, Boston's charter high schools produced gains of 0.16 standard deviations in reading and 0.19 standard deviations in math; charter middle schools in the city produced similar reading gains of 0.17 standard deviations and a remarkable 0.54 standard deviations in math); Joshua D. Angrist et al., *Stu-*

included only thirty-six charter middle schools in fifteen states, found—in keeping with more focused studies—that charter schools in affluent areas produced lower results than neighboring schools, but urban charter schools posted significant gains, especially in math.<sup>76</sup>

### B. Private-School Choice

Measuring and drawing generalizable conclusions about the effects of choice on student achievement is even more difficult in the private-school-choice context for a number of related reasons. In addition to the selection-bias concerns described above, the various private-school-choice mechanisms (vouchers, tax credits, and education savings accounts) work very differently. While regional variations in charter-school programs are also significant, all charter schools share some characteristics: Importantly, they are, by law, free to admitted students (that is, they may not charge tuition above the level of the per pupil public funding), and they must use lotteries to make admission decisions if demand exceeds available space. These characteristics are not uniformly true with respect to private-school-choice programs. For example, most programs permit schools to charge parents the difference between the scholarship level and tuition and give schools significant discretion in making admissions decisions.<sup>77</sup> Moreover, scholarship-tax-credit programs guarantee no minimum level of public funding at all but rather incentivize donations to scholarship-granting organizations, which must raise money to support scholarships. As a result, the level of support per student participating in scholarship tax credit programs varies both across and within states.<sup>78</sup> This model effec-

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*dent Achievement in Massachusetts' Charter Schools* (2011), <http://economics.mit.edu/files/6493> (finding that charter schools in non-urban areas produced no significant gains but urban charter schools produced middle school gains of 0.12 standard deviation in English and 0.33 standard deviation in math and high school gains of 0.33 standard deviation in English and 0.39 standard deviation in math); Caroline Hoxby & Sonali Murarka, *Charter Schools in New York City: Who Enrolls and How They Affect Their Students' Achievement* (Nat'l Bur. of Econ. Research, Working Paper No. 14,852, 2009), <http://www.nber.org/papers/w14852> (finding .04 standard deviation gains in reading and .09 in math).

76. NAT'L CTR. FOR EDUC. EVALUATION, *The Evaluation of Charter School Impacts: Final Report*, (2010), <http://ies.ed.gov/ncee/pubs/20104029/>.

77. See EDCHOICE, THE ABCS OF SCHOOL CHOICE: THE COMPREHENSIVE GUIDE TO EVERY PRIVATE SCHOOL CHOICE PROGRAM IN AMERICA: 2018 EDITION 31, 39, 73 (2018) (highlighting the rarity of “burdensome” requirements imposed on private schools in the District of Columbia, Louisiana, and Wisconsin, such as prohibiting schools from charging tuition “above the amount of the voucher” and using “their own admission standards”).

78. See *id.* at 82–126 (identifying a \$500–\$6,007 range in average scholarship value across states and noting that scholarship-granting organizations determine the scholarship amount per pupil within states).

tively eliminates the possibility of broad-scale random-assignment studies of student performance.

Also in contrast to charter schools, which by law must be open to all students, the eligibility for private-school-choice programs varies widely. Many programs are means-tested, with eligibility limited to low-to-moderate income students;<sup>79</sup> some programs are means-tested with eligibility further limited to students transferring out of failing public schools.<sup>80</sup> Additionally, a number of programs are limited to narrow categories of students, such as foster children and students with disabilities. These eligibility requirements dramatically complicate the selection-bias concerns. While participating students may be more likely to succeed academically than their peers because they have motivated parents, many programs are limited to categories of students that are more likely to have fallen behind their peers academically.

Most studies of private-school-choice programs find modest positive effects on academic performance over time (following early losses, in some cases), as well as more-significant longer-term effects on noncognitive variables, including high school graduation rates, college matriculation and persistence, and a reduced likelihood of involvement in the criminal justice system.<sup>81</sup> Eighteen random-assignment studies have evaluated the academic effects of participating in publicly and privately funded school voucher programs.<sup>82</sup> Of these, fourteen have found some positive effects on student achievement, most of them modest. Six of the studies found positive effects on all participating students, and eight found benefits for some group of students (for example, racial minorities, extremely disadvantaged students, and students exiting poorly performing public schools) and no visible effects on others. For example, the final review of the D.C. Opportunity Scholarship Program found no overall effects on student achievement, but positive effects on certain subgroups in reading.<sup>83</sup>

There are numerous other studies that employ less reliable methodologies, including the “matched samples” method employed in the *Stanford Urban Charter School Study* described above

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79. SCHOOL CHOICE YEARBOOK, *supra* note 8, at 8.

80. *Id.* at 9.

81. See, e.g., Celilia Elena Rouse & Lisa Barrow, *School Vouchers and Student Achievement: Recent Evidence, Remaining Questions* (Aug. 6, 2008), [http://www.ncspe.org/publications\\_files/OP163.pdf](http://www.ncspe.org/publications_files/OP163.pdf).

82. See Martin Lueken & Michael Q. McShane, *School Choice Research to Date* (Nov. 27, 2017), <https://www.edchoice.org/blog/school-choice-research-not-rorschach-test/>.

83. PATRICK WOLF ET AL., EVALUATION OF THE D.C. OPPORTUNITY SCHOLARSHIP PROGRAM, FINAL REPORT (June 2010), <http://ies.ed.gov/ncee/pubs/20104018/pdf/20104019.pdf>.

and another methodology known as “experimental, regression discontinuity,” which seeks to approximate random assignment. Researchers conducting these studies have reached mixed conclusions: For example, the most recent review of the effects of participating in the Milwaukee Parental Choice Program (MPCP) in 2010 found that participating students scored higher than similar Milwaukee public school students in reading but not in math.<sup>84</sup> However, the researchers found that participating in a program increased the likelihood that students would graduate from high school and enroll in college by approximately twenty percent.<sup>85</sup> The latter finding was in keeping with the random-assignment study of the D.C. Opportunity Scholarship Program, which found that participation increased students’ probability of completing high school from seventy to eighty-two percent.<sup>86</sup> A study of the early results of Indiana’s statewide voucher program found no effect in reading and negative effects in math, but recently a follow-up study by the same researchers found that students caught up and began to improve if they remained in their chosen school for four years.<sup>87</sup> Recent studies of student performance in Louisiana’s voucher program similarly found that students lost ground in the early years of participation, but caught up to and in some cases surpassed their public-school peers after three years in the program.<sup>88</sup>

### C. *The Quality-Variation Problem*

Studies of the effects of private-school choice and charter schools on student performance overall mask important variations

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84. JOHN WITTE ET AL., MPCP LONGITUDINAL EDUCATIONAL GROWTH STUDY FIFTH YEAR REPORT (2012), <http://ies.ed.gov/ncee/wwc/SingleStudyReview.aspx?sid=214>.

85. PATRICK J. WOLF, THE COMPREHENSIVE LONGITUDINAL EVALUATION OF THE MILWAUKEE PARENTAL CHOICE PROGRAM (Feb. 2012), <http://www.uaedreform.org/downloads/2012/02/report-36-the-comprehensive-longitudinal-evaluation-of-the-milwaukee-parental-choice-program.pdf>. More recently, researchers from the School Choice Demonstration Project found that participating in the MPCP was associated with a significant decrease in later criminal behavior, with even stronger effects for students the longer they persisted in the program. Corey A. DeAngelis & Patrick Wolf, *The School Choice Voucher: A “Get Out of Jail” Card?* (Univ. of Ark. Dep’t of Ed. Reform Working Paper No. 2016-03, 2016), <http://www.uaedreform.org/the-school-choice-voucher-a-get-out-of-jail-card-2/>.

86. Patrick J. Wolf et al., *School Vouchers and Student Outcomes*, 32 J. POL’Y ANALYSIS & MGMT. 247, 252 (2013).

87. R. Joseph Waddington & Mark Berends, *Impact of Indiana Choice Scholarship Program: Achievement Effects for Students in Upper Elementary and Middle School* (2017) (unpublished draft on file with author).

88. Cory Turner & Anya Kamenetz, *School Vouchers Get Two New Report Cards*, NPRED (June 26, 2017), <https://www.npr.org/sections/ed/2017/06/26/533192616/school-vouchers-get-a-new-report-card>.

among the schools participating in these programs. As a recent *Slate* article about charter schools observed, “There are some great ones but some real duds.”<sup>89</sup> For example, a recent study by Stanford’s Center for Research on Educational Outcomes found that students enrolled in charter schools operated by charter management organizations (CMOs) experienced more significant gains in both reading and math than those enrolled in independent charter schools.<sup>90</sup> Schools in some networks, however, fared better than others,<sup>91</sup> and certainly some independent charter schools outperform many CMO schools. Similarly, the researchers studying the early results of Indiana’s voucher program observed that some schools did an excellent job of helping students who transferred catch up to their peers education deficits; others failed the transfer students in the same situation.<sup>92</sup> Since it seems incontrovertible that school quality is one of the most important factors driving student performance, the question of whether and how the law should address the problem of poorly performing schools participating in parental-choice programs would persist even in the face of solid evidence that parental choice improves students’ academic performance overall. The remainder of this article tackles this question.

### III. ACADEMIC ACCOUNTABILITY POLICIES

As previously discussed, parental-choice policies were originally justified as a means of holding public schools accountable by subjecting them to competition. Yet, although the available evidence suggests that competition does, in fact, improve public-school performance,<sup>93</sup> parental choice has never taken center stage as a public-school-accountability device. Instead, as discussed briefly below, accountability policies have sought to improve public schools from *within* through a complex system of command-and-control regulations, penalties, and rewards. Moreover, while early parental-choice proponents assumed that it would be unnecessary to use the law to hold *chosen* schools accountable for student performance, current

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89. See Ray Fisman, *Do Charter Schools Work? Yes, but not always for everyone*, SLATE (May 22, 2013), [http://www.slate.com/articles/news\\_and\\_politics/the\\_dismal\\_science/2013/05/do\\_charter\\_schools\\_work\\_a\\_new\\_study\\_of\\_boston\\_schools\\_says\\_yes.html](http://www.slate.com/articles/news_and_politics/the_dismal_science/2013/05/do_charter_schools_work_a_new_study_of_boston_schools_says_yes.html).

90. CTR. FOR RESEARCH OF EDUC. OUTCOMES, CHARTER MANAGEMENT ORGANIZATIONS 2017 20–36 (2017), <https://credo.stanford.edu/pdfs/CMO%20FINAL.pdf>.

91. *Id.* at 34–35. (For example, schools in for-profit charter networks consistently underperformed independent charter schools and traditional public schools.)

92. Waddington & Berends, *supra* note 87.

93. See studies cited *supra* note 10 (each examining effect of competition on public schools’ academic performance).

parental-choice debates frequently feature demands to import the tools of public-school accountability into choice contexts.

### A. Public-School Accountability Policies

The academic “accountability” movement did not reach maturation until a decade after parental choice took hold in Wisconsin (with vouchers) and Minnesota (with charters), when Congress enacted the now-defunct No Child Left Behind Act of 2001 (NCLB).<sup>94</sup> NCLB imposed a number of measures designed to hold states, districts, and schools accountable for student performance. It required states to administer standardized tests aligned with state academic standards in reading and mathematics and to make “adequate yearly progress” toward bringing all students to proficiency by the 2013-2014 school year.<sup>95</sup> Further, NCLB included both carrots and sticks to hold schools and school districts accountable for standardized test scores, graduation rates, and other measurable objectives set by individual states.<sup>96</sup> For example, failing schools received additional funds for supplemental education services, such as tutoring, but were also required to develop a plan for improvement and to permit students to transfer to higher-performing schools. After a school failed to make adequate yearly progress for five years, districts were required to select from an array of punitive options, including closing the school or converting it into a charter school.<sup>97</sup>

Not only did NCLB’s goal of universal proficiency prove unrealistic,<sup>98</sup> but the law also fueled a widespread backlash against stand-

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94. No Child Left Behind Act of 2001, 20 U.S.C. § 6319 (repealed 2015); see also Janet T. Thomas & Kevin P. Brady, *The Elementary and Secondary Education Act at 40: Equity, Accountability, and the Evolving Federal Role in Public Education*, 29 REV. RES. EDUC. 51 (2005).

95. 20 U.S.C. § 6311(b)(2)(F) (2006) (repealed Dec. 10, 2015) (“Each State shall establish a timeline for adequate yearly progress. The timeline shall ensure that not later than 12 years after the end of the 2001-2002 school year, all students . . . will meet or exceed the State’s proficient level of academic achievements on the State assessments . . .”).

96. *No Child Left Behind*, EDUC. WEEK (Aug. 4, 2004), <http://www.edweek.org/ew/issues/no-child-left-behind/>; <http://www.edweek.org/ew/issues/no-child-left-behind/>.

97. 20 U.S.C. § 1116(b)(5). Beginning in 2007, the Department of Education’s School Improvement Grant (SIG) program provided grants to states to fund school district interventions to turn around low-achieving schools identified under the NCLB accountability system, including by closing and converting them to a charter school. U.S. DEP’T OF EDUC., GUIDANCE ON FISCAL YEAR 2010 SCHOOL IMPROVEMENT GRANTS, at xvii (2012).

98. Anya Kamenetz, *It’s 2014. All Children Are Supposed To Be Proficient. What Happened?*, NPR EDUC. (Oct. 11, 2014), <http://www.npr.org/blogs/ed/2014/10/11/354931351/its-2014-all-children-are-supposed-to-be-proficient-under-federal-law>. (In 2014, the established deadline achieving universal proficiency, “proficiency” rates were below fifty percent in both reading and math, in both fourth and eighth grade for all demographic groups except for Asian students, in all subjects, and white students in 4th grade math.)

ardized testing.<sup>99</sup> When President Obama entered office, he and his Secretary of Education, Arne Duncan, began to move away from NCLB's accountability devices toward other reform measures that they believed would more effectively promote academic gains and address the achievement gap. Their first opportunity to do so came with the enactment of the American Recovery and Reinvestment Act (more commonly known as the Stimulus Act), which appropriated funds to promote school improvement.<sup>100</sup> Race to the Top, the program devised by the Obama administration to distribute these funds established a competitive process requiring states to submit reform proposals meeting certain criteria.<sup>101</sup> These criteria included "ensuring successful conditions for high-performing charter schools and other innovative schools," such as eliminating numerical caps on charter schools, funding equalization between traditional public and charter schools, and adopting regulations holding charter schools accountable for academic performance, including by closing underperforming schools.<sup>102</sup> In 2011, the Department of Education went further and invited states to request waivers from ten of the NCLB's school-accountability requirements, including the unpopular "adequate yearly progress" mandate. The Department of Education justified these waivers by the need to reward states for initiating "ground breaking reforms and innovations,"<sup>103</sup> including the implementation of the Common Core State Standards<sup>104</sup> and value-added principal- and teacher-evaluation metrics.<sup>105</sup> The waiver policy also required states to specify a plan of action for improving student achievement and holding districts accountable for school turnarounds, including converting failing schools into charter schools.<sup>106</sup>

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99. See generally DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* 201 (2000).

100. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §14001, 123 Stat. 115, 279 (2012).

101. *Id.* § 14005. (other criteria included "articulating a comprehensive a coherent reform agenda," developing and adopting "common" standards and assessments, a tacit reference to the development of the Common Core State Standards, using data to support classroom instruction, implementing data-driven teacher-evaluation and compensation procedures).

102. See U.S. DEP'T OF EDUC., *RACE TO THE TOP PROGRAM: EXECUTIVE SUMMARY* (Nov. 2009), <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>.

103. Letter from Arne Duncan, Sec. of Educ., to Chief State Sch. Officers (Sept. 23, 2011), <http://www2.ed.gov/policy/gen/guid/secletter/110923.html>.

104. See U.S. DEP'T OF EDUC., *ESEA FLEXIBILITY* (2016), <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html> (explaining the Department of Education expressly disavowed "requiring" the adoption of the Common Core as a condition of receiving a waiver).

105. U.S. DEP'T OF EDUC., *ESEA FLEXIBILITY REQUEST* (2012), <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html>.

106. *Id.*



The future of public-school accountability policies is currently in flux. In December 2015—eight years after the date of NCLB’s expiration—Congress signed the Every Student Succeeds Act (ESSA). ESSA eliminated many of NCLB’s most unpopular requirements, including the requirement that schools and districts make “adequate yearly progress” toward proficiency. Although ESSA still requires that schools test students annually and disclose information about school performance, it gives states more latitude to select from a range of standardized tests and also mandates that accountability measures incorporate at least one measure of school quality other than test scores.<sup>107</sup> States were required to submit a plan to the United States Department of Education outlining their new accountability regimes under ESSA by September 2017. These plans suggest that most states will continue to rate schools’ overall performance based on standardized test scores, with some issuing “grades” (that is, A–F) and others dividing schools into performance tiers.<sup>108</sup> States have proposed a wide variety of noncognitive measures of school performance, ranging from absenteeism to college readiness to enrollment in the arts.<sup>109</sup>

It is unclear at this point how the transition to ESSA’s more flexible accountability regime will affect state accountability practices that were encouraged by the NCLB waiver process, including school closures and regulations employing charter school conversions as a school-turnaround device. Although neither NCLB nor the Race to the Top Program directly triggered many school closures,<sup>110</sup> the Obama administration provided financial support for charter conversions and encouraged them through the waiver process. At least twenty of the forty-five successful applications for NCLB waivers included some meaningful mention of either turning failing public schools over to outside management or restarting them as charter schools.<sup>111</sup> While the waivers were eliminated by

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107. See *What’s in the Every Student Succeeds Act?*, THE EDUC. TR. (Jan. 13, 2016), <https://edtrust.org/resource/whats-in-the-every-student-succeeds-act-accountability/>. The legislation also eliminates all ESEA waivers. See *Dear Colleague Letter on the Transition to ESSA*, U.S. DEP’T OF EDUC. (Dec. 18, 2015), <http://www2.ed.gov/policy/elsec/leg/essa/transition-dcl.pdf>.

108. *Id.*

109. *Approved ESSA Plans: Explainer and Key Takeaways from Each State*, EDUC. WK. (Apr. 21, 2017), <https://www.edweek.org/ew/section/multimedia/key-takeaways-state-essa-plans.html>.

110. See JENNIFER McMURRER & SHELBY MCINTOSH, CTR. ON EDUC. POLICY, STATE IMPLEMENTATION AND PERCEPTIONS OF TITLE I SCHOOL IMPROVEMENT GRANTS UNDER THE RECOVERY ACT 2 (2012); U.S. DEP’T OF EDUC., STATE AND LOCAL IMPLEMENTATION OF THE NO CHILD LEFT BEHIND ACT: VOLUME IX—ACCOUNTABILITY UNDER NCLB; FINAL REPORT (2010).

111. MELISSA LAZARIN, CHARTING NEW TERRITORY: TAPPING CHARTER SCHOOLS TO TURN AROUND THE NATION’S DROPOUT FACTORIES 1 (2012), <http://www.americanprogress.org/>

ESSA, the new law increases funding for charter schools and authorizes (but does not require) states to use these funds to convert failing public schools to charter schools.<sup>112</sup> Many states have adopted statutes that permit or encourage districts to convert failing public schools to charter schools, and several states have enacted a “parent trigger” law, which gives parents the option of converting their children’s schools to a charter school under certain circumstances. A number of other states are actively considering parent trigger statutes.<sup>113</sup> While these laws remain unaffected by ESSA, no state makes such conversions mandatory.<sup>114</sup> In addition, a number of states’ ESSA plans list the closure of failing public (and charter) schools and/or the conversion of these schools to a charter school (or transfer to a new charter operator in the case of a failing charter school) among a range of potential accountability devices—although, again, no state makes closure and/or conversion mandatory.<sup>115</sup>

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wp-content/uploads/issues/2011/06/pdf/charter\_schools.pdf). *See also* James Cersonsky, *A Lesson for Arne Duncan*, THE NATION (Sept. 26, 2012).

112. *See Charter Schools and the Every Student Succeeds Act*, NAT’L ALLIANCE FOR PUB. CHARTER SCHOOLS, (Jan. 7, 2016), <http://www.publiccharters.org/wp-content/uploads/2016/01/V3-NAPCS-ESSA-Charter-Overview-Webinar-01.07.15-updated.pdf>,

113. Josh Cunningham, *Parent Trigger Laws in the States*, NAT’L CONF. OF ST. LEGISLATURES (Oct. 15, 2013), <http://www.ncsl.org/issues-research/educ/state-parent-trigger-laws.aspx>; *In Your State*, PARENT TRIGGER, <http://theparenttrigger.com/in-your-state/> (last visited Oct. 23, 2018).

114. *See* Educ. Comm. of the States, *Charter Schools: Does the State Allow Existing Public Schools to Convert to Charter Schools?*, <http://ecs.force.com/mbdata/mbquestNB2?rep=CS1502>.

115. *See, e.g.*, ARK. DEP’T EDUC., EVERY STUDENT SUCCEEDS ACT ARKANSAS STATE PLAN 69–70 (2018); COLO. DEP’T EDUC., CONSOLIDATED STATE PLAN UNDER THE EVERY STUDENT SUCCEEDS ACT (ESSA) 86 (2017); CONN. DEP’T EDUC., CONNECTICUT CONSOLIDATED STATE PLAN UNDER THE EVERY STUDENT SUCCEEDS ACT 30 (2017); OFFICE OF THE STATE SUPERINTENDENT OF EDUC., DISTRICT OF COLUMBIA REVISED STATE TEMPLATE FOR THE CONSOLIDATED STATE PLAN 36 (2017) (“Unless specifically submitted as a proposal by the LEA of the identified school, the state-selected intervention would not include school closure.”); FLA. DEP’T EDUC., EVERY STUDENT SUCCEEDS ACT (ESSA) STATE PLAN SUBMITTED TO THE UNITED STATES DEPARTMENT OF EDUCATION 28 (2017); GA. DEP’T EDUC., EDUCATING GEORGIA’S FUTURE: GEORGIA’S STATE PLAN FOR THE EVERY STUDENT SUCCEEDS ACT 54–55 (2017); LA. DEP’T EDUC., LOUISIANA BELIEVES: LOUISIANA’S ELEMENTARY & SECONDARY EDUCATION PLAN PURSUANT TO THE FEDERAL EVERY STUDENT SUCCEEDS ACT (ESSA) 69 (2017); MINN. DEP’T EDUC., MINNESOTA’S CONSOLIDATED STATE PLAN UNDER THE EVERY STUDENT SUCCEEDS ACT (ESSA) TIT. I, PT. A: SCHOOL SUPPORT, at 3 (2018); NEV. DEP’T EDUC., CONSOLIDATED STATE PLAN UNDER THE EVERY STUDENT SUCCEEDS ACT 69–70 (2017); N.M. DEP’T EDUC., NEW MEXICO RISING: NEW MEXICO’S STATE PLAN FOR THE EVERY STUDENT SUCCEEDS ACT 91 (2017); N.Y. DEP’T EDUC., REVISED STATE TEMPLATE FOR THE CONSOLIDATED STATE PLAN 103 (2018); N.C. DEP’T EDUC., CONSOLIDATED STATE PLAN 50 (2017); OHIO DEP’T EDUC., REVISED STATE TEMPLATE FOR THE CONSOLIDATED STATE PLAN 51 (2018); OKLA. DEP’T EDUC., OKLAHOMA ESSA CONSOLIDATED STATE PLAN 183 (2017); PA. DEP’T EDUC., EVERY STUDENT SUCCEEDS ACT: PENNSYLVANIA CONSOLIDATED STATE PLAN 65 (2018); P.R. DEP’T EDUC., CONSOLIDATED STATE PLAN 107 (2018); R.I. DEP’T EDUC., RHODE ISLAND’S EVERY STUDENT SUCCEEDS ACT STATE PLAN FOR SUBMISSION TO U.S. DEPARTMENT OF EDUCATION 42–43 (2017); TENN. DEP’T EDUC., EVERY STUDENT SUCCEEDS ACT: BUILDING ON SUCCESS IN TENNESSEE 107–08 (2017); TEX. DEP’T EDUC., REVISED TEMPLATE FOR THE

### B. Parental Choice and Accountability

In many ways, NCLB discredited the efforts to hold *public* schools accountable for students' performance. By eliminating these requirements in ESSA, Congress effectively acknowledged that the NCLB had failed. But the demise of NCLB should not be equated with the demise of school accountability policies. When viewed as a measuring stick for the possibility of reforming failing public schools, NCLB's optics are bad. ESSA gives states more flexibility over school-level accountability, not because public schools' persistent struggles have been solved, but because NCLB's accountability regime did little to solve them. This failure highlighted the difficulties plaguing school turnaround efforts and, by so doing, fueled the demand for parental choice. After all, if public schools cannot be reformed from within, should students not be given options other than public schools?<sup>116</sup>

Of course, if the goal of parental choice is to give students access to higher-performing alternatives to traditional public schools, then the performance of those alternatives necessarily comes under scrutiny and demands for legal policies regulating the quality of chosen schools inevitably follows. Accountability proponents argue that more rigorous accountability measures are needed to ensure that parental choice delivers on its equality-of-opportunity promises; skeptics counter that additional regulations threaten to import into the charter and private-school sectors the very bureau-

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CONSOLIDATED STATE PLAN 28–29 (2017); UTAH DEP'T EDUC., REVISED STATE TEMPLATE FOR THE CONSOLIDATED STATE PLAN 50–51 (2017); VT. DEP'T EDUC., REVISED STATE TEMPLATE FOR THE CONSOLIDATED STATE PLAN 75–76 (2017); WASH DEP'T EDUC., WASHINGTON'S ESSA CONSOLIDATED PLAN 66–67 (2018).

116. *From the ECS State Policy Database: Accountability—Sanctions/Interventions*, EDUC. COMMISSION OF THE STATES <http://b5.caspio.com/dp.asp?AppKey=b7f93000695b3d0d5abb4b68bd14&id=a0y70000000CbISAAS> (last visited Sept. 25, 2018); *see e.g.*, FLA. STAT. §§ 1008.33(4)(b)(1)–(5) (2012) (allowing a school district to either take over the school, “[r]eassign students to another school,” close and reopen the school as a charter school, contract with a private management company, or any other model “that [has] a demonstrated record of effectiveness”); ILL. ADMIN. CODE tit. 23, §§ 1.85(e)(1)–(4) (2012) (“Each school restructuring plan shall indicate that the district is undertaking one or more of the following actions in the affected school: 1) reopening the school as a public charter school.”); MASS. GEN. LAWS ch. 69, § 1J(o) (listing sixteen possible actions that a superintendent may take with respect to a persistently low-performing school); MICH. COMP. LAWS § 380.1280c(2) (2011) (“The redesign plan shall require implementation of [one] of the [four] school intervention models that are provided for the lowest achieving schools under the federal incentive grant program . . . known as the ‘race to the top’ grant program.”); N.C. GEN. STAT. § 115C-105.37B(a) (2012) (stating that “the State Board of Education may authorize [a] local board of education to adopt” the transformation, restart, turnaround, or closure model).

cratic controls that choice was intended to render obsolete.<sup>117</sup> Thus far, the skeptics appear to have held the line. Although the nature and extent of accountability measures vary dramatically across a number of variables, chosen schools—especially private schools participating in choice programs—tend to be subject to far less extensive accountability regulation than traditional public schools.

### 1. Academic Accountability and Private-School Choice

All private-school-choice programs regulate the quality of schools by mandating certain predictive “inputs.” For example, all programs require, at a minimum, that participating private schools comply with state regulations of private schools generally. Many limit participation to accredited schools<sup>118</sup> and/or establish minimum qualification requirements for teachers<sup>119</sup>—usually a bachelor’s degree and/or substantial teaching experience.<sup>120</sup> A handful of programs establish basic curricular minimums beyond those required of nonparticipating private schools, such as civic and character education.<sup>121</sup> Many, but not all, private-school-choice programs also seek to hold participating schools accountable for certain academic outcomes. Many require participating schools to take either a state criterion-referenced or nationally normed standardized test and report the results to state regulators.<sup>122</sup> A number of programs also mandate that schools communicate with parents about students’ progress.<sup>123</sup>

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117. See David Stuit & Sy Doan, *School Choice Regulations: Red Tape or Red Herring?*, FORDHAM INST. (Jan. 2013), <https://edexcellence.net/publications/red-tape-or-red-herring.html>.

118. See SCHOOL CHOICE YEARBOOK, *supra* note 8, at 48 (Alabama), 55 (Arkansas); 60 (Georgia); 60 (Indiana); 64 (Iowa); 70 (Mississippi); 78 (North Carolina); 92 (South Carolina); 97 (Virginia); 100 (Wisconsin).

119. SCHOOL CHOICE YEARBOOK, *supra* note 8, at 80–84. (explaining that teacher certification is not required by any program, Ohio requires all schools participating in voucher programs to have a principal licensed by the state).

120. SCHOOL CHOICE YEARBOOK, *supra* note 8, at 57 (Florida); 60 (Georgia); 91 (Rhode Island); 98 (D.C.); 100 (Wisconsin).

121. SCHOOL CHOICE YEARBOOK, *supra* note 8, at 60 (Indiana); 66 (Louisiana); 74 (Nevada); 92 (South Carolina); 100 (Wisconsin).

122. SCHOOL CHOICE YEARBOOK, *supra* note 8, at 55 (Arkansas); 58 (Florida); 62 (Indiana); 66 (Louisiana); 73 (Montana); 74 (Nevada); 78 (North Carolina); 80 (Ohio); 98 (District of Columbia). Wisconsin requires high schools participating in the Milwaukee Parental Choice Program to administer the ACT and a civics exam, *id.* at 103, Ohio requires all students to take the state high-school graduation exam, *id.* at 80, and Alabama, North Carolina, and Virginia require schools participating in its scholarship tax credit program to report graduation rates to the state. *Id.* at 49, 78, 97.

123. SCHOOL CHOICE YEARBOOK, *supra* note 8, at 49 (Alabama); 58 (Florida); 71 (Mississippi); 73 (Montana); 78 (NC); 96 (Utah); 103 (Wisconsin).

Two states' voucher programs—Indiana and Louisiana—preclude schools falling below a certain performance threshold from accepting new scholarship students. In Indiana, all schools participating in the Choice Scholarship Program receive an A-F grade based upon student performance on the state exam. Schools receiving a D or an F for two or more consecutive years may not accept new scholarship students until the school's grade rises to a C or above for two years.<sup>124</sup> Each school participating in Louisiana's Student Scholarship for Educational Excellence Program receives a "scholarship cohort index" based upon performance on the states' exam. Schools must receive a score of fifty or above to remain eligible to admit new recipients.<sup>125</sup>

## 2. Academic Accountability and Charter Schools

Although charter schools are designated as public schools in all state statutes, they operate autonomously from local districts. In fact, they are considered their own school district—or "local education agency" in federal education parlance—in a majority of states.<sup>126</sup> To encourage educational innovation, states also automatically exempt charter schools from many state and local education regulations, including, importantly, teacher collective bargaining requirements and certain mandatory curriculum requirements.<sup>127</sup> That said, the accountability requirements in most state charter school laws are more comprehensive than those imposed upon schools participating in private-school-choice programs. For example, roughly half of state charter school laws require charter-school teachers to have the same licensure and certification as public-school teachers, a third require some percentage of teachers in a school to be certified (varying between thirty and ninety percent), and the remainder do not require licensure at all.<sup>128</sup> Especially af-

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124. SCHOOL CHOICE YEARBOOK, *supra* note 8, at 60.

125. SCHOOL CHOICE YEARBOOK, *supra* note 8, at 66.

126. NAT'L ALLIANCE FOR PUBLIC CHARTER SCHOOLS, *Measuring Up to the Model: A Ranking of State Charter School Laws* 11 (2016), [http://www.publiccharters.org/wp-content/uploads/2016/01/Model-Law-Final\\_2016.pdf](http://www.publiccharters.org/wp-content/uploads/2016/01/Model-Law-Final_2016.pdf).

127. *Id.* at 9 (summarizing state charter school requirements addressing these issues).

128. Teacher certification is a hotly contested issue in the charter-school context. While teacher unions demand universal teacher certification requirements across sectors, charter-school proponents object that teacher certification requirements disfavor (or preclude) schools from hiring highly qualified college graduates with subject matter expertise who lack education degrees. (Some state laws require a degree in education as a condition of certification.) Until recently, the federal charter-school program required schools to hire only certified teachers as a condition of receiving federal funds. Congress's decision to drop the certification requirement—known as the "highly qualified teacher requirement"—in ESSA was heralded as a victory by charter-school proponents. See Stephen Sawchuk, *ESSA*

ter the enactment of ESSA, most states require charter schools to undergo the same accreditation procedures as public schools,<sup>129</sup> to administer the same standardized tests,<sup>130</sup> to admit students based upon a randomized lottery if demand exceeds capacity,<sup>131</sup> and to serve at least some range of students with special needs in the same manner as public schools.<sup>132</sup>

Federal law also imposes accountability requirements on charter schools through the Charter Schools Program, which provides federal funds to states to create new charter schools, disseminate information about charter schools, replicate and expand high quality charter schools, and help find and fund facilities for charter schools.<sup>133</sup> In keeping with the devolution of authority for accountability to states, ESSA eliminated many of the conditions placed on charter school funding in NCLB, giving the states relatively broad autonomy to set their own accountability measures. ESSA further establishes charter school autonomy as a specific goal, prioritizing funding states that give charter schools operational autonomy and treat charter schools and traditional public schools equitably in terms of funding.<sup>134</sup> However, in exchange, ESSA requires that charter schools be treated the same as traditional public schools with respect to reporting regulations and prioritizes funding for states that adopt accountability policies that guarantee state over-

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*Loosens Reins on Teacher Evaluations, Qualifications*, EDUC. WEEK (Oct. 28, 2016), <https://www.edweek.org/ew/articles/2016/01/06/essa-loosens-reins-on-teacher-evaluations-qualifications.html>; *Charter Schools One Step Closer to Big Win with Senate Passage of ESSA*, NAT'L ALLIANCE FOR PUB. CHARTER SCHOOLS (Dec. 8, 2015), <http://www.publiccharters.org/press/charter-schools-step-closer-big-win-senate-passage-essa/>.

129. See Educ. Comm'n of the States, *Charter School Accountability Under ESSA 2* (May 2017), [https://www.ecs.org/wp-content/uploads/Charter\\_School\\_Accountability\\_Under\\_ESSA-1.pdf](https://www.ecs.org/wp-content/uploads/Charter_School_Accountability_Under_ESSA-1.pdf).

130. NAT'L ALLIANCE FOR PUB. CHARTER SCH., *CHARTER SCHOOL ACCOUNTABILITY* (April 2014), <http://www.publiccharters.org/wp-content/uploads/2014/04/Charter-Schools-are-Accountable.pdf>.

131. *Measuring Up to the Model*, *supra* note 126, at 11.

132. Charter schools serve fewer special needs students than public schools, and the question of why is hotly contested. While charter schools are bound by the Individuals with Disabilities Education Act (and private schools are not), the federal law allows states to make alternative arrangements for disabled children. While critics allege that charter schools intentionally exclude or expel disabled students disproportionately, see Stephani Blanchero & Caroline Porter, *Charter Schools Fall Short on Disabled*, WALL ST. J. (June 19, 2012), <https://www.wsj.com/articles/SB10001424052702303379204577477003893836734>, supporters argue that charter schools are less likely to diagnose students with minor learning disabilities, see Marcus A. Winters, *Why the Gap? Special Education and New York City Charter Schools*, MANHATTAN INST. (Sept. 30, 2013), <http://www.manhattan-institute.org/html/why-gap-special-education-and-new-york-city-charter-schools-5862.html>.

133. *Charter Schools Homepage*, U.S. DEP'T OF EDUC. (Oct. 16, 2015), <https://www2.ed.gov/about/offices/list/oii/csp/index.html?exp=6>.

134. James Davis O'Leary, *Revamp of Charter Schools Incentivizes Mostly the Right Things*, FLYPAPER BLOG (May 3, 2016), [http://edexcellence.net/articles/revamp-of-charter-schools-program-incentivizes-mostly-the-right-things#\\_ftn](http://edexcellence.net/articles/revamp-of-charter-schools-program-incentivizes-mostly-the-right-things#_ftn).

sight over charter-school performance.<sup>135</sup> Furthermore, ESSA gives the federal Department of Education more direct oversight to ensure that federal funds are only distributed to schools meeting the statute's definition of a "High Quality Charter School."<sup>136</sup> Importantly, states are required—as a condition of receiving funding through the federal Charter Schools Program—to report performance information about charter schools in the same way as traditional public schools, a requirement discussed in more detail below.<sup>137</sup> ESSA does not specifically mandate that any punitive steps be taken against failing charter schools, although states must intervene to address the performance of traditional public and charter schools scoring in the bottom five percent of state accountability metrics or falling below a sixty-seven percent graduation rate.<sup>138</sup>

A major distinction between accountability in charter-school programs versus private-school-choice programs is that all charter schools are—at least theoretically—at risk of being closed for underperformance. This is not the case in any private-school-choice program, although two programs (Indiana and Louisiana) do preclude struggling schools from accepting new scholarship recipients, as discussed above. Charter-school laws expose failing schools to closure in two ways: through the authorization process itself and, in a handful of states, through mandatory-closure laws. All charter schools are, by definition, subject to periodic review and renewal by charter authorizers since the terms of charters are limited, ranging from three to fifteen years.<sup>139</sup> In theory, authorizers can and should monitor charter-school performance and refuse to renew the charters of persistently failing schools, and a number of states require that all charters include performance-based criteria governing authorizer review of charter schools.<sup>140</sup> Concern that authorizers sometimes fail to monitor charter-school performance adequately has led a number of states to enact laws that either au-

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135. *Charter Schools and the Every Student Succeeds Act*, NAT'L ALLIANCE FOR PUB. CHARTER SCHOOLS (Jan. 7, 2016), [http://www.publiccharters.org/wp-content/uploads/2016/01/NAPCS\\_ESSA\\_Charter\\_Overview\\_Webinar\\_01.07.15.pdf](http://www.publiccharters.org/wp-content/uploads/2016/01/NAPCS_ESSA_Charter_Overview_Webinar_01.07.15.pdf) <http://www.publiccharters.org/wp-content/uploads/2016/04/NAPCS-ESSA-Overview-Webinar-3.10.2016.pdf>.

136. This definition turns on student proficiency, growth, and other academic indicators. *Id.*

137. *The Every Student Succeeds Act*, NAT'L ALLIANCE FOR PUB. CHARTER SCHOOLS (Jan. 19, 2016), <http://www.publiccharters.org/wp-content/uploads/2016/01/NAPCS-ESSA-CSP-Summary-and-Background-1-19-16.pdf>.

138. *Id.*

139. *50 State Comparison: Charter Schools*, EDUC. COMMISSION OF THE STATES (June 2014), <http://ecs.force.com/mbdata/mbquestNB2?rep=CS1401>.

140. *Measuring Up to the Model*, *supra* note 126, at 8, 10.

tomatically close persistently failing schools or require authorizers to do so.<sup>141</sup>

A second major distinction between accountability in the private-school choice and charter-school contexts is the question of *authorizer* accountability. Recall that charter schools are technically created by an agreement, a charter, between the authorizer and the school operator. These agreements, which are, as discussed above, reviewed periodically, set the basic operating procedures of a school, as well as the criteria that the authorizer will use to evaluate the school's performance. Authorizers are expected to provide oversight and technical assistance to the schools that they authorize and to ensure compliance with state and federal laws, in addition to the terms of the charter.<sup>142</sup> The regulation of authorizers is a highly contested issue in charter-school policy. While charter advocates strongly support laws permitting multiple authorizers,<sup>143</sup> critics express concern that states that permit a broad array of organizations to act as charter-school authorizers (for example, state charter boards, mayors, colleges and universities, and even non-profit entities) may invite "authorizer shopping," with subpar charter schools seeking the authorizer that will provide the least amount of scrutiny or switching authorizers to avoid closure.<sup>144</sup> Charter advocates strongly objected to federal regulations implementing ESSA, which calls for all charter authorizers to be treated the same as, and made subject to the same federal accountability requirements as, school districts.<sup>145</sup>

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141. The precise terms of these mandatory closure rules vary. See *50 State Comparison: Charter Schools – Does the State Set a Threshold Beneath which a School Must Automatically Be Closed?*, EDUC. COMM'N OF THE STATES (Jan. 2016), <http://ecs.force.com/mbdata/mbquestNB2?rep=CS1515>; Todd Ziebarth, *Automatic Closure of Low-Performing Public Charter Schools*, NAT'L ALLIANCE FOR PUB. CHARTER SCHOOLS (Sept. 2015), [http://www.publiccharters.org/wp-content/uploads/2015/10/policy\\_snapshot\\_autoclosure\\_web.pdf?x87663](http://www.publiccharters.org/wp-content/uploads/2015/10/policy_snapshot_autoclosure_web.pdf?x87663).

142. ANNENBERG INST. FOR SCH. REFORM, PUBLIC ACCOUNTABILITY FOR CHARTER SCHOOLS: STANDARDS AND POLICY RECOMMENDATIONS FOR EFFECTIVE OVERSIGHT 11 (2014), <http://annenberginstitute.org/sites/default/files/CharterAccountabilityStds.pdf>.

143. NAT'L ASS'N OF CHARTER SCH. AUTHORIZERS, POLICY GUIDE: MULTIPLE CHARTER AUTHORIZING OPTIONS (July 2009), [http://www.qualitycharters.org/wp-content/uploads/2015/11/PolicyGuide\\_MultipleCharterAuthorizingOptions\\_2009.07.pdf](http://www.qualitycharters.org/wp-content/uploads/2015/11/PolicyGuide_MultipleCharterAuthorizingOptions_2009.07.pdf).

144. LYRIA BOAST ET AL., NAT'L ASS'N OF CHARTER SCH. AUTHORIZERS, AUTHORIZER SHOPPING: LESSONS FROM EXPERIENCE AND IDEAS FOR THE FUTURE (2016), [http://www.qualitycharters.org/wp-content/uploads/2016/03/Authorizer\\_Shopping\\_Lessons\\_Ideas.pdf](http://www.qualitycharters.org/wp-content/uploads/2016/03/Authorizer_Shopping_Lessons_Ideas.pdf). In response to this concern, proponents of stronger accountability within the charter sector, including charter-school advocates and authorizers, have sought to focus on reforms that ensure that all authorizers are adequately funded and supervised. See, e.g., *Measuring up to the Model*, *supra* note 126.

145. ESEA of 1965, as Amended by ESSA—Accountability and State Plans, 81 Fed. Reg. 86,160 (Nov. 29, 2016), proposed for codification at 34 C.F.R. § 200.23(c)(1), reserved by 82 Fed. Reg. 31,696. "One commentator [on the regulation] asserted that the proposed regulation confused the roles of charter authorizers and charter operators, noting that authorizers are limited to monitoring school performance and using their nonrenewal and



#### IV. THE CHALLENGES OF ACCOUNTABILITY IN PARENTAL-CHOICE CONTEXTS

As previously discussed, the participation of poorly performing schools in charter-school and private-school-choice programs is arguably dissonant with what has become the central goal of parental choice: improving the quality of educational opportunities available to disadvantaged children. If parental choice is, in the words of Howard Fuller, a “rescue mission” to “save” students by empowering them to exit bad schools and enroll in good ones, permitting bad schools to be among the range of options available to participating students is deeply problematic. Using the law to hold chosen schools accountable for their academic results—to the point of closing failing charter schools and excluding persistently failing private schools from participating in parental-choice programs—can be seen as a policy imperative.

That said, significant public choice and institutional design challenges haunt accountability efforts in the parental-choice context. This Part discusses four of these challenges: First, public choice theory and lived experience suggest that proponents of traditional public schools may seek to use the mantra of “accountability” to control and/or suppress their competition. Second, the twin goals of parental-choice programs—to increase the number and quality of options available to disadvantaged students—come into tension in the accountability context. Third, selection-bias difficulties pervade efforts to compare the performance of students participating in parental-choice programs vis-à-vis their traditional public-school peers. Finally, most accountability metrics rely heavily on standardized test scores, which fail to capture important noncognitive indicators of school quality, including many that parents value highly.

##### *A. The Political Economy of Accountability Policies*

The first and perhaps most significant challenge to designing optimal accountability policies for chosen schools is politics. Both public choice theory and lived experience strongly suggest that the primary proponents of holding chosen schools accountable for their performance—and excluding failing schools from participating in parental-choice programs—are opponents of parental choice. Indeed, these opponents’ first line of argument is not that chosen schools should be held accountable for academic perfor-

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charter revocation authority to close low-performing schools, rather than providing support and intervention to such schools.” 81 Fed. Reg. 86, 160.

mance, but rather that charter schools and private-school choice programs should be dramatically limited or quashed altogether. Assertions that public funds should be invested exclusively in traditional public schools because parental choice “doesn’t work” pervade education policy debates.<sup>146</sup> Any study of a parental-choice program suggesting tepid or negative results presents an opportunity to bludgeon the very idea of parental choice, and examples of individual school failures inevitably are held up as an exemplar of the folly of parental choice.<sup>147</sup>

Relatedly, public-school proponents frequently argue that charter schools and private-school choice should be suppressed because these programs divert students and resources away from public schools.<sup>148</sup> Diane Ravitch, a former supporter of parental choice, dedicates her widely read blog to fighting “privatization” of public schools and the draining of public resources to charter and private schools through choice programs.<sup>149</sup> Others take a more conciliatory approach, while still insisting that accountability policies limit the competitive effect parental choice and charter schools have on traditional public schools. For example, in 2016, the Annenberg Institute for School Reform issued a report entitled *Public Accountability and Charter Schools*, that recommended that charter schools and district schools should be required to develop a citywide plan that ensures, among other things, that charter schools do not negatively affect district schools. The report further recommended that proposed charter schools be required to prepare and submit a report assessing the new schools’ effect on existing district schools. It also recommended that state departments of education be re-

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146. See, e.g., Valerie Strauss, *NAACP Sticks by its Call for Charter School Moratorium, Says They are “Not a Substitute” for Traditional Public Schools*, WASH. POST (July 26, 2017), [https://www.washingtonpost.com/news/answer-sheet/wp/2017/07/26/naacp-report-charter-schools-not-a-substitute-for-traditional-public-schools-and-many-need-reform/?utm\\_term=.7be03f5bb6ea](https://www.washingtonpost.com/news/answer-sheet/wp/2017/07/26/naacp-report-charter-schools-not-a-substitute-for-traditional-public-schools-and-many-need-reform/?utm_term=.7be03f5bb6ea).

147. See, e.g., Noah Smith, *School Choice Fails to Make a Difference*, BLOOMBERG VIEW (Feb. 12, 2016), <https://www.bloomberg.com/view/articles/2016-02-12/school-choice-lotteries-fail-to-make-a-difference>; Valerie Strauss, *Separating Fact from Fiction in 21 Claims about Charter Schools*, WASH. POST (Feb. 28, 2015), [https://www.washingtonpost.com/news/answer-sheet/wp/2015/02/28/separating-fact-from-fiction-in-21-claims-about-charter-schools/?utm\\_term=.a435f7b6b88c](https://www.washingtonpost.com/news/answer-sheet/wp/2015/02/28/separating-fact-from-fiction-in-21-claims-about-charter-schools/?utm_term=.a435f7b6b88c).

148. See, e.g., Natalie Hopkinson, *Why School Choice Fails*, N.Y. TIMES (Dec. 4, 2011), <http://www.nytimes.com/2011/12/05/opinion/why-school-choice-fails.html>.

149. See generally DIANE RAVITCH’S BLOG: A SITE TO DISCUSS BETTER EDUCATION FOR ALL, <https://dianeravitch.net/> (last visited Sept. 25, 2018). See also Sol Stern, *The Closing of Diane Ravitch’s Mind: A Once-Great Education Scholar Rejects Everything She Previously Believed*, CITY J. (Autumn 2013), <https://www.city-journal.org/html/closing-diane-ravitch%E2%80%99s-mind-13600.html>.

quired to conduct an annual assessment of the “cumulative impact of charter schools on traditional school districts.”<sup>150</sup>

Moreover, in education policy debates, calls for holding schools *accountable for academic performance* are often conflated with calls for holding chosen schools *accountable to local public schools*. For example, a recent report by the NAACP demanded “more robust charter-school accountability measures” demands that only public-school districts be permitted to authorize charter schools, that charter schools hire only certified teachers, and that state funding systems eliminate “the potential negative fiscal impacts on neighborhood schools of additional costs associated with charters,” among its recommendations.<sup>151</sup> The demands to limit authorization to public-school districts frequently is presented as a way to limit the “authorizer shopping” discussed previously.<sup>152</sup> Charter-school skeptics Preston Green, Bruce Baker, Joseph Oluwole, and Julie Mead have compared charter schools to the subprime mortgage crises, analogizing non-local authorizers to mortgage loan originators.<sup>153</sup>

The difficulty with the recommendation to limit authorization authority to school districts is that local school boards are usually reluctant to approve new charter schools that will compete with them. This reality is demonstrated by the fact that states that limit authorizer authority to local school boards have few charter schools. Compare, for example, two states with authorization limited to school districts—Iowa (3 charter schools) and Virginia (7 charter schools)—with two that decouple authorization and local control—Arizona (623 charter schools) and Ohio (384 charter schools).<sup>154</sup> In some cases, local school boards are quite forthcoming about the fact that the suppression of competition is a major factor in authorization decisions. In 2015, the Philadelphia School Reform Commission voted to authorize the first new charter schools since 2007. The hearings on thirty-nine charter applications lasted for hours and featured angry testimony on both sides. Parents lamented the lack of high-quality schools available to their kids and pointed to long charter waitlists, while public-school offi-

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150. ANNEBERG INST. FOR SCH. REFORM, PUBLIC ACCOUNTABILITY FOR CHARTER SCHOOLS: STANDARDS AND POLICY RECOMMENDATIONS FOR EFFECTIVE OVERSIGHT 4 (2014), <http://annenberginstitute.org/sites/default/files/CharterAccountabilityStds.pdf>.

151. NAACP TASK FORCE ON QUALITY EDUC., QUALITY EDUCATION FOR ALL. . . ONE SCHOOL AT A TIME 28 (July 2017), [http://www.naacp.org/wp-content/uploads/2017/07/Task\\_ForceReport\\_final2.pdf](http://www.naacp.org/wp-content/uploads/2017/07/Task_ForceReport_final2.pdf).

152. See *supra* note 143 and accompanying text.

153. See Preston C. Green III et al., *Are We Heading Toward a Charter School “Bubble”?: Lessons from the Subprime Mortgage Crisis*, 50 U. RICH. L. REV. 783 (2016).

154. Nat’l Ass’n of Charter Sch. Authorizers, *State-by-State Authorizer Data and Policy Information*, <http://www.qualitycharters.org/policy-research/state-policy-agenda/>.

cials expressed concern that the cash-strapped district could not afford to lose any students to new charter schools. By the time of the debate, the Governor of Pennsylvania and five of the six mayoral candidates called for a moratorium on charter schools until the district had solved its financial crisis. Governor Wolf lamented that he “continue[d] to believe that the district’s financial situation cannot responsibly handle the approval of new charter schools.” Ultimately, the Commission denied thirty-four of thirty-nine applications.<sup>155</sup>

Calls for greater democratic accountability over charter schools are about more than the suppression of competition, to be sure. For example, within the African-American community, charter schools are a bitterly divisive issue. Some reformers argue that charter-school policies effectively disenfranchise African-American communities by wresting control of public education from school boards; others see offering students choices outside traditional public schools as the best way to address the chronic mismanagement and woeful academic performance of urban public schools.<sup>156</sup> The former position was reflected by the NAACP report discussed above,<sup>157</sup> which in turn prompted strong negative reactions from other African-American leaders.<sup>158</sup> Even ardent supporters of parental choice have expressed concern about, in the words of Howard Fuller, the sense among many African Americans that the education reform happens “to us and not with us.”<sup>159</sup> This debate played out in a particularly vivid way in New Orleans, where a state entity, the Recovery School District, had wrested control of almost all public schools and, effectively, converted the city to an all-charter district after Hurricane Katrina. In 2016, the Louisiana legislature responded to the political pressure to restore local control of the New Orleans schools, passing legislation that will transfer supervision of the nearly all-charter district to the Orleans Parish

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155. *SRC approves five new charter schools*, PHILA. INQUIRER (Feb. 19, 2015), [http://www.philly.com/philly/education/20150219\\_SRC\\_approves\\_five\\_new\\_charter\\_schools.html](http://www.philly.com/philly/education/20150219_SRC_approves_five_new_charter_schools.html).

156. See, e.g., Anya Kamenz, *Questions of Race and Charter Schools Divide Education Reformers*, NPR.ORG (Sept. 30, 2016), <http://www.npr.org/sections/ed/2016/09/30/494606061/questions-of-race-and-charter-schools-divide-education-reformers>.

157. NAACP TASK FORCE ON QUALITY EDUC., *supra* note 151.

158. T. Willard Fair, *School Choice is Crucial for African-American Students’ Success*, USA TODAY (Sept. 21, 2017), <https://www.usatoday.com/story/opinion/2017/09/21/school-choice-crucial-african-american-students-success-t-willard-fair-column/665451001/>.

159. Jon Valant, *Charter Schools and Local Control in New Orleans*, BROWN CTR. CHALKBOARD (May 18, 2015), <https://www.brookings.edu/blog/brown-center-chalkboard/2016/05/18/charter-schools-and-local-control-in-new-orleans/>.

School Board by 2019—a move that has generated anxiety among choice proponents.<sup>160</sup>

The tensions in New Orleans, which have been building for over a decade, reflect broader political developments that may heighten the risk that accountability regulations may be employed to suppress parental choice. Until recently, a tacit political truce long existed between supporters of traditional public schools and proponents of charter schools. Charter schools were historically promoted as a modest and constrained version of parental choice and enjoyed broad bipartisan support. Within debates about educational finance, moderate reformers advocated charter schools as an alternative to private-school-choice programs, such as tax credits or vouchers.<sup>161</sup> In recent years, however, the truce between charter schools and public schools has unraveled as charter market share has grown, and public schools have faced enrollment declines as a result.<sup>162</sup>

Finally, and importantly, proponents of traditional public schools frequently advocate more stringent and more punitive accountability policies for charter schools and private schools than those governing public schools. Mandatory closure and exclusion policies are cases in point. For example, for all of the frustration generated by the NCLB accountability process, that law was always more carrot than stick. In theory, the law encouraged school districts to close persistently failing public schools. In practice, state and local officials usually eschewed more draconian measures such as closing and/or restarting persistently failing schools. While it is true that closing public schools for underperformance has been on the rise since NCLB, the available data suggests that forces other than NCLB, especially the economic and demographic realities facing many urban districts, are driving school closures.<sup>163</sup> In fact, under the NCLB regime, school closures and restarts were by far the *least popular* method of addressing failing schools, and the op-

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160. See Danielle Dreilinger, *New Orleans' Katrina School Takeover to End, Legislature Decides*, TIMES-PICAYUNE (May 5, 2016), [http://www.nola.com/education/index.ssf/2016/05/new\\_orleans\\_schools\\_reunify.html](http://www.nola.com/education/index.ssf/2016/05/new_orleans_schools_reunify.html).

161. See, e.g., JACK BUCKLEY & MARK SCHNEIDER, CHARTER SCHOOLS: HOPE OR HYPE 3 (2007).

162. See, e.g., Richard Whitmire, *Charter School War could go National: Governor Andrew Cuomo is Winning the Battle in New York, but What about Your State?*, USA TODAY (Apr. 1, 2014), <https://www.usatoday.com/story/opinion/2014/04/01/bill-de-blasio-cuomo-charter-schools-new-york-column/7158071/>.

163. On public school closure trends, see Nicole Stelle Garnett, *Disparate Impact, School Closures, and Parental Choice*, 2014 U. CHI. LEGAL F. 289, 290–93 (2014) [hereinafter “Garnett, *Disparate Impact*”].

tion of taking measures other than those specified in the law were the *most popular*.<sup>164</sup>

One of the reasons why NCLB resulted in so few school closures is that public-school proponents vehemently object to public schools closures on any ground, especially academic. Consider these examples: First, in 2012, *Mother Jones*, ran a feature-length article, *Everything You've Heard about Failing Schools is Wrong*, which argued that the standardized measures of student achievement are a farce and fail to capture the real positive trends in high-poverty schools.<sup>165</sup> The National Education Association has publicly stated that closing public schools—even persistently failing ones—harms students.<sup>166</sup> The conversion of failing public schools to charter schools, a reform strategy encouraged by federal and state law, is consistently characterized as a turnaround strategy that is doomed to fail.<sup>167</sup> Even school districts' decisions to close public schools on non-academic grounds, such as under-enrollment, inevitably spark controversy. When the Chicago Public Schools announced in 2013 that the district would close or consolidate more than fifty low-enrollment schools, weeks of protests ensued. Tellingly, the district insisted that it was not closing any of the schools for poor academic performance, although the school closure plan guaranteed all displaced students a spot in a higher-performing school.<sup>168</sup>

States with mandatory closure and exclusion policies for choice and charter schools impose far more draconian penalties. NCLB's

164. Although accurate data is difficult to obtain, these legal requirements apparently did not directly trigger many school closures. In 2007–2008, the Center on Education Policy found that 3,500 schools were “in” or “planning” “restructuring” as a result of NCLB. Unfortunately, the high percentage of districts opting to employ “other” restructuring options, rather than the four set forth in NCLB, makes it difficult to determine what, exactly, “restructuring” meant in any given context. CT. ON EDUC. POLICY RESEARCH, A CALL TO RESTRUCTURE RESTRUCTURING: LESSONS FROM THE NCLB ACT IN FIVE STATES (2008), <http://www.cep-dc.org/displayDocument.cfm?DocumentID=175>. A more recent report found that only fourteen states reported using the “closure” model and twelve using the “re-start” model (usually the conversion to a charter school) to address failing schools. SARAH YATSKO ET AL., CTR. ON REINVENTING PUB. EDUC., TINKERING TOWARD TRANSFORMATION 3 (2012).

165. Kristina Rizga, *Everything You've Heard about Failing Schools is Wrong*, MOTHER JONES (Aug. 22, 2012), <https://www.motherjones.com/media/2012/08/mission-high-false-low-performing-school/>.

166. See CTR. FOR RES. ON EDUC. OUTCOMES, 2 LIGHTS OFF: PRACTICE AND IMPACT OF CLOSING LOW-PERFORMING SCHOOLS 21–23 (2017), [http://credo.stanford.edu/pdfs/Closure\\_FINAL\\_Volume\\_II.pdf](http://credo.stanford.edu/pdfs/Closure_FINAL_Volume_II.pdf) (stating “in general and by sub-population, closures benefited the academic growth of students who landed in higher-performing schools but impaired the performance of students with equivalent or inferior school placement.”).

167. See, e.g., Eileen M. O'Brien & Charles J. Dervarics, *Which Way Up? What Research Says About School Turnaround Strategies*, CTR. FOR PUB. EDUC. 2–3, (May 2013), <http://www.centerforpubliceducation.org/Main-Menu/Policies/Which-Way-Up-At-a-glance/Which-Way-Up-Full-Report.pdf>.

168. See Nicole Stelle Garnett, *School Closures as Education Reform: New Evidence from Chicago and Ohio*, 9 J. SCH. CHOICE 649, 650 (summarizing policy).

now-defunct accountability regime exposed schools to the *possibility* of closure if they fell into the bottom five percent of overall performance for more than five years and gave district officials many options for addressing persistently failing schools other than closure.<sup>169</sup> The Obama administration's NCLB waiver policy also encouraged, but did not require, closing failing schools.<sup>170</sup> Similarly, most state education regulations merely list the closure of a persistently failing traditional public school (as well as, in appropriate cases, its conversion to a charter school) as an accountability option rather than dictate mandatory closure criteria.<sup>171</sup> School closures and charter conversions remain a last resort in most states, although some districts exercise these options when other methods of intervention fail.<sup>172</sup>

Although a majority of schools closed for underperformance over the last ten years have been traditional public schools,<sup>173</sup> low-performing charter schools have been more likely to close than low-performing traditional public schools.<sup>174</sup> Between 2006 and 2013, 5.5 percent of low-performing charter schools closed, compared to 3.2 percent of low-performing traditional public schools.<sup>175</sup> There are several explanations for this pattern. First, authorizers may be more vigilant than school districts in policing the quality of school because of reputational and institutional considerations. Second, authorizers may face less political pressure to keep failing schools open and/or exhibit more resistance to such pressure. Third, several states mandate closing (or require author-

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169. See Garnett, *Disparate Impact*, *supra* note 163, at 301–05.

170. *Id.* at 303.

171. See consolidated state plans cited *supra* note 115.

172. For example, one study of 100 school closures in Denver, Chicago, Hartford, and Pittsburgh between 2001 and 2007 found that academic performance generally was one of several factors influencing the districts' decisions to close schools, along with budgetary and enrollment considerations, and that district officials universally reported turning to closure as only after other efforts to improve performance failed. See LUCY STEINER, TOUGH DECISIONS: CLOSING PERSISTENTLY LOW-PERFORMING SCHOOLS 4 (2009), [http://www.centerii.org/survey/downloads/Tough\\_Decisions.pdf](http://www.centerii.org/survey/downloads/Tough_Decisions.pdf). A number of large urban districts, including New York City, Chicago, Detroit, Washington, D.C., and Philadelphia, have employed school closures aggressively as a tool to address academic underperformance. See Andy Smarick, *The Turnaround Fallacy: Stop trying to fix failing schools. Close them and start fresh*, 10 EDUC. NEXT 20, 21 (2010), <http://educationnext.org/the-turnaround-fallacy/>.

173. See CTR. FOR RESEARCH ON EDUC. OUTCOMES, 1 LIGHTS OFF: PRACTICE AND IMPACT OF CLOSING LOW-PERFORMING SCHOOLS 4 (2017), [http://credo.stanford.edu/pdfs/Closure\\_FINAL\\_Volume\\_1.pdf](http://credo.stanford.edu/pdfs/Closure_FINAL_Volume_1.pdf). (“Although the number of charter closures was smaller than that of TPS closures, the percentage of low-performing schools getting closed what higher in the charter sector than in the TPS sector.”)

174. *Id.*

175. *Id.* at 21.

izers to close) any persistently failing charter school,<sup>176</sup> a position that is now supported by both the leading association of charter schools and the leading organization representing charter authorizers.<sup>177</sup>

That said, closing failing schools appears most likely to boost student achievement only if the students exiting the closed schools subsequently enroll in higher-performing schools.<sup>178</sup> Unfortunately, the overall effects of closing schools, both charter and public, for low performance appear to be negative, in large part because a majority of students displaced by school closures land in schools that are lower-performing than their previous school.<sup>179</sup> This evidence strongly suggests the imperative of ensuring that accountability policies in charter and private-school-choice programs do not lead students to move from bad to worse educational environments. Accountability policies that hold chosen schools to a higher standard than traditional public schools increase the risk that they will.<sup>180</sup>

### B. More and Better Schools

As previously discussed, the animating goal of parental-choice policies is to improve students' academic prospects by increasing both the quality and quantity of educational options available to them. Accountability policies focus on the quality variable in the parental-choice equation: They are seeking to ensure that the choices available to participating students are good ones. Unfortunately, the goal of regulating the quality of students' choices can come into tension with the goal of increasing the quantity of options available. In calling for more comprehensive accountability regulations in charter-school and private-school-choice programs,

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176. See Educ. Comm'n of the States, *50-State Comparison: Charter Schools—Does the State Set a Threshold Beneath Which a School Must Automatically Be Closed?* (Jan. 2016), <http://ecs.force.com/mbdata/mbquestNB2?rep=CS1515>.

177. NAT'L ALLIANCE FOR PUB. CHARTER SCH., A MODEL LAW FOR SUPPORTING THE GROWTH OF HIGH-QUALITY CHARTER PUBLIC SCHOOLS 11 (2d ed. 2016), <http://www.publiccharters.org/publications/model-law-supporting-high-quality-charter-public-schools/>; NAT'L ASS'N OF CHARTER SCH. AUTHORIZERS, PRINCIPLES AND STANDARDS FOR QUALITY CHARTER SCHOOL AUTHORIZING (2015), [http://www.qualitycharters.org/wp-content/uploads/2015/08/Principles-and-Standards\\_2015-Edition.pdf](http://www.qualitycharters.org/wp-content/uploads/2015/08/Principles-and-Standards_2015-Edition.pdf). Automatic closures laws are not a feature of any private-school-choice program. However, as discussed previously, two states require the exclusion of persistently failing schools from further participation. See *supra* notes 124–125 and text accompanying notes.

178. See Ctr. for Res. on Educ. Outcomes, 2 LIGHTS OFF: PRACTICE AND IMPACT OF CLOSING LOW-PERFORMING SCHOOLS 21–23 (2017), [http://credo.stanford.edu/pdfs/Closure\\_FINAL\\_Volume\\_II.pdf](http://credo.stanford.edu/pdfs/Closure_FINAL_Volume_II.pdf).

179. *Id.*

180. See, e.g., Nicole Stelle Garnett, *School Closures as Education Reform: New Evidence from Chicago and Ohio*, 9 J. SCH. CHOICE 649 (2015) (reviewing evidence).



parental-choice proponents Chester Finn and Bruno Manno recently observed that there may be a “painful tradeoff” between quality and quantity in parental-choice programs, which is endemic to the “vexing reality . . . that market forces alone can’t reliably generate academic effectiveness.”<sup>181</sup>

Accountability proponents like Finn and Manno generally assume that, while accountability regulations may suppress the quantity of schools available to parents, the suppression of supply will be restricted on the tail end of the performance spectrum since the poorest-performing schools are those being excluded or closed. Unfortunately, this is not necessarily the case for two distinct reasons. The first reason, flagged above, is that stringent accountability policies may close or exclude schools that are struggling academically, but that also are *better* than the traditional public-school options available in a community. In this case, limiting the participation of bad charter and private schools may force some students into worse traditional public ones.

The second reason is that accountability policies may not only weed out poorly performing schools that are participating in choice programs but also may deter *high-performing* schools from entering publicly funded education markets because the operators of good schools may chafe at regulatory demands. Accountability policies advance the goal of *more and better schools* only if they succeed at weeding out bad schools without deterring the entrance of good ones.<sup>182</sup> This is no easy task, especially since there is evidence that anxiety about regulations (current and future) is one of the primary factors influencing school operators’ decisions whether to participate in a parental-choice program, or, in the case of charter schools, to open a school in a given jurisdiction. For example, in a recent randomized control study, researchers found that some regulations, including especially open-enrollment mandates and standardized testing requirements, dramatically reduced the expected participation of private schools by, respectively, seventy percent and forty-four percent.<sup>183</sup>

If one conceives of a parental-choice program as offering school operators a bargain—financial support in exchange for educating children and complying with program regulations—then the bur-

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181. Bruno V. Manno & Chester E. Finn, Jr., *A Progress Report on Charter Schools*, 24 NAT’L AFF. 3, 7 (2015).

182. See Brian Kisida et al., *Views from Private Schools: Attitudes about School Choice Programs in Three States*, American Enterprise Institute (Jan. 2015) at 13–18; cf. Amber M. Winkler & Chester E. Finn, Jr., *Is the Red Tape a Red Herring*, EDUC. NEXT (Jan. 30, 2013), <https://www.educationnext.org/is-the-red-tape-a-red-herring/>.

183. See Corey DeAngelis et al., *Do Voucher Regulations Reduce Anticipated Voucher Program Participation and School Quality?*, EDUC. NEXT (Oct. 29, 2018).

dens of the exchange must be properly calibrated with the benefits for school operators to accept the government's offer. If the regulatory burdens are too high—or the financial support too low—then some operators will decline to participate. This is particularly a problem in the private-school-choice context, where scholarship amounts tend to be only a fraction of the funding provided to charter and traditional public schools, often falling below private-school tuition and/or cost to educate.<sup>184</sup>

Moreover, higher-performing schools are more likely to pass on bad bargains. In the private-school-choice context, high-performing schools tend to have higher enrollments and sounder finances, so they do not need the infusion of public funds. In the charter-school context, the highest performing CMOs are actively recruited by multiple jurisdictions, and they reasonably favor those offering better bargains.<sup>185</sup> Unfortunately, lower-performing schools likely are more willing to accept bad bargains to sustain operations or fill empty seats. In speculating about the reason for the disappointing early results of the Louisiana voucher program, for example, researchers hypothesized that “it could be the case that a higher-quality set of private schools participated in earlier voucher and scholarship programs . . . in which more positive voucher experimental impacts were reported.” They further observed that “[l]ess than one-third of the private schools in Louisiana chose to participate in the LSP [the voucher program] in its first year, possibly because of the extensive regulations placed on the program by government authorities combined with the relatively modest voucher value relative to private-school tuition.”<sup>186</sup>

The regulatory anxieties of school operators pose a significant institutional design challenge. On the one hand, the risk that traditional public-school proponents will succeed in using the regulatory process to suppress and control their competitors is unquestionably a real one—as is the risk that anxieties about regulation will deter good schools' participation. On the other hand, some of the regulatory hesitations of chosen schools—for example, resistance to demands that they administer the same standardized

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184. Kisida et al., *supra* note 182, at 13–18.

185. See NAT'L ALLIANCE FOR PUB. CHARTER SCHOOLS ET AL., HOW TO RECRUIT HIGH-PERFORMING CHARTER MANAGEMENT ORGANIZATIONS TO A NEW REGION: RESULTS FROM THE 2015 CMO SURVEY 3–8 (2015), <https://www.excelined.org/wp-content/uploads/2017/11/ExcelinEd.HowToRecruitHighPerformingCharterManagementOrganizationsToANewRegion.March2016.pdf>.

186. Jonathan N. Mills & Patrick J. Wolf, *The Effects of the Louisiana Scholarship Program on Student Achievement After Two Years* 37–38 (Feb. 22, 2016), <http://www.uaedreform.org/downloads/2016/02/report-1-the-effects-of-the-louisiana-scholarship-program-on-student-achievement-after-two-years.pdf>.

tests as traditional public schools—complicate accountability efforts.<sup>187</sup> It is difficult to compare the performance of students in schools that administer different standardized tests, a challenge that is discussed in more detail below. Other sources of regulatory anxieties—for example, the demands for autonomy over enrollment, staffing and curriculum—can politically complicate efforts to enact and expand parental-choice programs.

### C. Selection Bias

Selection-bias concerns haunt all efforts to compare the performance of students across educational sectors. Opponents of parental choice frequently accuse private and charter schools of luring the best students away from traditional public schools and then taking credit for their success. Private schools and charter schools generally have more freedom to expel problematic students, as well. If such “cream skimming” occurs, then any “gains” resulting from parental choice are mere illusions: Transfer students who do better in private and charter schools do so because they are better students than the ones who remain behind.<sup>188</sup>

Whether, in fact, such cream skimming occurs is the subject of a vigorous debate. For example, there is some evidence that better educated, more motivated parents are more likely to take advantage of parental-choice opportunities.<sup>189</sup> On the other hand, as previously discussed, selection-bias concerns may run in both directions in the parental-choice context for a number of related reasons. To begin, at least in the urban public-school context, some research suggests that the cream may have already been skimmed. That is, many of the most motivated families have already exited struggling public schools, resulting in significantly reduced levels of within-school heterogeneity.<sup>190</sup> Second, as discussed previously, many elements of parental-choice programs may minimize selection-bias concerns and, indeed, may disadvantage choice

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187. See Kisida et al., *supra* note 182, at 12–18 (finding that twenty-five percent of school operators cited concerns about state testing requirements as an impediment to participation).

188. See, e.g., Joseph G. Altonji et al., *Estimating the Cream Skimming Effect of School Choice*, 123 J. POL. ECON. 266 (2015).

189. See, e.g., ANDREW D. CATT & EVAN RHINESMITH, WHY INDIANA PARENTS CHOOSE 16 (2017) (finding that better-educated parents found it easier to take advantage of choice opportunities in Indiana), <https://www.edchoice.org/wp-content/uploads/2017/09/Why-Indiana-Parents-Choose-2.pdf#page=18>.

190. Patrick Walsh, *Effects of School Choice on the Margin: The Cream is Already Skimmed*, 28 ECON. OF EDUC. REV. 227–36 (2007).

schools.<sup>191</sup> In some states, charter schools must, by law, be concentrated in urban centers.<sup>192</sup> Even when they are not required to do so, many charter schools choose to locate in disadvantaged communities to serve disadvantaged students. That is their mission.<sup>193</sup> In the private-school-choice context, virtually every program is either means-tested or limited to special needs children; a handful of programs are both means-tested and limited to students attending failing public schools or residing in failing schools' catchment boundaries.<sup>194</sup> These restrictions effectively limit eligibility for participation to students who are most likely to have fallen behind academically. Moreover, within the eligible group, parents may be more likely to seek alternatives for children who are not doing well in their current school—either because they are struggling academically or because they have developed behavioral issues. In either case, their chosen schools face the challenge of acculturating them to higher behavioral and academic expectations, as well as remediating past educational deficits.

#### D. *Practical Limits of Empirically Driven Accountability Policies*

Finally, most accountability policies rely heavily, if not exclusively, upon standardized test scores. As opponents of parental choice readily acknowledge in other contexts, these measures fail to capture many important indicia of school quality, including noncognitive educational skills (for example, character, generosity, and resiliency) and achievements (for example, high school graduation and college matriculation and persistence) that predict long-term success better than test scores do. Cognitive measures of student performance at a school are, moreover, only one factor influencing a parent's assessment of its quality. While the available evidence suggests both that parents participating in choice programs are more informed about their children's schools than non-

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191. See Dennis Epple & Richard Romano, *Educational Vouchers and Cream Skimming*, 40 INT'L ECON. REV. 1395 (2008).

192. *Are There Caps on the Growth of Charter Schools in this State?*, NAT'L ALLIANCE FOR PUB. CHARTER SCHOOLS, <https://www.publiccharters.org/our-work/charter-law-database/components/1> (Michigan, Missouri, New Mexico, Ohio, and Oklahoma) (last visited Oct. 23, 2018).

193. For example, the KIPP Charter Schools "aim to educate students in educationally underserved communities." Ninety-five percent of the nearly ninety-six thousand students attending a KIPP school are African American or Latino, and eighty-eight percent qualify for federal free or reduced price lunch. KIPP NATIONAL REPORT CARD (2017), <http://www.kipp.org/results/national/#question-1-are-we-serving-the-children-who-need-us>.

194. See *generally* SCHOOL CHOICE YEARBOOK, *supra* note 8 (listing these characteristics in programs across the country for the 2015–2016 school year).

participants and that they value school quality, it also suggests that parents consistently consider factors other than test scores (including school culture, extra-curricular activities, after-school care, safety, discipline, proximity, and high school graduation rates) along with academic achievement scores when explaining why they chose their children's schools.<sup>195</sup> In the private-school-choice context, some evidence suggests that a religious learning environment is an important factor influencing parental choice, especially among lower-income parents.<sup>196</sup>

Moreover, the tests used to measure the cognitive aspects of student performance often are themselves deeply flawed. Decades of research suggests that standardized tests may include unintended cultural biases that may benefit more affluent, white students.<sup>197</sup> NCLB required state accountability regimes to rely upon tests designed to measure whether students achieved "proficiency" in certain state-determined learning goals.<sup>198</sup> Unfortunately, state curricular standards—and the tests measuring proficiency against those standards—varied dramatically both in terms of content and rigor. This reality that provided the initial impetus for the development of the controversial Common Core State Standards.<sup>199</sup> More recently, ESSA gave states latitude to move away from state-criteria-referenced exams, and the state ESSA plans, discussed below, indicate more than half have chosen to do so.<sup>200</sup> Only time will tell whether these alternatives prove superior to the NCLB testing regimes.

Even in states with rigorous academic expectations and well-designed tests, measures of "proficiency" can mask important dif-

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195. See generally Heidi Holmes Erickson, *How Do Parents Choose Schools, and What Schools Do they Choose? A Literature Review of Private School Choice Programs in the United States*, 11 J. SCH. CHOICE 491, 497–501 (2017). See also DOUGLAS N. HARRIS & MATTHEW F. LARSEN, EDUC. RESEARCH ALL. FOR NEW ORLEANS, *WHAT SCHOOLS DO FAMILIES WANT (AND WHY)?* (2015), <http://educationresearchalliancenola.org/files/publications/ERA1402-Policy-Brief-What-Schools-Do-Families-Want-3.pdf>.

196. See, e.g., Thomas B. Fordham Institute, *What Parents Want: Education Preferences and Trade-Offs* (Aug. 2013), [https://edex.s3-us-west-2.amazonaws.com/publication/pdfs/20130827\\_What\\_Parents\\_Want\\_Education\\_Preferences\\_and\\_Trade\\_Offs\\_FINAL.pdf](https://edex.s3-us-west-2.amazonaws.com/publication/pdfs/20130827_What_Parents_Want_Education_Preferences_and_Trade_Offs_FINAL.pdf); CATT & RHINESMITH, *supra* note 189, at 28–29 (finding that parents participating in Indiana's voucher and tax credit scholarship programs ranked "religious environment and instruction," "safe environment," "moral/character/values instruction," along with "academic quality," as among the most important factors influencing school selection), <https://www.edchoice.org/research/indiana-parents-choose/>.

197. See, e.g., Valerie Strauss, *34 Problems with Standardized Tests*, WASH. POST (Apr. 19, 2017), <https://www.washingtonpost.com/news/answer-sheet/wp/2017/04/19/34-problems-with-standardized-tests>.

198. See *supra* notes 95–98 and text accompanying notes.

199. National Governors Association et al., *Benchmarking for Success: Ensuring U.S. Student Receive a World-Class Education* 24 (2008), <https://www.edweek.org/media/benchmarking%20for%20success%20dec%202008%20final.pdf>.

200. See *supra* note 107 and text accompanying note.

ferences between schools. Consider, for example, two schools with identical proficiency levels—say, fifty percent. If seventy-five percent of the students at one of the schools were significantly below proficiency the previous year, while student scores at the second school remained stable, then it would be reasonable to give the first school a higher accountability rating. For this reason, most academic studies comparing the performance of schools focus on student growth rather than proficiency.<sup>201</sup> While ESSA requires that states measure and report school quality using both growth as well as proficiency, regulators are frequently elusive and opaque about the details of growth determinations.<sup>202</sup>

## V. OPTIMAL ACCOUNTABILITY FOR CHOSEN SCHOOLS

If the goal of accountability regulations in the parental-choice context is to ensure that parents *only have good choices to make*, these complexities dramatically complicate regulatory design efforts. If, on the other hand, the goal of accountability regulations in the parental-choice context is to *help parents make good choices*, then the complexities are not insurmountable. Indeed, regulations in parental-choice programs, designed with potential complications in mind, can empower parents to serve the accountability function that early advocates assumed that they would. By choosing wisely, parents can drive improvements not only in their own child's performance, but also in school quality overall, limiting the need for punitive regulatory interventions.

To advance this goal, accountability regulations must satisfy two criteria. First, accountability regulations must arm parents with the information they need to make wise choices for their kids, which means that information about school quality must be transparent,

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201. See, e.g., Matthew Chingos, *Why the Proficiency v. Growth Debate Matters for Assessing School Performance*, URBANWIRE: EDUC. & TRAINING (Jan. 18, 2017), <https://www.urban.org/urban-wire/why-proficiency-versus-growth-debate-matters-assessing-school-performance>; Michael J. Petrilli & Aaron Churchill, *Why States Should Use Growth, and not Proficiency Rates, When Gauging School Effectiveness*, FLYPAPER (Oct. 13, 2016), <https://edexcellence.net/articles/why-states-should-use-student-growth-and-not-proficiency-rates-when-gauging-school>; Morgan Polikoff, *Proficiency vs. Growth: Toward a Better Measure*, FUTUREED (Mar. 20, 2017), <https://www.future-ed.org/work/proficiency-vs-growth-toward-a-better-measure/>.

202. See COUNCIL OF CHIEF STATE SCH. OFFICERS, CONSIDERATIONS FOR INCLUDING GROWTH IN ESSA STATE ACCOUNTABILITY SYSTEMS 11 (2017) (emphasizing need for clarity in growth measures), [https://www.nciea.org/sites/default/files/pubs-tmp/CCSSO\\_Growth\\_Resource.pdf](https://www.nciea.org/sites/default/files/pubs-tmp/CCSSO_Growth_Resource.pdf). For information on ESSA accountability implementation generally, see Brandon L. Wright & Michael J. Petrilli, *Rating the Rating: An Analysis of the 51 ESSA Accountability Plans* (Nov. 2017), <http://edex.s3-us-west-2.amazonaws.com/publication/pdfs/11.15%20-%20Rating%20the%20Ratings%20-%20An%20Analysis%20of%20the%2051%20ESSA%20Accountability%20Plans.pdf>.

readily available, easy to interpret, and matched, to the greatest extent possible, with the indicia of school quality that matter to parents in the real world. Second, accountability regulations must promote educational pluralism. Accountability regulations should aim to expand the number and variety of schooling options available to parents, to provide them with more and better schools. In most cases, the best way to advance this goal is by attracting good schools to choice markets, rather than by forcing bad ones to exit them. While the exclusion of persistently failing schools from choice markets is perhaps a necessary element of an accountability regime, it should not be the primary element. The long history of accountability efforts in the United States demonstrates both that punitive government regulations rarely drive school improvement and that closing bad schools works as a reform only when better options are available. The remainder of this essay suggests a few broad design elements that can help accountability regulations accomplish these goals.

#### A. *Encourage Transparency*

The central goal of accountability in the parental-choice context should be encouraging transparency. After all, parents need information to make informed decisions for their children. Going forward, transparency will primarily be a concern in the private-school-choice context, in large part because ESSA promises to increase the accessibility of school-quality information for charter schools. While ESSA and the U.S. Department of Education regulations implementing it allow states to choose their own research-based indicators of academic success, it also requires states to disaggregate and report data on student progress by demographic subgroups to ensure that disadvantaged groups make adequate progress. ESSA further requires states to issue an annual report card on every public school, including charter schools. While NCLB also required school report cards, ESSA requirements are different. NCLB report cards included state assessment results, the percentage of students not tested, graduation rates and adequate yearly progress measures. ESSA mandates that report cards include information about student achievement on the state's chosen test, at least one other academic measure (student growth for elementary schools and four-year graduation rates for high schools), progress toward English proficiency for English language learners, and the other indicators of school quality and student success discussed

above.<sup>203</sup> The ESSA-mandated reporting requirements also include exclusionary disciplinary and chronic absenteeism rates, as well as disaggregated rates of students who graduate from high school and enroll in higher education.<sup>204</sup> The federal regulations implementing ESSA further require that report cards for charter schools include a comparison of demographic and achievement data for each charter school and the district and neighborhood in which it is located.<sup>205</sup>

To be sure, ESSA's reporting requirements do not guarantee informed choices. To begin, the meaning of student achievement scores, especially those disaggregated at the school level, is not always evident. While nationally normed tests tend to report relatively straightforward percentile scores, the meaning of scores on the criteria-referenced tests can be unclear.<sup>206</sup> Most reports employ tiers of performance without clear meaning (such as, "not proficient," "approaching proficient," "proficient," and "above proficient," or, in the author's home state of Indiana, "did not pass," "pass" and "pass plus"). The Partnership for Assessment of Readiness for College and Careers (PARCC) test, which a number of states have opted to use as the basis for the academic assessments required by ESSA, reports scores in five "levels," along with information suggesting students' and their school's performance relative to the district and state.<sup>207</sup> And, measures of student growth, which are arguably more important than raw achievement scores as a school-quality, are even more difficult to understand. The standard means of reporting growth, a percentile score comparing a given student's performance to other students with a similar prior test score, provides a rough snapshot of student progress that masks enormous statistical complexity.<sup>208</sup> Measures of aggregate school quality in state accountability regimes are both frustratingly

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203. See Daarel Burnette II, *ESSA Brings User-Friendly Makeover of State Report Cards*, EDUC. WEEK (Oct. 20, 2017), <https://www.edweek.org/ew/articles/2017/10/25/essa-brings-user-friendly-makeover-of-state-report.html>.

204. See Jessica Pointer, *How Will ESSA Change Ohio's School Report Cards?*, EDEXCELLENCE (June 13, 2016), <https://edexcellence.net/articles/how-will-essa-change-ohio%E2%80%99s-school-report-cards>.

205. Elementary and Secondary Education Act of 1965, *amended by the Every Student Succeeds Act-Accountability and State Plans*, 81 Fed. Reg. 86,076, 86,175-76 (Nov. 29, 2016).

206. For a description of nationally normed versus criterion referenced tests, see *What's the Difference? Criterion-Referenced Tests Vs. Norm-Referenced Tests*, RENAISSANCE <https://www.renaissance.com/2018/07/11/blog-criterion-referenced-tests-norm-referenced-tests/> (last visited Sept. 25, 2018).

207. Score Report Guide, UNDERSTAND THE SCORE, <http://www.understandthescore.org/wp-content/uploads/2015/09/UTS-Sample-Full-Score-Rpeort.compressed.pdf>.

208. See Reform Support Network, *Emerging Approaches to Measuring Student Growth* (Aug. 2015), at 2, <https://www2.ed.gov/about/inits/ed/implementation-support-unit/tech-assist/emergaprotomeasurstudgrowth.pdf>.



opaque and moving targets. For examples, most states use either an A-F school grading system or a numerical index to report overall school quality. The overall school score often aggregates numerous factors (in some cases dozens) in a statistically complex way, making it difficult for parents and schools to interpret.<sup>209</sup> Currently, it is unclear how states report their “noncognitive” measures of school quality or how these measures will be combined with others and captured in aggregate scoring of school quality.

Despite these difficulties, available school-quality information about charter schools and traditional public schools is far more readily accessible to parents than information about private schools participating in parental-choice programs. Although many programs require participating schools to administer a standardized test and, in some cases, to report the results to regulators, these results are often not publicly available. There are four exceptions: In Wisconsin, all public schools and schools participating in the voucher program participate in the state accountability system and receive the same report cards.<sup>210</sup> In Indiana, all private schools participating in the state’s voucher program, but not scholarship tax credit program, are subject to the same academic accountability measures as traditional public schools and charter schools. That is, they must administer the state assessment, which forms the foundation of an A–F letter grade, along with several other measures including growth.<sup>211</sup> Two other states, Louisiana and Ohio, report information about the performance of students participating in choice programs, but not non-participating students in the same school. In Louisiana, every school accepts more than ten scholarship students is assigned a Scholarship Cohort Index (SCI) on a 150-point scale. The SCI in K-6 schools is based solely upon the performance of the scholarship students on the Louisiana Educational Assessment Program (LEAP) test. In K-8 schools, five percent of the score includes a measure intended to capture high school readiness. In high schools, the scores are based upon a mix of graduation rates, state test scores, and ACT scores.<sup>212</sup> In

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209. See, e.g., IND. DEP’T EDUC., HOW TO CALCULATE GRADES (Apr. 27, 2016), <https://www.doe.in.gov/sites/default/files/accountability/how-calculate-f-school-grades-04-27-2016.pdf>; ARIZ. DEP’T EDUC., ARIZONA 2016-2017 K-8 A-F SCHOOL ACCOUNTABILITY PLAN (Apr. 24, 2017), [https://azsbe.az.gov/sites/default/files/media/FINAL%20A-F%20Plan\\_2.pdf](https://azsbe.az.gov/sites/default/files/media/FINAL%20A-F%20Plan_2.pdf); OKLA. DEP’T EDUC., A TO F REPORT CARD CALCULATION GUIDE (Sept. 29, 2015), <http://sde.ok.gov/sde/sites/ok.gov.sde/files/documents/files/AtoFReportCardGuide.pdf>.

210. WISC. DEP’T OF PUB. INSTRUCTION, ABOUT WISCONSIN ACCOUNTABILITY, <https://dpi.wi.gov/accountability> (last visited Sept. 25, 2018).

211. IND. DEP’T OF EDUC., INDIANA CHOICE SCHOLARSHIP PROGRAM, <https://www.doe.in.gov/choice> (last visited Sept. 25, 2018).

212. LA. DEP’T OF EDUC., LOUISIANA NON-PUBLIC SCHOOL CHOICE 2015 ANNUAL REPORT CARD 9–10 (2015), <https://www.louisianabelieves.com/docs/default-source/school-choice/>

Ohio, private schools participating in one of the state's voucher programs are required to administer the state's assessment test, but non-participating students may opt out. The state department of education reports proficiency rates for all tested students as well as voucher recipients for each school.<sup>213</sup> Both the Louisiana Scholarship Cohort Index and the student assessment results reported in Ohio are imperfect measures of school quality, however, because only voucher recipients must take the test.<sup>214</sup>

The fact that so few states require private schools participating in school choice programs to make achievement data available publicly likely reflects a political reality: Proponents of private-school choice have not prioritized—and in some cases have resisted—efforts to condition participation in these programs on disclosure of the kinds of data required of public schools. Private schools have traditionally been exempted from state accountability requirements. Over time, the increased transparency required of public and charter schools by ESSA may incentivize more private schools to release achievement data voluntarily, but private schools' continued anxieties about transparency may continue to fuel resistance to mandatory disclosure. It is therefore possible that efforts to mandate disclosures of the kind required by ESSA will face political opposition, but also that imposing these requirements may dissuade some private schools from participating in private-school-choice programs.<sup>215</sup> One survey of private schools in parental-choice states found that twenty-one percent of the schools opting *not* to participate listed mandatory disclosure of test results as a reason for eschewing participation.<sup>216</sup>

Given these realities, as an alternative, states might opt to incentivize rather than mandate disclosure. For example, rather than mandating that schools participating in private-school-choice programs conform to the disclosure regimes required of public and

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2015-louisiana-nonpublic-school-choice—annual-report.pdf; LA. DEP'T OF EDUC., LOUISIANA SCHOLARSHIP PROGRAM PARTICIPATION GUIDE 18 app. C (July 2018), <https://www.louisiana-believes.com/docs/default-source/school-choice/scholarship-program-participation-guide.pdf>.

213. OHIO DEP'T OF EDUC., TEST SCORES FOR VOUCHER STUDENTS, <http://education.ohio.gov/Topics/Other-Resources/Scholarships/Test-Scores-for-Voucher-Students> (last visited Sept. 25, 2018).

214. *How to Understand School Performance Scores and Grades*, LENS, <http://thelensnola.org/how-to-understand-school-performance-scores-and-grades/> (last visited Sept. 25, 2018) (explaining the public school performance score; the SCI is calculated in the same way but limited to scholarship recipients); *see also* JESSICA POINTER, THOMAS B. FORDHAM INST., OHIO'S VOUCHER PROGRAM: AN OVERVIEW 10 (Feb. 2017), <http://edex.s3-us-west-2.amazonaws.com/publication/pdfs/Vouchers%20in%20Ohio%20whitepaper%20published%202-16-17.pdf>.

215. *See* Stuit & Doan, *supra* note 117, at 25.

216. *Id.* at 26.

charter schools, states might provide financial incentives to encourage disclosure. States might offer modestly higher scholarship amounts for students attending schools that agree to disclose information about student achievement, or, alternatively, expand the income eligibility range for participation in parental-choice programs for students attending such schools. In other words, states could, permit these schools to accept moderate-income, as well as low-income, students. Another option would be for states to make the public-school accountability regime a default rule for all participating schools, but permit schools to opt out if they adopt transparency practices that conform to certain minimal standards.<sup>217</sup> Since private schools have not traditionally administered state tests, providing the option of trading greater transparency for flexibility in assessment may be attractive to many school leaders, especially if the alternative is participation in the state assessment regime.

### B. *Permit Flexibility*

As discussed previously, ESSA gives states the autonomy to select the criteria that they will use to assess school quality. ESSA, however, requires that states use the same assessment criteria for both public and charter schools and mandates transparent reporting of the results of school assessments. Neither requirement, however, applies to private schools, including schools participating in parental-choice programs. As a result, states are free to give private schools flexibility in selecting their own assessment measures, and most do so. Currently, four states—Indiana, Ohio, Louisiana, and Wisconsin—and the District of Columbia require all students participating in voucher programs to take the state tests. Only Indiana requires schools to administer the test to non-participants, and only Indiana and Louisiana penalize schools with persistently poor performance on the tests.<sup>218</sup> Eight states allow private schools participating in choice programs to choose between administering state assessments or a nationally normed test. The remaining pa-

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217. See IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 158–62 (Donald R. Harris et al. eds., 1995) (discussing regulatory default rules).

218. See Stuit & Doan, *supra* note 117, at 34–36; see also WISC. DEP'T OF PUB. INSTRUCTION, *ASSESSMENT REQUIREMENTS FOR SCHOOLS PARTICIPATING IN THE MILWAUKEE PARENTAL PROGRAM, RACINE PARENTAL CHOICE PROGRAM, AND WISCONSIN PARENTAL CHOICE PROGRAM*, <https://dpi.wi.gov/assessment/parental-choice-program> (last visited Sept. 25, 2018).

rental-choice states do not require participating private schools to administer standardized tests.<sup>219</sup>

The goal of promoting transparency among private schools is linked to the willingness to permit a range of assessments. Many private schools object to state testing mandates. They assert that state testing mandates will force them to align with state exams, which may unduly constrain their ability to innovate and differentiate themselves from other schools. Moreover, since private schools do not always adhere to state curricular requirements, student performance on state exams is not necessarily an accurate reflection of student achievement and progress.<sup>220</sup>

The principal challenge of permitting multiple tests is comparative: Since traditional public and charter schools must use the same assessment, “apples to apples” comparisons across schools and sectors are possible. These comparisons, which allow regulators and parents, if the results are made public, to understand student achievement across the educational system, become impossible if private schools opt for other assessment devices or none at all. For example, nationally normed tests report percentile scores that compare other test takers to one another rather than measuring student “proficiency” on items and concepts included in a standard state curriculum. There are significant tradeoffs, however, including the risk that requiring the administration of state-mandated exams may deter participation in parental-choice programs.<sup>221</sup>

A compromise position would be to permit private schools to choose the researched-based testing regime of their choice but require the public reporting of results, ideally for all children enrolled in a school and not just those participating in the program. While multiple testing regimes complicates comparisons across sectors and between private schools administering different tests, a transparency requirement will empower parents with far more information than is currently available publicly while preserving schools’ curricular autonomy. Moreover, over time, the “apples-to-oranges” challenges may diminish as more states opt for national rather than state tests. ESSA proposals submitted in the fall of 2017 suggests that a number of states already are eschewing state-

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219. Stuit & Doan, *supra* note 117, at 15.

220. See generally NAT’L CONFERENCE OF STATE LEGISLATURES, ACCOUNTABILITY IN PRIVATE SCHOOL CHOICE PROGRAMS (Dec. 2014), <http://www.ncsl.org/documents/educ/AccountabilityInPrivateSchoolChoice.pdf>.

221. Moreover, since private schools were also exempt from the NCLB’s accountability regime, many have never adhered to the state curricular requirements tested on criteria-referenced tests, skewing proficiency levels downward. See THOMAS B. FORDHAM INST., PUBLIC ACCOUNTABILITY AND PRIVATE SCHOOL CHOICE 9 (Jan. 2014), <https://edexcellence.net/publications/public-accountability-private-school-choice>.

criterion-referenced assessments. Twenty-one states have opted to use one of two tests based upon the Common Core Standards (PARCC test or the Smarter Balanced Assessment Consortium test); fourteen states plan to use the National Assessment of Educational Progress test for at least some grades; and twenty-two states will administer the ACT or SAT tests to assess high schoolers' performance.<sup>222</sup>

### C. Develop Alternative Measures of School Quality

A related goal for all accountability regulations should be for states to focus on developing tools to measure school quality other than student test scores and incentivizing chosen schools to report their performance based on these factors. ESSA requires states to employ at least one non-test-score-based method of school quality. States have opted for a range of measures including, *inter alia*, chronic absenteeism,<sup>223</sup> access to a diverse curriculum;<sup>224</sup> rigor of

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222. See U.S. DEP'T OF EDUC., ESSA STATE PLAN SUBMISSION, <https://www2.ed.gov/admins/lead/account/stateplan17/statesubmission.html> (providing links to individual state plans).

223. Thirty-three states, Puerto Rico, and Washington, D.C., have included some form of measuring absenteeism as an indicator, with many of those states using it as their only indicator. See *generally id.* (listing Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Dakota, Virginia, Washington, West Virginia, Wisconsin, and Washington, D.C.). Oregon and Tennessee measure teacher chronic absenteeism in the same way as student absenteeism. OR. DEP'T EDUC., OREGON'S CONSOLIDATED STATE PLAN UNDER THE EVERY STUDENT SUCCEEDS ACT 46 (2017), <https://www2.ed.gov/admins/lead/account/stateplan17/orconsolidatedstateplan.pdf>; TENN. DEP'T EDUC., EVERY STUDENT SUCCEEDS ACT: BUILDING ON SUCCESS IN TENNESSEE 61 (2017), <https://www2.ed.gov/admins/lead/account/stateplan17/tnconsolidatedstateplan817.pdf>.

224. See, e.g., CONN. STATE DEP'T OF EDUC., CONNECTICUT CONSOLIDATED STATE PLAN UNDER THE EVERY STUDENT SUCCEEDS ACT 41 (2017) (including measures for fine arts and physical education), <https://www2.ed.gov/admins/lead/account/stateplan17/ctconsostateplan.pdf>; GA. DEP'T OF EDUC., EDUCATING GEORGIA'S FUTURE: GEORGIA'S STATE PLAN FOR THE EVERY STUDENT SUCCEEDS ACT, 33–34 (2017), <https://www2.ed.gov/admins/lead/account/stateplan17/gaconsolidatedstateplan.pdf> (measures include the number of students who received a passing grade in fine arts, world language, physical education/health, and career exploration); LA. DEP'T OF EDUC., LOUISIANA'S ELEMENTARY & SECONDARY EDUCATION PLAN PURSUANT TO THE FEDERAL EVERY STUDENT SUCCEEDS ACT 45 (2017) (including access to arts education, physical education, foreign language classes, and more), <https://www2.ed.gov/admins/lead/account/stateplan17/lastateplan882017.pdf>; MD. STATE DEP'T OF EDUC., MARYLAND EVERY STUDENT SUCCEEDS ACT (ESSA) CONSOLIDATED STATE PLAN 26 (2017) (measuring enrollment in science, social studies, fine arts, physical education and health at the elementary level, fine arts, physical education, health and computation learning at the middle school level, and completion of Advanced Placement and International Baccalaureate classes at the high school level), <https://www2.ed.gov/admins/lead/account/stateplan17/mdconsolidatedstateplan.pdf> [hereinafter Maryland State Plan]; N.Y. DEP'T OF EDUC., REVISED STATE TEMPLATE FOR THE CONSOLIDATED STATE PLAN 61 (2017)

high school curriculum;<sup>225</sup> post-secondary enrollment and persistence;<sup>226</sup> and, in a handful of states, measures of school climate<sup>227</sup> and parental satisfaction.<sup>228</sup> Interestingly, despite significant ongoing efforts to incorporate character education, as well as social and emotional learning competencies, into public-school curricula,<sup>229</sup> no state opted to employ measures of them, at least in the short term, to satisfy ESSA.<sup>230</sup> A few states' ESSA plans included among long-term goals the measurement of social and emotional learning, but the criteria for such measures have yet to be determined.<sup>231</sup>

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(indicating future plans to adopt a measure of art education, music education, and physical education), <https://www2.ed.gov/admins/lead/account/stateplan17/nyconsolidatedstateplan.pdf>.

225. At least nineteen states have included in their plans an indicator measuring access to Advanced Placement (AP) and International Baccalaureate (IB) classes. *See generally* U.S. DEP'T EDUC., *supra* note 222 (Arkansas, Connecticut, Delaware, D.C. Georgia, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Montana, New Mexico, New York, Ohio, Oklahoma, South Carolina, Texas, Vermont and Washington); *see also* SAMANTHA BATEL, CTR. FOR AM. PROGRESS, MEASURING SUCCESS: AN OVERVIEW OF NEW SCHOOL CLASSIFICATION INDICATORS UNDER ESSA 6–7 (2017).

226. *See* CONN. DEP'T OF EDUC., CONNECTICUT CONSOLIDATED STATE PLAN UNDER THE EVERY STUDENT SUCCEEDS ACT 39, 41 (2017); MICH. DEP'T OF EDUC., MICHIGAN'S CONSOLIDATED STATE PLAN UNDER THE EVERY STUDENT SUCCEEDS ACT 34 (2017); N.Y. DEP'T OF EDUC., REVISED DATE TEMPLATE FOR THE CONSOLIDATED STATE PLAN 69 (2018); R.I. DEP'T OF EDUC., RHODE ISLAND'S EVERY STUDENT SUCCEEDS ACT STATE PLAN FOR SUBMISSION TO U.S. DEPARTMENT OF EDUCATION 30–31 (2017); VT. DEP'T OF EDUC., REVISED STATE TEMPLATE FOR THE CONSOLIDATED STATE PLAN 54–55 (2017).

227. *See, e.g.*, D.C. STATE BD. OF EDUC., DISTRICT OF COLUMBIA REVISED STATE TEMPLATE FOR THE CONSOLIDATED STATE PLAN 21 (2017), <https://www2.ed.gov/admins/lead/account/stateplan17/dconsolidatedstateplan.pdf>; IOWA DEP'T EDUC., EVERY STUDENT SUCCEEDS ACT IN IOWA 46 (2017), <https://www2.ed.gov/admins/lead/account/stateplan17/iaconsolidatedstateplan.pdf>; Maryland State Plan, *supra* note 224, at 26; NEVADA DEP'T OF EDUC., CONSOLIDATED STATE PLAN UNDER THE EVERY STUDENT SUCCEEDS ACT 51 (2017), <https://www2.ed.gov/admins/lead/account/stateplan17/nvconsolidatedstateplan.pdf>.

228. COLO. DEP'T OF EDUC., CONSOLIDATED STATE PLAN UNDER THE EVERY STUDENT SUCCEEDS ACT (ESSA) 68 (2017).

229. *See, e.g.*, AEI/BROOKINGS WORKING GRP. ON POVERTY & OPPORTUNITY, OPPORTUNITY, RESPONSIBILITY AND SECURITY: A CONSENSUS PLAN FOR REDUCING POVERTY & RESTORING THE AMERICAN DREAM 59–61 (2015); MORAL DEVELOPMENT, SELF, AND IDENTITY (Daniel K. Lapsley & Darcia Narvaez eds., 2013); Joseph A. Durlak et al., *The Impact of Enhancing Students' Social and Emotional Learning: A Meta-Analysis of School Based Universal Interventions*, 82 CHILD DEV. 405 (2011); Victoria Clayton, *The Psychological Approach to Educating Kids*, ATLANTIC MONTHLY (Mar. 30, 2017), <https://www.theatlantic.com/education/archive/2017/03/the-social-emotional-learning-effect/521220/>; Roger Weisburg, *Why Social and Emotional Learning is Essential for Students*, EDUTOPIA (Feb. 15, 2016), <https://www.edutopia.org/blog/why-sel-essential-for-students-weissberg-durlak-domitrovich-gullotta>.

230. *See* Evie Blad, *No State Will Measure Social and Emotional Learning under ESSA: Will that Slow Its Momentum?* EDUC. WK. (Oct. 4, 2017), <https://www.edweek.org/ew/articles/2017/10/04/no-state-will-measure-social-emotional-learning-under.html>.

231. COLO. DEP'T OF EDUC., CONSOLIDATED STATE PLAN UNDER THE EVERY STUDENT SUCCEEDS ACT (ESSA) 68 (2017); OFFICE OF THE STATE SUPERINTENDENT OF EDUC., DISTRICT OF COLUMBIA REVISED STATE TEMPLATE FOR THE CONSOLIDATED STATE PLAN 21–24, 62 (2017).

The development of alternative measures of school quality is particularly important in the parental-choice context for three related reasons. First, as discussed previously, while parents clearly value school quality, it is not the only, or even in some cases the most important, factor influencing school choice decisions. Parents value a range of factors, and they make tradeoffs between their preferences when selecting schools.<sup>232</sup> Moreover, academic test scores are only one among a range of factors that parents consider when evaluating the quality of their children's schools; some studies find that only a minority of parents rank test scores as the most important predictor of school quality.<sup>233</sup> Logically, if a goal of accountability regulations is to help parents make informed decisions, then the regulations should rely upon and require schools to report about the factors that matter to parents, not just those that are easiest to collect.

Second, in a choice environment where schools administer a range of standardized tests, these alternative measures might mitigate the apples-to-oranges comparison problem described above. Presumably, all schools can measure and report in a uniform way, for example, truancy and graduation rates. Last, the research discussed above suggests that standardized test scores alone may underestimate the benefits of parental choice, because the biggest payoffs of giving parents options for their children tended to be reflected in longer-term effects on high school graduation, college enrollment, and persistence, among other examples.<sup>234</sup> Incorporating non-test-score measures of school quality may also reduce the resistance of private-school operators to transparency.

#### D. *Structure Closure and Exclusion Rules to Preserve Better Choices*

Finally, and importantly, accountability policies in school choice contexts ought to be structured to prevent closing charter schools and/or excluding private schools from parental-choice programs if they are better than the other educational options in a community. This is because the available evidence strongly suggests that closing failing schools leads to academic improvements if—and only if—affected students transfer to higher-performing schools.<sup>235</sup> Unfortunately, since many do not, the overall academic effects of school

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232. See Erickson, *supra* note 195, at 501–03.

233. *Id.* at 501.

234. See, e.g., Rouse & Barrow *supra* note 81.

235. CTR. FOR RES. ON EDUC. OUTCOMES, 2 LIGHTS OFF: PRACTICE AND IMPACT OF CLOSING LOW-PERFORMING SCHOOLS 13–27 (2017), [http://credo.stanford.edu/pdfs/Closure\\_FINAL\\_Volume\\_II.pdf](http://credo.stanford.edu/pdfs/Closure_FINAL_Volume_II.pdf).

closures (in both the charter and traditional public-school sector) are negative.<sup>236</sup> However, a recent study by Stanford's Center for Research Educational Outcomes found that students displaced by charter-school closures tend to do better than those displaced by the closure of a traditional public school, especially in states that worked with authorizers to "choreograph" the closure of charter schools to ensure that students landed in a higher-performing school.<sup>237</sup>

The fact that some states and authorizers were able to mitigate the negative effects of closure by attending to the other schooling options available to displaced children suggests that accountability policies should attend to this variable as well. In other words, the accountability system should take into account the comparative strength of other local schools before closing or excluding charter or private schools for academic performance. Two states' charter-closure laws—California's and Florida's—provide a potential model of comparative accountability regulations. Florida's charter-school law mandates the closure of charter schools that receive an F two years in a row through the state's accountability metrics, but makes an exception for failing charter schools located in the same attendance zone as a failing public school.<sup>238</sup> California's charter-school law requires authorizers to close charter schools that fail to meet certain academic benchmarks *unless* the authorizer finds that the school's academic performance is at least equal to performance at public schools the students would otherwise be required to attend.<sup>239</sup>

## CONCLUSION

Despite proponents' hopes, parental choice is not a panacea. But, as the troubled experience to improve public-school performance demonstrates, accountability is not a panacea either. Still, as the footprint of parental-choice programs continues to expand, and more and more American children are enrolled in publicly financed but privately operated schools, both charter and private, demands to use the law to hold chosen schools accountable for their performance will only intensify. This Article has examined the vexing questions posed by accountability efforts in parental-choice contexts and proposed several principles to guide regulato-

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236. *Id.* at 12–21.

237. *Id.* at 17–19.

238. FLA. STAT. ANN. § 1002.33(n)(2) (West 2016).

239. CAL. EDUC. CODE § 47607(b) (West 2016).



ry design efforts. These principles flow from the assumption that accountability regulations should seek to empower parents to serve their intended accountability function by making informed decisions for their children among a cross-sector range of *more* and *better* schools.