

FREE AT LAST? CHARTER SCHOOLS AND THE “DEREGULATED” CURRICULUM

by

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“Who are we really? WASP nation? Melting pot or pluralist paragon? Are we a refuge for the persecuted of the old world, as the Statue of Liberty promises? A new republic preserving and extending the best of Athens and Rome, as embodied in an Atlantic republican tradition? Is the nation to be understood as a consensual arena of absorption and assimilation or as a multicultural tapestry? Rainbow or mosaic? Worriers about ‘the canon’ must be asked, ‘which canon?’”¹

I. INTRODUCTION

American public schooling has, from its inception, struggled to define itself in a diverse democracy that aspires to both pluralism and consensus. It has sought to serve the often conflicting interests of the individual and the collective, and has been pulled in opposite directions by opposing desires for autonomy and unity, for advantage and equity. Decision-making in the public school arena is characterized by controversy and results that often fail to satisfy anyone. In an 1829 parody, Sarah Hale described parents fighting over the location of a new district school. Each parent wanted the school to be closest to their home. Finally, the decision was made to put the school in the exact center of the district: “[A]nd after measuring in every direction, the center had been discovered

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¹ BENJAMIN R. BARBER, AN ARISTOCRACY OF EVERYONE 24 (1992).

exactly in the centre of a frog-pond. As near that pond as safety would permit, stood the schoolhouse.”²

Every aspect of public schooling is a potential subject of debate, but decisions about the public school curriculum give rise to particularly heated conflicts and controversy. These conflicts are not the kind that can be resolved by moving the school closer to the frog-pond. The choice of what to teach is essentially and inescapably a value choice. Even when standards for so-called uncontroversial subjects are adopted, values are expressed.³ In a diverse culture it is expectedly difficult to reach decisions about what the society wants its children to know, and, from time to time, the conflict over the public school curriculum has escalated into a full-fledged war of ideas.⁴ When public values come into conflict with private values in the public school arena, the stakes are high. Professor Ingber explained:

The community demands an effective school program that promotes the “right” values through the “right” curriculum. Yet children are highly vulnerable to “village tyrants” who might pervert the educational process. On one hand, society expects schools to instill values and thoughts while transmitting knowledge. On the other, it fears the power of public

² CARL F. KAESTLE, *PILLARS OF THE REPUBLIC* 14 (Eric Foner ed., 1983) (quoting SARAH HALE, *SKETCHES OF AMERICAN CHARACTER* (1829)).

³ Because time and resources are limited, each choice to include a subject in the public school curriculum necessarily implies a choice to eliminate another subject. Even the decision to emphasize “core” subjects, such as reading, grammar, math, and science, have recently raised heated opposition from parents who want school time to be devoted to music, the arts and physical education. See, e.g., James Salzer, *PE, Arts Fight for Middle Schooler’s Time*, *ATLANTA CONSTITUTION*, May 23, 2000, at 1A. See also AMY GUTMANN, *DEMOCRATIC EDUCATION* 5 (1999) [hereinafter GUTMANN, *DEMOCRATIC EDUCATION*] (stating that there is no consensus on how either American history or sex education should be taught and that there is, in this crucial sense, no consensus on teaching even the “basics.”).

⁴ These conflicts are as old as the public school system itself. See ELLWOOD P. CUBBERLEY, *PUBLIC EDUCATION IN THE UNITED STATES* 164-66 (1934) (describing the bitter antagonism engendered by the struggle over the legislative establishment of public schools). They are often bitter. See DIANE RAVITCH, *THE GREAT SCHOOL WARS* (1974) (chronicling the controversy surrounding the establishment of private Catholic schools in New York). And they are continuing. See Rosemary C. Salomone, *Struggling with the Devil: A Case Study of Values in Conflict*, 32 *GA. L. REV.* 633 (1998) [hereinafter Salomone, *Struggling*] (describing the on-going conflict surrounding parents’ religious objections to activities at public school in Westchester County, New York).

education to undo what home and church have taught or to thwart constitutional mandates. This tension turns public schools into the stage for passionate struggles. Parent, teacher, school board, community, and even student groups fight to control the process of indoctrination. All recognize the need for value training. With equal emotion, however, all fear the dangers inherent in the power to teach.⁵

The last two decades have been a particularly contentious period for public schools. They have been criticized as “too permissive, too strict, too open, too bureaucratic, offensively monolithic and bland in their message, offensively pluralistic and sinful in their message”⁶ Amidst repeated declarations of school failure and a “rising tide of mediocrity,”⁷ school reform initiatives have become increasingly popular. The reform movement that has achieved the most notable success in the legislatures is the charter school movement.⁸

Charter schools are special public schools created through a charter with the state.⁹ The charter school idea has caught fire in state legislatures since the first charter schools were opened in 1992. Thirty-seven states now have legislation permitting their establishment. Part of the impetus for the charter school movement has been the perceived need for greater diversity, innovation, and responsiveness in the public school curriculum.¹⁰ Many charter school laws explicitly exempt charter schools from most

⁵ Stanley Ingber, *Socialization, Indoctrination, or the 'Pall of Orthodoxy': Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 20 (1987) (footnotes omitted).

⁶ KAESTLE, *supra* note 2, at 223.

⁷ NATIONAL COMM'N ON EXCELLENCE IN EDUC., U.S. DEP'T OF EDUC., *A NATION AT RISK 5* (1983) [hereinafter NATIONAL COMM'N].

⁸ This movement is discussed *infra* at notes 86-171 and accompanying text.

⁹ See *infra* notes 86-119 and accompanying text.

¹⁰ Other motivating factors behind the charter school movement are discussed *infra* at notes 86-101 and accompanying text.

state laws and local regulations so that they are free to innovate, to become laboratories for school reform. The charter school is envisioned as an engine for system-wide reform and innovation.¹¹

This paper will explore the prospects for charter school reform to provide curricular innovation and will point out several provisions in the legal organization of charter schools that will limit the possibilities for major innovation or radical reform of the official curriculum. This paper will also take stock of the autocratic and bureaucratic nature of the current public school model and weigh the possibility for charter schools to transform schools into places that embody democratic and community values. Charter schooling presents an exciting opportunity for school reform that rejects the factory model of public schooling and establishes both an official and hidden curriculum that fosters democratic participation. It also raises the ominous specter of a new type of public school that is more ideologically isolated and less democratic than the traditional public schools.

II. THE EVOLUTION OF THE “ONE-SIZE-FITS-ALL” PUBLIC SCHOOL

There is a story -- probably apocryphal -- that when the French Minister of Education was asked, “What are the eight-year-old children learning in school?,” his reply was, “What time is it?” The implication of this story is that the French educational program is so well-defined and so consistently carried out, that that you could determine what was going on in the classroom by consulting your watch. The story is probably not

¹¹ BRYAN C. HASSEL, THE CHARTER SCHOOL CHALLENGE 128 (1999).

an accurate description of French schooling.¹² It certainly could not describe American schooling. Schooling takes place in countless American public schools operating in thousands of counties and independent school districts in fifty states. From Baton Rouge, Louisiana to Fairbanks, Alaska, the diverse cultures, the communities, the boards of education, the teachers' organizations, and the individuals involved in schooling *must* have a profound affect on the character and content of instruction. Or, at least one would think so. But American public schools have been recently criticized for taking a "one-size-fits-all approach"¹³ to educating America's children; and school reformers criticize the bureaucratic and creativity-stifling structure of public schooling.¹⁴ The reality of American public schooling is that it is both diverse and remarkably uniform. Although any generalization about public schools is apt to be incorrect when it is applied to a specific school, students from Baton Rouge to Fairbanks will nonetheless have surprisingly similar school experiences. This section provides a brief overview of the evolution of the one-size-fits-all school.

At the time of the drafting of the Constitution, there was no widely accepted vision of the role for the government in providing tax -- supported education.¹⁵

¹² *But see* Martin McLean, *Education in France: Traditions of Liberty in a Centralized System, in EQUALITY AND FREEDOM IN EDUCATION, A COMPARATIVE STUDY* 63-104 (Brian Holmes ed., 1985) (describing the high degree of uniformity in the centralized French public school system).

¹³ Salomone, *Struggling*, *supra* note 4, at 696. *See also* DAVID B. TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION* (1974) (chronicling the development of American public education from individual rural school systems to a bureaucratized and centralized "one best system" of education); DEBORAH MEIER *WILL STANDARDS SAVE PUBLIC EDUCATION?* (Joshua Cohen & Joel Rogers eds., 2000) [hereinafter MEIER, *WILL STANDARDS SAVE*] (critiquing the idea of centralized authority over schooling); SUSAN OHANIAN, *ONE SIZE FITS FEW: THE FOLLY OF EDUCATIONAL STANDARDS* (Lois Bridges ed., 1999).

¹⁴ *See, e.g.*, JOHN I. GOODLAD, *A PLACE CALLED SCHOOL* (1984); THEODORE R. SIZER, *HORACE'S COMPROMISE: THE DILEMMA OF THE AMERICAN HIGH SCHOOL* (1984).

¹⁵ Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in*

Schooling in the colonies was primarily accomplished by parental initiative and informal, locally controlled institutions.¹⁶ The earliest publicly supported schools in the American colonies were founded primarily for religious reasons.¹⁷ The first American law establishing education as a state function was passed in 1647.¹⁸ Commonly referred to as "the old deluder, Satan law," the Massachusetts School Law of 1647 provided for each town with 50 households or more to appoint a teacher to teach all of the children to write and read.¹⁹ The stated purpose of the law was to ensure that children could read the Bible, in keeping with the ideals of the Protestant Reformation.²⁰

For Thomas Jefferson, who drafted a bill for free public schools in Virginia in 1779, the purpose of publicly supported schooling was to develop republican citizenship.²¹ Jefferson thought that citizens must be educated in order to vote, to protect liberty, and to be vigilant against government corruption.²² Jefferson believed that a republican government requires an educated citizenry, that education should fulfill a civic rather than religious purpose, and that the state therefore had a responsibility to provide

the Public School, 95 YALE L.J. 1647, 1648 n.4 (1986). See also LAWRENCE A. CREMIN, THE AMERICAN COMMON SCHOOL 29 (1951) [hereinafter CREMIN, AMERICAN COMMON SCHOOL].

¹⁶ KAESTLE, *supra* note 2, at 3.

¹⁷ HARL R. DOUGLASS & CALVIN GRIEDER, AMERICAN PUBLIC EDUCATION: AN INTRODUCTION 14 (1948).

¹⁸ *Id.*

¹⁹ *See id.*

²⁰ *Id.*

²¹ KAESTLE, *supra* note 2, at 6. See also THOMAS JEFFERSON, PREAMBLE TO A BILL FOR THE MORE GENERAL DIFFUSION OF KNOWLEDGE (1779), reprinted in KERN ALEXANDER & M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 28 (Joan Gill & Jennie Redwitz eds., 4th ed. 1998).

²² KAESTLE, *supra* note 2, at 4-6. See also CREMIN, AMERICAN COMMON SCHOOL, *supra* note 15, at 29-31.

that education.²³ Other founding fathers agreed with Jefferson that developing republican citizenship formed the foundational purpose of public education, but emphasized schooling to create an American national identity and social order.²⁴ Benjamin Rush, for example, favored founding a national university “where the youth of all the states may be melted (as it were) together into one mass of citizens.”²⁵ The metaphor of “melting” the students undoubtedly envisioned the school as an indoctrinating institution, requiring the conformity of students. Early school advocates feared that the fledgling republic might degenerate into anarchy.²⁶ A large country with a diverse population might fall prey to factional struggle unless an integrated population of responsible citizenry could be developed. The purpose of public education therefore was to produce “virtuous, well-behaved citizens” with resulting political conformity, social order, and disciplined behavior.²⁷

Still others among the early American educational theorists believed that the primary value of education was its liberating and empowering effect. Samuel Harrison Smith wrote in 1797, “If happiness be made at all to depend on the improvement of the mind and the collision of mind with mind, the happiness of the individual will greatly depend upon the general diffusion of knowledge”²⁸ Meanwhile, Benjamin Franklin saw the value in education in its power to promote individual self-sufficiency and

²³ GERALD L. GUTEK, A HISTORY OF THE WESTERN EDUCATIONAL EXPERIENCE 181 (2d ed. 1995).

²⁴ KAESTLE, *supra* note 2, at 6-7.

²⁵ *Id.* at 7.

²⁶ *Id.* at 4.

²⁷ *Id.* at 5-7. *See also* MICHAEL B. KATZ, SCHOOL REFORM: PAST AND PRESENT 3 (1971) (“[P]ublic education originated from impulses that were conservative, racist and bureaucratic.”).

economic efficiency. In 1749, Benjamin Franklin proposed the establishment of an “English grammar school” that would teach practical subjects, such as mathematics for keeping accounts, and vocational subjects like carpentry, ship-building, and cabinet-making.²⁹

Over the next two centuries of development of public education, the divergent goals and conflicting educational values that were present at the founding of the nation have remained. Although the legislatures and the courts endorsed the public goal of providing an education for citizenship as the legal basis for government involvement in tax supported public education,³⁰ individuals endorsed public education for the private benefits it could provide to them personally.³¹ While common school crusaders and the activists of the Progressive Era were enormously successful in establishing the ideals of universal, publicly supported education in the pantheon of American education,³² ethnic

²⁸ KAESTLE, *supra* note 2, at 7 (quoting Samuel Harrison Smith, *Remarks on Education*, in *ESSAYS ON EDUCATION IN THE EARLY REPUBLIC 188-89* (Frederick Rudolph ed., 1965)).

²⁹ GUTEK, *supra* note 23, at 177-78.

³⁰ See Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 96-98 (1989) (describing the connection between republican theory and state constitutional provisions relating to education); Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325 app. at 1343-48 (1992) (providing a collection of state constitutional provisions, including, *e.g.*, IDAHO CONST. art. IX, § 1) (“The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho to establish and maintain a general, uniform and thorough system of public, free common schools.”). See also, *e.g.*, *Scown v. Czarnecki*, 106 N.E. 276, 281 (Ill. 1914); *Fogg v. Board of Educ.*, 82 A. 173, 176 (N.H. 1912); *Leeper v. State*, 53 S.W. 962, 965-67, 969-70 (Tenn. 1899). In *Brown v. Board of Education*, Justice Warren illustrated the continuing power of republican theory in educational law: “Compulsory school attendance laws and the great expenditures for education demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.” 347 U.S. 483, 493 (1954).

³¹ See generally DAVID F. LABAREE, *THE MAKING OF AN AMERICAN HIGH SCHOOL* (1988) (arguing that individuals’ self-interest in the market value of a high school diploma had a profound impact on the development of public schooling).

³² LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE METROPOLITAN EXPERIENCE, 1876-1980*, at 154 (Mary Jane Alexander ed., 1988).

and religious minorities often found that the secular and nationalizing purposes of public education did not fit their personal values.³³ Further, while schooling continued to be touted as the great equalizer, influential individuals, corporations, and private interests played a major role in the development of schools that would further their goals.³⁴ And, while the interests of society weigh heavily in favor of a universal egalitarian education for participation in a deliberative democracy, it is individual children who must get up every morning and go off to school. Private goals and individual values are strong motivating factors for the participants in public education.

Although it is often possible for a variety of goals to be pursued simultaneously and harmoniously, disparate conceptions of the purpose and values of schooling have led to tension and conflict. Private goals of enlightenment, autonomy, and self-fulfillment stand in tension with the public goals of creating a national identity and maintaining the

³³ See generally Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL'Y REV. 169, 169-86 (1996) [hereinafter Salomone, *Common Schools*] (summarizing the history of values conflicts and culture wars in the public schools); Naomi Maya Stolzenberg, "*He Drew a Circle That Shut Me Out*": *Assimilation, Indoctrination and the Paradox of Liberal Education*, 106 HARV. L. REV. 581 (1993) (analyzing the legal dilemmas created by public school curricular choices that expose children of minority groups to beliefs and values that conflict with their family's culture and belief system); Tyll van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197 (1983) (arguing that the courts underestimate the importance of the student's interest in freedom of belief and overestimate the importance of the government's interest in value inculcation); KENNETH J. MEIER ET AL., *RACE, CLASS AND EDUCATION: THE POLITICS OF SECOND-GENERATION DISCRIMINATION* (1989) (chronicling the history of education for blacks in the United States from no schools to separate schools to desegregated schools; describing and documenting "second-generation discrimination" that includes homogeneous grouping, tracking, at large school district elections, over-representation of minority students in classes for the mentally retarded and under-representation in gifted classes, over-use of corporal punishment and suspension against minority students).

³⁴ JOEL SPRING, *CONFLICTS OF INTERESTS: THE POLITICS OF AMERICAN EDUCATION* 11-17 (Kenneth J. Clinton et al. eds., 2d ed. 1993) (identifying foundations, teachers' unions and the corporate sector as the "big three" special interest-groups with interest and influence in public education); JOHN C. HILL, *THE NEW AMERICAN SCHOOL* 1-26 (1992) (identifying numerous "stakeholders" in public education and describing "the great tug of war" for control of the schools).

social order.³⁵ The public goal of education for an egalitarian democracy and meritocracy stands in tension with the private goal of education for social or economic advantage.³⁶

The conflicting values and interests of the early architects of public schooling have endured, making the process of building the public school curriculum like trying to erect a building under the direction of multiple owners who have divergent conceptions of the purpose of the building. Imagine a group of workers arriving at a building site ready to begin a building project. As they arrive on the site, they discover that the owners of the site all agree that they must erect a large and sturdy frame for a building, but they disagree about the purpose that building will serve. Some of the owners think the building should be a community center, others think that the building must be an industrial complex, some think it will be an observatory, and some believe it will be an apartment building for their own families. The workers realize that each of these kinds of buildings should be built on a different plan, but there is no architect to consult. The owners and workers must come up with the plan themselves. Everyone is eager to begin

³⁵ This tension is palpable in several leading public school cases. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that the state may not prohibit parochial school teacher from teaching German); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that schools may attempt to foster national unity and patriotism, but may not require or coerce the expression of a political belief); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that the state’s interest in universal education must be balanced against parent’s interest in the religious upbringing of their children); *Board of Educ. v. Pico*, 457 U.S. 853 (1982) (holding that the First Amendment prevents editing particular ideas out of the curriculum in order to “prescribe what shall be orthodox in politics, nationalism, religion and other matters of opinion.”); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (1987) (holding that the school’s use of texts that parents found religiously objectionable did not create an unconstitutional burden); *Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525 (1995) (holding that although the state does not have the power to “standardize” its children, neither do parents have the right to dictate the content curriculum of the public school).

³⁶ Molly Townes O’Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 369-74, 396-406 (1997) [hereinafter O’Brien, *Tuition Vouchers*] (discussing the conflict between the public goal of educating citizens for egalitarian democracy and the private pursuit of individual educational advantage).

building and all believe that any building is better than no building. “Perhaps,” says one, “the building could serve all of those purposes.” Yes, perhaps that is possible, they think.³⁷ Then someone else pipes up, “Come on, we all know we need this building. Let’s start pouring the foundation. We can work out the details later.”³⁸

As the work proceeds, the owners and workers collaborate harmoniously much of the time. They agree that the building will need a concrete foundation, connections to water and sewer, electricity, and so on. But on many specifics, they cannot agree. The number and shape of rooms for an apartment building will not be appropriate for a community center. The domed roof that is standard equipment for an observatory seems like a foolish excess to the owner who envisions an industrial complex. Their purposes come into frequent conflict. The building process proceeds, however, and over the years various owners are able to exert their influence and see their purposes built into the plan.

Similarly, the evolution of the public school curriculum “could be interpreted in terms of the interplay among predominant interest groups that saw in the course of study the vehicle for the expression of their ideas and the accomplishment of their purposes.”³⁹ And, like a building project that is directed by multiple owners, the curriculum reflects

³⁷ Professor Sanford W. Reitman argues that Americans view schools as institutions of “messianic redemption.” SANFORD W. REITMAN, *THE EDUCATIONAL MESSIAH COMPLEX* 12 (1992). Americans “tend to expect far more of the nation’s schooling system than the latter can conceivably deliver; their exorbitant expectations laid upon a single social institution constitute an impossible burden for the schools.” *Id.*

³⁸ Nearly as strong as Americans’ faith in education is the conviction that the schools are inadequate as they are. Professors David Tyack and Larry Cuban point out that “reforming public schools has long been a favorite way of improving not just education but society . . . For over a century and a half, Americans have translated their cultural anxieties and hopes into dramatic demands for educational reform.” DAVID TYACK & LARRY CUBAN, *TINKERING TOWARD UTOPIA I* (1995).

³⁹ HERBERT M. KLIEBARD, *THE STRUGGLE FOR THE AMERICAN CURRICULUM, 1893-1958*, at xi (1986) [hereinafter KLIEBARD, *STRUGGLE*].

value choices, but it does not necessarily reflect the values of the all of the owners.⁴⁰

Several scholars have noted that educational policy has been disproportionately influenced by the interests and decisions of “policy elites,” who have privileged access to educational decision-makers.⁴¹ The curriculum therefore reflects the values of the groups in society who enjoy the power to promote their interests.⁴²

Schooling as we know it today was profoundly influenced by the “administrative progressives” of the early twentieth century.⁴³ These well-educated white men pioneered what has been called the “factory model” and sometimes the “corporate model of education.”⁴⁴ Prominent professors of education such as Cubberly, Strayer, and Judd (of Columbia, Chicago, and Stanford respectively) effectively promoted their idea that experts should design and run the system.⁴⁵ Under the influence of the administrative progressives, centralized decision-making and bureaucratic curriculum-building became the norm in public schooling.⁴⁶

⁴⁰ HERBERT M. KLIEBARD, *FORGING THE AMERICAN CURRICULUM* xii-xiii (1992) [hereinafter KLIEBARD, *FORGING*]. TYACK & CUBAN, *supra* note 38, at 8.

⁴¹ TYACK & CUBAN, *supra* note 38, at 8. Tyack and Cuban describe the “policy elites” as including “people who managed the economy, who had privileged access to the media and to political officials, who controlled foundations, who were educational leaders in the universities and in city and state superintendencies, and who redesigned and led organizations of many kinds.” *Id.*

⁴² KLIEBARD, *STRUGGLE*, *supra* note 39, at xi.

⁴³ TYACK, *supra* note 13, at 126-47.

⁴⁴ *Id.* at 144 (tracing the rapid acceptance of the “corporate model” of school politics); KLIEBARD, *FORGING*, *supra* note 40, at 116 (quoting ELLWOOD P. CUBBERLEY, *PUBLIC SCHOOL ADMINISTRATION* 338 (1916), who describes schools as factories).

⁴⁵ TYACK, *supra* note 13, at 136-38.

⁴⁶ *Id.* at 182-98 (chronicling the success of the administrative progressives); KLIEBARD, *FORGING*, *supra* note 40, at 128 (describing the on-going drive toward “standardization, predetermination and fragmentation in the [public] school curriculum”).

These evangelists of new educational goals of science and social efficiency worked to standardize education and to differentiate the curriculum to “better prepare students for the tasks they would face in life.”⁴⁷ Schools became the factories and children became “the raw [material] to be shaped into products to meet the various demands of life.”⁴⁸ For the administrative progressives, “[s]imple realism decreed that public schools should prepare some students directly for subordinate roles in the economy while it screened out those fit for further training in higher education.”⁴⁹ Scientific testing played an important role in preserving the “idea” that the schools fairly provided for social mobility based on merit.⁵⁰ Children could be measured for their competencies and tracked into curricula that would meet their measured abilities.⁵¹ Curriculum theory, influenced by systems analysis, began to “regard the child simply as input inserted into one end of a great machine from which he or she eventually emerges at the other end as output replete with all the behaviors, the ‘competencies,’ and the skills for which that child has been programmed.”⁵²

The corporate or factory model of public schooling is not, however, merely a model for classifying and instructing children. It is a model that pervades the structure

⁴⁷ TYACK, *supra* note 13, at 188.

⁴⁸ KLIEBARD, FORGING, *supra* note 40, at 116 (quoting CUBBERLEY, *supra* note 44, at 338).

⁴⁹ TYACK, *supra* note 13, at 189.

⁵⁰ *Id.*

⁵¹ *Id.* at 198-216 (describing the history of discriminatory student placement in public schools and the questionable “science” of psychological measurement that supports classifying students based on intelligence tests). *See also* Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237 (1995). (illustrating the operation of race in an ostensibly race-neutral student placement).

⁵² KLIEBARD, FORGING, *supra* note 40, at 132.

and politics of schooling.⁵³ The structure of schooling in the factory model is both hierarchical and patriarchal, with decreasing autonomy at each level of the hierarchy.⁵⁴ In the factory model of education, the teacher is the executive -- and the successful teacher, like the successful executive “is one that produces higher than predicted gains” in student achievement -- particularly as measured on standardized tests.⁵⁵ Classroom teachers are to “keep a tight reign on their pupils,” but they are also powerless to influence the policies dictated by their superiors.”⁵⁶

The factory model of education is surprisingly pervasive in contemporary schooling. Children in public school today -- like those of 30 or 50 years ago -- spend their time with children their own age and with instruction that is teacher-directed and divided into 45- to 50-minute periods.⁵⁷ Children are tracked into advanced and remedial courses, and spend most of their time in formal lectures, recitations, or worksheets.⁵⁸ Schools “require that students be punctual, clean, neat, make efficient use of their time, take care of their equipment, work individually, and learn how to wait if they need something. Absenteeism is frowned upon and generally noted on evaluations. Classroom interaction conveys the message that there are different roles and expectations

⁵³ *Id.* at 115-22 (describing the bureaucratization of public schooling as “scientific management,” the “efficient performance of every stage of the operation,” became the norm in American schooling).

⁵⁴ KATHLEEN P. BENNETT & MARGARET D. LÉCOMPTE, *THE WAY SCHOOLS WORK: A SOCIOLOGICAL ANALYSIS OF EDUCATION* 245-46 (Naomi Silverman & Judith Harlan eds., 1990).

⁵⁵ GARY D. FENSTERMACHER & JONAS F. SOLTIS, *APPROACHES TO TEACHING* 17 (2d ed. 1992).

⁵⁶ TYACK, *supra* note 13, at 259.

⁵⁷ ALFIE KOHN, *THE SCHOOLS OUR CHILDREN DESERVE* 6 (Education, Inc. ed., 1999).

⁵⁸ *Id.*

according to social class, ethnicity, and gender.”⁵⁹ The comprehensive high school that is hierarchically organized and bureaucratically run is an ubiquitous public school model.⁶⁰

III. THE FACTORY MODEL IN CONFLICT WITH DEMOCRATIC VALUES

The corporate or factory model of education promotes efficiency and social order above other democratic values. Herbert Kleibard, the noted historian of American public school curriculum, pointed out what is lost in the factory school model. “Even when the output is differentiated,” he wrote, “such a mechanistic conception contributes only to regimentation and dehumanization, rather than to autonomy.”⁶¹ Regimentation presents a particular dilemma in a school system that is ostensibly designed to prepare citizens for participatory democracy. As Betsy Levin noted in her essay about educating youth for citizenship:

Despite our rhetoric that the purpose of education is to impart to youth democratic values and political participation skills, . . . the real purpose of education at times seems to be to create a passive, docile citizenry. Rules that encourage silence and passivity and promote lack of privacy, abuse of power, and authoritarianism are generally accepted by the majority of students as the way life is.⁶²

The dilemma described by Betsy Levin is a complex one. Theoretically, the concept of education for citizenship can be articulated as either an education dedicated to creating national identity and social order, or an education dedicated to empowering and

⁵⁹ BENNETT & LECOMPTE, *supra* note 55, at 190.

⁶⁰ *Id.* at 138-40, 190. *See also* LABAREE, *supra* note 31, at 64-96 (describing the emergence of bureaucratic control of the modern high school and the consumer-driven politics that demanded market-based control structures).

⁶¹ KLIEBARD, *FORGING*, *supra* note 40, at 132.

⁶² Levin, *supra* note 15, at 1668.

liberating citizens for democratic participation, or both.⁶³ Of course, order and discipline are necessary to any educational process, but the regimentation and dehumanization of education have made both teachers and students little more than cogs in a vast bureaucracy.⁶⁴ A school reformer in 1904 quoted John Dewey, saying “How can the child learn to be a free and responsible citizen if the teacher is bound? How can an autocratic school teach the process of democracy?”⁶⁵

Philosophers of education are familiar with the paradox of teaching democratic concepts in an autocratic and bureaucratic system. Indeed, the ends and the means of education cannot be thoroughly separated. The ends and means of education together form the curriculum of schooling.⁶⁶ The “curriculum,” most simply and broadly defined is “what happens to students in school,”⁶⁷ or, somewhat more narrowly defined, what students learn in school. Educational theorists break down the “curriculum” into five parts: the official curriculum, the operational curriculum (the curriculum as it is implemented by teachers),⁶⁸ the hidden curriculum (the unstated norms and values communicated to students in school),⁶⁹ the null curriculum (what is not taught),⁷⁰ and the

⁶³ See *supra* notes 19-27 and accompanying text.

⁶⁴ KLEIBARD, FORGING, *supra* note 40, at 131.

⁶⁵ TYACK, *supra* note 13, at 257-58.

⁶⁶ GEORGE J. POSNER, ANALYZING THE CURRICULUM 4 (Lane Akers & Bernadette Boylan eds., 1992).

⁶⁷ BENNETT & LECOMPTE, *supra* note 55, at 179.

⁶⁸ The operational curriculum is sometimes called the “curriculum-in-use.” *Id.*; KLEIBARD, FORGING, *supra* note 40, at xi. This curriculum consists of what is actually taught and tested by teachers in actual classrooms. POSNER, *supra* note 66, at 10-11 (“The operational curriculum may differ sharply from the official curriculum because teachers tend to interpret it in the light of their own knowledge, beliefs and attitudes.”). The operational curriculum may also be influenced by institutional culture, student interactions with teachers and other factors. *Id.* at 11-12; KLEIBARD, FORGING, *supra* note 40, at xiii.

⁶⁹ The hidden curriculum will be discussed at greater length in this paper at Part V.

extra curriculum (planned experiences outside of school subjects, such as sports teams).⁷¹ Each of these concurrently operating curricula plays a role in what happens to children in school and what they learn from the school experience.⁷²

The official curriculum carries particular symbolic importance and is the part of the public school experience that is especially susceptible to control through policy change. It is the official curriculum that is the public target of most curricular reform efforts.

The official curriculum is the formal and documented expression of what educational decision-makers want children to know.⁷³ It may include the scope and sequence of intended learning outcomes, course plans and syllabi, the content of instruction, standards for evaluation, the textbooks and materials, and the course of study.⁷⁴ Embodied in documents emanating from prestigious national committees, local school boards, state departments of education, and state legislatures, these formal expressions of what is important enough to be passed along to children through education have been called “important artifacts from which the values of a given society may be assembled.”⁷⁵ The official curriculum reflects value choices because the very beginning

⁷⁰ Posner, *supra* note 66, at 11. The omission of certain subjects from the official curriculum may reveal important assumptions underlying the official curriculum.

⁷¹ *Id.* at 10-12.

⁷² *Id.*

⁷³ KLIEBARD, FORGING, *supra* note 40, at xii.

⁷⁴ POSNER, *supra* note 66, at 10.

⁷⁵ KLIEBARD, FORGING, *supra* note 40, at xii.

point for planning a curriculum is to decide what educational purposes the school should pursue.⁷⁶

But students learn more in school than is included in their formal instruction.⁷⁷ The hidden curriculum “consists of the implicit messages we give to students about differential power and social evaluation when students learn how schools actually work, what kinds of knowledge there are, which kind of knowledge is valued, and how students are viewed in relation to school. These are the things that are learned informally and are sometimes, but not always, unintentional outcomes of the formal structure and curricular content of schooling.”⁷⁸ For example, in kindergarten, the first things children learn are to “share, listen, put things away, and follow directions.”⁷⁹ During the first week of school, the kindergartner learns that she has no role in organizing the activities and is unable to affect the activities. It is the teacher’s duty to structure the use of time and to make materials available. The child learns to distinguish between “play” -- freely chosen activity -- and “work” -- something you are told to do, something that is supervised and evaluated.⁸⁰

The lessons learned from the hidden curriculum are both powerful and durable. Law structures and defines not only the content, but also the process and atmosphere of

⁷⁶ POSNER, *supra* note 66, at 13.

⁷⁷ BENNETT & LECOMPTE, *supra* note 55, at 188.

⁷⁸ *Id.*

⁷⁹ DECKER F. WALKER & JONAS F. SOLTIS, CURRICULUM AND AIMS 70 (Jonas F. Soltis ed., 2d ed. 1992).

⁸⁰ *Id.*

contemporary schooling.⁸¹ The legal organization of schools, the legislatively-prescribed policy- and decision-making process, the attendance mandate, the distribution of resources, the level of respect for or deference to parental decision-making, the degree of teacher autonomy, and the processes set up for discipline and for school accountability, are all legalized aspects of public schooling that communicate to school administrators -- and perhaps to students -- society's norms, values, and beliefs. Strikingly, however, the hierarchical and bureaucratic structure of schooling undermines the democratic values that are officially important elements of the curriculum. Official school curricula teach children the values of democratic participation, while their classrooms are ruled autocratically. Students spend their days in an institution where decisions are made in a top-down and bureaucratic fashion, while they read about the power of the people in a democracy.⁸² Every aspect of life in the public school is organized, regulated, monitored, and evaluated by administrators, bureaucrats, and legislators. The prototypical public school feels like a prison. It is a place where you have to walk on the right side of the yellow line painted down the center of the hallway, a place where you need a "pass" to go to the bathroom, where teachers "cover" the required subjects, and where no one has any "free" time.

The factory model of education pervades the hidden curriculum and has a

⁸¹ Several scholars have noted the progressive legalization of educational policy. See, e.g., MARK YUDOF, ET AL., *EDUCATIONAL POLICY AND THE LAW* 832-33 (Julie Bach ed., 3d ed. 1992).

⁸² Textbooks present students with a picture of American government as one where "the people are the rulers in theory as well as fact, and the government is the servant and protector of the people." van Geel, *supra* note 33, at 285. Ironically, those same textbooks shield students from learning about deliberative participation in government by avoiding controversy, presenting issues as one-sided, or leaving out crucial information. Stephen E. Gottlieb, *In the Name of Patriotism: The Constitutionality of 'Bending' History in Public Secondary Schools*, 62 N.Y.U. L. REV. 497, 511 (1987). Even high school history textbooks that chronicle the founding of the nation, do so without addressing dissent and moral disagreement. High schools "appear to teach conformity, complacency and hierarchical thinking. . . ." *Id.*

profound impact on what children learn. The hierarchical structure of schooling persists in spite of, or perhaps because of, a “. . . complex web of tensions, conflicts and ambitions among elected politicians, educational politicians, interest groups and the knowledge industry [that] keeps the educational system in constant change and turmoil.”⁸³ Constant change and endless reform have not saved schools from the irony of attempting to teach democratic citizenship in a place where the “[r]ules . . . encourage silence and passivity and promote lack of privacy, abuse of power, and authoritarianism.”⁸⁴ As John Dewey reflected shortly before he died, the “fundamental authoritarianism of schools has remained intact.”⁸⁵

IV. THE “LATEST AND BEST HOPE” FOR PUBLIC SCHOOLING: CHARTER SCHOOLS

Although the vast majority of children in America are educated in the public schools, dissatisfaction with public schooling has become a prominent theme in political and social life.⁸⁶ A river of dissatisfaction has flooded the educational landscape and has become a powerful force in the school choice movement. Of course, the factory model of schooling is not the only -- or even the primary target -- of contemporary school

⁸³ SPRING, *supra* note 34, at 21.

⁸⁴ Levin, *supra* note 15, at 1668.

⁸⁵ KOHN, *supra* note 57, at 7 (quoting John Dewey, in ELSIE RIPLEY CLAPP, *THE USE OF RESOURCES IN EDUCATION* 129-30 (1952)).

⁸⁶ Jonathan B. Cleveland, *School Choice: American Elementary and Secondary Education Enter the "Adapt or Die" Environment of a Competitive Marketplace*, 29 J. MARSHALL L. REV. 75, 77 (1995) (opening a discussion of school choice by decrying the failure of public schooling). *See also* JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 1 (1990); James A. Peyser, *School Choice: When, Not if*, 35 B.C. L. REV. 619, 626 (1994); Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 156 (1995) (“Almost everyone agrees that our schools are failing.”). *But see* DAVID C. BERLINER & BRUCE J. BIDDLE, *THE MANUFACTURED CRISIS* (1995) (arguing that American public schooling is a success in spite of widespread publicity concerning its failure); O’Brien, *Tuition Vouchers*, *supra* note 36, at 393-98 (arguing that the devaluation of the public school credential brought about by improved access to schooling for poor and minority groups has contributed to the perception that public school education is not as good as it used to be).

reformers.⁸⁷ Rather than a single movement with a single constituency and motivating cause, the school choice movement is a winding river with tributaries in the politics of race,⁸⁸ in the pursuit of academic advantage,⁸⁹ in the clash of religion and culture,⁹⁰ in parental frustration with bureaucratic and unresponsive public schools,⁹¹ in news of falling test scores,⁹² in skepticism about the role of government,⁹³ in fear of foreign competition,⁹⁴ and in the advent of market analysis of public schooling.⁹⁵ Part of the appeal of the school-choice movement, however, is the allure of the concepts of “choice” and “autonomy”⁹⁶ -- concepts that have particular appeal for adults who grew up with the factory model of education.

Choice initiatives have taken many different forms, including open-enrollment plans, inter-district transfer programs, tax incentives, private school tuition vouchers,

⁸⁷ *But see* NEW SCHOOLS FOR A NEW CENTURY 17-36 (Diane Ravitch & Joseph P. Viteritti eds., 1997) [hereinafter NEW SCHOOLS FOR A NEW CENTURY] (“The factory system must be replaced, just as other top-down hierarchical structures in other sectors of society have been replaced.”).

⁸⁸ O’Brien, *Tuition Vouchers*, *supra* note 36, at 374-93 (arguing that race politics have been a major factor animating the private school tuition voucher movement).

⁸⁹ *Id.* at 396-406 (reporting that private school vouchers may facilitate individual educational advantage).

⁹⁰ *See generally* Salomone, *Struggling*, *supra* note 4, at 695 (suggesting that the existence of publicly funded alternatives to the traditional public school would help to avoid value-based upheaval).

⁹¹ *See, e.g.*, Robin Barnes, *Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375, 2404 (1997). Books by nationally recognized scholars of education have also voiced concern about the bureaucratic structure of public schooling. *See, e.g.*, GOODLAD, *supra* note 14; SIZER, *supra* note 14.

⁹² *See, e.g.*, NATIONAL COMM’N *supra* note 7, at 11.

⁹³ *See, e.g.*, MYRON LIEBERMAN, PUBLIC EDUCATION: AN AUTOPSY (1993).

⁹⁴ NATIONAL COMM’N, *supra* note 7.

⁹⁵ *See, e.g.*, CHUBB & MOE, *supra* note 86.

⁹⁶ NEW SCHOOLS FOR A NEW CENTURY, *supra* note 87, at 4-6; PETER W. COOKSON, JR., SCHOOL CHOICE: THE STRUGGLE FOR THE SOUL OF AMERICAN EDUCATION 8-10 (1994).

public school vouchers, and magnet schools.⁹⁷ The swiftest moving current in the school choice torrent, however, is the charter school. Referred to in *Time Magazine* as the “latest and best hope for a public education system that has failed to deliver for too many children,”⁹⁸ charter school reform has quickly become established across the nation. Eight years ago, there was only one state that authorized charter schools.⁹⁹ Today 37 states and the District of Columbia have enacted laws supporting the establishment of these schools. Last year, three states -- New York, Oklahoma, and Oregon -- joined the ranks of states permitting charter schools.¹⁰⁰ In 1999, the nationwide total number of charter schools increased by 40 percent. In February of 2000, the United States Department of Education reported that there are nearly 1,700 charter schools enrolling 250,000 children in 27 states.¹⁰¹

Charter schools are special, “deregulated” public schools created through a charter contract with the state.¹⁰² Although state chartering requirements vary, schools may be sponsored by a group of teachers, a corporation, community members, or

⁹⁷ COOKSON, *supra* note 96, at 16.

⁹⁸ HASSEL, *supra* note 11, at 1-2 (quoting Claudia Wallis, “A *Class of their Own*,” TIME, Oct. 31, 1994, at 53).

⁹⁹ OFFICE OF EDUC. RESEARCH AND IMPROVEMENT, U.S. DEP’T OF EDUC., THE STATE OF CHARTER SCHOOLS 2000 10-11 (Jan. 2000) [hereinafter OFFICE OF EDUC., THE STATE].

¹⁰⁰ *Id.* at 11.

¹⁰¹ OFFICE OF EDUC. RESEARCH AND IMPROVEMENT, U.S. DEP’T OF EDUC., THE STATE OF CHARTER SCHOOLS 2000: FOURTH YEAR REPORT (Jan. 2000) [hereinafter OFFICE OF EDUC., CHARTER SCHOOLS].

¹⁰² OFFICE OF EDUC., THE STATE, *supra* note 99, at 1. HASSEL, *supra* note 11, at 4-5.

parents.¹⁰³ They may be a converted public or private school, or they may be a start-up school.¹⁰⁴

All states grant charter schools some degree of autonomy over programs and operations in return for greater accountability for student outcomes.¹⁰⁵ The charter outlines the school's goals, procedures, and standards. Schools that fail to meet their stated goals may be shut down.¹⁰⁶ Under most charter school legislation, charter schools receive the same level of funding per pupil that the conventional public schools receive.¹⁰⁷

Charter school reform advocates assert that charter schools, unbound from the pages of regulations governing typical public schools and freed from the reform-stifling politics of bureaucratic school districts and entrenched teacher organizations, will be better and more responsive schools.¹⁰⁸ Deregulation is expected to produce flexibility and innovation.¹⁰⁹ Charter school advocates also expect that freedom from the oversight of a bureaucratic decision-making structure will provide increased opportunities for parents to be involved in the operation and design of a public school¹¹⁰ and increased

¹⁰³ Louann A. Bierlein, *The Charter School Movement*, in *NEW SCHOOLS FOR A NEW CENTURY*, *supra* note 87, at 40-46.

¹⁰⁴ *Id.*; OFFICE OF EDUC., THE STATE, *supra* note 99, at 14-15.

¹⁰⁵ OFFICE OF EDUC., CHARTER SCHOOLS, *supra* note 101, at 12.

¹⁰⁶ OFFICE OF EDUC., THE STATE, *supra* note 99, at 1. During the 1998-99 school year, twenty-seven charter schools closed. *Id.*

¹⁰⁷ HASSEL, *supra* note 11, at 107. For a discussion of the difficulty of starting and supporting a new or special school on the standard per pupil cost, see *id.* at 104-27.

¹⁰⁸ Brett Lane, *Choice Matters: Policy Alternatives and Implications for Charter Schools* (visited Mar. 20, 2000) <<http://www.nwrel.org/charter/policy.html>>.

¹⁰⁹ HASSEL, *supra* note 11, at 128.

¹¹⁰ Barnes, *supra* note 91, at 2404.

opportunities for teachers to teach what they want to teach.¹¹¹ Charter schools are expected to be effective schools, in large part, because of characteristics of “participant ownership, freedom from external constraints, and a strong and distinctive culture.”¹¹²

Responsiveness and innovation in the charter schools are fostered by the efficiency of site-based management and the added competitive factor of choice.¹¹³ Charter schools are expected to “strengthen parental commitment to the schools their children attend because parents select a particular school after deciding that it meets their families’ needs and because they are assured continued participation in how the school is to be run.”¹¹⁴ Choice will allow schools to provide curricular diversity, to provide a place for the square pegs who do not fit into the system’s round holes. But the charter school movement has even higher aspirations. The idea is not simply to create a few effective schools, but rather to “create dynamics that will cause the main-line system to change so as to improve education for all students.”¹¹⁵ According to charter school advocates, competition may play a major role in creating dynamics that favor innovation. Public schools will no longer have the luxury of ignoring the preferences and needs of parents and students if those students can choose to attend a charter school and take their public funding with them.¹¹⁶ Competition will not, however, be the only factor creating a

¹¹¹ Bierlein, *supra* note 103, at 55-56. (expressing that teachers attribute increased professional satisfaction in charter schools to increased freedom and flexibility and increased decision-making power).

¹¹² Barnes, *supra* note 91, at 2409.

¹¹³ HASSEL, *supra* note 11, at 5-6.

¹¹⁴ Barnes, *supra* note 91, at 2404.

¹¹⁵ HASSEL, *supra* note 11, at 6 (quoting TED KOLDERIE, THE STATES BEGIN TO WITHDRAW THE EXCLUSIVE 1 (1993)).

¹¹⁶ *Id.*

dynamic favoring change. A major claim of the charter school movement is that these schools will work as “incubators for change” by allowing new concepts and ideas to be tried out on a small, experimental scale “before rolling educational reform through the entire school system.”¹¹⁷ The charter schools are envisioned as being laboratories for curricular innovation.¹¹⁸

This vision of the charter school is a dramatic departure from the factory model of public schooling. Instead of bringing together people with different visions of schooling and building one school that dissatisfies all, the charter school would bring together parents, students, teachers, and administrators who share a common vision of the schooling. Instead of sorting children and fitting them into pre-designated categories, the charter school could allow for diversity, flexibility, and innovation.¹¹⁹ Could charter schools provide an opportunity to re-envision public education? Could schools shake off their prison atmosphere and teach liberty for a democratic people who will be free at last?

V. THE PROSPECTS FOR INNOVATION IN CHARTER SCHOOLS

The charter school reform initiative, like other reform initiatives, makes a public claim that its target is reform or innovation of the official curriculum. There are,

¹¹⁷ Denise M. Kazlauskas, *Education Elementary and Secondary Education: Provide for Charter School Status*, 15 GA. ST. U. L. REV. 101, 108 (1998).

¹¹⁸ HASSEL, *supra* note 11, at 7, 128; UCLA CHARTER SCHOOL STUDY, BEYOND THE RHETORIC OF CHARTER SCHOOL REFORM 4 (1998) (“Charter Schools are more innovative, creating new models of schooling and serving as laboratories from which other public schools can learn.”); Bierlein, *supra* note 103, at 57 (“Charter schools are intended not only to serve their own students but to help initiate changes within the broader system as well.”); SCHOOL CHOICE IN THE REAL WORLD: LESSONS FROM ARIZONA CHARTER SCHOOLS 159 (Robert Moranto et al. eds., 1999).

¹¹⁹ Of course, only part of the impetus for charter school reform is the perceived need for greater diversity, innovation and responsiveness in the curriculum. Bryan Hassel maintains that the charter school movement grew out of numerous movements for educational reform, including the movement for school choice, for market competition in education, for school based management, for deregulation and for greater accountability for educational results. HASSEL, *supra* note 11, at 5.

however, several provisions in the legal organization of charter schools that will limit the possibility for charter schools to reform the official curriculum. In spite of the rhetoric about curricular reform, many charter school statutes leave charter school planners very little “wobble room” for innovative thinking about the official curriculum. Even the most innovative charter school statutes have incorporated legal constraints that will substantially impede innovation of the official curriculum. These constraints include the imposition of state core curricular requirements, standardized testing, and the charter application process. Each of these provisions incorporates some aspects of the factory model of education and will operate to limit reform. This section will sketch out some of the reform-limiting provisions facing charter school laws.

Perhaps more interesting than the potential for innovation in the official curriculum, however, is the opportunity for change in the hidden curriculum of public schooling. Charter provisions that are not likely to lead to change in the official curriculum – provisions that allow for greater autonomy, participation, and choice – give each charter school greater latitude to create a school “culture,” to independently define the power relationships within the school, and to change the “unstated norms, values and beliefs embedded in and transmitted to students through the underlying rules that structure the routines and social relationships in school and classroom life.”¹²⁰ I make no claim as to whether charter schools will actually change these routines and relationships. Nevertheless, each charter school has the *opportunity* to redefine them. Charter school statutes express a particular set of values, which -- if they are incorporated into the hidden

¹²⁰ HENRY A. GIROUX, *THEORY AND RESISTANCE IN EDUCATION* 47 (1983).

curriculum of the charter schools -- may signal a subtle, but nonetheless important opportunity for educational reform that departs from the factory model of education.

Although all charter school reform is designed to lead to innovation and reform, states have adopted charter school statutes that vary widely with regard to the degree of deregulation, the number of schools that may be chartered, the level of fiscal and managerial autonomy of charter schools, etc.¹²¹ This discussion of the prospects for charter schools to reform the curriculum of the public schools will not attempt to account for the variety of statutory schemes that have been put in place for the establishment of charter schools. Instead, it will focus primarily on the charter school statute that is widely agreed to be the “strongest” charter school reform law, one that is most likely to provide substantial change and innovation -- Arizona.¹²² Arizona has chartered more than 250 charter schools, more than any other state except California. Four percent of Arizona’s children attend charter schools, a higher percentage than any other state, and only surpassed by Washington D.C.¹²³ Arizona charter schools are funded at the same level as traditional public schools. They are given an automatic exemption from a wide

¹²¹ Checklists comparing provisions of the charter school statutes of various states can be found in Bierlein, *supra* note 103, at 42-43; HASSEL, *supra* note 11, at 20; OFFICE OF EDUC., THE STATE, *supra* note 99, at 12-13. The Center for Education Reform also maintains a website at <http://www.edreform.com>, which tracks state charter school laws in a state by state format.

¹²² Charter school laws have been analyzed as “strong” or “weak” based on the statute’s provisions that will affect the number and autonomy of charter schools. HASSEL, *supra* note 11, at 17-25; The Center for Education Reform, *Making Schools Work Better for All Children*, <<http://www.edreform.com>>. Arizona is judged to have a “strong” statute because it provides for a variety of authorizing entities, a wide range of people and organizations who may start up charter schools, for fiscally and legally independent charter school boards, for automatic exemption from a wide range of state and local educational policies, and for an unlimited number of charter schools. HASSEL, *supra* note 11, at 20. *See also* ARIZ. REV. STAT. § 15-183 (1999).

¹²³ OFFICE OF EDUC., THE STATE, *supra* note 99, at 18.

range of state and local regulations and have fiscally and legally independent school boards.¹²⁴

Like other states that adopted charter school statutes, Arizona expected curricular innovation.¹²⁵ Recently, however, researchers examining the Arizona charter schools concluded that they “are not providing curricular innovation of greater variety than are district schools.”¹²⁶ Similarly, strong charter laws in other states have not led to dramatic curricular innovations.¹²⁷ According to Bryan Hassell, “[C]harter schools in Colorado, Massachusetts, and Michigan have generally not engaged in activities that conventional districts would regard as new and path-breaking . . . the innovations that charter schools have undertaken are, by and large, innovations that have been proposed elsewhere and, to a limited extent, carried out in existing public schools.”¹²⁸

A. *Curricular Standards*

A major factor constraining reform of the official curriculum is the requirement that the charter schools follow state curricular standards. Most state charter school laws require schools to adhere to state curricular standards.¹²⁹ Rather than being relieved of regulations relating to the content of instruction and expected student progress, charter

¹²⁴ ARIZ. REV. STAT. § 15-183 (1999).

¹²⁵ SCHOOL CHOICE ON THE REAL WORLD, *supra* note 118, at 159.

¹²⁶ *Id.* at 170.

¹²⁷ HASSEL, *supra* note 11, at 129-34.

¹²⁸ *Id.* at 131.

¹²⁹ See, e.g., charter school statutes of Colorado, COLO. REV. STAT. §§ 22-30.5-101 to -209 (2000), Maryland, MD. CODE ANN., EDUC. §§ 1-101 to 16-301 (West 1999), California, CAL. EDUC. CODE §§ 47600-47664 (West 2000), New Jersey, N.J. STAT. ANN. §§ 18A:36A-1 to -18 (West 2000). See also Charter School Application of Englewood on the Palisades Charter School, 727 A.2d. 15 (N.J. Sup. Ct. App. Div. 1999).

schools must not only provide instruction that meets the curricular standards, but must also draft an application that demonstrates how the school will address the state required standards,¹³⁰ and “design a method to measure pupil progress toward the pupil outcomes adopted by the state board of education.”¹³¹ According to Professors Robert Stout and Greg Garn, who have studied charter school curricula in Arizona, these requirements may lead to “less, not more, variability among the schools with respect to what they declare they intend to teach and what, in fact, they do teach.”¹³²

The constraint of state curricular standards has increased in recent years. The “Standards Movement” -- another school reform movement that has gained strength since the 1983 publication of *A Nation at Risk* -- has led to recent enactment or revision of core curricular standards in many states. In reaction to reports of inadequate education in public schools, the standards movement aimed to set higher expectations for students.¹³³ Several years ago, most states had educational standards that were described by Chester Finn as “vague, uninspired, timid . . . and generally not up to the task at hand.”¹³⁴ Since 1998, states have been enacting “stronger standards with more detail and content.”¹³⁵

¹³⁰ ARIZ. REV. STAT. § 15-183(A) (1999).

¹³¹ *Id.* at § 15-183(E)(4).

¹³² SCHOOL CHOICE IN THE REAL WORLD, *supra* note 118, at 161.

¹³³ Judith A. Monsaas et al., *Georgia P-16 Initiative: Creating Change Through Higher Standards for Students and Teachers*, 6 VA. J. SOC. POL’Y & L. 179, 191 (1998). *See also* KOHN, *supra* note 57, at 14-15 (contrasting guidelines for teaching with demand for “Tougher Standards.”); OHANIAN, *supra* note 13 (critiquing the standards movement); MEIER, WILL STANDARDS SAVE, *supra* note 13 (criticizing the concept of centralized curriculum-building).

¹³⁴ CHESTER E. FINN, JR., ET AL., *THE STATE OF STATE STANDARDS 2000* vii (2000). Not everyone agrees with Chester Finn that standards should be specific. In his critique of what he calls the movement for “Tougher Standards,” Alfie Kohn quotes a former U.S. Commissioner of Education who said that any set of national educational standards “should be as vague as possible.” KOHN, *supra* note 57, at 48 (quoting Harold Howe II, *Uncle Sam Is in the Classroom!*, PHI DELTA KAPPAN, Jan. 1995, at 376).

¹³⁵ FINN, *supra* note 134, at vii.

These state-mandated standards define not only “what students should know and be able to do,” but also performance standards -- that is, how well students should be able to perform.¹³⁶ In reaction to conservative backlash against previous standards reforms that included “affective and social outcomes,” the current standards movement has focused on “generally acceptable student learning outcomes,”¹³⁷ but the standards nonetheless reach controversial learning areas. For example, “Arizona has a list of essential skills that students are expected to master at each grade level and in each subject.”¹³⁸ In 1997, the Fordham Foundation scrutinized Arizona’s standards and criticized Arizona’s science standards for “masking” evolution -- that is, not specifically mentioning the word “evolution.”¹³⁹ Since then, Arizona has revised its science standards to include these specifics: “Students should be able to ‘[u]se scientific evidence to demonstrate that descent from common ancestors produced today’s diversity of organisms over more than 3.5 billion years of evolution.’”¹⁴⁰ Another standard requires students to be able to “[e]xplain prominent scientific theories of the origin of the universe (Big Bang Theory), the solar system (formation from a nebular cloud of dust and gas), and life forms (evolution).”¹⁴¹

¹³⁶ Monsaas, et al., *supra* note 133, at 183.

¹³⁷ *Id.* at 191.

¹³⁸ SCHOOL CHOICE IN THE REAL WORLD, *supra* note 118, at 160.

¹³⁹ FINN, *supra* note 134, at 30.

¹⁴⁰ *Id.* at 30 (quoting Arizona Standard 4SC-P9).

¹⁴¹ *Id.* at 30 (quoting Arizona Standard 6SC-P1).

Whether to teach evolution or creationism has been a hotly debated subject in public schools for at least 75 years.¹⁴² The new standards, however, leave no room for debate. For the official curriculum of charter schools, the existence of prolix mandatory standards means that this question and most of the other important decisions about what children should be taught have already been made before the charter school curricular planning begins. Arguably, even the small decisions about what to teach have been made. The newly revised Arizona standards reflect a trend toward viewing educational standards as a “long list of facts and skills that students must acquire.”¹⁴³ The state’s curricular standards occupy hundreds of pages of text, listing standards and “pupil outcomes” beginning at the pre-kindergarten level and continuing through advanced or honors high school work.¹⁴⁴ The standards include specifics such as the following standard for pre-kindergarten music study:

1AM-R5. Improvise* simple rhythmic and melodic *ostinato** accompaniments on a variety of classroom instruments* and materials

PO 1. Identify an *ostinato*

PO 2. Perform an *ostinato*

PO 3. Create an *ostinato*¹⁴⁵

Standards are enunciated not only for science, math, language, and the arts, but also for health, technology, and “workplace” skills. Workplace standards outline a

¹⁴² Jeanne Anderson, *The Revolution Against Evolution, or “Well, Darwin, We’re Not in Kansas Anymore,”* 29 J. L. EDUC. 398, 398 (2000).

¹⁴³ KOHN, *supra* note 56, at 48.

¹⁴⁴ Copies of the standards for each subject area are available online at <http://www.ade.state.az.us/standards> (visited June 1, 2000).

¹⁴⁵ Arizona Dep’t of Educ., *Arizona Academic Standards & Accountability* (visited June 1, 2000) <<http://www.ade.state.az.us/standards/arts/arts-music.htm>>. The terms marked with an asterisk are defined in the glossary of terms that follows the standards.

course of study to prepare children for the working world.¹⁴⁶ These standards, like the standards in other more traditional areas of study, are defined for every grade level and encompass both the general and the specific. For example, in the sixth grade students will “use principles of effective oral written and listening communication skills to make decisions and solve workplace problems;”¹⁴⁷ and they will “[d]evelop an inventory record-keeping system to maintain data and information in a systematic fashion.”¹⁴⁸

The existence of these standards will dictate not only the content of instruction, but to a large extent will also dictate pedagogy. A prominent curricular planner, Dr. Judith Monsaas, points out, “As standards are put in place, schools must organize teaching and learning around meeting the standards.”¹⁴⁹ In one particularly controversial area of education, sex education, the Arizona standards dictate not only content, but also the format of instruction. The standards require that “[l]essons shall be taught to boys and girls separately;”¹⁵⁰ that lessons be “ungraded, [and] require no homework.”¹⁵¹ Further, “any evaluation administered for the purpose of self-analysis shall not be retained or recorded by the school or the teacher in any form.”¹⁵²

¹⁴⁶ Arizona Dep’t of Educ., *Arizona Academic Standards & Accountability* (visited June 5, 2000) <<http://www.ade.state.az.us/standards/workplace>>.

¹⁴⁷ Arizona Dep’t of Educ., *Arizona Academic Standards & Accountability* (visited June 5, 2000) <<http://www.ade.state.az.us/standards/workplace/standard1.htm>>.

¹⁴⁸ Arizona Dep’t of Educ., *Arizona Academic Standards & Accountability* (visited June 5, 2000) <<http://www.ade.state.az.us/standards/workplace/standard3.htm>>.

¹⁴⁹ Monsaas, et al., *supra* note 133, at 192.

¹⁵⁰ Arizona Dep’t of Educ., *Arizona Academic Standards & Accountability* (visited June 5, 2000) <<http://www.ade.state.az.us/standards/health/comprehensiverationale.htm>>.

¹⁵¹ *Id.*

¹⁵² *Id.*

Each standard, however well thought-out or uncontroversial, manifests an educational decision that charter school planners will not have to make. It hardly seems worth noting that the existence of these legislatively prescribed curricular standards will limit the ability of the charter schools to effect major innovation or radical reform of the official curriculum.

The legislatively prescribed curricular standards also carry unstated assumptions that will undoubtedly impact on the hidden curriculum of the charter schools. Standards that are, in fact, long lists of facts and skills that students must acquire incorporate not only incorporate specific values about the kind and content of information that is important enough to be addressed in school, but also the implicit assumptions about knowledge itself (that it is a list of facts and skills), about motivation (that pursuing knowledge because of interest or curiosity is not as important as acquiring the mandated list of facts and skills), and about child development (that all children should advance toward the attainment of that knowledge at roughly the same pace).¹⁵³ Moreover, the standards rely on the premise that state-employed experts and legislators should make the decisions about what is taught. The message implicit in the imposition of state curricular standards is that parents, teachers, and local school authorities cannot be trusted with important curricular decisions. State curricular standards tell school administrators and parents that state authorities must make important value-based decisions about the curriculum.

¹⁵³ KOHN, *supra* note 57, at 47-48.

Mistrust of the people has a long and honored history in American government;¹⁵⁴ and the impulse to mistrust is heightened when the matter at stake is the power to teach. Moreover, local decision-making is not necessarily any better than centralized decision-making. Indeed, it may embody the worst aspects of parochialism, factionalism and intolerance. As Mark Yudof, David Kirp, and Besty Levin note:

It bears remembering that law came to play such a prominent role in the shaping of educational policy because students who somehow differed from the norm were ignored or treated badly by educational institutions If the students were black, they were consigned to separate schools; women students were treated in ways that reinforced sex-based stereotypes; the non-English proficient were offered instruction in a language they could not understand; the handicapped were offered no instruction at all.¹⁵⁵

The curricular choices made by the State Board of Education may be the best possible curricular choices. On the other hand, requiring charter schools to follow curricular plans set out at the state level undermines a core concept of the charter school movement. If charter schools are not free to be different from the standard public schools in significant ways, they cannot “provide unique educational options,” “serve as experimental models,” or compete meaningfully with conventional schools.¹⁵⁶ Instead of following the charter concept that key curricular decisions are to be made by parents, school administrators, and teachers,¹⁵⁷ the Arizona standards carry on the legacy of the administrative progressives who favored centralized, efficient decision-making, who

¹⁵⁴ Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 809-10 (1999) (describing the Constitutional Convention as a “feast of distrust” and enumerating elements of government incorporating distrust of direct democracy).

¹⁵⁵ YUDOF ET AL., *supra* note 81, at 833.

¹⁵⁶ HASSEL, *supra* note 11, at 75.

¹⁵⁷ *Id.* at 4-6, 128-34.

feared factionalism and parochialism, and who mistrusted parents and teachers, and who believed in the notion of benign, patriarchal “schoolmen.”¹⁵⁸

B. Standardized Testing

Along with core curricular standards, Arizona -- like many other states that have adopted charter school legislation -- has put in place standardized testing to measure student progress toward the mandated achievement goals.¹⁵⁹ The pressure to score well on these standardized tests is particularly strong in charter schools, which, in order to maintain their charter, must demonstrate academic “progress” toward the pupil outcomes adopted by the state board of education.¹⁶⁰

Standardized testing has a noticeable impact on the official curriculum.¹⁶¹ Even in schools that do not depend on test outcomes for funding or for student attendance, scholars have observed that teachers prepare their students for standardized tests by abandoning hands-on learning techniques, long essays, and reading literature in favor of worksheets, drills, short essays, and test strategy sessions.¹⁶² Because charter schools are evaluated on the basis of student test performance,¹⁶³ and because charter schools must

¹⁵⁸ See generally TYACK, *supra* note 13.

¹⁵⁹ ARIZ. REV. STAT. § 15-183 (E)(4) (1999) (requiring charter schools to participate in testing under the “Arizona instrument to measure standards test and the nationally standardized norm-referenced achievement test as designated by the state board”).

¹⁶⁰ *Id.* at § 15-183(E)(4) (“including participation in the Arizona instrument to measure standards test and the nationally standardized norm referenced achievement test as designated by the state board . . .”).

¹⁶¹ For examples, see KOHN, *supra* note 57, at 88-89.

¹⁶² *Id.* at 88-90.

¹⁶³ Charter school student test scores must be included in an annual report card. ARIZ. REV. STAT. § 15-183(E)(4) (1999).

compete for students in a market where parents tend to depend heavily on standardized test scores, the incentive for charter schools to “teach to the test” will be strong.

As charter schools modify their curricula to teach to the standardized tests, much of the individual character of the schools may be lost. An Arizona teacher who taught at a Montessori school that converted from a private school to a public charter school described how the tests changed the school. The Montessori curriculum provides for children to be monitored daily in individual activities and rarely tested. “As a result,” wrote the teacher:

they are unfamiliar with test-taking strategies and are at a disadvantage in the standardized test-taking contests So now, instead of focusing on traditional Montessori goals of developing character, self-esteem, self-reliance and self-discipline, and on directing independent study at the student’s own pace, we find ourselves “teaching to the test” so that we won’t look bad when compared to the other schools that we have worked so hard for all these years not to imitate. Having fit our octagonally-shaped peg into the traditional round hole has cost us some of our shape and, sadly, some of our distinctiveness.¹⁶⁴

Not only does Arizona law require students to take a test to measure progress toward the state-mandated curricular standards, but it also requires students to take a “nationally standardized norm referenced achievement test.”¹⁶⁵ Norm-referenced tests are not designed to measure what students have learned, but rather to rank students and compare them against how other children perform on the same test. They do not even claim to measure what the individual student knows.¹⁶⁶ These tests are designed to sort

¹⁶⁴ SCHOOL CHOICE IN THE REAL WORLD, *supra* note 118, at 228.

¹⁶⁵ ARIZ. REV. STAT. § 15-183(E)(4) (1999).

¹⁶⁶ KOHN, *supra* note 57, at 79.

students rather than to emphasize or synthesize knowledge or to measure achievement.¹⁶⁷ Teaching to such a test is not likely to lead to innovative thinking about the delivery and content of education.¹⁶⁸

The impact of standardized testing on the hidden curriculum of the charter school is more profound. Measuring or chartering schools on the basis of student performance on standardized tests incorporates an input-output model of learning. Teachers pour the knowledge into the student's heads. Students must then spew the information back during the test. Schools once again became factories, churning out student-products of high quality. In keeping with the administrative progressive vision of schooling, children are treated as raw material "to be shaped into products to meet the various demands of life."¹⁶⁹ Further, as teachers and schools are held accountable on the basis of student performance on the test, the term "accountability" becomes a "euphemism for more control over what goes on in the classrooms by people who aren't in the classroom"¹⁷⁰ Here again, the hidden commitment in the statute is to top-down decision-making and "scientific efficiency" rather than to individual autonomy, intellectual choice, or parental participation in academic decision-making.

Moreover, standardized testing "distracts [parents and educators] from paying attention to the importance of building a culture of schooling that is genuinely intellectual

¹⁶⁷ *Id.* See also NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* (1999).

¹⁶⁸ KOHN, *supra* note 57, at 79. For another recent critique of standardized testing in public schools, see PETER SACKS, *STANDARDIZED MINDS: THE HIGH PRICE OF AMERICA'S TESTING CULTURE* (1999).

¹⁶⁹ KLIEBARD, *FORGING*, *supra* note 40, at 116 (quoting CUBBERLEY, *supra* note 44, at 338). See *supra* notes 44 and 48 and accompanying text.

¹⁷⁰ KOHN, *supra* note 57, at 95.

in character, that values questions and ideas, at least as much as getting the right answers.”¹⁷¹ Standardized tests cannot measure “initiative, creativity, imagination, conceptual thinking, curiosity, effort, irony, judgment, commitment, nuance, good will, ethical reflection, or a host of other valuable dispositions and attributes. What they can measure and count are isolated skills, specific facts and functions, the least interesting and least significant aspects of learning.”¹⁷² Standardized testing distorts the way we decide what is valuable by emphasizing conformity and right answers, rather than the kind of vigilant questioning of authority that is necessary for educated citizens. As schools increasingly value measurable outcomes, the prospects for innovative reform that addresses the most significant and interesting aspects of learning are diminished.

C. Chartering Boards

Like most charter school statutes, the Arizona charter school statute allows for charter schools to be established through an application process that culminates in the granting or denial of a charter.¹⁷³ In Arizona, applications may be approved by a school district governing board, the state board of education, or the state board for charter schools.¹⁷⁴ By providing multiple chartering boards, the legislature of Arizona sought to permit a high number of applications and to permit approval of a wide variety of

¹⁷¹ *Id.* at 94 (quoting Elliott W. Eisner, *Standards for American Schools: Help or Hindrance?* PHI DELTA KAPPAN, June 1995, at 763).

¹⁷² *Id.* at 82-83 (quoting WILLIAM AYERS, *TO TEACH: THE JOURNEY OF A TEACHER* 116 (1993)).

¹⁷³ A list of the number and types of agencies allowed to grant charters in various states can be found at OFFICE OF EDUC., *THE STATE*, *supra* note 99, at 12-13.

¹⁷⁴ *Id.* See also ARIZ. REV. STAT. § 15-183 (C)(1-2) (1999).

opportunities for innovative ideas (even if those ideas did not appeal to a particular local school board).¹⁷⁵

Most of the charters approved by Arizona chartering organizations have been “good, old-fashioned, back-to-basics” schools.¹⁷⁶ Other charter schools serve “at-risk” children, have a particular curricular focus (such as science or the arts), or are Montessori schools.¹⁷⁷ The story of one school that did not receive its charter provides an interesting glimpse into the hidden curriculum of charter schooling. In 1994, members of a rural community called Tonto Village reorganized a private school that was originally founded by the Church of the Immortal Consciousness.¹⁷⁸ The new school would be called the Shelby School and would be non-profit and non-sectarian.¹⁷⁹ In February of 1994, the State Board of Education unanimously approved the school’s application for a charter, the first step in opening a charter school.¹⁸⁰ Soon after that, the Board began to receive letters and phone calls from people in the Tonto community who objected to the school’s receiving a charter.¹⁸¹ The board reported that the objections related to the tax money that would be spent on the school,¹⁸² but meanwhile members of the Church of Immortal

¹⁷⁵ See HASSEL, *supra* note 11, at 148 (discussing the politics of maintaining several separate chartering boards).

¹⁷⁶ SCHOOL CHOICE IN THE REAL WORLD, *supra* note 118, at 163. (describing the majority of Arizona charter schools as schools designed “to prepare students for high academic achievement in the context of a formalized environment”).

¹⁷⁷ *Id.* at 161-64.

¹⁷⁸ *Shelby Sch. v. Arizona State Bd. of Educ.*, 962 P.2d 230, 235 (Ariz. Ct. App. 1998).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

Consciousness had filed suit alleging libel, saying that they had been called a “cult” and “baby-killers.”¹⁸³ The libel suit became sensational and the subject of national news stories after Trina Kamp, one of the church’s leaders, was permitted to testify while “channeling,” that is, to testify in the persona of Dr. Pahlvon Duran, a 15th century Englishman who provided the inspiration for the church.¹⁸⁴ Meanwhile, the Board denied the school’s application for a charter, citing the uncertain credit history of the proposed director of the Shelby School as the reason for denying the application.¹⁸⁵ On appeal from the denial of the charter, the school argued that the Board had investigated the “religious affiliation of [the applicant] and the School’s other constituents, along with their lifestyles, businesses, and relationships with local authorities financial status.”¹⁸⁶ In spite of the facts that the Board acknowledged receiving phone calls and letters objecting to the issuance of a charter to the school,¹⁸⁷ that the Board had not allowed the school to amend its application to demonstrate creditworthiness,¹⁸⁸ and that the Board refused to answer questions relating to communications from the community,¹⁸⁹ the court upheld the Board’s investigation, saying, “We cannot presume that the [B]oard’s decision was based on any alleged unconstitutional considerations.”¹⁹⁰ There was no evidence in the record

¹⁸³ Gail Tabor, *Spirit Bears Witness in Suit “Channeling” Session Makes Some Doubt Jurist’s Prudence*, THE ARIZONA REPUBLIC, July 27, 1995, at A1.

¹⁸⁴ *Id.*

¹⁸⁵ *Shelby Sch. v. Arizona State Bd. Of Educ.*, 962 P.2d 230, 235 (Ariz. Ct. App. 1998).

¹⁸⁶ *Id.* at 169.

¹⁸⁷ *Id.* at 162.

¹⁸⁸ *Id.* at 165.

¹⁸⁹ *Id.* at 167.

¹⁹⁰ *Shelby Sch. v. Arizona State Bd. of Educ.*, 962 P.2d 230, 243 (Ariz. Ct. App. 1998).

that religious bias played a role in the Board's decision: The school had not been permitted to subpoena and question the School Board members.¹⁹¹

It is possible, of course, that financial considerations were the only matters the Board considered in denying the charter application of the Shelby School. The denial would then be an appropriate exercise of fiscal responsibility by the Board. If the religious beliefs of the school founders were indeed a factor, however, then the story becomes reminiscent of other stories of minority groups who believe that they have been discriminated against and who have sought to prove discrimination.¹⁹² The misbehavior of the Board, if it exists, may be difficult or impossible to prove.¹⁹³ The Board, meanwhile, may operate to screen out reforms that do not please the majority. The chartering mechanism may operate to screen out educational reform ideas that do not satisfy local policy elites;¹⁹⁴ it may also screen dissenting views or alternative lifestyles out of the charter school experiment.

¹⁹¹ *Id.* at 167.

¹⁹² *See, e.g.,* Ward v. Regents of Ga. Univ. Sys., 191 F. Supp. 491, 492 (N.D. Ga. 1957) (demonstrating how a delay that attended the elaborate administrative appeal process prevented Horace Ward, a black student, from proving that the University of Georgia denied him admission to its law school based on his race); Hunt v. Arnold, 172 F. Supp. 847 (N.D. Ga. 1959) (illustrating how university system scrutinized black students' applications to Georgia State College of Business Administration looking for any reason other than race to deny admission). *See also* Molly Townes O'Brien, *Discriminatory Effects: Desegregation Litigation in Higher Education in Georgia*, 8 WM. & MARY BILL OF RIGHTS J. 1 (1999) [hereinafter O'Brien, *Discriminatory Effects*] (describing the administrative pretense that was used to exclude the plaintiffs in *Hunt v. Arnold* from being admitted to the college).

¹⁹³ *Id.*

¹⁹⁴ HASSEL, *supra* note 11, at 137 (reporting that a letter from Michigan Education Association threatened various actions if the university chartered schools that did not meet MEA standards).

D. Attendance by Choice

It is not immediately apparent how the element of “choice” will affect the official and hidden curricula of charter schools. Charter school statutes typically allow parents to decide whether their children will attend the charter school. No child is required to attend a particular charter school. Conversely, charter schools generally have more power than traditional public schools, through recruitment and enrollment requirements to “shape their educational communities.”¹⁹⁵ Even though charter schools may not discriminate in their admissions, hiring, or programs on the basis of race or religion,¹⁹⁶ a group of parents and students of like background may unite around any concept and may come together to form a charter school. Further, the admissions process allows charter schools to filter their applicants “to ensure that their shared values and beliefs about education are upheld.”¹⁹⁷ In other words, charter school statutes permits like-minded people to flock together. The values and beliefs of a group that chooses to attend a charter school are likely to be much more closely aligned than those of a group who attend a traditional public school based on assignment by residence in the school’s attendance district. Therefore, both the operational and the hidden curriculum may place greater significance on their constituents’ particular values and beliefs than a traditional public school. Thus, the element of choice carries important message for the hidden curriculum of public schooling. That message is: diversity in the aggregate is more important than diversity within the individual school. Within the charter school scheme, diversity may be

¹⁹⁵ UCLA Charter School Study, *supra* note 118, at 43.

¹⁹⁶ ARIZ. REV. STAT. § 15-181 (1999).

¹⁹⁷ UCLA Charter School Study, *supra* note 118, at 44. Not all states permit charter schools to have discretion in admissions. In Georgia, for example, admission to charter programs is based on a first-come-first-served basis with a lottery if the number of applicants exceeds the number of seats available. *Id.*

accomplished by having many different schools focused on many different educational concepts, rather than one school where many educational concepts come together. To return to the metaphor used earlier in this paper,¹⁹⁸ when the workers arrive at the site of the proposed building, each with a different vision of what is to be built (a community center, an industrial complex, an observatory, an apartment building), the charter school solution is to send all of the workers off to different sites to build separate buildings.

The acceptance of group self-segregation based on any principle represents a major modification of the ideal (though perhaps not the reality) of the traditional public school. Until the advent of the school choice movement, self-segregation based on ideology could be accomplished only by opting out of the public school system.¹⁹⁹ Of course, racial segregation was established by law and by custom throughout the United States until the landmark decision in *Brown v. Board of Education*.²⁰⁰ Even after the *Brown* decision, racial segregation of schools was accomplished through various means including private actions that led to residential segregation.²⁰¹ Similarly, private choice of housing based on ideological or religious grounds can and did create religiously or ideologically isolated public school communities before the advent of the school choice movement.²⁰² Nevertheless, integration, not only of the races, but also of social classes

¹⁹⁸ See text *supra* at Part II.

¹⁹⁹ *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925).

²⁰⁰ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

²⁰¹ This phenomenon has been well documented in numerous sources. See, e.g., JAMES A. KUSHNER, *APARTHEID IN AMERICA* (1980). In *Freeman v. Pitts*, 503 U.S. 467 (1992), the Supreme Court held that private action leading to residential segregation would not prevent termination of court supervision under a desegregation order.

²⁰² See, e.g., *Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994).

and ethnic and religious and ideological backgrounds, has long been an aspiration of American common schooling.²⁰³ The “melting” of American youth into one people was a concept favored by the earliest public school advocates.²⁰⁴ And, while the “melting pot” concept has come under sustained criticism,²⁰⁵ giving way to metaphors for multi-culturalism such as the “tossed salad” or the “stew,” the public school official devotion to schooling diverse groups of children together has been virtually unwavering.

A full exploration of the potential effect of ideological self-segregation in public schooling is beyond the scope of this paper. Because charter schooling is very new, it is too early to draw a conclusion about its impact on the racial, ethnic, and ideological make-up of individual schools. Race and class segregation are not among the permissible purposes for opening a charter school.²⁰⁶ In light of our history of persistent discrimination based on race and class, however, there is every reason to expect that race and class issues will play a role in motivating parents to choose to send their children to a

²⁰³ The common school crusaders reasoned that school should bring together children of all religions, classes, and ethnic backgrounds to avert the danger of communal isolation of new immigrants. Lawrence A. Cremin, *Horace Mann's Legacy*, in *THE REPUBLIC AND THE SCHOOL: HORACE MANN ON THE EDUCATION OF FREE MEN* 8, 25 (Lawrence A. Cremin ed., 2d ed. 1959). It should be noted, however that "[e]ven the most ringing statements about the equality of all men were not taken to include women or black people, and non-English immigrants faced various forms of discrimination." KAESTLE, *supra* note 2, at 92. In spite of the American endorsement of the concept of “common” and equal schooling, schools have remained separate and unequal. See generally GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION* (1996).

²⁰⁴ See KAESTLE, *supra* note 2, at 7. The common school crusaders generally viewed assimilation as having positive social value, promoting stability and social control.

²⁰⁵ See, e.g., KATZ, *supra* note 27, at 3. For a discussion of assimilation as a civic republican value, see Stolzenberg, *supra* note 33, at 641-46. See also Salomone, *Common Schools*, *supra* note 33, at 173-80 (discussing the tension between sectarianism and secularism in public schooling).

²⁰⁶ Charter schools, like all public schools, may not discriminate in admissions based on race. Some charter statutes have further requirements. For example, in California each charter application must contain a statement of the “means by which the school ‘will achieve a racial and ethnic balance among its pupils that is reflective of the general population residing within the territorial jurisdiction of the school.’” UCLA CHARTER SCHOOL STUDY, *supra* note 118, at 47. In spite of this requirement, the UCLA study found that

charter school.²⁰⁷ Although several charter school studies and reports have concluded that the ethnic composition of charter schools is “in line with those of traditional public schools,” an empirical study using disaggregated data revealed substantially increased ethnic separation in charter schools as compared to traditional public schools.²⁰⁸ These results merit further study and exploration.

Two other results of self-segregation seem probable and worth noting at this juncture. First, members of dissenting or minority groups whose interests are not adequately addressed in the mainstream curriculum may find a more welcoming environment in the charter schools, a new avenue for expression of their ideals and values; and second, values conflict within the public school arena may be diminished.

The allure of charter schools for racial minority parents and students is vividly expressed by Professor Robin Barnes in her article entitled “Black America and School Choice.”²⁰⁹ Professor Barnes recounts the frustration that she and other black and white parents felt when they approached their children’s public school administrators asking that Mark Twain’s *Adventures of Huckleberry Finn* be removed from the eighth-grade curriculum.²¹⁰ The group believed that teaching the text without the accompanying historical information would be “pernicious to our children because it diminishes the

in 10 of 17 California charter schools studied, at least one racial or ethnic group was over-represented by 15% or more. *Id.* at 48.

²⁰⁷ See generally O’Brien, *Tuition Vouchers*, *supra* note 36.

²⁰⁸ Casey D. Dobb & Gene V. Glass, *Ethnic Segregation in Arizona Charter Schools*, 7:1 EDUC. POL’Y ANALYSIS ARCHIVES 1, 3, 30-31 (Jan. 14, 1999), <<http://www.epaa.asu.edu/epaa/v7n1>>.

²⁰⁹ Barnes, *supra* note 91.

²¹⁰ *Id.* at 2380-81.

atrocities committed during the institution of chattel slavery.”²¹¹ In spite of her persistence, diplomacy, reasonableness, and willingness to compromise, the parental request provoked heated controversy and retaliation against black students in the school. Although the book was eventually removed from the eighth-grade curriculum, the controversy demonstrated for Professor Barnes “the tension between one group of parents (mostly black) who wanted meaningful involvement in school policies, and another group (mostly white) that expected to maintain control.”²¹² For Barnes, the charter school option presents a unique opportunity for minority parents to become involved in the policies of their children’s school.

If Barnes had been a participant in a charter school that decided to put together a program that differed from the standard public school curriculum only in the deletion of this one book, the change to the official curriculum would be small. The change in the hidden curriculum, however, would be significant. The message implicit in small changes in the curriculum may be as powerful as “we value you” and “your participation is desired;” exactly the opposite of the messages that were conveyed to Barnes when she approached the public school. In the context of a racially oppressive society, such a change in the hidden curriculum of the school might signal the difference between a student’s success and failure, between education and “miseducation.”²¹³

At the same time that charter schools may provide a more congenial atmosphere for dissenters and minorities, they may lead to a reduction of conflict in the public school

²¹¹ *Id.* at 2394.

²¹² *Id.* at 2397.

²¹³ JACQUELINE JORDAN IRVINE, *BLACK STUDENTS AND SCHOOL FAILURE: POLICIES, PRACTICES, AND PRESCRIPTIONS* (1990).

arena. If minority groups exit from the mainstream public schools, the public school and its constituents may be spared the unresolvable conflict that results from moral disagreement. This possibility was raised by Professor Rosemary Salomone in her article, “Struggling With the Devil: A Case Study of Values in Conflict.”²¹⁴ Professor Salomone describes the no-win situation that the dissenting parents faced when their religious views conflicted with certain school activities. When, after a great deal of public debate, conflict, and legal action, they were unsuccessful in changing the school curriculum to accommodate their beliefs, the parents could then either compromise their basic beliefs, or “bear the burden of private school tuition and forgo the convenience and social advantages of the neighborhood school.”²¹⁵ Professor Salomone suggests that, “If parents had reasonable alternatives within a publicly funded and loosely regulated system of schooling, then, perhaps, communities such as Bedford could be spared the upheaval that values-based conflicts inevitably produce.”²¹⁶ Something like a charter school would resolve the problem for the religious fundamentalist parents that Salomone describes.

Intuitively, the charter school would be a positive option for religious dissenters and ethnic minorities.²¹⁷ But the exit of dissenting voices from the mainstream public schools could be a loss for the schools and the greater society. A study of the effect of charter schools on the traditional public schools found that “both school district

²¹⁴ Salomone, *Struggling*, *supra* note 4.

²¹⁵ *Id.* at 696.

²¹⁶ *Id.*

²¹⁷ *But see* Kevin Brown, *Equal Protection Challenges to the Use of Racial Classifications to Promote Integrated Public Elementary and Secondary Student Enrollments*, 34 AKRON L. REV. (in this volume) (arguing that education in the context of difference and diversity is greater benefit than self-segregated alternatives); *see also* Tyll van Geel, *Citizenship Education and the Free Exercise of Religion*, 34 AKRON L. REV. (in this volume).

employees and charter school leaders were aware that charters often attract families with a long history of complaints against the school district.”²¹⁸ The effect of the exit of these “disgruntled families” was complex. One superintendent believed that the exit of the “loudest of the grippers” gave the public school more room to maneuver and more time to address the concerns of the majority.²¹⁹ Other school administrators were happy to have the “pain in the ass parents” out of their school.²²⁰ Another school administrator voiced concern, however, that “the exodus of grippers into charter schools ultimately might prove detrimental to traditional public schools because they will have lost a key constituency agitating for school improvement.”²²¹

If dissenting families exit the traditional public schools to find educational enclaves where their views are more mainstream, the negative impact on public school education may be even deeper than the loss of a few ideas for school improvement. Ideological conflict plays an important role in a democracy; political and moral disagreement should not necessarily to be avoided in public education.²²² Although the problems inherent in coping with moral disagreement are complex and formidable,²²³ the experience dealing with conflict is educational for both the child and society. Children who will assume the role of self-governing citizens need to develop skills in questioning

²¹⁸ Eric Rofes, *How Are School Districts Responding to Charter Laws and Charter Schools?* 6, April 1998, available in ERIC.

²¹⁹ *Id.* at 6-7.

²²⁰ *Id.*

²²¹ *Id.* at 7.

²²² GUTMANN, *DEMOCRATIC EDUCATION*, *supra* note 3, at 5.

²²³ AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 1 (1996) (“Of the challenges that American democracy faces today, none is more formidable than the problem of moral disagreement.”).

authority and reasoning, together with a goal of finding mutually acceptable solutions. According to Amy Gutmann, controversy over educational issues provides “a particularly important source of social progress.”²²⁴ If ideological segregation leads to the reduction of conflict in the public school arena -- because of the exit of minority groups or dissenting individuals from the mainstream public school -- diminished public dialogue about social and religious values may be the deleterious result of charter schooling.

E. Autonomy in Governance

In assessing the prospects for charter schools to effect meaningful innovation in the curriculum, it would be a mistake to ignore the governance structure of charter schools. Charter schools are set up to have independent school administrative boards.²²⁵ The schools are free to be innovative in setting up their management structures.²²⁶ Charter school administrators typically have considerable autonomy in hiring teaching staff, setting discipline policy, calendar, admissions, budget, and the daily schedule.²²⁷ Any one of these factors can play an important role in the delivery and quality of education.

The charter school statute also provides room for variation in how the teaching and learning environment is structured. Even though the state curricular standards leave little room for deciding what to teach, the charter school statute does leave room for variation in the structure of the teaching and learning environment, emphasis, philosophy, and

²²⁴ GUTMANN, DEMOCRATIC EDUCATION, *supra* note 3, at 5.

²²⁵ OFFICE OF EDUC., THE STATE, *supra* note 99, at 46-48.

²²⁶ *Id.* at 46.

²²⁷ *Id.* at 46.

approach.²²⁸ While this room for variation may not lead to substantial reform of the official curriculum for reasons I have already elaborated,²²⁹ the freedom to structure the learning environment provides an opportunity to effect substantial changes in the hidden curriculum. Within the school, changes in the power relationships of teachers, parents, and administrators are permitted. Changes in the learning atmosphere, such as allowing children to walk down the hall without a pass, permitting students to eat their lunches outside, and having the principal of the school read to the kindergarten class, may not show up in the official statements of what is being taught, but will nevertheless teach important lessons. The learning process may, indeed, be more important than the content.

VI. CONCLUSION

I have only begun to sketch out some of the possibilities for charter schools to reform schools into places that embody democratic and community values. The promise for school reform that rejects the factory model of public schooling and establishes both an official and hidden curriculum that fosters democratic participation appears to be severely limited by the imposition of state-mandated curricular standards and standardized tests. The distrust of the people that was present at the founding of the nation is palpable. Charter school statutes, envisioned as a vehicle for curricular innovation and parental empowerment, are being structured to ensure that most of the important decisions about the public school curriculum remain in the hands of experts and bureaucrats. Because of the importance of education in our society, a truly

²²⁸ SCHOOL CHOICE IN THE REAL WORLD, *supra* note 118, at 161.

²²⁹ *See supra* Part V, A-C.

“deregulated” curriculum may be beyond reach. Nevertheless, the values of a school community may be communicated to students in myriad ways. The freedom to decide obvious structural issues -- such as the size of the school, the length of the class periods, the length and timing of holidays, the responsibilities of teachers and administrators, the role of students in the classroom, and less obvious atmosphere issues (such as whether students may sit on the floor or wear hats indoors) -- is the freedom to change the messages that are implicit in the structure, power relationships, and atmosphere of school. Personal autonomy and institutional flexibility, even within the constraints placed on the charter school structure, may provide some room within the hidden curriculum for teaching liberty.

The many restrictions on actual innovation, the fact that a majority of charter schools incorporate a traditional “back-to-basics” structure,²³⁰ and the potential segregating factor of “choice,” raise serious concerns about charter school reform. Rather than institutional flexibility or genuine curricular innovation, a key motivating factor for parents involved in charter schools may be the prospect of their children receiving an academic credential that is enhanced by the value of the marketing spin that the charter school designers have placed on their school. Although the charter school idea has some potential to allow for greater autonomy, choice, and participation, other effects of charter schooling may be to facilitate academic credentialing, ideological self-segregation, and conflict avoidance. The blueprint for public school reform that provides both the official and the hidden curriculum for an education for democratic citizenship remains in the hands of the architects of the future.

²³⁰ SCHOOL CHOICE IN THE REAL WORLD, *supra* note 118, at 159-65;