Privileges and Immunities, Public Education, and the Case for Public School Choice

*Aaron Y. Tang**

Introduction

For Ashley, a fourteen-year-old East St. Louis resident who is preparing to enter her freshman year at East St. Louis Senior High School, the American dream may well seem out of sight, out of mind, and out of reach. In *Savage Inequalities*,[1] a seminal work on educational inequality in America, Jonathan Kozol describes the deplorable conditions that Ashley will face:

> East St. Louis Senior High School was awash in sewage for the second time this year. The school had to be shut because of fumes and backed-up toilets. . . . The backup, we read, occurred in the food preparation areas.
>
> School is resumed the following morning at the high school, but a few days later the overflow recurs. This time the entire system is affected, since the meals distributed to every student in the city are prepared in the two schools that have been flooded. School is called off for all 16,500 students in the district. . . .
>
> In the same week, the schools announce the layoff of 280 teachers . . . . [T]he cuts . . . will bring the size of . . . fourth to twelfth grade classes up to 35 . . . .[2]

Kozol continues:

> The science labs at East St. Louis High are 30 to 50 years outdated. John McMillan, a soft-spoken man, teaches physics at the school. He shows me his lab. The six lab stations in the room have empty holes where pipes were once attached. "It would be great if we had water," says McMillan.[3]

---

* J.D., expected June 2011, Stanford Law School. I would like to thank Elizabeth Campbell for her constant, unwavering support in all of my endeavors. I would also like to thank Professor William Koski for his thoughtful review and guidance throughout this project, and Professor Kathleen Sullivan and Professor Jane Schacter for their assistance in testing and formulating the novel constitutional claims presented herein.

1 Jonathan Kozol, Savage Inequalities (1992).

2 *Id.* at 23–24 (internal quotation marks omitted).

3 *Id.* at 27.

Faced with such circumstances, Ashley's prospects for completing high school are no better than a fifty-fifty proposition. According to one study, only forty-nine percent of freshmen at East St. Louis Senior High School made it to their senior year in 2007.[4] Even if she graduates, it is questionable whether meaningful opportunities will be available to her given the low quality of instruction she will have received. In 2009, for instance, less than one in every seven juniors at the school met Illinois's reading standards, only one in twelve met the state's math standards, and less than one in sixteen passed the state's science exam.[5] Among students who took the ACT, the average score was a 15,[6] placing the average test taker in the fifteenth percentile nationwide.[7]

Nine miles away in Belleville, Illinois, students enjoy a vastly different experience. At Belleville High School East, renovations have just been completed on an $8 million, "state-of-the-art" media center, which includes "three computer labs, each with about 30 computers, audio systems and SMART boards, access to wireless Internet and a cyber cafe, where students can buy coffee and watch news broadcasts on a flat screen TV."[8] The district's other high school, Belleville West, is a new $56 million, 360,000 square foot facility with a modern two-and-a-half story library, a high-tech auto shop, three full-sized basketball courts, and a greenhouse for horticulture and biology classes.[9]

If Ashley were somehow able to enroll in either of Belleville's high schools, her chances for success would improve dramatically. Over ninety percent of students in the district graduate on time,[10] and Belleville juniors perform at or slightly above the state average on standardized tests in reading, math, and science.[11] In 2009, Belleville

---

4 *List of Illinois High Schools with High Dropout Rates*, ASSOCIATED PRESS, Oct. 30, 2007, *available at* http://67.151.102.46/story/?id=66970.

5 *East St. Louis Senior High School Test Scores*, GREATSCHOOLS, http://www.greatschools.org/modperl/achievement/il/1871 (last visited Apr. 4, 2011).

6 *East St. Louis Sr High School*, CHI. TRIB., http://schools.chicagotribune.com/school/east-st-louis-sr-high-school_east-saint-louis (last visited Apr. 4, 2011).

7 THE ACT, ACT PROFILE REPORT - NATIONAL 10 (2009), *available at* http://www.act.org/news/data/09/pdf/National2009.pdf.

8 Rickeena J. Richards, *Belleville East Students Get Extra Gift*, BELLEVILLE NEWS-DEMOCRAT, Dec. 14, 2009, at A1.

9 Robert Kelly, *The Opening of the New West; As New Belleville West High Rises, The Excitement Builds*, ST. LOUIS POST-DISPATCH, May 8, 2003, at SM1.

10 ILL. STATE BD. OF EDUC., 2010 ILLINOIS SCHOOL REPORT CARD: BELLEVILLE HIGH SCHOOL-EAST 3 (2010), *available at* http://bths201.org/documents/BE_Report_10.pdf.

11 *See Belleville High School-East Test Scores*, GREATSCHOOLS, http://www.greatschools.org/modperl/achievement/il/598 (last visited Apr. 4, 2011); *Belleville High School-West Test*

East students achieved a mean score of 21 on the ACT,[12] placing the average student in the fifty-sixth percentile[13]—competitive enough for various state and private college institutions to consider students for acceptance.[14]

But nearby Ashley's home in East St. Louis, there are public schools even better than those in Belleville. Twenty-five minutes away, across the Mississippi river and into the State of Missouri, sits Lindbergh High School. Lindbergh students' performances on Missouri's English, Biology, and Algebra standardized tests surpass statewide norms.[15] With an average composite ACT score of 23.7,[16] the average Lindbergh student places roughly in the seventy-fourth percentile nationwide.[17] Moreover, unlike East St. Louis Senior High School,[18] not only do most of Lindbergh's students graduate, but most of them go on to college; in 2008, this figure was about ninety-one percent.[19] Nearly seventy percent of these graduates, including eleven National Merit finalists, received academic scholarships.[20] Recognizing the school's success, U.S. News & World Report awarded Lindbergh High School a Silver Medal in its 2010 rankings of America's best high schools.[21] Put succinctly, if Ashley were able to enroll in Lindbergh High School, her educational success would be more than attainable—it would be expected.

The vast disparity in the quality of educational opportunity afforded by these three nearby schools, and in similar geographic areas throughout the nation, is not news to many policymakers and public interest litigators. The past four decades have witnessed no shortage of policies and school finance lawsuits aimed at leveling the playing

---

Scores, GREATSCHOOLS, http://www.greatschools.org/modperl/achievement/il/599 (last visited Apr. 4, 2011).

12 ILL. STATE BD. OF EDUC., *supra* note 10.

13 THE ACT, *supra* note 7, at 10.

14 *Directory of Colleges and Universities*, U.S. NEWS & WORLD REP., 2010, at 129, 131–288 (detailing admission standards for United States colleges, including schools' 25th–75th percentile scores on the SAT and ACT).

15 *See Lindbergh Senior High School Test Scores*, GREATSCHOOLS, http://www.greatschools.org/modperl/achievement/mo/1126 (last visited Apr. 4, 2011).

16 *Id.*

17 THE ACT, *supra* note 7, at 10.

18 *See supra* text accompanying note 4.

19 *The Class of 2008*, LINDBERGH HIGH SCH. (July 12, 2008, 6:30 PM), http://www.lindbergh.k12.mo.us/lhs/article.php?story=2008Class.

20 *Id.*

21 *See Lindbergh High School*, U.S. NEWS & WORLD REP., http://education.usnews.rankingsandreviews.com/listings/high-schools/missouri/lindbergh_high_school (last visited Apr. 4, 2011).

field and improving the quality of education provided in the nation's lowest-performing schools.[22] A primary goal of the lawsuits in particular has been to force states to increase school spending.[23]

Whether school finance litigation has actually accomplished its goal is a matter of some debate among scholars.[24] For Ashley and East St. Louis Senior High School, however, that debate may be beside the point, as it is not apparent that the amount of money spent in her district is the problem. Despite its starkly inferior outcomes, East St. Louis School District actually spends significantly more per pupil than either of the other two districts: East St. Louis spent $12,439 per student in 2009 compared with $11,479 in Lindbergh and $11,644 in Belleville.[25] When multiplied by the roughly 2000 student high school enrollment in each district, these per-pupil funding differences amounted to East St. Louis Senior High being able to spend approximately $1.75 million more per year than either of its counterparts.

There are, of course, many plausible explanations—poverty, race, and inability to attract good teachers to name a few[26]—for why the additional money already spent in East St. Louis may not be enough to provide a high-quality education to Ashley or her peers. There are also persuasive legal arguments to be made in support of further increasing the amount of money spent in low-performing districts.[27] The

---

22 *See* Janet D. McDonald et al., *School Finance Litigation and Adequacy Studies*, 27 U. ARK. LITTLE ROCK L. REV. 69, 69–70, 79–89 (2004) (observing that school finance lawsuits have occurred in forty-five states, with multiple claims in several states).

23 *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 2 (1973) (rejecting plaintiffs' equal protection challenges against Texas's unequal funding structure); Serrano v. Priest, 557 P.2d 929, 952 (Cal. 1976) (finding that California's property-tax-based school funding system violated the state's equal protection clause); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 215 (Ky. 1989) (holding that Kentucky's school finance program violated the state constitution's education clause's guarantee of an adequate education).

24 For the argument that school spending has little impact on student learning, see Eric A. Hanushek, *The Economics of Schooling: Production and Efficiency in Public Schools*, 24 J. ECON. LITERATURE 1141, 1141–77 (1986). *But see* MICHAEL A. REBELL & JOSEPH J. WARDENSKI, THE CAMPAIGN FOR FISCAL EQUITY, INC., OF COURSE MONEY MATTERS: WHY THE ARGUMENTS TO THE CONTRARY NEVER ADDED UP 3 (2004) (arguing that money does improve student achievement and that school finance litigation can bring about major reallocations of school resources).

25 *See Common Core of Data*, NAT'L CENTER FOR EDUC. STAT., http://nces.ed.gov/ccd/index.asp (last visited Apr. 4, 2011).

26 *See* James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2107–08 (2002) (discussing the issues of race, poverty, and quality of teachers in public education).

27 *See* Laurie Reynolds, *Full State Funding of Education as a State Constitutional Imperative*, 60 HASTINGS L.J. 749, 753 (2009) (arguing for the use of state constitutional education provisions to enforce school funding increases).

purpose of this Article, however, is not to debate the importance of money in improving student outcomes, nor is it to formulate a claim for why more money should be spent on schools.[28] Instead, this Article seeks to challenge a different practice in American public education: the sacrosanct notion that a local school district like Belleville or Lindbergh may, as a matter of law, exclude a child like Ashley from its schools simply on the basis of her residency—even if the district would be compensated for the full cost of enrolling and educating her.[29]

The upshot of these exclusionary practices is that millions of children throughout the nation have little choice but to attend woefully inadequate local public schools like East St. Louis Senior High School.[30] Closed enrollment policies thus function to deny these children—who are disproportionately low-income and children of color[31]—access to high-performing schools that are all too often located just minutes away across town lines. Accordingly, this Article's objective is to mount a policy rationale and, as necessary, a legal basis for replacing closed school enrollment practices with policies that offer students real choice among public schools so that a greater number of children have fair access to a quality public education.[32]

To meet this task, this Article proceeds in four parts. Part I begins by describing the current policy arena of public school choice, where commentators and school districts alike have dramatically overstated the reach of open enrollment laws as they stand. Although many districts and states have enacted enrollment laws that are "open" in name, in reality, virtually all of them function to allow

---

28 This Article instead proceeds under the belief that additional money, spent wisely, can make a positive impact on student outcomes, and that other strategies exist to improve educational outcomes beyond increasing funding.

29 That is to say, even if the East St. Louis school board voted to authorize payment of $12,439 per student to another school district in exchange for enrolling an East St. Louis transfer student, nothing under current law would compel other school districts to accept East St. Louis's and Ashley's transfer proposal. *See infra* Table.

30 *See* Diana Jean Schemo, *Few Exercise New Right To Leave Failing Schools*, N.Y. TIMES, Aug. 28, 2002, at A1 (finding that 3.5 million American students attend chronically failing schools with few, if any, choices available to leave).

31 *See* Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791, 800–01 (2005).

32 Meanwhile, wealthy parents are able to choose the schools to which to send their children, most often by simply moving to the best public school district in the area. The National Center for Education Statistics indicates that this use of "residential school choice" has been exercised by twenty-seven percent of Americans. *Fast Facts*, NAT'L CENTER FOR EDUC. STAT., http://nces.ed.gov/fastfacts/display.asp?id=6 (last visited Apr. 4, 2011).

schools to exclude students on the basis of residency.[33] Part II provides theoretical and some empirical support for replacing these exclusionary practices with policies that would promote public school choice and improve the quality of education offered to disadvantaged children. It does so by discussing the impact of enrollment policies on four important values: property rights, liberty, educational efficiency, and equality of opportunity.

Part III addresses the question of why closed enrollment practices persist as the norm in states and districts throughout the nation if, as suggested in Part II, a comprehensive program of public school choice would actually further important American interests and values. In briefly analyzing the political economy of public school choice, Part III describes how the policy arena is dominated by intense suburban and education establishment interests that oppose efforts to break down district barriers. Responding to this political obstacle and representing the primary focus of this paper, Part IV proposes a novel legal claim grounded in the Article IV Privileges and Immunities Clause of the Federal Constitution,[34] which can compel successful school districts to enroll nonresident students. By way of conclusion, Part V discusses some of the practical considerations implicated by the proposed claim and the nature of the relief students would receive under this proposal.

I. THE LIMITS OF PRESENT-DAY PUBLIC SCHOOL CHOICE PROGRAMS

For parents and students who are unhappy with their assigned neighborhood schools and who are unable to relocate to a different neighborhood of their choice, three main varieties of public school choice programs are available: charter schools, intradistrict choice programs, and interdistrict choice programs.[35] Each of these avenues

---

33 These policies enable districts to refuse enrollment to nonresidents with one notable exception: school desegregation orders enforced by federal courts. The interplay between school desegregation orders and open enrollment policies, however, goes beyond the scope of this Article, which focuses instead on the value of public school choice in furthering educational equity and efficiency, parent liberty, and national unity. For an overview of the relationship between school choice and desegregation, see generally Erica J. Rinas, *A Constitutional Analysis of Race-Based Limitations on Open Enrollment in Public Schools*, 82 IOWA L. REV. 1501 (1997).

34 The Clause reads: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2.

35 Note that vouchers are excluded from this list because they represent a form of private school choice. This Article takes no position on the desirability of publicly funded voucher programs other than to observe that voucher programs, unlike interdistrict public school choice, do

for school choice is deeply limited in current practice, however, and we will explore these limits presently.

A. Charter Schools

Despite the great deal of attention they have received lately, charter schools enroll between only two percent to three percent of all public school students.[36] Although charter schools offer these students an alternative to traditional local public schools, the evidence on their educational impact is far from conclusive. A 2009 study published by Stanford's Center for Research on Education Outcomes found, for example, that only seventeen percent of studied charter schools produced student achievement gains that were better than their traditional public school counterparts who served similar populations of students.[37] This in turn suggests that fewer than 850 charter schools in the nation perform better than their public school counterparts.[38]

To make matters worse, there is some evidence that charter schools in the aggregate provide students with a quality of education that is inferior to that provided by the already inadequate traditional public school system serving comparable student populations. The same Stanford study found that a staggering thirty-seven percent of charter schools in the sample generated student learning gains that were significantly worse than in the public schools—meaning, all else equal, a child who chooses to leave her local public school to attend a charter school may be twice as likely to finish in a worse position as a result.[39] To illustrate this point, there are two charter high schools open in East St. Louis that our hypothetical student Ashley could attend: SIU Charter School and Tomorrows Builders Charter School. Both schools, however, perform just as poorly as East St. Louis Senior High School on statewide standards.[40] Thus, from the perspective of a

---

not come within the reach of the Article IV Privileges and Immunities Clause and are thus in no manner constitutionally required. *See infra* Part IV.

36 SUSAN AUD ET AL., NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2010, at 271 (2010), *available at* http://nces.ed.gov/pubs2010/2010028.pdf.

37 CTR. FOR RESEARCH ON EDUC. OUTCOMES, MULTIPLE CHOICE: CHARTER SCHOOL PERFORMANCE IN 16 STATES 45 (2009).

38 A total of 4988 charter schools operated between 2009–2010, and if seventeen percent of them performed better than average, that would amount to approximately 848 schools. CTR. FOR EDUC. REFORM, NATIONAL CHARTER SCHOOL & ENROLLMENT STATISTICS 1 (2010), *available at* http://www.edreform.com/_upload/CER_charter_numbers.pdf.

39 CTR. FOR RESEARCH ON EDUC. OUTCOMES, *supra* note 37, at 44.

40 *See SIU Charter School Test Scores*, GREATSCHOOLS, http://www.greatschools.org/illinois/east-st.-louis/5709-Siu-Charter-School-Of-East-St.-Louis/ (last visited Apr. 4, 2011); *Tomor-*

student who seeks an alternative to a dismal local public school, charter schools, as they currently function, appear insufficient to single-handedly ensure access to quality educational options.

B. Intradistrict Public School Choice

Two other variants of public school choice programs, intradistrict and interdistrict choice, have the potential to reach far more children because the public schools that could be implicated in these programs enroll nearly ninety percent of all children attending K-12 schools in America.[41] However, the practiced reality of both intra- and interdistrict choice programs is that whether a school district chooses to participate—and consequently whether a student will have access to real choice—is a matter upon which districts themselves have final discretion. At the point at which schools may pick and choose whether and for which students to open their doors, the concept of choice and its promise of quality educational opportunity are rendered illusory.

As it currently stands, a small yet significant number of students are involved in some version of public school choice: in 2003, 15.4% of parents indicated that they sent their child to a public school of their choosing, compared with 73.9% of parents who enrolled their children in the school assigned to them by the district.[42] Of the parents who choose a public school for their children, the choice is far more likely to originate as part of an intradistrict program.[43] Broadly speaking, intradistrict choice programs encompass policies that allow students the opportunity to attend non-neighborhood schools that are located within a single school district without a justification based on special needs.[44]

Unfortunately, the beneficial impact of intradistrict choice programs is limited in three key ways. The first and most important limiting factor is the nature of the district policies themselves. A number

---

rows Builders Charter School Test Scores, GREATSCHOOLS, http://www.greatschools.org/illinois/east-st.-louis/5999-Tomorrows-Builders-Charter-School/ (last visited Apr. 4, 2011); *see also East St. Louis Senior High School Test Scores*, *supra* note 5.

41 *See Fast Facts*, *supra* note 32.

42 *See id.* Note that this figure is based on parent survey responses, and may overstate the actual number of parents who chose where to send their children because some parents may believe that they have "chosen" to send their child to the same school that the district has assigned to them.

43 At last count, only between 0.5% and 1% of all students in 1993 had access to an *interdistrict* choice program. Jeffrey R. Henig & Stephen D. Sugarman, *The Nature and Extent of School Choice*, *in* SCHOOL CHOICE AND SOCIAL CONTROVERSY 13, 22, 29 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999); *see also* Ryan & Heise, *supra* note 26, at 2066.

44 *See* Ryan & Heise, *supra* note 26, at 2064–65.

of school districts are not required under state[45] or federal law[46] to implement intradistrict open enrollment plans at all. Even states that do require districts to enact open enrollment[47] typically do so through statutes that are so riddled with loopholes that districts are perfectly able to continue their preferred practices of forcing children to attend the neighborhood schools to which they have already been assigned.

The two most common loopholes in these enrollment laws allow a school district to deny a student's request to transfer to another school within the district if the receiving school would exceed its self-defined capacity, or if the transferee does not meet the school's admissions criteria.[48] As a result, most districts with intradistrict open choice policies begin by assigning students to their neighborhood schools and end by giving school officials wide latitude to turn away children they do not wish to admit.[49]

To illustrate these policies in practice, the most common "open" intradistrict plans only give students choice to the extent that they may apply for admission to specialized schools, such as San Francisco's Lowell High School or New York's Bronx High School of Science, where students are accepted into a limited number of slots based on academic and other criteria.[50] In some districts, children are allowed to apply for a transfer out of the neighborhood school to which

---

45 For a table of state-by-state enrollment policies, see generally *Open Enrollment: 50-State Report*, ECS StateNotes, *available at* http://mb2.ecs.org/reports/Report.aspx?id=268 (last visited Apr. 15, 2011) (noting that many states, such as Alabama, Connecticut, New Jersey, and Pennsylvania, do not have mandatory intradistrict open enrollment policies).

46 The No Child Left Behind Act only requires school districts to offer public school choice where a school has failed to meet adequate yearly progress for two consecutive years. 20 U.S.C. § 6316(b)(1)(A), (E)(i) (2006). Furthermore, the Act does not forbid a district from denying such a choice where a district's high-performing schools lack the capacity to accommodate transfers. *See* Jane Dimyan-Ehrenfeld, Note, *Making Lemonade: Restructuring the Transfer Provisions of the No Child Left Behind Act*, 16 Geo. J. on Poverty L. & Pol'y 217, 220–21 (2009).

47 Note that the terms "public school choice" and "open enrollment" are used interchangeably to the extent that both connote policies that allow individual students to attend schools of their choosing within a relevant jurisdiction.

48 *See, e.g.*, 105 Ill. Comp. Stat. Ann. 5/10-21.3a(a), (1)–(2) (West 2006) ("A student may not transfer to any of the following [schools], except by change in residence . . . or unless approved by the board on an individual basis: (1) [A school] that exceeds or as a result of the transfer would exceed its attendance capacity. (2) [A school] for which the board has established academic criteria for enrollment if the student does not meet the criteria . . . .").

49 Only a small handful of districts employ choice plans that do not give preference to neighborhood school assignments. Ryan & Heise, *supra* note 26, at 2065. In these plans, present in districts such as Cambridge, Massachusetts, all parents are required to affirmatively select a school for their children, but the school district uses various demographic factors to balance student assignments for under- and over-subscribed schools. *Id.*

50 *See* Henig & Sugarman, *supra* note 43, at 17–18.

they have been assigned without a selective applications process, but even in these districts, individual principals and district officials retain the power to reject any such requests.[51] Choice under these "open" enrollment plans is thus form without substance: it is available only on a limited basis to the few students who qualify and are approved by administrators. And the limited effect of these plans may be purposeful because many intradistrict enrollment policies are motivated by a desire to protect neighborhood school enrollments and not to maximize the choices available to students.[52]

The second key limit on the ability of intradistrict choice programs to substantially improve student learning is a practical one: even if a district wanted to provide all of its students with a robust intradistrict choice program, meaningful choices are simply illusory for the vast majority of students because the typical school district contains only a handful of schools. After all, for intradistrict choice policies to improve educational outcomes, students must be able to choose from a range of school options. Where a district contains only a small number of schools that serve a child's grade level, however, the ability to choose one of those schools may be of only marginal benefit, particularly if the schools are of a substantially similar quality. Furthermore, where there is only one school serving a child's grade level in a district, such as the case with East St. Louis Senior High School, intradistrict choice is simply impossible. Yet, this is exactly the situation in a majority of school districts in the nation, especially at the high school level: seventy-six percent of school districts have only one high school and around ninety percent have only two.[53]

The third and final limit on the efficacy of intradistrict choice programs is that even in districts large enough to offer a reasonable amount of public school options on paper, it is often the case that only a small subset of those schools are desirable, a problem that is prevalent in districts that serve large numbers of disadvantaged children.[54] Further, where desirable schools do exist, they are often already over-

---

51 *Id.* at 20.

52 Ryan & Heise, *supra* note 26, at 2064; *see also, e.g.*, CAL. EDUC. CODE § 35160.5(b)(2)(C) (West 2009) (protecting students who live in neighborhoods with desirable schools by declaring that "no pupil who currently resides in the attendance area of a school shall be displaced by pupils transferring from outside the attendance area").

53 Mark Schneider, *The Costs of Failure Factories in American Higher Education*, EDUC. OUTLOOK (Am. Enter. Inst. for Pub. Policy Research, Wash., D.C.), Oct. 2008, at 2.

54 *See* Dimyan-Ehrenfeld, *supra* note 46, at 226–27. Moreover, in large school districts, some students may be unable to avail themselves of intradistrict choice if the district does not provide free transportation to schools of one's choosing. *See id.* at 227.

subscribed and have little incentive to expand their enrollment capacity.[55] This has been the experience of the public school choice provisions in the No Child Left Behind Act ("NCLB"),[56] which require districts to provide students at schools that have failed to make adequate yearly progress for two consecutive years the option to transfer to a non-failing school within the district.[57] A U.S. Department of Education report released in June 2007 found that over the course of a two-year study, a mere 0.5% of eligible students in nine large urban districts participated in school choice as required under NCLB.[58]

For all these reasons, intradistrict choice alone is incapable of ensuring access to quality educational opportunities for a substantial number of students. Recognizing this reality, a range of school reformers and policymakers have suggested revising state- and federal-level policies to promote *interdistrict* choice programs insofar as the ability to choose a school across district lines may lead to greater access to quality educational opportunities.[59]

C. Interdistrict Public School Choice

A cursory review of present-day, state-level interdistrict open enrollment policies might lead one to believe that a substantial number of children are able to cross district lines to attend schools of their choice. For example, the Education Commission of the States, a leading authority on state education policy, observes that forty-two states have enacted policies authorizing some form of interdistrict open enrollment.[60] Minnesota was the first to adopt such a policy in 1989, and

---

55 *See, e.g.*, Michael Winerip, *No Child Left Behind Law Leaves No Room for Some*, N.Y. TIMES, Sept. 10, 2003, at B7 (describing overcrowding due to transfers at a public school in Manhattan).

56 No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301–7941 (2006).

57 20 U.S.C. § 6316(b)(1)(E)(i).

58 RON ZIMMER ET AL., RAND, STATE AND LOCAL IMPLEMENTATION OF THE NO CHILD LEFT BEHIND ACT: VOLUME 1—TITLE I SCHOOL CHOICE, SUPPLEMENTAL EDUCATION SERVICES, AND STUDENT ACHIEVEMENT 8 (2007), *available at* http://www2.ed.gov/rschstat/eval/choice/implementation/achievementanalysis.pdf.

59 *See, e.g.*, Erin Dillon, *In Need of Improvement: Revising NCLB's School Choice Provision*, IDEAS AT WORK (Educ. Sector, Wash., D.C.), Nov. 2008, at 1, *available at* http://www.educationsector.org/sites/default/files/publications/NCLB_Choice_Idea_at_Work.pdf (recommending interdistrict choice programs); *see also* CYNTHIA G. BROWN, CITIZENS COMM. ON CIVIL RIGHTS, CHOOSING BETTER SCHOOLS: A REPORT ON STUDENT TRANSFERS UNDER THE NO CHILD LEFT BEHIND ACT 13, 15 (2004) (same).

60 *Open Enrollment: 50-State Report*, *supra* note 45; *see also infra* Table. *But see Table 4.2. Numbers and Types of State Open Enrollment Policies, by State: 2010*, NAT'L CENTER FOR EDUC. STAT., http://nces.ed.gov/programs/statereform/tab4_2.asp (last visited Apr. 4, 2011) [hereinafter

it is often cited as a leading example of the efficacy of interdistrict choice programs.[61]

The reality, however, is that interdistrict choice plans have had an extremely limited impact on public schooling thus far: only between 0.5% and 1% of all public school students actually attend a public school outside of their home district.[62] The primary reason for this disjuncture between rhetoric and reality is in the substance of the state policies themselves; although they are commonly referred to as "open" interdistrict enrollment laws, many of these statutes, thirty to be exact,[63] are voluntary in that school districts are not compelled to participate.

Even in the nineteen state statutes that mandate district participation,[64] the districts still retain the authority to reject any and all nonresident students due to gaping loopholes in the various statutes. The text of New Mexico's interdistrict choice statute shows how limited

---

Table 4.2] (finding that forty-three states have implemented interdistrict open enrollment policies, because unlike the Education Commission of the States, the National Center for Education Statistics counts Wyoming as having an interdistrict program).

61 *See, e.g.*, Edwin G. West, *Open Enrollment: A Vehicle for Market Competition in Schooling?*, 9 CATO J. 253, 253 (1989) ("The U.S. state that has pioneered the open enrollment concept the furthest is Minnesota."). *But see* Elaine M. McGillivray, Comment, *The New Minnesota Miracle?: A Critique of Open Enrollment in Minnesota's Public Schools*, 11 HAMLINE J. PUB. L. & POL'Y 105, 117–29 (1990) (arguing that Minnesota's plan is not supported empirically, raises problems of equity, may be used for nonacademic reasons such as athletic recruiting, results in a loss of control for local school districts, and may violate the Minnesota State Constitution).

62 Henig & Sugarman, *supra* note 43, at 22, 29; Ryan & Heise, *supra* note 26, at 2066. Even this figure—0.5% to 1%—likely overstates the reach of interdistrict choice programs, because included in it are a substantial number of students who attend out-of-district public schools where their parents are employees as well as students whose transfer requests are approved for idiosyncratic reasons, such as athletic merit. *See, e.g.*, Leila Summers, *Longview School District Will Restrict Flow of High School Transfers*, DAILY NEWS ONLINE (Apr. 27, 2010, 10:30 PM), http://tdn.com/news/local/article_0c7981ce-525b-11df-b5be-001cc4c002e0.html (observing that interdistrict transfers "for purposes of participating in athletics has been a hot-button topic in recent years"); Gary Walker, *Change to Transfer Policy Could Spell Windfall for LAUSD But Angers Some Local Community Parents*, THE ARGONAUT (Mar. 18 2010, 3:20 PM), http://www.argonautnewspaper.com/articles/2010/03/18/news_-_features/top_stories/2la.txt (noting that Los Angeles Unified School District had changed its interdistrict transfer program to allow permits only for parent employment and senior status).

63 *Open Enrollment: 50-State Report*, *supra* note 45; *Table 4.2*, *supra* note 60. *But see infra* Table (identifying twenty-five states with voluntary interdistrict choice policies). It should be noted that some states have both voluntary and mandatory interdistrict choice policies. This Article, however, treats such states as having only mandatory interdistrict choice policies for purposes of the Table, *supra*, and this accounts for any differences among the sources cited in this footnote.

64 *See Open Enrollment: 50-State Report*, *supra* note 45; *Table 4.2*, *supra* note 60; *infra* Table.

the voluntary plans are by their very nature: "Local school boards *may* admit school-age persons who do not live within the school district to the public schools within the school district when there are sufficient school accommodations to provide for them."[65] Voluntary policies thus allow but do not force districts to admit nonresident children.

Yet, there are many reasons why school districts prefer not to admit cross-district transferees.[66] Chief among these reasons is a simple economic motive—under interdistrict choice programs, states do not reimburse receiving schools for the full cost of educating nonresident children. In New Jersey, for example, the average annual per-pupil expenditure in 2005–2006 was $14,630.[67] Yet, the average amount of "school choice aid" given to New Jersey districts that accepted nonresident students in 2005–2006 was only $10,148, or just 69.4% of the average amount spent statewide.[68] Similarly, Ohio's interdistrict choice program provides receiving school districts with per-student funding amounts equal, on average, to just fifty-six percent of actual per-pupil costs.[69]

Even in the nineteen so-called mandatory interdistrict open enrollment policies, the requirement that districts participate is of little help to students because the policies still cede wide latitude to districts with respect to when and under what conditions students should be admitted. Indeed, the two dominant databases that track state-level interdistrict enrollment plans, the Education Commission of the States and the National Center for Education Statistics, fundamentally misrepresent the strength of these policies by even labeling them "mandatory" in the first instance.[70] Every "mandatory" open enrollment law, with the slight exception of Minnesota's,[71] has statutory or

---

65 N.M. STAT. ANN. § 22-12-5 (1978) (emphasis added).

66 *See infra* Part III.

67 U.S. CENSUS BUREAU, PUBLIC EDUCATION FINANCES 2007, at 8 (2009).

68 *See* INST. ON EDUC. LAW & POLICY, NEW JERSEY'S INTERDISTRICT PUBLIC SCHOOL CHOICE PROGRAM: PROGRAM EVALUATION AND POLICY ANALYSIS 24 tbl.9, app. A (2006), *available at* http://ielp.rutgers.edu/docs/schoolchoicereport_final.pdf.

69 *See* U.S. CENSUS BUREAU, PUBLIC EDUCATION FINANCES 2008, at 8 tbl.8 (2010), *available at* http://www2.census.gov/govs/school/08f33pub.pdf (noting that Ohio spent $10,173 per student during the 2007–2008 academic year); *see also* Susan McMillan, *Open Enrollment Means Money on the Move*, SANDUSKY REG. (Ohio), Feb. 5, 2011, http://www.sanduskyregister.com/news/2011/feb/05/oemoney020111smxml (explaining that Ohio open enrollment aid was only $5732 per pupil in February 2011).

70 *See supra* note 60 and accompanying text.

71 Minnesota's open enrollment policy allows school districts to turn away students based on "the capacity of a program, class, or school building." MINN. STAT. ANN. § 124D.03 subdiv. 6 (West 2008). However, the statute does require districts to enroll at least as many nonresident

regulatory language that enables a school district to reject *every* single out-of-district transfer applicant with complete impunity. The table below describes each state's interdistrict enrollment statute along with some key ways in which districts can escape the responsibility to offer actual choice to nonresident students.[72]

Table. Interdistrict Open Enrollment Laws in the Fifty States

State	Interdistrict open enrollment law?	Voluntary or Mandatory	Can district reject every student?	If yes, for what reason(s)?	Governing Statute
Ala.	No	—	Yes	No law otherwise	—
Alaska	No	—	Yes	No law otherwise	—
Ariz.	Yes	Mandatory	Yes	Selective admissions criteria, immunity from civil liability	ARIZ. REV. STAT. ANN. §§ 15-816.01, .02, .07 (2009 & Supp. 2010)
Ark.	Yes	Mandatory	Yes	Capacity	ARK. CODE ANN. § 6-18-206 (2007)
Cal.	Yes	Mandatory	Yes	Capacity, adverse financial impact	CAL. EDUC. CODE §§ 48354–48356 (West Supp. 2011)
Colo.	Yes	Mandatory	Yes	Capacity, selective admissions criteria	COLO. REV. STAT. § 22-36-101 (2010)
Conn.	Yes	Mandatory	Yes	Capacity (districts self report number of "spaces available")	CONN. GEN. STAT. § 10-266aa (2007)
Del.	Yes	Mandatory	Yes	Capacity, selective admissions criteria	DEL. CODE ANN. tit. 14, §§ 401–413 (2007)
Fla.	Yes	Voluntary	Yes	Choose not to participate	FLA. STAT. § 1002.31 (2009)
Ga.	Yes	Mandatory	Yes	District can refuse for any reason	GA. COMP. R. & REGS. 160-5-4.09 (2001)
Haw.	Yes	Voluntary	Yes	Choose not to participate	HAW. REV. STAT. § 302A-1143 (2007)
Idaho	Yes	Voluntary	Yes	Choose not to participate	IDAHO CODE ANN. §§ 33-1401 to -1408 (2008)
Ill.	No	—	Yes	No law otherwise	—

children as the lesser of (1) the number of its own resident students that transfer to other districts, or (2) one percent of the total district population in a particular grade level. *Id.* § 124D.03 subdiv. 2. Because the total number of students in the first category is presumably often extremely low for the highest achieving districts in the state, the best schools are also the ones that have the greatest discretion to turn away transfer applicants. Indeed, if a school district had zero resident students choose to transfer elsewhere, the district would be free to reject every last nonresident transfer request.

72 Many state statutes give school districts wide discretion to adopt standards by which to reject transfer students, even in mandatory open enrollment programs. Additionally, many of these statutes contain racial-balancing and desegregation provisions that further limit the extent to which students may transfer to other school districts. This table does not explicitly consider such provisions, and instead, conveys only the predominant reasons that a district may reject a student.

Ind.	Yes	Voluntary	Yes	Choose not to participate	IND. CODE ANN. §§ 20-26-11-5 to -18 (West 2008)
Iowa	Yes	Mandatory	Yes	Capacity	IOWA CODE § 282.18 (2007)
Kan.	Yes	Voluntary	Yes	Choose not to participate	KAN. STAT. ANN. § 72-8233 (2002)
Ky.	Yes	Mandatory	Yes	District can refuse for any reason subject to review by Commissioner of Education	703 KY. ADMIN. REGS. 5:120 (2004)
La.	Yes	Voluntary	Yes	Choose not to participate	LA. REV. STAT. ANN. § 17:105 (2001)
Me.	Yes	Voluntary	Yes	Choose not to participate	ME. REV. STAT. ANN. tit. 20-A, §§ 5203–5205 (Supp. 2010)
Md.	No	—	Yes	No law otherwise	—
Mass.	Yes	Voluntary	Yes	Choose not to participate	MASS. ANN. LAWS ch. 76, §§ 12–12C (LexisNexis 2003)
Mich.	Yes	Voluntary	Yes	Choose not to participate	MICH. COMP. LAWS ANN. §§ 388.1705, 388.1705c (West Supp. 2010)
Minn.	Yes	Mandatory	Maybe	Capacity if no students leave district (see *supra* note 71); otherwise can cap transfer receipts at one percent	MINN. STAT. ANN. § 124D.03 (West 2008)
Miss.	Yes	Mandatory	Yes	District can refuse for any reason; mutual consent needed	MISS. CODE ANN. § 37-15-31 (West 2010)
Mo.	Yes	Mandatory	Yes	Statute only applies to students facing geographic hardship; requires approval from Commissioner of Education	MO. ANN. STAT. §§ 167.121, 167.151 (West 2010)
Mont.	Yes	Mandatory	Yes	Capacity	MONT. CODE ANN. § 20-5-321 (2009)
Neb.	Yes	Mandatory	Yes	Capacity	NEB. REV. STAT. ANN. § 79-238 (LexisNexis 2007)
Nev.	Yes	Voluntary	Yes	Choose not to participate	NEV. REV. STAT. ANN. § 392.010 (LexisNexis 2008)
N.H.	Yes	Voluntary	Yes	Choose not to participate	N.H. REV. STAT. ANN. §§ 194-D:1 to -D:7 (Supp. 2010)
N.J.	Yes	Voluntary	Yes	Choose not to participate	N.J. STAT. ANN. §§ 18A:36B-14 to -17 (West, Westlaw through 2010–2011 Legis. Sess.)
N.M.	Yes	Voluntary	Yes	Choose not to participate	N M. STAT. ANN. § 22-12-5 (1978)
N.Y.	Yes	Voluntary	Yes	Choose not to participate	N.Y. EDUC. LAW § 3202 (McKinney 2009)
N.C.	No	—	Yes	No law otherwise	—
N.D.	Yes	Voluntary	Yes	Choose not to participate	N.D. CENT. CODE §§ 15.1-31-01 to -08 (2003)
Ohio	Yes	Voluntary	Yes	Choose not to participate	OHIO REV. CODE ANN. §§ 3313.98–.981 (LexisNexis 2009)
Okla.	Yes	Mandatory	Yes	Capacity	OKLA. STAT. ANN. tit. 70, § 8-103.1 (West 2005)

Or.	Yes	Voluntary	Yes	Choose not to participate	OR. REV. STAT. § 339.125 (2005)
Pa.	Yes	Voluntary	Yes	Choose not to participate	24 PA. CONS. STAT. ANN. § 13-1316 (West 2006)
R.I.	Yes	Voluntary	Yes	Choose not to participate	R.I. GEN. LAWS § 16-2-19 (2001)
S.C.	Yes	Voluntary	Yes	Choose not to participate	S.C. CODE ANN. § 59-63-490 (2004)
S.D.	Yes	Mandatory	Yes	Capacity	S.D. CODIFIED LAWS § 13-28-21 (2004)
Tenn.	Yes	Voluntary	Yes	Choose not to participate	TENN. CODE ANN. §§ 49-6-3104 to -3105 (2009).
Tex.	Yes	Voluntary	Yes	Choose not to participate	TEX. EDUC. CODE ANN. §§ 25.035–.036 (West 2006)
Utah	Yes	Mandatory	Yes	Capacity	UTAH CODE ANN. §§ 53A-2-207 to -208 (LexisNexis 2009)
Vt.	Yes	Voluntary	Yes	Choose not to participate	VT. STAT. ANN. tit. 16, § 1093 (2004)
Va.	No	—	Yes	No law otherwise	—
Wash.	Yes	Mandatory	Yes	Capacity; financial hardship; student discipline	WASH. REV. CODE § 28A.225.225(3) (2010)
W. Va.	Yes	Voluntary	Yes	Choose not to participate	W. VA. CODE ANN. § 18-5-16 (LexisNexis 2008)
Wis.	Yes	Mandatory	Yes	Capacity	WIS. STAT. § 118.51 (2007–2008)
Wyo.	Yes	Voluntary	Yes	Choose not to participate	WYO. STAT. ANN. § 21-4-502 (2009)

The main problem with these mandatory policies is the same loophole that impairs intradistrict choice policies: districts are allowed to turn students away when they lack the capacity to enroll additional nonresident students. California's new interdistrict open enrollment law, for example, which has received a great deal of attention from school choice proponents,[73] gives final say over interdistrict transfer applications to the very districts that have turned away nonresidents for as long as they have existed: "A school district of enrollment may adopt specific, written standards for acceptance and rejection of applications pursuant to this article. The standards may include consideration of the *capacity of a program, class, grade level, school building, or adverse financial impact*."[74] Under California's school choice law, which is fairly representative of the other so-called mandatory stat-

73 *See, e.g.*, *Our View: Choice for Public Schools*, PASADENA STAR-NEWS, May 26, 2009, at A16. *But see* Tom Ammiano, *A Chance to Learn*, S.F. CHRON., July 13, 2009, at A10 (noting that interdistrict open enrollment in California benefits 5000 students). Five thousand students represent roughly 0.08% of the state's total student population, which exceeds six million. *See State of California Education Profile*, ED-DATA, http://www.ed-data.k12.ca.us/navigation/fstwopanel.asp (last visited Apr. 11, 2011).

74 CAL. EDUC. CODE § 48356(a) (West Supp. 2011).

utes, a school district can thus legitimately turn away any and all transfer applicants by simply declaring its schools at-capacity or by asserting an adverse financial impact. Furthermore, a school district's decision to reject students for capacity or financial reasons is extremely difficult to challenge. California's law sets forth: "No exercise of discretion by a district of enrollment in its administration of this article shall be overturned absent a finding as designated by a court of competent jurisdiction that the district governing board acted in an arbitrary and capricious manner."[75]

At least two additional hurdles exist for students who wish to enroll in a public school of their choosing outside of their home district. The first is transportation. In many states, even if a student is granted the opportunity to attend a public school across district lines, the responsibility for transporting the child to that school rests with the parent.[76] Such a responsibility may prove prohibitive, particularly for parents of low-income children who may not have access to independent means of transportation.[77]

The second hurdle is that some state interdistrict enrollment statutes provide limitations on the number of students that may choose to leave a particular district.[78] In other words, not only are students who seek to transfer out of their low-performing schools hamstrung by a would-be receiving district's virtually unchecked discretion over whom to turn away, but so too are some students limited by their home district's desire to prop up enrollment numbers for the purpose of maximizing state aid. Wisconsin's interdistrict law, for instance, provides that "[a] school board may limit the number of its resident pupils attending public school in other school districts under this section in the 1998–1999 school year to 3% of its membership."[79] The law gradually raises the maximum transferee cap to 10% over seven years, meaning every Wisconsin school district may deny up to 90% of its students the right to choose a public school outside of its borders.[80]

---

75 *Id.* § 48361.

76 *See generally Open Enrollment: 50-State Report*, *supra* note 45; *see also, e.g.*, MICH. COMP. LAWS ANN. § 388.1705(17) (West Supp. 2010) ("This section does not require a district to provide transportation for a nonresident pupil enrolled in the district under this section or for a resident pupil enrolled in another district under this section.").

77 *See, e.g.*, Jason C. Seewer, *Opening the Door: A Proposal for Increased Educational Choice in Detroit*, 83 U. DET. MERCY L. REV. 411, 438–39 (2006).

78 *See, e.g.*, WIS. STAT. § 118.51(6) (2007–2008).

79 *Id.*

80 *Id.*

An examination of our hypothetical student Ashley's inability to transfer to a public school outside of East St. Louis exemplifies the wide gap between interdistrict open enrollment policies in theory and in reality. Illinois does not have an interdistrict open enrollment policy at all and thus nothing compels Belleville School District or any other Illinois district to admit Ashley.[81] The same is true for Lindbergh School District in Missouri, because no state has a policy requiring interstate open enrollment.[82] Even if Illinois did have a mandatory interdistrict open enrollment law, Belleville would be able to reject Ashley's transfer request by simply saying it lacked the capacity to enroll her. Consequently, apart from her family moving out of East St. Louis to a wealthier neighborhood, the only chance that Ashley has to attend a public school in another district is if that district *voluntarily* agrees to enroll her.[83] Neither state nor federal law is of assistance to her. Thus, a happenstance program of public school choice that relies on the good will of self-interested local school districts is hardly a reasoned approach to ensuring access to quality educational opportunities for millions of disadvantaged students. Indeed, history shows that it simply relegates at-risk children to the worst schools in the nation.[84]

What is important to note about interdistrict choice programs, however, is that unlike intradistrict choice plans that suffer from a largely practical inability to provide significant numbers of disadvantaged children with access to quality educational options, the principal problems with interdistrict choice plans are by design. That is to say, interdistrict choice plans could benefit large numbers of children if implemented properly. Using Geographic Information Systems mapping technology, the Education Sector found that a robust interdistrict choice program could enable as many as twenty percent of all students to transfer from one of the worst schools in a state to one of the higher-performing schools in a state.[85] The report likely underestimates the potential impact of interdistrict choice as it bases its finding

---

81 *See Open Enrollment: 50-State Report*, *supra* note 45.

82 It is precisely this fact that this Article challenges in Part IV, *infra*.

83 *See, e.g.*, *Other Choice Options*, POLK CNTY. PUB. SCHOOLS, http://www.polk-fl.net/districtinfo/departments/schoolbased/schoolchoice/vpsc/otheroptions.htm (last visited Apr. 15, 2011) (describing a voluntary agreement between three Florida school districts).

84 *See, e.g.*, *supra* notes 1–7 and accompanying text.

85 ERIN DILLON, EDUC. SECTOR, PLOTTING SCHOOL CHOICE: THE CHALLENGES OF CROSSING DISTRICT LINES 21 (2008), *available at* http://www.educationsector.org/usr_doc/Interdistrict_Choice.pdf. The study defined the worst schools in a state as those performing in the bottom two quintiles and the good schools worth transferring to as those in the top three quintiles. *See id.* at 3.

on three key assumptions that unduly limit students' abilities to choose alternate schools: students were precluded from travelling more than twenty minutes to a better school; receiving schools were presumed to have space for only ten percent more students; and transfers were not contemplated across state lines.[86] Adjusting any or all of those assumptions would lead to a corresponding increase in the number of students who could attend better schools through interdistrict transfers.[87]

With such substantial potential to enhance educational opportunity, the question should now be asked: would American students as a whole benefit or be harmed by a robust program of interdistrict public school choice?

II. The Benefits of Public School Choice

Americans take as given that it is permissible for a school district to deny enrollment to a child who happens to reside outside the district's borders.[88] Often, the general precept of "local control" is put forward as a justification for these exclusionary policies as well as others, such as property-tax-based school funding schemes, which share the ultimate effect of disadvantaging some children on the basis of residency.[89] The principle of local control dates back to our nation's founding,[90] embodying a vision of schooling where local educational institutions should be responsive to individual parents and community interests.[91] From the perspective of local control propo-

86 *See id.* at 4.

87 The assumption that schools cannot accommodate more than ten percent of their existing enrollment totals is particularly suspect, as this assumes that school districts are incapable of growing at a measured pace over a period of years. It might be more reasonable to suggest, for example, that receiving districts can increase capacity by ten percent *each year*.

88 *See, e.g.*, Martinez v. Bynum, 461 U.S. 321, 333 (1983) (upholding a state law requirement that in order for a student to be granted admission to a public school, the student must be a resident of the school district or reside in the district for a purpose other than attending a tuition-free school); Ryan & Heise, *supra* note 26, at 2045 (arguing that "suburbanites" oppose open enrollment policies for fear that they may undermine the "physical and financial sanctity" of their local schools).

89 *See* Wright v. Council of Emporia, 407 U.S. 451, 478 (1972) (Burger, C.J., dissenting) ("[L]ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well."). *See generally* Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 Conn. L. Rev. 773 (1992) (describing the rationale behind judicial reliance on local control to justify various inequitable educational policies).

90 For an overview of the development of American public schools and their distinctively local character, see generally Carl Kaestle, Pillars of the Republic: Common Schools and American Society 1780–1860 (1983).

91 *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49 (1973) ("In part, local

nents, allowing nonresident children to attend a district's schools would upset this time-honored ideal, leading to an education system where the interests of local stakeholders are watered down by those of nonresidents and where parents and communities would thus have reduced ability and incentive to invest in their neighborhood schools.[92]

Adherence to local control in enacting exclusionary policies based on residency is, however, hardly the unquestioned norm for all services provided by local governments. If Ashley and her mother were injured in a car accident while driving through Belleville, for example, municipal paramedics would provide emergency medical care to them regardless of their residency. It would be an odd thing indeed for a Belleville EMT to respond to the scene, discover that the accident involves East St. Louis residents, and rather than provide medical assistance, abandon the scene arguing that the principle of local control requires Ashley and her mom to call for East St. Louis paramedics to provide assistance instead.[93] Yet, this is essentially the policy that school districts employ with respect to nonresident children in educational need.

A justification of exclusionary closed enrollment policies in our schools, therefore, must be defended on more particular grounds than "local control." Three plausible arguments exist: First, there is a property right implicated by open enrollment policies because local residents are largely responsible for funding their schools. Second, local residents have a liberty interest in determining policies that govern their schools, including enrollment. Third, local control furthers educational efficiency. This Article addresses these arguments in turn, responding that the first argument is conditional upon a school finance structure that no longer exists; the second is outweighed by the countervailing liberty interest that parents have over the upbringing and education of their children; and the third is refuted by empirical evidence. This Article then adds to these three considerations the value

---

control means . . . the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decisionmaking process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs.").

92 *See* Briffault, *supra* note 89, at 794–96 (discussing the perceived benefits of local control).

93 Schooling, to be sure, is different from emergency medical services, but it is no less essential. The point of this analogy is to illustrate how the principle is far from an unassailable ideal. *See, e.g.*, Doe v. Bolton, 410 U.S. 179, 200 (1973) (holding unconstitutional a Georgia law criminalizing the provision of an abortion to an out-of-state patient).

of educational equity, which would also be substantially better served through policies of real public school choice.[94]

A. Property Rights

The first justification one might put forward for school districts' practice of rejecting nonresident children is that local residents have a property right over their schools to the extent that they pay for them through local taxes. If the district's residents provide financial support for their local schools—thereby, in a sense, "owning" those schools—perhaps they should also have the final say over which children may enjoy the educational fruits of those schools.

Although this argument may have carried considerable weight in an era where schools were funded wholly or predominantly through local sources, the present-day structure of state school finance systems undercuts its force now. Currently, only forty-four percent of all K–12 education spending in America comes from local sources, compared with forty-seven percent contributed by the states and nine percent by the federal government.[95] The contention that a property interest is generated when one pays taxes to support a particular school district might therefore *promote* a policy of real public school choice because nonresidents elsewhere in the state and, indeed, across the nation also pay taxes that ultimately benefit most school districts.[96] Moreover, the property-based argument is further undermined in a public school

---

94 I use the label "real public school choice" to describe a comprehensive program of intradistrict, interdistrict, and even interstate open enrollment policies, where all school districts are required to open their borders to incoming and outgoing students, where schools cannot discriminate against particular students for reasons of academic or extracurricular achievement, and where decisions about transfer capacity—i.e., how many nonresident students a school must enroll each year—are driven by impartial calculations for the best interests of all children and not by the political interests of an elected school board. Thus, in a program of real public school choice, a high-achieving school that is at maximum capacity could be required to grow its operating capacity in a manner consistent with continued educational excellence. *See infra* notes 244–45 and accompanying text.

95 *School Finance*, NEW AM. FOUND., http://febp.newamerica.net/background-analysis/school-finance (last visited Apr. 6, 2011).

96 Even the wealthiest local school districts typically receive state and federal support. For instance, during the 2006–2007 school year, the sixty-eight richest school districts in the State of New York received $229 million in state aid. Joan Gralla, *NY Shouldn't Aid Schools Spending $64,000 Per Pupil: Study*, REUTERS, Oct. 17, 2007, *available at* http://www.reuters.com/article/idUSN1622610320071017. Furthermore, at the federal level, any "district with at least ten poor children and 2% of its students in poverty receives" federal Title I spending through the Basic Grant formula. *No Child Left Behind Act - Title I Distribution Formulas*, NEW AM. FOUND., http://febp.newamerica.net/background-analysis/no-child-left-behind-act-title-i-distribution-formulas (last visited Apr. 6, 2011).

choice program where receiving districts are reimbursed for the full cost of educating nonresident children as proposed below in Part IV.

B. Individual Liberty

A second defense of closed school-district enrollment policies is rooted in notions of individual parental liberty. As the Supreme Court declared in *Pierce v. Society of Sisters*[97] in 1925, parents have a liberty interest in directing the "upbringing and education of children under their control."[98] American public school systems have long been organized with this liberty in mind; primary authority over schools is entrusted in locally elected school boards because they are considered the governing body that will be most responsive to the demands of parents.[99] Local control over core educational practices, including a district's enrollment policy, is thus arguably an instrumental good that will safeguard the liberty interest recognized in *Pierce* by ensuring a maximum correspondence between how and what parents want their children to learn and what actually takes place in schools.[100]

This argument encounters two immediate difficulties. First, it is not necessarily the case that a robust program of interdistrict public school choice would endanger the liberty of local parents to "direct the upbringing and education" of their children.[101] School districts that enroll nonresident children can still be run by local boards of education that are responsive only to parents and students *within* the district. That is to say, although public school choice does constrain

---

97 Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

98 *Id.* at 534–35.

99 A state or federally run school system would, it is suggested, impose the unassailable will of distant majorities upon parents, depriving parents of their ability to raise their children as they wish. *See* Chester E. Finn, Jr., John M. Olin Fellow, Hudson Inst., Testimony Prepared for Delivery to the Subcommittee on Government Management, Information, and Technology, Committee on Government Reform and Oversight, U.S. House of Representatives: Rethinking the Federal Role in Education (May 23, 1995), 1995 WL 313843 (explaining that the federal role in education "keeps people from doing what they know is right for their children, communities and states" and "substitutes the rules of distant bureaucrats for the on-site knowledge of parents and teachers").

100 Local control, which in this context means the right of local school districts to exclude nonresident children, is instrumental in the sense that it asserts that individual parental liberty interests are best protected through local school governance as opposed to state or federal control over schools. The liberty argument for denying children real public school choice is not an assertion that school districts in the aggregate have any cognizable claims to liberty, as our Constitution of course guarantees individual and not group rights.

101 *See generally* Briffault, *supra* note 89, at 785–802 (discussing various meanings of the term "local control" and noting ways in which state involvement in schools may not be in opposition to those meanings).

school district authority over enrollment practices, it need not affect local parent preferences over aspects of the curriculum, school discipline policies, local property tax levels, or any other policy area where the board of education has discretion. A program of public school choice could protect parental liberty in a receiving district by making it clear at the outset that nonresident parents who send their children to the receiving district do not acquire a voting interest in the district's school board elections. District policy will continue to be set in the same manner as before, and to the extent that parents who participate in school choice will see a reduction in their ability to voice an opinion over what happens in their child's school, such a result would be voluntary and not an affront to the individual liberty protected in *Pierce*.

Second, and more important, the very parental liberty interest that *Pierce* acknowledged actually counsels for the creation of comprehensive public school choice initiatives. The educational decision that the *Pierce* Court affirmed as falling under the purview of the liberty protected by the Fourteenth Amendment was the right of a parent to *choose a school for their child*.[102] Although *Pierce* specifically upheld parents' right to send their child to a private school of choice, what is important is that the Court recognized a choice among schools—not a choice among various educational policies within a school district—as fundamental. And the Court certainly did not find that the right to liberty extends to a parent's ability to enact a district-wide exclusionary enrollment policy. Put simply, *Pierce* stands for the proposition that parents' liberty interest in directing the upbringing and education of their child is implicated in its fullest at the point where the parents choose a school.[103]

Viewed in this light, closed enrollment policies actually function to frustrate parental liberty, particularly among lower-income families who do not have the financial wherewithal to send their children to private schools or to move to a neighborhood with better public schools. There is also evidence to suggest that this liberty matters: parents who have a choice over what schools their children attend report significantly higher rates of satisfaction with their schools than

---

102 The Court found Oregon's compulsory public school attendance law that forbade a parent from sending her child to a private school to be unlawful because "parents and guardians, as a part of their liberty, might direct the education of children by selecting reputable teachers and places." *Pierce*, 268 U.S. at 534.

103 The liberty interest of students, too, would counsel in favor of public school choice because a student's ability to direct her own education would be furthered by the opportunity to attend a school of one's choosing.

parents who have no choice but to send their child to an assigned public school.[104]

C. *Educational Efficiency*

Opponents of public school choice cite a third rationale for their position that such choice will harm schools: the idea that the most efficient method of school governance to ensure successful outcomes for students is to empower local communities to make educational decisions.[105] Supporters of local control generally suggest that the federal government is "meddlesome, intrusive and bullying" when it comes to education, and that local parents and school board members know what is best for their children—not bureaucrats sitting in Washington, D.C.[106] In the context of enrollment policies, this efficiency argument thus boils down to a debate over strategy. If everyone agrees that the goal of schooling is to prepare children for economic, civic, and social success, what will further that goal most effectively: a universal policy of open public school choice or allowing individual districts to set closed enrollment policies as they see fit?

There are two main mechanisms through which closed enrollment might encourage greater educational efficiency than public school choice. The first is expertise—the idea that because local communities know best what skill and knowledge sets their children need to learn, local school officials should be free to focus exclusively on meeting the unique educational needs of the district's children.[107] Although this may have been true in an era when regional economic diversity generated real variations among the skills that children needed to succeed in society, it is no longer true today when all American children face shared challenges in the twenty-first century. It is now simply no justification to say that school districts should only enroll children within their own borders because each district's children

---

104 NAT'L CTR. FOR EDUC. STATISTICS, TRENDS IN THE USE OF SCHOOL CHOICE 1993 TO 2003, at 32 (2006), *available at* http://nces.ed.gov/pubs2007/2007045.pdf (finding that fifty-four percent of parents whose children attended assigned public schools were very satisfied with their schools, compared to sixty-four percent of parents whose children attended public schools of choice, and seventy-two percent of parents whose children attended non-church-related private schools).

105 *See, e.g.*, Briffault, *supra* note 89, at 798.

106 Finn, *supra* note 99.

107 *See, e.g.*, Maurice R. Dyson, *Putting Quality Back into Equality: Rethinking the Constitutionality of Charter School Enabling Legislation and Centric School Choice in a Post-*Grutter *Era*, 36 RUTGERS L.J. 1, 40–41 (2004) (discussing how a school district with a majority of African-American students focuses some of its educational curriculum on topics related to African-American culture).

face different geographically oriented academic needs. The states themselves have dispelled this myth by establishing common academic standards that apply to all schools within the state and that describe what all children must learn and know by grade level to succeed in our modern global economy.[108] To the extent that schools today are organized with this common reality in mind, "expertise" affords no justification for a school district to turn away nonresident children.

The second mechanism through which closed enrollment policies might enhance educational efficiency is rooted in behavioral incentives. If a district enrolls children who reside exclusively within its borders, local officials and parents may choose to invest more in their schools and children may perform better as a result.[109] If the district must open its school doors to all students, however, some argue that local officials and parents may have less reason to invest the same energy and resources they might have otherwise offered.[110] Of particular concern is the possibility that affluent parents might choose to pull their children out of the local schools altogether,[111] taking their substantial educational capital with them (in the form of volunteer hours, school donations, and so on) and resulting in losses for all the children who remain at the school.

If it is true that an influx of nonresident children due to public school choice might persuade some affluent parents to pull a child out of a particular public school, such parents would have two primary options for where to send their child: a different public school or a nonpublic option, such as private school or home schooling. However, the harm to educational efficiency in the aggregate due to flight by affluent families from one public district to another would likely be minimal because the districts that receive affluent transfer students would experience a proportional benefit from the additional educational capital that the transferring families bring along with them. Furthermore, in a system with robust public school choice, such flight

---

108 *See* James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1223 (2008).

109 *See* Briffault, *supra* note 89, at 799 (discussing the minimum adequacy requirement and the possibility that affluent districts under local control will spend more than the baseline per-pupil expenditure figures).

110 *See* Ryan & Heise, *supra* note 26, at 2087 (noting that current limits on school choice programs serve a common purpose: protecting the ability of suburban parents to "spend locally raised revenues primarily if not exclusively on local kids").

111 *See, e.g.*, Mingliang Li, *Is There "White Flight" into Private Schools? New Evidence from High School and Beyond*, 28 ECON. EDUC. REV. 382, 382–83 (2009) (discussing how an increase in the minority share of public schools might encourage white students to enroll in private schools).

would stand little chance of creating permanent classes of elite and nonelite schools, because low-income students would always be free to transfer to whatever new school districts that their affluent counterparts may choose.

Flight to private schools, of course, presents a more vexing problem because families that leave the public system altogether have little self-interested motivation to continue providing additional support beyond their tax revenues to any public school. However, the evidence that exists is far from clear on whether a robust interdistrict choice program would indeed trigger flight to private schools. In Minnesota, for example, minimal changes in private school enrollment totals during the years following the state's implementation of the nation's most far-reaching interdistrict choice plan in 1989 suggest that private school flight may be a nonfactor.[112] When the choice program began, 96,593 Minnesota school children were enrolled in private elementary and secondary schools.[113] Five years later, private school enrollment in Minnesota actually *declined* by almost ten percent to 86,477, even as private school enrollment climbed nationwide.[114]

Moreover, although research evidence does suggest that white parents currently living in school districts with higher proportions of minority students are somewhat more likely to enroll their children in private schools than white parents in school districts with lower minority populations,[115] it is unclear whether the mere presence of minority children is what drives private school flight in those studies that have found it or whether another variable, such as lower quality schools in the relevant districts, actually drives the data.[116] If it is the latter—that is to say, if affluent parents care more about the quality of a particular school than they care about the demographics of the children served by the school—then robust public school choice might lead to minimal private school flight if choice programs are structured in a way that does not hamper the quality of education provided in desirable school districts.[117]

---

112 *See supra* note 61 and accompanying text (discussing the origins of the Minnesota statute).

113 NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS: 1993, at 73 tbl.62 (1993).

114 NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS: 1998, at 74 tbl.64 (1999).

115 *See* Li, *supra* note 111, at 391.

116 *See id.* at 387.

117 The evidence from several suburban districts that currently participate with low-income urban districts in voluntary interdistrict choice programs suggests that many parents believe their schools were positively and not adversely affected by the influx of transfer students from lower-

Even if some affluent parents do respond to a public school choice program by enrolling their children in private schools, it could be that the positive effects of competition and integration associated with the open enrollment policy outweigh any negative effects that flight by these families would have on school quality. Researchers studying the impacts of a controversial socioeconomic school integration plan in Wake County, North Carolina, found, for instance, that the incorporation of low-income students into formerly affluent schools resulted in *across-the-board gains* by the district's students with the largest gains made by low-income and minority children.[118]

Beyond rebutting the two arguments raised above, proponents of school choice actually go further in their view of the relationship between choice and educational efficiency. The overarching rejoinder from proponents is that not only will the overall quality of education be unhindered by choice, but it will actually be enhanced as schools compete with one another and as the market dynamic drives schools toward better outcomes.[119] In analyzing the federal Voluntary Public School Choice Program, for example, the U.S. Department of Education found that the nearly 25,000 students who participated across thirteen cites showed statistically significant improvement in reading and math when compared with control students who did not participate.[120] Another analysis of interdistrict choice programs found that students who were able to attend schools across district lines produced

---

performing schools. For example, school boards in sixteen suburban districts that were under court order to participate in an interdistrict choice program with St. Louis city schools voted unanimously to continue their transfer programs even after the courts lifted the order, and thirteen of the districts did so despite a reduction in the amount of state funding they would receive for enrolling transfer children from the city of St. Louis. AMY S. WELLS ET AL., CHARLES HAMILTON HOUSTON INST. FOR RACE & JUSTICE, BOUNDARY CROSSING FOR DIVERSITY, EQUITY, AND ACHIEVEMENT: INTER-DISTRICT SCHOOL DESEGREGATION AND EDUCATIONAL OPPORTUNITY 7–8 (2009).

118 Between 1995 and 2005, as the socioeconomic integration plan was put into effect, the percentage of all Wake County students achieving at grade level increased from seventy-nine percent to ninety-one percent, while African-American students increased their proficiency rate from forty percent to eighty percent. Alan Finder, *As Test Scores Jump, Raleigh Credits Integration by Income*, N.Y. TIMES, Sept. 25, 2005, at A1.

119 For an overview of this argument, see generally JOHN E. CHUBB & TERRY M. MOE, THE BROOKINGS INST., POLITICS, MARKETS, AND AMERICA'S SCHOOLS (1990). *See also* RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 48–58 (2001) (describing how peer effects might result in improved student achievement when placing low-performing, disadvantaged children in schools alongside more affluent students).

120 *See* U.S. DEP'T. OF EDUC., STUDY OF THE VOLUNTARY PUBLIC SCHOOL CHOICE PROGRAM, at xiii, xvi (2008), *available at* http://www2.ed.gov/rschstat/eval/choice/vpscp-final/report.pdf.

significantly better test scores and graduation rates than students who were not able to transfer, and without adverse impacts on the receiving districts.[121] Moreover, a study of Minnesota schools found that students participating in interdistrict choice programs outperformed both their traditional public and charter school counterparts by 5% in math and 2.5% in reading.[122] At bottom, there is reason to think that our nation's pursuit of a day when all children are provided a quality education may be facilitated and not stifled by public school choice.

D. Equality of Educational Opportunity

In addition to the values of liberty and educational efficiency, which as suggested above may actually support rather than challenge the wisdom of public school choice, another value is implicated by open enrollment policies: educational equity. This value, too, pushes in favor of removing the policy barriers that divide most school districts.

It is no secret that educational opportunity is distributed in a profoundly unequal manner in America. For example, if an average seventeen-year-old African-American or Latino student were placed in the same classroom with an average thirteen-year-old Caucasian student, the two would likely be academic peers.[123] A twenty-four-year-old white male is twice as likely as his African-American counterpart and five times more likely than a Latino twenty-four-year-old to hold a bachelor's degree.[124] In terms of wealth, an eighteen- to twenty-four-year-old raised in a family with an annual income over $75,000 has an 86% chance of reaching college, while a peer born into a family with an annual income of $10,000 has only a 28% chance.[125]

Although there are undoubtedly nonschool factors that contribute to these troubling statistics, the schools matter too. Common sense informs us that middle- and upper-class Americans prefer to send their children to the schools they currently attend rather than to

---

121 WELLS ET AL., *supra* note 117, at 4–6.

122 INST. ON RACE & POVERTY, FAILED PROMISES: ASSESSING CHARTER SCHOOLS IN THE TWIN CITIES 28 (2008), *available at* http://www.irpumn.org/uls/resources/projects/2_Charter_Report_Final.pdf.

123 *See* NAT'L CTR. FOR EDUC. STATISTICS, YOUTH INDICATORS 2005: TRENDS IN THE WELL-BEING OF AMERICAN YOUTH 34–41 (2005), *available at* http://nces.ed.gov/pubs2005/2005050.pdf.

124 ERIC C. NEWBURGER & ANDREA E. CURRY, U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES 5, 8, 14 (2000).

125 *See High School Graduation, College Continuation and Chance for College by Family Income 1995*, POSTSECONDARY EDUC. OPPORTUNITY (Mortenson Res. Seminar on Pub. Pol'y Analysis Opportunity for Postsecondary Educ., Oskaloosa, Iowa), Oct. 1997, at 1, 1–3.

schools like East St. Louis Senior High School, where students like Ashley are relegated.[126] Thus, in a minimal sense, because many upper-class American families can choose a school for their children by virtue of residential relocation or the ability to pay for private school tuition, an education system that does not offer low-income families some measure of choice is inherently unequal. A program of comprehensive public school choice would address this inequity.

In its stronger form, however, educational equity does not just mean a common ability to choose among a menu of schools—it means an actual guarantee of fair access to some level of educational opportunity. Public school choice furthers this goal by providing disadvantaged children a way out of dismal traditional public schools and into more successful schools, eliminating the arbitrary and exclusionary effect of school district boundaries. A 1995 study found that students who participated in an interdistrict choice plan in St. Louis, Missouri and attended schools outside the city were twice as likely as their peers who remained in the city schools to graduate from high school.[127] The students who had access to interdistrict choice also outperformed their city-school peers by ten percent in language arts and math.[128]

Public school choice may also enhance educational equity by placing competitive pressures on low-performing schools to improve, as these schools will lose their funding as students choose to exit. While some suggest that students who remain in these low-performing schools will be in a worse position as a result of school choice,[129] the research evidence is far from conclusive on this proposition. A recent study of school choice in Milwaukee found, for instance, that public schools that were subject to competition from a voucher program experienced a one-time boost in achievement after the program created the competition and thereafter experienced results similar to but no

---

126 Social science evidence confirms this point. *Cf.* Rob Greenwald et al., *The Effect of School Resources on Student Achievement*, 66 REV. EDUC. RES. 361, 384 (1996) (explaining that "school resources are systematically related to student achievement and that these relations are large enough to be educationally important").

127 William H. Freivogel, *St. Louis: Desegregation and School Choice in the Land of Dred Scott*, *in* DIVIDED WE FAIL: COMING TOGETHER THROUGH PUBLIC SCHOOL CHOICE 209, 220 (2002).

128 *Id.*

129 *See* Martha Minow, Lecture, *Reforming School Reform*, 68 FORDHAM L. REV. 257, 268 (1999) ("[C]hoice reforms may instead remove from existing public schools the motivated parents who make those schools as adequate or good as they currently are. The remaining students then will face risks even worse than they do now.").

worse than those in schools that did not face competition.[130] Moreover, unlike the private schools funded by vouchers and brand new charter schools, which both seek to enroll students even before they have established a track record of educational success,[131] students in a public school choice program will typically transfer to established schools that have already demonstrated the ability to provide a quality education—reducing the chance that students will enroll in worse schools than before. For all of these reasons, interdistrict choice may help to close the achievement gap in a manner that piecemeal district reforms may be unable to match.

III. THE POLITICAL ECONOMY OF PUBLIC SCHOOL CHOICE

If a robust public school choice policy really stands to advance the interests articulated above—parental liberty, educational efficiency, and educational equity—the logical question in response is, "why hasn't it been implemented already?" Put another way, if children, their families, and America as a whole would really be better served by public schools that enroll children without regard for their residential status, why is it still the case that the very first question asked on a typical American public school's application for enrollment is, "does the student live within the school district's borders?"[132]

The utter absence of real public school choice in the vast majority of school districts is even more confounding when one considers the political calculus that, at least superficially, surrounds the issue. Both conservatives and liberals have reason to support public school choice, and indeed poll data suggests that members of both parties are likely to take a favorable view on the matter. A poll conducted in 1997 by the Lincoln Institute for Public Policy research found that sixty-four percent of Republicans and sixty-four percent of Democrats responded in favor of giving parents the right to send their children to the public school of their choice.[133]

---

130 MARTIN CARNOY ET AL, ECON. POLICY INST., VOUCHERS AND PUBLIC SCHOOL PERFORMANCE: A CASE STUDY OF THE MILWAUKEE PARENTAL CHOICE PROGRAM 2–3 (2007).

131 Indeed, because several private voucher and charter schools do not have an established educational track record, they have been shut down for poor performance. *See, e.g.*, Alan J. Borsuk, *Lesson in Accountability?*, MILWAUKEE J. SENTINEL, Apr. 2, 2009, at 1 (private voucher school); Jill Tucker, *State Looking to Close Failing Charter Schools*, S.F. CHRON., July 30, 2010, at A1 (charter school).

132 For example, the Cambridge Public Schools website contains an "Affidavit of Residency" form for any Cambridge school. *See Affidavit of Residency*, CAMBRIDGE PUB. SCHOOLS., http://www.cpsd.us/Web/FRC/FRC_REG_RESIDENCY.pdf (last visited Apr. 6, 2011).

133 George A. Clowes, *Pennsylvania Voters Strongly Support School Choice*, HEARTLAND

Conservatives are likely to support public school choice because they believe it unleashes the powerful upward pressures of competitive markets on the entrenched school establishment.[134] Although many conservatives prefer a school choice program that includes publicly funded vouchers to attend private schools,[135] some support public school choice as a potential Trojan horse from which private voucher programs might emerge.[136]

Liberals, on the other hand, may support public school choice because it assists low-income and minority children, providing students with the option to leave their failing schools and enroll in the more successful public schools to which other children already have access.[137] Many Democrats support public school choice because, unlike private school vouchers, which may remove much needed resources from public schools, public choice can actually benefit the public school system by discouraging students from transferring to private schools.[138]

With seeming majorities in both political parties, why have meaningful open interdistrict enrollment policies—that is to say, policies that do not allow individual school districts the unfettered discretion to opt out—nevertheless failed to emerge? The simplest explanation is that public school choice represents a paradigmatic example of pow-

---

INST. (Mar. 1, 1998), http://www.heartland.org/publications/school%20reform/article/13419/Pennsylvania_Voters_Strongly_ Support_School_Choice.html.

134 *See, e.g.*, CHUBB & MOE, *supra* note 119, at 207; THOMAS B. FORDHAM INST., FUND THE CHILD: TACKLING INEQUITY & ANTIQUITY IN SCHOOL FINANCE 35–36 (2006), *available at* http://www.eric.ed.gov/PDFS/ED495066.pdf.

135 In 2007, for example, Republican lawmakers in South Carolina voted down a public school choice plan because it did not include vouchers for private school choice. *See Democratic Lawmaker Joins Republican Effort*, AUGUSTA CHRON., Mar. 25, 2009, at 7B.

136 Ross Corson, *Choice Ironies: Open Enrollment in Minnesota*, AM. PROSPECT, Fall 1990, at 94, 96 ("Some of the support for open enrollment comes from Minnesotans who see it as an opening wedge for a choice program that includes private schools.").

137 *See, e.g.*, RICHARD D. KAHLENBERG, CENTURY FOUND., HELPING CHILDREN MOVE FROM BAD SCHOOLS TO GOOD ONES 2 (2006), *available at* http://tcf.org/publications/pdfs/pb571/kahlenbergsoa6-15-06.pdf (explaining why a liberal think tank supports interdistrict choice); *School Choice & Charter Schools*, DEMOCRATIC LEADERSHIP COUNCIL (Mar. 6, 2003), http://www.dlc.org/ndol_ci.cfm?kaid=450006&subid=900042&contentid=251353 (advising Democrats to "support efforts to strengthen charter schools and other public school choice options").

138 Corson, *supra* note 136, at 96 ("[O]ther supporters, such as the Minnesota Parent Teacher Association, defend open enrollment in its present form as a bulwark against vouchers for private education. They believe that if parents who are unhappy with their local public school have the option of shifting to another public school, they will be that much less likely to move to private schools. Public school choice, in this view, will undercut support for vouchers and could even attract private school students back into public schools.").

erful interest groups exerting political influence to further their self-interest to the detriment of society at large.

Casual observers of the politics of school reform have long recognized the first group that strongly opposes school choice: teachers unions.[139] Although unions do not oppose public school choice with the same vigor as they oppose private vouchers,[140] the unions' first-line policy response is to resist both versions of choice for fear that public school choice may represent the initial slide down a slippery slope to a completely privatized system where teachers unions have little or no sway.[141]

A second, less visible group also exists with perhaps an even greater reason to oppose public school choice: suburban parents who want to keep local tax dollars in their communities and their schools that only serve their children.[142] The two groups, particularly when combined, easily have the numbers and the political clout necessary to derail interdistrict school choice proposals in local and state legislative arenas.[143] They can accomplish this either through wholesale opposition to interdistrict choice or through the inclusion of statutory loopholes like those described in the Table, *supra*, which undermine the ultimate impact of choice plans by giving school districts wide discretion to turn away nonresident children.[144]

Also vital to the unfavorable political economy around public school choice is the inability of school choice proponents to mobilize in opposition to teachers unions and suburban parents. Any effort to mobilize is hampered by the fact that the debate over school choice is means-oriented, not ends-oriented.[145] That is, there is disagreement

---

139 James G. Cibulka, *The NEA and School Choice*, *in* CONFLICTING MISSIONS? TEACHERS UNIONS AND SCHOOL REFORM 150, 156 (Tom Loveless ed., 2000) ("The NEA has not supported interdistrict public school choice plans, however."); *see also AFT on Public School Choice*, AM. FED. TEACHERS (June 2007), http://www.aft.org/pdfs/teachers/fl_schoolchoice0607.pdf ("NCLB's transfer provisions are not backed by research . . . .").

140 *See* KAHLENBERG, *supra* note 137, at 11 ("[T]he threat of vouchers may push advocates of public schools (including teachers unions) to endorse interdistrict public school choice as a superior alternative.").

141 *See* Ryan & Heise, *supra* note 26, at 2136 (explaining that limited choice programs "are the proverbial camel's nose under the tent. Allow limited choice programs, the argument goes, and the next thing you know, vouchers will be given mostly to white middle-class parents looking to flee public schools").

142 *See id.* at 2045.

143 *See id.* at 2088. Both groups have similar motivations to oppose intradistrict choice as well, as intradistrict open enrollment might represent a first step towards more robust choice programs against the wishes of unions and an abrogation of local neighborhood preferences.

144 *See supra* Part I.C.

145 *See* Ryan & Heise, *supra* note 26, at 2089 (explaining that advocates for social choice

between the groups as to whether interdistrict open enrollment can actually improve educational outcomes for America's children, but there is little argument about the desirability of a better school system in the first instance.[146] As a result, opponents of choice are able to preserve the inviolability of school district borders in part because, even as they fight choice proposals, they can appease some choice proponents by supporting other school improvement efforts, such as increasing funding, reducing class size, advancing standards and accountability, and so on. Faced with the daunting prospect of taking on the unions and suburbanite parents, groups that are concerned with the plight of low-income and minority children who view public school choice as just one of many potentially beneficial strategies may rationally choose to give up the school-choice ghost when presented with easier-to-obtain alternatives.

At the end of the day, this much is clear: teachers unions and suburban parents have enjoyed great success in curtailing the reach of open enrollment laws.[147] Because of them, it does not appear as though the ordinary political process will produce, of its own accord, a public policy result whereby students like Ashley would be able to attend public schools of their choosing.[148] Responding to this adverse political economy, the next Part proposes a new legal theory that can compel local districts to admit certain nonresident children. The hope is that even short of a judicial resolution, the proposed cause of action may offer supporters of public school choice the leverage they need to persuade lawmakers to enact open interdistrict enrollment policies that will advance our collective pursuit of liberty, educational efficiency, and educational equity.

IV. Using the Article IV Privileges and Immunities Clause to Compel School Districts to Enroll Nonresident Students

Although courts have entertained public law litigation efforts in many facets of the education policy arena, proponents of public school choice have yet to pursue their goals in court.[149] This is, perhaps, for

"are typically not very interested in enhancing opportunities for racial or socioeconomic integration").

146 Contrast school choice with an issue such as abortion, where the debate is ends-oriented, not means-oriented. In abortion, neither side has an intrinsic advantage because neither side can suggest an alternative approach to the disagreement that will appease both sides.

147 *See* Ryan & Heise, *supra* note 26, at 2089.

148 *See id.* at 2088.

149 Although supporters of school choice have not yet filed suit to advance choice as an

good reason: none of the established theories of education impact litigation appears amenable to a judicial finding that closed enrollment laws are invalid as a federal or state constitutional matter. At the federal level, the Equal Protection Clause has been dead letter for advocates since the Supreme Court's adverse rulings in *Rodriguez v. San Antonio Independent School District*[150] and *Milliken v. Bradley*.[151] The *Rodriguez* Court declared in 1973 that education is not a fundamental interest and wealth is not a suspect classification, and that states are thus free under the Equal Protection Clause to discriminate against low-income children with respect to educational opportunity subject only to rational basis review.[152] A year later in *Milliken*, the Court showed its reluctance to step on the toes of suburban parents with respect to student enrollment when it overturned the district court's interdistrict bussing remedy designed to integrate Detroit's segregated schools.[153]

Even in state courts that interpret state equal protection guarantees to require strict scrutiny of discriminatory state educational programs,[154] it is far from clear that public school choice proponents could advance a successful claim because closed enrollment laws apply uniformly to all students outside their home districts.[155] State courts also appear unlikely to find room for public school choice under the prevalent adequacy theory of school finance litigation, which asserts that state constitutions impose a duty on states to provide an absolute,

---

offensive matter, proponents of publicly funded private school voucher programs have had to defend vouchers in court on two different fronts. In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Supreme Court upheld a Cleveland voucher program against a First Amendment Establishment Clause challenge. *Id.* at 662–63. Voucher opponents responded to the *Zelman* decision by challenging such programs on state constitutional grounds, where they have met with greater success. In *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), for example, the Florida Supreme Court struck down the state's Opportunity Scholarship Program as a violation of the state constitution's "uniform" education clause. *Id.* at 412. These cases, however, have little applicability to a potential offensive claim seeking public school choice, as public choice programs involve only traditional public schools and do not implicate either religious freedom or violate state uniformity clauses.

150 Rodriguez v. San Antonio Indep. Sch. Dist., 441 U.S. 1 (1972).

151 Milliken v. Bradley, 418 U.S. 717 (1974).

152 *Rodriguez*, 441 U.S. at 51, 54–55.

153 *Milliken*, 418 U.S. at 752–53.

154 *See, e.g.*, Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976) (finding that California's local property tax-based school funding system violated the state's equal protection clause because education is a fundamental interest, wealth is a suspect classification, and the state was unable to show a compelling interest for its discriminatory finance system).

155 State closed enrollment policies may be consistent with equal protection of the laws insofar as every student is guaranteed access to a local public school, but no student is guaranteed access to interdistrict choice.

adequate level of education to all children.[156] Although a state court could, in theory, impose a school choice program as part of a remedy to an adequacy challenge, no court has done so to date.[157]

There is, however, reason for optimism for supporters of public school choice, rooted in a relatively obscure clause of the Federal Constitution: the Article IV Privileges and Immunities Clause.[158] Both the text of the Clause and Supreme Court jurisprudence governing its application point to the conclusion that children enjoy the right to *interstate* public school choice so long as receiving school districts are reimbursed for the cost of educating nonresident children. Such a holding could, in turn, place overwhelming pressure on state lawmakers to enact robust intrastate, interdistrict open enrollment policies as well. It is to the clause and the merits of this legal argument that this Article turns.

A. The Meaning of the Article IV Privileges and Immunities Clause

As a starting point, let us examine the meaning of the Article IV Privileges and Immunities Clause, both as of the founding and as it has been interpreted by the Supreme Court.[159] The Clause reads, "The Citizens of each State shall be entitled to all Privileges and Immunities of the Citizens in the several States."[160] In *The Federalist No.*

---

156 *See* McDonald et al., *supra* note 22, at 76–77 (providing a general overview of the adequacy theory).

157 *See* Clint Bolick, *A Framework for Choice Remedy Litigation*, 83 PEABODY J. EDUC. 285, 288, 294 (2008) (observing that no court has ordered a school choice program as a remedy to state level education litigation, but proposing private school choice as a potential remedy to state constitutional violations moving forward). The exception is school choice remedies available under the Individuals with Disabilities Education Act ("IDEA"). *See* 20 U.S.C. § 1412(a)(10)(C)(ii) (2006).

158 U.S. CONST. art. IV, § 2.

159 It is important to distinguish between two clauses in the Constitution: the Article IV Privileges and Immunities Clause, which forms the basis for the proposed claim in this Article, and the Fourteenth Amendment's Privileges or Immunities Clause, which is not implicated here. The Article IV Privileges and Immunities Clause prohibits state discrimination against residents of other states with respect to fundamental privileges and immunities provided by the state, whereas the Fourteenth Amendment prohibits discrimination by any state against any citizen, including its own residents, with respect to privileges and immunities enjoyed by citizens of the United States. *Compare* U.S. CONST. art. IV, § 2 ("No State shall make or enforce any law which shall abridge the privileges of the citizens of the United States."), *with* U.S. CONST. amend. XIV, § 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). *See generally* Douglas G. Smith, *The Privileges and Immunities Clause of Article IV, Section 2: Precursor of Section 1 of the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 809 (1997) (discussing the origins of the Article IV Privileges and Immunities Clause, and noting its differences from the Fourteenth Amendment's Privileges and Immunities clause).

160 U.S. CONST. art. IV, § 2.

80, Alexander Hamilton underscored the importance of the Clause, going so far as to declare that it "may be esteemed the basis of the Union."[161] James Madison discussed the Clause's intended meaning in *The Federalist No. 42*:

> [C]itizens of such State, are entitled, in every other State, to all the privileges of free citizens of the latter: that is, to greater privileges than they may be entitled to in their own State; so that it may be in the power of a particular State, or rather every State, is laid under a necessity, not only to confer the rights of citizenship in other States, upon any whom it may admit to such rights within itself, but upon any whom it may allow to become inhabitants within its jurisdiction.[162]

Put simply, the Clause guarantees that when a citizen of state *A* ventures into state *B*, that citizen of state *A* is entitled to the same privileges and immunities inside state *B* that a citizen of state *B* would enjoy.[163] The Supreme Court elaborated on the interstate nature of the Clause in 1869, writing in *Paul v. Virginia*[164]:

> It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.[165]

There has been, however, some debate over the nature of the privileges and immunities guaranteed by the Article IV Privileges and

---

161 THE FEDERALIST NO. 80, at 502 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

162 THE FEDERALIST NO. 42, at 307 (James Madison) (Benjamin Fletcher Wright ed., 1961). Madison's discussion of the Privileges and Immunities Clause occurred in the context of a similar, earlier version of the Clause that was enshrined in the Articles of Confederation. *See id.*

163 For a detailed overview on the Supreme Court's interpretation of the Article IV Privileges and Immunities Clause and how it has developed over time, see generally David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RES. L. REV. 794 (1987).

164 Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869).

165 *Id.* at 180.

Immunities Clause—a debate that was recently the subject of attention from legal scholars seeking to understand the reach of the Fourteenth Amendment's Privileges or Immunities Clause in the lead-up to and aftermath of the Supreme Court's decision in *McDonald v. Chicago*.[166] Drawing on the text of an 1823 circuit court opinion, *Corfield v. Coryell*,[167] some have argued that the Privileges and Immunities Clause guarantees individuals rights inherent under natural law, without regard for whether a particular state affirmatively recognizes such rights.[168] By contrast, the dominant view embraced by the Court today rejects the natural rights interpretation in favor of a narrower antidiscrimination view, where the Clause does not create new rights but, instead, protects nonresidents with respect to some of the rights that a state already guarantees to its own people.[169] Summarizing this antidiscrimination purpose in *Austin v. New Hampshire*,[170] the Court declared that the purpose of the Privileges and Immunities Clause is to establish "a norm of comity" among the states.[171]

But what are the boundaries of this "norm of comity?" To address this question, the Supreme Court has announced a two-part test to claims brought under the Privileges and Immunities Clause. The first part of the test concerns the scope of the "privileges and immunities" that are protected under the Clause. In *Baldwin v. Fish & Game Commission of Montana*,[172] the Court held that only those privileges and immunities that are "fundamental" to the livelihood of the nation

166 McDonald v. Chicago, 130 S. Ct. 3020 (2010); *see, e.g.*, Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 GEO L.J. 1241, 1244–45, 1259–60 (2010); Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 N.Y.U. J.L. & LIBERTY 115, 141–42 (2010); B. Aubrey Smith, Comment, *Laying Privileges or Immunities to Rest:* McDonald v. City of Chicago, 5 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 161, 173, 177 (2010).

167 Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

168 *See, e.g.*, Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63, 63 (1989) (arguing that natural law provides the most historically appropriate and legally defensible basis for interpreting the privileges and immunities protected under the Constitution).

169 *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 77 (1873) ("The [Article IV Privileges and Immunities Clause] *did not create* those rights . . . . It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens. Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction." (emphasis added)).

170 Austin v. New Hampshire, 420 U.S. 656 (1975).

171 *Id.* at 660.

172 Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978).

should receive protection.[173] The second element of the test arises once a court finds that a nonresident has asserted a fundamental privilege or immunity. Under this second part, a state may still discriminate against nonresidents with respect to a fundamental privilege or immunity if it can show a substantial justification for its discriminatory action, essentially a version of intermediate scrutiny.[174] The Court explained this standard in *Supreme Court of New Hampshire v. Piper*,[175] declaring that a state may infringe on nonresident privileges and immunities if "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective."[176] As will be explained below, a plaintiff challenging the commonplace practice of closed public school enrollment can make a sufficient showing with regard to both elements of the test.

B. Litigating for Public School Choice Under the Article IV Privileges and Immunities Clause

To determine whether a school district's closed enrollment policy violates the Article IV Privileges and Immunities Clause, we will look at a hypothetical claim where Ashley, our East St. Louis student, has decided to sue Lindbergh School District ("Lindbergh") in Missouri, seeking a court order that she be allowed to attend Lindbergh High School.[177] The basis of the challenge is the notion that by refusing admission to students who do not reside within a school district's borders, a district's closed school enrollment policy necessarily deprives

---

173 *Id.* at 388; *see also* United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 218 (1984) ("As a threshold matter, then, we must determine whether an out-of-state resident's interest in employment on public works contracts in another State is sufficiently 'fundamental' to the promotion of interstate harmony so as to [be protected under the Clause]."); Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230) (noting that the Clause only applies to privileges and immunities "which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments").

174 *See United Bldg.*, 465 U.S. at 222.

175 Supreme Court v. Piper, 470 U.S. 274 (1985).

176 *Id.* at 284. The remainder of this Article uses the phrase "substantial justification" as a substitute for this two-part requirement of a substantial reason for discriminating against nonstate residents and a substantial relationship between the disparate treatment and the state's asserted interest.

177 It is important to recognize that for the Article IV Privileges and Immunities Clause to offer Ashley any force in her desire to transfer, it must be the case that she is seeking to transfer to a school *across state lines*. The Clause does not guarantee individuals any additional rights within their home state. *See supra* note 159 (comparing the Article IV Privileges and Immunities Clause with the Fourteenth Amendment's Privileges or Immunities Clause).

students who live out-of-state of a fundamental privilege and immunity protected under the Clause.

As part of this hypothetical action, we make two critical assumptions. First, it is assumed that both Illinois and East St. Louis officials support Ashley's desire to transfer to Lindbergh High School such that they are willing to transfer to Lindbergh the full cost of her tuition, or $11,644 per year.[178] Although no state or East St. Louis official has publicly expressed such a position, there are three reasons why state leaders, district administrators, and school board members might support such a measure.

First, because the cost of education is cheaper in Lindbergh than in East St. Louis,[179] there may actually be a relative financial benefit if the state and district choose to support Ashley's transfer application. For each student that transfers to Lindbergh at the cost of $11,644, Illinois and East St. Louis School District stand to save a combined amount up to the difference between that cost and the student's original per-pupil expenditure amount of $12,439, or $795 per transfer.[180]

Second, although it may sadly be untrue of all public officials, it is undoubtedly the case that some officials are driven first and foremost by what is best for children. Faced with the opportunity to send East St. Louis High School students to a first-rate public school like Lindbergh High School, a state or local school official could rationally support such a move in light of the tragic quality of education being provided in East St. Louis. Third and finally, an official might support the transfer plan for ideological reasons. Politically conservative school board members and state lawmakers might support the interstate transfer idea because it follows the market-driven competitive ideology of school choice, placing power in the hands of parents and putting pressure on the failing East St. Louis School District to dramatically improve its schools or face losing more students.[181]

The second assumption is that upon receiving Ashley's request to transfer to its high school, Lindbergh will reject her request. This is a

---

178 *See supra* note 25 and accompanying text.

179 *See supra* text accompanying note 25.

180 *See supra* note 25 and accompanying text. How this $795 would be divided up between the state and East St. Louis School District could be a matter of negotiation between the two parties, as it is not apparent whether the money sent to Lindbergh would have to come first out of local sources, first out of state coffers, or some measured balance between the two.

181 *See supra* note 133 and accompanying text. Because public officials somewhere in the nation are driven by various combinations of the foregoing motivations, it is enough for the academic exercise that follows to assume their presence in East St. Louis, because all that is necessary for the right to interstate public school choice to be vindicated is one successful claim.

reasonable assumption given the nature of Lindbergh's political economy,[182] and given the widely held belief that a school is under no obligation to accept what may be the beginning of a large influx of students from outside its borders, much less from outside the state. One key reason why Lindbergh would reject Ashley's transfer is the fear that enrolling her would open the floodgates to tens or even hundreds of transfers from out of state, which plainly the stakeholders in the district would not countenance. In response, Ashley files the instant claim, arguing that Lindbergh's refusal to enroll her, where the cost of her education would be reimbursed, is a violation of a fundamental privilege under the Privileges and Immunities Clause, and one for which Lindbergh can assert no substantial justification.

1. Threshold Questions

Before addressing the merits of Ashley's claim—whether the right to enroll in a public school is a fundamental privilege and whether Lindbergh has a substantial justification for discriminating against out-of-state residents—Lindbergh might attempt to raise three threshold defenses. First, Lindbergh might argue that the Article IV Privileges and Immunities Clause only forbids states from discriminating against nonresidents and that it is silent on the matter of discriminatory practices by local government entities, such as school districts. However, the Supreme Court rejected this local-versus-state distinction in *United Building and Construction Trades Council v. Mayor of Camden*[183] where it held:

> We have never read the Clause so literally as to apply it only to distinctions based on state citizenship. . . . A person who is not residing in a given State is *ipso facto* not residing in a city within that State. Thus, whether the exercise of a privilege is conditioned on state residency or on municipal residency he will just as surely be excluded.[184]

Second, Lindbergh might argue that its enrollment policy does not violate the Clause because it discriminates against out-of-state citizens and in-state citizens in an identical fashion—that is, not only are Illinois citizens like Ashley forbidden from enrolling in Lindbergh schools, but so too are Missouri citizens rejected if they do not reside in Lindbergh. Yet, the *United Building* Court rejected this defense too, declaring that a local policy "is not immune from constitutional

182 *See supra* Part III.

183 United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208 (1984).

184 *Id.* at 216–17.

review at the behest of out-of-state residents merely because some in-state residents are similarly disadvantaged."[185]

Finally, Lindbergh might argue that it is not bound by the Privileges and Immunities Clause where its discriminatory actions occur as a market participant and not as a market regulator. Drawing on the market participant exception recognized in the Court's dormant Commerce Clause jurisprudence,[186] Lindbergh would contend that the Article IV Privileges and Immunities Clause only forbids the state from enacting regulation that requires private actors to discriminate against nonresidents, such as would be the case if Missouri enacted a law prohibiting private schools from admitting Illinois residents. But where it directly owns and operates the discriminatory institutions itself, Lindbergh would argue that it is constitutionally permitted to turn away non-Missouri residents. Like the previous two defenses, however, this argument would also fail because the Supreme Court expressly rejected it in *United Building*:

> [W]e decline to transfer mechanically into this context [a market participant exception] fashioned to fit the Commerce Clause. . . . It is discrimination against out-of-state residents on matters of fundamental concern which triggers the Clause, not regulation affecting interstate commerce. Thus, the fact that Camden is merely setting conditions on its expenditures for goods and services in the marketplace does not preclude the possibility that those conditions violate the Privileges and Immunities Clause.[187]

With these three threshold arguments foreclosed by *United Building*, a decision must be reached on the basis of the Court's two-part inquiry into whether the alleged injury is a fundamental privilege or immunity and whether the state has a substantial justification for its discriminatory action.

2. Education as a Fundamental Article IV Privilege or Immunity

As the Article IV Privileges and Immunities Clause dictates that a state or a political subdivision of a state may not discriminate against nonresidents with respect to fundamental privileges and immunities,[188] our plaintiff's first task will be to show that enrollment in a public

---

185 *Id.* at 218.

186 For an overview of the market participant exception to the dormant Commerce Clause, see generally Barton B. Clark, *Give 'Em Enough Rope: States, Subdivisions and the Market Participant Exception to the Dormant Commerce Clause*, 60 U. CHI. L. REV. 615 (1993).

187 *United Bldg.*, 465 U.S. at 219–20.

188 *See supra* note 173 and accompanying text.

school is fundamental so as to merit protection under the Clause. What makes an individual interest fundamental and thus worthy of protection? The Court offered its initial explanation in *Baldwin*, where it held that, "[o]nly with respect to those 'privileges' and 'immunities' *bearing upon the vitality of the Nation as a single entity* must the State treat all citizens, resident and nonresident, equally."[189] Three years later, in *Supreme Court of Virginia v. Friedman*,[190] the Court elaborated on this standard, describing the proper inquiry as one into whether the asserted interest is "sufficiently basic to the livelihood of the Nation."[191] Consistent with this reasoning, the *Baldwin* Court rejected the argument that elk hunting is a fundamental privilege and immunity protected under the clause because elk hunting is merely a "recreational, noncommercial, nonlivelihood" enterprise that is not vital to our national well-being.[192]

By contrast, the Court has held that an individual's right to pursue a common calling,[193] to be free from special taxes,[194] and to receive medical care[195] are all "fundamental" to the nation's livelihood and therefore merit protection under the clause. These interests each have a "bearing upon the vitality of the nation" because unlike elk hunting, they are not mere "recreational, noncommercial, nonlivelihood" activities;[196] each protected privilege substantially affects the livelihood of nonresidents and the nation as a whole in a manner that recreational big-game hunting does not. For instance, a policy that restricts a nonresident's ability to seek employment across state lines, as was at issue in *United Building*, visits a profound financial burden upon affected nonresidents and the national economy.[197] Similarly, as the Court observed in *Lunding v. New York Tax Appeals Tribunal*,[198] a policy that subjects a nonresident to additional taxes on the basis of state resi-

189 Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 383 (1978) (emphasis added).

190 Supreme Court v. Friedman, 487 U.S. 59 (1988).

191 *Id.* at 64 ("First, the activity in question must be 'sufficiently basic to the livelihood of the Nation' . . . as to fall within the purview of the Privileges and Immunities Clause." (quoting *United Bldg.*, 465 U.S. at 221–22)).

192 *Baldwin*, 436 U.S. at 391.

193 *United Bldg.*, 465 U.S. at 219; *see also* Supreme Court v. Piper, 470 U.S. 274, 284 (1985) (finding that a year-long residency requirement for the practice of law to violate the Article IV Privilege and Immunities Clause).

194 Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287, 315 (1998); Austin v. New Hampshire, 420 U.S. 656, 657 (1975).

195 Doe v. Bolton, 410 U.S. 179, 200 (1973).

196 *Baldwin*, 436 U.S. at 391.

197 *See United Bldg.*, 465 U.S. at 210.

198 Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287 (1998).

dency impairs "the right of nonresidents to pursue their livelihood on terms of substantial equality with residents."[199] And a state policy that denies medical care to a person on the basis of residency, as was overturned in *Doe v. Bolton*,[200] can impinge on the livelihood of nonresidents in the direst of manners.[201]

Viewed in comparison with elk hunting and the three already protected interests, it is almost too plain to refute that public education is basic to the livelihood of our nation and that it should therefore trigger the Clause's protection. To begin with, as the Supreme Court held in *Brown v. Board of Education*,[202] education is vital to an individual's future civic and economic success.[203] More importantly, education is vital to the well-being of the nation as a whole. As the Court observed in *Plyler v. Doe*,[204] "education has a fundamental role in maintaining the *fabric of our society*. We cannot ignore the significant social costs *borne by our Nation* when select groups are denied the means to absorb the values and skills upon which our social order rests."[205] The Court thus issued in *Plyler* the precise declaration that is sought under our Privileges and Immunities inquiry: education is essential to the "livelihood of the Nation"[206] not just because of its impact on individuals, but also because it has a "fundamental role in maintaining the fabric of our society," and because a failure to educate children like Ashley would result in "significant social costs borne by our Nation"[207]—not just by the states as discrete entities.

Plyler's conclusion is all the more meaningful in light of the evolving, fast-paced, complex nature of the global economy.[208] Edu-

---

199 *Id.* at 303.

200 Doe v. Bolton, 410 U.S. 179 (1973).

201 *See id.* at 183–84.

202 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

203 *See id.* at 493 ("Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both 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. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.").

204 Plyler v. Doe, 457 U.S. 202 (1982).

205 *Id.* at 221 (emphasis added).

206 Supreme Court v. Friedman, 487 U.S. 59, 64 (1988); Baldwin v. Fish & Gaming Comm'n, 436 U.S. 371, 388 (1978).

207 *Plyler*, 457 U.S. at 221.

208 *See generally* CRAIG D. JERALD, CTR. FOR PUB. EDUC., DEFINING A 21ST CENTURY EDUCATION (2009) (describing the rapidly changing knowledge and skills that characterize our

cation no longer prepares our youth for participation in local factory or farming economies; today's children will face future economic challenges as part of a shared national enterprise. Seen in this light, discrimination practiced by one state against children of another state profoundly threatens our national vitality as the lowest achieving states fall further and further behind and as uneducated citizens in these states inflict an ever larger burden on the nation, draining valuable national resources via unemployment support, federal prison spending, and other lost economic opportunities.[209] Put another way, as the Mississippis and Californias of our union struggle to provide quality educational opportunities for their children,[210] the resulting harms are increasingly exported unto other states, imposing a social deadweight loss to the detriment of America as a whole.

Only by forcing citizens to view their own futures as inextricably intertwined with the success of public schools located across state and district lines will the "vitality of the Nation as a single entity" be protected.[211] Striking down enrollment policies that discriminate on the basis of state residency, which foster a myopic view of the benefits and harms of public education, would substantially further national vitality and interstate unity. Accordingly, public education appears to be precisely the kind of fundamental, nonrecreational activity with significant implications for the nation as a whole and for the livelihood of individuals contemplated by *Baldwin* and *United Building*, such that the Court should demand substantial justification before allowing discrimination against nonresidents.[212]

---

increasingly competitive global economy along with the changes in our educational approaches that will be necessary to keep pace).

209 *See* MCKINSEY & CO., THE ECONOMIC IMPACT OF THE ACHIEVEMENT GAP IN AMERICA'S SCHOOLS 17 (2010), *available at* http://www.mckinsey.com/app_media/images/page_images/offices/socialsector/pdf/achievement_gap_report.pdf (noting that the gap between American public schools and schools in higher-performing nations accounts for a loss to U.S. GDP of between $1.3 trillion and $2.3 trillion annually).

210 Between 1998 and 2009, four of the nation's already lowest achieving states—California, Mississippi, New Mexico, and Alabama—saw their schools stagnate or get even worse according the National Assessment of Educational Progress ("NAEP"). *NAEP State Comparisons*, NAT'L CENTER FOR EDUC. STATS., http://nces.ed.gov/nationsreportcard/statecomparisons/acrossyear.aspx?usrSelections=1%2cRED%2c5%2c7%2cacross%2c0%2c0 (last visited Apr. 15, 2011) (comparing NAEP reading scores in 1998 with those in 2009 for eighth-grade students).

211 *Baldwin*, 436 U.S. at 383.

212 An additional consideration buffers Ashley's contention that her choice to attend a public school across state lines is a fundamental privilege and immunity protected under the Clause. All fifty states, with the arguable exception of Mississippi, have state constitutional provisions that obligate the state to provide public schools for the benefit of their students. To the extent that the ambit of the privileges protected under the Article IV Privileges and Immunities Clause is bounded by the actions that the states themselves have taken with respect to their *own* citi-

The argument that access to public education is a fundamental privilege and immunity protected under the Article IV Privileges and Immunities Clause finds additional support in an historical analysis of antebellum interpretations of the Clause. In *Corfield*, the pioneering 1823 case construing the scope of protections offered under the Clause, Justice Bushrod Washington famously wrote:

> We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.[213]

If Article IV privileges and immunities are those that have been "enjoyed by the citizens of the several states . . . from the time of their becoming free, independent, and sovereign,"[214] then access to public education would appear to be one such privilege insofar as numerous state constitutions at the founding contained provisions expressly describing the state's responsibility for providing access to public education.[215]

Faced with these arguments regarding the fundamental nature of public school enrollment and national unity, Lindbergh might raise four points in response. First, Lindbergh might argue that because Ashley has access to public schools in her home State of Illinois, her desire to enroll in a public school *in Missouri* is not "fundamental" within the meaning of the Clause. This line of reasoning, however, fundamentally misconceives the basic premise of the Clause. The Article IV Privileges and Immunities Clause is offended wherever a state unjustly discriminates against nonresidents without regard for the opportunities available to a nonresident in her home state. The Court

---

zens, it bears mentioning that numerous state courts have recognized substantial educational rights under these state constitutional provisions. *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 206 (Ky. 1989) ("[E]ducation is a fundamental right in Kentucky."); Campaign for Fiscal Equity, Inc. v. New York, 801 N.E.2d 326, 332 (N.Y. 2003) (interpreting New York students' constitutional rights to a sound basic education to require a "meaningful high school education"). Where a state has declared that its own citizens possess a constitutional right, it would seem plainly within the purview of the Article IV Privileges and Immunities Clause to guarantee that the state does not deprive nonresidents of the same right absent a substantial justification.

213 Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230).

214 *Id.*

215 *See, e.g.*, GA. CONST. of 1777, art. LIV; MASS. CONST. of 1870, ch. V, § 2; N.C. CONST. of 1776, art. XLI.

has never rejected a challenge brought under the Clause on the grounds that the plaintiff nonresident has access to opportunities within her home state similar to the ones sought in the defendant state. The existence of job openings in New York did not foreclose the challenge raised by New York residents against the city of Camden's local hire law,[216] and the Court did not reject the challenge brought in *Baldwin* on the grounds that there are also elk to be hunted in Minnesota.[217] As a result, the fact that Ashley is already guaranteed enrollment at East St. Louis Senior High School is of no moment to our Article IV privileges and immunities analysis.

Second, Lindbergh might try to import the Supreme Court's analysis of education from the equal protection context, where it declined to find that education is a fundamental right in *Rodriguez*.[218] The test for determining whether a right is fundamental for the purposes of equal protection is, however, not coextensive with the test for fundamentality under the Article IV Privileges and Immunities Clause. Only those rights that are "explicitly or implicitly guaranteed by the Constitution" are fundamental for equal protection analysis[219] whereas no such limitation has applied to the Article IV Privileges and Immunities analysis; for instance, there is no explicit or implicit constitutional right to employment, a particular state tax treatment, or medical care, and yet, the Court has recognized these to be fundamental Article IV privileges and immunities.[220] Likewise, the absence of a federal right to education should have no bearing on its fundamentality under Article IV.

Third, Lindbergh might raise an originalist interpretation of the Clause, arguing that only those privileges and immunities that existed and were fundamental at the founding should be recognized today. This interpretation has never guided the Court's jurisprudence, however, and a case like *Lunding* illustrates this point. In *Lunding*, the Court struck down a New York state income tax law that prevented

---

216 *See* United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 210 (1984).

217 *See* Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 372, 391 (1978); *see also* Supreme Court v. Piper, 470 U.S. 274, 284 (1985) (finding that a New Hampshire law limiting bar admission to state residents violated the Article IV Privileges and Immunities Clause even though the plaintiff Vermont resident could practice law within her home state); Doe v. Bolton, 410 U.S. 179, 200 (1973) (striking down a Georgia law prohibiting hospitals from providing abortions to nonresidents of the state without regard for whether nonresidents have access to abortion procedures in their home states).

218 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

219 *Id.* at 33–34.

220 *See supra* notes 193–94 and accompanying text.

nonresidents from claiming a tax deduction for alimony payments under the Article IV Privileges and Immunities Clause.[221] But there was, of course, no such thing as a state income tax at the founding, much less a state income tax deduction for alimony payment.[222] The fact that education may have had a less fundamental relationship to national unity in 1787 than it does now is thus immaterial.

Finally, Lindbergh might attempt to rebut the fundamental relationship between public schooling and the national livelihood directly. Implicit in this argument is the concept that public schooling is somehow more like recreational big-game hunting than employment, medical care, or tax liability. Perhaps Lindbergh would argue that school enrollment policies, like elk hunting,[223] have been left to the discretion of states and their political subdivisions without any apparent or severe detriment to national unity for the past two centuries, so why change now? But this argument fails because it assumes the question. Although it is true that the Court's holding in *Baldwin* does not define with specificity the quantity of harm that must occur to national comity before the Clause is triggered, the announced rule appears to set a low threshold. The crux of the *Baldwin* rule for what constitutes a "fundamental" privilege and immunity is that only "those 'privileges' and 'immunities' *bearing* upon the vitality of the Nation as a single entity" will be subject to the substantial justification requirement.[224] Even if district policies that discriminate against nonstate residents have not sparked a civil war among the states, the policies surely have a "bearing" on the nation as an entity by depriving untold numbers of children access to educational opportunities that would prepare them to function as productive members of our polity. Put succinctly, it is difficult to imagine a governmental enterprise that has a greater bearing on our national well-being than public education, and school enrollment should thus be deemed a fundamental privilege and immunity under the clause.

3. School Districts Have No Substantial Justification for Discriminating Against Out-of-State Students

If the court finds that public school enrollment is indeed a fundamental, and therefore protected, privilege and immunity, Lindbergh

---

221 Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287, 314–15 (1998).

222 Wisconsin was the first state to impose a statewide income tax in 1911. *See* Scott A. Taylor, *The Unending Onslaught on Tribal Sovereignty: State Income Taxation of Non-Member Indians*, 91 MARQ. L. REV. 917, 955 n.240 (2008).

223 *See supra* text accompanying note 192.

224 Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 383 (1978) (emphasis added).

would likely assert that its residency-based policy is still constitutional under the second part of the Supreme Court's test. Here, under the Court's formulation in *Baldwin*, Lindbergh could justify the infringement of a fundamental privilege and immunity so long as it could satisfy a version of intermediate scrutiny, showing both that there is a "substantial reason for the difference in treatment" of nonresidents and that "the discrimination practiced against nonresidents bears a substantial relationship to the State's objective."[225]

But what constitutes a "substantial reason" for discriminating against nonresidents? The Supreme Court addressed this question squarely in *Hicklin v. Orbeck*,[226] where it held that a substantial reason would not exist "unless there is something to indicate that noncitizens constitute a peculiar source of the evil at which the discriminatory statute is aimed."[227] Applying this rule, the Court rejected Alaska's assertion that its preferential hiring law for state citizens was justified by a substantial interest in alleviating unemployment.[228] The Court found that an influx of nonresident workers was not the peculiar source of Alaska's local unemployment problems; unemployment instead stemmed from insufficient education and training.[229]

Moreover, even if out-of-state workers had been the peculiar source of the state's unemployment problems, the *Hicklin* Court would still have struck down the statute, for it failed the means-end fit component of the Article IV privileges and immunities test—the requirement that the discrimination be substantially related to the state's objective. Here, the Court found that the state's policy was not substantially related to the objective of alleviating unemployment because it was needlessly overbroad in granting a preference to all Alaska residents and not just the unemployed.[230]

With this dual substantial reason and substantial relationship requirement in mind, Lindbergh would likely assert three justifications for its discriminatory enrollment policy: first, that requiring the district to accommodate interstate transfers will jeopardize the quality of local schools; second, that education is a finite resource that the district should be allowed to provide only to its own residents; and third, that the policies are necessary to maintain local control of schools. None

225 Supreme Court v. Piper, 470 U.S. 274, 284 (1985).

226 Hicklin v. Orbeck, 437 U.S. 518 (1978).

227 Toomer v. Witsell, 334 U.S. 385, 398 (1948).

228 *See Hicklin*, 437 U.S. at 526.

229 *See id.* at 526–27.

230 *Id.* at 519.

of these reasons pass constitutional muster, however, as they either fail to implicate out-of-state students as a peculiar source of the alleged evils or they are not substantially related to a policy of carte blanche district discretion to reject non-state residents.

a. Substantial Interest 1: The Quality of the District's Local Schools

Lindbergh's first argument would be that its decision to turn away out-of-state transfer students furthers its substantial interest in maintaining the quality of its schools. Requiring Lindbergh to accept nonresidents would, in Lindbergh's argument, severely hamper the quality of its schools as huge influxes of students lead to overcrowding and skyrocketing costs. To the extent that these problems will be the direct result of new interstate student transfers, Lindbergh would point out that students like Ashley are indeed the peculiar source of the alleged evil. Lindbergh would also cite the Supreme Court's ruling in *Martinez v. Bynum*,[231] which upheld a Texas local residency requirement against an equal protection challenge, stating, "[a]bsent residence requirements, there can be little doubt that the proper planning and operation of the schools would suffer significantly. The State thus has a substantial interest in imposing bona fide residence requirements to maintain the quality of local public schools."[232]

All of these arguments fail, however, because in the hypothetical interstate transfer program at issue, Ashley's former school district and the State of Illinois offer to pay Lindbergh the full per-pupil cost of education.[233] The instant claim is thus fundamentally not analogous to *Martinez* because, in *Martinez*, the Supreme Court upheld a bona fide local residency requirement that denied only *tuition-free admission* to nonresident students.[234] Ashley, by contrast, does not argue

---

231 Martinez v. Bynum, 461 U.S. 321 (1983).

232 *Id.* at 329–30. The plaintiff child in *Martinez* was already a resident of Texas and therefore did not raise an Article IV Privileges and Immunities Clause challenge to the state's local residency requirement. As a result, only a legitimate interest was needed to justify the requirement against the alleged equal protection violation—not a substantial interest as is required under an Article IV challenge. *See id.* at 321. The Court's declaration that maintaining the quality of local public schools constitutes a substantial interest should therefore be read with caution, as it is still an unsettled question whether this interest would be "substantial" in the Article IV context.

233 *See supra* text accompanying notes 179–79. Note that present-day public school choice plans all involve some level of reimbursement for receiving school districts; I simply assume here that East St. Louis School District and Illinois volunteer to pay the full cost of education provided in Lindbergh, or $11,644, during the 2009 school year.

234 *Martinez*, 461 U.S. at 322.

that Lindbergh is obligated to educate her for free; she merely argues that Lindbergh must take her money, or more accurately the money paid on her behalf by East St. Louis School District and Illinois, and enroll her if she chooses to transfer. To the extent that Ashley's enrollment would increase class sizes, pupil-teacher ratios, and require additional instructional materials, Lindbergh would be able to use the additional funds it obtains from her enrollment to offset those costs, much in the same manner that Lindbergh already uses local- and state-granted funds to pay for costs associated with its indigenous student population. And because Lindbergh is reimbursed for the cost of educating her, Ashley is no different from any other student in the district for budgetary purposes. Lindbergh therefore cannot assert that Ashley represents a "peculiar source of evil"[235] that undermines the overall quality of Lindbergh's public schools.[236]

Lindbergh might attempt to argue that the quality of its schools would be undermined by nonresident transfer students because local residents might respond by pulling their children out of the public schools, resulting in reduced potential for positive peer effects among the children that remain. This argument fails for two reasons. First, it is unclear whether Lindbergh parents would in fact pull their children out of the local schools in substantial numbers.[237] Second, research evidence from school districts, such as Wake County, which have recently experienced increased diversity in their enrollments,[238] and from studies on detracking within schools[239] suggests that overall educational quality may actually increase in schools that improve the di-

---

235 *Hicklin*, 437 U.S. at 525–26.

236 There is, of course, the open question as to how much money a school district may charge under this plan to enroll nonstate students like Ashley. In other words, if East St. Louis and Illinois offered only $3000 to Lindbergh to enroll Ashley, must Lindbergh accept? If not, where should the court draw the line? Fortunately, state legislatures have already sought fit to answer this question in the context of interstate, interdistrict transfers. In Missouri, for instance, interdistrict student transfers for geographic reasons require a sending district to pay a receiving district tuition for any students who transfer, but that tuition cannot exceed "the pro rata cost of instruction." MO. ANN. STAT. § 167.121 (West 2010). Similarly, MO. ANN. STAT. § 167.131, which governs school transfers in the case that a district loses its accredited status, commands such unaccredited districts to pay for their students to transfer to neighboring districts at an amount equal to "the per pupil cost of maintaining the [receiving] district's grade level grouping which includes the school attended." In sum, the easiest rule to draw is that in the case of an interstate district transfer request, the receiving district can charge the sending state/district a tuition amount equal to their current per-pupil expenditure amount, which in Lindbergh's case is $11,644 per year.

237 *See supra* Part II.C.

238 *See supra* note 118 and accompanying text.

239 *See* Carol Corbett Burris & Kevin G. Welner, *Closing the Achievement Gap by Detracking*, 86 PHI DELTA KAPPAN 594, 595 (2005) (finding that "detracking," or the process of combin-

versity of their student bodies.[240] Lindbergh would thus struggle to prove that Ashley's enrollment would necessarily lead to a rampant flight of local children from its public schools, much less to a decrease in the quality of the schools as a whole.

Lindbergh can, however, offer one meaningful rationale for why out-of-state transfers might constitute a peculiar source of evil vis-à-vis the quality of its schools: once Ashley is admitted, an unpredictable and fluctuating stream of out-of-state transfer students might follow her such that it would be difficult for Lindbergh to plan effectively for future teacher hiring, materials purchases, and facility needs. In other words, even if Lindbergh receives sufficient funding from out-of-state students, it still needs time to formulate a plan for how to accommodate the additional students. Such educational planning, Lindbergh would contend, is particularly difficult and the quality of schools is uniquely endangered by an influx of nonresidents where there are so many transfer students in a given timeframe that new facilities like portable classrooms and new school buildings are required.

This rationale fails to justify an absolute policy of rejecting out-of-state student transfers for two reasons. First, the argument that out-of-state transfer students impose an insuperable nonfinancial burden on receiving school districts for educational planning purposes is precisely the kind of administrative convenience rationale that the Supreme Court has repeatedly rejected as being insufficient to satisfy intermediate scrutiny. In *Craig v. Boren*,[241] a gender-based equal protection case, the Court explained:

> To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. Thus, in *Reed*, the objective[ ] of "reducing the workload on probate courts," . . . [was] deemed of insufficient importance to sustain use of an overt gender criterion . . . . Decisions following *Reed* similarly have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications.[242]

---

ing students from low-track courses with those in advanced courses in a single accelerated track, can increase student achievement among both population groups).

240 *See supra* Part II.C.

241 Craig v. Boren, 429 U.S. 190 (1976).

242 *Id.* at 197–98 (citing Reed v. Reed, 404 U.S. 71, 75–77 (1971)).

If administrative convenience is not an important enough state interest to justify gender discrimination, it is likely that it would also not be substantial enough to justify discrimination against out-of-state residents under a similar standard of intermediate scrutiny.[243]

Second, even if the court finds that the educational planning problem is a sufficiently substantial reason to discriminate against out-of-state students, that concern does not justify a district policy of *absolute* prohibition against any and all transfers. A policy against all student transfers is needlessly overbroad in violation of the substantial-relationship prong of the Supreme Court's test[244] because Lindbergh's legitimate concern for planning can be alleviated through narrower solutions that do not impinge on fundamental privileges and immunities. For example, because enrolling a small or moderate number of out-of-state transfers each year would have little adverse impact on Lindbergh's educational planning,[245] Lindbergh could enact a policy admitting some set number of transfers each year that is small enough to make planning possible.[246] Better yet, Lindbergh could accept all transfer students but impose a lengthy wait requirement such that an application for enrollment in spring or summer of 2010 would enable a child to begin school in Lindbergh during the 2011–2012 school year, giving Lindbergh a full year to plan for a predictable enrollment total. Whatever the case may be, there are numerous ways that Lindbergh could preserve its ability to plan for changing student enrollment without running roughshod over nonresident students' constitutionally protected interests. As such, even if a court finds that educational

---

243 In *Jech v. Burch*, 466 F. Supp. 714, 720 (D. Haw. 1979), a federal district court case concerning the due process rights of parents to name their children, the state's asserted interest in administrative convenience was not sufficient to satisfy even rational basis review.

244 Indeed, a court would not need to look any further than to *Hicklin*, which struck down Alaska's local hire law because it was too overbroad to be substantially related to the alleviation of unemployment. Hicklin v. Orbeck, 437 U.S. 518, 527 (1978). The Alaska law provided preference to *all* Alaska residents and not just the currently unemployed. *See id.* This overbreadth is identical to Lindbergh's policy of rejecting *all* out-of-state transfers and not just those who present a problem for educational planning purposes.

245 Where small numbers of students are transferring into a district, the district's primary additional educational planning responsibilities include hiring a few additional teachers and securing an appropriate number of textbooks and other instructional materials—hardly an insurmountable task.

246 Of course, a district policy that set this amount too low, say at one percent of its current enrollment each year (which would equal roughly sixty transfer students admitted per year in Lindbergh) could still violate the Privileges and Immunities Clause because Lindbergh might have a difficult time proving that it is incapable of planning for an additional sixty students when it already serves nearly 6000 children. *See Fall Enrollment, Average Daily Attendance, Eligible Pupils Projections*, MO. DEPARTMENT ELEMENTARY & SECONDARY EDUC., http://dese.mo.gov/schooldata/profile/p5096093.txt (last visited Apr. 7, 2011).

planning is a substantial reason to discriminate against out-of-state residents, that reason cannot justify the practice of refusing admission to all transfer students.

b. Substantial Interest 2: Education as a Finite Resource

The second justification that Lindbergh might provide for its decision to reject out-of-state children is that the education it provides is a finite resource that it should be able to hoard for only its own residents. Lindbergh would attempt to cite the Court's ruling in *Baldwin* as authority for this proposition, arguing that Montana was allowed to discriminate against nonresidents with respect to elk hunting because elk is a finite resource.[247] Other cases, such as *McCready v. Virginia*,[248] which involved Virginia oyster beds, assert a similar proposition: a state may reserve local resources for the exclusive benefit of its own citizens.[249]

The trouble with this argument is straightforward. Education is simply not a finite natural resource like oysters or elk. There is no readily identifiable quantum of limited education available in Lindbergh, especially where the district is provided the full cost of tuition to educate each additional out-of-state transfer student. Lindbergh might argue that there is an inverse relationship between school size and student learning, or district size and student learning.[250] But even if this is true, the proper conclusion to be drawn is not that education is a finite natural resource, but rather that administrators should organize districts and schools strategically to maintain high achievement.

Moreover, education, unlike oysters or elk, is not a natural resource to begin with. This poses serious problems for Lindbergh, as the Court has never held a nonnatural resource to be free from the Article IV Privileges and Immunities Clause because it is limited.[251]

---

247 *See* Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 390 (1978).

248 McCready v. Virginia, 94 U.S. 391 (1877).

249 *See id.* at 391, 397 (upholding a Virginia law preserving local oyster populations for the benefit of Virginia oyster farmers).

250 *See, e.g.*, Christopher Berry, *School District Consolidation and Student Outcomes: Does Size Matter?*, *in* BESIEGED: SCHOOL BOARDS AND THE FUTURE OF EDUCATION POLITICS 56, 65 (William G. Howell ed., 2005) (finding that of seven studies comparing district size to student performance, only one found a positive relationship).

251 This is with the notable exception of certain political privileges such as voting in state and local elections or holding public office or certain kinds of jobs that are entrusted with matters of state policy. For these political acts, the state has a sufficiently substantial interest in safeguarding its separate political community to justify discriminating against nonresidents. *See* Supreme Court v. Piper, 470 U.S. 274, 282 n.13 (1985) ("We recognize that without certain resi-

For example, the number of jobs available in New Jersey was surely finite to some degree in *United Building*, but the Court did not find that the city had a substantial reason to hire only local residents as a result.[252] Ultimately, because education is not a natural resource and because Lindbergh could provide education to additional students, especially when it is provided the funding necessary to do so, Lindbergh's second reason would not justify its discriminatory actions against Ashley.

c. Substantial Interest 3: Local Control

The final reason that Lindbergh would likely give to justify its rejection of Ashley is local control. In *Rodriguez*, the Supreme Court found local control to be a legitimate state interest that satisfied rational basis review of Texas's unequal school-funding structure.[253] Lindbergh would argue that the same interest should be found substantial in the Article IV Privileges and Immunities Clause context because admitting out-of-state students directly removes power from local constituents.

The problem with this argument is evident when one considers the actual meaning of local control. As Justice Marshall described in his dissent in *Rodriguez*, the mantle of local control encompasses two kinds of authority: local decisionmaking authority over school policy and fiscal control over school revenues and expenditures.[254] Thus, for Lindbergh's interest in local control to justify rejecting *all* out-of-state students, the admission of these students must somehow jeopardize local decisionmaking and fiscal control.[255] But for this to be the case, transfer students would need to be able to exact some measure of in-

---

dency requirements the State 'would cease to be the separate political community that history and the constitutional text make plain was contemplated.'" (quoting Gary J. Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379, 387 (1979))).

252 *See* United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 222–23 (1984).

253 *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54–55 (1973).

254 *See id.* at 126–28 (Marshall, J., dissenting). To be sure, Justice Marshall expressed his view in a dissenting opinion joined only by one other Justice. But his logic may be more persuasive in the Article IV context inasmuch as the government must show a *substantial* interest for its discrimination against out-of-state students, whereas *Rodriguez* only held local control to be a *legitimate* government interest good enough to satisfy rational basis review. *See id.* at 55 (majority opinion).

255 No court has held, and surely Lindbergh would not contend, that a school district has a substantial interest *per se* in denying students that it does not wish to enroll; local control is only legitimate to the extent that it furthers local involvement in general policy and financial decisions. For more on the matter of local control, see *supra* Parts II.A–C.

fluence over Lindbergh's administrative and fiscal decisions in the first instance. In other words, out-of-state parents would need to have the right to vote for Lindbergh's local school board members and to advocate for specific policies at the school and district level. But Lindbergh could enact an enrollment policy that admits nonresident students while explicitly withholding from their parents all of the school board voting and advocacy privileges that might interfere with local decisionmaking.[256] Lindbergh could also preserve local autonomy over school finance decisions by agreeing to accept transfer-student tuition payments subject to the condition that Lindbergh alone has authority over how to spend that money—neither East St. Louis nor Illinois will have a say in fiscal matters. Lindbergh could further require its counterparties to stipulate that Lindbergh voters alone have the authority to raise local taxes, which would effectively raise the cost of tuition reimbursement that East St. Louis and Illinois would have to provide. Because Lindbergh could protect its asserted interest in local administrative and fiscal control using tailored means that are less offensive to protected privileges and immunities than a policy that categorically rejects all transfer applicants, Lindbergh's interest in local control cannot justify its rejection of Ashley.

V. From Litigation to Legislative Action: A Voluntary State Solution to the Problem

This Article argues that a student who lives in a given state is entitled under the Article IV Privileges and Immunities Clause to attend a public school across that state's borders so long as the student (or her former school district, her state of residence, or both) pays the receiving district for the cost of her education. This right to interstate public school choice exists for two reasons. First, public education is a fundamental, and therefore protected, Article IV privilege and immunity because it is eminently vital to national livelihood. Second, a receiving district would be unable to assert a substantial justification for discriminating against nonresident students using a policy of complete closed enrollment.

From the standpoint of the judiciary, the proposed claim offers appropriate grounds for relief because a ruling in favor of the plaintiff child does not implicate separation-of-powers concerns: the court is not asked to make any substantive policy determinations. All the court must do is interpret whether education is basic enough to the

256 *See supra* Part II.B.

national livelihood to warrant consideration as a fundamental Article IV privilege and immunity, and then apply intermediate scrutiny to the state's asserted justifications.

A victory in court, however, only gets proponents of public school choice so far. The proposed claim secures students a right to interstate, but not *intrastate*, public school choice because the Article IV Privileges and Immunities Clause offers protection only to out-of-state residents. A victory under this claim, however, could spark a domino effect that might make meaningful intrastate, interdistrict choice inevitable. For once affluent St. Louis County school districts are required to admit Illinois students, it would be very difficult for the same districts and for state officials, as a political matter, to justify excluding Missouri's own disadvantaged children from its most successful schools.

Consider, after all, the perspective of parents in St. Louis, Missouri, whose children are relegated to the widely criticized St. Louis Public School system.[257] Upon hearing that the county public schools are enrolling children from across the state border in Illinois, St. Louis parents will surely seek to send their children to the county public schools as well. Yet, if the State of Missouri allows the county school districts to reject requests made by St. Louis parents, those parents will have a compelling cause to be offended by their inequitable treatment: how can the state guarantee children from Illinois access to Missouri's best public schools while at the same time forcing taxpaying Missouri residents to keep their children in the state's least desirable schools? Faced with this injustice, these parents would develop such a concentrated interest in rectifying this wrong that they, alongside the sixty-four percent of Republicans and Democrats who already support interdistrict public school choice but who simply lacked the public outcry needed to bring it about,[258] should be able to force teachers unions and suburban parents into a legislative solution whereby real public school choice is secured for all of the state's children.[259] In the midst of this highly charged political atmosphere, the district border as we know it may be but one of many casualties in the dramatic shakeup of the way we think about student assignment in America.

---

257 St. Louis Public Schools have suffered from such severe problems of mismanagement and substandard student performance that the state stripped the district of its accreditation and took over control of the schools in 2007. Malcolm Gay, *State Takes Control of Troubled Public Schools in St. Louis*, N.Y. TIMES, Mar. 23, 2007, at A12.

258 *See* Clowes, *supra* note 133.

259 *See supra* notes 139–47 and accompanying text (discussing the opposition of teachers unions and suburban parents).

Or, to avoid fighting the legal claim described here, along with the contentious political spectacle it may engender—and drawing on the theoretical and empirical support offered for public school choice programs above[260]—state lawmakers could instead proactively reach a legislative compromise to provide truly mandatory public school choice on the state's own terms. Such a voluntary maneuver would have the benefit of preventing the state and its highest achieving school districts from having to defend discriminatory student assignment policies that have unmistakably disparate effects. It could also keep the state from being compelled by court order to implement a far-reaching choice remedy that exceeds what the state and districts would have been willing to do of their own accord.

What should such a legislative solution look like? Two core elements are essential to any program of public school choice that hopes to encounter success. The first element is meaningful choice for students who do not wish to attend the public schools to which they are currently assigned. Meaningful choice can be evaluated on a spectrum that measures the degree to which local schools can control their own enrollment populations, which in turn reflects how angrily suburbanite parents will respond to a given program. At one end of the spectrum are present-day choice policies, as described earlier, where districts have virtually unchecked discretion to reject applicants and educate only local children, resulting in a dearth of actual choices for the vast majority of children who cannot control where they live (but satisfaction for wealthy suburban parents). At the other end is a choice policy that would allow all students to choose whatever school they would like such that districts would have no control over the characteristics of their enrollments whatsoever.

In the middle of this spectrum is a policy that allows districts to retain some control over the rates at which their enrollments change, but that also provides real options to students wishing to transfer. In this kind of policy, the key variable is the enrollment capacity of sought-after schools and school districts. By forcing desirable schools and districts to increase their enrollment capacity with all reasonable speed and in proportion to student demand, an open enrollment policy could keep local parents happy (or at least happier than they would be if they could not send their children to the local schools) while also accommodating additional transfer students each year.

---

260 *See supra* Part II.

The crucial issue, of course, is how rapidly high-demand schools and districts can grow to accommodate new students. Schools and school districts grow in size by virtue of internal demographic shifts as a routine matter, often without negative impacts on the quality of education they provide. Indeed, the lesson from robust choice programs in the Netherlands, Denmark, and Sweden is that the fluid movement of students and growth in school populations need not be catastrophic for institutions that see their enrollment balloon.[261] Such growth could actually be beneficial because with the additional students comes additional funding to ramp up and improve existing programs and facilities. Accordingly, a state legislature would do well to commission an expert analysis into how schools and districts may best grow quickly to accommodate transfers while maintaining a high quality of education.

In requiring existing public schools and districts to increase their enrollments in accordance with student demand, policymakers must challenge the present-day assumption that when a school or district says it is "at capacity," this is the end of the matter. School reformers routinely talk about successful school models, saying, "How can we take what public school *X* is doing and replicate it in public school *Y*?" In doing so they overlook an obvious strategy for reform: make public school *X* serve the children that would otherwise attend public school *Y* and provide school *X* with the resources it needs to maintain its success. If entire new schools are founded to take on entire new student bodies and can still provide high-quality educational opportunities,[262] it must also be possible for existing schools with track records of success to take on additional students and continue performing at a high level.

The second element that will be necessary for any public school choice program to succeed is that funding must be tied to the student, which is to say funding must follow the student to the school she chooses, and it must be weighted proportionally to student needs. This proposal, widely known as Weighted Student Funding, is far from a new idea, as education experts from both sides of the aisle have supported it.[263] The basic idea is that every student is assigned a base

---

261 *See* David Salisbury, *School Choice: Learning from Other Countries*, CATO INST. (May 31, 2005), http://www.cato.org/pub_display.php?pub_id=3786.

262 *See generally, e.g.*, CHRISTINA C. TUTTLE ET AL., MATHEMATICA POLICY RESEARCH, STUDENT CHARACTERISTICS AND ACHIEVEMENT IN 22 KIPP MIDDLE SCHOOLS (2010), *available at* http://www.mathematica-mpr.com/publications/pdfs/education/KIPP_fnlrpt.pdf (detailing a program to create a network of charter schools).

263 *See* THOMAS B. FORDHAM INST., *supra* note 134, at 21–30; *see also* Helen F. Ladd &

value of student funding: 1.0.[264] Students who face particular educational challenges, however, receive additional weights, for example an additional weight of 0.25 for coming from a low-income family, or 0.50 for speaking English as a second language.[265] Once students choose their schools, their dollar figures follow them accordingly.[266] The result is that schools are compensated appropriately for educating children who require more resources, which also removes incentives for schools to try and game the system through selective admissions criteria. In fact, in successful choice programs, such as the one implemented in the Netherlands, most schools do not reject students on the basis of particular admissions criteria at all[267]—and a state program should formalize that requirement. By combining Weighted Student Funding with open enrollment rules requiring districts to admit transfer students without present-day capacity and selectivity loopholes, a state could advance its interests in educational equity and excellence with salutary effects on parental liberty in addition.

CONCLUSION

At the end of the day, whether the legal theory suggested here is necessary to change school enrollment practices or whether policy arguments can advance the ball alone, what matters is that disadvantaged students are not deprived of high-quality educational opportunities simply because of a collective belief that arbitrary school district borders are somehow impenetrable. To paraphrase Ronald Reagan in a vastly different context, but with the same spirit in mind: states and their school districts must tear down these walls. For until they do, we will continue to live in a nation where, in a matter of a few miles, a child's life outlook can go from hopeful to hopeless—and where we are all complicit in actively denying millions of children access to the education they need and deserve.

Edward B. Fiske, *The Dutch Experience with Weighted Student Funding: Some Lessons for the U.S.* 1–8 (Duke Sanford Sch. of Pub. Policy, Working Paper No. SAN09-03, 2009), *available at* http://sanford.duke.edu/research/papers/SAN09-03.pdf (describing successes and lessons to be taken from Dutch school choice and WSF program).

264 *See* THOMAS B. FORDHAM INST., *supra* note 134, at 21–22.

265 *See id.* at 22.

266 *Id.*

267 Andrew Coulson, *Market Education and Its Critics: Testing School Choice Criticisms Against the International Evidence*, *in* WHAT AMERICA CAN LEARN FROM SCHOOL CHOICE IN OTHER COUNTRIES 149, 156 (David Salisbury & James Tooley eds., 2005).