

NOTE

RIGHT TO BE EDUCATED OR RIGHT TO CHOOSE? SCHOOL CHOICE AND ITS IMPACT ON EDUCATION IN NORTH CAROLINA

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Today, states face the challenge of how best to educate their citizens in light of state constitutional obligations to provide public education. Lawmakers must decide between investing more in traditional public schools or pursuing educational alternatives for students and their families. The school choice movement advocates for legal reform creating alternatives such as charter schools and school vouchers. This Note examines the ongoing doctrinal and social effects of school choice in North Carolina.

Doctrinally, school choice has successfully shifted the debate about what the purpose of state education law should be. As recently as one decade ago, statutory and decisional law was primarily premised on the idea that public education was a societal good designed to educate the citizenry and was governed by the costs and benefits to the community. Now, North Carolina education law increasingly emphasizes the importance of creating distinctive, varied school options and the benefits individual students accrue by accessing educational alternatives.

The change in North Carolina education law raises serious practical concerns. Rationalizing the benefits of publicly sponsored education in terms of individual gain leaves some students behind and produces negative social outcomes, such as segregation of schools. Charter schools and private schools funded by vouchers also have incentives to recruit high-performing students and not accommodate various disadvantaged groups within North Carolina. Unless the State is

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careful in considering the needs of all individual students, legalizing more state-sponsored school choice alternatives will exacerbate the relationship between family resources and educational opportunity.

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I. INTRODUCTION

Traditionally, public education in North Carolina has been conceived of as collectively shared by everyone in the state. Under the North Carolina Constitution, “[t]he people have a right to the privilege of

education, and it is the duty of the State to guard and maintain that right.”¹ The Framers of the North Carolina Constitution vested the people as collective owners of the right, suggesting everyone is entitled to education. However, the North Carolina Constitution also describes education as a privilege. Literally construed, privilege can be interpreted to mean “to treat with special benefit or favour.”² This ambiguity in the North Carolina Constitution reflects a broader tension in state education law. Historically, the State treated public education as a collective enterprise promising a better life for all citizens and instilling public, social values that benefit the community as a whole. Public education usually concerned the State of North Carolina, its management of local school boards, and the quality of public education received by students across the state.

The rise of the school choice movement, however, has invigorated the argument that successful education policy is principally measured by the success of individual students rather than receipt of benefits to the community.³ Parents, educators, and policymakers have all expressed concern with underperforming traditional public schools, arguing that it is not in the best interest of students to keep them enrolled in these schools. While the State has consistently tried to improve upon the traditional schools’ student achievement through various reforms, North Carolina has also recently sought to expand alternative schooling options to families, consistent with arguments advanced by school choice advocates.

School choice refers to the processes surrounding students’ enrollment in alternatives to traditional public schools. It encompasses such varied forms as public magnets, quasi-public charter schools, and vouchers to attend private schools. Though rare in comparison, homeschooling is also an example of school choice in the most private sense.⁴ While these forms of choice are not synonymous, each draws support through the notion that

¹ N.C. Const. art. I, § 15. The right to education as currently written was originally enumerated in the North Carolina Constitution of 1868 and then reenacted in the current Constitution. *Id.*; N.C. Const. art. I, § 27 (1868).

² Privilege, Oxford English Dictionary (3d ed. 2007).

³ See Derek W. Black, *Charter Schools, Vouchers, and the Public Good*, 48 Wake Forest L. Rev. 445, 446–47 (2013).

⁴ Homeschooling presents unique challenges outside the scope of this Note. For a discussion of homeschooling, see, e.g., Jessica Archer, *Leandro’s Limit: Do North Carolina’s Homeschoolers Have a Right to a Sound Basic Education Protected by the State?*, 36 Campbell L. Rev. 253 (2014).

families' freedom to make independent decisions about a child's schooling surpasses the needs of students as a collective. Based on legal, historical, and social science empirical evidence, we argue that a marked shift from viewing education as a collective good to an individual choice amidst support for school choice has fundamentally changed how state law conceptualizes the purpose of education.

In the past decade, North Carolina's statutory and decisional law has turned away from preceding modern law focusing on public education as a single public service to the community, instead sanctioning competition among all schools for public support and emphasizing the benefits of education that accrue to individual students.⁵ The notable doctrinal shifts allowing for the legal establishment of school choice principles raise serious questions. One of these is the extent to which the State is effectively carrying out its ongoing obligation to educate children. Now that the law has provided school choice options, who are the individuals making those choices? Do those choices meaningfully improve students' education? These are the main questions that we address in this Note.

In this Note, we focus on privatized forms of school choice outside of the home—charter schools and vouchers to attend private schools. Although they are publicly funded, their management is outsourced to private organizations, rather than local school boards, and thus can be considered privatized forms of schooling. Vouchers and charters are also most similar in their origins compared to other forms of choice. Usually, their foundations are traced to Albert Shanker's advocacy for charters and Milton Friedman's call for privatizing education in the 1980s and 1990s,⁶ but, as we discuss, their roots developed much earlier. These origins are most evident at the local level: since school choice varies by state, we focus on developments within one state, North Carolina, to illustrate the evolution of school choice and the shift to individual family preferences.

This Note proceeds in six Parts. Following this introduction in Part I, Part II provides an overview of the historic, doctrinal, and social developments fostering school choice ideology in North Carolina that were precursors to the present-day school choice movement. Part III

⁵ Nicole Stelle Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 *Vand. L. Rev.* 1, 5 (2017) (“[E]ducation reformers and urban leaders alike are coming to embrace a child-focused, rather than a sector-focused, reform agenda.”).

⁶ See Michael Fabricant & Michelle Fine, *Charter Schools and the Corporate Makeover of Public Education: What's at Stake?* 18 (2012); Milton Friedman, *Public Schools: Make Them Private*, 5 *Educ. Econ.* 341 (1997).

summarizes the principles guiding the modern school choice movement, including marketplace ideology and individual autonomy. Part IV analyzes how North Carolina statutes and case law on public education from the late 1990s to the present have changed as the school choice movement has gained traction in the state. In particular, this Note will examine the state doctrine from the late 1990s to the late 2000s in court decisions of critical importance to public education: the right to education and pupil placement cases. The Note will then analyze the impact of the school choice movement on statutes, statutory interpretation, and constitutional interpretation from the late 2000s to the present regarding charter schools and school vouchers. Part V will discuss the implications for North Carolina following a shift in legal thinking embracing education as a benefit conferred on individuals by choice. This Part focuses on who is taking advantage of school choice and whether choice is meaningful for certain groups targeted by school choice programs, as well as potential tradeoffs in the quest for school choice. Finally, Part VI concludes by reflecting on changes in the law facilitating school choice and their prospective impact on education in North Carolina.

II. PRECURSORS TO SCHOOL CHOICE: HISTORIC LEGAL DEVELOPMENTS IN NORTH CAROLINA EDUCATION

Despite sudden attention to vouchers and charters beginning in the 1990s, school choice was historically defined in large part by desegregation of public schools. The idea that states would fund private schooling emerged in the mid-twentieth century following *Brown v. Board of Education (Brown I)* and the constitutional mandate to desegregate public schools.⁷ Understanding the current evolution of school choice is impossible without regard to the landmark school desegregation decision in *Brown I* and subsequent interpretations of its holding.⁸

Following *Brown I*, the Supreme Court famously held that states were to desegregate their schools “with all deliberate speed” in *Brown II*.⁹ Developed in response to *Brown II*, North Carolina’s Pearsall Plan illustrates how choice rhetoric emerged within the context of schooling.

⁷ 347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”).

⁸ Gerard Toussaint Robinson, *Can the Spirit of Brown Survive in the Era of School Choice?: A Legal and Policy Perspective*, 45 *How. L.J.* 281, 281 (2002).

⁹ *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

The Pearsall Plan proposed amending the public-school provisions of the North Carolina Constitution in 1956 to reconfigure student assignments to public schools.¹⁰ For children who were assigned to desegregated schools, it permitted transfers and tuition grants for them to attend private schools: In effect, it provided an exit strategy for white families who sought to avoid integration.¹¹ One of the rationales of the plan was that, for public education to succeed, one group of constituents, white families, must be given the freedom to choose not to attend an integrated school.¹² Declared unconstitutional in 1966,¹³ the Pearsall Plan and similar efforts to close public schools in other Southern states struggled to endure as the federal government intervened.

Black residents of North Carolina also expressed the need for school choice. For example, many parents in Hyde County, North Carolina advocated the right to preserve their local, historically black schools because they opposed the one-sided approach to desegregation, which often demoted black school personnel, eliminated historically black schools' symbols, and subjected black children to harassment.¹⁴ They, too, wanted school choice, but they wanted it for different reasons.¹⁵ While black parents did not oppose sending their children to school with white students, they were skeptical of *Brown I*'s logic that desegregating schools would ameliorate psychological harm to black students by allowing students to attend school interracial and thus avoid separate, unequal schools. Despite the challenges of segregated, unequal schools, desegregation presented challenges of its own for black families.

¹⁰ N.C. Advisory Comm. on Educ., Report of the North Carolina Advisory Committee on Education 9–10 (1956), https://ia800706.us.archive.org/6/items/reportofnorthcar00nort_0/-reportofnorthcar00nort_0.pdf [<https://perma.cc/X2C4-BWNT>] [hereinafter Pearsall Plan].

¹¹ *Id.* (noting availability of funds for students assigned to desegregated public schools “against the wishes of [their] parents”); see also Wilma Peebles-Wilkins, Reactions of Segments of the Black Community to the North Carolina Pearsall Plan, 1954–1966, 48 *Phylon* 112, 114 (1987) (noting that the Pearsall Plan, among other things, provided grants to private schools for children whose parents objected to their children attending desegregated schools).

¹² Pearsall Plan, *supra* note 10, at 10.

¹³ *Hawkins v. N.C. State Bd. of Educ.*, No. 2067, 11 *Race Rel. L. Rep.* 745, 746 (W.D.N.C. Mar. 31, 1966). The Supreme Court would later strike down a school choice plan as an insufficient remedy for desegregation of schools. *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 440 (1968) (“[I]n desegregating a dual system a plan utilizing ‘freedom of choice’ is not an end in itself.”).

¹⁴ David S. Cecelski, *Along Freedom Road: Hyde County, North Carolina, and the Fate of Black Schools in the South* 8–9 (1994).

¹⁵ See *id.* at 69 (“Black parents had begun to doubt that they would have significant influence over their children’s educations or reasonable access to educators at the school.”).

Converting black schools to predominantly white ones, eliminating sports teams and accomplishments of black community schools, and sending black students to desegregated schools without the support of their former teachers and role models took an emotional toll on black students.¹⁶ Sixty percent of North Carolina's school districts did not employ even a single black administrator, and many black teachers lost their jobs.¹⁷ At least black students in years prior, with support from historically black schools like those in Hyde County, could gain confidence under the leadership of community members who believed in them. Thus, school choice, including the use of vouchers and charter schools, has also been considered a method of liberating students of color from academically inadequate or emotionally hostile school environments.¹⁸

Like other school districts in the South, North Carolina resisted and delayed the terms of desegregation until the 1970s. Federal courts ultimately intervened, changing school policies following the decision in *Swann v. Charlotte-Mecklenburg Board of Education*, which upheld pupil reassignment and busing to correct racial imbalance in previously segregated schools.¹⁹ Thereafter, students began to be reassigned between schools by race. In the wake of *Swann*, advocacy for school choice in the context of desegregation took on different shapes. Proponents of integrated schools advocated for the use of magnet programs to create racially diverse, thematic educational programs available to students attending specific public schools.²⁰ Parents opposed to desegregation collapsed "freedom of choice" into advocacy for "neighborhood schools" in urban areas of North Carolina such as Charlotte,²¹ while rural areas created private, segregationist academies allowing white students to

¹⁶ Id. at 34–35; see also Martha Minow, In *Brown's Wake: Legacies of America's Educational Landmark 14* (2010) ("[E]ven racially separate schooling would be better than schools that undermine the aspirations, confidence, and achievement of students of color.").

¹⁷ Cecelski, *supra* note 14, at 8.

¹⁸ See Robin D. Barnes, *Black America and School Choice: Charting a New Course*, 106 *Yale L.J.* 2375, 2383–84, 2401, 2404, 2407–08 (1997); Brian P. Marron, *Promoting Racial Equality Through Equal Educational Opportunity: The Case for Progressive School-Choice*, 2002 *BYU Educ. & L.J.* 53, 70 (2002).

¹⁹ 402 U.S. 1, 27–30 (1971).

²⁰ See Genevieve Siegel-Hawley & Erica Frankenberg, *Does Law Influence Charter School Diversity? An Analysis of Federal and State Legislation*, 16 *Mich. J. Race & L.* 321, 335 (2011).

²¹ See Matthew D. Lassiter, *The Silent Majority: Suburban Politics in the Sunbelt South* 131–37 (2006).

retreat from diverse schooling and remain free from government intervention.²²

Ultimately, the United States Supreme Court allowed federal courts to extract themselves from court-ordered desegregation once the effects of prior segregation on individual students had been remedied.²³ By the late 1990s and early 2000s, Charlotte-Mecklenburg and other districts previously under court orders had been declared “unitary” and were thus relieved of further court supervision.²⁴ Just as the fight over desegregation in federal courts subsided, however, North Carolina state law became a new battleground for school choice. Beginning in the late 1990s, the State was forced to answer difficult questions about the purpose of public education, the State’s responsibility to students, the beneficiaries of such education, and the best way for the State to allocate its limited resources. The school choice movement today seeks to fundamentally alter the conception of education from a societal good to an individual good.

III. THE RATIONALE FOR MODERN SCHOOL CHOICE: APPLYING MARKET PRINCIPLES TO SCHOOLS

School choice simulates market principles in the context of education.²⁵ Prominent among these principles is families’ freedom to choose a school from a decentralized range of alternatives to traditional public schools. Ideally, these schools will in turn compete for student enrollment and promote achievement in choice schools as well as traditional public schools.²⁶ School choice is also premised on equality of

²² Christopher Myers, *White Freedom Schools: The White Academy Movement in Eastern North Carolina, 1954–1973*, 81 *N.C. Hist. Rev.* 393, 393, 395 (2004); Jeremy R. Porter et al., *Old Times Are Not Forgotten: The Institutionalization of Segregationist Academies in the American South*, 61 *Soc. Probs.* 576, 578 (2014).

²³ *Freeman v. Pitts*, 503 U.S. 467, 489 (1992) (“A federal court in a school desegregation case has the discretion to order an incremental or partial withdrawal of its supervision and control. This discretion derives both from the constitutional authority which justified its intervention in the first instance and its ultimate objectives in formulating the decree.”).

²⁴ See, e.g., *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 311 (4th Cir. 2001) (en banc) (per curiam). Even after being declared unitary, some school districts, such as Wake County, North Carolina, use socioeconomic status rather than race to reassign students to schools. See Toby L. Parcel & Andrew J. Taylor, *The End of Consensus: Diversity, Neighborhoods, and the Politics of Public School Assignments* 26 (2015).

²⁵ See Friedman, *supra* note 6, at 343–44.

²⁶ Dan Goldhaber et al., *How School Choice Affects Students Who Do Not Choose*, in *Getting Choice Right: Ensuring Equity and Efficiency in Education Policy* 101, 102 (Julian R. Betts & Tom Loveless eds., 2005).

opportunity, an ideal that is tightly linked to individualism.²⁷ For example, if a superior private education is available, vouchers provide a route for students who cannot afford the school to attend it. Similarly, charter schools promise students who attend failing or underperforming schools that innovative schooling will better adapt to the needs of individual families.²⁸ Proponents further argue that local, traditional public schools will in turn improve to maintain student enrollments.²⁹

Autonomy is also a central school choice principle. Private schools are necessarily autonomous from the public realm; hence, vouchers grant an expansion of autonomous school options to traditional public-school students. Charter schools are often considered quasi-public or public-private hybrid schools: Though publicly funded, charters are entities separate from public school districts and are led by their own board of directors and/or management, allowing them the flexibility of private schools.³⁰ Developed as experiments for innovation, charter schools remain autonomous from local school boards' rules and curriculum management in exchange for transparency and academic results.³¹ If charters do not produce achievement gains, their risk of closure

²⁷ Jerome J. Hanus & Peter W. Cookson, Jr., *Choosing Schools: Vouchers and American Education* 33 (1996).

²⁸ See Christopher A. Lubienski & Peter C. Weitzel, *Two Decades of Charter Schools: Shifting Expectations, Partners, and Policies*, in *The Charter School Experiment: Expectations, Evidence, and Implications* 1, 2 (Christopher A. Lubienski & Peter C. Weitzel eds., 2010) (“Instead, [charter schools] are focused on changing the fundamental governance and management structure of schooling: unleashing the creative potential of educators and communities, nurturing diverse options for families, encouraging parents to choose what is best for their children, and making schools directly accountable to the people who use them.”).

²⁹ See Catherine DiMartino & Sarah Butler Jessen, *Selling School: The Marketing of Public Education* 6 (2018) (citations omitted) (“Supporters of markets additionally argue that putting such policies into practice will improve not only the choice schools but the entire public school system.”); Iris C. Rotberg, *A School System Increasingly Separated*, in *Choosing Charters: Better Schools or More Segregation?* 41, 51 (Iris C. Rotberg & Joshua L. Glazer eds., 2018) (“[T]he introduction of charter schools would create a market economy in which schools would compete, strong schools would thrive, and weak schools, if they did not improve, would drop out.” (citation omitted)).

³⁰ DiMartino & Jessen, *supra* note 29, at 45–46; James E. Ryan, *Five Miles Away, a World Apart: One City, Two Schools, and the Story of Educational Opportunity in Modern America* 198 (2010); Dan D. Goldhaber, *School Choice: An Examination of the Empirical Evidence on Achievement, Parental Decision Making, and Equity*, 28 *Educ. Researcher* 16, 19 (1999); Office of Charter Schs., N.C. Dep’t of Public Instruction, *Charter School Application Resource Manual* 14 (2018), <http://www.ncpublicschools.org/docs/charterschools/applications/2018-resource-manual.pdf> [<https://perma.cc/FWU2-5EBG>].

³¹ Fabricant & Fine, *supra* note 6, at 18–19.

increases.³² Charter schools thus have an incentive to recruit high-performing students,³³ including students for whom English is a first language.³⁴

In the era of school choice, education is viewed as a personal commodity in a marketplace of school options.³⁵ Families are conceptualized as consumers, and they are responsible for gathering information and choosing schools.³⁶ For example, they can acquire information from websites, online discussion boards, and peer networks.³⁷ Ultimately, enrollment decisions belong to families, as student assignments to traditional public schools do not necessarily determine student enrollment in those schools. This expansion of privatized school choice alters the relationship between students and their assigned schools. It also places the onus on individual families to secure the right to education for their children. Next, we review how these market principles have gradually reshaped statutes, statutory interpretation, and state constitutional law regarding education as a collective right shared by all.

³² Maria Paino et al., *For Grades or Money? Charter School Failure in North Carolina*, 50 *Educ. Admin. Q.* 500, 516 (2014) (finding that reading scores are a predictor of charter school closures).

³³ See Terri S. Wilson & Robert L. Carlsen, *School Marketing as a Sorting Mechanism: A Critical Discourse Analysis of Charter School Websites*, 91 *Peabody J. Educ.* 24, 25–26 (2016). As one charter school principal put it, advertising available spaces at a charter school risks attracting “less-capable students.” Huriya Jabbar, *Selling Schools: Marketing and Recruitment Strategies in New Orleans*, 91 *Peabody J. Educ.* 4, 18 (2016).

³⁴ Kevin G. Welner, *Nat’l Educ. Police Ctr.*, *The Dirty Dozen: How Charter Schools Influence Student Enrollment* (2013), <https://nepc.colorado.edu/publication/TCR-Dirty-Dozen> [<https://perma.cc/8DCD-SGL3>].

³⁵ Jeffrey R. Henig, *Rethinking School Choice: Limits of the Market Metaphor* 57 (1994).

³⁶ See John E. Chubb & Terry M. Moe, *Politics, Markets, and America’s Schools* 33 (1990) (noting the presence of “new schools that enter the marketplace to offer similar services in a better way, or perhaps to appeal to specialized segments of consumer demand that are not being met adequately”); DiMartino & Jessen, *supra* note 29, at 153 (“[B]eing a consumer in the public educational realm means choosing to participate in or become part of an organization in a manner that either directly or indirectly sustains the organization—by enrolling in a school, becoming employed by the organization, or donating to it.”).

³⁷ See Shelley McDonough Kimelberg & Chase M. Billingham, *Attitudes Toward Diversity and the School Choice Process: Middle-Class Parents in a Segregated Urban Public School District*, 48 *Urb. Educ.* 198, 219–20 (2012).

IV. MODERN LEGAL DEVELOPMENTS AND SHIFTS TOWARD SCHOOL CHOICE

A. The Status Quo: Education as a Societal Good Governed by Collective Concerns

Modern doctrinal and statutory developments in North Carolina illustrate conflicting schools of legal thought around what constitutes the “public good” in education.³⁸ As recently as the late 2000s, the North Carolina Supreme Court and General Assembly took what could be described as a community-oriented view of education. Across the United States, education law was governed by the notion that “[t]he state provides education not only because individuals want or need it but because an educated citizenry is needed for society to function in the ways it desires.”³⁹ In cases deciding crucial issues such as the adequacy of school funding in public schools and the ability of school districts to assign pupils to particular schools, some states, such as North Carolina, adopted a collective understanding of the goals of education, generally adhering to the view “that a core set of individual liberties must be protected, but [limiting] individualism at the point that it seriously threatens group interests.”⁴⁰

1. School Funding — Leandro and the Right to a Sound Basic Education

The clearest example of community-oriented education law is the landmark case *Leandro v. State (Leandro I)*.⁴¹ In *Leandro I*, the plaintiffs sued for relief on the ground that they were being denied the funding necessary to ensure that children in their relatively poor school districts received a constitutionally adequate education and that children were denied an equal education because of the funding disparities between their districts and wealthier districts in North Carolina.⁴² Plaintiffs alleged numerous deficiencies in their schools, such as inadequate facilities, lack

³⁸ For a discussion of the competing definitions of the public good in education in United States legal doctrine, see Black, *supra* note 3, at 448–62.

³⁹ *Id.* at 452. Black added that “[t]he purpose of a common experience is to foster substantive commonality and social cohesion based on whatever underlying values and goals society chooses to promote.” *Id.* at 456.

⁴⁰ *Id.* at 455.

⁴¹ 488 S.E.2d 249 (N.C. 1997).

⁴² *Id.* at 252.

of current educational resources and technology, and inability to offer competitive salaries to attract high-quality teachers.⁴³

The North Carolina Supreme Court resolved both legal issues in *Leandro I* by considering communities rather than individuals. First, the court held that the right to education guaranteed by the North Carolina Constitution was not merely one of equal access, but “a right to a sound basic education.”⁴⁴ The court elaborated, holding that “[a]n education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate.”⁴⁵ Appealing to precedent, the court stated that public education must be “adequate to the needs of a great and progressive people, affording school facilities of recognized and ever-increasing merit to all the children of the State.”⁴⁶ The court justified giving the right to education qualitative content on the grounds that education is a collective endeavor for the benefit of society as a whole.

The second holding in *Leandro I* was that the North Carolina Constitution “does not require substantially equal funding or educational advantages in all school districts.”⁴⁷ The court justified this holding in collective terms, as well, focusing on the responsibilities of local school districts as a community unit and their shared responsibility to fund schools rather than the individual students in the district.⁴⁸ Moreover, the court declined to rule on an allegation based on the demographics of urban districts, in particular, finding that taking demographics of individual students into account would actually lead to unequal treatment resulting from an unusually large per-pupil allocation of funds.⁴⁹ Thus, both holdings in *Leandro I* oriented the law toward more community-focused solutions, rather than focusing on individual students.

The North Carolina Supreme Court affirmed its community-oriented approach in *Hoke County Board of Education v. State (Leandro II)*.⁵⁰ One

⁴³ Id. For additional description of the conditions in Hoke County schools at the time of the case, see Robert H. Tiller, *Litigating Educational Adequacy in North Carolina: A Personal Account of Leandro v. State*, 488 S.E.2d 255 (N.C. 1997), 83 Neb. L. Rev. 893, 897 (2005).

⁴⁴ *Leandro I*, 488 S.E.2d at 254.

⁴⁵ Id.

⁴⁶ Id. (quoting *Bd. of Educ. v. Bd. of Comm’rs of Granville Cty.*, 93 S.E. 1001, 1002 (N.C. 1917)).

⁴⁷ Id. at 256.

⁴⁸ Id.

⁴⁹ Id. at 257.

⁵⁰ 599 S.E.2d 365 (N.C. 2004).

of the procedural issues in *Leandro II* was whether plaintiffs' allegation that the affected children began kindergarten at a disadvantage because of lack of funding for pre-kindergarten services was relevant.⁵¹ The trial court had attempted to narrow the scope of *Leandro I* when it found that the plaintiffs' allegation was not relevant to the complaint on the grounds that the right to education was not based on age but instead "upon the need of the particular child."⁵² The North Carolina Supreme Court rejected this reasoning, choosing instead to interpret the right to a sound basic education as broadly as possible. According to the court, the right articulated in *Leandro I* belonged to "all children of North Carolina, regardless of their respective ages or needs."⁵³ The court thus set up the right to education to be much more inclusive than it had previously been construed.

The *Leandro II* court then considered whether students had been denied a sound basic education by reviewing the findings of the lower courts. In order to determine whether a violation had occurred, the court emphasized aggregate measures of student success in Hoke County, such as standardized test performance and college and career readiness.⁵⁴ After reviewing the record, the court concluded that students across Hoke County had been denied their right to a sound basic education.⁵⁵ The use of aggregate measures to evaluate the sufficiency of the education children received in the state is further evidence of the community-focused orientation of the court.

Finally, the *Leandro II* court approved the trial court's structural remedy for Hoke County. After finding a violation of the right to a sound basic education, the trial court mandated:

- (1) that "every classroom be staffed with a competent, certified, well-trained teacher";
- (2) "that every school be led by a well-trained competent principal"; and
- (3) "that every school be provided, in the

⁵¹ Id. at 378.

⁵² Id. at 379.

⁵³ Id.

⁵⁴ Id. at 383–84. The *Leandro II* court's approach focuses on the adequacy of education. Derek W. Black, *Preferencing Educational Choice: The Constitutional Limits*, 103 *Cornell L. Rev.* 1359, 1404–05, 1405 n.250 (2018).

⁵⁵ *Leandro II*, 599 S.E.2d at 391. For additional analysis of *Leandro II* and its implications for school funding cases, see *Recent Case, School Finance — North Carolina Supreme Court Finds the State in Violation of Its Constitution for Failing to Provide Students an Opportunity to Obtain a Sound Basic Education. — Hoke County Board of Education v. State*, 599 S.E.2d 365 (N.C. 2004), 118 *Harv. L. Rev.* 1753 (2005).

most cost effective manner, the resources necessary to support the effective instructional program within that school so that the educational needs of all children, including at-risk children, to have the equal opportunity to obtain a sound basic education, can be met.”⁵⁶

The North Carolina Supreme Court approved the order as a remedy sufficiently broad to prevent infringement of students’ right to education, while showing appropriate deference to the legislative and executive branches in making education policy.⁵⁷ The court was persuaded by the trial court’s analysis, which focused first on the State’s obligation to all students and then proceeded to evaluate the State’s “Hoke County educational obligations.”⁵⁸ Thus *Leandro II* stands for the proposition that providing adequate public education to North Carolina students is a communal, aggregate-driven problem, requiring broad structural improvements that reach all schools within the community.

2. *Pupil Assignment — Overriding Choice in Public School Placement*

The North Carolina Supreme Court’s focus on education as a collective enterprise was not restricted to school funding cases but can also be seen in other areas such as pupil assignment. The most contentious example of this is *Wake Cares, Inc. v. Wake County Board of Education*.⁵⁹ In *Wake Cares*, the Wake County School Board was forced to confront the issue of overcrowding in its schools, a result of explosive growth of the district.⁶⁰ In order to alleviate the problem, the School Board voted to convert several schools to a year-round calendar, keeping the same number of school days but spreading them out over the course of a year.⁶¹ Plaintiffs sued the School Board, alleging that students could not be assigned to year-round schools without parental consent.⁶²

The North Carolina Supreme Court held that the School Board was authorized to order students to attend year-round schools, finding that the Board’s statutory obligation to manage increased enrollment and control class size allowed it to make such a change without parental consent.⁶³ In

⁵⁶ *Leandro II*, 599 S.E.2d at 389.

⁵⁷ *Id.* at 390.

⁵⁸ *Id.*

⁵⁹ 675 S.E.2d 345 (N.C. 2009).

⁶⁰ *Id.* at 347.

⁶¹ *Id.*

⁶² *Id.* at 348.

⁶³ *Id.* at 349–50.

order to justify its holding, the court relied on collective goals, referring to statutory text that encouraged using calendar flexibility “to meet the annual performance standards set by the State Board.”⁶⁴ The court rejected the notion that state law required parental consent for pupil placement, finding instead that school boards had sole authority to assign students to schools and that only parent consultation—not consent—was required.⁶⁵ In its conclusion, the court admonished plaintiffs to use the political process if they disagreed with the decisions of the Wake County School Board.⁶⁶ Thus, the cumulative effect of the court’s opinion was to deny the primacy of choice in school placement, instead deferring to the School Board’s decision about how best to allocate all students across the district.

The internal resistance to *Wake Cares* showed the change in legal thought starting to take place between the *Leandro* cases and the development of school choice mechanisms such as charter schools and vouchers to attend private schools. While casting the decisive vote, Justice Edmunds expressed his reservations about Wake County’s actions. He emphasized in his separate concurrence that, although he felt the result of the case was compelled by the state constitution and by statute, parents could resort to mandatory hearings to reconsider assignment of children based on “the best interest of the child.”⁶⁷

Similarly, the dissenters in *Wake Cares* rejected the court’s emphasis on collective goals, instead choosing to look at the impact that school assignment would have on individual parents and students.⁶⁸ Focusing on differential treatment of students, the dissenters discussed how the year-round calendar “upset[] families’ reliance on the traditional summer vacation” and diminished the ability of students to engage in extracurricular activities over the summer such as learning to play an instrument or sport.⁶⁹ Justice Martin’s dissent represented a major turn away from the notion that the law should look at education as a collective enterprise governed by collective concerns, such as limiting class size for all students. Instead, the dissenters chose to focus on the individual benefits students gained from having a summer break.

⁶⁴ Id. at 349 (citing N.C. Gen. Stat. § 115C-84.2(a) (2007)).

⁶⁵ Id.

⁶⁶ Id. at 351.

⁶⁷ Id. (Edmunds, J., concurring) (quoting N.C. Gen. Stat. § 115C-369(c) (2007)).

⁶⁸ Id. at 353–54 (Martin, J., dissenting).

⁶⁹ Id. at 353 (Martin, J., dissenting).

Parents affected by the decision in *Wake Cares* ultimately did resort to using the political process to obtain a remedy, voting together with other constituencies in favor of neighborhood schooling to replace four out of nine members of the Wake County School Board and creating a new majority on the Board.⁷⁰ Legal doctrine involving choice and education, however, was far from settled after *Wake Cares*. The dissenters' and Justice Edmunds's logic would foreshadow the sweeping change in North Carolina education law that would come with the advent of legal challenges to school choice options, including charter schools and vouchers.

B. The "Competing" View of Education: School Choice and Prioritizing the Individual

The school choice movement has fundamentally shifted the General Assembly and the North Carolina appellate courts' view of education as serving the public good to a more individual-based view of education, particularly when looking at the statutes and doctrines involving the development of charter schools and vouchers. From the late 2000s to the present, consistent with the general trend toward school choice, North Carolina law with respect to these new school options has become premised on the notion that "[t]he primary purpose . . . of education is to benefit the individual. Society may receive a benefit as well, but that benefit is indirect and not a driving motivation."⁷¹ To further this notion, North Carolina state law is now broadly interpreted to endorse competition between public schools, charter schools, and private schools (via vouchers) to provide greater opportunities for the individual, creating divisions between these schools and a fight for state resources.⁷²

⁷⁰ See Gerald Owens, Tedesco Wins Seat on Wake County School Board, WRAL.com (Nov. 4, 2009), <https://www.wral.com/news/local/politics/story/6341346/> [<https://perma.cc/5YUE-8FTA>] (discussing reform of the student assignment plan as an implication of the turnover on the School Board); Some Wake Schools Voters Get to Cast Second Ballot, WRAL.com (Oct. 19, 2009), <https://www.wral.com/news/local/politics/story/6220442/> [<https://perma.cc/Y8RR-VFH6>] (indicating WakeCARES, a community group, endorsed all four of the candidates elected in the 2009 race).

⁷¹ Black, *supra* note 3, at 451 (referring to the primary purpose of education under an individualized concept of education).

⁷² See *id.* at 458–61, 471–73.

1. Charter Schools — Legalizing Competition Among Publicly Supported Schools

The statutory and judicial framework for charter schools in North Carolina demonstrates the impact of the school choice movement on public education and the law. Charter schools were first created by the North Carolina General Assembly in 1996, around the same time that *Leandro I* was decided.⁷³ Among other purposes, the law was originally intended to “[i]mprove student learning” and “[i]ncrease learning opportunities for *all* students, with special emphasis on expanded learning experiences for students who are identified as at risk of academic failure or academically gifted.”⁷⁴ Although the legislature instituted this new form of school, it was clear that legislators intended for the charter school to be an experiment in how to improve education in the public school system overall and to provide targeted educational programs for a limited number of students. The law carefully circumscribed the creation of charter schools, limiting the total number of charter schools to 100 across the state of North Carolina.⁷⁵

The 2010s have seen an explosion of charter school legislation designed by the General Assembly to provide for greater ability to create new charter schools. In 2011, the legislature passed a law that removed the 100-school cap on new charter schools.⁷⁶ Subsequently, the legislature took steps to provide a separate infrastructure for charter schools and to differentiate the administration of charter schools from the rest of public schools. In 2013, the legislature created the North Carolina Charter Schools Advisory Board and tasked it with providing comprehensive recommendations to the State Board of Education on how to govern charter schools, ranging from which schools to approve to broader rules

⁷³ Charter Schools Act of 1996, 1995 N.C. Sess. Laws 424 (codified as amended at N.C. Gen. Stat. § 115C-218 (2017)).

⁷⁴ *Id.* at 424 (emphasis added).

⁷⁵ *Id.* at 427 (codified at N.C. Gen. Stat. § 115C-238.29D(b) (1995) (current version at N.C. Gen. Stat. § 115C-218.5) (amended by 2011 N.C. Sess. Laws 647)).

⁷⁶ An Act to Remove the Cap on Charter Schools; to Allow State Board of Education Discretion in Granting Final Approval of Charter School Applications; to Raise the Enrollment Growth Cap to Twenty Percent; to Permit Charter Schools to Charge Fees Charged by the Local School Administrative Unit; to Strengthen the Standards for Retaining a Charter for a Charter School; and to Require the State Board of Education to Report to the General Assembly on Charter Schools, 2011 N.C. Sess. Laws 647 (repealing N.C. Gen. Stat. § 115C-238.29D(b)).

about monitoring of charter schools.⁷⁷ In 2015, the legislature created the North Carolina Office of Charter Schools to provide guidance to applicants seeking to start charter schools and to help the Advisory Board carry out its duties.⁷⁸ While the creation and expansion of charter schools through legislation has helped these schools to develop, such creation and expansion has also emphasized the role of the individual students by creating competing alternatives within North Carolina's public school system, resulting in infighting between traditional public schools and charter schools.

The most obvious place where infighting between traditional public schools and charter schools plays out in court is funding. To date, the North Carolina Supreme Court has largely refrained from issuing opinions on charter schools, essentially leaving the work of interpreting relevant statutes and the North Carolina Constitution to the North Carolina Court of Appeals.⁷⁹ In *Sugar Creek Charter School, Inc. v. State*, the North Carolina Court of Appeals considered whether the charter school plaintiffs were entitled to request funding from the local capital outlay portion of the local school district's budget.⁸⁰ Invoking *Leandro I*, the plaintiffs argued that, since the charters were public schools, the North Carolina Constitution's uniform schools provision and the right to sound basic education would be violated if the charters were not given funding for capital outlays.⁸¹ The court determined that the plaintiffs' key contention was that the North Carolina Constitution mandates one class of public schools, and expressly rejected that contention.⁸² In order to justify its holding, the court did not treat charter schools as equal to public schools but instead as "additional educational programs" that were either

⁷⁷ An Act to Create the North Carolina Charter Schools Advisory Board and Make Other Changes to Charter School Laws, 2013 N.C. Sess. Laws 965 (codified at N.C. Gen. Stat. § 115C-218(b) (2017)).

⁷⁸ An Act to Make Changes to Various Charter School Statutes and Other Education Statutes, 2015 N.C. Sess. Laws 1152, 1154 (codified as amended at N.C. Gen. Stat. § 115C-218(c) (2017)). The law also mandated that "[a]ll State agencies and departments shall cooperate with the Office of Charter Schools in carrying out its powers and duties as necessary in accordance with this Article." *Id.*

⁷⁹ See, e.g., *Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cty. Bd. of Educ.*, 789 S.E.2d 442 (N.C. 2016) (mem.) (per curiam) (denying petition); *Union Acad. v. Union Cty. Pub. Schs.*, 720 S.E.2d 390 (N.C. 2012) (mem.) (denying petition); *Learning Ctr./Ogden Sch., Inc. v. Cherokee Cty. Bd. of Educ.*, 720 S.E.2d 671 (N.C. 2012) (mem.) (denying petition).

⁸⁰ 712 S.E.2d 730, 732 (N.C. Ct. App. 2011).

⁸¹ *Id.* at 740.

⁸² *Id.* at 740–41.

a separate “component of the uniform system of public schools” or outside of the system entirely.⁸³ Rather than emphasizing the similarities between the schools, the court instead focused on the unique characteristics of charter schools, including greater freedom to devise educational plans and responsibility for providing their own facilities.⁸⁴ This reasoning reflects a school choice-influenced interpretation of the North Carolina Constitution, emphasizing and sanctioning distinctions between charter schools and public schools.

The legal shift to distinguish charter schools from other public schools also leads to competition for the funding allocated to individual students. A relatively recent example of this is in pre-K education. In *Charter Day School, Inc. v. New Hanover County Board of Education*, the North Carolina Court of Appeals considered whether pre-K students should be included when calculating the appropriation to charter schools, given that some funds in the local expense fund were allocated for pre-K programs.⁸⁵ Interpreting “per pupil” narrowly, the court found that pre-K funds were subject to allocation under the Charter School Funding Statute, but that pre-K students could not be used to determine the proper allocation because the children were not eligible to enroll in the school system.⁸⁶ This treatment of future students marks a departure from *Leandro II*, where the North Carolina Supreme Court had been willing to acknowledge every child held a constitutional right to a sound basic education, even if those children were not yet students of the school system.⁸⁷ In *Charter Day*, the court took a different position by requiring the school system to allocate pre-K funds to a charter school without accounting for pre-K students in the per-pupil allocation of funding.⁸⁸ The beneficiaries of pre-K funds are pre-K children. The conflict over how to treat individual students for funding purposes, however, results in a zero-

⁸³ *Id.* at 741–42. The court added that “N.C. Const. art. IX, § 2(1) merely requires that all North Carolina students have access to a sound basic education and does not preclude the creation of schools or other educational programs with attributes or funding options different from those associated with traditional public schools.” *Id.* at 741.

⁸⁴ *Id.* at 742.

⁸⁵ 754 S.E.2d 229, 235 (N.C. Ct. App. 2014).

⁸⁶ *Id.* at 235–36.

⁸⁷ *Leandro II*, 599 S.E.2d 365, 379 (N.C. 2004).

⁸⁸ See *Charter Day*, 754 S.E.2d at 235–37.

sum game between public schools and charter schools, bringing the fight over individual students to the funding process.⁸⁹

A close reading of *Leandro I* together with charter school case law might lead a reader to conclude that the North Carolina Court of Appeals is simply extending *Leandro I*'s second holding and that the State has always been allowed to provide different educational opportunities to students.⁹⁰ The key distinction in charter school case law and the holdings of *Leandro I* and *Leandro II*, however, is the focus on schools instead of school districts. *Leandro I* and *Leandro II* recognized the importance of the school district as the primary unit acting on behalf of the State to provide education to children.⁹¹ Current cases sanction competition between charter schools and public schools by upholding state law that promotes education policy at the school level rather than the district level.

The fight between charter and public schools to develop their own policies and secure as much funding as possible stems from one of the policy consequences of school choice influenced law: sector agnosticism.⁹² North Carolina lawmakers and judges are less interested in committing resources solely to traditional public schools, instead preferring a child-centered approach focused on providing the best available education programs.⁹³ To that end, the legislature is willing to create different types of public schools such as traditional and charter schools and provide different infrastructures for each. Recent calls by some North Carolina lawmakers to reform funding of North Carolina

⁸⁹ In 2017, the General Assembly passed a law allowing charter schools to compete for pre-K students directly by allowing them to operate pre-K programs. An Act to Make Various Changes to the Laws Affecting Charter Schools, 2017 N.C. Sess. Laws 1172, 1176 (codified at N.C. Gen. Stat. § 115C-218.115 (2017)).

⁹⁰ Compare *Sugar Creek*, 712 S.E.2d at 741 (“[W]e are unable to infer from the existence of the constitutional mandate requiring the establishment of a general and uniform school system sufficient to provide all North Carolina children with access to a sound basic education the existence of a constitutional prohibition on the establishment of additional educational programs that are intended to supplement the statutory provisions effectuating this basic constitutional requirement.”), with *Leandro I*, 488 S.E.2d at 257 (“We believe that even greater problems of protracted litigation resulting in unworkable remedies would occur if we were to recognize the purported right to equal educational opportunities in every one of the state’s districts.”).

⁹¹ See *Leandro II*, 599 S.E.2d at 378 (“[I]n our view, the school boards were properly maintained as parties because the ultimate decision of the trial court was likely to: (1) be based, in significant part, on their role as education providers; and (2) have an effect on that role in the wake of the proceedings.”); *Leandro I*, 488 S.E.2d at 257.

⁹² Garnett, *supra* note 5, at 5.

⁹³ *Id.* at 5–6 (outlining sector agnosticism and child-centered approaches at a high level).

public education include increased appropriations for charter schools.⁹⁴ At the same time, the courts interpret the state constitution to sanction separate school funding schemes and standards for schools, allowing for provision of a greater variety of educational services to children.⁹⁵

2. Opportunity Scholarships — Shifting Legal Doctrine to Emphasize the Individual Over the Community

Another way that the law has moved toward prioritizing the individual student's educational experience over education as a collective enterprise is through vouchers to attend private schools, further dividing public resources among public, charter, and private schools. In 2013, the North Carolina General Assembly included a provision in the state appropriations bill for "Opportunity Scholarships" that would pay tuition for students to go to private school instead of public school.⁹⁶ Scholarship grants could be up to \$4,200 per year, and at least fifty percent of the scholarships would be awarded on a means-tested basis.⁹⁷ Each year, more scholarships may be awarded than the year before.⁹⁸

In *Hart v. State*, the North Carolina Supreme Court heard a challenge to the constitutionality of Opportunity Scholarships.⁹⁹ The principle challenge raised by the plaintiffs was that the scholarships violated the North Carolina Constitution because raising taxes and paying tuition for students to attend private schools was not a public purpose.¹⁰⁰ To resolve this question, the court applied a two-part test to the Opportunity Scholarship appropriation, evaluating whether "(1) it involves a reasonable connection with the convenience and necessity of the [State]; and (2) the activity benefits the public generally, as opposed to special interests or persons."¹⁰¹

⁹⁴ T. Keung Hui, *The Way Your Child's NC Public School Gets Money to Educate Students Could Be Changing*, News & Observer (Dec. 14, 2017, 6:14 PM), <https://www.newsobserver.com/news/local/education/article189828914.html> [<https://perma.cc/222G-EBC6>].

⁹⁵ See, e.g., *Sugar Creek*, 712 S.E.2d at 741.

⁹⁶ Current Operations and Capital Improvements Appropriations Act of 2013, 2013 N.C. Sess. Laws 1064 (codified at N.C. Gen. Stat. § 115C-562.1–562.8 (2017)).

⁹⁷ N.C. Gen. Stat. § 115C-562.2 (2018).

⁹⁸ *Id.* § 115C-562.2(b1).

⁹⁹ 774 S.E.2d 281, 286 (N.C. 2015).

¹⁰⁰ *Id.* at 290; see also N.C. Const. art. V, § 2, cl. 1 (1971).

¹⁰¹ *Hart*, 774 S.E.2d at 291 (quoting *Maready v. City of Winston-Salem*, 467 S.E.2d 615, 624 (N.C. 1996)).

In both prongs of the analysis, the court focused expressly on benefit to the individual. When addressing the convenience and necessity of the State, the court did not evaluate the case in terms of betterment for all students. Instead, it focused on how the law would be expedient in helping lower-income families provide different educational options to their children.¹⁰² When discussing whether Opportunity Scholarships benefit the public generally, the court became even more individualistic in its reasoning. First, the court defended Opportunity Scholarships as serving the public generally by articulating that it is not necessary that everyone benefit from the expenditure.¹⁰³ Then the court pivoted to assert that the individual benefits given to students receiving the scholarship actually translate into a collective benefit for all.¹⁰⁴ Some scholars contest this view, especially where states advocate for the use of school vouchers on the ground that it saves the state money it would have to invest in education.¹⁰⁵ Importantly, the court rejected the notion that the right to education was a substantive, independent restriction on the State's ability to fund private schools, while simultaneously distinguishing *Leandro I* as applying only to public schools.¹⁰⁶

The dissenters' opinions vigorously advocated a more expansive reading of the right to education to encompass any attempt to use public funds to support private schools. Justice Hudson emphasized that the school voucher fund violates the right to a sound basic education because the Opportunity Scholarship program "allows for taxpayer funds to be spent on private schooling with no required standard to ensure that teachers are competent or that students are learning at all."¹⁰⁷ Justice Hudson's opinion made clear that finding the constitutional right to a

¹⁰² Id. ("[T]he provision of monetary assistance to lower-income families so that their children have additional educational opportunities is well within the scope of permissible governmental action and is intimately related to the needs of our state's citizenry.").

¹⁰³ Id. at 292 ("[I]t is not necessary, in order that a use may be regarded as public, that it should be for the use and benefit of every citizen in the community." (quoting *Maready*, 467 S.E.2d at 625) (internal quotation marks omitted)).

¹⁰⁴ Id. ("Although the scholarships at issue here are available only to families of modest means, and therefore inure to the benefit of the eligible students in the first instance, and to the designated nonpublic schools in the second, the ultimate beneficiary of providing these children additional educational opportunities is our collective citizenry.").

¹⁰⁵ See, e.g., Joseph O. Oluwole & Preston C. Green, III, School Vouchers and Tax Benefits in Federal and State Judicial Constitutional Analysis, 65 Am. U. L. Rev. 1335, 1353, 1434–35 (2016).

¹⁰⁶ *Hart*, 774 S.E.2d at 292–93.

¹⁰⁷ Id. at 300 (Hudson, J., dissenting).

sound basic education inapplicable in private schools funded by public dollars would allow the legislature to avoid the guarantee of a right to education for all.¹⁰⁸ Justice Beasley's separate dissent invoked history as an example, illustrating how allocation of public money to private schools could thwart the right to education.¹⁰⁹ Discussing the Pearsall Plan specifically, Justice Beasley noted how school choice and school voucher programs had been used "as a means to avoid the State's obligation under the U.S. Constitution to desegregate public schools as required by the Supreme Court of the United States in its seminal *Brown v. Board* decisions."¹¹⁰ In sum, the dissenters argued that the Opportunity Scholarship Program would undermine students' right to education by creating separate standards for education in public schools and private schools funded with public money.

The court's reasoning in *Hart* represents a shift in legal thinking following *Leandro I* and *Leandro II*. In the *Leandro* cases, the court was concerned about providing substantive rights to all students, and it discussed educational benefits in communal terms.¹¹¹ Those substantive rights came with an implied obligation that the State provide enough funds to provide everyone with a sound basic education.¹¹² Even when the court found that schools could receive different amounts of funding, it did so with an eye to differences in school districts.¹¹³ *Hart* reflects a doctrinal shift embracing school choice. Instead of looking at the community as a whole and the impact of Opportunity Scholarships on students collectively, the court suggested the rest of the community need not be considered and the benefit to the individual is in fact a proxy for the benefit to the community.¹¹⁴

Supporters of the *Hart* decision could point to the majority's ruling that the right to education has never been applied to private schools and, therefore, *Hart* does not represent a shift in doctrinal thinking.¹¹⁵ In their view, the State has always had the power to fund private schools without

¹⁰⁸ Id. (Hudson, J., dissenting) ("[B]y creating this program, the State's legislature has completely abrogated the duty to 'guard and maintain [the] right' to an education." (alteration in original) (quoting N.C. Const. art. I, § 15)).

¹⁰⁹ Id. at 302–03 (Beasley, J., dissenting).

¹¹⁰ Id. at 303 (Beasley, J., dissenting).

¹¹¹ See supra Subsection IV.A.1.

¹¹² See supra Subsection IV.A.1.

¹¹³ See supra Subsection IV.A.1.

¹¹⁴ See *Hart*, 774 S.E.2d at 292.

¹¹⁵ See id. at 292–93.

the obligation to provide a sound basic education, and therefore the needs of the community are not being neglected. In fact, many might say that parents have an even more important right to educate their children in the manner they think is best.¹¹⁶ However, *Hart* is the first time that the North Carolina Supreme Court addressed public funding of private schools on the scale of the Opportunity Scholarship Program. Divorcing publicly funded private education from the State's obligation to protect the right to education held by all students provides doctrinal support for individually-oriented laws that blur the distinction between public and private schools.¹¹⁷ Those laws as currently constructed, which focus on directly allocating funds to different groups of students within the community to opt in to choice schools, may not resolve the problem of inadequate education that denies students their constitutional rights.¹¹⁸ Next, we consider the implications for North Carolina following a shift in legal thinking to embrace education as a benefit conferred on individuals by choice.

V. EVALUATING NORTH CAROLINA EDUCATION LAW IN THE SCHOOL CHOICE ERA: SOCIAL IMPLICATIONS OF THE SHIFT IN LEGAL DOCTRINE

North Carolina education law increasingly reflects the priorities of the school choice movement, grounding the objectives of publicly sponsored education in competitive programs and the best interests of individual students. In upholding state laws designed to expand alternatives to traditional public schools, the North Carolina courts have admitted that school choice may not result in benefits to all students in North Carolina as would be expected in traditional public education.¹¹⁹ North Carolina General Assembly members argue the traditional public school system is in need of reform and must give way to the modern realities of

¹¹⁶ See, e.g., *Wake Cares*, 675 S.E.2d at 360 (Brady, J., dissenting) (“This Court has . . . held the right of parents to direct the upbringing of their children in high regard.”).

¹¹⁷ Garnett, *supra* note 5, at 6–7, 42.

¹¹⁸ See Black, *supra* note 3, at 467–68, 474.

¹¹⁹ See *supra* Part IV. Compare, e.g., *Hart*, 774 S.E.2d at 292 (“[I]t is not necessary, in order that a use may be regarded as public, that it should be for the use and benefit of every citizen in the community.” (quoting *Maready v. City of Winston-Salem*, 467 S.E.2d 615, 625 (N.C. 1996) (internal quotation marks omitted))), with *Leandro II*, 599 S.E.2d 365, 379 (N.C. 2004) (“Whether it be the infant Zoë, the toddler Riley, the preschooler Nathaniel, the ‘at-risk’ middle-schooler Jerome, or the not ‘at-risk’ seventh-grader Louise, the constitutional right articulated in *Leandro* is vested in them all.”).

education.¹²⁰ After a decade of education law aggressively expanding school choice, North Carolina provides empirical evidence showing some of the practical implications of institutionalizing choice in state-sponsored education. Some key indicators of the social impact of school choice include which families utilize choice, whether choice is meaningful, and what a focus on choice in schooling forgoes in terms of equal access to quality schools.

A. Who Chooses?

North Carolina law generally encourages more educational options but provides limited structure in determining which students are able to take advantage of school choice.¹²¹ Within such a permissive legal framework, the shift in state law to prioritize individual students' educational experiences begs the question of which students use privatized school choice options outside of the home. Thus, this Section considers who benefits from an expansion in school choice, assuming the academic benefits that charter schools and private schools supported by vouchers promise are realized.

On a national scale, scholars recognized early in the movement for school choice that middle-class parents are advantaged in navigating the market of school options.¹²² In particular, socioeconomically advantaged parents are better equipped to gather information and engage with choice schools in ways that benefit children, including informal conversations with school personnel and other parents about deadlines for charter school admissions.¹²³ They are also more able to pay fees that amount to informal

¹²⁰ See Hui, *supra* note 94.

¹²¹ See, e.g., N.C. Gen. Stat. § 115C-562.2 (2018). Compare *supra* Subsection IV.B.1, with *supra* Subsection IV.B.2 (showing greater flexibility for students to opt in to charter schools than school vouchers).

¹²² See generally Stephen J. Ball et al., *Circuits of Schooling: A Sociological Exploration of Parental Choice of School in Social Class Contexts*, 43 *Soc. Rev.* 52, 64–72 (1995) (discussing how middle-class parents make use of school choice options in the marketplace).

¹²³ See Annette Lareau et al., *The Rules of the Game and the Uncertain Transmission of Advantage: Middle-Class Parents' Search for an Urban Kindergarten*, 89 *Soc. Educ.* 279, 291 (2016) ("Parents who called the school were readily told the date; but parents needed to know to call. Because the school district did not send information to parents of children who were three, four, or five years old, there was no standard mechanism for parents to learn about the important, and inflexible, deadline for charter school admissions."); see also Paul Teske et al., *Ctr. on Reinventing Pub. Educ., Opening Doors: How Low-Income Parents Search for the Right School* 59 (2007), <https://files.eric.ed.gov/fulltext/ED495279.pdf> [<https://perma.cc/->

tuition.¹²⁴ Although working-class parents use kinship and friendship networks to shape their decisions about choosing schools for their children, they seek information about a school's reputation and safety more often than they compare performance data between schools using various public websites.¹²⁵ However, proponents argue that low-income families, in particular, have much to gain from school choice.¹²⁶

The trends in North Carolina charter school enrollment are evident. Students with parents who graduated from college are overrepresented in charter schools relative to traditional public schools;¹²⁷ underrepresented are students whose parents did not graduate from high school.¹²⁸ Charter schools in North Carolina also have lower proportions of economically disadvantaged students compared to traditional public schools, with low-income student enrollment at charters about twenty percentage points lower than at traditional public schools.¹²⁹ Due to the state's permissive legislation, North Carolina charter schools do not have to provide a lunch program for students from low-income families.¹³⁰ Since lunch services would not be provided to their children, families who might otherwise qualify to receive free or reduced lunch are unlikely to be attracted to these charter schools, which made up one-third of all charter schools in

KY45-REQG] (explaining how low-income parents, despite high levels of "feeling informed," are more likely to want help from a counselor in picking a school).

¹²⁴ See Wagma Mommandi & Kevin Welner, *Shaping Charter Enrollment and Access: Practices, Responses, and Ramifications*, in *Choosing Charters: Better Schools or More Segregation?* 61, 67 (Iris C. Rotberg & Joshua L. Glazer eds., 2018).

¹²⁵ Elliot B. Weininger, *School Choice in an Urban Setting*, in *Choosing Homes, Choosing Schools* 268, 287, 291–92 (Annette Lareau & Kimberly Goyette eds., 2014).

¹²⁶ Joe Nathan, *Charter Schools: Creating Hope and Opportunity for American Education* 183 (1996).

¹²⁷ Helen F. Ladd et al., *The Growing Segmentation of the Charter School Sector in North Carolina*, 12 *Educ. Fin. & Pol'y* 536, 542 (2017).

¹²⁸ Robert Bifulco & Helen F. Ladd, *School Choice, Racial Segregation, and Test-Score Gaps: Evidence from North Carolina's Charter School Program*, 26 *J. Pol'y Analysis & Mgmt.* 31, 34 (2007).

¹²⁹ T. Keung Hui, *New Report Praises NC Charter Schools, Marking a Shift from Previous Years*, *News & Observer* (Feb. 3, 2018, 1:23 PM), <https://www.newsobserver.com/news/-local/education/article198017579.html> [<https://perma.cc/SNR6-S87R>] ("Economically disadvantaged students make up 30.6 percent of the enrollment at charters and 50.4 percent at traditional public schools.").

¹³⁰ Ladd et al., *supra* note 127, at 545.

the state in 2011.¹³¹ The fact that some charter schools do not provide lunch services complicates the free or reduced lunch data for charters.¹³²

It is unsurprising that low-income families are underrepresented in North Carolina charter schools, given that many charters do not provide transportation.¹³³ Low-income parents, especially those without access to a car, might be less equipped to use choice schools.¹³⁴ Timing and transportation constraints limit low-income families who depend on public transportation, including the buses that deliver their children to school and bring them home.¹³⁵ Low-income parents with less predictable work schedules sometimes have difficulty consistently transporting their children to and from school on a fixed schedule.¹³⁶

There is also racial disparity in charter school enrollment. As some scholars have argued and shown through empirical evidence, the growth of charter schools has contributed to black and white students' racial isolation within schools in North Carolina.¹³⁷ Siegel-Hawley and Frankenberg illustrate the vast disparity between racial demographics of North Carolina charter schools and their respective school districts, as well as how these differences between schools have changed over time: contrary to the early years of charter schools in the state, during which black students disproportionately populated charter schools, North

¹³¹ *Id.*

¹³² Erica Frankenberg et al., *Choice Without Equity: Charter School Segregation*, *Educ. Pol'y Analysis Archives*, Jan. 10, 2011, at 1, 38 ("The current method of reporting of free or reduced lunch data also makes it difficult to compare at the state-level the enrollment of low-income students in charter schools as compared to other public schools. . . . In North Carolina, for example, only 26% of charter schools reported at least one FRL [free and reduced lunch] student.").

¹³³ See Lynn Bonner, *Charter School Transportation May Be Worth Considering*, *NC Senate Leader Berger Says, News & Observer* (Oct. 20, 2017, 4:01 PM), <https://www.news-observer.com/news/politics-government/article180028051.html> [<https://perma.cc/QDP7-7M-J9>] ("Charter schools are not required to offer student transportation. Although some charter schools do operate buses, it is optional for them. The state does not pay for charter schools' bus purchases. Lack of transportation is often cited as one of the factors that has resulted in a relative lack of diversity at charters.").

¹³⁴ See Mary Pattillo, *Everyday Politics of School Choice in the Black Community*, 12 *Du Bois Rev.: Soc. Sci. Res. on Race* 41, 55 (2015).

¹³⁵ See Anna Rhodes & Stefanie DeLuca, *Residential Mobility and School Choice Among Poor Families*, in *Choosing Homes, Choosing Schools* 137, 157, 161 (Annette Lareau & Kimberly Goyette eds., 2014).

¹³⁶ *Id.* at 157.

¹³⁷ Bifulco & Ladd, *supra* note 128, at 32–33, 39; see also Black, *supra* note 3, at 465 ("Removing the cap on charters drastically increases the opportunity for integration dissenters to create their own schools or fill seats in otherwise legitimately motivated charter schools.").

Carolina charters developed in recent years over-enroll white students.¹³⁸ Within one year of the cap on charter schools being lifted, charter schools in North Carolina contained an overrepresentation of white students.¹³⁹ Evidence shows that charters increase racial isolation between schools.¹⁴⁰ White students who attend charter schools in North Carolina disproportionately attend segregated schools compared to students in traditional public schools.¹⁴¹ Specifically, white charter school students in North Carolina attend schools that are eighty percent white on average.¹⁴² While black and Latino students attend charter schools, too, they attend those that are majority-minority and are generally underrepresented in newer, whiter charter schools.¹⁴³ Yet, compared to other states, North Carolina has been identified as taking *more* affirmative steps to promote racially diverse enrollment in charter schools.¹⁴⁴ This indicates that the State prioritizes school diversity at least in the abstract, even if charter schools are more stratified by class, race, and ability compared to traditional public schools.

Contrary to charters, it is less clear who utilizes vouchers in North Carolina, as vouchers are rarer than charters and understudied in the state. Based on the legal limitations in the enabling statute and data collected in the first few years of the Opportunity Scholarship Program, we know that the households that tend to use vouchers in North Carolina are from low-income backgrounds.¹⁴⁵ Vouchers are popular among African American families and increasingly popular among white families.¹⁴⁶ Contrary to

¹³⁸ Siegel-Hawley & Frankenberg, *supra* note 20, at 356–57.

¹³⁹ Ladd et al., *supra* note 127, at 540; see An Act to Remove the Cap on Charter Schools; to Allow State Board of Education Discretion in Granting Final Approval of Charter School Applications; to Raise the Enrollment Growth Cap to Twenty Percent; to Permit Charter Schools to Charge Fees Charged by the Local School Administrative Unit; to Strengthen the Standards for Retaining a Charter for a Charter School; and to Require the State Board of Education to Report to the General Assembly on Charter Schools, 2011 N.C. Sess. Laws 647 (repealing N.C. Gen. Stat. § 115C-238.29D(b)).

¹⁴⁰ See Ladd et al., *supra* note 127, at 542–43.

¹⁴¹ Frankenberg et al., *supra* note 132, at 30.

¹⁴² *Id.* at 32.

¹⁴³ See Ladd et al., *supra* note 127, at 541–42.

¹⁴⁴ See Siegel-Hawley & Frankenberg, *supra* note 20, at 344.

¹⁴⁵ N.C. Gen. Stat. § 115C-562.2 (2018); Children’s Law Clinic, Duke Law Sch., School Vouchers in North Carolina: The First Three Years 2 (2017), https://law.duke.edu/childed-law/docs/School_Vouchers_NC.pdf [<https://perma.cc/K8BL-W3TV>] [hereinafter School Vouchers].

¹⁴⁶ *Id.* at 7; see also Black, *supra* note 54, at 1401 (“A recent study of North Carolina, for instance, revealed that its entire charter school sector was becoming increasingly white . . .”).

early trends that favored African American families, white families' proportion of voucher use exceeded African American families' proportion by the 2015-2016 school year.¹⁴⁷ Since fewer than eight percent of vouchers in North Carolina were allocated to secular private schools in 2017,¹⁴⁸ families who use vouchers are overwhelmingly choosing religiously affiliated institutions. Voucher schools' limited transportation options, however, also raise questions about which families can participate in voucher programs, a choice that some low-income families might be unable to make.¹⁴⁹

B. Is Choice Meaningful?

If low-income parents, single parents, and other families with limited resources experience an information or opportunity gap when it comes to choosing schools, how meaningful is individual choice? How can families with disabled children make use of school choice options when charters and voucher schools do not accommodate their needs? How does public access to education change when it depends on gathering information to make the best choices, and transporting students to and from school?

Using market principles in education does not provide all of the answers, especially for disadvantaged families or those with special needs children.¹⁵⁰ Further complicating an understanding about how choice operates are questions about whether charter schools and voucher programs to attend private schools comply with state and federal law or

¹⁴⁷ School Vouchers, *supra* note 145, at 7.

¹⁴⁸ *Id.* at 6–7.

¹⁴⁹ *Hart v. State*, 774 S.E.2d 281, 303 (N.C. 2015) (Beasley, J., dissenting) (“With additional costs for transportation, tuition, books, and, at times, school uniforms, for the poorest of these families, the ‘opportunity’ advertised in the Opportunity Scholarship Program is merely a ‘cruel illusion.’” (quoting *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 155 (Tenn. 1993))); see also Helen F. Ladd, *School Vouchers: A Critical View*, *J. Econ. Persp.*, Fall 2002, at 3, 13 (“For example, low-income families would be disproportionately affected if the government did not pay for transportation to the chosen schools . . .”).

¹⁵⁰ See Black, *supra* note 3, at 474; Shanon S. Taylor, *Special Education, Private Schools, and Vouchers: Do All Students Get a Choice?*, *J.L. & Educ.* 1, 22–23 (2005); Mei-lan E. Wong, Note, *The Implications of School Choice for Children With Disabilities*, 103 *Yale L.J.* 827, 858–59 (1993). But cf. *Leandro II*, 599 S.E.2d 365, 379 (N.C. 2004) (protecting special needs students by extending the right to a sound basic education to “all children of North Carolina, regardless of their respective ages or needs”). See generally Sarah Butler Jessen, *Special Education & School Choice: The Complex Effects of Small Schools, School Choice and Public High School Policy in New York City*, 27 *Educ. Pol’y* 427, 428 (2013) (examining the consequences for special needs students of New York City’s implementation of “market-based and high-stakes accountability reforms” in its public high school choice process).

encourage corruption.¹⁵¹ In particular, charter school closures in North Carolina raise concerns about to whom charters are accountable,¹⁵² particularly when management organizations gain revenue from the rental of facilities or maintain other sources of profit.¹⁵³

It would be overly simplistic to accuse families with abundant resources of making better choices than families with fewer resources. While expanding opportunities to choose schools is an appealing notion for families,¹⁵⁴ it is not enough to offer the option of choice schools; the promise of simulating market principles through school choice must be secured through adequate information and equal access for families from varied social backgrounds, a necessary prerequisite for the market-based model of education.¹⁵⁵

It remains unclear whether choice is an illusory or realistic concept in the context of schools.¹⁵⁶ Flexibility permitted with privatized choice can allow schools like charters to target underrepresented groups and devise mission statements that attract families from varied backgrounds. As advocates have suggested in recent years, regulated choice programs have the potential to promote integration along the lines of class, race, and academic ability.¹⁵⁷ Meanwhile, vouchers allow families to choose schools that they cannot afford. Yet, differential access to information by income and education between families has the potential to limit student diversity between traditional and choice schools in the era of school choice.¹⁵⁸ While there are little data showing charter schools successfully

¹⁵¹ See Thomas A. Kelley III, *North Carolina Charter Schools' (Non-) Compliance with State and Federal Nonprofit Law*, 93 N.C. L. Rev. 1757, 1821–24 (2015); Taylor, *supra* note 150, at 10–11 (discussing lack of guidance for private school compliance with the Americans with Disabilities Act when considering high-need students with vouchers).

¹⁵² See Paino et al., *supra* note 32, at 516–17 (finding charter school closures correlated both with performance-based accountability—such as reading scores—and market accountability, such as enrollment).

¹⁵³ Kelley, *supra* note 151, at 1794–95.

¹⁵⁴ Paul Teske & Mark Schneider, *What Research Can Tell Policymakers About School Choice*, 20 J. Pol'y Analysis & Mgmt. 609, 611 (2001).

¹⁵⁵ Gary Orfield & Erica Frankenberg, *Educational Delusions?: Why Choice Can Deepen Inequality and How to Make Schools Fair* 257 (2013).

¹⁵⁶ *Id.* at 256 (“There is nothing inherent in school choice that guarantees that the choice will be real and feasible or the new options better than (or even as good as) the assigned school in the regular public system. Research clearly shows this.”).

¹⁵⁷ Casey D. Cobb & Gene V. Glass, *School Choice in a Post-Desegregation World*, 84 *Peabody J. Educ.* 262, 267 (2009).

¹⁵⁸ See Ladd, *supra* note 149, at 13 (“Other aspects of voucher programs would also contribute to stratification to the extent that they placed low-income families in a less

recruiting higher-performing students, there is evidence they do enroll fewer high-need students.¹⁵⁹

While families' preferences could match a local private school that accepts vouchers, their views might conflict with a school's curriculum or religious affiliation. Parents might also make decisions based on the racial composition of schools.¹⁶⁰ Since almost one-third of private schools in North Carolina are highly segregated, meaning that they have more than ninety percent of one racial group represented in student enrollment,¹⁶¹ it is reasonable to speculate that voucher programs, like charter schools, may contribute to racial imbalance between schools. Alternatively, if students of color enroll in predominantly white private schools or vice versa, vouchers could ameliorate racial imbalance between schools.

Although *Leandro I* is still regarded as the cornerstone of the constitutional right to education in public schools, its scope and ongoing vitality remain issues even after *Leandro II*. In 2017, Governor Roy Cooper signed an executive order forming a commission to evaluate North Carolina's progress toward satisfying obligations laid out in *Leandro I* and *Leandro II*.¹⁶² Since convening, the commission has started to evaluate how best to comply with the orders of the court as remedial litigation continues.¹⁶³ Experts have already put forth evidence that North Carolina's funding of public schools is much lower than other states

favorable position to exercise choice than higher income families. For example, low-income families would be disproportionately affected if . . . [they] have less access to information than did high-income families.”)

¹⁵⁹ Black, *supra* note 3, at 474 (“[T]he data tend to show that charters do, in fact, enroll significantly smaller percentages of high-need students—particularly disabled and English Language Learner (‘ELL’) students—than traditional public schools.”); see also Taylor, *supra* note 150, at 22–23 (concluding states not requiring special education services limit the ability of high-need students to access private schools with vouchers).

¹⁶⁰ See Chase M. Billingham & Matthew O. Hunt, *School Racial Composition and Parental Choice: New Evidence on the Preferences of White Parents in the United States*, 89 *Soc. Educ.* 99, 108 (2016) (“[T]here is a relatively steady downward trend in the likelihood of enrollment as the proportion of black students rises, irrespective of the school’s academic record. For both high- and low-performing schools, respondents were less likely to enroll in schools that had higher concentrations of black students.”).

¹⁶¹ School Vouchers, *supra* note 145, at 7.

¹⁶² Exec. Order No. 10, 32 N.C. Reg. 150, 150–52 (Aug. 15, 2017).

¹⁶³ Liz Schlemmer, *Governor’s Commission to Weigh in on Leandro Case: How to Give Access to Sound, Basic Education*, WUNC 91.5 (Dec. 1, 2017), <http://wunc.org/post/governors-commission-weigh-leandro-case-how-give-access-sound-basic-education#stream/0> [<https://perma.cc/63U2-ZFD6>].

across the nation, while local school superintendents have expressed concern with greater proportions of higher-need students in traditional public schools and increased financial strain as state resources have been diverted to charter schools and private schools.¹⁶⁴ This places non-choosing students, who remain in traditional public schools, at risk of not receiving an adequate education due to lack of financial support from the State.¹⁶⁵

School choice may also undermine North Carolina's obligation under *Leandro II* to provide competent teachers for students who remain in traditional public schools.¹⁶⁶ In addition to funding constraints, non-choosers might be academically disadvantaged by the exit of high-quality teachers following policy changes that increasingly concentrate minority students in traditional public schools.¹⁶⁷ Consequently, students' movement to choice schools is likely to create a dearth of high-quality teachers in traditional public schools, especially in majority-minority schools.¹⁶⁸ Moreover, when low-achieving students are the ones who

¹⁶⁴ Billy Ball, Experts to Gov. Cooper's Education Commission: NC School Funding Is Near Nation's Lowest, NC Policy Watch (Feb. 21, 2018), <http://www.ncpolicy-watch.com/2018/02/21/experts-gov-coopers-education-commission-nc-school-funding-near-nations-lowest/> [<https://perma.cc/BA9R-YDJJ>]; see also Fabricant & Fine, *supra* note 6, at 34 (arguing that poor students whose parents are not informed or resource-advantaged enough to get them into a charter or elite public or private school are "relegated to underfunded and overwhelmed inner-city public schools representing the lowest tier of education"); Amy Stuart Wells et al., Charter School Reform and the Shifting Meaning of Educational Equity: Greater Voice and Greater Inequality?, *in* Bringing Equity Back: Research for a New Era in American Educational Policy 219, 235 (Janice Petrovich & Amy Stuart Wells eds., 2005) ("[W]hile charter schools provide some families with new educational opportunities, they frequently add another layer of selectivity to an already highly stratified public education system.").

¹⁶⁵ See Helen F. Ladd & John D. Singleton, The Fiscal Externalities of Charter Schools: Evidence from North Carolina 15–17 (Econ. Research Initiatives at Duke, Working Paper No. 261, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3082968## [<https://perma.cc/K384-88CP>] (documenting reduction in services per public school pupil due to charter schools in North Carolina).

¹⁶⁶ See *Leandro II*, 599 S.E.2d 365, 390 (N.C. 2004).

¹⁶⁷ Cf. C. Kirabo Jackson, Student Demographics, Teacher Sorting, and Teacher Quality: Evidence from the End of School Desegregation, 27 *J. Lab. Econ.* 213, 216 (2009) (discussing the impact of student demographic shifts on teacher quality following the end of busing in Charlotte-Mecklenburg schools); Ladd et al., *supra* note 127, at 544 (discussing white parents and students leaving majority-minority schools).

¹⁶⁸ Cf. Jackson, *supra* note 167, at 217 ("The findings underscore that policy makers should be careful to consider how teachers may reallocate themselves when students are moved across schools through vouchers, school choice, district consolidation, or student busing."). Empirical evidence suggests in rural, as well as urban, districts with larger proportions of minority students, lawmakers can expect an overrepresentation of less experienced educators.

remain in traditional public schools, the peer effects of high achievement are limited.¹⁶⁹ In these cases, students lack opportunities to learn from their more advanced peers.¹⁷⁰ These disparities have the potential to exacerbate existing gaps in achievement and opportunity by race and class.¹⁷¹

C. What Are We Trading for Choice?

Equal access to quality schooling need not be traded for individual freedom to choose schools. The quest for school choice, however, has changed the relationship between families and schools, elevating a student's right to choose a school over another's right to a sound education. As Wells, Slayton, and Scott argue, "an increasingly popular connotation of democracy in the United States is that it represents the freedom to consume and own In education, the implication was freedom to choose schools and freedom from state regulation."¹⁷² In particular, recent developments in school choice place concerns about equity on the backburner.¹⁷³

Responding to these debates over equity and autonomy, proponents advocate for regulated forms of choice. In their recent work, Cobb and Glass argue that unregulated choice plans exacerbate social stratification by class, race, and academic ability.¹⁷⁴ However, equity concerns remain disregarded in the quest to promote and gain support for school choice in the abstract—without recognition of its real consequences for families based on categorical distinctions that relate more to background than to merit or deservedness.

See Charles T. Clotfelter et al., *Who Teaches Whom? Race and the Distribution of Novice Teachers*, 24 *Econ. Educ. Rev.* 377, 386 (2005).

¹⁶⁹ Goldhaber et al., *supra* note 26, at 108.

¹⁷⁰ See Ladd, *supra* note 149, at 13–14.

¹⁷¹ See, e.g., Angel L. Harris, *Kids Don't Want to Fail: Oppositional Culture and the Black-White Achievement Gap* 4–5 (2011) (documenting the achievement gap by race); Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in *Whither Opportunity?: Rising Inequality, Schools, and Children's Life Chances* 91, 91 (Greg J. Duncan & Richard J. Murnane eds., 2011) (documenting the achievement gap by class).

¹⁷² Amy Stuart Wells et al., *Defining Democracy in the Neoliberal Age: Charter School Reform and Educational Consumption*, 39 *Am. Educ. Res. J.* 337, 338 (2002).

¹⁷³ See Black, *supra* note 3, at 459.

¹⁷⁴ See Cobb & Glass, *supra* note 157, at 264–67 (synthesizing studies from across the country to demonstrate that school choice programs that ignore students' race, class, or achievement levels may exacerbate gaps).

When it comes to education, it should not be a binary decision between equity and freedom.¹⁷⁵ Charter schools can be innovative and equitable—void of corruption and transparent—and voucher programs can provide opportunity for a variety of students who wish to attend private schools. Privatized school choice options, however, cannot be the only answer to improving public education. Without careful attention to traditional public schools, teacher quality, and the collective student population, we can expect students to become further stratified between schools along dimensions of racial and socioeconomic background.¹⁷⁶

VI. CONCLUSION

The legal and social impact of the school choice movement in North Carolina cannot be overstated. Until the past decade, historical experience and conventional wisdom rejected placing the preferences of the individual over society as a whole. When making education policy, the State was presumed to be responsible for providing a minimal level of education to all students, as well as improving educational opportunities for all children to the extent possible.¹⁷⁷ Local school districts were given discretion to make judgments about how best to resolve pressing issues in public education, such as overcrowding in schools.¹⁷⁸ North Carolina focused on public education as a good that benefitted all by creating an educated citizenry.

In the face of difficulty in improving public education, lawmakers and judges have started to pursue other possible avenues for improving students' education, turning to the market-based approach of the school choice movement over the past decade. This change in the law has been accompanied by different statutory approaches and legal rationales that undermine the State supporting education with the benefit of society in mind. New doctrine simultaneously encourages competition among different types of schools, emphasizes the benefit education confers on the individual student, and denies the relevance of the baseline obligation of the State to provide a sound basic education to all students, regardless

¹⁷⁵ See Fabricant & Fine, *supra* note 6, at 35.

¹⁷⁶ See Black, *supra* note 54, at 1401–02; Cobb & Glass, *supra* note 157, at 264–67. See generally Ladd, *supra* note 149, at 21–22 (concluding that a universal voucher system would harm disadvantaged students, but that more targeted programs may benefit them).

¹⁷⁷ See *supra* Subsection IV.A.1.

¹⁷⁸ See *supra* Subsection IV.A.2.

of the sector of their school.¹⁷⁹ Together, this combination of legal analyses facilitates the State's creation of various competitive educational options. As a result, voucher programs and charter schools purportedly provide students with innovative, expanded options in the educational market by contributing to a growing variety of schools from which families may choose.

Creating law that deemphasizes the community as the primary beneficiary of education, however, has its perils. As a legal matter, denying the interconnectedness of public schools, charter schools, and private schools while simultaneously fueling competition between them creates a risk that the State will neglect its constitutional obligation to provide a sound basic education to all students.¹⁸⁰ If not carefully structured, these bold reforms to transform education into a system of competing alternatives will potentially exacerbate the problem of creating winners and losers with respect to who is able to take advantage of state-sponsored educational options.

Privatized choice offers promise for educational innovation *and* diversity in schooling,¹⁸¹ but the predominant focus of lawmakers on individual students obscures variation between groups with varied amounts of resources. Moreover, a focus on the former will not necessarily promote the latter.¹⁸² It is unclear in the current moment whether vouchers and charters are expanding or restricting school options for disadvantaged North Carolinians, especially students with single parents, students from low-income backgrounds, students who speak English as a second language, and students who require special attention in the classroom.¹⁸³ Direct efforts should be made to address the needs of disabled and low-income students, as well as those with limited English fluency. Without legal accommodation of the categorical differences between families' access and opportunities, the goal of school choice is empty and its name misleading. State law should not privatize education to the extent it loses sight of the public goal of doing what is best for all children based on shared community values. The "right to the privilege of

¹⁷⁹ See *supra* Section IV.B.

¹⁸⁰ See *Hart*, 774 S.E.2d at 302–03 (Beasley, J., dissenting).

¹⁸¹ See Ryan, *supra* note 30, at 199, 202 (discussing the innovative roots of charter schools and vouchers); Suzanne E. Eckes & Anne E. Trotter, *Are Charter Schools Using Recruitment Strategies to Increase Student Body Diversity?*, 40 *Educ. & Urb. Soc'y* 62, 62, 76, 78 (2007) (discussing charter schools' strategies to recruit diverse students).

¹⁸² See *supra* Section V.C.

¹⁸³ See *supra* Part V.

education”¹⁸⁴ should not be appropriated based on the individual bargaining power of families or the academic abilities of individual students.

¹⁸⁴ N.C. Const. art. I, § 15.