

# The Philadelphia Story: the Rhetoric of School Reform

by  
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## I. Introduction

“Academic performance is at tragic levels for the children of Philadelphia, with 80 percent of the District’s children scoring below “proficient” in reading and math. The human consequences of that failure are heartbreaking—170,000 Pennsylvania boys and girls who have not achieved proficiency in the basic skills of learning.”<sup>2</sup> “

“We didn’t make the change from the school board to the School Reform Commission to not get the results we need for the kids. The commission has to be accountable.”<sup>3</sup>

“Independent schools are public schools governed by teachers, administrators and parents who are empowered to make decisions about school operations, and who are held accountable for fiscal and academic results”<sup>4</sup>

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<sup>2</sup> Gov. Mark Schweiker, *A Proposal to Transform the Philadelphia School District into a High-Performance System of Schools for the 21<sup>st</sup> Century*, at 24 (October 31, 2001)(copy on file with author)(hereafter Schweiker Report).

<sup>3</sup> Pa. State Rep. Dwight Evans, quoted in Martha Woodall, et al., *Pa. puts a condition on extra funding for Phila. schools*, Philadelphia Inquirer, at B3, July 10, 2002 (quoting Evans on why he supported a requirement that \$55 million out of \$82 million in increased state education funding for Philadelphia be reserved solely for the 45 city public schools that would run under private management).

<sup>4</sup> April 9, 2002, Pa. Dept. of Education Press Release announcing award of \$2 million in grants to seven community groups to convert 80 Philadelphia public schools to independent status, <http://papress.state.pa.us/ctc/data/20020409.0010.htm><x-html>, on file with author. See *infra* at for a discussion of what this program actually meant for the targeted schools.

The words empower, accountability, and failure permeate the debate over public education. They appear repeatedly not only in media accounts<sup>5</sup> and in the public statements of political figures<sup>6</sup> but in the language of legal authority –in court opinions,<sup>7</sup> statutes,<sup>8</sup> and in academic scholarship.<sup>9</sup> But what do these words mean? Who is being empowered? To do what? Who is accountable to whom and for what? What is failure?

I teach law students how to identify and analyze legal problems, how to research and apply legal authority and how to communicate their analysis orally and in writing.<sup>10</sup> One major theme is precision—they must be precise in their language and in their analysis. They cannot say “failure” without defining what they mean by that term. But the law makers of school reform do not feel the need to meet this basic requirement of good lawyering. Instead these words are used without definition, without examination and

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<sup>5</sup> See, e.g. Michael A. Fletcher, *State to take over Philadelphia schools*, Seattle Times, A 10 (Nov. 7, 2001)2001 WL 3525784 (referring to “troubled public schools”, “follows years of failed reform efforts,”and “one constant: the dismal performance of the city’s 210,000 public-schools students”).

<sup>6</sup> See, e.g., The Achiever, a newsletter issued by the U.S. Department of Education regarding the No Child Left Behind Act, features a picture of President George Bush over the quote, “When it comes to the education of our children . . . failure is not an option.” See [Http://www.nochildleftbehind.gov/Newsletter/index.html](http://www.nochildleftbehind.gov/Newsletter/index.html) (accessed March 11, 2003).

<sup>7</sup> *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002).

<sup>8</sup> See No Child Left Behind Act, 20 U.S.C. § 6301(4); Education Empowerment Act, 24 P.S. §17-1701-B et seq.

<sup>9</sup> A westlaw search performed on August 4, 2003, asking for all law journal articles that contained the word “failing” within five words of public and school elicited 188 hits.

<sup>10</sup> See Susan L. DeJarnatt, *Law Talk: Speaking, Writing, and Entering the Discourse of Law*, 40 Duq. L. Rev. 489 (2002), Susan L. DeJarnatt, *In re McCrate: Using Consumer Bankruptcy as a Context for Learning in Advanced Legal Writing*, 50 J. Leg. Ed. 50 (2000).

without any historical context. In this article, I will examine the use and misuse of language that has driven “the largest school reform effort in the history of public education”<sup>11</sup>—the transformation of the Philadelphia School District.<sup>12</sup> Philadelphia in 2001 and 2002 became a key battleground where long held visions of public education as a community value, essential to create the common citizenship necessary to the functioning of democracy, were being confronted directly by those who view education in individual consumer terms and firmly believe that it should be controlled by the market and all schools should be subject to market principles in order that education can be provided more “efficiently.”<sup>13</sup> I am not going to directly address that underlying debate—though it will be obvious from my own rhetoric where my sympathies lie. I have a more limited goal—to look at how the pro-market forces use language to push for the changes they seek, how words are used as weapons but without definition or precision and often in contrast to the underlying reality they supposedly describe. I focus on Philadelphia because the language of the debate here is remarkably illuminating. This article will trace the language through the key events occurring in Philadelphia in 2001

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<sup>11</sup> See Philadelphia School District, Press Release, *SRC Selects Paul Vallas as Chief Executive Officer of the Philadelphia School District*, [www.phila.k12.pa.us/src/press\\_releases/ceo\\_release.pdf](http://www.phila.k12.pa.us/src/press_releases/ceo_release.pdf) (accessed September 7, 2003).

<sup>12</sup> As a parent of two children who have been or are being educated in the public schools of Philadelphia, I have an intense personal interest in this transformation that drives my own professional interest in the language used to promote and justify it. My daughter attended C.W. Henry School from kindergarten through eighth grade and attended high school at Central High School, from which she graduated on June 20, 2002. My son has attended C.W. Henry since kindergarten and entered the third grade in September 2003.

<sup>13</sup> See Michael Apple, *EDUCATING THE “RIGHT” WAY: MARKETS, STANDARDS, GOD AND INEQUALITY* (New York: RoutledgeFalmer, 2001) (hereafter Apple); John E. Chubb and Terry Moe, *POLITICS, MARKETS, AND AMERICA’S SCHOOLS* (The Brookings Institution, Washington, D.C. 1990) (hereafter Chubb and Moe).

and 2002. I will briefly refer to the national context as well but my focus is local. The words I focus on are “accountability,” “empowerment,” and, most important, “failure.”

What is a failing school? This term is bandied about by nearly everyone these days—from think tank writers devoted to the marketization of everything<sup>14</sup> to legal scholars,<sup>15</sup> and Supreme Court justices.<sup>16</sup> But what does it mean? Failing at what? Failing whom? And, if a school is “failing,” what should be done about it? Who is accountable for the failure? Should we “empower” the “community” to “reform” the school? How? How does the image of failure contrast or harmonize with legal rulings at the state and federal level that children are entitled only to an “adequate” education, rather than one that is equal to those of other children in their state?<sup>17</sup> Finally, what do we mean when we describe a school as “good?”<sup>18</sup> What do we risk

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<sup>14</sup> See, e.g. Jack Haulk, *A Malpractice Suit We Won't See*, Policy Brief, The Allegheny Institute for Public Policy, Vol. 3, No. 25, June 3, 2003. <[www.alleghenyinstitute.org/briefs/vol3no25.pdf](http://www.alleghenyinstitute.org/briefs/vol3no25.pdf)> (accessed August 26, 2003); Carrie Lips, “*Edupreneurs*” *A Survey of For-Profit Education*, 386 Policy Analysis 1, 4 (Nov. 20, 2000) available at [www.cato.org/pubs/pas/pa386.pdf](http://www.cato.org/pubs/pas/pa386.pdf). (accessed Sept. 12, 2003)(comparing failed public schools to Soviet collective farms).

<sup>15</sup> See, e.g., Lewis Solomon, *Edison Schools and the Privatization of K-12 Public Education: A Legal and Policy Analysis*, 30 Fordham Urb. L. J.1281 (2003).

<sup>16</sup> See, e.g. *Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2480 (2002)(Thomas, J. concurring)(referring to failing public schools six times).

<sup>17</sup> See *Campaign for Fiscal Equity, Inc. v. New York*, 744 N.Y.S. 2d 130, 138 (Supr. Ct., App. Div. 2002)(holding that New York provided “the opportunity of a sound basic education” because “evidence at trial established that the skills required to enable a person to obtain employment, vote, and serve on a jury, are imparted between grades 8 and 9, a level of skills which plaintiffs do not dispute is being provided.”). The Appellate Division’s opinion was recently overturned by the New York Court of Appeals which rejected this crabbed interpretation of a “sound, basic education.” See *Campaign for Fiscal Equity, Inc. v. New York*, 2003 WL 21468502 (June 26, 2003). In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 37 (1972), the Supreme Court similarly found that, even if “some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [the right to vote and the right to free speech], we have no indication that the present levels of educational

losing that is “good” through this process of reform of our public school system? Does the privatization and marketization of public education threaten the historic democratic ideal of the common school?<sup>19</sup>

In mid-2001, the Philadelphia public school system became the subject of a very public experiment in school reform. The state wrested control of the school district from the city, acting under an agreement between then-Governor Tom Ridge and Philadelphia Mayor John Street, but against the background of a recently enacted state law that authorized state takeover of school districts that have budgetary problems or poor standardized test scores.<sup>20</sup> The governor and secretary of education for Pennsylvania repeatedly invoked dire descriptions of the academic problems exhibited by the system as justification for their actions.<sup>21</sup> But the terms, though flamboyant and emotionally compelling, were rarely if ever defined, and never defined within any historical context. This article will examine the language of the law, the law makers and the

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expenditures in Texas provide an education that falls short. Whatever merit appellees’ argument might have if a State’s financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.”

<sup>18</sup> Parental perception of whether a school is “good” seems to be, unsurprisingly, dependent on who attends the school, rather than on its specific academic program or even its test score success. Luis Benveniste, et al., *ALL ELSE EQUAL: ARE PUBLIC AND PRIVATE SCHOOLS DIFFERENT?* at 7 (RoutledgeFalmer NY 2003). Parents also tend to rank highly the school their own children attend, even when they rank public schools generally as poor. *Id.* at 2-3.

<sup>19</sup> Many scholars have concluded this threat is real, a conclusion I share. *See, e.g.* Apple, *supra*, note 13; Martha Minow, *Reforming School Reform*, 68 *Fordham L. Rev.* 257 (1999).

<sup>20</sup> 24 P.S. §§ 17-1701B et seq.

<sup>21</sup> *See infra*, Part IV.

advocates of market-based school reform and how it compares and contrasts to the actual situation in the public schools of Philadelphia. Part II sets out the story itself. Part III explores the theoretical framework of the reform movement. Part IV provides a closer examination of the words and language employed by the reform forces and of the assumptions those words rely on. I conclude that the rhetoric has not been honest but has been used to present an incomplete picture of both the role of public schools and the actual experience of public education in Philadelphia in a conscious and unconscious effort to individualize and marketize schooling in Philadelphia, with the ultimate goal of eliminating the “public” from education altogether.

## II. Chronology of a Takeover

One cannot understand the current situation in Philadelphia without understanding a bit of history, particularly Philadelphia’s relationship to the rest of Pennsylvania. Pennsylvania has been described as “Pittsburgh and Philadelphia separated by Alabama.”<sup>22</sup> The truth of this pithy description is that largely rural Pennsylvania does not always enjoy the city that dominates its eastern end. Neither Pennsylvania nor Philadelphia are wealthy entities. Public education was valued in Pennsylvania at its founding however. William Penn declared public education a founding principle of Pennsylvania in his charter establishing the Commonwealth in 1701. The Pennsylvania Constitution directs the General Assembly to “provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.”<sup>23</sup> Philadelphia is home to the second oldest public high school in the United

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<sup>22</sup> See James Carville, *James Carville on Bob Casey*, National Review On Line [www.nationalreview.com/interrogatory/interrogatory060100.html](http://www.nationalreview.com/interrogatory/interrogatory060100.html) (accessed August 23, 2003).

<sup>23</sup> Pa. Const., Art. 3, sec. 14.

States, Central High School.<sup>24</sup> The financing of public education in Pennsylvania, as in many states, relies primarily on local property taxes. This system has burdened localities, especially as the Commonwealth's contribution has shrunk in recent decades.<sup>25</sup> Localities like Philadelphia which are facing shrinking tax bases, have been especially hard hit. Philadelphians pay twice as much of their incomes in local taxes as do residents of its surrounding, wealthier suburban counties but, because of their more modest incomes, this burden results in less not more money.<sup>26</sup> This has led, inevitably, to stark contrasts in school spending. In 1999, Philadelphia spent \$7480 per student while Lower Merion, a well funded and highly regarded suburban district, spent \$13,139.<sup>27</sup> Many of Pennsylvania's rural and small town districts face equally difficult funding crises—and equally harsh budgetary realities.<sup>28</sup>

Philadelphia's school system also lacks any authority to tax directly. It must depend on the city's government to raise taxes to provide any necessary funding or on the beneficence of the state legislature. The Philadelphia School District has been operating at a deficit for years. Public school parents and staffs are intimately familiar with the annual round of cutbacks and

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<sup>24</sup> See [www.centralhigh.net/](http://www.centralhigh.net/) (Accessed August 23, 2003); HANDBOOK OF THE CENTRAL HIGH SCHOOL OF PHILADELPHIA at 1 (22nd ed. 1998).

<sup>25</sup> See Good Schools Pennsylvania, *There is a Crisis in Public Education in Pennsylvania* (2002). The state's share of funding for public schools shrank from 55% in 1974-75 to 35% in 2000-2001. *Id.*

<sup>26</sup> Germaine Ingram, Panelist, *Separate But Unequal: The Status of America's Public Schools*, Proceedings, 8 Mich J. Race and L. 249, 317 (2002).

<sup>27</sup> See Ronald Cowell, *State government shortchanges Pennsylvania's children*, Press Release, Education Policy and Leadership Center, Aug. 19, 2003.

<sup>28</sup> Education Week ranked Pennsylvania as the fourth most inequitable of the 50 states in how the state provides for local education funding.

fighters to preserve an extra kindergarten here, a music program there. The fight has seemed endless.

Despite the financial problems, though, Philadelphia has not ignored its schools. The District has been struggling with reform efforts for years, most recently under the leadership of David Hornbeck, appointed Superintendent by then-Mayor Ed Rendell in 1994. Hornbeck's reform effort, Children Achieving, focused on educational improvement.<sup>29</sup> Standardized test scores<sup>30</sup> were rising in Philadelphia for the final years of the Hornbeck administration.<sup>31</sup> Hornbeck largely left the looming financial crisis to others however. He took the position that the state needed to live up to its obligation to provide adequate funding and focused his efforts on showing that the District was making strides that deserved to be paid for. Hornbeck resigned in 2000, following a bitter dispute with the legislature, during which he, perhaps undiplomatically but in the opinion of many accurately, denounced the legislative refusal to provide increased funding for Philadelphia as racist and motivated by hostility to urban

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<sup>29</sup> The reforms included provision of all-day kindergarten, smaller class size in the early years, performance targets for each school, and expanded professional development. See Philadelphia School District, *Tell Them We Are Rising: The Philadelphia Story, 1994-1998* (1999)(copy on file with author).

<sup>30</sup> See *infra* at [redacted] for a critique of over reliance on test scores as evidence of good education.

<sup>31</sup> Hornbeck resigned in 2000. Standard and Poor's evaluation of Pennsylvania schools included Philadelphia as one of a "select group" of 51 districts out of the 501 in the state that made "significant annual progress in math and reading scores" showing average annual increases that were more than twice the average gain during 1997-2001 in the state. Standard and Poor, *The Greatest Gains: Making Consistent and Significant Improvements, A Study of Pennsylvania Schools and Districts, 1997-2001*, (Copy on file with author). See also Council of Great City Schools, *Beating the Odds II: A City by City Analysis of Student Performance and Achievement Gaps on State Assessments*, at 9-10, 21 (June 2002)((citing Philadelphia for improving math and reading scores faster than the state average during all years of administration of the PSSA test up to the spring of 2001)(copy on file with author).

communities.<sup>32</sup> The reforms of Children Achieving, including all day kindergarten and reduced class size in primary grades, were maintained by the District under Hornbeck's replacements—acting Chief Executive Officer Philip Goldsmith and acting Chief Academic Officer Deidre Farmbry.

The landscape changed rather dramatically in 1998 with the passage of legislation that allows the state to take over school districts in academic or fiscal distress. This legislation, known as Act 46 or the Education Empowerment Act,<sup>33</sup> enabled the state to take over the Philadelphia School District in January 2002. The course of events involved in the takeover was complex. Philadelphia was placed on the state's empowerment list in 2001 based on its 2000 standardized test scores.<sup>34</sup> But in 2001 Philadelphia did not qualify for takeover under the Empowerment Act based on academic distress.<sup>35</sup> Instead, with the school district facing an ever more severe fiscal crisis, Philadelphia Mayor John Street and then-Governor Tom Ridge<sup>36</sup> cut a deal<sup>37</sup>—the city would agree to the state hiring an independent evaluator to assess the school

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<sup>32</sup> See Brent Staples, *How Philadelphia Came Back From Collapse*, N. Y. Times, A12 (July 29, 2000).

<sup>33</sup> 24 P.S. §17-1701 et. seq.

<sup>34</sup> Pa. Dept. of Education Press Release, July 31, 2001.

<sup>35</sup> The Education Empowerment Act allows a district two years on the empowerment list before it is subject to state takeover for continued academic failure. 24 P.S. § 17-1705-B(a).

<sup>36</sup> Following the attacks on September 11, 2001, Governor Ridge resigned his post to become the new director of homeland security. The lieutenant governor, Mark Schweiker, became governor. Schweiker soon announced that he would not seek election and would leave office at the end of Ridge's term, January 2003.

<sup>37</sup> Ridge agreed to advance the district's share of the state funding due later in the year. In exchange, Street agreed to seek a stay of the district's pending equitable funding lawsuit against the state, to commit to keep the schools open for the remainder of the school year, and to "an

district and recommend changes. If the city and state could not reach agreement on how to respond to the assessment, the state would take over the school district. The key to the takeover was the District's financial distress not its academic woes.

After the state and city reached this agreement, the Ridge administration promptly hired Edison Schools, Inc. to perform the assessment of the school district.<sup>38</sup> Edison had never before engaged in this kind of work.<sup>39</sup> Edison, by its own description, is a corporation devoted to the private management for profit of public schools and publically-funded charter schools.<sup>40</sup> Nonetheless, Edison received \$2.7 million to perform an assessment of the Philadelphia School District.<sup>41</sup> Its report, delivered on October 29, 2001, found the District in crisis with serious budget problems, poor standardized test scores, inadequate technology, and an administration it

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intensive review of the district's educational and fiscal management." Pa. Dept. of Educ. Press Release, July 31, 2001.

<sup>38</sup> See Pa. Dept. of Educ. Press Release, Aug. 1, 2001; Governor Ridge, Press Release, Aug. 1, 2001 ("Edison Schools knows what it takes to produce better educational results for children, and they know how to do it within a budget.").

<sup>39</sup> The Department of Education's hiring of Edison was harshly criticized by the state Auditor General, Robert P. Casey, Jr., in an audit issued November 20, 2002. Casey's audit concludes that the contract itself was unnecessary, that the Department of Education did not consider Edison's qualifications or compare them to any other potential vendors, and that there was "no basis to support the Department of Education's assessment that Edison's fee was reasonable." Press Release, Nov. 20, 2002, Auditor General Robert P. Casey, [www.auditor.gen.state.pa.us](http://www.auditor.gen.state.pa.us); Robert P. Casey, *A Performance Audit of the Pennsylvania Department of Education's Contract with Edison Schools, Inc.* (Nov. 20, 2002)(on file with author).(Casey Audit).

<sup>40</sup> See Edison Schools, Inc.'s website at <[www.edisonschools.com/home/home/cfm](http://www.edisonschools.com/home/home/cfm)> (accessed August 25, 2003).

<sup>41</sup> Casey Audit, *supra*, note at .

deemed too big, too inexperienced, and too decentralized.<sup>42</sup> Edison's report recommended that it be hired to manage the district.<sup>43</sup>

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<sup>42</sup> See Edison Schools, Inc., *Report* (Oct. 29, 2001)(Edison Report)(on file with author).

<sup>43</sup> Edison Report, *supra*, note at .

The initial hiring of Edison, its recommendation that it take over the district, and many other aspects of Edison's assessment instantly became the subject of enormous controversy in Philadelphia.<sup>44</sup> Noisy demonstrations, student walkouts, and law suits followed.<sup>45</sup> Politicians and community groups split, with some groups publicly supporting the state takeover—most notably State Representative Dwight Evans and State Senator Anthony Williams.<sup>46</sup> The

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<sup>44</sup> See, e.g. *Council of Great City Schools, Strengthening the Performance of the Philadelphia School District, Analysis and Comment* (on file with author); Philadelphia School District, *Setting the Record Straight: A Comparison of Student Progress made by Edison Schools and by the School District of Philadelphia, 1996-2001* (on file with author) (comparing Philadelphia School District rates of improvement on PSSA and SAT-9 standardized tests for three years showing steady average improvement, exceeding the state's average improvement for the PSSA—grade 5, 10 point average gain compared to 2 point average gain state-wide; grade 8, 13 point average gain compared to 2 point average gain state-wide; grade 11, 4 point average gain compared to 1 point average gain state-wide; also citing improvements in four year graduation rate); Mensah Dean, *New nonprofit study blasts Edison's Report*, Philadelphia Daily News, Dec. 12, 2001 (reporting critique of the Edison study by the Council for Great City Schools, describing the Edison study as “rudimentary,” and “fatally flawed.”) More recently, the hiring of Edison and its performance were the subject of an audit performed by the Commonwealth's Auditor General Robert P. Casey, Jr.. That audit concluded that “[t]he Pennsylvania Department of Education showed a shocking disregard for sound business practices when it awarded a \$2.7 million, no-bid contract last year to Edison Schools Inc. to analyze the Philadelphia School District . . . .” New Release, Auditor General of Pennsylvania, Nov. 20, 2002. The Auditor General's audit determined that the Edison study was unnecessary, Edison lacked the qualifications to perform the study, the Department of Education failed to request adequate documentation of Edison's expenditures under the contract, and the contract circumvented state competitive bidding requirements. Casey Audit, *supra*, note at 37-48.

<sup>45</sup> See, e.g., *Phila. City Council, et al. v. Schweiker, et al.*, 2002 WL 468708 (E.D. Pa. Mar. 27, 2002) *aff'd* 2002 WL 1561919 (3d Cir. July 17, 2002).

<sup>46</sup> Evans unsuccessfully ran for mayor against Street in the Democratic primary election to succeed Mayor Ed Rendell in 1999. Williams and Evans both supported the charter school movement and to a large extent privatization of the schools. Evans' webpage promotes school choice, including proposed legislation he calls “The Chance Initiative,” a full voucher program, which would require the Philadelphia School District to fund the transfer, including transportation expenses, of any of its students to another public school or private school. See [www.pahouse.com/evans/chanceinitiative/](http://www.pahouse.com/evans/chanceinitiative/) (accessed March 11, 2003). Evans's own biography states that he “championed the state's charter school law” and the Empowerment Act and notes

community groups that favored the state's position on Edison were rewarded for their loyalty with subcontracts for Edison's initial assessment,<sup>47</sup> and by being proposed as appropriate community partners for privatized schools in the Schweiker Report.<sup>48</sup>

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his membership on the national board of directors of the Black Alliance for Educational Options. See [www.pahouse.com/evans/bio203/htm](http://www.pahouse.com/evans/bio203/htm). The BAEO is committed to promotion of school choice. See [www.baео.org/about/manifesto/htm](http://www.baео.org/about/manifesto/htm). (accessed March 11, 2003). Evans's fellow board members include Rev. Floyd Flake, a founder of Edison Schools, and Deborah McGriff, a high ranking Edison executive. *Id.* State Senator Anthony Williams is also a strong supporter of school choice, particularly the charter school movement. See [http://www2.legis.state.pa.us/cfdocs/memberinfo/senate\\_bio.cfm?districtnumber=8](http://www2.legis.state.pa.us/cfdocs/memberinfo/senate_bio.cfm?districtnumber=8) touting Sen. Williams's presidency of the Renaissance Advantage Charter School in 1999. Senator Williams's District Newsletter for Summer 2002 describes his invitation to the Bush White House for the signing of a Presidential Proclamation of National Charter Schools Week. See <http://www.pasen.gov/members/districts/sd08/news/williamsnews802/pdf>. (accessed March 11, 2003).

<sup>47</sup> For example, Universal Companies received worked with Edison to survey community members on school reform. Nueva Esperanza, a Latino community development corporation which, inter alia, runs a charter school, also worked on this effort. See Universal Companies, *Voices and Experiences: A Community Outreach Report on Education Reform in Philadelphia 2001*, Appendix (on file with author)(Universal Report). Universal solicited input in the form of a questionnaire that invited criticism of the current system. The form focused on the performance of the District, not on reform models. It asked if the respondent agreed or disagreed with such questions as:

“11. Philadelphia public schools prepare all students for higher education.”

“14. Class sizes are manageable.”

“18. The School District is doing all it can to prevent school dropout.[sic]”

“19. Philadelphia public schools provide students with quality educational materials, including books and supplies.”

*Id.* A total of only 312 questionnaires were collected, including only 4 from students. *Id.* at 8, Appendix. Universal asserts in the Appendix to the Report that “the survey return-rate was affected by anti-Edison, anti-privatization efforts to limit community feedback” but it provides no explanation of what these efforts consisted of. *Id.* at Appendix. Of the nine neighborhood forums held for this outreach effort, one was at a public school, one at a city recreation center, one at a funeral home, four were at churches and two were at charter schools. *Id.* at 6. Universal also conducted focus groups with another 179 people, including only three public school parents and 4 public school students but including 17 charter school principals and 30 public school

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principals. *Id.* at 7. The report also says that Universal conducted 95 individual interviews with “stakeholders” but does not provide any further identification. *Id.* at 7.

Despite Universal’s stress on the inadequacies of the current system, the report somewhat crankily notes that the community had other priorities:

“A persistent challenge to Universal’s community outreach work was the frequent shift in focus by community members and special interest groups from SDP’s overall performance and improvement opportunities to Edison’s for-profit state, track record, fiscal health, \$2.7 million no-bid contract, long-term commitment, etc. At every forum, moderators had to allow time for people to express their opinions about Edison, privatization, and the assessment process, often curtailing our ability to get targeted information. Stenographer recordings of neighborhood forums readily show to what extent this *distraction* monopolized these meetings, sometimes more than 50%.”

*Id.* at 10 (emphasis added).

<sup>48</sup>Groups supportive of Edison and privatization were rewarded in the Schweiker Report by being proposed as community partners for the schools to be privatized, including “Universal Companies, Germantown Settlements (sic), Rep. Dwight Evans-related organizations, Sen. Anthony Williams-related organizations, Nueva Esperanza, and the Coalition of Clergy.” Schweiker Report at 9. In April 2002, six of these organizations—Nueva Esperanza, Universal Companies, Foundations, Inc., Germantown Settlement, the West Philadelphia Coalition—were awarded a total of \$1,975,000 in grants to study converting 79 existing public schools to independent status. See section IV *infra*.

Governor Ridge left office in the fall of 2001 to become the head of Homeland Security for the Bush Administration.<sup>49</sup> His successor, Mark Schweiker, exhibited an equally deep devotion to the concept of private management as the solution to Philadelphia's school problems. Governor Schweiker and Mayor Street engaged in heated negotiations over the recommendations which ultimately led to state takeover with the acquiescence of the mayor in January 2002.<sup>50</sup>

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<sup>49</sup> *See note , supra.*

<sup>50</sup> At one point in the fall, Mayor Street temporarily moved his office into the District administration building as a symbol of his opposition to the proposed transfer of management to Edison. As a result of the negotiations, Edison's role as manager of the entire district was scaled down to the role of consultant and the mayor was entitled to appoint two, rather than only one, of the five members of the SRC. *See* Dept. of Ed. Press Releases, Nov. 20, 2001; Dec. 21, 2001.

The Philadelphia School Board was replaced by the School Reform Commission, comprising five members, three appointed by the governor and two by the mayor.<sup>51</sup> The negotiation process itself was complicated by a late hour legislative maneuver in October 2001 when the Republican leadership of the state senate engineered an amendment to unrelated legislation involving loan forgiveness for student nurses.<sup>52</sup> The amendment was introduced and passed on October 23, 2001, without debate or even consideration by many members of the legislature. It provided that the School Reform Commission would assume all decision making power concerning the Philadelphia School District and that it would be largely insulated from any change in the governorship because the commissioners' terms would extend beyond the term of the governor who would replace Schweiker.<sup>53</sup> The negotiations between Mayor Street and the Governor simply gave the Mayor one additional appointee, two of the five, instead of the original one provided for in the amendment.<sup>54</sup>

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<sup>51</sup>The Governor appointed James Nevels, a business executive as chair and James Gallagher, President of Philadelphia University and Daniel Whelan, CEO at Verizon, as commissioners. Mayor Street appointed two former members of the Philadelphia School Board—Sandra Dungee-Glenn and Michael Masch. *See* Dep. of Ed. Press Release, Jan. 14, 2002.

<sup>52</sup> The marked up version of SB 640, dated October 23, 2001 is available on line at [www.legis.state.pas.us/WUO1/LI/BI/BT/2001/0/SB6640P1473.htm](http://www.legis.state.pas.us/WUO1/LI/BI/BT/2001/0/SB6640P1473.htm). (Accessed Sept. 7, 2003). For the Republican perspective on the amendment, see [www.pasenategop.com/comingup/news%20briefs/NB-PDF/2001/NB102901.pdf](http://www.pasenategop.com/comingup/news%20briefs/NB-PDF/2001/NB102901.pdf). (accessed Sept. 7, 2003).

<sup>53</sup> The legislation provides that the terms of the Philadelphia School Reform Commissioners, unlike the members of other state control boards authorized by the Education Empowerment Act, cannot be ended except for cause. *Compare* 24 P.S. §6-696(b)(2) *with* 24 P.S. §17-1705-B: [www.psea.org/article.cfm?SID=40](http://www.psea.org/article.cfm?SID=40) (Accessed Sept. 7, 2003).

<sup>54</sup> *See* Press Release, Dept. of Education

The SRC almost immediately exhibited some independence from Governor Schweiker's views on the direction of the reforms. The SRC resisted the governor's pressure to turn the entire management of the District over to Edison, and instead opted to hire a variety of consultants, including Edison.<sup>55</sup> In April, the SRC announced that it was naming 70<sup>56</sup> schools as "partnership" schools which would be subject to one of four reform models—the named schools would either be reconstituted, made into independent schools or charter schools, or would be assigned to an entity outside the school district for management. The partnership schools were selected based on their test scores on the required Pennsylvania standardized tests for 1999 and 2000—the SAT 9 test<sup>57</sup> and the Pennsylvania System of Scholastic Assessment (PSSA).<sup>58</sup> On April 17, 2002, the SRC announced how each of the partnership schools would be assigned—to what category and to which private manager.<sup>59</sup> Forty-two schools were assigned to one of seven

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<sup>55</sup> See Press Release, SRC

<sup>56</sup> Initially the SRC listed 75 schools but removed 5 of them based on test score improvements that it had not fully fathomed when it first chose the schools for intervention. See Susan Snyder and Martha Woodall, *75 schools targeted for possible overhaul*, Philadelphia Inquirer, A1(April 11, 2002); Susan Snyder and Martha Woodall, *School Assignments, Managers to take over 42 schools; 20 put under Edison*, Philadelphia Inquirer, A1,11 (April 18, 2002).

<sup>57</sup> In 2002-2003, Philadelphia dropped use of the SAT-9 and began using the Terra Nova test instead. Both tests are normed standardized tests where scores are released as comparative percentiles, ranking a particular student against all others who took the test that year.

<sup>58</sup> The PSSA, first used in the 1995-1996 academic year, was norm-referenced through the years relied on by the SRC in choosing the partnership schools. See *infra*, notes and accompanying text.

<sup>59</sup> The April 17, 2002, SRC meeting had to be moved to a new location after a group of high school student activists succeeded in blockading the District Administration building preventing entry by the Commissioners and other employees of the District. The students told

private managers; five were slated to become independent, four to become charter schools; and the remaining nineteen were to be “reconstituted.”<sup>60</sup> As of April 17, none of the Commissioners had engaged in any direct, formal communication with any school or any parent group nor had any Commissioner officially visited any of the schools targeted for reform<sup>61</sup>. The SRC committed that all 70 partnership schools would get equal funding so that the experiment in varying reform models could be fairly tested.<sup>62</sup> It is also useful to note here that even though the SRC and the media consistently referred to the 70 partnership schools as the “lowest-performing” schools, that term was misleading. The SRC decided not to intervene with high schools, leaving

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the news media they felt compelled to engage in civil disobedience because of their fervent belief that privatization would hurt them and because they had not been able to meet with or communicate with the SRC in any other way. See Martha Woodall and Susan Snyder, *Protesting students block school offices*, Philadelphia Inquirer, A11 (Apr. 18, 2002).

<sup>60</sup> “Reconstitution” has several, conflicting meanings and the SRC did not define what it meant by the term, other than to state that the reconstituted schools would remain under the direct management of the District. See PSN on reconstitution; Kelly C. Rozmus, *Education Reform and Education Quality: Is Reconstitution the Answer?* 1998 B.Y.U. Educ. & L.J. 103 (1998)(discussing reconstitution as a reform method nationally). In 1997, then-superintendent David Hornbeck used a provision of the District’s contract with the teachers’ union to reconstitute two neighborhood high schools, Audenreid and Olney. Hornbeck proposed trading the staffs of the two schools to foster reform, relying on the poor test scores of each school. His effort was challenged by the union. See Editorial, *When to blame the teachers*, N.Y. Times, A 28 (March 27, 1997). The Education Empowerment Act says “reconstitute” means “[t]o remove all or a significant percentage of the administration, faculty and staff of a school and to create a new school with new leadership and personnel as an alternative to closure of the school.” 24 P.S. §17-1702-B. Whatever the SRC meant by the term, it was not wholesale replacement of school staff. Eventually, the SRC changed the designation for these schools to “restructured” to avoid the controversy. See Paul Socolar, *Takeover brings turmoil, uncertainty to school district*, 1 (Summer 2002)(on file with author).

<sup>61</sup>On April 25, 2002, in its first direct communication with parents of public school students, the SRC sent a letter to the family of each student announcing the reform models. See <http://www.phila.k12.pa.us/src/ParentLetter.pdf>. (accessed Sept. 7, 2003).

<sup>62</sup> Philadelphia School Reform Commission, *Guiding Principles* <[www.philschK12.pa.us/guidin\\_principles.html](http://www.philschK12.pa.us/guidin_principles.html)> (accessed Sept. 15, 2003).

all high schools off the partnership list even though many of the comprehensive neighborhood high schools had test scores at or below the levels of the targeted schools.<sup>63</sup> The SRC's reliance on PSSA scores also effectively exempted the District's K-4 schools because, during the relevant years, the PSSA was not administered to students in those grades.<sup>64</sup>

After the Commission made its decision on the schools, Commissioner Michael Masch convinced his colleagues that they had to communicate more directly with the affected schools and their communities. Thus, the Commissioners individually traveled out to each affected school and met with the staff, parents and other concerned individuals over the months of May and early June.<sup>65</sup> These meetings were tightly orchestrated however—with the bulk of the meeting taken up by the Commissioner's presentation to the audience and questions allowed only by means of writing the question on an index card supplied at the meeting. At some meetings the Commissioner present took questions directly from the audience. The responses made clear that, even as of mid-May, the SRC had not fully determined what the reform models would mean.

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<sup>63</sup> See Socolar, *supra*, note .

<sup>64</sup> *Id.*; Standard and Poors, *The Greatest Gains*, *supra*, note .

<sup>65</sup> See Susan Snyder, *Panel to meet at schools that are to be overhauled*, Philadelphia Inquirer (May 15, 2002) <[www.philly.com/mld/philly.living.education/K-12/3268552.htm](http://www.philly.com/mld/philly.living.education/K-12/3268552.htm)> (accessed Sept. 15, 2003).

Two other important events occurred in this same time frame. In November 2001, the Pennsylvania Department of Education solicited grant applications from seven community groups to develop contracts to convert a list of 80 Philadelphia schools to independent schools.<sup>66</sup> These grants were awarded under the Independent Schools Act<sup>67</sup> and the awards were announced in April, the week before the SRC announced its list of schools.<sup>68</sup> The grantees received \$25,000 per school but half of the award was contingent on the grantee providing the Department of Education with a draft contract for converting the school to independent status.<sup>69</sup> This entire process was at cross purposes with the SRC process. Even though the statute gives authority only to the local district, i.e. the SRC, to decide whether to make a school independent, the grants required submission of a draft contract to the Department of Education which lacks any direct authority to complete the contracts.<sup>70</sup> The list of grantees was also remarkable in that the money, \$2 million, went, with one exception,<sup>71</sup> only to groups that had publically supported the state's

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<sup>66</sup> See Pa. Dept. of Educ. Request for Proposals, Nov. 7, 2001 (on file with author)(Independent Schools RFP).

<sup>67</sup> 24 P.S. §5-502.1 et seq.

<sup>68</sup> Pa. Dept. of Educ. Press Release, Apr. 9, 2002(on file with author).

<sup>69</sup> See Independent Schools RFP, *supra*, note at 3.

<sup>70</sup> *Id.*

<sup>71</sup> The one exception was the Laboratory School of Communications and Language, a charter school with exceptionally good test scores. See Pa. Dept. of Ed. School Report Cards, <http://www.paprofiles.org/profiles/assessment5.asp> (accessed Sept. 15, 2003) The Laboratory School received a grant to study conversion of a school "to be determined." See April 9, 2002 Press Release, *supra*, note at 4.

side of the fight with the city the previous fall.<sup>72</sup> And the list of schools for which grants were awarded overlapped inconsistently with the SRC list. For example, the SRC determined that James Alcorn Intermediate School and Norris S. Barratt Middle School would be managed by Edison Schools, Inc. yet both were included in Universal Companies' independent schools grant.<sup>73</sup> Grants were awarded for study of 25 schools that were also on the SRC list and designated by the SRC for other reforms.<sup>74</sup>

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<sup>72</sup>See Schweiker Report, *supra*, note 2 at 19.

<sup>73</sup> See April 9, 2002, Press Release, *supra* at , and List of Partnership Schools, Philadelphia School District (on file with author). Ironically, Universal also received an independent schools grant to study conversion of Edwin M. Stanton Middle School and William S. Pierce Middle School, even though Universal itself received contracts to manage these schools from the SRC. Similarly, Foundations, Inc. received \$75,000 in grants to study conversions of Ada H. Lewis, Pastorius, and Kinsey even though the SRC had assigned all three schools to Foundations to manage. Nueva Esperanza got \$175,000 for seven schools that the SRC had designated for its own reform process.

<sup>74</sup> *Id.*

The most important event was the annual budget process in the state legislature. The city originally agreed to the original Edison study and to the takeover largely because of the promise of additional state funding. Throughout the winter, there were frequently rumblings from various state legislators who clearly did not feel bound by Schweiker's commitment. Their concerns were heightened by the state's own fiscal problems which were going to force very limited increases in school spending throughout the state. Non-Philadelphia legislators complained about providing special benefits to Philadelphia when their own schools were starving for funds. Governor Schweiker proudly and loudly maintained that he was committed to providing \$75 million to the Philadelphia schools and would use all his power and influence to make sure that money was in the budget.<sup>75</sup> Shortly before the budget was finalized the United States Supreme Court issued its opinion in *Zelman*, finding that school vouchers were constitutional even if used primarily for parochial school tuition. Much talk ensued about the possibility that funding for vouchers would be incorporated into the budget at the expense of spending for traditional public schools. When the dust settled on July 1, voucher funding was not present and the \$75 million for Philadelphia was. Or was it? Ten days later, on July 10, 2002, the news broke that the state's funding came with not just strings but tensile steel chains attached. \$55 million of the appropriation could be used only for the 45 schools that the SRC decided to place under private management.<sup>76</sup> The SRC was also forbidden from moving any

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<sup>75</sup> See Schweiker Report, p. iv, v; Press Release, Dept. of Education, Nov. 1, 2001.

<sup>76</sup> See Editorial, *Charles in Charge*, Philadelphia Inquirer (July 20, 2002) <[www.philly.com/mld/inquirer/2002/07/20/news/editorial/3701246.htm](http://www.philly.com/mld/inquirer/2002/07/20/news/editorial/3701246.htm)> (accessed Sept. 15, 2003).

other funds away from those schools.<sup>77</sup> These steel chains directly conflicted with two of the SRC's guiding principles—equal funding for all partnership schools and fair examination of different reform models.<sup>78</sup>

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<sup>77</sup> *Id.*; Chris Brennan, *State school \$ allocation challenged*, Philadelphia Daily News (July 23, 2002) <[www.philly.com/mld/dailynews/news/local/3716697.htm](http://www.philly.com/mld/dailynews/news/local/3716697.htm)> (accessed Sept. 14, 2003).

<sup>78</sup> See SRC Principles, *supra* note .

Two days later the landscape changed yet again as Schweiker claimed the reports of restrictions were just a “huge misunderstanding” and that the \$55 million would be available to all 70 partnership schools.<sup>79</sup> This still left the SRC compromised in its ability to make appropriate budget decisions for all 264 schools in the district.<sup>80</sup> Although the Governor’s representatives complained that critics were misguided and paranoid about a “conspiracy” between the administration and Edison, Edison representatives themselves acknowledged that they had complained to the administration that they would not be able to operate the schools they had been assigned unless they received additional funds.<sup>81</sup> None of these communications were shared with the SRC or those negotiating on its behalf with Edison and the other private managers.<sup>82</sup> The next week, the state administration, through Secretary of Education Charles Zogby, retracted the retraction and, in writing, demanded that the SRC provide the private managers with an additional \$1500 per student above what all other schools would get<sup>83</sup>. Zogby

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<sup>79</sup> Editorial, *Spread the Wealth*, Philadelphia Daily News, July 15, 2002; Chris Brennan, *Republicans split over schools’ \$55M*, Philadelphia Daily News (July 18, 2002); Martha Woodall and Dale Mezzacappa, *Schweiker clarifies use of funds for city schools*, Philadelphia Inquirer B1 (July 12, 2002).

<sup>80</sup> See Susan Snyder, *Vallas: Playing field must be level*, Philadelphia Inquirer B1 (July 20, 2002).

<sup>81</sup> Edison demanded an extra \$1500.00 per pupil—an interesting demand coming from the company that claimed it could run the entire district for less money. See Edison Report, *supra* note ; Chris Brennan, *45 schools to split \$55M in extra funding*, Philadelphia Daily News (July 9, 2002).

<sup>82</sup> *Id.*

<sup>83</sup> See Susan Snyder, *Street’s office criticizes Pa.’s school-funding plan*, Philadelphia Inquirer B1 (July 23, 2002); Chris Brennan, *State school \$ allocation challenged*, Philadelphia

reminded the SRC that he would exercise the power granted him in the budget language to deny the entire \$55 million if his directions were not obeyed<sup>84</sup>. While the budget fight was proceeding, the SRC hired Paul Vallas as the new CEO of the Philadelphia School District.<sup>85</sup> Vallas, formerly in charge of the Chicago public schools, shepherded through a compromise which allowed the privatized schools a greater share of the state funding but not nearly as much as Zogby and Edison had demanded.<sup>86</sup> In the waning weeks of the summer, the schools prepared for a new year, with much uncertainty.

### III. Who are these reformers and what do they want?

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Daily News (July 23, 2002) <[www.philly.com/mld/dailynews/news/local/3716697.htm](http://www.philly.com/mld/dailynews/news/local/3716697.htm)> (accessed Sept. 14, 2003).

<sup>84</sup>The city's response was outrage. The Philadelphia Daily News termed Zogby a "sliver of a bureaucrat" who was "essentially a pimp for Edison Schools," and urged the SRC to throw the money back if they had to use it only in the way Zogby demanded. Editorial, *State Holding School Reform Hostage: What School Reform Commission Should Tell State: Drop Dead*, Philadelphia Daily News at 17 (July 19, 2002).

<sup>85</sup> SRC Press Release, July 10, 2002, <[http://www.philsch.k12.pa.us/src/press\\_releases/ceo\\_release.pdf](http://www.philsch.k12.pa.us/src/press_releases/ceo_release.pdf)> (accessed Sept. 14, 2003).

<sup>86</sup> Edison ended up with an extra \$881 per student over the regular district budget amount; the other private managers were awarded less—Chancellor Beacon, \$803, Victory, \$857, Universal Companies, Foundations, Inc. \$667, Temple University and the University of Pennsylvania, \$450. Chris Brennan, *All schools to share \$55M in funding*, Philadelphia Daily News (Aug. 1, 2002) <<http://www.philly.com/mld/dailynews/news/local/3776740.htm?template=contentModules/printstory.jsp>> (accessed Sept. 15, 2003); Vallas also ended Edison's role as lead consultant, a contract worth \$18,000,000. Chris Brennan, *Vallas kills consulting pact sought by Edison Schools*, Philadelphia Daily News (July 25, 2002) <[www.philly.com/mld/dailynews/news/local/3731056.htm](http://www.philly.com/mld/dailynews/news/local/3731056.htm)> (accessed Sept. 16, 2003).

Philadelphia is a battleground for the meaning and purpose of public education—should it be viewed as an institution of community which aspires to provide a free quality education to all children<sup>87</sup> or should we look at the system from an individual consumerist perspective and evaluate it based solely on what it has done or can do for a particular child or family? The issues, the language and the fight in Philadelphia brought to life and illuminate the theories animating the school reform movement which have been usefully described by philosopher Amy Gutmann<sup>88</sup> and theorist Michael Apple<sup>89</sup>.

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<sup>87</sup> I do not argue here that the public education system in general or Philadelphia's system in particular has succeeded in bringing this aspiration to reality. Public education reflects the social and class divisions of society and suffers from insufficient support, both financial and societal, and from deep inequities between districts that thwart its aspirations. I do not argue that Philadelphia has no need for improvement and is meeting the needs of all of its students now. My purpose is to argue for an honest and historically aware evaluation of how the district is meeting those aspirations and an honest evaluation of what public education is supposed to mean.

<sup>88</sup> Gutmann has written extensively on morality, ethics and democracy. *See, e.g.* Amy Gutmann and Anthony Appiah, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* (Princeton, N.J. Princeton University Press, 1996); Amy Gutmann and Dennis Thompson, *DEMOCRACY AND DISAGREEMENT*, (Cambridge, Mass.: Belknap Press of Harvard University Press, 1996); Amy Gutmann, *DEMOCRATIC EDUCATION*(Princeton, N.J.Princeton University Press, 1987, 2d ed. 2003); Amy Gutmann, *LIBERAL EQUALITY* (New York and London: Cambridge University Press, 1980); Amy Gutmann and Dennis Thompson, *ETHICS AND POLITICS: CASES AND COMMENTS* (Chicago, Ill.: Nelson-Hall, 1984, 3d ed.1997).

<sup>89</sup> Michael W. Apple is John Bascom Professor of Curriculum and Instruction and Educational Policy Studies at the University of Wisconsin. He has written extensively on the relationship between culture and power in education. *See, e.g.*, *CULTURAL POLITICS AND EDUCATION* (New York: Teachers College Press, 1996); *EDUCATING THE "RIGHT" WAY: MARKETS, STANDARDS, GOD AND INEQUALITY* (New York: RoutledgeFalmer, 2001); *EDUCATION AND POWER* (New York: Routledge, 2d ed.1995); *IDEOLOGY AND CURRICULUM* (New York: Routledge, 2d ed., 1990); *OFFICIAL KNOWLEDGE: DEMOCRATIC KNOWLEDGE IN A CONSERVATIVE AGE* (New York: Routledge, 2000).

Amy Gutmann defined three competing normative theories of education which animate the competing forces pushing education reform.<sup>90</sup> The “family state” model puts control of education in the hands of the state;<sup>91</sup> the “state of families,” in contrast, entrusts educational authority exclusively to parents.<sup>92</sup> The third competing vision, the state of individuals, “maximizes future choice without prejudicing children towards any controversial conception of the good life.”<sup>93</sup> The story of school reform in Philadelphia shows that the rhetoric of reform, especially the use of empowerment as a putative goal, evokes the states of families and individuals, but the reality of the reforms themselves—the insistence that failure is widespread and can only be addressed by accountability in the form of state control and high-stakes standardized tests—firmly invokes the family state.<sup>94</sup>

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<sup>90</sup> Gutmann, *DEMOCRATIC EDUCATION*, *supra*, note , at 22 (hereafter Gutmann).

<sup>91</sup> “The defining feature of the family state is that it claims exclusive educational authority as a means of establishing a harmony—one might say a constitutive relation—between individual and social good based on knowledge. Defenders of the family state expect to create a level of like-mindedness and camaraderie among citizens that most of us expect to find only within families (and now perhaps not even there).” *Id.* at 23.

<sup>92</sup> *Id.* at 28. Barbara Woodhouse argues that the foundational Constitutional cases on family law and parental rights—*Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)—represent “the constitutionalization of a parental right to control children’s education [which] perpetuated a view of the child as parental property and of education of the child as a private good rather than as a fundamental right of the child or a fundamental responsibility of the community.” Barbara Woodhouse, *Speaking Truth to Power: Challenging the Power of Parents to Control the Education of Their Own*, 11 *Cornell J. L. & Pub. Pol’y* 481, 482 (2002).

<sup>93</sup> The state of individuals focuses primarily on the individual learning needs of individual children, with the goal of advancement in material terms but without imposing a particular value system. Gutmann, *supra*, note at 34.

<sup>94</sup> Gutmann critiques and rejects all three in favor of a vision of democratic education that offers shared authority between the state, education professionals, and the family, “conscious social reproduction in its most inclusive form. Unlike a state of families, a democratic state

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recognizes the value of professional authority in enabling children to appreciate and evaluate ways of life other than those favored by their families. Unlike the state of individuals, a democratic state recognizes the value of political education to predispose children to accept ways consistent with sharing the rights and responsibilities of citizenship in a democratic society. A democratic state is therefore committed to allocating educational authority in such a way as to provide its members with an education adequate to participating in democratic politics, to choosing among (a limited range of) good lives, and to sharing in the several subcommunities, such as families that impart identity to the lives of its citizens." *Id.* at 42.

Michael Apple more recently analyzed the main threads of the movement for privatization of schools, which he terms “conservative modernization,” and categorized them as neoliberal, neoconservative, and authoritarian populism.<sup>95</sup> Although the purposes of categorization differ for Gutmann and Apple,<sup>96</sup> the overlap between them provides an enormously helpful framework for understanding both the rhetoric and the reality of the Philadelphia reform forces. Apple’s categories largely echo the three philosophies Gutmann identified. The authoritarian populists, based in the fundamentalist Christian right, adhere quite directly to the philosophy of the state of families, advocating that educational authority be

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<sup>95</sup> Apple, *supra* note 13 at 28-29.

<sup>96</sup> Gutmann’s goal is to develop a philosophy of democratic education. She is developing a useful theory of moral education that will allow evaluation of policy: “The primary aim of a democratic theory of education is not to offer solutions to all the problems plaguing our educational institutions, but to consider ways of resolving those problems that are compatible with a commitment to democratic values. A democratic theory of education provides principles that, in the face of our social disagreements, help us judge (a) who should have authority to make decisions about educations, and (b) what the moral boundaries of that authority are.” Gutmann, *supra*, note at 11. Gutmann’s democratic state may, indeed should, educate to predispose children towards “identification with and participation in the good of their family and the politics of their society.” *Id.* at 43. But with two major constraints or limits on the state and the family—nonrepression—which “prevents the state, and any group within it, from using education to restrict rational deliberation of competing conceptions of the good life and the good society,” *id.* at 44, and nondiscrimination, which demands that “[n]o educable child may be excluded from an education adequate to participating in the political processes that structure choice among good lives.” *Id.* at 45. The commitment to this vision of democratic education is absent from the rhetoric and theory of all three threads of reformers. Martha Minow analyzed these waves of reformers as pushing choice as the panacea in replacement of the push for equity that animated inclusion reformers who sought integration of all races and genders and inclusion of children with *special* needs.. See Martha Minow, *Reforming School Reform*, 68 *Fordham L. Rev.* 257, 263 (1999). Apple’s explicit goal is to understand the forces of privatization to more effectively counter them, and to more fully understand the real limitations of current educational practices that have contributed to the support for privatization. Apple, *supra*, note 13 at 8-9, 95.

financed by the state but controlled by parents<sup>97</sup>. The neoconservatives yearn for a romantic, idealized past where the state both controlled education and ensured that it uniformly promoted the values of patriotism, morality, and Western traditions, echoing Gutmann's family state.<sup>98</sup>

The neoliberals are not quite such a neat apparent fit with the state of individuals which Gutmann identified primarily with moral neutrality. Yet, at heart they are—their principle is the market, a neutral market that will effectively, efficiently—and neutrally—sort and educate children, if only it is left to operate with minimum interference.<sup>99</sup>

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<sup>97</sup> Apple, *supra*, note 13 at 53-57.

<sup>98</sup> As Apple points out, this romanticized past ignores not only the past battles over curriculum but also discounts the past of much of the population of the United States. Apple, *supra*, note 13 at 49.

<sup>99</sup> Apple, *supra*, note 13 at 38-47.

Apple identifies a fourth important element of the forces advocating for “radical restructuring” of education—the technical support of a managerial class.<sup>100</sup> Apple analyzes the mutual interests that have brought these forces into alliance and the tensions that threaten to disrupt their cooperation.<sup>101</sup> The family state/neoconservative demand for uniform standards, curricula and, above all, standardized testing to evaluate schools’ effectiveness at achieving the standards, functions to justify the imposition of market and consumer choice—even though the market notion is grounded in arguments that a proliferation of types of schools and pedagogies will be the beneficial result of market-based schooling.<sup>102</sup> The tension between uniformity and variety is analogous to the tension between the neoconservative desire to impose a national vision of education on all schools with the authoritarian populist effort to separate the state completely from educational authority by placing all funding in the hands of parents who will then be able to use public money to fund education compatible with their personal and religious values.<sup>103</sup> The authoritarian aspect of this movement may falter if and when such public funding is available but is not restricted to those schools that comport with the vision and values of the Christian right. Will they support the right of fundamentalist Muslim parents to use public money to educate their children in the tenets of their religion?<sup>104</sup>

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<sup>100</sup> Apple, *supra*, note 13 at 57-59.

<sup>101</sup> Apple, *supra*, note 13 at 59-62.

<sup>102</sup> This conclusion is at the heart of Chubb and Moe’s insistence that total privatization of primary and secondary education in the United States is the panacea that will cure all of public education’s ills. Chubb and Moe, *supra*, note 13 at 217.

<sup>103</sup> Compare Gutmann, *supra*, note at 28 with Apple, *supra*, note 13 at 16.

<sup>104</sup> The school profiles section of the Pennsylvania Department of Education website identifies at least three Muslim schools in Philadelphia with a total of 260 students in 2000-2001,

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the Al Aqsa School, Muhammad's Islamic Academy, and the Quba Institute of Arabic and Islamic Studies. See <http://www.paprofiles.org/pa0001/Philadelphia.htm#226510132> (Accessed March 11, 2003). The profiles do not include the curriculum or any information as to the level of religious rigor of the schools.

The Philadelphia story presents a weird but, under Apple's analysis, predictable conflation. The rhetoric is grounded primarily in Gutmann's states of families and of individuals but the reality is firmly the family state. To use Apple's terms, the reform forces use the rhetoric of choice and parental empowerment dear to the authoritarian populists and the privateers but the reforms themselves have been imposed with minimal choice or input by parents, students or teachers and the market has been imposed by the state not chosen by any parent or student<sup>105</sup>. Instead the changes have been dictated by the neoconservative state bureaucracy, guided by an unquestioned belief in the value of uniformity and high-stakes standardized testing.<sup>106</sup> All of this has been enabled and supported by the managerial class that depends on the standards and testing movement for its employment and validity.<sup>107</sup> The reform forces have occasionally paid lip-service to some of the ideals of the democratic state theory proposed by Gutmann but have never taken seriously the most essential aspects of her theory—that parents and the state share educational authority and that authority be committed to providing a nonrepressive, nonexclusive education adequate to allow all educable children to participate.<sup>108</sup>

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<sup>105</sup> See Part II, *supra* describing the lack of communication the SRC had with parents.

<sup>106</sup> See Part IV, *infra*, at .

<sup>107</sup> Edison describes itself as “[t]he nation’s leading partner with public schools and school districts, focused on raising student achievement through its research based school design, uniquely aligned assessment systems, interactive professional development, integrated use of technology and other proven program features.” <[www.edisonschools.com/home/home/cfm](http://www.edisonschools.com/home/home/cfm)> (accessed August 25, 2003).

<sup>108</sup> See Part IV. C. *infra*.

The impetus for change in Philadelphia is grounded in several unquestioned assumptions—that the public schools are failing;<sup>109</sup> that drastic intervention is necessary and risk-free<sup>110</sup>; and that those who are most involved in the current system as administrators, teachers, students and parents cannot be trusted because they are defenders of the status quo.<sup>111</sup> The state officials who imposed change on Philadelphia asserted they were acting in the interests of the children and parents of the city—but they had no interest in communicating with the actual people

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<sup>109</sup> For example, James Nevels, the chair of the School Reform Commission appointed to run the Philadelphia School District, stated: “I took this job because I believed there was room for success. I believed that [the schools] could not get worse.” Martha Woodall, *His year at the heart of city’s schools*, Philadelphia Inquirer, B1, 4 (Dec. 22, 2002). Edison’s Report to the Governor concludes, “[t]his is a critical time for the children, parents, and the community of Philadelphia. The school system, having miseducated most of its students for many years, is now teetering at the edge of financial failure.” Edison Report, *supra* note at 75.

<sup>110</sup> Edison asserted that “[t]he risk of not implementing the proposed change is too great. Philadelphia students deserve a quality education, and they deserve to have a system of accountability, checking the effectiveness of those who control their education.” Edison Schools, *Myth vs. Facts*, website. The “things can’t get worse” argument and its near-twin “things are so bad that change of any kind can’t hurt” both ignore the history of public education. As Molly O’Brien has demonstrated, the United States has only recently begun to attempt to seriously effectuate the goal of inclusive education for all, including children of color (Brown 1954), children with special needs (1975), non-English speaking children (1988). Molly Townes O’Brien, *Questioning the Power of Consumerism to Reform Public Education*, 75 St. John’s L. Rev. 233, 242-44 (2001)(O’Brien, *Questioning the Power*). These relatively recent efforts are endangered by the voucher and privatization movements that are grounded in market efficiency and parent/consumer choice instead of the inclusive goal of equity and quality education for all children. *Id.*; Minow, *supra*, note at 264.

<sup>111</sup> This position is easy to understand when it aims at those whose livelihoods depend on the current system—though it denigrates their experience and expertise. It may be more puzzling that I include parents—but, as will be demonstrated in part IV. C., the choice forces have very little interest in the views of current public school parents. The Center for Education Reform goes so far as to call them cheerleaders for the status quo. See <<http://edreform.com/>>. Wilbur Rich refers to a “public school cartel (PSC) made up of administrators, school activists, and teacher union leaders” but does not define school activist. Wilbur Rich, *Putting Black Kids into a Trick Bag: Anatomizing the Inner City Public School Reform*, 8 Mich. J. Race and L. 159, 181 (2002).

affected by their decisions.<sup>112</sup> They asserted the value of empowerment through parental choice and local control while insisting that Philadelphia accept state and federally mandated standards, particular testing regimes and management by private profit-making entities who, by definition, owe their greatest allegiance not to the families in their schools but the shareholders in their corporations.

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<sup>112</sup> In my role as a concerned parent, I wrote to Governor Schweiker and to Secretary Zogby four times about the reform process and its impact on my children's schools. Neither official answered any of these letters or even acknowledged them. Copies are on file with the author. As was detailed above, the members of the School Reform Commission, which took control of the Philadelphia School District, never visited the schools they targeted for intervention until after they selected them. Even the official community outreach effort that was part of the assessment of the school district performed by Edison, Inc. in the fall of 2001, managed to conduct only one parent focus group which had only three parents and one with students that included only eight of them. Universal Report, *supra*, note at 7.

Michael Apple's analysis of the pro-choice forces effectively explains the dissonance between the rhetoric and the reality—the choice rhetoric itself is dependent on the development of “standards” to enable the consumers to choose.<sup>113</sup> We have to have “objective” criteria to use the market—so the reality of the family state is a necessary precursor to justify the market approach to education.<sup>114</sup> The adherents of the state of families accept this compromise to enhance the

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<sup>113</sup> See Apple, *supra*, note at 59-60.

<sup>114</sup> The No Child Left Behind legislation illustrates the role of standards in the road to “choice” in its perverse requirement that offers the illusion of choice to children enrolled in schools labeled “failing” based solely on test scores. The schools must notify all students that they have a right to transfer to a higher performing school in the same district—but the law provides no funding other than transportation, no obligation on higher performing districts to take children from struggling ones, and no concern for the destructive impact on functioning schools which will face overcrowding from the potential influx of students entitled to transfer. See 20 U.S.C. § 6316. The Department of Education issued regulations implementing the transfer provision which preclude the “failing” districts from asserting a lack of space in their performing schools. 34 C.F.R. § 200.32, 200.44. Failing districts will now be obligated to find room somehow—even if that means purchasing space at a presumably high premium from other districts or overcrowding their performing schools. 34 C.F.R. §200.44(h)(1)(if a district has no schools that are not identified as in need of improvement or subject to even higher sanctions, then the district “must, to the extent practicable, establish a cooperative agreement for a transfer with one or more other [districts] in the area.”). Undersecretary for Education Eugene Hickok explained that this requirement is intended to make “public school choice . . . become part of the culture of American public education.” Eugene Hickok quoted in Ellen R. Delisio, *No Child Left Behind Picks Up Steam*, Education World, [www.education\\_world.com/a\\_issues/issues371.shtml](http://www.education_world.com/a_issues/issues371.shtml) (accessed Sept. 8, 2003). Undersecretary Hickok goes on to suggest that “districts that currently have capacity challenges can create opportunities to meet those challenges. In New York City, for example, the possibility of charter schools looms large. The possibility of cyber schools . . . looms large.” *Id.*

It does not take a genius to see the pressure for vouchers or other roads out of the public system that these regulations will impose on a district like Philadelphia which has relatively few schools not labeled as failing under NCLB. The labels are particularly harsh because they can be imposed for failure to show improvement every year for every subgroup within the school, including white, African-American, Latino, Asian-American, and Native American students, students for whom English is not a first language, and special education students. 20 U.S.C. § 6311(b)(2); 20 C.F.R. §200.13(a)(7)(ii). Pennsylvania required schools to have 35% of their students at proficient or above on math and 45% in reading in 2002. It identified 884 public

possibility of getting funding for their schools or for home schooling options, even though the emphasis on state control has actually reduced choice and reduces parental input on the curriculum mandated at ever higher levels of government.<sup>115</sup>

IV. The Rhetoric of Reform

A. The Rhetoric of Failure

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schools—both traditional and charter—which failed to meet that standard, including 29 of 39 charter schools and 209 of the 264 traditional public schools. *See Schools Are Warned*, Philadelphia Inquirer, B16, Jan. 3, 2003. The rates of improvement must be constant—a big gain in one year will not save a school from the failure label the next year if a subgroup experiences a decline. *See, e.g.* Sam Dillon, *Thousands of Schools May Run Afoul of New Law*, New York Times, A33, Feb. 16, 2003; Michael Winerip, *Defining Success in Narrow Terms*, New York Times, B7, Feb. 19, 2003. Indeed, when the 2002-2003 scores came out for Pennsylvania, over half the schools in the Commonwealth were labelled as failing to meet “adequate yearly progress” under the No Child Left Behind criteria. Dale Mezzacappa et al, *Pa. schools missing federal goals*, Philadelphia Inquirer, A1 (Aug. 13, 2003).

<sup>115</sup> Neither No Child Left Behind nor the Empowerment Act mandate a particular curriculum but both stress the importance of aligning curricula with the mandated assessments. The pressure to improve test scores which is spurred by the sanction provisions of both Acts will foster use of curricula that teach to the test. *See, e.g.* Alfie Kohn, *THE SCHOOLS OUR CHILDREN DESERVE* at 73-112 (N.Y. Houghton Mifflin 1999).

The assertion that public education is failing is a necessary underpinning to the theories of all three threads of the school reform movement. The state of families vision is grounded in a belief that loosening of traditional values and experimentation run amok have led to the failure of current public schools and must be reigned in by centralization and a return to traditional values.<sup>116</sup> The state of families adherents also rely on failure to justify their demand that control over education be placed in the hands of parents who will then be able to correct these failures by using public funds to pay for parent-directed education.<sup>117</sup> The market/choice forces and managers who facilitate and implement choice reforms depend on the failure of the current system to justify their calls for wholesale change in the fundamental structure of how education is provided.<sup>118</sup> The rhetoric of the Philadelphia reform process illustrates this need to see schools as failing and to define failure very narrowly, if it is defined at all. Most of the assertions of failure do not even bother to attempt to define what the term means.

The proponents of the state takeover universally assert that the Philadelphia public schools are failing. Kenneth Gamble, president of Universal Companies and an early supporter of Edison's role in Philadelphia, proclaimed:

America has developed separate and unequal societies. Within our urban communities, which are predominantly African American and Hispanic, there are disproportionate levels of unemployment, teen families, poor health and a failing education system that will only reinforce and further deteriorate the overall sub-par economic and social conditions facing our communities. These conditions can only be addressed with strong community leadership in a

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<sup>116</sup> See Apple, *supra*, note 13; Richard Rothstein, *THE WAY WE WERE?* (Centyr Foundation 1998).

<sup>117</sup> Gutmann, *supra*, note .

<sup>118</sup> Chubb and Moe, *supra*, note .

partnership with government. Collectively and individually, we stand ready in taking responsibility in the education of our children. We will succeed where everyone else has failed.<sup>119</sup>

This group went on to state:

Philadelphia's educational crisis has created an unprecedented opportunity for community organization and parents to vigorously and cooperatively pursue true education reform. This coalition of organization, embracing practically every area of the city, collectively and individually, is committed to dramatic change in public education giving our children a real chance to compete and to succeed. We are resolved to take a giant step forward, pledge to never returning to the status quo of today.<sup>120</sup>

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<sup>119</sup> Press release, October 31, 2001, Groups represented: Universal Companies, Community Connections, West Philadelphia Coalition (Lee Tolbert and Lana Watkins), Overbrook Coalition (Gail Hawkins- Bush), Neighborhood School Network (Kimberly Turner), Germantown Settlement, Nueva Esperanza, BAE0 (Keisha Hegaman).

<sup>120</sup>*Id.*

Media coverage of the reform process nearly always described the Philadelphia schools as “failing”,<sup>121</sup> “struggling”<sup>122</sup> or “troubled.”<sup>123</sup> A strident but typical example is the Associated Press headline, “Philly Schools Failing Academically” over a story that begins: “The math and reading skills of Philadelphia students have sunk to ‘tragic levels,’ with 80 percent failing

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<sup>121</sup> See, e.g. Erika Niedowski, *Woes growing, educator’s fate in the balance*, The Baltimore Sun 1A (Sept. 28, 2002) 2002 WL 100129740, “Edison faces one of its most important – and difficult–test: the transformation of 20 failing schools in Philadelphia.” “Clearly Philadelphia’s public schoolsystem is failing its students. Only 12% of the city’s students perform at a ‘proficient’ level on state tests, and more than half are essentially failing reading and math.” The Wall Street Journal, Review and Outlook, Editorial, 2001 WL-WSJ 2873279 (Aug. 21, 2001). See also, Rebecca Winters, *The Philadelphia Experiment*, Time Magazine 64 (Oct. 21, 2002) 2002 WL 21960222 (2002); Sarah Schmidt, *Privatizing the classroom*, National pOst A16 (2001 WL 31022029 (Nov. 29, 2001); Sally C. Pipes, *Kids com last*, Investor’s Business Daily A20 (Dec. 6, 2001).

<sup>122</sup> See, e.g. National Public Radio, Morning Edition, *Philadelphia turning struggling schools over to private hands*, 2002 WL 3189196 (August 19, 2002).

<sup>123</sup> The media emphasis on failure continues to infect coverage of public education in Philadelphia. In the summer of 2003, two sets of standardized test scores from the 2002-2003 school year were released–the Terra Nova, administered in September 2002 and again in May 2003 to grades 3 through 10; and the PSSA, administered in April 2003 to grades 3, 5, 8, and 11. The Philadelphia public schools showed gains in scores on both tests. The headlines and placement in the Philadelphia Inquirer of the stories about these results are curious however. The headline for the story about the Terra Nova results read: “Test results show progress in schools;” the story appeared on the first page of the second section of the paper. See Philadelphia Inquirer, June 19, 2003, Section B1. The headline for the general story on the PSSA results read: “Report shows big gains on PSSA test in region;” accompanying a story placed in the lower left corner of the front page. Philadelphia Inquirer, August 20, 2003, A1. A specific story on the high test performance of the restructured schools, those being reformed directly by the Philadelphia School District instead of being switched to private management, ran on the first page of the second section under the headline: “‘Restructured’ schools shine on test: The overhauled Phila. schools showed greater improvement on PSSA exams than charters or privately managed sites.” Philadelphia Inquirer, Aug. 21, 2003, B1. But the story that got placed on the top of the front page had the banner headline: “Pa. schools missing federal goals: More than half aren’t gaining fast enough for all students to be proficient in reading and math by 2014, as required.” Philadelphia Inquirer, Aug. 13, 2003, A1. Once again, “failure” commanded the lead position.

standardized tests, according to a governor's report that recommended privatizing the school district."<sup>124</sup> These stories typically use test scores alone or test scores and reported incidents of violence as the sole basis for characterizing a school as failing.<sup>125</sup>

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<sup>124</sup> Michael Rubinkam, *Philly Schools Failing Academically*, Associated Press (2001 WL 29789984 Nov. 2, 2001). The Los Angeles Times echoed the 80 % "failure" rate, a figure that includes all students who achieved "Basic" on the PSSAs. See 2001 WL 28925754 (Nov. 3, 2001).

<sup>125</sup> They have powerful company in using these qualities as the basis for failure. The statement of purpose for the No Child Left Behind asserts that the legislation is intended to hold schools "accountable for improving the academic achievement of all students, and identifying and turning around low-performing schools that have failed to provide a high-quality education to their students, while providing alternatives to students in such schools to enable the students to receive a high-quality education." Section 6301(4). Annual yearly progress under No Child Left Behind is measured solely by test scores, that is "a set of high-quality, yearly student academic assessments . . . that will be used as the primary means of determining the yearly performance of the State and of each local educational agency and school in the state . . . ." Section 6311(b)(3)(A). The state must use at least one other indicator which may be an additional test, grade retention rates, attendance rates, or rates of students completed gifted, or other accelerated programs. 34 C.F.R. § 200.19(b)(1)-(4). However, these additional indicators may be used only to identify more schools as in need of improvement, corrective action, or restructuring. 34 C.F.R. §200.19(e)(2). They may not be used to remove schools from the sanction list except in one limited circumstance—a school that misses the annual yearly progress goal for a sub-group can avoid sanctions if it had at least 10 % fewer students in that sub-group rank at below proficient and that sub-group made progress on one of the additional indicators. 34 C.F.R. §200.20(b)(1)-(2).

The most striking aspect of the language used by both the governors—Ridge and Schweiker—is how insistent they were that the entire Philadelphia School District was failing and how much they also equated excellence with choice and privatization of schools. On October 24, 2001, newly sworn in Governor Schweiker told the Philadelphia Bar Association: “For-profit companies are not the enemy. Failure is the enemy. I have no time for those who prefer a publicly operated school that fails, to a privately operated school that serves them well.”<sup>126</sup>.

Both Tom Ridge and Mark Schweiker were consistent supporters of private management of schools while governor.<sup>127</sup> Schweiker, for example, hailed the *Zelman* decision as “an

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<sup>126</sup> Robert C. Johnston, *Legislature signals probable takeover of Phila. schools*, Education Week 1, Oct. 31, 2001, 2001 WL 12047111.

<sup>127</sup> The centerpiece of Ridge’s education program as governor was the effort to bring a voucher program to Pennsylvania. That effort failed. As a backup, Ridge strongly supported choice in the form of charter schools, praised as one of the most effective in the nation by supporters of school choice. See Center for Education Reform website See <<http://edreform.com/>> (accessed Sept. 16, 2003). Philadelphia itself had 39 charter schools in 2001-2002 with four new charter schools scheduled to open in September 2002, and three existing public schools to then become charter schools as part of the SRC reform process. When Ridge signed the legislation that authorized converting public schools to independent status, funds for tutoring, and tax credits for corporations providing school choice scholarships, he said, “I couldn’t wait to sign this bill. It includes some of the most dramatic education reforms Pennsylvania or the nation has ever seen—reforms that will launch the most concerted effort ever to rescue elementary school students in academic peril—while improving education across the board for all our kids.” Press Release, Governor’s Office, May 17, 2001.

It is a little hard to know what he supported before given his rather limited public career. In keeping with a Pennsylvania tradition, his success at state-wide political office is widely attributed to the fact that he shares a name with a very well known Pennsylvania political figure, former United States Senator Richard Schweiker. They are, however, merely distant cousins. Pennsylvania has three times elected men named Robert Casey to statewide elective office—but only one of them was the recent governor, Robert Casey. The others just shared his name. See G. Terry Madonna, *The Pennsylvania Brand Name Game*, Millersville University Center for Politics and Public Affairs, May 8, 2001 <<http://muweb.millersville.edu/~politics/many82001.htm>> (accessed Aug. 23, 2003). The Schweiker Report demands that Philadelphia be managed by an entity “expert in the challenges of urban education, while thriving in a private-sector environment where compensation and

extraordinary victory for children and parents everywhere . . . [E]ducation tax dollars should follow children to their school of choice. When we create a vibrant marketplace of educational providers, competition will force improvement.”<sup>128</sup>

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continued employment are dependent on results.” Schweiker Report, *supra*, note 2, Executive Summary at v.

<sup>128</sup> Press Release, Governor’s Office, June 27, 2002.

Schweiker issued his own report in response to the Edison evaluation, which began with ten principles of education reform, including an explicit commitment to charter school.<sup>129</sup>

Schweiker's report accepted as true Edison's assessment of the Philadelphia School District, despite the highly contested nature of that evaluation.<sup>130</sup> In both his principles and his specific

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<sup>129</sup> Governor Schweiker's ten principles were:

1. Educational greatness. Reform cannot be just another exercise in plugging a budget hole, or delaying a problem. Our goal is to make Philadelphia a great urban school district.
2. Any new public money must go to improve education. More money for the same results is unacceptable. New investments to improve education must first be focused on children in Philadelphia's lowest performing schools
3. We must be relentless in ensuring that public money goes into the classroom. To do so, we must attack inefficient or nonessential spending with vigor—including significantly streamlining and refocusing the District's central administration.
4. Any reform plan must value teachers and invest in their professional development.
5. Special-needs children must be protected. No effort to improve education can leave them behind.
6. High-performing schools in the district also must be protected. Efforts to improve education will not be successful if they come at the expense of the Philadelphia Schools that are already working well.
7. Any reform plan must include a strong central school management system that clearly and publicly identifies the academic performance expected of every school; that insists upon proven educational programs to achieve those results; and that articulates clear, community-supported accountability measures.
8. Whenever possible, reform should be a vehicle to empower the *Philadelphia community* to take charge of its schools.
9. Continuity is essential. There must be a long-term, multi-year commitment to a single reform plan. The plan must be based on proven educational programs, and a realistic budget, with revenues the District actually can achieve.
10. Charter schools must be valued in any reform plan. Any effort to control the district's charter-school costs must be grounded in the fact that charter schools are providing some of the most exciting educational options available to Philadelphia parents.

Schweiker Report, *supra*, note 2.

<sup>130</sup> See Council of Great City Schools, *Analysis and Comment; supra, note* ; *Setting the Record Straight, supra, note* ; Casey Audit.

recommendations, Schweiker accepted, without question, several of Edison's most contested conclusions about the District—including that Philadelphia had more teaching staff than necessary, that it spent less per pupil in its lowest-performing schools,<sup>131</sup> and that it should be managed by a private entity.<sup>132</sup>

Both Edison and Schweiker concluded that the Philadelphia School District was an academic catastrophe. Schweiker's key conclusion was that "academic performance is at tragic levels for the children of Philadelphia, with 80 percent of the District's children scoring below 'proficient' in reading and math. The human consequences of that failure are heartbreaking—170,000 Pennsylvania boys and girls who have not achieved proficiency in the basic skills of learning. Worse, there are some 140,000 children who are failing reading and math outright. This is not an 'issue' or an 'challenge.' It is a full-fledged crisis. We are hemorrhaging children's futures."<sup>133</sup>

There are two significant problems with this assessment. It lacks any historical perspective, including complete inattention to the gains that Philadelphia had made in the previous five years. It also uses a highly politicized and misleading definition of "failure."

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<sup>131</sup> See *infra*, note .

<sup>132</sup> See Schweiker Report, *supra*, note 2.

<sup>133</sup> Schweiker executive summary, p. ii. Department of Education

The reform efforts under David Hornbeck, superintendent in Philadelphia from 1994-2000, had showed improvement even under the limited standardized-test-score definition of failure. Hornbeck embarked on an ambitious reform effort called Children Achieving.<sup>134</sup> This effort itself was controversial<sup>135</sup> What can be determined however, is that test scores showed improvement.<sup>136</sup> Indeed, according to a national evaluation of standardized test scores, Philadelphia outpaced the rest of Pennsylvania in its test score improvement for all grades tested in all subjects tested.<sup>137</sup> Hornbeck resigned under pressure in 2000 and was replaced by a team—Deidre Farmbry, a life long Philadelphia educator, as Chief Academic Officer; and Philip Goldsmith, a business executive, as Chief Executive Officer.<sup>138</sup> They continued the educational reforms instituted under ChildrenAchieving but streamlined the administrative structure. Test score gains continued.<sup>139</sup> Neither Schweiker nor Edison addressed the past efforts except to label them failures because the scores remained below state averages in absolute terms.

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<sup>134</sup> See Philadelphia School District, *Tell Them We Are Rising: The Philadelphia Story, 1994-98* (2000)(on file with author).

<sup>135</sup> Teachers were highly critical because they felt sandbagged at how testing was handled initially. Legislators took offense when Hornbeck suggested that inequality of funding was racist—though his perspective is supported by Jonathan Kozol's exploration evaluation of school funding in the United States. See Jonathan Kozol, *SAVAGE INEQUALITIES*.(Harper Perennial 1991).

<sup>136</sup> Though I remain dubious about the value of high-stakes testing, see *infra*, those who do rely on them as the primary or exclusive means of accountability, are obligated to consider the same information when it does not advance their goals.

<sup>137</sup> See Council of Great City Schools, *supra*, note at 9-10, 21.

<sup>138</sup> This change in terminology—from Superintendent to Chief Executive Officer—itself is emblematic of the marketization of education. Charter schools in Pennsylvania commonly have Chief Academic Officers not principals.

<sup>139</sup> See Council of Great City Schools, *supra*, note .

The other contested matter that Schweiker's rhetoric ignored is the meaning of failure and the validity of the Pennsylvania standardized tests in documenting failure. The PSSA tests use four categories to label test scores in reading and math<sup>140</sup>—advanced, proficient, basic and below basic. Schweiker labeled “tragic” and performance less than “proficient”. But until academic year 2001- 2002, the test was norm-referenced and those four categories represented a division of results by quartiles—the top 25% of the scores across the state were advanced, the next 25% proficient, the next 25% basic and the bottom 25% were below basic.<sup>141</sup> Thus, by Schweiker's definition of failure, half of the children in Pennsylvania had to fail this test. Lisa Kelly has said that

Norm-referenced tests embody the worst of two worlds. On the one hand, if accurately normed, the tests are set up to stigmatize half of the children as being below average. On the other hand, usually the norms are so old that test results at the statewide level provide a false feel-good impression that nearly all of the children are above average. Outdated, norm-referenced tests serve no real educational purpose at all but can function as excellent public relations tools for the states themselves.<sup>142</sup>

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<sup>140</sup> There is a separate writing test that is administered in grades 6 and 9.

<sup>141</sup> Press Release, PSEA Study Finds Flaws in Test Scoring Procedures, <http://www.psea.org/article.cfm?SID=236> (accessed March 9, 2003). Standard and Poor's evaluation clarifies this further. Pennsylvania froze the demarcation points for the PSSA quartiles from 1996 to order to measure progress from that year. See Standard & Poor's School Evaluation Services, *Statewide Insights, Commonwealth of Pennsylvania, Phase I Study Period, School Years Ending 1997, 1998, 1999* at 5. (Standard and Poor's *Insights*) The actual distribution among the quartiles over these three years did not change significantly. In 1998, 50.2 % of the PSSA scores statewide were above the median, with 23.9% in the top quartile, 26.2% in the second, 26 in the third, and 23.9% in the bottom quartile. *Id.* at 11.

<sup>142</sup> Lisa Kelly, *Yearning for Lake Wobegon: The Quest for the Best Test at the Expense of the Best Education*, 7 Law & Southern California Interdisciplinary Law Journal 41, 44(1998)

Certainly to deem the children who score in the 50-75% range as “failures” was harsh given that, by definition, one fourth of the children who took the test had to be in this category.

Finally, both Edison and Schweiker ignored the social context of Philadelphia school children. There is no discussion in either report of the literacy or employment or poverty rates of their parents even though these factors have an enormous effect on student test results.<sup>143</sup>

Edison’s 80 page report mentioned once that “a substantial number of the PSD’s students are economically disadvantaged,” and acknowledged that this “may be a factor” in their performance.<sup>144</sup> But Edison never challenged Pennsylvania’s inequitable funding structure and referred to it only as a given, as the “constraints of the financial realities facing the Commonwealth and the City.”<sup>145</sup> The executive summary to Schweiker’s report chastised Philadelphia for “irresponsible” financial management for spending more than it expected to

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<sup>143</sup> See Rothstein, *supra*, note at 37-40.

<sup>144</sup> Edison Report at 9.

<sup>145</sup> Edison Report, at 1. Edison justifies its lack of focus on socio-economic factors by comparing Philadelphia to other urban districts—Houston, Las Vegas, and Fort Lauderdale—which achieved higher SAT scores while spending less per student than Philadelphia. Edison Report, 10-11. Edison does not provide any data on the comparative costs or socio-economic compositions of these three districts, nor does it justify use of a selective college admissions test for its comparison. See Council of Great City Schools, *Analysis and Comment, supra*, note. Use of Houston as a positive example is ironic in hindsight as more and more information has since developed indicating that much of Houston’s vaunted successes may have been falsified. See Michael Winerip, *The ‘Zero Dropout’ Miracle: Alas! Alack! A Texas Tall Tale*, N.Y. Times B7 (Aug. 13, 2003).

receive in revenue, and for failing to budget more appropriately “despite significant state-funding increases.”<sup>146</sup>

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<sup>146</sup> Schweiker Report at i, iii. Schweiker is correct that in absolute numbers state funding had increased but he failed to note that the state’s share of the burden of school expenses had decreased from 55% in 1974-75 to 35% in 2000-2001.

I.

In 2001, Pennsylvania moved the PSSA to a criteria-based test instead of a norm-referenced one.<sup>147</sup> A criteria-based test, in contrast to a norm-referenced test, evaluates students against a pre-established set of correct answers.<sup>148</sup> It is theoretically possible for all students to reach the standards of advanced and proficient under criteria-referenced evaluation.<sup>149</sup> Pennsylvania's choice of the scores necessary to reach the acceptable standards has been harshly criticized however. A study financed by the Pennsylvania State Education Association asserted that, in setting the breaking points between the four categories, the Department of Education had manipulated the data and misused the accepted methods of determining these "cut scores" to ratchet up the numbers of students ending up in the basic and below basic categories, putting thousands more students in those unacceptable categories.<sup>150</sup> Many, including me, question the

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<sup>147</sup> See Standard and Poors, *Insights*, *supra*, note at 34.

<sup>148</sup> See Kelly, *supra*, note at .

<sup>149</sup> Harris L. Zwerling, Ph.D., *The Performance Levels and Associated Cut Scores on the Pennsylvania System of School Assessment Mathematics and Reading Tests: A Critical Analysis* (2002) <<http://www.psea.org/ftpimage/PSSAPerfLevel3-02.pdf>> (accessed July 16, 2002)(Zwerling Study).

<sup>150</sup> *Id.* The study, performed by Dr. Harris Zwerling, analyzed the Department's use of two methods of setting the points at which students fall into one of the named categories—the bookmark method and the borderline groups method. It criticized the Department's decision to average the results from the two methods and then to increase the averaged scores by "one-quarter standard error" which, according to the PSEA study, decreased the number of students achieving proficient or advanced scores by 25,000 and increased the number of students ending up in the below basic category by 42,000. *Id.* at 1. The main impetus for the study was the effect that the score setting would have on Pennsylvania's award of diploma seals for high school graduates who score at proficient or above on the PSSA. The study authors concluded that the method of setting the scores imposed multiple hurdles on graduates that would deny between 7000 to 14000 students the recognition of the seal. *Id.* at 27.

The study also compared the scores of students within four districts on the PSSAs and the other standardized tests administered in those districts. It found that "[s]tudents scoring below

wisdom and validity of using standardized test scores as the only measure of excellence.<sup>151</sup> But here I just stress that if that is the measure, it must be used accurately—with attention to improvements, context, and history.

The PSSA definitions are problematic enough. But this language infuses the entire grading process and belies the rhetoric that Philadelphia lacked high standards. The report cards for kindergarten through third grade now require the teacher to assess each child developmentally. So far, so good—that sounds like useful information. But rankings still apply

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basic on PSSAs approach or surpass the 50<sup>th</sup> percentile on national commercial tests, suggesting that the below basic cut score is set too high.” *Id.* at 29. For example, the fifth grade math scores on the PSSA and the Terra Nova, a commercial standardized test used nationally, showed that the students ranked at Basic on the PSSAs were predominantly above the 50<sup>th</sup> percentile nationally on the Terra Nova. The “failing” Pennsylvania students in the Below Basic category looked much better on the Terra Nova. Those in the top rank of Below Basic were above the 50<sup>th</sup> percentile nationally on the Terra Nova while those in the bottom rank, that is the bottom 25 percent of the Below Basic category on the PSSAs were just below the bottom 25 percent nationally on the Terra Nova. The Department of Education response to this study challenged its findings, asserting that the comparison between the national tests and the PSSAs “offers little meaningful information” because of the “very real possibility of inflated norms on the commercial tests, the content nature of these tests, or their norm citations.” “The Department’s decisions to apply two statistical methods, and then to slightly increase the academic rigor, were policy decisions. Our motivation to set high standards for our children is simple: We believe higher standards encourage higher achievement. Higher academic achievement benefits our children and our state.” PDE Response to PSEA’s The Performance Levels and Associated Cut Scores on the Pennsylvania System of School Assessment, Mathematics and Reading Tests, A Critical Analysis” <http://www.psea.org/article.cfm?SID=146>. The PSEA study echoes Rothstein’s critique of a similar effort to define advanced, proficient, basic and below basic for the National Assessment of Educational Progress (NAEP) exams. Under the definitions adopted by the National Assessment Governing Board, a mere 2% of 12<sup>th</sup> grades were deemed proficient in math in 1992 even though 3.8% of the same group got college Advanced Placement credit for calculus and 7% scored over 600 on the math portion of the SAT. Rothstein, *supra* note at 71.

<sup>151</sup> See, e.g. Alfie Kohn, THE SCHOOLS OUR CHILDREN DESERVE at 73-112 (N.Y. Houghton Mifflin 1999).

and the standards the children must satisfy are remarkably demanding. Each child must be labeled as either advanced, proficient, basic or below basic.

Advanced means:

- ▶ Goes beyond standard
- ▶ Demonstrates superior understanding of concepts, skills and strategies
- ▶ Demonstrates the ability to apply and extend learning
- ▶ Independently explores ideas/topics

Proficient means:

- ▶ Meets standard [Grade Level Expectation]
- ▶ Demonstrates solid understanding of concepts, skill and strategies
- ▶ Needs to demonstrate greater ability to applying and extending learning
- ▶ Needs to work toward increased independent learning

Basic means:

- ▶ Minimal progress toward standard
- ▶ Demonstrates partial understanding of concepts, skill and strategies
- ▶ Needs focused and continuous instruction
- ▶ Needs increased effort

Below Basic means:

- ▶ No progress toward standard
- ▶ Demonstrates inadequate understanding of concepts, skills and strategies
- ▶ Needs focused and continuous instruction
- ▶ Needs increased effort<sup>152</sup>

The form requires the teacher to further break down the child's literacy development to her progress towards goals for the middle and end of each grade. Stage 4, the goal for the end of kindergarten, for example, requires the child to demonstrate that she has the following abilities:

- ▶ Draws a picture and labels in direct relationship to the picture.
- ▶ Connects letters and sounds, usually initial and final consonants and some vowels, uses phonetic spelling

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<sup>152</sup> K-3 Report Card for Philadelphia School District, 2002-2003 (on file with author).

- ▶ Spells some high frequency words correctly.
- ▶ Knows the direction of print
- ▶ Demonstrates spacing between words
- ▶ Text may contain incomplete thoughts and/or simple sentences
- ▶ Parts of text may not be understandable unless dictated

By the end of second grade, that child must be doing the following:

- ▶ Composes story that has a definite structure (clear beginning, middle, and end)
- ▶ Composes text that contains main ideas supported by well-developed details
- ▶ Focuses on the topic most of the time
- ▶ May express ideas in a creative way or writing may contain original ideas
- ▶ May use dialogue effectively
- ▶ Includes rich descriptive language
- ▶ Writes correct sentences that are varied in length and pattern
- ▶ Uses conventional spelling most of the time
- ▶ Uses correct capitalization and punctuation most of the time<sup>153</sup>

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<sup>153</sup> Explanatory booklet for K-3 Report Cards, 2002-2003, Philadelphia School District, on file with author.

These are admirable normative goals. But should we label an eight-year-old inadequate or “failing” because she does not yet conform to the rules of grammar that some bright law students still struggle with?<sup>154</sup> Contrast this structure with the traditional letter grades prevalent

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<sup>154</sup> When I presented an earlier version of this paper at the Tenth Annual CLE Conference–Update for Feminist Law Professors on February 8, 2003, I asked the participants to identify what grade this set of report goals applied to. Only two of the nineteen participants correctly guessed second grade. Eight picked third grade. Four thought the goals were for high school students. I also gave them the following rubric for fourth grade for research with the grade level blanked out:

By the end of the grade, in order to meet Grade benchmarks, a student should be able to do the following:

1. A. Select a topic for research.

**Activate prior knowledge** and formulate questions about a topic.

B. Locate information using appropriate sources and strategies.

- Locate and survey sources for a particular task (e.g. newspapers, dictionaries, encyclopedias, nonfiction trade books, **interviews, observations** and electronic media.) Locate and select relevant information from media sources such as photographs, videos, computer software program, and telecommunications systems.
- Select appropriate sources.
- Use table of contents, key words, guide words, and appendices.
- Use traditional and electronic search tools.

C. Organize and present main ideas from the research. Check information for accuracy and exclude extraneous or inappropriate information. Connect prior knowledge to new content. Take notes while listening and reading using a structured format. **Brainstorm** what has been learned about the topic. Summarize and synthesize information. Organize information, using various **graphic organizers**. Document information. Present orally or in writing several of the main ideas.

In order to:

- Write a report.
- Develop habits of lifelong learning.

Writing #4, Research. Grade-specific concepts/skills, Philadelphia School District. <<http://www.phila.k12.pa.us/teachers/frameworks/grid/gridmast.htm>> (accessed March 10, 2003) (emphasis in original). The nineteen law professors were even more flummoxed by this one. Only four of them correctly identified this standard as applicable to fourth grade; six chose

in law schools. Law students care deeply about grades—many of them see grades as key determinants of their futures. It is fair to say that A and B are good grades, C is problematic and D is damning. Temple, for example, adheres to a strict B- minus curve which means most students experience a C grade at least once during their law school careers, an experience they generally find deeply upsetting.<sup>155</sup> Contrast that experience with the experience of a Philadelphia second grader. Of the four levels, only one is better than average—advanced. And that one requires the student to exceed beyond the level she is being taught at. There are no A grades—at least not based on being excellent at what is asked and expected of you. By the definitions of the report card, excellence at what is expected means you are proficient, not advanced. This is certainly a message of rigor but hardly one of encouragement.<sup>156</sup> In effect, the switch from a broader scale has greatly narrowed the possibility for children to be told they are doing well, better than the average. Many of them will be told they are inadequate—not just the C but the message equivalent of D or F. This message is unlikely to bring joy or encouragement to young children. It is unlikely to encourage older ones but rather discourage even renewed efforts that may still not bring them up to the abstract and demanding standard.<sup>157</sup>

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fifth through seventh grades; six chose eighth or ninth; three picked tenth and twelfth grades. The responses are on file with the author.

<sup>155</sup> In 2001, 91% of the seniors graduated from Harvard with honors, a figure described by the dean of Yale College as “hilarious.” Patrick Healy, *Harvard’s honors fall to the merely average*, Boston Globe (Oct. 8, 2001) <[http://www.boston.globe.com/globe/metro/packages/harvard\\_honors/part2.htm](http://www.boston.globe.com/globe/metro/packages/harvard_honors/part2.htm)> (accessed Sept. 16, 2003).

<sup>156</sup> See Kohn, *supra*, note at 40-46 for an enlightening and detailed discussion of the overall negative effects grades have on learning.

<sup>157</sup> See Sara Rimer, *Failing and Frustrated, School Tries Even F’s*, N.Y. Times A24 (Dec. 3, 2002).

And to make matters even more challenging, these assessments do not count for much for either the school or the child. Instead of the assessment based on the teacher's year long daily experience with the child, the determinative score is the one she gets on the PSSA. That score, not the report card, determines whether the school is failing or not.<sup>158</sup>

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<sup>158</sup> See 24 P.S. § 17-1702-B. Under No Child Left Behind, states have the option of using other indicators in addition to standardized tests to evaluate a school's status—but only to add it to the list of failing schools, not to exempt it. See 20 U.S.C. § 6311(b)(2)(D)(ii).

Federal law now defines failure by reference not only to test scores but to continual improvement in them.<sup>159</sup> Not only must children achieve “proficiency,” their schools must demonstrate unwavering progress towards this goal. Inconsistency damns the school with the failing label, even where, over years, the school is moving forward.<sup>160</sup> The impact of the label is severe—the school must notify all parents and must allow transfer of any student to a higher performing school—though that right itself is illusory<sup>161</sup>. The dream-within-a-dream quality of this “right” was heightened by recent federal regulations that eliminate lack of capacity in non-failing schools as an excuse.<sup>162</sup> For those like Apple who connect the rhetoric of failure with the movement to marketize public education, these trends are both frightening and predictable. If huge numbers of schools, even ones with rigorous standards and good teachers, are “failing,” and there is no room at the district schools that have overcome the obstacles, what else is left other than charters or vouchers?<sup>163</sup>

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<sup>159</sup> See NO Child Left behind, 20 U.S.C. § 6311(b)(2)(C)(iii).

<sup>160</sup> See Sam Dillon, *Thousands of Schools May Run Afoul of New Law*, New York Times, Feb. 16, 2003, at 33; Michael Winerip, *Defining Success in Narrow Terms*, New York Times, Feb. 19, 2003, B7; Dale Mezzacappa, et al, *Pa. schools missing federal goals*, Philadelphia Inquirer (Aug. 13, 2003)(noting that over half of the schools in Pennsylvania failed to make annual yearly progress)..

<sup>161</sup> See *infra* at for analysis of the problems with the transfer provisions of No Child Left Behind.

<sup>162</sup> See Maria Newman, *Federal Law on Failing Schools Has States Scrambling to Comply*, New York Times, July 4, 2002, B1(noting that parents at 16 schools in Camden, New Jersey, got letters about their children’s right to transfer but the remaining 12 schools and all of the charter schools in the district were full).

<sup>163</sup> This “standards without funding” approach has been criticized. “It is both perverse and cruel of state officials to raise the academic requirements for public school students in New York City while fighting furiously against efforts to provide the resources that the students need to

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reach those higher standards." See Bob Herbert, *The Iota Standard*, N.Y. Times, A15 ( July 1, 2002)(criticizing N.Y.Gov. Pataki's response to the New York school funding litigation).

Schweiker's report does not explore at any length the reasons for the failure it highlights. Failure is assumed to be the result of the Philadelphia School District's choices<sup>164</sup> and behavior. Although the Schweiker Report criticizes the District for decentralizing its approach to math and reading, it simply accepts Edison's evaluation that the schools used 100 different reading programs and 75 different math programs, "many of them unproven and all of them unsynchronized."<sup>165</sup> This aspect of the Edison report has been highly criticized as simply inaccurate.<sup>166</sup>

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<sup>164</sup> See, e.g. Schweiker Report, *supra* note 2 at 7 (attributing Philadelphia's problems to a lack of a system-wide curriculum, mobility of students and insufficient teacher training and support); and 8 (weak leadership and large central office). See Edison Report, *supra* note at 14, 17-21)(criticizing the District for experimenting with curricula, for a lack of rigorous accountability for principals, for inadequate professional development, for lacking a "required model for building a positive learning environment", for lack of clear roles for Non-Teaching Assistants (NTAs), and for insufficient data collection on discipline, and poor maintenance). There is no mention of a lack of funding for these items though the Report does acknowledge and blame the District for operating at a deficit. The roles of NTAs became much clearer in the schools managed by Edison in the fall of 2002—they were all fired. See Paul Socolar, Public School Notebook, *CEO Vallas commits to a fresh start*, 1, 13 (Fall 2002)(on file with author). Some were later rehired at the District's order in response to concerns about safety. Edison suggested that the District improve its finances by taking steps to "grow government revenue."

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The assumption that goes unquestioned is that the academic failure is the result of bad choices by the District, not the consequence of poor funding or perhaps the consequence of deep societal inequity that the schools contend with but do not cause. Making test scores the only means for defining failure begs the question of what causes low scores in the first place. A study of students in Cleveland recently concluded that so far voucher students have performed about the same on standardized tests as the students who sought but did not get the vouchers and remained in the “failing” Cleveland Public Schools system.<sup>167</sup> If private schooling did not result in improved scores for these students, are the private schools failing too?<sup>168</sup>

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<sup>167</sup> See Kim K. Metcalf, et al. *Evaluation of the Cleveland Scholarship and Tutoring Program, Summary Report, 1998-2001* (Cleveland Study) <[www.schoolchoiceinfo.org/research/index.cfm?search\\_form=true&r\\_programs=2](http://www.schoolchoiceinfo.org/research/index.cfm?search_form=true&r_programs=2)> (accessed Aug. 29, 2003). “The most recent results do not reveal any significant impacts of participation in the CSTP [Cleveland Schools and Tutoring Program] on student achievement.” *Id.* at 7. The study goes on to note a slightly greater achievement pattern for students in the voucher program since kindergarten which might become meaningful if it continues but which would require further study. *Id.* Rothstein and Benevise’s work on comparisons between private and public schools provides further evidence that the socio-economic backgrounds of the students have more to do with school organization and success than does the private or public nature of the school. See Benveniste, *supra*, note ; Rothstein, *supra*, note .

<sup>168</sup> See Richard Rothstein, *Defining Failed Schools Is Harder Than It Sounds.* “New York Times, July 3, 2002, B9. The record of performance of charter schools in Philadelphia so far is mixed at best. See *infra* at .

Schweiker and Edison criticized the District for operating at a deficit—for budgeting more for spending that it could expect to receive in revenue.<sup>169</sup> Nowhere does either acknowledge that Pennsylvania’s school funding structure creates grotesque inequities for poor districts. As noted before, Philadelphians already pay a much higher percentage of their modest incomes in taxes than do the residents of affluent suburbs. But those suburbs can raise much more money even with lower tax rates because of higher wealth they enjoy. If Philadelphia had chosen to live within its means,<sup>170</sup> it is hard to imagine how much worse education might have been in the last decade. Despite the strident calls for removal of waste, neither Edison nor Schweiker identified any specific major savings except for privatizing maintenance and reducing teaching staff and selling the District administration building.<sup>171</sup> The Governor stated “These cost-savings would come through such measures as educational reprogramming, procurement innovations, reducing complement through attrition and other methods.”<sup>172</sup> Schweiker also

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<sup>169</sup> See Schweiker Report, *supra* note 2; Edison Report, *supra*, note .

<sup>170</sup> Hornbeck’s approach was to budget what he deemed necessary for quality education under the Children Achieving model. He acknowledged that the Philadelphia School District lacked the revenue to fund this model but his approach was to force a showdown with the state over funding inequities. Many commentators believed that Mayor Street’s intent in agreeing to the Edison assessment and state takeover was to force the state to acknowledge that the Philadelphia School District was underfunded and to make funding the state’s problem.

<sup>171</sup> Edison Report, *supra*, note

<sup>172</sup> Edison’s and Schweiker’s credibility was further undercut by their insistence that the Philadelphia School District spends less on lower-performing schools. See Edison Report, *supra*, note at 34 (calling for additional money for privately managed schools to “remedy a tragic inequity that persists with the District—that the lowest performing schools receive less per pupil support than higher-performing schools, which tend to garner the more experienced teachers as well as greater overall resources.”) This was echoed in the governor’s executive summary where it is stated as a “finding” that the District “systematically allocates the lowest level of per-pupil resources to its lowest performing schools.” Schweiker Report, Executive Summary at iv. Later

failed to explain why, if Philadelphia's deficit was the result of waste, its future should be tied to a corporation, Edison, that had never produced a profit.<sup>173</sup>

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in the Schweiker Report, this assertion becomes fact—"low performing schools usually receive the least amount of dollars from the district." *Id.* at 11.

However, Edison cited no statistics or data to support its original assertion. Its sole support is a footnote asserting that "Although difficult to prove conclusively, anecdotal evidence suggest that the worst-performing schools indeed get the least resources. It makes intuitive sense that experienced teachers would gravitate towards assignments in better-performing schools, driving up per-pupil allocations in those schools through their higher salaries and through their greater experience in securing resources for their departments and classes. The net result is that the worst-performing schools tend to have less experienced teachers less adept at working the system to their and their students' advantage." Edison Report, *supra*, note at 34, n. 92. The teachers' collective bargaining agreement does give teachers with greater seniority greater transfer rights which results in an overabundance of less experienced teachers in schools that are perceived as less desirable teaching environments—not coincidentally often the lower-performing schools. However this disparity is not the result of budget decisions by the central administration. As Debra Kahn, the city's Secretary of Education, pointed out, baseball teams may have shortstops with different salaries but they all field the same number of players. Chris Brennan, *State school \$ allocation challenged*, Philadelphia Daily News (Jul. 23, 2002) <<http://www.philly.com/ml/dailynews/news/local/3716697.htm>>(accessed Sept. 15, 2003).

<sup>173</sup> See William C. Symonds, *Edison: How Big A Blow To School Choice?* Business Week at 44 (June 3, 2002).

Philadelphia's experience bears out Apple's theory that the rhetoric of failure is necessary to justify the need for "conservative modernization"—both the adherents of the state of families and the adherents of the state of individuals base their calls for change on a picture of existing schools as failures.<sup>174</sup> Apple sees these claims of failure as attacks on democratic education itself, an attack on the idea of education for common citizenship that was the purpose of public schools in the first place.<sup>175</sup> The common equating of failing as a synonym for urban for city schools, especially in the Philadelphia experience bears this out. The use of high-stakes testing as the primary means of evaluating schools leads to and even justifies greater stratification of children based on their alleged abilities as measured by a test whose results are tied so closely to economic privilege.<sup>176</sup>

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<sup>174</sup>“Our educational institutions are seen as total failures. High dropout rates, a decline in ‘functional literacy,’ a loss of standards and discipline, the failure to teach ‘real knowledge’ and economically useful skills, poor scores on standardized test, and more—all these are charges leveled at schools.” Apple, *supra* note at 35.

<sup>175</sup> “Behind all of these charges is an attack on egalitarian norms and values. Though hidden in the rhetorical flourishes of the critics, in essence ‘too much democracy’—culturally and politically—is seen as one of the major causes of ‘our’ declining economy and culture.” Apple, *supra*, note at 36. Apple sees the attack on public education as an attack on shared experience-- “Even with the evident shortcomings of many public schools, at the very least they provide ‘a kind of social glue, a common cultural reference point in our polyglot, increasingly multicultural society.” *Id.* at 177 (internal quotes omitted).

<sup>176</sup>Lisa Kelly points out that

“In addition to the explicit goals of measuring school outcomes and individual student success, these testing requirements also have effects, perhaps unintended, that should be considered carefully before we as a nation continue to hurtle down this road of more and earlier testing of elementary school children. These effects include incentives for teachers to sacrifice developmentally appropriate curricula in order to teach to tests and a deepening of racial and class differences in an educational system that sacrifices children of color and poor children to make the dream of Lake Wobegon come true for the children of privilege. Children of the poor and communities of color become the leaven that allows for the remainder of American children to rise above average.”

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Lisa Kelly, *Yearning for Lake Wobegon: The Quest for the Best Test at the Expense of the Best Education*, 7 *Law & Southern California Interdisciplinary Law Journal* 41, 42 (1998).  
*See also*, Kohn, *supra* note at 102 (“Standards are essentially used as selection devices to privilege some over others. This movement is not only more about demanding than supporting, it is more about sorting than teaching.”).

The use of the rhetoric of failure to attack the existence of public education and to deny the ability of common schools to effectively educate children stands in sharp contrast to the rhetoric of courts that have denied equity challenges to school funding. The judicial rhetoric in the school funding cases provides a telling contrast to the rhetoric of failure.<sup>177</sup> The Appellate Division of the New York Supreme Court recently rejected a claim that the inequities of New York's property tax based school funding system deprive New York City public school students of their state constitutional right to "the opportunity of a sound basic education."<sup>178</sup> The court found that the plaintiffs' concession that the schools were providing skills on an eighth and ninth grade level sufficiently enabled graduates to obtain employment, vote and serve on a jury, and thus satisfied the sound basic education requirement.<sup>179</sup> The appellate court rejected the trial court's determination that the New York Constitution required schooling that would prepare students for something more than minimum wage employment, noting that "[i]t cannot be said, however, that a person who is engaged in a 'low-level service job' is not a valuable, productive

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<sup>177</sup>Scholars group the school funding cases into three phases—federal equal protection challenges, equity challenges based on state constitutional provisions, and adequacy cases. *See, e.g.*, James E. Ryan, *The Influence of Race in School Finance Reform*, 98 Mich. L. Rev. 432, 448 (1999); Michael Heise, *State Constitutions, School Finance Litigation and the "Third Wave": From Equity to Adequacy*, 68 Temp. L. Rev. 1151 (1995). The shift to adequacy was largely strategic according to Ryan but represents, at minimum, a concession that equality is no longer even an aspiration. This retrenching contrasts painfully with the demands of No Child Left Behind that all schools end "failure" for all students, regardless of the needs and demands of the school's population.

<sup>178</sup> *Campaign for Fiscal Equity, Inc. v. New York*, 744 N.Y.S. 2d 130 (Sup. Ct. App. Div. 2002) (quoting the Education Article of the New York State Constitution, N.Y. Const. art. XI, § 1)(aff'd in part and rev'd in part, 2003 WL 21468502 (N.Y. Jun. 26, 2003)).

<sup>179</sup> *Id.* at 139

member of society.”<sup>180</sup> It further rejected the evidence of poor performance on standardized tests, poor graduation rates, and low rates of students qualifying for the more highly valued Regents’ diploma, noting that some students do perform well and that the “proper standard is that the State must offer all children the *opportunity* of a sound basic education, not *ensure* that they actually receive it. Thus, the mere fact that some students do not achieve a sound basic education does not necessarily mean that the State has defaulted on its obligation.”<sup>181</sup>

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<sup>180</sup> *Id.* at 138.

<sup>181</sup> *Id.* at 143.

The court used the evidence of the high poverty rates and other demographic factors to excuse the state's obligation, instead of heightening it, saying that "the cure lies in eliminating the socio-economic conditions facing certain students"<sup>182</sup> In a nutshell, the state is allowed to ignore its obligation to educate all students for civic participation so long as some of them manage to succeed with what is offered even if the majority cannot. Justice Thurgood Marshall aptly critiqued such a view in 1973 noting: "That a child forced to attend an underfunded school with poorer physical facilities, less experienced teachers, larger classes, and a narrower range of courses than a school with substantially more funds—and thus with greater choice in educational

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<sup>182</sup> *Id.* at 144. "Both parties agree that the City students' lower test results in comparison with the rest of the State are largely the result of demographic factors, such as poverty, high crime neighborhoods, single parent or dysfunctional homes, homes where English is not spoken or homes where parents offer little help with homework and motivation. Although there was evidence that certain 'time on task' programs, such as specialized reading courses, tutoring and summer school could help such 'at-risk' students, nevertheless, plaintiffs' own expert . . . conceded that investing money 'in the family' rather than the schools 'might pay off even more.' That is not to say that this circumstance lessens the State's burden to educate such students. But it is an indication of the fact that more spending on education is not necessarily the answer . . . " *Id.* at 144. The appellate court rejected the rhetoric and findings of the trial court which, in contrast, had found "The establishment of such a causal link might appear to be fairly straightforward. If it can be shown that increased funding can provide New York City with better, teachers, better school buildings, and better instrumentalities of learning, then it would appear that a causal link has been established between the current funding system and the poor performance of the City's public schools." *Campaign for Fiscal Equity v. New York*, 719 N.Y.S. 2d 475, 521 (Sup.Ct., 2001). The trial court quoted the testimony of former SED Commissioner Thomas Sobel:

"If you ask the children to attend school in conditions where plaster is crumbling, the roof is leaking and classes are being held in unlikely places because of overcrowded conditions, that says something to the child about how you diminish the value of the activity and of the child's participation in it and perhaps of the child himself. If, on the other hand, you send a child to a school in well-appointed or [adequate facilities] that sends the opposite message. That says this counts. You count. Do well." *id.* at 506

planning—may nevertheless excel is to the credit of the child, not the State.”<sup>183</sup> For Philadelphia, the state demanded that the city schools perform the very obligation that the state refused to assume—that it educate the children of poverty without the resources necessary to do it well.

B. Rhetoric of accountability

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<sup>183</sup>San Antonio Independent School District v. Rodriguez, 93 S. Ct. 1278, 1322 (1973)(Marshall, J. dissenting).

What is the solution to failure? In a word, accountability—and that word itself translates directly to accountability in the form of standardized test results and private management. Schweiker's principles and his report consistently support his conclusion that the Philadelphia School District should be privatized—that the solution to its academic and financial woes is management by a separate organization because privatization would enhance accountability.<sup>184</sup> The overstatement of the failure of the system; the insistence that the system had no accountability systems,<sup>185</sup> and that the financial problems were the result of mismanagement, not funding inequity all were used to support the single solution—hire a private manager who will run the system under a contract with “accountability,” more efficiently.<sup>186</sup> And who did the governor determine that manager should be? None other than the assessor itself, Edison Schools, Inc.

Schweiker's report treated accountability as a question of test scores—elementary schools were to increase their PSSA scores by 25 points over five years; middle schools and high schools were to achieve those gains within seven years.<sup>187</sup> But his insistence that private management would improve test scores was not supported by the record of either Edison itself or that of the charter schools already in operation in Philadelphia.<sup>188</sup>

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<sup>184</sup> Schweiker Report, *supra*, note 2 at 14, 16, 17, 18, 25.

<sup>185</sup> *Id.* at 8.

<sup>186</sup> *Id.* 25.

<sup>187</sup> *Id.* at 24.

<sup>188</sup> *See infra* notes and accompanying text.

This version of accountability through privatization and choice makes students and their parents into consumers who are then individually responsible for their choices and their outcomes.<sup>189</sup> Such a limited version of accountability not only allows but virtually requires the imposition of the family state of the neoconservative branch of the school reform movement.<sup>190</sup> It is also a necessary prerequisite for choice—but Schweiker’s version of accountability and reform omits this component—choice is not part of the picture of reform for Philadelphia. Apple notes that the equating of high stakes testing and accountability also benefits the managerial class at the expense of equity.<sup>191</sup> Standardization is the prerequisite for choice and marketing of schools because it provides the consumer/parent with “objective” data to inform their choice.<sup>192</sup> This also allows blame to be placed on the parent who fails to choose a “successful” school for

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<sup>189</sup>“The entire project of neoliberalism is connected to a larger process exporting the blame from the decisions of dominant groups onto the state and onto poor people.” Apple *supra*, note at 39.

<sup>190</sup> “[A]mong the policies being proposed under this [neoconservative] ideological position are mandatory national and statewide curricula, national and statewide testing, a ‘return’ to higher standards, a revivification of the ‘Western tradition,’ patriotism, and conservative variants of character education.” Apple, *supra* at 47.

<sup>191</sup> “A good deal of the current emphasis in schools on high-stakes testing, on more rigorous forms of accountability, and on tighter control is not totally reducible to the needs of neoliberals and neoconservatives. Rather, part of the pressure for these policies comes from educational managers and bureaucratic offices who fully believe the such control is warranted and ‘good.’ Not only do these forms of control have an extremely long history in education, but tighter control, high-stakes testing and (reductive) accountability methods provide more dynamic roles for such managers . . . . These policies enable such actors to engage in a moral crusade and enhance the status of their own expertise.

Yet, in a time when competition for credentials and cultural capital is intense, the increasing power of mechanisms of rest ratification such as the return of high levels of mandatory standardization also provides mechanisms that enhance the chances that the children of the professional and managerial new middle class will have *less competition* from other children.” Apple, *supra*, note at 58

<sup>192</sup>Apple, *supra*, note at 60.

her children and eliminates the state's obligation to secure even an "adequate," let alone a "quality" education for each child.<sup>193</sup> Schweiker's rhetoric foreshadows the placement of this obligation on individual parents but it explicitly holds the state blameless for failing to adequately fund public education and makes Philadelphia solely responsible for its "bad" choices.

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<sup>193</sup> "[O]ne of [the] effects is that when the poor 'choose' to keep their children in underfunded and decaying schools in the inner cities or in rural areas (given the decline and expense of under mass transportation, poor information, and the absence of time, and their decaying economic conditions, to name by a few of the realities), *they* (the poor) will be blamed individually and collectively for making bad 'consumer choices.'" *Id.* at 60.

The “it’s poverty, not funding” argument of the New York appellate court in the school funding case also abdicated responsibility for education for the common citizenship necessary to democracy.<sup>194</sup> If we are serious about providing equal access to education for all our children, then we need to account for and at least attempt to ameliorate the effects of poverty, not write them off. The position of the state in the New York case allowed the state to blame the children for their own deficiencies—or at minimum, blame their parents’ poverty. Although, the appellate court treated test scores more realistically, recognizing that “myriad” factors affect scores,<sup>195</sup> it then used the more realistic view to potentially deprive the kids, not empower them by excusing the state from any responsibility to improve the education that could have contributed to the lower scores.<sup>196</sup> Pennsylvania’s Education Empowerment Act similarly uses test scores to punish

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<sup>194</sup> See *Campaign for Fiscal Equity, Inc. v. New York*, 744 NYS 2d 130, 144 (NY Sup. Ct. App. Div. 2002) (finding no causal link between funding and New York City public school students’ test scores and denying relief, in part because: “Both parties agree that the City students’ lower test results in comparison with the rest of the State are largely the result of demographic factors, such as poverty, high crime neighborhoods, single parent or dysfunctional homes, homes where English is not spoken or homes where parents offer little help with homework and motivation. . . . That is not to say that this circumstance lessens the State’s burden to educate such students. But it is an indication of the fact that more spending on education is not necessarily the answer, and suggests that the cure lies in eliminating the socio-economic conditions facing certain students.”). The Pennsylvania Constitution requires that the Commonwealth provide a “thorough and efficient” system of education. However, the Appellate Division of the New York Supreme Court was content to interpret a similar state constitutional requirement as obligating the state only to provide the “the opportunity of a sound basic education, not ensure that they actually receive it.” *Campaign for Fiscal Equity, Inc. v. New York*, 744 NYS 2d 130, 143 (Sup. Ct. App. Div. 2002) *rev’d* 2003 WL 21468502 (June 26, 2003).

<sup>195</sup> *Id.* at 135 (Noting test performance must be used “cautiously as there are a myriad of factors which have a causal bearing on test results.”)

<sup>196</sup> *Id.* at 144.

districts without consideration of any of the factors that affect test scores and without more money.<sup>197</sup> The federal No Child Left Behind Act simply uses test scores to offer the hollow promise that children can move to a higher performing school—but does not offer requirements or funds to make that happen and the transfers are likely to leave the former school even worse off, having lost a child whose parent had the energy and care to take action.<sup>198</sup>

Governor Schweiker and Secretary Zogby enthusiastically greeted No Child Left Behind's enactment with Schweiker calling it "a landmark law [that] offers . . . our schools a chance to make sweeping improvements . . . [and will] empower parents and children to choose the education that's best for them . . . ."<sup>199</sup> Zogby added, "In Pennsylvania, we've built our most powerful educational reforms around the ideas embodied in the President's education agenda. *Assessments measure learning—and we can improve only what we measure.* More information about our schools makes them more accountable to parents and students. Giving parents more choices helps them better guide their child's academic development."<sup>200</sup>

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<sup>197</sup> See 24 P.S. §17-1701 et seq.

<sup>198</sup> See *infra*.

<sup>199</sup> Pa. Dept. of Ed. Press Release, Jan. 9, 2002.

<sup>200</sup> Pa. Dept. of Ed. Press Release, Jan. 9, 2002. (emphasis supplied). Zogby's attraction to numbers evokes Alfie Kohn's worry about our "cultural penchant for attaching numbers to things." Kohn, *supra*, note at 75.

Accountability in this form is necessary for public schools but not, apparently, for privatized or charter schools.<sup>201</sup> Edison's own choppy history contradicts its claims of success<sup>202</sup> A New York Times investigation showed that Edison's method of evaluating its own schools' progress on standardized tests was highly questionable. Edison has consistently asserted that test scores at 84 percent of the schools that it began managing before 2001 have improved.<sup>203</sup> To calculate that figure, Edison takes the average annual change in test scores for each grade on each subject tested to arrive at a single school-wide average.<sup>204</sup> If the number is greater than zero, the company rates the school as improving.<sup>205</sup> The flaw of this method is that gains in one grade can mask an overall decline. "The same formula produced similarly glowing results when applied, for example, to schools in the Cleveland school district, which has struggled academically in recent years,[ the system repeated described as failing by Justice Thomas<sup>206</sup> .] When asked by The New York Times to subject its test results over the last five years to Edison's

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<sup>201</sup> "Unlike interdistrict choice plans, which have either grown slowly or withered, charter schools are the kudzu of school choice" growing to enroll over 500,000 by 1997. James E. Ryan and Michael Heise, *The Political Economy of School Choice*, 111 Yale L. J. 2043, 2074 (2002).

<sup>202</sup> .Jacques Steinberg and Diana B. Henriques, *Complex Calculations on Academics*, New York Times (July 16, 2002).

<sup>203</sup> See Edison Schools, Inc. Advertisement, New York Times A9 (Oct. 28, 2002).

<sup>204</sup> Steinberg and Henriques, *supra*, note .

<sup>205</sup> *Id.*

<sup>206</sup> *Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2480 (2002)(Thomas, J. concurring).

method, Cleveland achieved comparable results: 87.4 percent of its elementary and middle schools rated ‘positive.’”<sup>207</sup>

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<sup>207</sup> *Id.* Edison’s method contrasts starkly with No Child Left Behind’s requirements that schools demonstrate Adequate Yearly Progress not only for each grade but for each designated sub-group within the test pool. Public schools are not allowed to “hide” lower test results with gains overall—but Edison’s methods were implicitly approved of and explicitly relied on by Governor Schweiker in his push to turn the entire Philadelphia school system over to Edison’s management.

Schweiker's reliance on PSSA scores as proof of failure for traditional public schools contrasts with his lack of concern about the even worse PSSA test scores of charter schools.<sup>208</sup> Failure apparently has different meanings for these two types of schools. Traditional public schools are judged by test scores in a vacuum—nothing else counts—not parent satisfaction, not other student achievements. But charter schools are exempt from accountability under high-stakes testing because they are providing “exciting educational options.”<sup>209</sup>

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<sup>208</sup> One of Schweiker's ten principles of reform was that “Charter schools must be valued in any reform plan. Any effort to control the district's charter school costs must be grounded in the fact that charter schools are providing some of the most exciting educational options available to Philadelphia parents.” Schweiker Report, Principle 10. This language was taken directly from the Edison Report itself at 66. Indeed, the PSSA scores for 2002-2003 landed 36 out of the 46 Philadelphia charter schools warnings or placement on the No Child Left Behind “failure to meet annual yearly progress” list, continuing to show that, whatever their other advantages, accountability in the form of standardized test scores is not something charter schools have yet been able to offer consistently to Philadelphia. *See* Dale Mezzacappa, *Pa. schools missing federal goals*, Philadelphia Inquirer at A1, 8 (Aug. 13, 2003).

<sup>209</sup> This inconsistency applies to voucher programs as well. Florida's Education Commissioner state that where vouchers were concerned, “the primary accountability and responsibility lies with the parents.” [www.sptimes.com/2003/08/03/Perspective/school-double-standar.shtml](http://www.sptimes.com/2003/08/03/Perspective/school-double-standar.shtml). The article goes on to quote Florida legislator Joe Negron, a sponsor of the voucher legislation as saying, “Primarily, the obligation for accountability in voucher programs comes from the community and parents, not state government.” *Id.* Parental satisfaction is sufficient for private and privatized education but irrelevant for public schools.

Where the rhetorical view of public schools is hostile and damning, the rhetorical approach to charter schools is quite the opposite. Schweiker and privatization supporters describe charters as exciting, innovative, offering the best opportunity for choice.<sup>210</sup> For example, on Dec. 5, 2001, Secretary Zogby, announcing the award of \$475,000 in planning grants for new charter schools, said, “[u]sing these grants, dedicated Pennsylvanians can make a difference in the lives of children by giving them a choice to attend a charter school. New, innovative charter schools give parents more opportunities to give their children the education that’s best for them.”<sup>211</sup> What is similar, however, is the dissonance between the rhetoric and the reality. The same law makers who criticized public schools as failing because their students exhibited unsatisfactory test scores were untroubled by charter schools that had no better and often worse records.<sup>212</sup>

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<sup>210</sup> See Edison Report, Schweiker Report. Edison did minimally acknowledge that charter schools are a costly option for the school district. It recommended that the District find a way of controlling charter costs—though it made no specific suggestions for how this could be accomplished and cautioned that the District has “to do this in a way that does not harm charter schools, which have provided some of the most innovative and exciting new educational options for Philadelphia parents.” Edison Report at 66.

<sup>211</sup> Pa. Dept. of Education Press Release, Dec. 5, 2001. The press release goes on to say “charter schools are independent public schools designed by local citizens, including parents, teachers and community and business leaders. Charter schools offer a specific, often unique, and always locally driven educational mission.” Secretary Zogby does not explain where national for-profit entities who operate charter schools—including Edison and Mosaica—fit into this locally driven mission.

<sup>212</sup> See Pennsylvania School Reform Network, *Evaluating the Evaluation: Notes and Critical Questions About the Interim Report on Charter Schools in Pennsylvania*, which criticized the Pennsylvania Department of Education’s refusal to release a department-funded report on charter schools performed by The Evaluation Center at Western Michigan University. The report’s findings included that “on average [charter schools] scored 60 points lower than comparable traditional public schools on the state’s reading and math tests, a gap that widened 30 percent from 46 points the previous year.” The Report also notes that the lack of data supplied by the Department of Education compromised its ability to determine accountability. Finally,

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the data showed charter schools had declining numbers of children on the free and reduced-price lunch programs and in special education programs which the PSRN noted may indicate “skimming”.

Philadelphia in 2000-2001 had 34 charter schools.<sup>213</sup> Using the coin of the realm—the PSSA scores that determine empowerment or death for public schools, the Philadelphia charter schools do not shine. Keep in mind that the Empowerment Act subjects to state takeover, schools with a “history of extraordinarily low test performance” which is defined as “combined average of sixty per centum (60%) or more of students scoring in the bottom measured group of twenty-five per centum (25%) or below basic level of performance on the Pennsylvania System of School Assessment test . . . . in math and reading in the most recent two school years for which scores are available.” A history of low test performance—combined average of 50%—gets a public school on the empowerment list. Of the 34 charter schools in Philadelphia in 2000-2001, 19 had test scores in this category.<sup>214</sup> Indeed, compared directly to the “failing” schools of Philadelphia, nine of the 16 charter schools reported a higher percentage of fifth grade PSSA

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<sup>213</sup> See Greater Philadelphia Urban Affairs Coalition, *Profiles: A Directory of Philadelphia Charter Schools, 2000-2001* (2001) <[www.gpuac.org/csprofile.pdf](http://www.gpuac.org/csprofile.pdf)> (accessed Sept. 11, 2003)(on file with author)

<sup>214</sup> According to the School Profiles available on the Pennsylvania Dept. of Ed. website, the following charter schools had at least 60% of their tested fifth students in the Below Basic category on the PSSA: Alliance for Progress, 71% math, 70% reading; Eugenio Maria de Hostos, 82% math, 84% reading; Germantown Settlement, 86% math, 66% reading; Imani Circle, 76% math; Leadership Learning, 88% math, 69% reading; Harambee Institute, 64 % math, 75% reading; Raising Horizons Quest, 78% math, 60% reading; Renaissance Advantage, 85% math, 72% reading; West Oak Lane, 63% math. For eighth graders, the following schools' scores qualified: Community Academy, 86% math; Eugenio Maria de Hostos, 78% math; Freire, 79% math, 60% reading; Germantown Settlement, 88% math, 64% reading; Imani Circle, 92% math; Math Civics and Sciences, 80% math; Renaissance 75% math; Wakisha 77% math. The high schools showed a similar pattern with the following schools having at least 60% of eleventh graders below basic on either reading or math: Architecture and Design, 69% math; Center for Economics and Law, 76% math; Community Academy 76% math; Delaware Valley, 94% math, 86 % reading; Franklin Towne, 72% math; Imhotep Institute, 89% math; Multi-Cultural Academy, 66% math; Preparatory, 66% math.

scores in the below basic category than the average for Philadelphia fifth graders.<sup>215</sup> Half the charter schools had a higher percentage of eighth grade students come in below basic than the Philadelphia School District . In high school, 7 out of 10 charter schools reported a higher percentage of eleventh grade below basic scores than the Philadelphia School District.<sup>216</sup> But the legislative enactments, Schweiker and Zogby continued to insist that charter schools are great and the public schools are failures.

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<sup>215</sup> Some of the charter schools escaped testing altogether because they did not have students in the tested grades. The Empowerment Act categories also cover an average of two years.

<sup>216</sup> Perhaps ironically, in the scores released in October 2002, the one charter school run by Edison Schools, Inc., Mariana Bracetti Academy Charter School, had the lowest scores of all Philadelphia charter schools for eighth grade math and reading. It came in second to last on eighth grade math and reading for the entire Philadelphia School District. Chris Brennan, *Edison Charter in Kensington's Failing Too*, Philadelphia Daily News (Nov. 4, 2002). Edison spokesperson Adam Tucker blamed the public schools that the charter schools transferred from for the low showing. "These scores very much reflect where our students came into the school," Tucker said. *Id.* Tucker did not explain why Bracetti transfers did so much worse than students who transferred into other charters or remained in the ostensibly inadequate public schools.

This limited vision of accountability makes sense only from a perspective of misguided simplicity—standardized tests are easier to administer and to reduce to statistics than any portfolio or other broad form of evaluation.<sup>217</sup> It also makes sense if the real goal is to privatize public education<sup>218</sup> The necessity of scores becomes the justification for vouchers, charters and other forms of privatization because the public system is set up for failure by the rigidity of the testing regime. The similarity of test scores in charter and privatized schools and traditional public schools that serve similar populations is not really surprising given the mounting evidence that the socio-economic base of the student body has the most significant effect on the academic achievement of the students.<sup>219</sup> I align with those who call for much broader means of evaluating students and schools and less or no reliance on high-stakes testing.<sup>220</sup> But whatever the means of accountability, the least useful and least fair is to apply rigorous high-stakes testing only to traditional public schools and to allow charters or private schools to bask in accountability by parent satisfaction alone.<sup>221</sup>

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<sup>217</sup> See Kohn, *supra*, note at 74-75.

<sup>218</sup> No Child Left Behind's draconian transfer provisions make much more sense when looked at with this purpose in mind.

<sup>219</sup> Benveniste, *supra*, note at . The rhetoric of accountability that equates standardized test scores and accountability also ignores mounting evidence that the key determinate of test scores is the socio-economic status of the cohort of students in the school, not whether the school is private or public. See Rothstein, *supra* note , at ; Minow, *supra* note , at 279.

<sup>220</sup> See Kohn, *supra*, note at 74-75.

<sup>221</sup> It is not so clear that charters and vouchers would fare well under that accountability system either as some studies show frequent parental rejection of charters and vouchers as well. It is difficult to find statistics as the publically available documents simply list the number of students who leave in a given year and provide no information on where they go or why.

C. Rhetoric of empowerment

“Whenever possible, reform should be a vehicle to empower the Philadelphia community to take charge of its schools.”<sup>222</sup>

The rhetoric of accountability says accountability is supposed to empower parents and students to escape from failure through choice. This choice story evokes Gutmann’s states of families and individuals, both of whom seek to transfer control over education from the state or community to the individual or family.<sup>223</sup> and is grounded, substantially, in the bible of privatization, Chubb and Moe’s *POLITICS, MARKETS, AND AMERICA’S SCHOOLS*.<sup>224</sup> .

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<sup>222</sup> Principle 10 of Governor Schweiker’s Education Reform Proposal, Schweiker Report, *supra*, note 2 at 4.

<sup>223</sup> Gutmann, *supra* note at 28-41.

<sup>224</sup> *See supra*, note 13.

It is beyond the scope of this article to fully develop the theories of choice or to do adequate justice to the critiques of it<sup>225</sup>. But to evaluate the rhetoric and reality of the Philadelphia reform process, some basic understanding is in order. Choice in its most advanced form, laid out by Chubb and Moe, is supposed to provide improvement in education both in quality and cost through individualization and reliance on parents as consumers.<sup>226</sup> Each parent will receive public funds to pay for her child's education. The parent will choose among available schools and the parent's choice will determine the continued existence of schools—those that attract parents will thrive, those that are not chosen will die.<sup>227</sup> This story on its face seemingly puts all power in the hands of parents who, presumably, know what is best for the children and will make the best choices on their behalf.

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<sup>225</sup> See, e.g. James S. Liebman, *Voice Not Choice*, 101 Yale L. J. 259 (1991); Molly O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics* 64 Tenn L Rev 359, 374-385 (1997).

<sup>226</sup> See Chubb and Moe, *supra*, note .

<sup>227</sup> See Chubb and Moe, *supra*, note at 185-229.

Chubb and Moe assume that is what exists is bad and drastic reform for excellence is needed. Their belief the current system of public education is so bad is again based mostly on test scores. Their introduction cites falling SAT scores, high drop out rates, the alleged poor showing of U.S. students on international tests, and relies heavily on the “mother of all critiques”<sup>228</sup>, *A Nation At Risk*.<sup>229</sup> Chubb and Moe ultimately conclude that the institutional and democratic structure of public education is the problem—the very fact that schools are operated through democratic systems prevents them from being responsive to the need for change.<sup>230</sup> They argue that the professionalization of education deprived parents of control and created sluggish, unwieldy bureaucracies that exist to perpetuate themselves rather than to provide optimal educational environments. In a nutshell, the claim is that schools that perform best are those with effective organization—“clear goals, an ambitious academic program, strong educational leadership, and high levels of teacher professionalism.”<sup>231</sup> They further conclude that schools with the most autonomy have the best organization, and that the current system thwarts rather than encourages autonomy.<sup>232</sup> The solution is the market—individualized funding will encourage each family to choose the best school and that individual use of the market will force

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<sup>228</sup> O’Brien, *supra*, note at 393 (quoting David C. Berliner and Bruce J. Biddle, *THE MANUFACTURED CRISIS: MYTHS, FRAUDS, AND THE ATTACK ON AMERICA’S PUBLIC SCHOOLS*, at 139 (1995)).

<sup>229</sup> National Commission on Excellence in Education, *A Nation At Risk* (1983); Chubbs and Moe, *supra*, note at 9-11.

<sup>230</sup> *Id.* at 2,18-20,28-30.

<sup>231</sup> *Id.* at. 23.

<sup>232</sup> *Id.*

schools to improve or die. Market-based education is the panacea that will cure failure in schools.<sup>233</sup>

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<sup>233</sup> *Id.* at 217.

Chubb and Moe express no concern about profit or the potential conflict in mission between shareholders and students. Their conception appears to be that existing non-profit schools will be source of education and that new non-profits will spring up to meet the demand once students and their families control the system by having all funding individualized. They also pay little attention to access problems—how to protect children whose parents may lack the ability or energy to study the market options.<sup>234</sup> Some who rely on their theories express no concern at all about access and consider that parental deficits are just part of the fall out; the system just fairly rewards parents who do care.<sup>235</sup>

Apple, O'Brien, James Liebman and others have thoughtfully and extensively critiqued the theories animating Chubb and Moe's proposals and the empirical work supporting it.<sup>236</sup>

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<sup>234</sup> They do propose a vaguely described government back up plan. *Id.* at 221-226. Other advocates of choice deny that this is a source of concern. See Jonathan B. Cleveland, *School Choice: American Elementary and Secondary Education Enter the "Adapt or Die" Environment of a Competitive Marketplace*, 29 J. Marshall L. Rev. 75, 132-135 (1995) "[S]chools should survive or fail according to their academic performance. Accordingly, a school should expire if its students score lower on standardized tests or are not admitted to desirable colleges." *Id.* at 123.

<sup>235</sup> See Douglas J. Besharov, *Creating a Marketplace for Social Welfare Services*, 16 Notre Dame J.L. Ethics & Pub. Pol'y 519, 528 n. 25 (2002). William Risher, a supporter of vouchers, opined that:

Our system of free public education has been one of America's glories. But in recent decades, the nation's determination to provide equal opportunities to all youngsters, minority and nonminority alike, has flooded inner-city schools with unmanageable numbers of underachieving 'students.' . . . [S]ome ghetto parents too stoned on drugs themselves, or otherwise beaten down to know or care what is happening to their children in school . . . There are, of course, some essentially ineducable youngsters in the ghettos on whom vouchers would simply be wasted.

William Risher, *The ABC's of tuition vouchers*, Washington Times (Mar. 14, 2002) <<http://www.washtimes.com/commentary/20020314-2472146.htm>> (accessed Sept. 16, 2003).

<sup>236</sup> See Apple, *supra*, note ; O'Brien, *supra*, note ; Liebman, *supra*, note .

James Liebman argued that Chubb and Moe “translated correlation into cause”<sup>237</sup> Choice becomes the ultimate schooling for families that provides no protection for the children disadvantaged by poverty and racism. The market vision is squarely grounded in individualist notion that places no real value on collective interests.<sup>238</sup> Apple points out that the parents empowered by choice are those who already enjoy the advantages of class, affluence, and, typically, race.

Middle-class parents are clearly the most advantaged in this kind of cultural assemblage, and not only . . . because schools seek them out. Middle-class parents have become quite skilled, in general in exploiting market mechanisms in education and in bringing their social, economic, and cultural capital to bear on them. Middle class parents are more likely to have the knowledge, skills and contacts to decode and manipulate what are increasingly complex and deregulated systems of choice and recruitment. The more deregulation, the more possibility of informal procedures being employed. The middle class also, on the whole, are more able to move their children around the system . . . because class and race intersect and interact in complex ways and because marketized systems in education often *expressly* have their conscious and unconscious *raison d’être* in a fear of “the Other” and these often are hidden expressions of a racialization of educational policy, the differential results will ‘naturally’ be decidedly raced as well as classed.”<sup>239</sup>

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<sup>237</sup>Liebman, *supra*, note at 262. Liebman points out that Chubb’s and Moe’s definition of effectiveness was their own invention based on subjective factors.

<sup>238</sup> Liebman offers the reform of voice instead—eliminate the private option, keep everyone in the collective system so that the disadvantaged will benefit from the one clear factor that all studies support, that schools with higher percentages of economically advantaged and involved parents do better. *See id.* at 295-308. Needless to say, no major player pushing reform in the Philadelphia process has advocated that idea.

<sup>239</sup>Apple, *supra*, note at 73. “Economic and social capital can be converted into cultural capital in various ways. In marketized plans, more affluent parents often have more flexible hours and can visit multiple schools. They have cars—often more than one—and can *afford* driving their children across town to attend a ‘better’ schools. They can as well provide the hidden cultural resources such as camps and after-school programs (dance, music, computer classes, etc.) that give their children an ‘ease,’ a ‘style,’ that seems ‘natural’ and acts as a set of cultural resources. Their previous stock of social and cultural capital—who they know, their ‘comfort’ in social encounters with educational officials—is an unseen but powerful storehouse of resources. Thus, more affluent parents are more likely to have the informal knowledge and

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skill—what Bourdieu would call the habitus—to be able to decode and use marketized forms to their own benefit. This sense of what might be called ‘confidence—which is itself the result of past choices that tacitly but no less powerfully depend on the economic resources to actually have had the ability to make economic choices—is the unseen capital that underpins their ability to negotiate marketized forms and ‘work the ‘system’ through sets of informal cultural rules.” *Id.* at 73.

The history of the voucher movement illustrates this all too well and demonstrates why it is essential to consider both the proposed reforms and the reality they address in a historical context. Molly O'Brien emphasizes need for historical perspective on the voucher movement, which, she notes, originally grew out of racist white objections to looming desegregation orders.<sup>240</sup> The "choice" was choice to avoid equality and integration. O'Brien challenges the more benign view of the origins of choice, and says the original call for vouchers "demonstrably coincide[d] with the white conservative pursuit of dominance and privilege."<sup>241</sup> O'Brien points out that there was no evidence of parental objection to school placement before desegregation<sup>242</sup> and no factual evidence to "support the theory of public school decline."<sup>243</sup> O'Brien situates the rise of the voucher movement in the historical context of civic republicanism's relationship to public education which was seen as necessary for citizens to effectively participate in the political community.<sup>244</sup> But these democratic ideals of the nineteenth century contrasted with the discriminatory reality of slavery and anti-immigrant fervor, and themselves involved an element

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<sup>240</sup>O'Brien debunks the attribution of choice through vouchers to Milton Friedman who proposed them in 1955. She traces the racist history preceding Milton Friedman's voucher proposal in which southern avowed segregationists proposed vouchers as part of several successful efforts to evade implementation of *Brown v. Board of Education*. See O'Brien, *Private School, supra*, note at 374-385.

<sup>241</sup> *Id.* at 363.

<sup>242</sup> *Id.* at 363

<sup>243</sup> *Id.* at 364

<sup>244</sup> *Id.* at 369-370. "The concept of universally available, no-cost, empowering education was and remains a radical idea. It embraces citizen equality; it requires collective exercise of responsibility for the education of each citizen; and it rejects wealth or social position as the prerequisites to citizenship and education for citizenship." *Id.* at 371

of privilege—the creation of educational credentials allowed the middle class to maintain privileges associated with those credentials.<sup>245</sup> These two contradictory visions, education for citizenship and education for advantage, with vouchers a part of the latter vision, “arose in reaction to African-American efforts to gain an education for citizenship. It grew out of the impulse to preserve privilege and to protect social and economic advantage in a competitive market. The tuition voucher movement represents a betrayal of civic republican aspirations, rather than a promise to achieve them.”<sup>246</sup>

The current reform movement, especially the choice/privatization wing, shares some of these characteristics. As noted above, much of the justification for vouchers and other forms of choice, emphasizes the “failure” of modern public education. O’Brien demonstrates that the actual NAEP scores, the most widely available documentation of performance based on standardized testing, shows that whites have stayed level and blacks have advanced over the last quarter century.<sup>247</sup> “What these scores demonstrate is that the ‘decline’ witnessed in the last twenty-five years is the decline of white academic advantage. Perhaps the rising chorus of dissatisfaction with regard to academic standards reflects, in part, white majority concern over losing that advantage.”<sup>248</sup>

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<sup>245</sup> *Id.* at 373.

<sup>246</sup> *Id.* at 374.

<sup>247</sup> O’Brien, *Private Schools*, *supra*, note at 395-398. See National Center for Education Statistics, Indicator 12, *Trends in the Mathematics Performances of 9-, 12- and 17-year olds, positive for 1973-99*, at 21, 24 (reading performance higher for 9 and 13, same for 17, most of the gain was in the 1970s). See also Rothstein, *supra*, note at 68-74.

<sup>248</sup> O’Brien, *supra*, note at 396-7

James E. Ryan and Michael Heise analyze choice from a more positive perspective.<sup>249</sup> Their thesis is that the failure of the choice movement to focus on suburban public school stakeholders who are threatened by school choice dooms it much more than opposition by teachers' unions or urban school bureaucracies.<sup>250</sup> Just as school integration stopped at the suburban line—so too has choice.<sup>251</sup>

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<sup>249</sup> See James E. Ryan and Michael Heise, *The Political Economy of School Choice*, 111 Yale L. J. 2043 (2002).

<sup>250</sup> Suburban stakeholders are threatened by influx of outsiders and by potential loss of revenue that could affect property values. *Id.* at 2045-46.

<sup>251</sup> *Id.* at 2046; see *Milliken v. Bradley*, 418 U.S. 717 (1974).

Ryan and Heise consider choice to have “radical potential” which is being thwarted by suburban resistance.<sup>252</sup> They recognize though that the choice advocates do not sufficiently attend to “the connection between socioeconomic status and academic achievement [and] [i]nstead . . . tend to place a great deal of faith in the power of competition to improve schools generally and to boost academic achievement in particular.”<sup>253</sup> Ryan and Heise question whether school choice will inevitably produce overall gains.<sup>254</sup>

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<sup>252</sup> *Id.* at 2086. “Simply put, allowing students to choose freely among schools could transform the way that education is provided in this country. To accept school choice in its most aggressive and purest form is to accept the proposition that all students should be able to choose from a range of schools. Further, if one believes that schools should really compete for students –and compete fairly–then all students should have an equal opportunity to attend all schools. It seems arbitrary to limit choice to a particular type of school, whether public or private, or to schools in a particular geographic area. A robust school choice plan would give all students a ticket good for entry at any school. Under these circumstances, students would have the widest range of choices practicable, and schools would have to compete on the basis of services provided with similar resources. A universal school choice plan thus would undermine the rationales for local control of public schools; local restrictions on attendance would be inconsistent with allowing students to choose freely, and unequal expenditures among localities would be inconsistent with requiring schools to maximize their efficiency by competing fairly with one another.” *Id.* .

<sup>253</sup> *Id.* at 2112.

<sup>254</sup> It may be that choice results in advantaged parents and students clustering in particular schools, which would benefit those schools but do nothing for, or harm, less advantaged schools. (Consider here the inequities among colleges and universities.) Put differently, the same self-sorting that might increase family-level utility might simultaneously decrease net social utility by reducing the socially optimal level of socioeconomic integration. Local residents, in addition, might have less reason to care about local school quality because residence would no longer determine school placement, and housing values and local school quality would no longer be as tightly linked. Any competitive gains through choice might thus be offset by losses from a reduction in monitoring by local residents.” *Id.* at 2112-2113.

We have already had a large and relatively unexamined experiment in privatizing education which illustrates the challenges to the access and equity ignored by Chubb and Moe and challenges the efficiency of the market in producing high quality education. In the 1980s the federal student loan programs were largely deregulated leaving the recipients—i.e. the consumers—the freedom to choose where to spend their education dollars. This led to an explosion of trade schools of, to be charitable, varying quality.<sup>255</sup> Many pegged their tuition to the precise amount of financial aid and grants that low income students could qualify for and many offered programs of very dubious value—including security guard training and, my personal favorite, a correspondence course to learn how to drive tractor-trailers.<sup>256</sup> It would be very enlightening to see if the deregulation and availability of individual choice led to more quality programs and how well people disadvantaged by class and poverty were able to access them. The lawyers most involved in trade school litigation say it had exactly the opposite effect—public funds intended to help people out of poverty were drained off, leaving the students with substantial and unaffordable debts and unable to obtain any more loans to attend more legitimate programs.<sup>257</sup>

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<sup>255</sup> See, e.g. *Rodriguez v. McKinney*, 156 F.R.D. 112 (E.D. Pa. 1994); Cathy Lesser Mansfield, *The Federal Trade Commission Holder Rule and Its Applicability to Student Loans: Reallocating the Risk of Proprietary School Failure*, 26 Wake Forest L. Rev. 635 (1991); National Consumer Law Center, UNFAIR AND DECEPTIVE ACTS AND PRACTICES, ¶5.9 (3d ed. 1991 and supp. 1996).

<sup>256</sup> See Cathy Lesser Mansfield, *The Federal Trade Commission Holder Rule and Its applicability to Student Loans—Reallocating the Risk of Propriety School Failure*, 26 Wake Forest L. Rev. 635 (1991).

<sup>257</sup> Interview with Alan White, Community Legal Services, Inc., attorney for plaintiffs in *Rodriguez* and other trade school fraud cases.

The biggest contradiction between the rhetoric of empowerment and the actual experience in Philadelphia is that the reform process imposed by Schweiker added no empowerment at all to Philadelphia or its families. Philadelphia students already enjoyed the right to transfer to another school if space was available so long as the requested transfer would not have a segregating impact on either school.<sup>258</sup> The takeover process disempowered Philadelphia as a community; the changes in management of schools were imposed without input or voice by the students and families affected.<sup>259</sup> Parents were not even notified directly by the SRC whether their schools were being considered for intervention until after the SRC made these decisions.<sup>260</sup> The SRC meetings, with one rare exception, were held during the middle of the ordinary work day—Wednesday afternoons at 1 p. m.—and anyone who wished to testify had to sign up in advance and provide written copies of their testimony. In a nutshell, the main reform process offered neither voice nor choice to Philadelphia families.<sup>261</sup>

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<sup>259</sup> *See* Part II, *supra*.

<sup>260</sup> *See* Letter to Parents, *supra*, note .

<sup>261</sup> *See* Liebman, *supra*, note .

Who was empowered? The managerial class embodied in Edison and the other private managers and state government forces supporting privatization of public education—demonstrated by the state's initial choice of Edison to evaluate Philadelphia, the governor's wholehearted and uncritical acceptance of Edison's findings and its recommendation that it run the entire Philadelphia School District,<sup>262</sup> and the provision of extra funds to Edison beyond what even the non-profit managers received to run the schools turned over to private management; and the community groups and politicians who supported privatization, shown most starkly through the independent schools grants program which rewarded these groups with thousands of dollars.

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<sup>262</sup> See Casey Audit, *supra*, note for a detailed and harsh critique of the process by which Edison was selected.

The Pennsylvania statute that mandates state take over of failing schools is known as the “Education Empowerment Act.”<sup>263</sup> The statute does not explicitly say who is intended to be empowered but local school districts themselves are certainly not empowered by this law. The Act directs the state department of education to place on the empowerment list any school district with a “history of low test performance.”<sup>264</sup> A history of low test performance is defined solely by PSSA test scores, specifically a combined average of 50% or more of the students scoring in the bottom 25% or below basic level of performance on math and reading for the most recent two years of scores.<sup>265</sup> Extraordinarily low test performance is similarly defined solely in reference to PSSA scores: 60% per cent in the bottom quartile or below basic for two years lands a district in this category.<sup>266</sup> School districts on the empowerment list must set up a “school district empowerment team” that will work with the “academic advisory team” named by the state department to develop a school improvement plan.<sup>267</sup> If the district “does not meet the goals for improving educational performance set forth in the school district improvement plan

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<sup>263</sup> 24 P.S. § 17-1701-B. Eugene Hickok, Secretary of Education in Pennsylvania under Tom Ridge, stated: “The Education Empowerment Act gives us a chance to help our schools that need it most, using new models and new ideas to help failing school districts turn themselves around. And, most important, it enables us to help our children success.” Pa. Dept. of Ed. Press Release, Dec. 4, 2000.

<sup>264</sup> 24 P.S. §17-1703-B

<sup>265</sup> *Id.* 1702-B

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

and maintains a history of low test performance” for three years, the state will take over the district.<sup>268</sup>

The School District of Philadelphia was placed on the empowerment list in 2000 but was not subject to takeover for academic distress at the time of the state takeover. Instead the takeover was engineered by financial distress under a subsection of the statute aimed only at Philadelphia.<sup>269</sup>

The Empowerment Act primarily empowered Governor Schweiker and Secretary Zogby to force privatization on Philadelphia, allowing the Commonwealth of Pennsylvania to literally function as the family state in its starkest form.

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<sup>268</sup> 1705-B.

<sup>269</sup> See 24 P.S. §6-691(c)(applicable only to cities of the first class–i.e. Philadelphia).

The sideshow to the main process, the independent schools grant program, crystallized this conflict between the rhetoric of empowerment and the reality of lack of voice. The Independent Schools Act<sup>270</sup> is not a well known law. It is generally believed that this law grew out of former Governor Ridge's frustration at the barriers the charter school law places in the way of converting existing public schools to charter schools. An existing school can be converted only when half the staff and parents vote in favor of conversion.<sup>271</sup> No existing public school has been converted to a charter school since the law was enacted. The Independent Schools Act contains no such barrier. A school district may designate "any school of the district as an independent school operating under an agreement with the board of school directors" so long as the school board agrees.<sup>272</sup> The governing body of the independent school must include "representatives of parents and teachers" but the number, percentage or even definition of such representatives is not specified.<sup>273</sup> The agreement between the school board and the governing body of the independent school determines everything from the governance structure to funding.<sup>274</sup> The employees remain school district employees and continue to be covered by existing collective bargaining agreements<sup>275</sup>.

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<sup>270</sup> 24 P.S. §502.1.

<sup>271</sup> *See* 24 P.S. §17-1701-A (b)(2).

<sup>272</sup> 24 P.S. §5-502.1(a).

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> 24 P.S. §5-502.1(e).

The Act also provided for funding for grants to support conversion to independent school status throughout Pennsylvania.<sup>276</sup> In 2002, however, grants were awarded only for schools in Philadelphia and only to groups that were closely and publically identified with Governor Schweiker's position on school reform.<sup>277</sup> The Department of Education awarded \$2 million in grants for independent school conversion to seven groups in Philadelphia; the awards were announced on April 9, 2002.<sup>278</sup> No information appeared on the Department's extensive website about this grant program; there is no record that any Request for Proposals ever appeared there. No grants were awarded for any schools outside of Philadelphia. One award recipient stated publically that his group was made aware of the availability of the grants when they were contacted by Department of Education officials suggesting that they apply.<sup>279</sup>

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<sup>276</sup> 24 P.S. §5-502.1(f).

<sup>277</sup> As best as can be determined from the information available on the Department of Education website, no other grants have ever been awarded under the Independent Schools Act before or since April 2002.

<sup>278</sup> The grantees—Germantown Settlement, Universal Companies, Community Connections Services and Development, Inc, Nueva Esperanza, Foundations, Inc., and the West Philadelphia Coalition—were all involved in supporting Governor Schweiker's effort to turn the district over to Edison. The one exception was the Laboratory School of Communications and Language, a charter school with exceptionally good test scores. The Laboratory School was awarded one grant for "a school to be determined." This grant might be the rare example of the grant program functioning on merit but there is no public record of whether the grantee was ever awarded a school or got the grant money.

<sup>279</sup> Emanuel Freeman, CEO, Germantown Settlement, at May 14, 2002 community forum. See Charing Ball, *Settlement grilled over school study, management plans*, Mt. Airy Times Express 1, 4, 6-7 (May 22, 2002 (on file with author)).

The contrast between the Department of Education and Governor's press releases about the program and the actual grant applications that were successful is quite remarkable. On passage of the Act, Governor Ridge lauded the Act as among "some of the most dramatic education reforms Pennsylvania or the nation has ever seen . . . ." <sup>280</sup> The Department's Request For Proposals for the grants, dated November 2001, but not publically available on the website, stated that

Independent schools are an educational innovation based upon three ideas:  
>A compelling, well-defined, well-rounded mission is established for the students.  
>The freedom to achieve this mission is established through decreased central controls, and the leadership of parents and teachers in prescribing the educational goals, the mission of the school, and the curriculum to be offered.  
> the school district transfers a portion of its authority to the governing body of an independent school, so that the independent school may be primarily accountable to the educational consumer for both the academic and fiscal goals of the independent school. <sup>281</sup>

The Request For Proposals goes on to provide the following evaluation criteria for award of the grants:

Statement of anticipated mission and program overview of the independent school.  
Identification of goals for the use of grant funds.  
Identification of objectives and activities necessary for the achievement of each goal.  
Description of expected results and time line for each activity.  
A list of individuals involved in the development of the grant proposal, their addresses, their affiliants and signatures.  
Time line with completion dates to submit the independent school agreement to the school board. <sup>282</sup>

The grants were awarded on a per-school basis-\$25,000 per school proposed for conversion, with payment split in two. Half the funds were to be provided when the grant

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<sup>280</sup> Press Release, Governor's Office, May 17, 2001.

<sup>281</sup> See Independent Schools RFP, *supra*, note .

<sup>282</sup> *Id.*

contract was signed. The other half was to be furnished only when the grant recipient submitted to the Department of Education an independent school agreement and a letter of intent to submit the agreement to the school board.

In April 2002, Governor Schweiker proudly announced that seven community groups in Philadelphia had been awarded \$2 million in independent schools development grants “based on proposals that outlined individual school missions—such as raising standards, improving student performance and involving parents and the community in the schools—and how the organization would achieve these goals.”<sup>283</sup> The press release relied on those old favorites—empowerment and accountability—“independent schools are public schools governed by teachers and administrators and parents who are empowered to make decisions about school operations, and who are held accountable for fiscal and academic results.”<sup>284</sup>

Germantown Settlement was one of the successful grant recipients. It received \$425,000 in grants for 17 schools, including six schools that were named on the SRC partnership list.<sup>285</sup> This left Germantown Settlement with \$150,000 in grants to convert six schools to a status which the SRC had already explicitly rejected.

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<sup>283</sup> Pa. Dept. of Ed. Press release, April 7, 2002.

<sup>284</sup> *Id.*

<sup>285</sup> The two lists designated conflicting treatment for these schools—the SRC determined that three would be reconstituted (Emlen, Steel and Roosevelt) and one, Fulton, was assigned to Foundations, Inc. for private management. The remaining two, Pickett and Logan, were originally designated by the SRC to become independent schools but at the end of May, the SRC, after considering and rejecting proposals from Germantown Settlement itself and two other community groups to run Logan and Pickett, decided not to use the independent school model after all. Instead it designated Logan for reconstitution and Pickett for private management.

What were the individual missions outlined by Germantown Settlement for these schools that would empower their parents and teachers to run them and which so convinced the Department of Education to provide this money? Interestingly, Germantown Settlement filed identical grant applications for all 17 schools. The only difference among them was the name and address of the school. No individualized mission was outlined. Each grant application identified the mission of the school as:

To help low and moderate income students in grades K-12 to reach world class standards of academic excellence within an active learning context, promote social and cultural growth, prepare young people for leadership roles within their community and the national, and model effective educational approaches.

The application further identified the education model to be used as:

The Settlement's model includes the following components: social supportive services, community planning and organizing, resident engagement, and physical and economic development. Our model requires that education programming for youth be integrated with community development; and conversely, that community development support the growth and education of children.

The Settlement believes that Philadelphia's education model of yesterday is less effective as a model to respond to the child and family poverty indicators specific to the Charles Henry [one of the 17 schools] and the surrounding community of today. These indicators form the nexus of the challenges faced by students and their families. In proposing to establish and implement independent schools, The Settlement will work with key stakeholders, utilizing existing resources within the community and the school, to help to mitigate these challenges. Through the efforts of the Germantown Community Collaborative Board (GCCB) and the Wister Neighborhood Council (WNC), we will work to increase personal commitment and the leadership of residents to serve as catalysts to facilitate positive solutions. *Our short-term goals are to: 1)develop a planning infrastructure; 2)offer on-site activity and services; 3)increase resident and community ownership; 4)increase school employee ownership; and 5)facilitate coordination of local institutional resources.*<sup>286</sup>

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<sup>286</sup> Grant proposal, on file with author (emphasis supplied).

It is all too easy to poke fun at another field's jargon, but it is hard to resist wondering exactly what "on-site activity" was worth \$425,000 to the Commonwealth of Pennsylvania. Nowhere in the grant application were these terms or proposals explained more specifically.

This process glaringly demonstrated the lack of empowerment of the communities of the targeted schools. Neither the Department of Education nor Germantown Settlement bothered to communicate with any of the targeted schools before seeking or awarding the grants. Indeed the C.W. Henry school staff and parents learned their fate by reading a newspaper article that listed the schools and the grant recipients.<sup>287</sup> Carol Nejman, Henry's principal, first assumed that Henry's inclusion on the list was a mistake because the school's test scores ranked near the top of Philadelphia elementary schools. But, as she and the other schools quickly learned, the grant awards had nothing to do with school performance. Indeed Central High School, Philadelphia's much lauded academic magnet high school, was the subject of an independent school grant awarded to Foundations, Inc. in the same process.<sup>288</sup> The schools targeted in the grant proposals were all over the city and range from the elite to the struggling. They had little in common other than their appeal to groups that Schweiker wished to reward. Germantown Settlement apparently sought schools within the Northwest area and included schools ranging from large

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<sup>287</sup> Interview, Carol Nejman, principal of C.W. Henry, 2001-2002,.

<sup>288</sup> Central is the second oldest public high school in the United States. It has the second highest test scores of any public high school in Philadelphia, second only to the other academic magnet school, Julia Masterman. Its scores far surpass the state medians. Central regularly sends significant numbers of graduates to elite colleges. For example, members of its 2002 graduating class enrolled at Yale, Princeton, University of Chicago, Brown, Penn, Columbia, Duke, Stanford, Swarthmore, University of California at Berkeley, Curtis Institute of Music, and other elite colleges. See <<http://centralhigh.net/alumni/collegeattendance/261college.html>> (accessed Sept. 16, 2003).

comprehensive high schools like Roxborough High School and Germantown High School to a variety of elementary schools to the regional magnet school for severely disabled children, Widener Memorial. Several of the schools—AMY\_NW, Emlen, Lingelbach and Henry—were members of a loose coalition of schools in the Mt Airy neighborhood of Philadelphia that were all working with the Coalition of Essential Schools<sup>289</sup>. The news that they were targeted for conversion to independent status by an entity they had had no contact with was very disturbing.

What upset the targeted school communities most was the governance structure proposed by Germantown Settlement which did not in any way “empower” parents or teachers. In contrast to the enthusiastic words of Governor Schweiker, describing an independent school as governed by parents and teachers, Germantown Settlement proposed to set up a non-profit corporation that it would control which would then have full authority over school operations. Specifically, the grant proposal accepted by the Department of Education stated:

The Independent school proposed herein will be managed by a separate entity to be entitled, Northwest Education Development Corporation (NEDC). This entity . . . shall have full responsibility for the following tasks:

- Establish all policies governing the school . . .
- Shall hire and fire all personnel
- Shall enter into all professional service contracts on behalf of the school
- Shall establish and maintain an active resident and parent advisory committee and promote participation in program aspects of the operations of the school.
- Approve an annual operating budget . . .
- Responsible for school facilities, including maintenance, safety and operations.

The governance structure will consist of a total of five (5) members to be appointed as follows:

- Three members shall be appointed by Germantown Settlement (one such appointee shall serve as the President of the Board of Directors)
- One member shall be appointed by the Germantown Settlement Charter

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<sup>289</sup> The Coalition of Essential Schools has a website at [www.essentialschools.org/pub/ces\\_docs/about/about.html](http://www.essentialschools.org/pub/ces_docs/about/about.html) (accessed Sept. 16, 2003).

School, and  
One member shall be elected by the appointed members.<sup>290</sup>

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<sup>290</sup> Germantown Settlement, Grant Proposal for the conversion of C.W. Henry School (on file with author).

The proposal also contained several strong hints that not only would Germantown Settlement control the school through the NEDC, the NEDC in turn would employ a private manager to actually run the school. The proposal states, “It is envisioned that NEDC will function under a contract with the School Reform Commission (SRC). Under this agreement, NEDC will handle the day-to-day operations of the school via professional service contracts with various entities to be identified through the course of the planning process.”<sup>291</sup> The organizational chart illustrating the governance structure that was attached to the grant proposal contained a box for an Educational Management Organization, SRC jargon for a private for-profit manager like Edison Schools, Inc.

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<sup>291</sup> *Id.*

The news that their schools might be taken over by a community group with little experience in education created quite a stir in a community known for activism. Over 200 people signed a petition, presented to Governor Schweiker and Secretary Zogby, that demanded use of the grant funds for school needs and not for take overs.<sup>292</sup> Parents organized a community forum in May 2002 that was attended by an estimated 250 people who pelted questions at Germantown Settlement's representatives about what they intended to do.<sup>293</sup> Germantown Settlement CEO, Emanuel Freeman, insisted that no take over was intended and that NEDC was just a conceptual model. He did stress though that Germantown Settlement intended to set up NEDC and to proceed with its assessments though it promised to respect the decisions of individual schools that chose not to become independent. Parents quickly found out exactly what this commitment meant. The C.W. Henry school had its own school meeting in early June where the parents, teachers and staff discussed the situation and unanimously decided to tell Germantown Settlement that they declined to seek independent status and wished to continue working on reforms under the Coalition for Essential Schools model as a public school.<sup>294</sup> On June 10, 2002, a letter signed by Principal Nejman, Assistant Principal Karen Dean, PFT Building Representative Cred Dobson, School Council Representative Yvonne Thompson-Friend and Home and School President Elayne Bender, was sent to Mr. Freeman at Germantown Settlement advising him that the C.W. Henry community did not want to participant in any conversion to independent status with Germantown Settlement. The letter asked that

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<sup>292</sup> A copy of the petition is on file with author.

<sup>293</sup> See Mt Airy Times Express, *supra*, note .

<sup>294</sup> Letter to Emanuel Freeman and Cornelia Swinson, June 10, 2002; letter to Charles Zogby, June 10, 2002. (Copies on file with author).

Germantown Settlement confirm in writing that it would not proceed with plans for conversion and would not submit a draft conversion contract to the Department of Education. Neither Germantown Settlement nor Governor Schweiker nor Secretary Zogby acknowledged or responded to this letter. In September 2002, Germantown Settlement submitted its assessment to the Department of Education, complete with a proposed contract that provided for full control of the school by Germantown Settlement.<sup>295</sup>

It is illuminating to compare the records of the schools subjected to this process with the record of the entities that the Department of Education entrusted with the public's money. Germantown Settlement representatives acknowledged that they had little background in education. Its primary involvement in education is the establishment and operation of the Germantown Settlement Charter School (GSCS). The GSCS, established in 1999, includes grades 5-8 and enrolled 520 students in 2000-2001.<sup>296</sup> Its test scores are abysmal. The vast majority of its students landed in the lowest category—below basic—in the two years of testing available at the time the grants were awarded. In 2001, 86% of its fifth graders scored in below basic in math, 66% in reading; 88% of the eighth graders scored below basic in math and 64% in reading.<sup>297</sup> The much maligned Philadelphia school district average in these categories were, for fifth grade, 57% math, 59% reading; for eighth grade 63% math and 52 % reading. The schools that Germantown Settlement sought to control had much better test scores; only the few that

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<sup>295</sup> Copy on file with author.

<sup>296</sup> See GPUAC Profiles, *supra*, note at 17.

<sup>297</sup> The school profiles, including PSSA results, are available at [www.paprofiles.org/pa2001/Philadelphia.html#126515001](http://www.paprofiles.org/pa2001/Philadelphia.html#126515001) (accessed Sept. 16, 2003).

were on the SRC partnership list even approached GSCS's low scores.<sup>298</sup> The GSCS scores would have squarely placed the school on the reform list of the SRC –if charter schools were subject to the same standard of evaluation as traditional public schools.

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<sup>298</sup> *Id.*

The Department of Education website continued to be silent on the status of the Independent Schools grants throughout 2002. Germantown Settlement filed its assessments, late, in September 2002, and, presumably, received the second half of the grant award funds before Secretary Zogby resigned. Germantown Settlement sent a copy of the assessment, dated September 2002, for C.W. Henry to the school on Oct. 15, 2002. Principal Nejman compared notes with the principals at the other targeted schools and all had, again, received identical documents. The assessment was rife with inaccuracies and vague conclusions. From the Executive Summary, it appears that Germantown Settlement submitted assessments for Simon Gratz High School and Edward T. Steel Elementary even though its initial grants for these schools had been transferred to Joseph E. Hill/Samson and Prince Hall Schools.<sup>299</sup> I have not had access to the other documents which are not publically available. The Germantown Settlement story illustrates Schweiker and Zogby's willingness to force "choice" and "independence" onto schools, students, and parents even when they had no interest or desire for it and actively opposed it. The empowerment of this story was for the managerial class represented by the would-be manager Germantown Settlement, not the parents or students of the schools at issue.

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<sup>299</sup> Germantown Settlement Assessment of Charles W. Henry School, Executive Summary at 1(listing schools for which it received grants); Letter of September 20, 2002 from J. Terry Kostoff, Depute Auditor General for Audits, Department of the Auditor General of Pennsylvania, advising that the Germantown Settlement grants for Gratz and Steel were replaced by Hill/Samson and Prince Hall schools. (copies on file with author).

## V. Conclusion

The Philadelphia public schools are not as “good” as some of the better-funded suburban public schools when you compare quality and age of buildings, extent of teacher credentials, high school drop out rates, or standardized-test scores.<sup>300</sup> It would take another article to try to define what a “good” school is and whether these are the right criteria to determine it. But any definition has to consider the economics and equities of school funding and has to consider the challenges the students bring with them. A district where the bulk of the children are living below the poverty line has a harder job than a district where the vast majority come from privileged homes where formal education is fully supported from birth. Philadelphia’s children will present their challenges to any school they go to—whether public, public charter, privately managed, or traditional private school. However, the aspirational ideal to provide a decent public education to all of our children is one of the key bases to our collective image of the United States as an egalitarian democracy. Before we take more steps to eliminate the public school system, we need to recognize the challenges it faces and we need to recognize its value and role as an institution even where parts of that institution need improvement.

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<sup>300</sup> See Kohn, *supra*, note ; Kozol, *supra*, note .

Perhaps I will be viewed as extreme in thinking that the reformers I have looked at here want to end public education. It is also beyond the scope of this article to analyze thoroughly how the requirements more than the rhetoric of No Child Left Behind,<sup>301</sup> the mania for high-stakes testing, and the growing individualist attitude towards education are putting public education at serious risk. But the rhetoric of the reformers, both in their double standard for charter and private schools and their characterization of public schools, illuminates the goals they seek. The current United States Education Secretary, Ronald Paige, recently praised the superiority of Christian schools, saying “[t]he reason that Christian schools and Christian universities are growing is a result of a strong value system. . . .In a religious environment the value system is set. That’s not the case in a public school, where there are so many different kids with different kinds of values.”<sup>302</sup> “All things equal, I would prefer to have a child in a school that has a strong appreciation for the values of the Christian community, where a child is taught to have a strong faith. Where a child is taught that, there is a source of strength greater than themselves.”<sup>303</sup> Charles Zogby, the former Pennsylvania Commonwealth Secretary of Education, made no secret of his preference for and commitment to privatizing public education. After Rendell’s election as governor, Zogby resigned and became the Senior Vice President of Education and Policy for K12, Inc., a company devoted to providing private management for

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<sup>301</sup> The name of this law is itself cynical—as its effect is the opposite of what the name purports. More and more children are getting letters mandated by No Child Left Behind advising them that their schools are failing and that they have a right to transfer—to other schools that are overcrowded, unable, or unwilling to take them. *See infra* at . As No Child Left Behind’s sanctions on these schools kick in, the thousands of children enrolled in them will indeed be “left behind” in the most real sense.

<sup>302</sup> [www.nytimes.com/aponline/national/AP-Paige-Religion.html](http://www.nytimes.com/aponline/national/AP-Paige-Religion.html) April 9, 2003

<sup>303</sup> *Id.*

public schools and to providing a curriculum for homeschooling.<sup>304</sup> The No Child Left Behind Act states that its purpose will be accomplished by “providing alternatives to students in [failing] schools.”<sup>305</sup> The Empowerment Act requires that the improvement plans of schools placed on the empowerment list include school choice.<sup>306</sup>

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<sup>304</sup> K12, Inc. describes itself on its website as:

K12 is an education company led by William J. Bennett, the former U.S. Secretary of Education, editor of *The Book of Virtues*, and author of *The Educated Child*. K12 is building a comprehensive, standards-based curriculum and learning program. We work with educators and parents across the nation, utilizing traditional materials and the latest technology to deliver our excellent academic program. K12 is not a school; it is a company that provides a research-based curriculum, innovative instructional tools, and top-quality school management services to schools across America. K12 also serves homeschooling families by making a portion of its curriculum available for direct purchase by consumers.

<http://www.k12.com/about/company.html> (accessed August 22, 2003)

<sup>305</sup> Section 6301(4).

<sup>306</sup>

The point of privatization, according to Chubb and Moe, was to let the market, through empowered parents as consumers, determine whether schools live or die. The Philadelphia reform process in 2001-2002 was largely an anti-choice reform. It brought Philadelphia parents privatization without consent or choice. Philadelphia students and parents were not consulted, were not listened to, and were not even told in advance what reforms were being instituted in their schools. Although parents continue to have the right to seek a transfer for their children, nothing in the reform process gave the parents any more effective information to guide that choice. Philadelphia has not benefitted from the efficiency that Chubb and Moe promised. Its privately managed schools cost more, not less, to run and threaten the resources of the remaining schools. There will be no voting with parental feet—because parental choice is not part of this picture. Zogby got to choose and he chose Edison.<sup>307</sup>

Why does the rhetoric of failure, accountability, and empowerment work to persuade? One could cogently argue that it has not. There has been enormous and fervent opposition in Philadelphia to the edicts of the state.<sup>308</sup> But my focus here is those who have been persuaded and on those doing the persuading. Gutmann's consideration of vouchers, the other darling of "choice," is illuminating:

The appeal of vouchers to many Americans who are not otherwise committed to a state of families stems, I suspect, from three facts. One is

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<sup>307</sup> I must note though that Secretary Zogby did not get his full choice either—Edison got a large chunk of the Philadelphia School District but they did not get the entire thing, thanks to a fervent and hard-fought campaign by many Philadelphia students, parents, community members, educators and school staffs.

<sup>308</sup> The fight throughout the fall of 2001 by the students, parents, teachers, employees and other concerned citizens, right up to Mayor Street at one point, helped block Governor Schweiker from effecting his original plan of turning management of the entire district over to Edison.

that our public schools, especially in many of our largest cities, are so centralized and bureaucratized that parents along with other citizens actually exercise very little democratic control over local schools. The second is that only poor parents lack the option of exiting from public schools, and this seems unfair. The third, and most sweeping fact, is that the condition of many public schools today is bleak by any commonsensical standard of what democratic education ought to be.

The proper response to the first problem is to make public school systems less bureaucratic and more democratic. The best response to the second problem is to redistribute income more equitably, which would also overcome many other inequities in the ability of citizens to make use of their freedoms. Were *private* schooling an essential welfare good like health care, then the case for directly subsidizing it would be stronger. But we have already argued that public, not private schooling is an essential welfare good for children as well as the primary means by which citizens can morally educate future citizens. We have yet to consider whether (and why), given the democratic purposes of education, a democratic society should leave room for private schooling. But based on our considerations so far, we can conclude that the welfare of children and the well-being of democracy can be supported simultaneously by improving education, especially moral education within public schools rather than by encouraging parents to exit from them. We need not deny the third problem—that the condition of many public schools today is bleak—to recognize that we know of no more effective way, nor is there a more consistently democratic way, of trying to develop democratic character than to improve public schooling.<sup>309</sup>

I maintain that Gutmann is right—private choice, whether in the form of vouchers or charters or an illusory right to transfer to a “successful” school—is not the democratic solution. It entails running away and avoiding our differences. It deprives us of the social capital created by all of our children learning together. It undermines our collective responsibility to all our children. It has made us devalue the essential good of a system that brings all children together to create community out of difference. And running away is largely what has undercut the public school system in the first place and brought us the real problems it faces.<sup>310</sup>

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<sup>309</sup> Gutmann, *supra*, note at 70.

<sup>310</sup> See O’Brien, *Questioning the Power*, *supra*, note .

It is not my point here to say which reform to use. I just aim to be clear about what has been done, and to ask for fairness in how students and schools are being evaluated; to ask for honesty about the standards that are used; and to ask the law makers of these reform to be at least as precise in language as new lawyers are expected to be.