

Charter School Jurisprudence and the Democratic Ideal

TARA RAAM*

This Note will explore the implications of recent charter school legislation on democratic principles in the context of public education. In 2015, the Washington Supreme Court held, in League of Women Voters of Washington v. State, that charter schools are not “common schools.” Thus, the court proscribed the application of state funds designated for “common schools” towards supporting charter schools. Part II provides background on the development of charter schools and describes the Washington Supreme Court’s decision in League of Women Voters, particularly the Court’s reliance on its 1909 interpretation of the Washington constitution’s “common schools” principle in School District No. 20 v. Bryan, as well as the legislative response to League of Women Voters and subsequent lawsuit. Part III argues that evolving views of school governance necessitate a reading of the Bryan requirements that is more sensitive to the democratic ideals of participation, deliberation, and accountability underlying Bryan. Recognizing the League of Women Voters interpretation of Bryan as the only appropriate means of voter control of public schools would have harmful and far-reaching effects not contemplated by the Bryan court on public schools across the United States. Part IV challenges whether a system of state-authorized charter schools can achieve the democratic ideal, and ultimately offers a portfolio of school options as one possible democratic solution.

* Editor-in-Chief, Colum. J.L. & Soc. Probs., 2016–2017. J.D. Candidate 2017, Columbia Law School. The author extends her deepest gratitude to her advisor and mentor, Professor James Liebman, and to the editorial staff of the *Columbia Journal of Law and Social Problems*. She also thanks her family for their enduring support.

I. INTRODUCTION

In a controversial 2015 decision, *League of Women Voters of Washington v. State*,¹ the Washington Supreme Court struck down Washington's Charter School Act² and effectively shuttered the charter school system across the state.³ The state's electorate adopted the Charter School Act in 2012 by initiative, which was supported by Bill Gates and other philanthropists,⁴ as well as other pro-charter groups.⁵ Charter school supporters decried the ruling for depriving Washington students of innovative and effective education models.⁶ The decision struck down the voter-adopted legislation on the grounds that removing schools from direct local political control violated constitutional principles linking funding to the "common" school ideal.⁷ Although some opponents of charter schools quickly advocated for extending the Washington decision's logic to their states,⁸ other commentators on both sides of the issue thought the ruling's basis in idiosyncratic Washington law and precedent would limit the reach of the opinion's reasoning in other states.⁹

1. *League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015).

2. WASH. REV. CODE ANN. § 28A.710 (West 2015), *invalidated by* *League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015).

3. Washington Governor Jay Inslee decided not to call for a special session to "cure the constitutional concerns with the current system" because he opposes the initiative and believes that charter schools lack public oversight and accountability. See Andrew Ujifusa, *No Special Session to Save Washington State Charters*, *Gov. Inslee Says*, EDUC. WK.: ST. EDWATCH (Sept. 14, 2015, 8:37 AM), http://blogs.edweek.org/edweek/state_edwatch/2015/09/no_special_session_to_save_wash_st_charter_schools_gov_inslee_says.html [<http://perma.cc/38YE-SKFF>] ("Washington state Gov. Jay Inslee has declined to call a special session to create a legal pathway for charter schools to remain open this year."); Letter from Jay Inslee, Governor, Wash., to Members of the Washington State Legislature (Sept. 11, 2015), *available at* <http://www.governor.wa.gov/sites/default/files/documents/letters/LetterMcClearyPlanWorkgroup.pdf> [<https://perma.cc/YWR2-LJHS>] ("I opposed the initiative that created charter schools because I did not believe that public money belongs in schools that lack public oversight and accountability."). Governor Inslee separately noted that private groups had agreed to fund the charters for the 2015–2016 school year. Ujifusa, *supra*.

4. See Valerie Strauss, *Charter School Law Funded by Bill Gates in Washington State Ruled Unconstitutional*, WASH. POST (Sept. 6, 2015), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/09/06/charter-school-law-funded-by-bill-gates-in-washington-state-ruled-unconstitutional> [<https://perma.cc/XEB4-KCP2>] ("Washington's charter school law . . . narrowly passed in a 2012 referendum with financial support from Microsoft founder Bill Gates and other wealthy philanthropists."). Supporters included such funders as Bill Gates, Microsoft co-founder; Vulcan Inc., an investment company lead by Microsoft co-founder Paul Allen; Alice Walton, heiress to the Walton family fortune; and Nicolas Hanauer, American entrepreneur and venture capitalist. *Cash Contributions for: Yes on 1240 WA Coalition for Public Charter Schools*, WASH. PUB. DISCLOSURE COMM'N, <http://www.pdc.wa.gov/MvcQuerySystem/CommitteeData/>

This Note casts a critical light on the Washington Supreme Court's decision, which has linked the constitutionality of public funding for schools to a limited and compromised form of public school governance. There is bipartisan agreement that U.S. public schools do not sufficiently personalize instruction to the diverse needs of children and that this failure is at least partly attributable to the nation's decades-long reliance on educational bureaucracies to effectuate the democratic control of public, and

contributions?param=WUVTIFdDIDUwNw====&year=2012&type=initiative [https://perma.cc/SXJ3-FQB5] (last visited Nov. 15, 2015).

5. See, e.g., *Charter School Supporters Submit 350,000 Signatures to Put I-1240 on November Ballot*, WASH. CHARTER SCH. ASS'N (Jul. 6, 2012), <http://wacharters.org/charter-school-supporters-submit-350000-signatures-to-put-i-1240-on-november-ballot/> [https://perma.cc/U7AS-C29J] (noting Shannon Campion, the executive director of the Washington chapter of the advocacy group Stand for Children, provided support for the initiative by stating that "the creation of charter schools will help students receive a better education").

6. See, e.g., Nina Rees, *A Charter School Lesson for Washington*, FORBES: OPINION (Nov. 6, 2015, 2:24 PM), <http://www.forbes.com/sites/realspin/2015/11/06/a-charter-school-lesson-for-washington> [https://perma.cc/2ADM-RBWZ] ("Basing education policy decisions on such an antiquated framework would deprive Washington state students of a century of advances in educational innovation.").

7. See *League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015) ("Here, because charter schools under I-1240 are run by an appointed board or nonprofit organization and thus are not subject to local voter control, they cannot qualify as 'common schools' within the meaning of article IX.").

8. For a discussion on potentially applying *League of Women Voters* to Connecticut, see, e.g., Sarah D. Littman, *Connecticut Legislators Take Note, West Coast Rulings Are Going Against Charter Schools*, CTNEWSJUNKIE (Sept. 18, 2015), http://www.ctnewsjunkie.com/archives/entry/op-ed_ct_legislators_should_take_note_of_west_coast_rulings_on_charters [https://perma.cc/L33Z-HJWW] ("Connecticut legislators should be paying close attention to several interesting legal developments on the West Coast, which could have significant implications here in the Nutmeg State."); Wendy Lecker, *Do Courts Need to Guide Malloy About Education?*, STAMFORD ADVOC. (Sept. 19, 2015), <http://www.stamfordadvocate.com/news/article/Wendy-Lecker-Do-courts-need-to-guide-Malloy-6514492.php> [https://perma.cc/Q9VV-47FX] ("The refusal to fund public schools and simultaneous willingness to divert money to privately run charter schools has parallels to Connecticut.").

9. See Andrew Ujifusa, *Shock Waves Reverberate from Wash. State Charter Ruling*, EDUC. WK. (Sept. 11, 2015), http://www.nysasbo.org/uploads-firstread/1442238399_2015-09-14-EW-Shock.pdf [https://perma.cc/P75R-XLJN] (noting Rich Wood, Washington Education Association (WEA) spokesperson, stated constitutional language in other states differs from that of Washington, and Todd Ziebarth, vice president of National Alliance for Public Charter Schools, discussed unique circumstances in Washington). WEA is the state union for public school employees and one of the plaintiffs in *League of Women Voters of Washington v. State*, and it has publicly opposed charter schools. See, e.g., John Higgins, *State Supreme Court: Charter schools are unconstitutional*, SEATTLE TIMES (Sept. 4, 2015, 4:31 PM), <http://www.seattletimes.com/seattle-news/education/state-supreme-court-charter-schools-are-unconstitutional/> [https://perma.cc/P65K-WF5G] (noting Kim Mead, WEA president, stated that "charter schools steal money from our existing classrooms, and voters have no say in how these charter schools spend taxpayer funding").

especially, urban schools.¹⁰ This Note argues that, in the process of invalidating a statute adopted through the directly democratic action of the state's electorate,¹¹ and yet in the name of democracy, the *League of Women Voters* decision effectively treats bureaucratic control as the only constitutionally permissible mechanism for democratically governing public schools.¹² In doing so, it not only diminishes educational opportunities for disadvantaged children, particularly in the urban school systems where charter schools are often established to expand those opportunities,¹³ but also undermines the very democratic ideals of political participation and voter control that the decision purports to defend.

This Note does not assume that charter schools necessarily exhibit market-oriented behavior¹⁴ and therefore does not advocate the use of charter schools to privatize education in response to the failures of public school boards.¹⁵ Rather, it argues that the logic behind the Washington decision could deprive the public, particularly families of children in failing public schools, of a broader array of effective public schools and highly participatory and deliberative democratic governance. Both offer an important antidote to the limited and ineffective bureaucratic form of governance to which the Washington decision relegates public education in the state.

Part II provides background on the development of charter schools and describes the Washington Supreme Court's decision

10. This view reigns on both the left and the right. See, e.g., JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 35–38 (1990) (noting it is unlikely for centralized bureaucracy to be efficient because education is based on personalized interaction, but despite this, key players have political incentives to pressure for more bureaucracy); THEODORE SIZER, *HORACE'S COMPROMISE: THE DILEMMA OF THE AMERICAN HIGH SCHOOL* 209 (1984) (“[H]ierarchical bureaucracy stifles initiative at its base; and given the idiosyncrasies of adolescents, the fragility of their motivation.”).

11. See *League of Women Voters*, 355 P.3d at 1134 (noting “in November 2012, Washington voters approved I-1240” — the Charter School Act — and the court struck down that Act).

12. See *infra* Part III.

13. See Charles Payne & Tim Knowles, *Promise and Peril: Charter Schools, Urban School Reform, and the Obama Administration*, 79 HARV. EDUC. REV. 227, 228 (2009) (“Effective charter schools provide new schooling options for children and families who have had, historically, far too few.” (emphasis in original)).

14. For a discussion on the blurred distinction between market and political orientation as it relates to charter schools, see Jeffrey R. Henig et al., *Privatization, Politics, and Urban Services: The Political Behavior of Charter Schools*, 25 J. URB. AFF. 37 (2003).

15. For an overview of the market model and critique of privatization as a viable solution to challenges faced by school bureaucracies, see generally JEFFREY R. HENIG, *RETHINKING SCHOOL CHOICE* (1994).

in *League of Women Voters*, particularly the Court's reliance on its 1909 interpretation of the Washington constitution's "common schools" principle in *School District No. 20 v. Bryan*, as well as the legislative response to *League of Women Voters* and subsequent lawsuit. Part III argues that evolving views of school governance necessitate a reading of the *Bryan* requirements that is more sensitive to the democratic ideals of participation, deliberation, and accountability underlying *Bryan*.¹⁶ Recognizing the *League of Women Voters* interpretation of *Bryan* as the only appropriate means of voter control of public schools would have harmful and far-reaching effects not contemplated by the *Bryan* court on public schools across the United States. Part IV challenges whether a system of state-authorized charter schools can achieve the democratic ideal and ultimately offers a portfolio of school options as one possible democratic solution.

II. THE RISE OF CHARTER SCHOOLS AND LEGAL CHALLENGES TO THEM

This Part traces the development of charter schools both generally and in Washington, specifically discussing recent challenges to Washington's charter system. Part II.A identifies the limitations of bureaucratic governance of schools and school systems and details the rise of charter schools to address them. Part II.B then discusses two Washington Supreme Court decisions, *School District No. 20 v. Bryan*, and *League of Women Voters of Washington v. State*, the latter of which relied on the former to strike down Washington's Charter School Act, leaving the future of Washington's nine charter schools in question.¹⁷ Finally, Part II.C addresses the Washington Senate's 2016 workaround bill and the subsequent legal challenge to the statute, cautioning that in defending the now amended Charter School Act, the state must resolve similar legal questions — while lawmakers success-

16. These markers of democracy have also been applied in other contexts. See, e.g., BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 283–87 (4th ed. 2007) (offering representation, responsiveness, and responsibility as criteria to be used in assessing the efficacy of Congressional lawmaking).

17. See Teresa Yuan, *WA Charter Schools Continue Fight for Survival*, KING 5 NEWS (Dec. 14, 2015), <http://www.king5.com/story/news/education/2015/12/14/washington-charter-schools-supreme-court-ruling-funding/77278670/> [https://perma.cc/FA9X-BKUH] (noting Washington's nine charter schools looked for alternative solutions in the wake of *League of Women Voters*).

fully kept charter schools open for the 2016–17 school year, amending the act has not fully addressed the faulty reasoning underlying the *League of Women Voters* decision.

A. CHARTER SCHOOLS' RESPONSE TO BUREAUCRATIC GOVERNANCE IN AMERICAN EDUCATION

In the United States, centralized bureaucracy has been the primary model for governing public education since the early 1900s, particularly in the nation's cities.¹⁸ Under this model, the publicly elected school board (or, in a minority of jurisdictions, the mayor) typically selects a superintendent¹⁹ to preside over a centralized district office.²⁰ Often working in conjunction with teachers' unions and through lengthy collective bargaining agreements, central boards codify educational policy²¹ in rules and regulations that principals enforce at the school level via their hierarchical authority over teachers.²² School boards are susceptible to frequent turnover among board members and school superintendents.²³ Moreover, lay school board members

18. See CHUBB & MOE, *supra* note 10, at 5 (“This [bureaucratic] system of [school] governance has been firmly in place now for as long as most Americans can remember.”); TODD ZIEBARTH, EDUC. COMM’N OF THE STATES, THE CHANGING LANDSCAPE OF EDUCATION GOVERNANCE 2 (1999) (“In the early years of [the 20th] century, ‘progressive reforms’ shifted school governance . . . to . . . school boards.”).

19. See Marco A. Castillo, *Public Participation, Mayoral Control, and the New York City Public School System*, 9 J. PUB. DELIBERATION 2, 7 (noting the traditional power of local school boards to appoint school superintendents and their minimized role in mayoral control jurisdictions like New York City); CHUBB & MOE, *supra* note 10, at 5 (“The school board . . . is almost always elected. The superintendent is its administrative head and is sometimes elected, sometimes appointed.”).

20. See CHUBB AND MOE, *supra* note 10, at 5 (“The district office is the bureaucratic organization responsible for carrying out the policies of the board and the superintendent.”); ZIEBARTH, *supra* note 18, at 2 (noting the school superintendent presides over a local bureaucracy that manages the district’s educational, managerial, and fiscal responsibilities).

21. See CHUBB AND MOE, *supra* note 10, at 48–49 (noting collective bargaining agreements, which usually have “excruciating detail and [are of] spectacular length,” are a reflection of union demands about “the structure of teachers’ jobs [and] the structure of the school as a whole”).

22. See James P. Spillane, *School Administration in a Changing Education Sector: The US Experience*, 50 J. EDUC. ADMIN. 541, 549 (2012) (“School leaders seek to achieve results that they see as consistent with federal, state, and school district objectives and thus have to work to constrain teachers’ autonomy and discretion.”).

23. *E.g.* Thomas L. Alsbury, *Superintendent Turnover in Relationship to Incumbent School Board Member Defeat in Washington from 1993–2000* (May 2001) (unpublished Ed.D dissertation, Washington State University) (on file with author) (“School districts in Washington had a high rate of school board member change (97%) during the 1993–2000 time period. Superintendent turnover was also high (72%).”).

may lack experience to effectively implement policies.²⁴ Thus, the most significant and stable forces in school governance are bureaucracies staffed by career employees with tenure and civil service protections²⁵ and the regulations they enforce.

As many observers have noted, centralized policies and regulations lack the organizational flexibility and creativity that are necessary to address the diversity of student needs in the classroom.²⁶ This has led to concerns that centralized governance systems focus on process over educational outcomes and ultimately reward compliance behavior on the part of teachers and bureaucrats.²⁷ In some cases, this results in a looser form of bureaucracy, where teachers attempt to follow rules that go against their professional judgment,²⁸ but often end up improvising solutions to the array of challenges²⁹ for which existing policies and teacher training provide little or no preparation.³⁰

Bureaucratic structures also face criticism for their failure to incorporate democratic values into their processes.³¹ However,

24. See Niamh M. Brennan, *Governance Matters*, in LEADING AND MANAGING SCHOOLS 24, 30 (Helen O'Sullivan & John West-Burnham eds., 2011) ("Lay school board members are unlikely to have first-hand experience of the tasks and activities over which they are governing. In addition, they may not fully understand their governance roles.")

25. See *id.* at 50 (noting teachers' unions push forward teacher autonomy, and this "formalization of personnel" means teachers "have formal rights to their positions" regardless of qualifications favored by school leadership).

26. See *id.* at 37 ("Bureaucracy inherently requires equal treatment for people who are in fact very different. Schools can recognize and respond to those differences — as long as they are unconstrained by bureaucracy."); Abe Feuerstein, *Elections, Voting, and Democracy in Local School District Governance*, 16 EDUC. POL'Y 15, 21 (2002) (quoting ZIEBARTH, *supra* note 18, at 3) ("[O]rganizational flexibility, adaptability, and creativity are necessary if education is going to properly prepare the next generation for the fast-paced, ever-changing and technologically oriented world that awaits them.")

27. See Feuerstein, *supra* note 26, at 21 (quoting ZIEBARTH, *supra* note 18, at 3) (noting bureaucracy promotes a "compliance mentality" that "ignore[s], discourage[s], and even sanction[s] creativity, risk-taking and inventiveness").

28. See *id.* at 59 ("[Teachers] are required to follow rules that cause them to depart from what they might otherwise do, and thus behave in ways that contradict or fail to take advantage of their professional expertise and judgment.")

29. See Jal Mehta, *From Bureaucracy to Profession: Remaking the Education Sector for the Twenty-First Century*, 83 HARV. EDUC. REV. 463, 468–69 (2013) ("The more general historical pattern . . . has been a loosely coupled bureaucracy that is hierarchical in its distribution of authority but fairly weak in its specification of the actual procedures that govern practice. . . . [T]eachers are given considerable freedom to decide how to reach these ends.")

30. See *id.* at 474, 477–78 (noting teacher training, external directives, and professional development all focus on theory to the detriment of teaching practice).

31. See B. Guy Peters, *Bureaucracy and Democracy*, 10 PUB. ORG. REV. 209, 209 (2010) ("The terms bureaucracy and democracy are usually thought of, both in the academic and the popular literature, as antithetical approaches to providing governance for a society.")

public institutions are often called upon to promote democratic values as a reflection of broader democratic society.³² Democratic public institutions legitimize the exercise of government power because of “the communicative action that precedes and provides the context for the exercise of popular sovereignty.”³³ This view of democracy, or “deliberative democracy,”³⁴ emphasizes the extent to which democratic process — like seeking public input and consensus building — is required for a legitimate exercise of governmental power. Thus, bureaucratic structures (including public school systems) that fail to involve the broader public in decision-making processes not only lose legitimacy but also are ultimately ineffective.³⁵

The bureaucratic model, though subject to criticism for its inflexibility and democratic process failures, has a number of legitimizing features. By standardizing the allocation and delivery of resources, bureaucracy has contributed to equal treatment of teachers and of students.³⁶ Political theorists have posited that

32. See, e.g., ROBERT REICH, *Policy Making in a Democracy*, in THE POWER OF PUBLIC IDEAS 123, 124 (1988) (“[T]he public manager’s job is not only, or simply, to make policy choices and implement them. It is also to participate in a system of democratic governance in which public values are continuously rearticulated and recreated.”); A.D. LINDSAY, THE MODERN DEMOCRATIC STATE 281 (1962) (“The key to democracy is the potency of discussion. A good discussion can draw out wisdom which is attainable in no other way.”).

33. Natalie Gomez-Velez, *Public School Governance and Democracy*, 53 VILL. L. REV. 297, 326–27 (2008). See also Jürgen Habermas, *Three Normative Models of Democracy*, in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 28 (Seyla Benhabib ed., Princeton Univ. Press 1996).

34. See generally *id.* at 333 (“[D]eliberative democracy generally contemplates the ongoing substantive involvement of the governed in the decision-making process by elected leaders.”); Feuerstein, *supra* note 26, at 29–30 (“[C]itizens must continuously discuss issues of public policy . . . to cope with various disagreements. . . . [A]ccountability in deliberative terms focuses on the need to provide the public with an accounting of one’s reasons for supporting a particular initiative.”).

35. See, e.g., Kate Zernike, *Cami Anderson, Picked by Christie, Is Out as Newark Schools Superintendent*, N.Y. TIMES (June 22, 2015), <http://www.nytimes.com/2015/06/23/nyregion/newark-schools-superintendent-is-stepping-down.html> [<https://perma.cc/4K5K-BHX6>] (“[M]any parents, teachers and local politicians complained that [former Newark Schools Superintendent Cami Anderson] failed to listen to community residents who just as badly wanted a better education for their children in public schools.”); Valerie Strauss, *Controversial Newark schools chief leaving post — finally*, WASH. POST (June 22, 2015), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/06/22/controversial-newark-schools-chief-leaving-post-finally/> [<https://perma.cc/4RUV-PCP6>] (Anderson’s policies “wound up leading to the closure of numerous schools, mass firings of teachers and principals and a rise in charter schools. At least seven complaints of civil rights violations [were] investigated by the U.S. Education Department. . . . [S]chool reform was causing so much ‘unnecessary instability’ that [Newark clergy members] were ‘concerned about the level of public anger’ over the issue.”).

36. See ZIEBARTH, *supra* note 18, at 2 (“Centralized bureaucracies . . . tend to equalize differences across local groups.”).

equal resource allocation is essential for democratic procedures to work.³⁷ The electoral process, in which voters select members of the school board, reinforces the legitimacy of local bureaucracies in at least two ways³⁸: (1) when members of the community vote for school board members, they feel as though they have agency over the quality of schools' activities, and (2) voting for school board members legitimizes decisions that come from the school board.³⁹ However, low voter turnout and engagement can negatively impact how representative elections are.⁴⁰ Moreover, simply allowing community members to vote without broader public involvement in elected board members' decision-making may ultimately result in a net loss in legitimacy.⁴¹

In 1983, policymakers led by the National Commission on Excellence in Education challenged the bureaucratic approach to local control of schools, concluding that the nation's schools were being inundated by "a rising tide of mediocrity."⁴² Among other responses, charter schools were developed both to replace bureaucratic control over schools with educator or parent control⁴³ and to create competition that would give school board members and other local officials a political incentive to improve the quality of traditional public schools.⁴⁴ While this Note does not address whether charter schools are the best solution to address the

37. See, e.g., EVA ETZIONI-HALEVY, BUREAUCRACY AND DEMOCRACY 91 (1983) ("For democratic procedures to work properly . . . , an organization . . . will not only allocate the resources but will do so by non-partisan criteria.").

38. See KENNETH K. WONG & WARREN E. LANGEVIN, THE DIFFUSION OF GOVERNANCE REFORM IN AMERICAN PUBLIC EDUCATION 6 (2005) (noting local constituents may reinforce legitimacy of local politicians by casting ballot in favor of community interests).

39. See Feuerstein, *supra* note 26, at 16 (noting school board elections are viewed as important because citizens can affect quality of school governance and schools, and elections provide legitimacy to school board decisions).

40. See *infra* Part III.B.1.

41. See *infra* Part IV.B.

42. See WONG & LANGEVIN, *supra* note 38, at 8 (contending the National Commission on Excellence in Education placed local governance reform on national policy agenda).

43. This impetus came from both the left and the right. Although the initial charter school idea, e.g. Albert Shanker, President, Am. Fed'n of Teachers, National Press Club Speech (Mar. 31, 1988) ("[A] group of teachers could set up a school that . . . would be a totally autonomous school within that district."), stemmed from a desire to test ideas to improve public schools, conservative proponents of charter schools advanced the proposition that competition among charter and public schools would then force public schools to improve. See Richard D. Kahlenberg & Halley Potter, *Restoring Shanker's Vision for Charter Schools*, AM. EDUCATOR 4, 9 (Winter 2014–15).

44. See WONG & LANGEVIN, *supra* note 38, at 10 (citing PAUL T. HILL ET AL., REINVENTING PUBLIC EDUCATION: HOW CONTRACTING CAN TRANSFORM AMERICA'S SCHOOLS 182–83 (1997)) (noting states promoted charter schools, predicting increased competition would "reshape the political incentives of school board members").

drawbacks of the traditional model, charter schools are still responsive in many ways to dealing with the bureaucratic challenges that the traditional model faces — including that it is not adaptive to meet the needs of diverse children, and that it does not sufficiently reflect a democratic society.

A key feature of charter schools is that their student bodies are comprised of public school students whose families choose to enroll them there, rather than being assigned to a school by the district based on geographic or other considerations.⁴⁵ If charter schools are oversubscribed, they typically must use lotteries to select among their applicants.⁴⁶ State legislators authorize state departments of education, local boards of education, and other statutorily defined authorizers⁴⁷ to grant charters, which are “compact[s] of sorts which specif[y] the school’s mission and certain important operating modes,”⁴⁸ to school designers. Within these charters, designers delineate how they intend to organize and manage their schools, teach their students, and measure students’ success.⁴⁹ After approval, charter school leaders are “primarily accountable to the charter,”⁵⁰ which they periodically

45. See Albert Cheng et al., *No Excuses Charter Schools: A Meta-Analysis of the Experimental Evidence on Student Achievement* 3 (University of Arkansas Department of Education Reform, Working Paper No. 2014-11, 2015) (“Unlike traditional public schools where assignment to school is based upon place of residence, students may enroll in charter schools regardless of where they live.”). Notably, Seattle Public Schools offers an “open enrollment” program that does not limit students to attending schools based on geography — while students are initially assigned to schools based on their residences, they may apply to other schools during a two-week open enrollment period. See *Open Enrollment Fast Facts*, SEATTLE PUB. SCH., http://www.seattleschools.org/admissions/school_choice/open_enrollment_fast_facts/ [<https://perma.cc/8F3R-KFMT>] (last visited Aug. 8, 2016).

46. See Cheng et al., *supra* note 45, at 5 (“By law, any charter school . . . must hold admission lotteries to determine enrollment when it is oversubscribed.”). Similarly, the Seattle Public Schools open enrollment program uses a series of tiebreakers to determine enrollment when schools are oversubscribed, including the school attended by a child’s sibling, the child’s geographic zone, and a lottery system. See *Open Enrollment Fast Facts*, *supra* note 45.

47. See *Frequently Asked Questions About Public, Charter Schools*, UNCOMMON SCHOOLS, available at <http://www.uncommonschools.org/faq-what-is-charter-school> [<https://perma.cc/ZH5Z-X8WE>] (last visited Jan. 24, 2016) (noting authorizers vary by state and depend on charter statute).

48. HILL ET AL., *supra* note 44, at 239.

49. See ZIEBARTH, *supra* note 18, at 9 (“Charter schools . . . operate under a written contract — a charter — spelling out how the school will be organized and managed, what students will be taught and expected to achieve and how success will be measured.”).

50. SCOTT ABERNATHY, *SCHOOL CHOICE AND THE FUTURE OF AMERICAN DEMOCRACY* 55 (2005).

renew,⁵¹ and they have much more freedom than traditional public schools to experiment.⁵² Moreover, these processes permit charter providers, educators, families, and community members to share decision-making authority.⁵³

B. CHARTER SCHOOLS IN WASHINGTON STATE

In September 2015, the Washington Supreme Court decided *League of Women Voters of Washington v. State*.⁵⁴ This case invalidated the state's new voter-approved charter school legislation under a state constitutional provision that created a public school system including "common schools." The constitution privileges common schools by setting aside a fund to support them. In a 1909 case, the Washington Supreme Court defined common schools in a manner that the *League of Women Voters* decision interpreted to exclude voter-approved charter schools, denying them access to the common school fund, from which the new law intended to draw for the support of charter schools.

1. *The Constitution of the State of Washington and Bryan*

Article IX of the Washington constitution provides that public schools "shall include common schools [and other schools]. . . . But the entire revenue derived from the common school fund . . . shall be exclusively applied to the support of the common schools."⁵⁵ While article IX does not define the term "common school," the current definition in the Revised Code of Washington states that common schools are "maintained at public expense in each school district and [carry] on a program from kindergarten through the twelfth grade or any part thereof including vocational educational courses otherwise permitted by law."⁵⁶

51. *E.g.* N.Y. EDUC. LAW § 2851 (Consol. 2015) ("Charters may be renewed, upon application, for a term of up to five years . . .").

52. *See* HILL ET AL., *supra* note 44, at 7 (1997) (noting few public schools can take advantage of innovative approaches because rules and restrictions govern the majority of public schools); ZIEBARTH, *supra* note 18, at 9 ("Many charter schools enjoy freedom from rules and regulations affecting other public schools, as long as they continue to meet the terms of their charters.")

53. *See* HILL ET AL., *supra* note 44, at 62 ("In a market-oriented public system decisions are shared by the community, providers, and consumers.")

54. *League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015).

55. WASH. CONST. art. IX, § 2 (West, Westlaw through Nov. 2014 amendments).

56. WASH. REV. CODE ANN. § 28A.150.020 (West 2015).

In 1909, the Washington Supreme Court decided *School District No. 20 v. Bryan*,⁵⁷ which defined “[a] common school, within the meaning of our Constitution” as a school:

that is common to all children of proper age and capacity, free, and subject to, and under the control of, the qualified voters of the school district. The complete control of the schools is a most important feature, for it carries with it the right of the voters, through their chosen agents, to select qualified teachers, with power to discharge them if they are incompetent.⁵⁸

The *Bryan* Court gave meaning to article IX by requiring that school district voters control common schools. This, in turn, meant that revenue from the common school fund could be used to support only schools that met the voter control requirement.

2. *The Charter School Act and League of Women Voters*

In November 2012, Washington voters approved Initiative 1240 (Charter School Act), which for the first time allowed the operation of charter public schools in Washington.⁵⁹ The Act declared that a charter school was a “public, common school open to all children free of charge.”⁶⁰ It also provided for student funding using “the same funding criteria used for noncharter public schools.”⁶¹ Finally, it created the Washington Charter School Commission, a state-level agency, which, along with approved local school boards, would authorize charter schools.⁶² Several groups, including the state teachers’ union (WEA), the school administrators’ association (WASA), political advocacy groups (League of Women Voters of Washington; El Centro de la Raza of Seattle), and a number of private individuals, opposed the law and challenged it in court.⁶³ Plaintiffs in the case argued that the Act violated multiple sections of the Washington constitution.⁶⁴

57. *Sch. Dist. No. 20 v. Bryan*, 99 P. 28 (Wash. 1909).

58. *Id.* at 30.

59. WASH. REV. CODE ANN. § 28A.710 (West 2015), *invalidated by* League of Women Voters of Wash. v. State, 355 P.3d 1131 (Wash. 2015).

60. *Id.* § 28A.150.020.

61. *Id.* § 28A.710.220.

62. *Id.* § 28A.710.080.

63. *League of Women Voters*, 355 P.3d at 1135 n.4.

64. *Id.* at 1135 n.5.

The King County Superior Court invalidated the provisions designating charter schools as common schools and funding them as such but left the remainder of the Act standing, after which all parties sought direct review by the Washington Supreme Court.⁶⁵

In September 2015, soon after the opening of the first seven charter schools in the large urban districts of Seattle, Tacoma, and Spokane,⁶⁶ the Washington Supreme Court declared the entire Act unconstitutional.⁶⁷ The Court applied *Bryan*'s definition of common schools, unanimously holding that charter schools are not common schools because Washington voters lack direct control over the schools.⁶⁸

By a 6–3 vote, the court then ruled the Act unconstitutional on the ground that it could not properly sever the provisions relying on the restricted common school fund to support charter schools from the rest of the Act.⁶⁹ While the Act itself did not specify the source of funding for charter schools, and only specified the criteria by which charter schools receive funding,⁷⁰ the majority still found that because the State did not segregate the general education fund, it could not prove that charter schools were not receiving restricted funding. The dissent, however, noted that restricted funding only makes up about 28% of the \$7.095 billion in the general fund,⁷¹ so it would be constitutionally permissible to fund charter schools — which account for two percent of Washington's schools — through the remaining unrestricted funds.⁷² But, the majority's reasoning was that charter schools' use of the general education fund necessitated that they rely on common school funding, thereby toppling the entire Act.

65. *Id.* at 1141.

66. SOAR Academy and Spokane International Academy, for example, opened on August 17 and August 26, 2015, respectively. The Court issued its ruling on September 4, 2015. School Year Calendar, SOAR ACAD., <http://soaracademies.org/content/wp-content/uploads/2015/08/2015-2016-School-Calendar.pdf> [<https://perma.cc/AU6K-QLJQ>] (last visited Jan. 24, 2016); School Year Calendar, SPOKANE INT'L ACAD., http://docs.google.com/spreadsheets/d/1aEJM_HPFJ7V9-kcp55sbZvxVq0ekwfdIY8ijSN8Kq0Q [<https://perma.cc/XS3T-LA3N>] (last visited Jan. 24, 2016); *League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015).

67. *League of Women Voters*, 355 P.3d 1131.

68. *Id.* at 1141.

69. *Id.*

70. WASH. REV. CODE ANN. § 28A.710.220 (West 2015), *invalidated by League of Women Voters*, 355 P.3d 1131.

71. *League of Women Voters*, 355 P.3d at 1143 (Fairhurst, J., dissenting).

72. *See id.* at 1146 (Fairhurst, J., dissenting) (“Because charter schools are part of our system of public education, they are a proper recipient of public school funds.”).

The Court's decision to overturn the Act on its face left several questions unanswered. First, while Spokane Public Schools, a school district with an elected board, authorized one of the charter schools,⁷³ the Court did not specifically address whether this particular model of local-board authorization satisfied the test for local voter control. Rather, the Court found that charter schools were not "common schools" by invalidating the Act based on specific language it contained, which stated that charter schools would be "run by an appointed board or nonprofit organization"⁷⁴ instead of an elected board; the Court held that this removed them from the sphere of local control. Second, even if the Spokane model did not satisfy the Court's test, the Court has still left open the question as to the level of local-board involvement that is necessary for a charter school to be "subject to local voter control."⁷⁵

While *League of Women Voters* marks the first time a state's judiciary has struck down a charter school statute,⁷⁶ charter opponents have previously challenged state authorizing systems on the same logic as the Washington decision. In Georgia, for instance, the state supreme court interpreted local boards' constitutional "[a]uthority . . . to establish and maintain public schools"⁷⁷ as an exclusive grant of authority, and thereby disallowed the Georgia Charter Schools Commission from chartering schools.⁷⁸ In Florida, an appellate court also struck down a state statute-created authorizer. As in Georgia, the Florida court based its

73. *Id.* at 1134 n.3.

74. *Id.* at 1137.

75. *See infra* Part III.C.

76. *See* Chad A. Readler & Kenneth M. Grose, *We've Been Here Before: Charter School Opponents Use Same Legal Arguments and Lose Every Time*, NAT'L ALL. FOR PUB. CHARTER SCH. (Nov. 19, 2013), http://www.publiccharters.org/wp-content/uploads/2014/01/Weve-Been-Here-Before_20131119T144720.pdf [<https://perma.cc/GCH8-HQNF>] ("And in every similar prior effort, the charter school opponents have failed, their constitutional claims rejected by state appellate courts around the country.")

77. *Gwinnett County Sch. Dist. v. Cox*, 710 S.E.2d 773, 775 (Ga. 2011).

78. Ironically, the Georgia court rejected the idea that charter schools should be considered "special schools" pursuant to language in the Georgia Constitution, ruling instead that commission charter schools had "the same strengths that may be found in all general K-12 schools, whether locally controlled or Commission established." *Id.* at 780. In response to *Gwinnett County*, Georgia's legislature amended its constitution to divest local boards of their exclusive authority over education, after which the state would have power to enact a charter law. GA. CONST. art. VIII, § 1 (noting in relevant part that "the General Assembly may by general law provide for the establishment of education policies for such public education").

decision on a perceived lack of local control⁷⁹ — despite the fact that the state exercises concurrent authority with local boards over non-charter public schools in many respects, including funding, teacher credentials, and student assessment.⁸⁰

Ultimately, *League of Women Voters'* reliance on a 1909 decision, rendered before bureaucracies came to dominate urban school systems, has essentially placed a constitutional imperative on some degree of bureaucratic control over school systems. This, in effect, is less democratic than and perhaps somewhat contrary to the form of governance *Bryan* put into place in 1909.

3. *The Amended Charter School Act*

Subsequent to *League of Women Voters*, Washington senators proposed Senate Bill 6194, which would amend the Charter School Act by classifying charter schools as “uncommon schools” and by shifting the funding stream from general tax revenues to state lottery revenues.⁸¹ The bill first removed the term “common” from the definition of “charter school,” instead defining a charter school as “a public school that is . . . [o]perated separately from the common school system as an alternative to traditional common schools.”⁸² It then stated that appropriations would come from the “Washington opportunity pathways account,”⁸³ which was created pursuant to RCW 28B.76.526 for the purpose of “stabiliz[ing] and increas[ing] existing resources for the recruitment of entrepreneurial researchers, innovation partnership zones and research teams, early childhood education, [and various grants and scholarships].”⁸⁴ The state bill passed the Senate

79. While the Florida Constitution calls for local school boards to “operate, control and supervise all free public schools,” FLA. CONST. art. IX, § 4, the court made no substantial inquiry as to the degree of practical control — only to the extent of indicating that the statute would relegate local school boards to “essentially ministerial functions.” *See Duval Cty. Sch. Bd. v. State Bd. of Educ.*, 998 So. 2d 641, 643–44 (Fla. Dist. Ct. App. 1st Dist. 2008).

80. *See* Josh Dunn & Martha Derthick, *Another Lemon*, 9 EDUCATION NEXT (2009), available at <http://educationnext.org/another-lemon-2/> [<https://perma.cc/AZ9J-FRVA>] (“When the state bears significant funding responsibilities and monitors curricula, teaching credentials, and student assessment, school boards are not exclusively operating, controlling, and supervising schools in their districts.”).

81. Melissa Santos, *State Senate votes to continue charter schools*, NEWS TRIB. (Jan. 20, 2016, 6:17 AM), <http://www.thenewstribune.com/news/politics-government/article55685475.html> [<https://perma.cc/Y2ZJ-LQAU>].

82. WASH. REV. CODE ANN. § 28A.710.020 (West 2016).

83. *Id.* § 28A.710.270.

84. *Id.* § 28B.76.526 (Editor’s and Revisor’s Notes).

in January 2016 and the House in March 2016, after which it became law without Governor Jay Inslee's signature effective April 3, 2016.⁸⁵

One state senator correctly predicted that the law would merely "set up another court challenge over the schools' constitutionality," arguing that "the bill doesn't solve the problem of charter schools being privately run, despite receiving public funding."⁸⁶ Challengers⁸⁷ again filed suit, noting in their complaint:

The Charter School Act essentially reenacts I-1240's private charter school system. Under the Act, charter schools continue to be run by and responsible to non-profit companies and non-elected boards and, thus, are not accountable to taxpayers who provide funding for charter schools. Likewise, the Act continues the *unconstitutional diversion of public funds to charter schools*.⁸⁸

Plaintiffs also argued that the Act interfered with the State's ability to comply with an existing court order for "the legislature to fully fund basic educational programs by 2018."⁸⁹

Ultimately, as challengers to the statute take issue with linking public funding to non-elected boards, the argument in the complaint may force the Washington courts to clarify the underlying reasoning behind *League of Women Voters*. Plaintiffs' argument demonstrates that the Senate has not necessarily remedied the statutory issues by addressing a technicality related to the funding source for charter schools — and leaves this question open for the courts. Importantly, this means that Washington court decisions in the new lawsuit will show whether *League of Women Voters* could potentially be applicable to state constitutions that do not use the "common school" terminology or set up a

85. See Melissa Santos, *Charter-schools fix will become law in Washington without governor's signature*, NEWS TRIB. (Apr. 1, 2016, 10:53 AM), <http://www.thenewstribune.com/news/politics-government/article69444487.html> [https://perma.cc/7R8Z-7REC].

86. Santos, *supra* note 81.

87. Among other plaintiffs, challengers included the original *League of Women Voters* plaintiffs: the state teachers' union (WEA), the school administrators' association (WASA), political advocacy groups (League of Women Voters of WA, El Centro de la Raza of Seattle), and private individuals. Complaint at 1, *El Centro de la Raza et al. v. Washington*, No. 16-2-18527-4 (Wash. Super. Ct. King Cty. Aug. 3, 2016).

88. *Id.* at 2 (emphasis added).

89. *Id.* at 3.

separate common school fund. This Note argues that the Washington courts should consider a new paradigm for assessing school governance models, and apply this reasoning in deciding whether public funding can be linked to non-elected boards.

III. *LEAGUE OF WOMEN VOTERS* AND EVOLVING VIEWS OF SCHOOL GOVERNANCE

This Part argues that, in equating local control of schools with control by local school districts, *League of Women Voters* not only cemented an often-ineffective form of school governance into the constitutional law of the state, but also subjected public schools — especially in large cities — to a weak form of democracy.

Section A of this Part will argue that as the statutes governing common schools have changed since *Bryan*, they allow for a broader interpretation of the term “common schools” than the one taken up by the *League of Women Voters* court. Section B will discuss the changes in school governance since the time of *Bryan* and examine these changes across three key areas of democracy: participation, deliberation, and accountability.⁹⁰ Finally, Section C will explore the possibility of limiting charter schools in Washington to those authorized by local boards, arguing that while this may solve the legal issue in Washington, it would not reach the deeper issues of either the democracy deficit⁹¹ or the accountability problems that arise in traditional public schools.

A. “COMMON SCHOOL” STATUTES POST-*BRYAN*

Although the purpose of this Note is not to provide a close analysis of the Washington law on which *League of Women Voters* relied, Washington law also did not compel the decision. Since *Bryan*, Washington courts have held that school districts’ powers and rights come from statute because they are created by the legislature.⁹² The Washington constitution itself provides some support for this idea in creating a public school system that “include[s] common schools and such high schools, normal schools,

90. See *supra* note 16 and accompanying text.

91. See *infra* Part III.A.

92. See *Moses Lake Sch. Dist. No. 161 v. Big Bend Cmty. Coll.*, 503 P.2d 86, 90 (Wash. 1972) (holding school district is a creature of legislature); *Tunstall ex rel. Tunstall v. Bergeson*, 5 P.3d 691 (Wash. 2000) (holding school districts are “creatures of statute” and have only powers and rights specifically granted to them by statute).

and technical schools as may hereafter be established.”⁹³ The use of the term “include” suggests that Washington’s founders did not intend to limit the state’s public school system to the school forms/types enumerated in the constitution. Additionally, the statutes governing common schools have changed since *Bryan* was decided. In 1909, the Laws of Washington defined “common schools,” in language analogous to the *Bryan* definition, as “schools that are maintained at public expense in each school district and under the control of boards of directors.”⁹⁴ Although *Bryan* predated the effective date of the 1909 Laws,⁹⁵ the similarities between the two reflect a common understanding at the time between the judiciary and the political branches.

In 1969,⁹⁶ the Washington Legislature revised the statutory definition of “common schools” to “schools maintained at public expense in each school district and carrying on a program from kindergarten through the twelfth grade . . .,” backing away from local school boards and associated governance forms as their defining feature. The current definition in the Revised Code of Washington is unchanged from 1969.⁹⁷ The legislative change in the statutory definition of “common schools” supports the view that, as the powers and rights of school boards come from statute, the legislature effectively divested school boards of their exclusive authority over common schools. In following the 1909 interpretation of *Bryan*, the *League of Women Voters* reasoning not only diverges from but also does not acknowledge what the political branches have put forth, by effectively reducing a public school system that *includes* common schools to a system only of common schools. Furthermore, it has also created a narrow definition of “common schools” that can exist in a public school system.⁹⁸ Had the *League of Women Voters* court chosen to conform the constitutional definition of “common schools” to the definition adopted by the political branches, there would be room for a broader perspec-

93. WASH. CONST. art. IX, § 2 (West, Westlaw through Nov. 2014 amendments).

94. 1909 Wash. Sess. Laws 261.

95. The Eleventh Legislature of Washington convened on January 11th, 1909, five days before *Bryan* was decided, and adjourned on March 11th, 1909. 1909 Wash. Sess. Laws 2.

96. 1969 Wash. Sess. Laws 1670.

97. WASH. REV. CODE ANN. § 28A.150.020 (West 2015).

98. *League of Women Voters of Wash. v. State*, 355 P.3d 1131, 1142 (Wash. 2015) (“Here, because charter schools under 1-1240 are run by an appointed board or nonprofit organization and thus are not subject to local voter control, they cannot qualify as ‘common schools’ within the meaning of article IX.”).

tive of what “local control” requires that does not simply relegate control to bureaucratic local school boards.

While Washington courts are not required to exercise judicial restraint to the same extent as federal courts — there is no “overarching principle of judicial restraint” in Washington law⁹⁹ — Washington courts have deferred to the political branches when deciding sociopolitical questions.¹⁰⁰ However, Philip A. Talmadge, a former Washington Supreme Court Justice, has advocated that “Washington courts should be reticent about deciding significant sociopolitical controversies, particularly where viable remedies for litigants exist in the political process and elsewhere.”¹⁰¹ One of the dangers of deciding such cases is that the Court risks providing an interpretation that is devoid of true deliberative process where all interests can be heard, which may have an especially negative impact where there are complex structures with multiple stakeholders, as in the realm of public education.¹⁰² The argument for judicial restraint in sociopolitical issues is not a new concept in the Washington Supreme Court,¹⁰³ even concerning education. Specifically, since *League of Women Voters*, Justice Talmadge has expressed concerns that the decision ignores the reasoning of *Tunstall v. Bergeson*,¹⁰⁴ a case that he helped decide in 2000. In that case, which challenged a contractor-run education program for incarcerated youth, the court stated, “it is not this court’s role to micromanage education in Washington.”¹⁰⁵ The court also deferred to the legislature in holding that school districts did not have plenary authority to run the Washington school system because “the Legislature has found entities other than school districts qualified to educate our

99. Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, SEATTLE U.L. REV. 695, 711 (1999).

100. *See id.* at 710 (“Washington courts, though not compelled to employ the language of judicial restraint as are federal courts facing the mandate of Article III, nevertheless have discussed principles of judicial restraint.”).

101. *Id.* at 733.

102. *See id.* at 698 (“By its nature, the common law process is not the best means for establishing complex societal policies. . . . [Judges] cannot possibly broker the complete array of interests inherent in many issues.”).

103. *See id.* (Talmadge notes that the Washington Supreme Court has itself recognized its limitations. For instance, in *Burkhart v. Harrod*, 755 P.2d 759, 761 (Wash. 1988), the court noted that “of the three branches of government, the judiciary is the least capable of receiving public input and resolving broad public policy questions based on a societal consensus.” (citations omitted)).

104. *Tunstall v. Bergeson*, 5 P.3d 691 (Wash. 2000).

105. *Id.* at 702.

youth.”¹⁰⁶ Talmadge advocated for judicial restraint¹⁰⁷ in his concurrence in *Tunstall*, stating that the judiciary’s role is not to define the means of providing education for children, but rather to ensure that the state provides children their constitutional right to equal educational opportunity.¹⁰⁸ Yet by wading into sociopolitical issues better left to the legislature, the *League of Women Voters* court has ultimately prescribed a very specific and ineffective means of educating the children of Washington State.

Talmadge encourages the courts to defer significant sociopolitical questions to the political branches, which are “better situated institutionally to make policy judgments necessary to execute political decisions.”¹⁰⁹ When the court does step in, it must do so only when it can “effectively articulate the controversy and a remedy for it.”¹¹⁰ The burden for invalidating a statute is especially high in Washington, where the court must determine “beyond a reasonable doubt”¹¹¹ that the statute is unconstitutional. Here, the Court has left open several questions¹¹² and has not provided much guidance to the legislature in their current task, which is to guess the level of involvement of school boards in fashioning an appropriate charter law.

B. DEMOCRATIC IMPLICATIONS OF WASHINGTON GOVERNANCE CHANGES

In using the *Bryan* definition of local control as the defining characteristic of a “common school,” the *League of Women Voters* court overlooked not only statutory changes to the term “common school,” but also changes in school governance that have transformed the meaning of local control. At the time of *Bryan*, local control was more prevalent for several reasons. First, in 1910,

106. *Id.* at 707.

107. *See id.* at 710 (Talmadge, J., concurring) (“The courts are ill-equipped to annex such a duty from the other branches and to execute the considerable responsibilities associated with it.”).

108. *See id.* at 709 (Talmadge, J., concurring) (“The Washington Constitution effectively offers children in this state a constitutional right to *educational opportunity*.” (emphasis in original)).

109. Talmadge, *supra* note 99, at 734.

110. *Id.* at 736.

111. *E.g.* *Island Cty. v. State*, 955 P.2d 377, 378 (Wash. 1998) (“Our traditional articulation of the standard of review . . . is that a statute is presumed to be constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt.”).

112. *See supra* Part II.B.2.

around the time *Bryan* was decided, there was nearly a one-to-one ratio between schools and school districts in Washington.¹¹³ Modern school districts contain, on average, 9.7 schools, meaning school district voters have control over schools their children may not attend and are thus much farther removed from the schools they control.¹¹⁴ Second, in early 20th century Washington, the percentage of households consisting of single individuals without children was about half of what it was in 2000,¹¹⁵ and the percentage of the population under 15 was 1.5 times what it was in 2000,¹¹⁶ which may be evidence that households were more likely to consist of school-age children in the early 20th century. This supports the idea that local control of schools in the early 20th century also often meant control of schools by families of school-age children. Finally, communities in Washington were more socially homogenous in the early 20th century: not only was the proportion of whites far greater,¹¹⁷ but the percentage of the population living in urban areas, which are historically more heterogeneous,¹¹⁸ was almost one-third of what it was in 2000.¹¹⁹ In sum, this means that in the early 20th century, citizens who did not vote were likely to still have their needs represented by their community.

113. See Mary Jane Honegger, Washington Tr. for Historic Pres., *Washington State Historic Schools Status 2002*, WASH. ST. DEP'T OF ARCHAEOLOGY & HIST. PRESERVATION, <http://www.dahp.wa.gov/sites/default/files/2002WTHP%20Historic%20Schools%20Status%20Report1.pdf> [https://perma.cc/J38P-FW2L] (last visited Jan. 24, 2016) (noting “2,888 school structures” in 1908 and “2,710 operating school districts” in 1910).

114. In the 2010–2011 school year, there were 132,183 total schools and 13,588 school districts. *Digest of Education Statistics: Number of Public School Districts and Public and Private Elementary and Secondary Schools*, NAT'L CTR. FOR EDUC. STATISTICS, http://nces.ed.gov/programs/digest/d12/tables/dt12_098.asp [https://perma.cc/YGG3-NS96] (last visited Nov. 15, 2015).

115. See FRANK HOBBS & NICOLE STOOPS, U.S. CENSUS BUREAU, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY A-3 (2002) (noting that in 1900, 13.3 percent of Washington households were single-person households, as compared to 26.2 percent in 2000).

116. See *id.* at A-18 (noting that in 1900, 30.8 percent of the Washington population was under 15, as compared to 21.3 percent in 2000).

117. See *id.* at A-25 (noting that in 1900, 95.8 percent of the Washington population was white, as compared to 88.5 percent in 2000).

118. See DICK G. WINCHELL ET AL., RURAL DEV. INST., GEOGRAPHICAL PERSPECTIVES ON SUSTAINABLE RURAL CHANGE 188 (2010) (noting the “commonality of value systems in rural communities” attributed to “relative social homogeneity” of rural as opposed to urban neighborhoods).

119. See HOBBS & STOOPS, *supra* note 115, at A-5 (noting that in 1910, 31.9 percent of the Washington population lived in a metropolitan area, as compared to 83.1 percent in 2000).

These three characteristics of early 20th century school governance provide evidence that, at the time, local school board elections facilitated the democratic ideals of participation, deliberation, and accountability.¹²⁰ First, because voters and parents were often one and the same, there was less control by interest groups and more opportunity for the school community to participate meaningfully in elections.¹²¹ Second, social homogeneity may have established a baseline level of consensus, which today is one goal of deliberation. Finally, the one-to-one school-to-district ratio meant that districts were directly responsible for issues at the school level and were held accountable to voters and parents in this manner.

However, with the onset of large urban school systems, local-board control began to provide a much more impoverished version of participation, deliberation, and accountability. This Section will examine the implications of changes in school governance across these three components of democracy. Section B.1 will examine how well today's school governance structures promote participation and deliberation,¹²² and Section B.2 will assess their commitment to accountability.¹²³

1. *Participation and Deliberation*

Low voter turnout and lack of voter engagement in school board elections suggest that modern bureaucratic school governance systems lack both meaningful participation and deliberation by the general public, especially minority groups. As a result,

120. See *supra* note 16 and accompanying text.

121. Today, features of the school board election system make it easier for interest groups to exercise disproportionate influence. See *infra* Part III.B.1.

122. Proponents of “deliberative democracy” have identified participation and deliberation as central values to that ideal, while recognizing that these values are in tension. See, e.g., Cristina Lafont, *Deliberation, Participation, and Democratic Legitimacy: Should Deliberative Mini-publics Shape Public Policy?*, 23 J. POL. PHIL. 40, 41–45 (2015) (identifying participation and deliberation and components of deliberative democracy, recognizing that advancing one may undermine the other, but both are necessary to achieve the democratic ideal).

123. Accountability is an often-overlooked component of democracy; while the United States has shown a commitment to standards, assessments, and accountability, researchers have focused on these practices' effects on student achievement. But, these mechanisms have the potential to affect how democracy is delivered. See Meira Levinson, *Democracy, Accountability, and Education*, 9 THEORY AND RES. IN EDUC. 125, 126 (noting the connection between accountability in public education and democracy).

special-interest groups, including teachers' unions, dominate the educational landscape.

Voting policies, including, but not limited to, off-cycle board elections and at-large voting systems, contribute to low voter turnout. First, off-cycle school board elections can result in low voter turnout because they are “formally nonpartisan and deliberately timed not to coincide with other elections, when the public’s attention is at its peak.”¹²⁴ Second, these policies negatively impact minorities and noncitizens, which contributes to a decrease in participation, particularly in urban areas. For example, plaintiffs in a current lawsuit argue that election rules like off-cycle elections are discriminatory against black voters, as board elections have consistently shown low voter turnout with regard to marginalized populations.¹²⁵ Moreover, the lawsuit has challenged the at-large voting system, where multiple candidates are selected from the entire district, rather than one candidate from each geographic sub-district.¹²⁶ At-large systems disadvantage poor and minority candidates, who often must run in electorates where the majority of people are neither poor nor minorities.¹²⁷ Additionally, poor candidates may not have the campaign resources to run an effective campaign in an at-large system like a citywide election.¹²⁸ A study of Latino representation on school boards found that when Latinos are a minority of a school district’s population, ward- or precinct-based elections result in more Latinos on school boards than at-large elections.¹²⁹ Noncitizens

124. HENIG, *supra* note 15, at 218.

125. See Zachary Roth, *Ferguson’s Black Voters Want New Election System*, MSNBC (Oct. 1, 2015, 7:49 PM), <http://www.msnbc.com/msnbc/ferguson-black-voters-want-new-election-system> [<https://perma.cc/SW7W-RAVW>] (“Although African-Americans make up 77% of students in the district . . . , over the last decade or so, very few black candidates have managed to get elected to the board [H]olding the elections in April with no other contests on the ballot . . . consistently leads to lower turnout among more marginalized voters.”).

126. See *id.* (“[A]ll candidates are elected by all the voters, rather than representing specific geographical areas.”).

127. See Feuerstein, *supra* note 26, at 20 (quoting Luis R. Fraga et al., *Hispanic Americans and Educational Policy: Limits to Equal Access*, 48 J. POL. 850, 857 (1986)) (“At-large elections force minority candidates to run city wide races so that minorities must often run in an electorate with an Anglo majority.”).

128. See *id.* (quoting Luis R. Fraga et al., *Hispanic Americans and Educational Policy: Limits to Equal Access*, 48 J. POL. 850, 857 (1986)) (“At-large races further limit minority candidates because they require greater campaign resources than smaller district elections do.”).

129. David L. Leal et al., *The Politics of Latino Education: The Biases of At-Large Elections*, 66 J. POL. 1224, 1235 (2004).

are also marginalized; they are denied voting rights in the vast majority of school board elections.¹³⁰ This matters particularly in states with large noncitizen immigrant populations such as California, where immigrants are disproportionately overrepresented in public schools, as they tend to be younger with school-age children and unable to afford private schools.¹³¹ Some contend that elections further marginalize minorities in terms of deliberation, because “when citizens disagree about the direction of educational policy, those most able to mobilize and advocate for their values will have the greatest opportunity to use those elections to their advantage.”¹³²

Similarly, explanations for low voter engagement demonstrate the lack of a deliberative form of democracy that informs school governance regimes. A study of incumbent school board member elections in South Carolina assessed what information voters consider when electing school board members.¹³³ The study first looked at what board members actually do, finding that their activities are primarily geared towards student learning¹³⁴ and the collective success of these activities can be measured by improvements in student learning.¹³⁵ Information about trends in

130. Noncitizens have voting rights in Chicago and some school districts in Maryland. *Voting by Nonresidents and Noncitizens*, NAT'L CONF. OF ST. LEGISLATURES (Feb. 27, 2015), <http://www.ncsl.org/research/elections-and-campaigns/non-resident-and-non-citizen-voting.aspx> [<https://perma.cc/8LUL-9AQC>]. *But cf.* Plyler v. Doe, 457 U.S. 202 (1982) (holding states cannot deny children a free public education on account of their immigration status).

131. See April Chung, Comment, *Noncitizen Voting Rights and Alternatives: A Path Toward Greater Asian Pacific American and Latino Political Participation*, 4 UCLA ASIAN PAC. AM. L.J. 163, 181 (1996) (noting Asian Pacific American and Latino populations, which comprise a large percentage of the noncitizen population, are most likely to utilize public schooling and are younger with a high proportion of school-age children).

132. Feuerstein, *supra* note 26, at 27; see also ETZIONI-HALEVY, *supra* note 37, at 52 (noting bureaucracy is more responsive to “the better established, the more articulate, the more powerful among the interest groups” while disregarding “[t]hose which lack economic, social and political power”).

133. Christopher R. Berry & William G. Howell, *Accountability and Local Elections*, 69 J. POL. 844, 844–45 (2007).

134. A national survey of school board members found that their second highest priority was student achievement. Additionally, most members surveyed indicated that they increased their focus on test scores during their tenure, and discussed findings regarding student achievement with parents and community members. *Id.* at 846 n.6 (citing FREDERICK M. HESS, SCHOOL BOARDS AT THE DAWN OF THE 21ST CENTURY: CONDITIONS AND CHALLENGES OF DISTRICT GOVERNANCE 23 tbl.19, 24 tbl.20 (2002)).

135. See Berry & Howell, *supra* note 133, at 846 (“To the extent that these activities collectively succeed, student learning should improve.”).

student learning, like test scores, are often available to voters;¹³⁶ this information can be used as a proxy for school board members' success in accomplishing their goals. The study found that an increase or decrease in precinct-level test scores, rather than district-level scores, was a statistically significant predictor of an incumbent school board member's performance in the election.¹³⁷ This suggests that voters who are given the power to control school district board members focus on results in their immediate neighborhood, not in the entire district¹³⁸ — which undermines the idea of 'local control,' as decisions may not be based on local concerns. Moreover, when student learning information is not available,¹³⁹ or when information is of lower quality or value to parents,¹⁴⁰ voters may give weight to other considerations. One study found that, in assessing an incumbent's performance, voters give more weight to race than to any retrospective evaluation.¹⁴¹ Another study found that voters use considerations like "candidate likeability, issue agreement, and shared partisanship" to determine whether or not they would support an incumbent.¹⁴²

136. *See id.* at 847–48 (“In the context of school board elections, mediated sources of information about student learning trends are often available, if not as commonly as information about trends in the national economy.”). In South Carolina, student achievement data was available in the form of Palmetto Achievement Challenge Tests (PACT). *See id.* at 849 (“Student achievement data were obtained through the South Carolina Department of Education. Since 1999, South Carolina has administered the Palmetto Achievement Challenge Tests (PACT) to students in grades three to eight.”).

137. *See id.* at 851 (“[W]e find that precinct-level test score change is significant . . . , indicating that incumbents won more votes where test scores showed improvements. . . . In models that include both district- and precinct-level scores . . . , only precinct-level scores have a significant relationship with vote share.”).

138. *See id.* (“Panel B shows that district-level scores were not significant, suggesting that voters focused on school performance within their immediate neighborhood rather than across the broader district.”).

139. Media coverage may change the costs of learning about test scores and other information. *See id.* at 855 (“[I]t is possible that test scores were not a factor in . . . elections because the costs of learning about test scores increased due to fading media coverage.”).

140. South Carolina changed how it reported PACT score reports distributed to parents from raw form to reporting each school's performance in one of five broad categories; most schools were rated as average or above. *See id.* at 856 (“In . . . the first two years of PACT testing, scores were reported in their raw form. . . . Beginning in 2001, however, official PACT reports to parents began to focus on a simpler rating scale. . . . But under this scheme, almost every school attained a rating of at least 'average.'”).

141. *See id.* at 845–46 (citing KAREN KAUFMAN, *THE URBAN VOTER: GROUP CONFLICT AND MAYORAL VOTING BEHAVIOR IN AMERICAN CITIES* 165–66 (2004)) (“For instance, Kaufman (2004) finds that racial politics usually trump retrospective evaluations of incumbent performance in mayoral elections in major U.S. cities.”).

142. *See id.* at 846 (citing Eric J. Oliver & Shang E. Ha, *Vote Choice in Suburban Elections*, 101 *AM. POL. SCI. REV.* 393, 400 (2007)) (“Oliver and Ha found that candidate likea-

This calls into question whether school board elections promote the democratic ideal of deliberation — there is low voter participation at the polls, and even those who do vote are unlikely to be well-informed about district conditions outside of their neighborhoods.

Though voters may participate more in other types of elections, the winners of those elections may not be able to impact education policy. Mayoral and council elections show increased public participation relative to school board elections,¹⁴³ so many mayors presently have little incentive to get involved in education.¹⁴⁴ Even when there is a clear role in education policy for city or county council members, school board members become more involved to emphasize their independence and expertise, while other public officials may not want to get involved for fear of electoral repercussions.¹⁴⁵

Because low voter turnout and lack of voter engagement have undermined the democratic ideals of participation and deliberation, a small minority of the public, such as a special-interest group, tends to have more control over school board elections — which means that school board elections do not result in the type of ‘local control’ envisioned by the *League of Women Voters* court. For instance, off-cycle elections leave room for teachers’ unions to exercise disproportionate influence, where it would be more difficult for them to do so in general-purpose elections.¹⁴⁶ This is because teachers’ unions tend to be “the largest and best organized group in school district elections across the country.”¹⁴⁷ Teachers’ unions have strong incentives to push for off-cycle elections, as there is evidence that they are able to exert more influence in

bility, issue agreement, and shared partisanship were the strongest predictors of support for incumbents.”)

143. See HENIG, *supra* note 15, at 218 (“Mayoral and council elections . . . tend to get more attention and stir more involvement than those for school boards.”).

144. See *id.* (Noting mayors don’t have much incentive to get involved because of “considerable variation from jurisdiction to jurisdiction in the degree to which such offices currently have the power to shape school policy.”).

145. See *id.* (“[The] role [of city or county councils] often is obfuscated by school-board members, who have a stake in emphasizing their independence and greater expertise, and by other public officials, who may prefer not to be held responsible by the electorate for . . . the schools.”).

146. See generally, TERRY MOE, SPECIAL INTEREST: TEACHER UNIONS AND AMERICA’S PUBLIC SCHOOLS (2011).

147. Sarah F. Anzia, *Election Timing and the Electoral Influence of Interest Groups*, 73 J. POL. 412, 415 (2011).

those elections.¹⁴⁸ Moreover, studies researching voting behavior across the country have found that, in some cases, low voter turnout has led to a small percentage of citizens having power over school district operations, including budgets.¹⁴⁹ In turn, low voter turnout and interest groups' disproportionate power have had a significant negative impact on deliberation, which means that local voters may not feel as though they have control over local issues. Specifically, policy choices viewing public authority as a vehicle of accommodating or aggregating individual — or interest group — preferences have ultimately failed to “inspire confidence among citizens that the decisions of public managers are genuinely in the ‘public interest.’”¹⁵⁰ This is because based on which interest groups are accommodated, the general public may not feel empowered to act, especially citizens associated with a group that doesn't have a seat at the table.

Researchers Laurence Iannaccone and Frank Lutz counter the proposal that low voter turnout is evidence of minority marginalization. While they acknowledge that there is a lack of competition and low voter turnout in the majority of school elections,¹⁵¹ their “dissatisfaction theory” suggests that low voter turnout can be evidence that voters agree with the status quo; when there is too much divergence between representatives' values and individual values, voters will become more active.¹⁵² However, this may not be the case if the majority group permanently marginalizes minorities through the electoral process. Minorities may not vote for reasons including off-cycle elections

148. One study found that “[s]chool districts that hold off-cycle elections pay beginning teachers 1.5% more and their experienced teachers over 3% more per year in base salary than districts that hold on-cycle elections” — which is consistent with the idea that “teacher union leadership tends to be more responsive to the needs of senior teachers than beginning teachers.” *Id.* at 424.

149. See ABERNATHY, *supra* note 50, at 91 (“The fact that a small percentage of New Jersey citizens are involved in setting the district budgets is not surprising and is consistent with more comprehensive studies of voting behavior and political participation.”).

150. See REICH, *supra* note 32, at 138 (“Both . . . share a view of democracy in which relevant communications all flow in one direction: from individuals' preferences to public officials, whose job it is to accommodate or aggregate them.”).

151. See Laurence Iannaccone & Frank W. Lutz, *The Crucible of Democracy: The Local Arena*, in *THE STUDY OF EDUCATIONAL POLITICS* 39, 42 (Jay D. Scribner & Donald H. Layton ed., 1995) (“Dissatisfaction theory notes the lack of competition and low voter turnout in the majority of school elections.”).

152. See *id.* at 42 (“Lutz and Iannaccone found that when the policies of the board and superintendent policy-making group become too different from the community, incumbent board members will be defeated and superintendents replaced by outsiders with a new mandate to provide the services demanded by the district's voters.”).

or a lack of belief in the efficacy of the electoral process.¹⁵³ The dissatisfaction theory presupposes an ‘adversarial’ view of democracy¹⁵⁴ in which citizens’ interests are constantly conflicting with one another and can only be resolved by voting.¹⁵⁵ Deliberative democracy, in contrast, not only improves minority representation by allowing neglected citizens to be heard by their representatives,¹⁵⁶ but also offers a broader definition of democracy that goes beyond the polls. Specifically, deliberation allows members of the public to attribute more weight to their own views and generate voluntary action,¹⁵⁷ as well as legitimize minority preferences.¹⁵⁸ More importantly, however, allowing for deliberation enables groups to cooperatively redefine the problem and its solutions.¹⁵⁹ Additionally, deliberation helps shape the personal views of individuals involved,¹⁶⁰ and it may also uncover deeper internal conflicts between groups deliberating a surface-level issue.¹⁶¹ The current regime, though, allows for special-interest groups to dominate both in elections and in different forms of deliberation.

Many of the challenges to participative and deliberative democracy are present in Washington. In some Washington districts, “all or some [school] board directors are elected at large

153. See Feuerstein, *supra* note 26, at 28–29 (“Thus, although voting is an efficient process, it is also a weak form of participation that can result in the creation of permanent minorities. Unable to influence policy, minorities often develop a distrust of the political system.”).

154. See *id.* at 26 (citing JANE MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY 16 (1980) (noting proponents of adversarial democracy believe that “a democracy should weigh and come to terms with conflicting selfish interests rather than trying to reconcile them or to make them subordinate to a larger common good”)).

155. See *id.* at 26 (“[A]n adversarial view of democracy assumes that citizen’s interests are in constant conflict, need protection, and are irresolvable without voting.”).

156. See *id.* at 31–33 (noting tenets of deliberative democracy where citizens can hold representatives accountable by deliberation, and suggesting reforms to “improve minority representation and increase general participation in school board elections”).

157. See REICH, *supra* note 32, at 145 (“The discovery empowers people, together, to take voluntary action.”).

158. See *id.* (“Had there been no such deliberation, each might have continued to assume that his feelings were somehow illegitimate . . .”).

159. See *id.* (“During the course of such deliberations, people may discover that their initial assumptions about the nature of the problem and its alternative solutions are wrong or inappropriate.”).

160. See *id.* at 146 (“Some people may discover a conflict between their personal, pecuniary interests in the problem and their hopes for the community.”).

161. See *id.* (“People may discover that these disagreements run much deeper than previously imagined.”).

and may live anywhere in the district.”¹⁶² In others, directors must live in “director districts,” but all voters in the school district vote for all candidates.¹⁶³ Both systems may disadvantage minority candidates, who have limited funding to target all voters. Low voter turnout is also an issue in Washington. Counties with major school districts like Seattle, Tacoma, and Spokane showed voter turnout rates between just 34 and 40 percent in 2015.¹⁶⁴ Off-cycle elections pose similar issues in Washington as they do in other states, as Washington school district elections happen during odd-numbered years.¹⁶⁵ Finally, interest groups in Washington have a significant amount of power. For instance, critics have noted that in 2014, the Washington Education Association made the maximum possible campaign contribution to four of the nine justices on the Washington Supreme Court — while *League of Women Voters*, in which the WEA was a co-plaintiff, was on appeal to the Washington Supreme Court.¹⁶⁶ Of

162. *Serving on Your Local School Board*, WASH. STATE SCH. DIRECTORS’ ASS’N, <http://www.wssda.org/portals/0/resources/publications/candidateguide.pdf> [<https://perma.cc/LHY5-EL3L>] (last visited Mar. 6, 2016).

163. *Id.*

164. *King County Elections Historical Turnout Information*, KING CTY. ELECTIONS, <http://www.kingcounty.gov/~media/depts/elections/about-us/data-and-statistics/historical-turnout-data.ashx?la=en> [<https://perma.cc/HVA6-ZBXU>] (last visited Mar. 6, 2016); *November 3, 2015 General Election*, PIERCE CTY. AUDITOR, <http://results.vote.wa.gov/results/20151103/pierce/> [<https://perma.cc/SF76-GHGD>] (last visited Mar. 6, 2016); *Summary Report, Spokane County*, WASH. SEC’Y OF STATE, <https://wei.sos.wa.gov/county/spokane/en/ElectionResults/Documents/2015%20results/S215Results.pdf> [<https://perma.cc/3QLH-NBSR>] (last visited Mar. 6, 2016). While these percentages are high relative to the national average voter turnout for local elections, which is around 21%, they may still be evidence of “negativity surrounding government in general [] seeping into local government,” especially when compared to figures from the 1960s and 70s of “more than two-thirds of registered voters . . . in New York, Los Angeles and elsewhere” participating in such elections. Mike Maciag, *Voter Turnout Plummeting in Local Elections*, GOVERNING THE STATES AND LOCALITIES (Oct. 2014), <http://www.governing.com/topics/politics/gov-voter-turnout-municipal-elections.html> [<https://perma.cc/Z9QC-S6VW>].

165. *How Does a School District Work?*, OFFICE OF THE EDUC. OMBUDSMAN, http://www.digitalarchives.wa.gov/GovernorGregoire/oeo/publications/007_english.pdf [<https://perma.cc/QHX5-FDK4>] (last visited Mar. 6, 2016).

166. See Danny Westneat, *The Trouble With Union Donations, School Cases*, SEATTLE TIMES (Sep. 8, 2015, 8:44 PM), www.seattletimes.com/seattle-news/the-trouble-with-union-donations-school-cases/ [<https://perma.cc/7K9G-DPTJ>] (“[O]f our nine justices, seven got the maximum financial donations . . . from the WEA. . . . Four of the justices . . . got [the maximum] contributions from the WEA . . . after the WEA had filed suit against the charter-school law, and after the case had been appealed to the state Supreme Court.”). While judges may recuse themselves from cases involving big donors, the law does not mandate that they do so. See Wash. St. Ct. R. 2.11(D) (“A judge may disqualify himself or herself if the judge learns . . . that an adverse party has provided financial support for any of the judge’s judicial election campaigns . . . that causes the judge to conclude that his or her impartiality might reasonably be questioned.”).

those four justices, three joined the majority in striking down the law.¹⁶⁷

2. *Accountability*

Voters are much further removed from schools today than they were at the time *Bryan* was decided. An increase in the number of layers of bureaucracy has contributed to school board members having expanded roles and interests, which lessens their effectiveness as agents of the voters. As federal and state power has encroached on the school board's traditional sphere of decision-making, the public may not view school boards' decisions as having sufficient legitimacy because school boards must share their authority.

Voter-selected school board members serve various roles. Board members who employ school staff must manage those interests when they are called upon to serve the general public, as they may conflict with those of the public.¹⁶⁸ Additional conflicts of interest are created where school board members are elected from wards or single-member subdistricts; there is potential for political stalemate where narrowly defined constituencies butt heads.¹⁶⁹ Moreover, when school board members focus only on these narrow concerns for political survival, they may ignore the potential of overarching district, state, or national concerns that affect the community members whom they serve.¹⁷⁰ However, at-large systems with more accountability to the entire district can have negative effects on poor and minority candidates.¹⁷¹

Overall, the balance of power has shifted upward from local to state boards. Local school boards have less autonomy and control over local practices than state boards.¹⁷² Recent court rulings¹⁷³

167. Westneat, *supra* note 166.

168. See HILL ET AL., *supra* note 44, at 12 ("School board members continually find themselves in . . . conflicted positions. . . . Board members are elected to represent the interests of a public . . . [and] are also employers of [various staff members].").

169. See *id.* at 12 ("Narrowly defined constituency decision-making contributes to legislative gridlock.").

170. See Feuerstein, *supra* note 26, at 19 ("If representatives within districts focus too narrowly on their own concerns, they may become blind to larger overarching issues that face the entire community and therefore require conjoined action.").

171. See *supra* Part III.B.1.

172. See generally, JEFFREY R. HENIG, THE END OF EXCEPTIONALISM IN AMERICAN EDUCATION: THE CHANGING POLITICS OF SCHOOL REFORM (2013).

173. "Following the passage of No Child Left Behind, lawsuits challenged the federal government's use of educational funding . . . (e.g., *Reading School District v. Pennsylvania*

have also underscored a fundamental shift in the role of the federal government, which now has the ability to control various parts of the educational process, a role that originally rested with states.¹⁷⁴ State and national interests can dictate what local governance looks like; for instance, states with a history of education finance reform legislation tend to favor alternative governance regimes (including charter schools).¹⁷⁵ This shift has created additional distance between the voter and the school board; as school governance becomes centralized and bureaucratic, critics argue that school boards are neither efficient nor effective at accomplishing goals and serving the needs of their constituents.¹⁷⁶ One important reason may be that, practically, as school governance shifts upward to the federal level, less deliberation occurs at the local level.¹⁷⁷ While deliberation is itself an important value for relevant voices to be heard, allowing for the public to engage with decisions may also offer accountability benefits by contributing to the legitimacy of such decisions.

Department of Education; Pontiac v. Spellings, 2005; *Connecticut v. Spellings*, 2005). In these rulings, the courts dismissed the challenge that the federal government failed to provide the funding necessary for states to comply with NCLB[.]” Gail Sunderman, *Evidence of the Impact of School Reform*, 34 REV. RES. EDUC. 226, 236 (2010). School finance litigation resulted in courts requiring states to implement particular reforms, as courts have no spending authority and are dependent on policy solutions. *See id.* at 238–39 (noting “the success of court decisions in changing school funding practices is dependent on the political process” and courts’ responses to states’ limited progress has been to require implementation of “particular educational programs or systems of governance”).

174. *See id.* at 237 (citing Deborah Temkin & Christopher Roellke, *Federal Educational Control in No Child Left Behind: Implications of Two Court Challenges*, in HIGH STAKES ACCOUNTABILITY: IMPLICATIONS FOR RESOURCES AND CAPACITY 225, 225–49 (Jennifer K. Rice & Christopher Roellke eds., 2009)) (arguing the outcome of these cases was allowing federal government to “specify and control several aspects of education that historically were under the control of state education agencies”).

175. *See* Kenneth K. Wong & Warren E. Langevin, *Policy Expansion of School Choice*, 82 PEABODY J. EDUC. 440, 464 (“The hazard rate for state adoption of a charter school law increases by 19% for every legal decision on the constitutionality of the state education finance system.”).

176. *See* Feuerstein, *supra* note 26, at 21 (“[S]earch for alternative institutions to run public schools . . . has resulted in threats to the current system of educational governance. . . . This type of criticism threatens school boards and may also threaten the democratic nature of public education.”).

177. *See* Gomez-Velez, *supra* note 33, at 339 (“[T]he place for the greatest degree of participation, input and democratic deliberation is generally at the local level.”).

C. CHARTER SCHOOL AUTHORIZATION BY LOCAL SCHOOL BOARDS

League of Women Voters leaves open whether it closed the one school-board-authorized charter school in the Spokane school district because other provisions of the Charter School Act made the law unconstitutional as a whole, or because local-board-authorized charters are always unconstitutional.¹⁷⁸ That raises the question of whether the Washington legislature and voters could solve the problem by limiting charters to those authorized by local boards. This Section argues that while this solution may solve the legal issue in Washington, it would not address the democracy deficit in terms of either participation or deliberation, because local school boards generally are not good authorizers and are not responsive to the democratic process.

First, local school boards are not good charter school authorizers.¹⁷⁹ One study¹⁸⁰ measuring the quality of authorizers in every state found that in the 13 best states,¹⁸¹ only 18 percent of charter schools were authorized by local school boards, while in the mid-level and worst states, 83 percent and 93 percent of charter schools, respectively, were authorized by local school boards.¹⁸² The study suggested that local school boards are “more readily influenced by charter-averse education interest groups and by local politics.”¹⁸³ Another study of authorizer-type comparisons on decision-making processes found that in cases where political considerations seemed to override merit-based thinking in the decision-making process, the authorizer was almost always a local school board.¹⁸⁴ This suggests that local school boards are more susceptible to interest group politics, which poses challeng-

178. See *infra* Part III.B.2.

179. See generally *supra* note 47 and accompanying text.

180. LOUANN BIERLEIN PALMER & REBECCA GAU, THOMAS B. FORDHAM INST, CHARTER SCHOOL AUTHORIZING: ARE STATES MAKING THE GRADE? (2003).

181. The study developed a grading scale based on several criteria measuring “state policy climate for charter schools and authorizers” and “the performance of a state’s authorizing bodies as a whole.” *Id.* at 9.

182. *Id.* at 18.

183. *Id.* at 21.

184. BRYAN C. HASSEL & MEAGAN BATDORFF, PUBLIC IMPACT, HIGH-STAKES: FINDINGS FROM A NATIONAL STUDY OF LIFE-OR-DEATH DECISIONS BY CHARTER SCHOOL AUTHORIZERS 36 (2004) (“In cases where ‘political’ factors seemed to have dominated decision-making, the authorizer was almost always a local board of education.”).

es to both participation and deliberation,¹⁸⁵ than other types of authorizers.

Another reason why local school boards may not be good authorizers is that there is a “lack of infrastructure devoted to the work of authorizing.”¹⁸⁶ One study found that over 90 percent of state-level authorizers often had separate offices and staff members for charter-related activities, while one quarter of local school-board authorizers had the same.¹⁸⁷ Additionally, non-local authorizers were more likely than local authorizers to have been involved in formal or informal networks,¹⁸⁸ which may suggest a lower level of deliberation in decision-making on the part of local authorizers. Because local school boards are often built for basic compliance without more, they cannot offer a more comprehensive approach to charter authorization.¹⁸⁹ One university charter authorizer noted, “[i]mplementing the same types of oversight as used with traditional public schools just isn’t enough. Expectations for charter schools are so much higher that serious thinking outside the traditional nature of compliance-based accountability is in order.”¹⁹⁰

Overall, while local school boards may not be able to solve their issues by turning away from government completely,¹⁹¹ this Section argues that our view of the democratic process in terms of participation, deliberation, and accountability should not be limited to what local school boards can offer. Charter schools should not only be held accountable to government, but also to political processes.¹⁹² Education policy decisions, particularly, need to be

185. See *infra* Part III.B.1.

186. BIERLEIN PALMER & GAU, *supra* note 180, at 22.

187. LEE ANDERSON ET AL., SRI INT’L, A DECADE OF PUBLIC CHARTER SCHOOLS 23 (2002) (“[A]lmost all state-level authorizers (93 percent) had a separate office and staff, compared with fewer than half of universities (44 percent) and one-quarter of local authorizers (26 percent).”).

188. See *id.* at 24 n.19 (“39 percent of local authorizers were not involved in formal or informal networks. This proportion is much higher than that for the other types of authorizers.”).

189. See BIERLEIN PALMER & GAU, *supra* note 180, at 22 (“[L]ocal boards and their staff are accustomed to compliance-based accountability and apt to bring that approach to charter authorizing.”).

190. *Id.*

191. See HENIG, *supra* note 15, at 10 (“[D]emocratic government plays an absolutely critical role in airing alternative visions, encouraging compromise, and enticing disparate groups to redefine their interests and find common ground.”).

192. See *id.* at 94 (noting accountability to government is insufficient; schools must be accountable to government and political processes). For a discussion on the importance of democratic political process, see also *id.* at 199 (“It is because there is no single, stable,

held accountable to democratic political processes — not only because common schools were created to serve broad social purposes,¹⁹³ but also because education is the mechanism responsible for transmitting democratic values to the next generation.¹⁹⁴

IV. STATE-AUTHORIZED CHARTERS AND THE DEMOCRATIC IDEAL

In eliminating Washington's charter school system and equating local control with control by local school boards, *League of Women Voters* did not offer a viable solution to the archaic bureaucratic governance system that is now mandated under Washington constitutional law. Allowing charter schools to exist is not necessarily the answer. A system of only locally authorized charters would similarly be plagued by the democracy deficit Washington currently faces.¹⁹⁵ The question that now remains is whether Washington can achieve the democratic ideal by allowing state-authorized charters. This Part argues that allowing for a state authorizer of charter schools will result in significant benefits both in terms of accountability and choice — but in order for the public to meaningfully participate in a more deliberative form of democracy, a system of state-authorized charters must be part of a broader portfolio of options, combined with a more comprehensive mechanism of evaluating charter schools.

A. ACCOUNTABILITY

Several individuals and education reform organizations have developed methods of evaluating the quality of charter school accountability provisions. While methods of evaluation differ in what they value, the previous iteration of Washington's Charter School Act scored highly under each of the key charter law ranking systems. Finally, although one key measure of accountability

clearly defined set of societal values and understandings . . . that we properly give extra weight to values and understandings that have been openly articulated, subject to public challenge, collectively negotiated, and validated through democratic processes.”)

193. See Gomez-Velez, *supra* note 33, at 302 (noting common schools were created to “serve broad social purposes, like preparation for citizenship, moral education and cultural unity”).

194. See HENIG, *supra* note 15, at 201 (“[E]ducation has a special status as a producer of the values, perspectives, knowledge, and skills that will be applied in the ongoing enterprise of collective deliberation and adjustment.”).

195. See *supra* Part III.C.

to the public — high student outcomes — could not be measured in Washington because of how quickly the Charter School Act was overturned, one study linking the purpose of charter legislation to student outcomes shows that states with similar legislative purposes to Washington have outperformed other states with respect to charter-school outcomes.¹⁹⁶

The National Association for Public Charter Schools (NAPCS), a non-profit organization committed to supporting and improving state charter policy, has developed a ranking system that compares state charter laws with its own “model” provisions.¹⁹⁷ The NAPCS rankings give preference to state laws that are more effective at enforcing charter school accountability.¹⁹⁸ NAPCS gave Washington’s Charter School Act twelve points out of twelve for conforming to the model law provisions requiring an accountability system for authorizers and the overall program,¹⁹⁹ recognizing that pursuant to the Act, charter schools would be held accountable to their authorizers, who in turn would be accountable to the state board of education, the state legislature, or the governor — all of whom would be directly responsible to the people. Further, the Act’s emphasis on collecting data regarding student outcomes demonstrates its commitment to high-quality charter schools. NAPCS also gave Washington’s Charter School Act twelve points out of sixteen for conforming to the model law provisions for transparent charter application, review, and decision-making

196. Elaine Liu, *Solving the Puzzle of Charter Schools: A New Framework for Understanding and Improving Charter School Legislation and Performance*, 2015 COLUM. BUS. L. REV. 273, 278, 314 tbl.5 (2015) (classifying the purpose of Washington’s state charter law as ‘gap-closing,’ and concluding that gap-closing states enjoy better charter school performance outcomes).

197. *Measuring Up*, NAT’L ALL. FOR PUB. CHARTER SCH., <http://www.publiccharters.org/get-the-facts/law-database/> [https://perma.cc/EAQ4-33US] (last visited Nov. 15, 2015).

198. See TODD ZIEBARTH, NAT’L ALL. FOR PUB. CHARTER SCH., *MEASURING UP TO THE MODEL: A RANKING OF STATE CHARTER SCHOOL LAWS 6–9* (6th ed. 2015).

199. See *id.* at 90. NAPCS pointed to some of the key features of the Act’s accountability provisions, including: (1) the state board oversees the performance and effectiveness of local authorizers, WASH. REV. CODE ANN. § 28A.710.120(1) (West 2015), *invalidated by* League of Women Voters of Wash. v. State, 355 P.3d 1131 (Wash. 2015); (2) the state board must submit an annual report comparing the performance of students in charter schools to those in non-charter schools, *id.* § 28A.710.100(4)(b); (3) authorizers must collect and analyze charter school evaluation data, *id.* § 28A.710.100(1)(e); (4) school performance affects charter renewal: charter schools in the bottom quartile of schools on the state’s accountability index will not be renewed but for exceptional circumstances; *id.* § 28A.710.200(2); and (5) the legislature has established and can strip the authorizing ability of the state charter commission, *id.* § 28A.710.070(1), which is the state’s only non-district authorizer, *id.* § 28A.710.080.

processes,²⁰⁰ recognizing that the Act provided clear guidance for charter applications.²⁰¹ Additionally, pursuant to the Act, authorizers would be required to conduct thorough evaluations of each application, including an in-person interview and a public meeting allowing for deliberation by members of the public.²⁰² Finally, NAPCS gave Washington's Charter School Act twelve points out of sixteen for conforming to the model law provisions for comprehensive charter school monitoring and data collection processes,²⁰³ because the Act gave authorizers the specific authority needed to fulfill their responsibilities of monitoring and data collection, and authorizers could also take corrective action.²⁰⁴

The Center for Education Reform (CER), which specifically studies charter school laws, has also assessed Washington's charter law and highlighted its provisions relating to accountability and performance.²⁰⁵ The CER rankings note, similarly to the NAPCS rankings, that charters in the bottom 25 percent of the statewide accountability index will not be renewed.²⁰⁶ Additionally, they point to the requirement that teachers who work at charter schools must be certified by the state.²⁰⁷ Finally, charter schools must provide performance reports to parents and community members served by the school.²⁰⁸

Both of the above ranking systems are subject to particular sets of values espoused by each charter-ranking organization.²⁰⁹ CER's rankings have specifically been noted for placing value on the free market, and thus giving more weight to charter laws that

200. See ZIEBARTH, *supra* note 198, at 90.

201. WASH. REV. CODE ANN. § 28A.710.130 (West 2015), *invalidated by* League of Women Voters of Wash. v. State, 355 P.3d 1131 (Wash. 2015).

202. *Id.* § 28A.710.140(2).

203. See Ziebarth, *supra* note 198, at 91.

204. WASH. REV. CODE ANN. § 28A.710.180 (West 2015), *invalidated by* League of Women Voters of Wash. v. State, 355 P.3d 1131 (Wash. 2015).

205. *Charter School Laws Across the States 2015 Rankings and Scorecard*, CTR. FOR EDUC. REFORM, <https://www.edreform.com/wp-content/uploads/2015/07/CharterLaws2015.pdf> [<https://perma.cc/4UWM-RM3M>] (last visited Oct. 14, 2016).

206. WASH. REV. CODE ANN. § 28A.710.200(2) (West 2015), *invalidated by* League of Women Voters of Wash. v. State, 355 P.3d 1131 (Wash. 2015).

207. *Id.* § 28A.710.040(2)(c).

208. *Id.* § 28A.710.040(2)(f).

209. See Wendy C. Chi & Kevin G. Welner, *Charter Ranking Roulette: An Analysis of Reports That Grade States' Charter School Laws*, 114 AM. J. EDUC. 273, 275 (2007) ("Evaluation criteria are not value-free.")

are less constrained by the government.²¹⁰ Critics of such ranking systems argue that such values should be made explicit when publishing rankings,²¹¹ and some have developed frameworks to assess charter laws more holistically without ranking or rating them.²¹² While many such analyses exist, this Note will consider the Annenberg Institute for School Reform assessment.

The Annenberg Institute for School Reform (Annenberg) differs from the organizations above because it encompasses policy research and reform support across all types of education, particularly focusing on children in urban communities.²¹³ Annenberg's assessment of charter laws details recommendations to consider in creating charter laws, and the Charter School Act aligns with several of these recommendations, particularly in terms of accountability.²¹⁴ First, the Charter School Act requires the state department of education, through its data-collection processes, to assess the cumulative impact of charter schools on traditional school districts.²¹⁵ Authorizers also monitor charter school enrollment practices, and can provide intensive support and intervention to improve charter management.²¹⁶ All charter authorization practices are subject to public meetings, which increases transparency.²¹⁷ Charter caps and term limits are also in place.²¹⁸ Finally, the state department of education is empowered to provide oversight of authorizers and the monitoring process.²¹⁹

In sum, the 2012 version of the Charter School Act has met success markers under a variety of methods of evaluation, and

210. See *id.* at 275–76 (“CER’s rankings frame the charter school movement . . . around a set of beliefs that places the highest value on the free market. . . . [A] charter school law with fewer governmental constraints is . . . good and strong.”).

211. See *id.* at 280 (noting critics that “persuasively assert that value orientations in such evaluations should be overt”).

212. One example is Janelle Scott and Margaret Barber’s framework, which is grounded in four different goals: choice, productive efficiency, equity, and social cohesion. See *id.* (“Scott and Barber do not grade or rank the state laws; the framework provides no basis on which [values] to prefer[.]”).

213. *About Us*, ANNENBERG INST. FOR SCH. REFORM, <http://annenberginstitute.org/?q=about-us> [<https://perma.cc/52AD-CTXH>] (last visited Nov. 15, 2015).

214. *Public Accountability for Charter Schools*, ANNENBERG INST. FOR SCH. REFORM, <http://annenberginstitute.org/sites/default/files/CharterAccountabilityStds.pdf> [<https://perma.cc/S5CX-QMMC>] (last visited Nov. 15, 2015).

215. WASH. REV. CODE ANN. § 28A.710.100(4)(b) (West 2015), invalidated by *League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015).

216. *Id.* § 28A.710.180.

217. *Id.* § 28A.710.140(2).

218. *Id.* § 28A.710.150(1).

219. *Id.* § 28A.710.160(5).

therefore addresses at least this portion of the democratic concerns evinced by *League of Women Voters*. As the provisions of the Act relating to accountability have not substantially changed since Washington reenacted its charter school law in 2016,²²⁰ the current Act is similarly responsive to these concerns.

B. PARTICIPATION: CHOICE, BUT NOT VOICE

In allowing for charter schools to coexist with public schools, Washington's Charter School Act allows for parental school choice²²¹ — which market-based charter theorists view as a method for parents to democratically control schools, and therefore as a proxy for their participation.²²² More importantly, choice has been championed as a “means of empowerment for disadvantaged communities” and disenfranchised individuals,²²³ the supporters of whom view choice as a “mechanism to provide poor families with the same opportunities enjoyed by the middle class.”²²⁴ Yet critics rightfully point out that private control has little discernible effect on positive student outcomes,²²⁵ and that in some cases, choice programs have actually perpetuated segregation.²²⁶

Voice, rather than choice, is a more accurate indicator of parental participation, particularly in urban populations. In his famous treatise, economist Albert O. Hirschman contrasted these two ideas in the context of a declining organization or firm.²²⁷ He found that dissatisfied members will either exercise an “exit option” and leave the organization (what this Note refers to as

220. See Engrossed Second Substitute S.B. 6194, 64th Leg., Reg. Sess. (Wash. 2016).

221. *Id.* § 28A.710.050(1).

222. See CHUBB & MOE, *supra* note 10, at 226 (explicating a choice plan where direct democratic control is eliminated and replaced with authority vested in schools, parents, and students).

223. Elizabeth H. DeBray-Pelot et al., *The Institutional Landscape of Interest Group Politics and School Choice*, 82 PEABODY J. EDUC. 204, 205 (2007).

224. Joseph Viteritti, *Vouchers on Trial*, 2 EDUCATION NEXT 25, 32 (2002).

225. See James S. Liebman, *Voice, Not Choice*, 101 YALE L.J. 259, 265 n.36 (1991) (noting various sources that show negligible differences between the outcomes of private school students and public school students).

226. See *id.* at 291 n.147 (providing evidence of white students in Minnesota using its choice plan to transfer from integrated to all-white public schools, and of a Virginia county's unconstitutional use of a freedom-of-choice plan to desegregate schools); see also *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (finding the school district's racial tiebreaker plan unconstitutional under the Fourteenth Amendment Equal Protection Clause).

227. See ALBERT HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* 3–4 (1970).

choice) or “express their dissatisfaction directly” by using their voice.²²⁸ A parent in a public school system has similar options — she can exit, or “leave for a private or charter school,” or use her voice to “work to make the public schools better.”²²⁹ To exercise the latter option, she can “join the PTO, volunteer, go to school board meetings, write letters to the newspaper, lobby the legislature, etc.”²³⁰ Voice is important because families without much social mobility often find that though they may have a particular set of school options for their children, their choices are much more limited than those of their suburban counterparts.²³¹ Additionally, a parent who has choices may not, for a variety of reasons, be satisfied with any choice. That parent may then find herself in a situation where she has no meaningful control over improving her child’s education. Moreover, a parent who does have a voice in his child’s current school may find that school choice proposals allow him to congregate with similarly situated individuals, meaning he may no longer need to use his voice if another parent represents his particular needs or interests — the classic collective action problem.²³² However, as these people gradually leave the public school system, those without a voice become disproportionately affected, and those with a voice who stay then have the extra burden of representing more of their parent-constituents.²³³ Choice proposals may thus reduce the incentive for parents to “stand and fight for better schools.”²³⁴

While Washington’s Charter School Act provides for choice, much more is required to ensure that parents not only have options, but that the options they do have include the high-performing schools often inaccessible to disadvantaged popula-

228. *Id.* at 4.

229. See Steve Hinnefeld, ‘Voice,’ not ‘choice,’ will make schools better, SCHOOL MATTERS BLOG (July 3, 2013), <https://inschoolmatters.wordpress.com/2013/07/03/voice-not-choice-will-make-schools-better/#more-4810> [<https://perma.cc/3ZKD-9T7J>].

230. *Id.*

231. See Liebman, *supra* note 225, at 296 (noting as “educational connoisseurs” exit, public schools retain a guaranteed pool of families “that are legally required to send their children to school and financially unable to move to the suburbs or the private market”).

232. See *id.* at 309 n.251 (noting the collective action problem that occurs when “[i]ndividuals with great interest in a particular public service and substantial resources . . . congregate with like individuals”).

233. See *id.* at 308–09 (noting “the paralysis that can occur when each constituent believes that her neighbor has more to gain than she from agitating for change”).

234. *Id.* at 300.

tions.²³⁵ Promoting the idea of market competition in this respect would only allow those with exit options (e.g., the means to afford private education) to abandon public schools. One possible solution is for districts to provide a ‘portfolio’ of different educational options, and have them work with the communities they serve to determine the best models. Parents would be responsible not only for giving input on what options should be available to them, but also for monitoring their own satisfaction with a particular arrangement. Limited exit options would mean that stakeholders’ focus would shift from the demand side (choice) to innovations on the supply side (different providers), which would give teachers and parents a responsibility to drive the movement.²³⁶ Developing contracting arrangements with these providers, rather than relying on markets, would encourage voice by allowing parental input and not simply exit. For instance, parental discontent with a particular contractor, which could be expressed by a request to transfer, would signal to the school or district to make a supply-level change.²³⁷ Parents would have choices within their district, meaning that all evidence of parental choice would be shown by the “district’s monitoring of enrollment pat-

235. See Gaysu R. Arvind, *Local Democracy, Rural Community, and Participatory School Governance*, 24 J. RES. RURAL EDUC. 1, 3 (2009) (“Democratic governance through institutional practices that expand participation, power, and voice and ensure the accountability of decision-makers is critical for gaining political empowerment of disadvantaged populations.”).

236. See Katrina E. Bulkley, *Introduction: Portfolio Management Models in Urban School Reform*, in BETWEEN PUBLIC AND PRIVATE: POLITICS, GOVERNANCE, AND THE NEW PORTFOLIO MODELS FOR URBAN SCHOOL REFORM 3, 18 (Katrina E. Bulkley et al. eds., 2010) (“[T]he charter school idea was first promoted as a means of fostering innovation that teachers, parents, and others would drive.” (footnote omitted)).

237. See Jeffrey R. Henig, *Portfolio Management Models and the Political Economy of Contracting Regimes*, in BETWEEN PUBLIC AND PRIVATE, *supra* note 236, at 27, 33 (“Under contracting arrangements, collective expression of discontent — what Hirschman refers to as ‘voice’ — plays a more central role.” (footnote omitted)). With the advent of private companies in public education, especially those that take advantage of economies of scale and pass along these savings to school districts, making such supply-level changes can be carried out without too much time or cost to school districts. See John Chubb, *The Private Can Be Public*, 1 EDUCATION MATTERS, no. 1, Spring 2001, <http://educationnext.org/the-private-can-be-public/> [<https://perma.cc/6CS3-MXAC>] (“[Private] firms believe that, using economies of scale as well as other tools that are more readily available to the private sector, they can build organizations that use time and resources more efficiently and effectively than public school districts, leading to higher student achievement at a similar cost.”).

terns,” which would then allow the district to make any necessary changes.²³⁸

C. DELIBERATION

While Washington’s Charter Act seems relatively strong in its ability to create an accountable system of charter schools, as well as providing for a relatively improved form of participation (parental choice), a successful system will allow for meaningful participation that occurs before decisions arise, allowing groups to come to some sort of consensus about how to move forward.

Historically, successful choice programs with widespread support have been developed after a great deal of deliberation. Moreover, this support

was not ready-made. It had to be constructed deliberately. This required public leadership. Special responsibilities lay on elected officials to provide this leadership, but they were not the only candidates. Business and community leaders and parents also played a role in many cities. While they acted as individuals — motivated to be sure by personal values and with private interests in mind — what counted more is that their actions took place in the open, public arena in which the pros and cons were debated, reconsidered, and ultimately weighed.²³⁹

This suggests that deliberation was the driving force behind the support for successful charter school proposals, and also legitimized the decisions that were made.

In addition to promoting deliberative process in developing a district’s broader portfolio of options, districts must also consider holistic measures of assessment that address what the public values. Several scholars have identified guiding questions around which deliberative groups of parents, teachers, school leaders, and other stakeholders might choose to fashion a program of school choice or a portfolio of school options.²⁴⁰ Estab-

238. See Henig, *supra* note 237, at 33 (“Parent choice, a form of exit, can also play a role, but rather than operating directly on schools, it is filtered through the district’s monitoring of enrollment patterns . . .”).

239. HENIG, *supra* note 15, at 156.

240. *E.g. id.* at 175–78.

lished evaluation frameworks have moved towards consciously placing family and community members on the same level as school leadership, realizing that both are necessary to evaluate leading indicators like teacher and instructional quality and lagging indicators like student achievement.²⁴¹ Others have chosen to be explicit about reducing the impact of test scores and increasing the use of guiding principles surrounding parent involvement, parental choice, holistic teacher assessment and adaptive curriculum.²⁴²

Finally, districts have an important role to serve as strategic managers during the reform process. In a portfolio management system, a central governing unit (CGU) is responsible for maintaining a balance between family and school choice on the one hand and developing an efficient, equitable, and socially cohesive system on the other.²⁴³ Each district is ultimately responsible for implementing a portfolio of options, identifying service providers to assist it in doing so, and closing schools that are unsuccessful,²⁴⁴ but the central office must also maintain a long-term approach. A truly democratic system must focus on long-lasting reforms, shifting away from bureaucracy to focus on long-term educational impacts.²⁴⁵ Finally, while the central office bears much of the implementation responsibility, it must also ensure a clear, transparent process of operator selection and school closure.²⁴⁶ Some school districts have turned to meaningful civic

241. See *Framework for Great Schools*, NYC DEP'T OF EDUC., <http://schools.nyc.gov/AboutUs/schools/framework/vision> [<https://perma.cc/5R47-Q852>] (last visited Mar. 6, 2016) (showing effective school leadership and strong family-community ties on the same level in a set of concentric circles centered around student achievement).

242. See Letter from Charles Barone et al., Center for Reinventing Public Education, Thomas B. Fordham Institute, to State Superintendents of Education and Governors (Sept. 24, 2014) (on file with author), available at http://www.crpe.org/sites/default/files/Statement_Guiding%20Principles%20on%20Accountability.Sept2014.pdf [<https://perma.cc/M74M-98SM>] (listing eight such principles for the design of accountability systems).

243. See Henry M. Levin, *A Framework for Designing Governance in Choice and Portfolio Districts*, in *BETWEEN PUBLIC AND PRIVATE*, *supra* note 236, at 217, 228 (“Obtaining balance between a system predicated on freedom of choice for both families and schools and a system that meets the goals of productive efficiency, equity, and social cohesion is a formidable challenge.”).

244. See *id.* at 218 (“In portfolio districts, the central office actively manages the portfolio, both closing schools . . . that do not meet district expectations . . . and opening new schools or contracting with other organizations to open new schools.”).

245. See DeBray-Pelot et al., *supra* note 223, at 222 (noting parental choice is necessary for reforms to be “permanent or lasting”).

246. See Josh Edelman, *Portfolio Management Models: From the Practitioner's Eyes*, in *BETWEEN PUBLIC AND PRIVATE*, *supra* note 236, at 307, 318 (noting the political dangers of

engagement to promote the idea that the new model augments, rather than undermines, the current system.²⁴⁷ Perhaps this means that portfolio districts must include a public relations or marketing role as part of the central office's work. Ultimately, though, a sustainable portfolio model necessitates parental and community involvement — a strong CGU should still welcome attempts to change or debate central policy.²⁴⁸

V. CONCLUSION

League of Women Voters is an enormous setback to charter schools and innovation in the education field. The case sets a dangerous precedent — one that threatens the democratic ideal. When assessed under three markers of democracy — participation, deliberation, and accountability — state-authorized charter schools may offer more democratic control to parents and community members than the current system of bureaucratic local school districts can provide. Yet simply upholding Washington's Charter School Act piecemeal is not the solution — an effective school system will integrate parents' and community members' voices into decision-making processes, rather than just provide exit options. Shifting to a portfolio model where choice occurs within the confines of a public school district will push public education structures closer to the democratic ideal.

silencing public voices and the benefits of including public participants in plan development).

247. *See id.* (“[C]ommunity groups and members may see portfolio management as undermining the traditional system rather than augmenting it. . . . Meaningful civic engagement can provide significant support for portfolio management.”).

248. Jeffrey R. Henig & Katrina E. Bulkley, *Where Public Meets Private: Looking Forward*, in *BETWEEN PUBLIC AND PRIVATE*, *supra* note 236, at 323, 328 (The New York City approach struggled to build a strong governing regime for a portfolio model because it resisted “efforts by parents and others to attempt to change or even debate centrally defined policies.”).