

Homeschooling, Virtual Learning, and the Eroding Public/Private Binary

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ABSTRACT

Regulators ubiquitously dichotomize schooling into two discrete sectors: *public* and *private*. Although homeschooling is regulated in some contexts as a third sector, the general approach is to treat it as a species of private education by subjecting it to public regulation while simultaneously denying it public funds. But the public/private binary is increasingly difficult to sustain as charter schools multiply and, especially, as virtual schooling increasingly penetrates primary and secondary education. Public school systems are deploying virtual education in ways that erode once impermeable walls between public and private. Many obstacles to homeschooling will fall with those walls—particularly obstacles related to government financing of homeschooling activities.

KEYWORDS

charter schools;
homeschooling; online
schools; virtual schools

The hegemonic public/private binary

A legal and regulatory binary, deeply rooted in many legal systems, demands that every school be either *public* or *private*. Under this binary, regulators understand home schools as a particular genus of the phylum, “private schools.” This taxonomy is unsurprising. There is an undeniable and strong analogy between home and private schooling: both involve parents opting out of state-provided education. The United States guarantees the right to homeschool as it does the right to private school, and for many of the same reasons (*Pierce v. Society of Sisters*, 1925). Concomitantly, it requires families who elect homeschooling, like those who choose private school, to forfeit all but *de minimis* entitlements to state educational subsidies for their children.

To be sure, regulatory regimes for homeschools with respect to issues like curriculum, teacher qualifications, and the school day are, in many jurisdictions in the United States at least, considerably less demanding than those faced by institutional private schools (McMullen, 2002, pp. 87–88; Waddell, 2010, pp. 547–548; Yuracko, 2008, pp. 151 & n. 138, 169). This can make homeschools appear to be a *sui generis*, third regulatory category. But these differences ultimately represent particular adaptations of regulatory

approaches used for private schooling. They should not obscure the fundamental regulatory categorization of homeschools as “private.”

Important comparative legal scholarship demonstrates that the categories of “public” and “private,” as applied to schools, bear vastly different meanings in different systems (Glenn & DeGroof, 2005). In the United States, moreover, the meaning of the terms developed “late in time,” through a process both “slow and uneven” (Reese, 2007, p. 100).¹ Prior to the 20th century, in the United States “[t]he terms ‘public’ and ‘private’ did not have their present connotations, and most schools did not fit neatly into either of our modern categories” (Kaestle, 1983, p. 13; see also, Green, 2010, p. 253; Tyack, 1974, p. 57). In the 1800s, American schools were arranged by cooperatives of neighbors. Schools’ organizers understood their institutions to serve a “public” function, and some even received taxpayer subsidies. Nevertheless, “contemporary standards” of the time deemed these schools “private institutions” (Reuben, 2005, p. 5). Attacks by progressive-era reformers on “private” schools targeted institutions quite different than those Americans would reflexively call “private schools” in, say, the 1960s or 1990s (Kaestle, 1983, p. 116; Reese, 2007, pp. 99–102).

Today’s American idea of what makes a school public or private is, in other words, highly contingent. Nevertheless, by the latter half of the 20th century, the contemporary concepts of “public” and “private” had achieved ideological “hegemony” in America. A particular sort of “public” school, founded and managed along progressive lines, had become the “taken-for-granted educative institution for most Americans” (Jones, 2008, pp. 2–4). It was education’s “one best system” (Tyack, 1974), a “natural state of affairs” (Hess, 2010, pp. 163–64). Like the free press, it was a fundamental “institution of American constitutional democracy,” although nowhere mentioned in the United States Constitution (Pelikan, 2005, p. xiii). Its exemplary characteristics, and their combination within a single institution, have been a fixed point in public understanding for decades.

That understanding designates public schools as those that are free of charge to parents. It understands them to be governed by a local school government, a “board of education” that monopolizes the provision of public schooling within its jurisdiction. That board is popularly elected within that jurisdiction. The board imposes taxes on property to support its activities. (Later in time, state and federal monies came substantially to supplement the local financing of public schools.) Public school systems must educate all pupils within the jurisdiction—although certain categories of children, notably racial minorities, the disabled, and noncitizens, only came to be included within this stricture over time. Public schools are and must be secular.

Private schools are understood to have a very different characteristic vector of institutional features. Private schools are privately managed and run. They have no obligation to educate any particular child beyond duties

created by the civil rights laws prohibiting discrimination, by enrollment contracts, and by the dictates of their own mission or conscience. They may select their students from any geographic location. They are regulated by the state, but the scope of that regulation is considerably less than that affecting public schools. They receive no or minimal government monies. Instead, they charge tuition, rely upon charitable contributions, or otherwise support themselves. And private schools may be religious. Indeed, religious institutions today account for approximately 75% of private school enrollment (Kena et al., 2015, p. 75).

Because private schools are, by definition, not *public*, parents and schools that wish to forgo public management or pervasive regulation must also forfeit public subsidy and pay their own way. Thus, the famous observation that those who opt out of public schooling in the United States pay twice, although, as some have noted, it is more accurate to say that they pay *three* times (Sugarman, 1991, p. 181). They pay taxes to support the public schools, like every other taxpayer; they do not send their children to the public schools, relieving the public fisc of the duty to expend resources to educate those children; and then, under compulsory schooling laws, they must utilize their own resources to provide that education.

Homeschoolers are like private school parents in this respect, except that they pay with their time the bulk of the expenses that other private school parents pay also for in cash. There remain some items for which homeschoolers also in cash, of course, such as materials and sometimes special instruction. Homeschoolers, like private schools, are also eligible for certain minimal subsidies, as, for example, when they are allowed to use public school facilities or transportation without charge.

As noted previously, from the legal and regulatory perspective, a great deal hinges on whether a home school, or for that matter any other school or school system, is deemed to be “public” or “private.” Its categorization determines whether it can receive public monies, teach religion, or deny admission to a student it does not desire to teach. But, precisely because the public/private binary is “taken for granted,” categorization has not historically depended upon precise definitions. “Public” and “private” are descriptions of the two clusters of school types that existed in the United States for most of the 20th century. In a world where the types’ classic exemplars—the neighborhood, district-run public school, the Catholic school, the tony private academy—were ubiquitous, the need for definitions was not felt. It was generally clear to everyone, including lawyers, legislators, bureaucrats, and parents, which schools were which. It was, therefore, easy to determine which set of regulatory requirements applied to any given school. For this reason, I have purposely described the key features of “public” and “private” schools as constituting “understandings” or “vectors of characteristics” rather than definitions.

The absence of formal definition permits some departures from ideal types, and, as is to be expected in a country as diverse as the United States, a field as complex as education, and a binary that substantially postdates the development of formal schooling, such departures have a long history. The United States is far from the only country that has preserved specialized academies for blind, deaf, disabled, and academically talented students inside its “public” school system, notwithstanding that such institutions have admissions criteria, which means that they are *not* open to all children within a jurisdiction. During the civil rights era, the set of “public” schools not available to all children grew, as school systems and their judicial supervisors sought to create and maintain racially integrated schools by the use of zoning, magnet programs, racial quotas, and other devices.

Likewise, there has long been variation in the institutions of governance. The progressive era largely homogenized a pre-existing diversity of governance arrangements, but did not eradicate all variation (Cronin, 1973, Chapter 6). The standard progressive arrangement, a school board directly elected by voters and given the power to manage the schools and tax on their behalf, is called in the United States an “independent school district.” This well-worn phrase reveals a long history of “dependent” school districts; these relatively unusual school systems are administrative arms of general-purpose city or state governments. Recently, additional kinds of dependency have become more common. On the one hand, there has been a recent revival of interest in mayoral control, which has displaced independently elected school boards in many of America’s largest cities (Cronin, 1973, Chapter 7; Wong, 2007). On the other, states have asserted the authority to impose “substitute administration” upon school districts whose performance, in their view, is inadequate. This involves the disempowerment or even ousting of locally elected school boards in favor of state-appointed bureaucrats (Anderson, 2012; Saiger, 1999). Notwithstanding these arrangements, nobody doubts that the school system of New York City, run by the City’s mayor, or that of Newark, New Jersey, run by appointees of the state’s Governor, remain “public.”

A paradigmatic legal example of the fuzziness of the line between “public” and “private” schools arose in a case heard by the United States Supreme Court in 1982, *Rendell-Baker v. Kohn*. *Rendell-Baker* involved a school organized as a private corporation, but that received nearly all of its income by contracting with the state to meet the state’s obligation to educate special-needs children. Those children attended the school free of charge; the State of Massachusetts paid their fees. The school was sued by teachers who argued that they had been unfairly dismissed. Notwithstanding that the school’s only function was to provide classically “public” services to nonpaying students using public monies, the Court held that the school was a “private” entity. But this holding was limited to the question of which rules of employment

law governed the dispute between the school and the teachers. The Court was not called upon to, and did not, define “public” and “private” schools more generally.

For a long time, these kinds of variations, although present, were marginal. Lately, however, they have moved to center stage, substantially eroding the public/private binary and its hegemony. This change was catalyzed by movements for parental choice in education, and especially by the rise of charter schools. Going forward, the most important influence destabilizing the public/private binary will be virtual education.

Charters as desectorizing

The idea of school choice, implemented through any number of modalities, challenges the foundations of the public/private binary. A government-issued school voucher, usable at a public or private school at a parent’s election, is publicly funded, but the school that cashes it is privately run (*Zelman v. Simmons-Harris*, 2002). Is the school “public” or “private”? Or, rather than issuing vouchers, a state offers tax credits or tax-advantaged savings accounts to parents who incur private-school costs (Garnett, 2016). Is a tuition-dependent school whose fees can be higher because parental payments are untaxed “public” or “private”?

These issues are raised especially by charter schools. A charter is a school created by some group of stakeholders that receives public funds to provide education on a nondiscriminatory basis to students who choose to enroll. Charters are important to the argument here for two reasons. First, the charter sector is growing explosively. In 2012–2013, 2.3 million children were enrolled in over 6,000 charter schools. By comparison, 450,000 children were enrolled in 1,993 charters in 2000–2001, and there were no charter schools in 1990 (U.S. Department of Education, National Center for Education Statistics, 2015, tbl. 216.20). Nearly all government-funded schools in New Orleans are now charter schools; other large districts, including Los Angeles, Chicago, Houston, Philadelphia, and Miami-Dade, enroll more than 10% of their students in charters (Saiger, 2013). The possibility that chartering will fizzle out seems remote.

Second, the challenge that chartering poses to the public/private binary is particularly sharp. Charter schools share many important features with traditional public schools. Charter schools are publicly funded and require a government permit to operate (the “charter”). They do not admit privately paying students and may not charge tuition (Mead, 2003, p. 367). Only in some states are charters exempt from the collective bargaining agreements reached by their local school districts with teachers and other staff (Godwin & Kemerer, 2010, p. 6). Charters are also prohibited from discriminating among students in admission. Oversubscribed charters must admit students by lottery, although there is perennial concern that they use strategies such as

location, targeted advertising, and counseling students at enrollment and re-enrollment to shape their student bodies to their liking (Lubienski & Weitzel, 2009, p. 361; Sugarman & Kuboyama, 2001, p. 873).

In other, equally important respects, charters are classically private. They can be established by any group of people or institution that can meet the regulatory requirements and attract students. This group might be made up of teachers, parents, not-for-profit, or for-profit actors. They are thus private, incorporated entities; in some ways the government-issued charter is more like the corporate “charter” issued to all private companies than the organizational documents of a public school or school district. Charters are privately managed and regulated much less heavily than archetypical public schools.

And families choose charters; no child is forced to attend. Charters, like private schools, therefore face market discipline. Within whatever regulatory strictures are imposed, charters compete for students with other charters and with other types of schools. If students enroll, a charter thrives. Otherwise it disappears (Sugarman & Kuboyama, 2001, p. 876; Vergari, 2003, p. 500).

Charter schools, therefore, pose a clear challenge to the binary. The only fair description of charter schools, given their characteristics, is that they are public/private hybrids. Nor are they a single type; charters occupy various intermediate midpoints along the spectrum between entirely public to entirely private, varying from state to state and school to school.

By opening up the space between the poles of that spectrum, charters make the task of categorizing schools as “public” and “private”—still so necessary under our regulatory regime—especially difficult. The field is full of competing definitions and descriptions, with both descriptive and prescriptive agendas, that emphasize one or another element of the classic vectors of publicness and privateness. The charter school industry and its customer base, on the one hand, insist that charters are “public,” as do nearly all states’ charter school statutes (Saiger, 2013). Aware of the financial and political benefits of that categorization, charter proponents emphasize that charters receive public money and are subject to public oversight. Teachers’ unions, for exactly the same reasons, declare that only traditional, district-managed schools are genuinely “public” schools.

The debate in the field is paralleled in the literature. Hill (2001, p. 316), for example, argues that “[p]ublic education is a set of goals,” not “a fixed set of institutions”; he would apparently categorize even a privately managed and funded religious academy as a “public” school. His interlocutors insist that a school is only truly “public” if it is constituted as a government, so that its decisions are the conclusions of processes of “public” deliberation among citizens rather than the outcome of market-based processes among consumers (e.g., Gutmann, 1987).

Descriptively, the only fair conclusion seems to be that the popular and political decision to define charters and other choice arrangements as “public” or “private” is an attempt to place a square peg in one of two round holes. No element of the vector of publicness does or should be singled out as the critical one. Moreover, a school that is public for one set of purposes can be private for another (Green, Baker, & Oluwole, 2015).

These observations, moreover, indicate both the continuing hold of the binary and its ultimate unsustainability. Calling charters “public” when they have so many “private” features has already begun to raise all manner of legal problems, chief among them whether they may constitutionally accept public funding. As Garnett (2016) argues, these problems clearly portend the continuing erosion of the binary itself.

Virtuality as desectorizing

Virtual education is a less mature reform than charters, but, like charters, its diffusion seems inexorable. Compared to higher education in particular, broad public awareness of e-delivery of primary and secondary education is fairly low (Barbour et al., 2011, p. 18). But big changes are happening despite—or, perhaps, because of—there not being much of a spotlight. And the potential of virtuality to disrupt the public/private binary is even greater than that of charter schools.

Today’s virtual education sector can be divided into three broad categories. The first involves virtual tools used to supplement existing in-person education. Educators and entrepreneurs are busily rolling out a gallimaufry of school technology (Selwyn, 2011, pp. 23–24). Schools are buying computers, wiring for high-speed Internet, and instructing their students to “bring your own device.” They are rolling out online platforms that allow students and teachers to communicate, to post and respond to homework assignments, to take quizzes, and to monitor student progress. They are “flipping” classrooms (Khan, 2012, pp. 115–118; Murphy et al., 2014b). They are building “completely realized, networked digital environment[s]” that will integrate in-school pedagogy, learning, and assessment into single, seamless “digital teaching platforms” (Dede & Richards, 2012, p. 1). Various current iterations of these platforms allow teachers electronically to analyze student work for plagiarism, individualize assessment, and even track student behavior (Singer, 2014).

Ultimately, those building these tools envision them as seeds for a new “blended” or “personalized” model of schooling. “Blended learning” can be described as “splitting up the work of teaching between man and machine [by] combining teacher-led lessons with computer-based lectures and exercises” (Sengupta, 2011). Educators who study the technique define it as instruction some of which takes place “at a supervised brick-and-mortar location away from home”—school, in other words—while at

the same time “a student learns at least in part through online delivery of content and instruction with some element of student control over time, place, path, and/or pace” (Staker & Horn, 2012, p. 3). In a 2015 survey, 45% of school-district administrators reported that they were using blended learning “with positive results.” (Project Tomorrow, 2015, p. 6). A 2014 report from the Michael and Susan Dell Foundation expects blended learning to become “standard practice in many classrooms in the future” (Murphy et al., 2014a, p. 3).

Another possibility, however, is that information technology will come to *supplant* some or all traditional classroom instruction. The proliferation of online courses, especially at the middle- and high-school levels, is the clearest example. All over the country, schools are using online courses to provide instruction that they cannot, or no longer want to, provide in person (Clements, Stafford, Pazzaglia, & Jacobs, 2015, p. 9; Queen, Lewis, & Coopersmith, 2011, p. 3). The foreign language that the school does not offer, the advanced science or math course, or the advanced placement course not in the curriculum can all be taken online instead. As of August 2014, high school students in Alabama, Arkansas, Florida, Michigan, and Virginia were required by law to take at least one online course to be graduated. Other states have passed legislation that facilitates online instruction (Layton & Brown, 2011; Watson, Pape, Murin, Gemin, & Vashaw, 2014, p. 64).

Local school districts also create incentives for their students to move their learning online. Districts like those in Fairfax, Virginia and Houston, Texas, maintain an “online campus” through which high school students can register for online versions of standard high school courses. “These courses,” according to the “Frequently Asked Questions” list on the Fairfax campus’s Web site, are intended “for students who have scheduling conflicts, special medical needs requiring a home or hospital setting, special needs requiring a flexible schedule, or, are seeking to complete high school graduation requirements” (Fairfax County Public Schools, n.d.). That last category, of course, applies to almost every student enrolled in high school.

Just as supplementation can shade into substitution, online courses can be combined to the point that school itself becomes online. In a 2010 survey of public school districts, 22% reported that high school students “could take a full course load in an academic term using only distance education courses,” and another 12% reported that students “could fulfill all high school graduation requirements using only distance education courses” (Queen et al., 2011, p. 3). By simply combining online courses, students can turn themselves into online students, even as they are matriculants of traditional schools.

Specific legislation in the states has also enabled the creation of fully online schools, or even “virtual school districts,” designed purposefully to operate exclusively online.² These districts, which exist in at least 17 states, including Florida, Massachusetts, and Virginia, are distinct from any of the state’s

brick-and-mortar public school districts. Students anywhere in the state may enroll in these schools; they are not students in any other school, as are many students who take online classes.

Many other online schools, not part of virtual districts, have been organized as *cybercharter schools*. These schools use the charter school form discussed previously, which of course was developed for, and is still mostly used by, in-person schools. In recent years, several states have adapted their regulatory regimes to permit charter schools that operate exclusively online (Clark, 2008, p. 57). Cybercharters operate at every educational level, from kindergarten through high school. Students of virtual school districts and cybercharter schools do their coursework entirely in the cloud.

These forms of online learning—the online supplement, blended learning, the online course, the state virtual school district, and the cybercharter school—represent the very earliest forms of online K–12 education. They will certainly grow and change. But they are already a significant phenomenon. Consistent data are hard to obtain, “because there currently is no single entity that tracks students, and because of the wide variety of ways in which students can engage in this form of schooling” (Waters, Barbour, & Menchaca, 2014, p. 380). But, in the 2013–2014 school year, one census counted 400 full-time virtual schools with an estimated enrollment of 263,705 students (Molnar et al., 2015, p. 2). A different study in the same year counted 316,320 pupils, about one half of 1% of all students, receiving all of their K–12 education online. Fully online schools were operating in 30 different states (Watson et al., 2014, p. 53).

Meanwhile, by the 2007–2008 school year, 70% of school districts that offered online learning were reporting that at least one of their students was taking an online course (Picciano & Seaman, 2009). In the 2009–2010 school year, there were more than 1.8 million enrollments in online courses (some students may have taken more than one course). Most, but not all, online learning that supplanted in-person learning was at the high-school level. In the 2009–2010 school year, “[s]eventy-four percent of the distance education enrollments were in high schools, [nine] percent were in middle or junior high schools, and [four] percent were in elementary schools” (Queen et al., 2011, p. 3).

These are not amazingly high numbers, but neither are they insubstantial. More important, their trajectory is steep. The 1.8 million online enrollments in 2009–2010 can be compared to the estimated 506,950 registrations in technology-based distance education courses during the 2004–2005 school year and the 317,070 in 2002–2003 (Zandberg, Lewis, & Greene, 2008, p. 15). Compare these numbers to a small scale survey that suggests that, in the 2001–2002 academic year, only 40,000 to 50,000 students took an online course (Clark, 2001, p. i). In some states, growth has been even more explosive. For example, state virtual schools in Georgia and North Carolina

have seen double-digit growth in course enrollments in each of the last 2 years. During the 2013–2014 school year, state virtual schools reported 741,516 supplemental online course enrollments (Hall, 2011; Watson et al., 2014, p. 27).

In full-time virtual schools, enrollment increased by a factor of 10 between 2002 (25,000 students) and 2010 (250,000 students) (Miron & Urschel, 2012, p. 2).³ Cyber-charters, similarly, grew in both number and size over a span of 5 years during the same time period. A 2014 report found that the number of cybercharter schools increased from 147 cybercharters with 65,000 students in 2006 to 220 cybercharters with 217,000 students in 2011 (Waters et al., 2014, p. 381). It is hard to imagine that in the mid-1990s, when postsecondary institutions helmed the distance-education movement, these enrollment numbers for K–12 education were anything other than close to zero (Sikora & Carroll, 2002, p. iii). Before the Office of Educational Technology in the U.S. Department of Education commissioned a survey of the distance education courses for public elementary and secondary students during the 2002–2003 school year, there was “no nationally representative study [that] examined technology-based distance education availability, course offerings, and enrollments in the nation’s elementary and secondary schools” (Setzer, Lewis, & Greene, 2005, p. 1).

Virtual education is a foundational challenge to the public/private binary because it abolishes several key features that are core characteristics of the traditional “public” school, without replacing them with corresponding features of a “private” school. In particular, virtual education need not be bundled, need not be organized into traditional communities, and need not be localist in orientation.

Bundling

Traditional schooling is a package deal. The constraints of buildings and transportation mean that, with very rare exceptions, a given child must attend one school during school hours. That school sets a curriculum which its students consume. This curriculum may, especially as children get older, allow them a measure of choice in some areas; in many other respects, however, even older students have no choice at all. A school or school district might decide, for example, that every student should take calculus, or not to offer calculus to anyone. Both of these options might be available to it from the perspective of district policy and state law; but once the school has made its election, its students are bound by it. Such school choices, moreover, might be driven by pedagogical considerations, but they might also be made based upon actual or perceived demand, resource constraints (teachers, space, money), and other nonpedagogical factors.

Virtual education radically unbundles schooling. No matter if one school does not offer calculus; surely some other provider does. Indeed, access to arcane and advanced course offerings is routinely touted as one of the more obvious benefits of virtual schooling. But unbundling has other effects whose normative implications are less clear. Today, if a school teaches about family structure, evolution, or history in ways a family does not like, its options are to complain or to depart for a different school. The first of these options is often ineffective and the other frequently expensive. The option merely to move to a different online module for social studies or biology, one more *sympatico* with a family's tastes, saves it, to use Hirschman's classic categories (1970), the uncertainties associated with voice and the expense otherwise associated with full exit.

Bundling is not a new issue. In one sense, many middle- and upper-class parents already unbundle when they supplement public education with after-school lessons. A robust market for such services supports not only extra-curricular karate, ballet, and piano lessons but enrichment or drill in academic subjects as well. Parents who supplement choose how to do so, so that many children's total package of educational activities differ one from another. Home schooling, as noted below, often involves radical unbundling.

Virtuality dramatically expands the range of unbundling and makes it relevant to a much larger group than was interested in partial exit from public schooling under the bricks-and-mortar technological paradigm. If virtuality invites all students to search for and enroll in the particular courses that meet their needs, everyone becomes an unbundler. In such an environment, an all-or-nothing view is untenable. This is so even if religion is a motivator for choices among commodities; it will be but one among many.

Community

One objection to allowing unbundling of the public school programs is that it undermines the school as a learning community. Since the consolidation of informal schooling at the dawn of the common-school and progressive eras, it has seemed obvious and necessary to most public school people that schools are and must be *communities*. As discrete places where students, teachers, and staff gather together at set times in set places in order to teach and learn, what else could they be? Many educators have made virtue of necessity, understanding community to be at the core of civically informed pedagogy.

Community clearly plays a central role in bricks-and-mortar schools. For teachers and staff, they are workplaces. For neighborhoods, they are local institutions. For students, they are complex sites of aggregation: to a greater or lesser extent involuntary, organized around learning, but also, because of the nature of children and the amount of time for which they are required to

be in school, very often the locus of children's social and political as well as intellectual life.

Community seems less necessary in a world where individual students can log on asynchronously to a variety of providers to consume commodified courses. But it is not true that virtuality avoids community. It involves different kinds of communities than those we are used to, but, their participants insist, they are no less vital for that. Virtual users do not merely consume virtual experience. They also assist in shaping it. As the late Greg Lastowska put it (2010, p. 10):

The most compelling element of virtual worlds, it turns out, is not the powerful graphic technologies they employ but the very real social interactions that occur through that technology. Virtual worlds are fundamentally new sorts of places. ... As books by journalists, anthropologists, sociologists, and others have explained, because virtual worlds are places, they are also sites of culture.

Balkin and Noveck (2006, p. 3), along with others, make a similar point: Virtual worlds “stimulate social experimentation” and “are full of social cooperation and social conflict.”

At the same time, virtual worlds are clearly not the sort of communities that traditional public schools are. They are more atomistic, their membership is more fluid, and they do not have any natural geographic base. They are a different kind of community than the kind we are used to.

Localism

Geography is particularly important because localism is a foundational principle of American public school governance. *Brown v. Board* itself mentions localities. “Today,” *Brown* states, “education is perhaps the most important function of state and local governments” (*Brown v. Board of Educ. of Topeka*, 1954, p. 493). The contemporary rule is best articulated in a later Supreme Court case, *Milliken v. Bradley* (1974, pp. 741–742):

[T]he notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.

Localism has been a basic premise of schooling for a long time. School districts are, therefore, entrenched institutions. They have officeholders, staffs, budgets, and property. They have voters, constituencies, and interest groups. They have political capital and social meanings. They own buildings, grounds, and equipment. They are parties to labor contracts and insurance

policies. These facts on the ground are among the many reasons districts have been so strong notwithstanding their inequity-promoting effects.

Districts will not disappear, therefore, at the first hint of digital learning. But the challenges that virtuality poses to localism will accelerate over time. The past few years, in which early digital education alternatives have begun to roll out, have made it already possible to see the shape of the coming challenge to the district's privileged position. Every single digital education effort, from the most local to the least, reflects the atterritorial nature of information technology. And newer initiatives seem to depart further and further from the localist paradigm.

Since the implementing agencies of public education in this country are school districts, many efforts have begun there. These are structured to be the most local of efforts. Consider again the online campuses like those managed by the school district of Fairfax, Virginia. Once something like an online campus is up and running, one would expect for its proprietors to find it nearly irresistible to fill available spaces with paying customers, should space remain available after district children fill their spots. Indeed, it ought to prove deeply tempting to increase capacity to accommodate such paying customers. Online learning of this kind, much more than in-person classes, has high start-up costs but low marginal costs. Once the infrastructure is established, adding more participants is fairly straightforward and relatively cheap.

Unsurprisingly, this is indeed the policy of the Fairfax Campus: district children attend for free—unless they are taking more than the seven-course load the district permits—but out-of-district students pay a few hundred dollars a course. Nor is this unique to Fairfax. The Houston (Texas) Independent School District runs a “Virtual School Tuition based Program”; its Web site, in conjunction with a price list, explains that its “unique program allows for any student from any district in any part of the world to complete courses online with the approval of their school guidance counselor.” The Madison (Wisconsin) Virtual High School offers similar arrangements.

It must be emphasized how striking this policy is. In the context of bricks-and-mortar education, districts, especially affluent ones like Fairfax, have mightily resisted admitting or registering students from out of district. Options for interdistrict transfers that have been a part of education reform packages have generally withered. Such programs generally provide that receiving, wealthy districts must certify that there is space for additional students; and such districts rarely do so.

This has been the case, for example, in the Cleveland school voucher program. This program permitted parents of Cleveland public school children to receive vouchers for use outside the district. That program, and the Supreme Court case upholding it, was famous because it allowed the vouchers to be used at private religious schools (*Zelman v. Simmons-Harris*,

2002). But the voucher law also provided that vouchers could be cashed at public schools in neighboring, whiter, wealthier districts. This part of the program was *not* famous. This is because no vouchers moved across district lines. Receiving districts had to agree to accept the vouchers, and none would.

Similarly, until a legislative reauthorization in late 2015, the federal No Child Left Behind Act provided that children in what the Act called “failing” schools be permitted to transfer to other, more effective school districts. Again, this required that nonfailing districts accept such students. Unsurprisingly, almost none were willing. Most cited space constraints (Aikens, 2005). It should surprise no one that interdistrict transfer was the least utilized plank of the Act.

And then you find rich, successful Fairfax, not just accepting paying customers from anywhere in the country, but soliciting business on the Internet. Fairfax online is not the same as Fairfax on the ground, in part, because the students it accepts in this way are disembodied. No strangers, no out-of-towners, actually show up to your local school. Students from beyond the boundary don’t pose the kind of challenges, real, symbolic, and imagined, when they are virtual as they do when they appear in person. In addition, they have low marginal cost. Not to solicit such students must seem to Fairfax like leaving money on the table. (There are relatively rare provisions by which traditional high schools in some sparsely populated states, especially in Northern New England, register students from neighboring districts without high schools of their own.)

Other challenges to localism are more direct. The cybercharter schools discussed previously are not necessarily tied to any school district. Like charter schools generally, cybercharters may be started and managed by a wide variety of organizations; the statutory lists generally include school districts, but also create options for chartering by nonprofits, groups of parents and teachers, or for-profit corporations. Similarly, charter statutes authorize a range of institutions to review charter applications, grant charters, and monitor the charter schools. Again, school districts are among the institutions that can do so; but so are state departments of education and state universities.

This means that many cybercharters are detached from the localist school district structure. They are present statewide, solicit customers statewide, and are regulated by state-level actors; for-profit entities must also respond to investors who live anywhere and everywhere. Because cybercharters are not local school districts, they have no local boundary which entitles them to favor children from a certain area over others. All comers within the state are treated equally. And this is what they want. They have no more interest than local efforts like that of Fairfax in leaving money on the table.

Still other cyberschools do not use the cybercharter form *per se* but nevertheless are organized as public schools that are independent of the local school district structure. Several states have now established schools known as Virtual Academies. Some of these, like the Texas Virtual Academy, are cybercharters. Others, however, are formally organized as institutions that serve students under the umbrella of particular school districts. But they are not really local projects. The schools are established under state legislation that invites districts—but not only districts—to plan and implement such schools, often in collaboration with an outside provider or contractor.

For example, the Massachusetts legislature passed an act in 2012 providing for the establishment of “one or more” “Commonwealth virtual schools.” The statute allows various actors to apply to the state for permission to establish such a school. They could be institutions of higher education, nonprofits, or groups of parents or teachers, although private schools were prohibited from applying. But school districts were also invited to apply (Mass. Acts, 2012, Chapter 379; Mass. General Laws Chap. 71, § 94(b), 2013). The district of Greenfield won that competition; indeed, it was with a partnership with Greenfield in mind that the contractor lobbied for the state legislation in the first instance. The resulting school, the Massachusetts Virtual Academy, is available to any Massachusetts student tuition free, but preference is given to students in its “home” district of Greenfield (Layton & Brown, 2011; Massachusetts Virtual Academy at Greenfield, 2015).

Or consider the Virginia Virtual Academy, a full-time, all-virtual K–6 school. It was established under a state law, similar to Massachusetts’, that allows school districts to cooperate with providers to provide online schools, and exempts such contracts from some rules that otherwise govern public contracts (Va. Code Ann., 2015). At the start of its life, the Virginia Academy was sponsored by the Carroll County School Board. Carroll County then withdrew and at the Academy became a joint project of the King and Queen County Public School District and the Patrick County Public Schools. Although students within the sponsoring districts attend for free, during the Carroll County period, fewer than 2% of its students were district residents. The rest lived elsewhere in the state. Indeed, this was one of the reasons that Carroll County withdrew its support (Chandler, 2013; Klein, 2013).

Although schools like the Massachusetts and Virginia academies are district-private partnerships, from the point of view of enrollment, they are statewide schools. From the perspective of parents and students, they are indistinguishable from cybercharters. Although the legal forms differ, both are government-established, publicly funded virtual schools, access to which does not depend, or depends only at the margins, on one’s district of residence.

Other states have chosen to cut out the middleman. Florida is a case in point. Florida allows its school districts to establish their own virtual education

programs. It also authorizes the creation of virtual charter schools. But at the same time, the state directly created the Florida Virtual School as a free-standing, nongeographically based school district. This entity is not a school district but a state-level government agency. Its Board of Trustees is appointed by the governor, not by the electorate of any jurisdiction. School districts, notably, are forbidden by law from “limit[ing] student access to courses offered through the Florida Virtual School,” although they can contract with the school to provide local services (Fla. Stat. Ann. §§ 1002.37, 1002.45, 2015).

Perhaps the most critical aspect of the Florida Virtual School is its funding, which is based nearly entirely upon the number of enrolled students and the number of courses for which they enroll, and, potentially under the law, from general appropriations and philanthropy. This framework—an entirely nonlocal, nonproperty-tax based mechanism for student funding—was for many years, and continues to be, the impossible dream of state school finance reformers working in the context of bricks and mortar. Yet it not only appears, but does so in Florida, hardly a dark-blue, liberal state. Once the school is virtual, local funding simply does not make sense.

The Florida Virtual School shows no trace of the localism which, even 10 years ago, most scholars and reformers considered the foundation, the linchpin, of the institutional structure of American educational inequality. The virtual academies and other cybercharters, even those whose charter is granted by a school district, show little. Inequality, many scholars argued, was a permanent part of the landscape. But in the new and growing virtual sector, one sees almost no localism at all. Only the locally managed cyber-schools plausibly can be described as local institutions. This is a direct consequence of the atterritorial nature of the technology.

It is not that virtual schools are *non*local, but that they compete with local schools and localist districts. At the economic level, they compete for customers: will a child, and his associated entitlement to state funding, enroll in his or her local district, or in the charter? And at the conceptual level, they offer a competing model. Their atterritoriality is an alternative to the district’s localism.

Given the central roles of bundling, community, and localism in sustaining and entrenching the standard public/private binary, their undermining by virtual schooling is a clear threat to that binary.

Impacts upon home schooling

The impact of virtual education upon home schooling is potentially very great. There are three categories of effects. First, homeschool families can use virtual education to meet their educational needs and desires. Second, virtuality facilitates unbundling, which has long been a principle and an

activity important to home schoolers. Finally, and perhaps most important in the long run, virtuality, like charters, undermines the public/private binary that excludes homeschoolers from things like public subsidy and access to public facilities. A more polyphonic categorization of schools will confer upon homeschooling, with other nontraditional varieties of educational provision, greater fiscal and political resources and greater legitimacy.

The first category is straightforward. For some homeschoolers, virtual education will not respond to the motives for homeschooling. For example, parents concerned about the content of curriculum, those interested in unschooling, and those who object for principled reasons to governmental involvement in instruction will find virtual classes prepared or sanctioned by government unsatisfactory. But for many others, virtual education can be a means or even a substitute for classical homeschooling. If the goal is to keep children at home, to allow them to pace themselves, or to design curricula that meet their particular interests, virtual schooling fits the bill. It is a very attractive way to provide materials and expertise to students who remain at home. And online resources, of course, have already penetrated the homeschooling sector very dramatically.

Second, the acceleration of virtual schooling ought to make it easier for homeschooling families to navigate their contact with the public education system to their own advantage and the advantage of their children. Consider the cases, like those described in Mawdsley (1999, pp. 317–319), of students not enrolled in the full public school program by virtue of their attendance at homeschools (or private schools) who seek to avail themselves of particular portions of the public school program in which they are interested. Thus, a homeschooled child wants to join the public school band, or the varsity football squad. Or a student wishes to enroll in advanced chemistry, because the public school has the necessary labs and teachers, while taking her other coursework at home. When schools object, plaintiffs' arguments are straightforward. They have the legal right to enjoy the entirety of a public school program, and also the right to seek private alternatives to public school; surely they, therefore, are entitled to *part* of the public school curriculum. School and school districts object that selective disenrollment undermines schools' efforts to create coherent instructional programs and learning communities that have pedagogic, civic, and disciplinary coherence—not to mention school rules that can be fairly and easily administered.

In a variation on these cases, parents have also sought the right to withdraw their children piecemeal from the public school program in order to shield them from materials that they viewed as objectionable (Hirschhoff, 1977, pp. 873–874 & nn. 3–7). These requests are generally motivated by religious objections to sex education, and to teaching about evolution and homosexuality, although other topics also arise (*Leebaert v. Harrington*, 2003;

Parker v. Hurley, 2008). These cases are conceptually of a piece with requests for selective enrollment public schools courses and activities; all that differs is the magnitude of the partial public school program parents seek for their children. The selective enrollment cases, like the selective withdrawal cases, also often but not always involve religious motivation, given the large proportion of private and home schooling that is religious in nature.

When these cases are litigated, courts have been unfriendly to selective enrollment, taking the view that that public school is an all-or-nothing proposition. They have been somewhat more friendly to selective withdrawal, although the more overtly religious cast of exemption requests has tempered judicial enthusiasm (Yudof, Levin, Moran, Ryan, & Bowman, 2012, p. 184 n. 4). Courts, in other words, generally though not universally enforce the prohibition on unbundling. Legislatures and education officials, however, have been less negative. In 23 states, homeschoolers by state statute or league rules have access to extracurricular sports, while the same number of states denies them access (Batista & Hatfield, 2005, pp. 224–252). Some of these statutes allow curricular access as well (Fuller, 1998, p. 1615 n. 73). Local regulation is similarly diverse.

The most important long-run effect of virtuality, however, is to defeat the public/private binary and make room in the public discourse and in its institutions for homeschooling generally. What, after all, is the formal difference between a cyber-charter school student and a homeschooled student who uses online courses? Both students are learning at home (or somewhere other than a school). The difference is only that in the cyber-charter case, it is the charter that has aggregated the online courses and produced a program of study, while in the latter case, the parent aggregates the educational resources. But the parent, of course, chooses the charter provider; and homeschooled students have long used off-the-shelf products as components of their instructional program. Suddenly, therefore, a homeschooled child looks quite similar to a “public,” charter-school child.

In what sense, then, is an online public school different from a loose aggregation of homeschoolers? Online school districts are often managed by private providers. Both are regulated, though not to the same degree. As online education becomes a second wedge (after charter schools) that creates a strong incentive to define privately provided educational experiences as “public,” the distinction between public, private, and home blurs further.

Virtuality also undermines the idea that only “public” schools can provide the kind of community necessary to democratic education. The question of community and socialization has also been central to many critiques of homeschooling. Homeschoolers have long rejoined that educating children at home is entirely consistent with both socialization and the training of democratic citizens (Medlin, 2000, 2013). This response is considerably

strengthened by the governmental embrace of full-time virtual schooling, whose students also lack the kind of social community that accompanies traditional, bricks-and-mortar schools. Virtuality signals an acceptance that the classic, in-person full-time model of community associated with the traditional public school is not the only possible model of a democratic learning community. It will be harder to reject homeschools as a legitimate, alternative models.

There remains the difference that the government pays for cybercharter schools, but not for home schools. But state financial support is a consequence, not a cause, of whether a school is “public” or “private.” The blurring is important because it offers a different answer to whether government *should* pay.

Finally, the modularity of online courses might help to deal with the problem of state support for religious education, which is an oversized presence in the American private and home sectors. The off-the-shelf nature of publicly-offered online courses substantially reduces the First Amendment entanglement concern that has been associated with public subsidy for the secular portions of a religiously inflected curriculum since at least the 1970s (*Lemon v. Kurtzman*, 1971). Virtuality neatly squares the circle that long blocked state support for the secular component of education: it requires neither cash grants, which are fungible in a religious school’s budget, nor the sending of state personnel into religious institutions, which many courts held can signal government endorsement of religion. From an entanglement perspectives, virtual courses are more like secular books, filmstrips, or globes. It is now routine in some states for cyber-charter schools to recruit religious home educators and thus to provide, using government support, secular components of the total education designed by parents. Because entanglement has been a major motivator for the strength of the public/private divide, its mitigation is likely to reduce its vigor.

In short, the introduction of virtual education at a replicable scale is very likely to make the distinction between public and private schools—a divide long so obvious to Americans that the terms required no definition—increasingly anachronistic. Homeschools will then have a strong case for the claim that they should be regulated on their merits, and, in particular, that their use of state-sanctioned virtual tools should be regulated and supported no differently than that of any other school.

Notes

1. This discussion, along with other charter school materials in this article, relies heavily on the discussion and citations in Saiger (2013).

2. Ariz. Rev. Stat. Ann. § 15-808 (2014 & Supp. 2015); Fla. Stat. Ann. §§ 1002.37, 1002.45 (West 2012 & Supp. 2015); Ga. Code Ann. § 20-2-319.1 (2012 & Supp. 2015); Idaho Code Ann. § 33-5504A (2008 & Supp. 2015); Iowa Code Ann. § 256.42 (West 2012 & Supp. 2015); Me. Rev. Stat. Ann. tit. 20-A, § 19152 (Supp. 2015); Mass. Gen. Laws Ann. Ch. 71, § 94 (LexisNexis 2013); Miss. Code Ann. § 37-161-3 (West 2009 & Supp. 2015); Mo. Ann. Stat. § 161.670 (West 2010); Mont. Code Ann. § 20-7-1201 (West 2009 & Supp. 2015); N.M. Stat. Ann. § 22-30-3 (West 2011); S.C. Code Ann. § 59-16-15 (2004 & Supp. 2015); S.D. Codified Laws § 13-33-24 (Supp. 2015); Tex. Educ. Code Ann. § 30A (West 2012 & Supp. 2015); Utah Code Ann. § 53A-15-1002.5 (LexisNexis 2013 & Supp. 2015); Va. Code Ann. § 22.1-212.24 (2011 & Supp. 2015); W. Va. Code Ann. § 18-2E-9 (LexisNexis 2012).
3. Online schools run by education management organizations (EMOs) saw the same rate of growth during the time period. For-profit and nonprofit EMO-operated schools enrolled 11,500 students during the 2003–2004 school year and almost 115,000 students in 2010–2011 (Miron, Urschel, Aguilar, Mayra, & Dailey, 2012, p. 18).

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