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**Book Review Essay—**

Changing the Conversation in Education Law: Political Geography and Virtual Schooling

Aaron J. Saiger*

**JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART.** Oxford University Press (2010).

**PAUL E. PETERSON, SAVING SCHOOLS: FROM HORACE MANN TO VIRTUAL LEARNING.** Harvard University Press (2010).

**ABSTRACT**

In *Five Miles Away, A World Apart*, James E. Ryan concludes that the educational reforms of the hour, school accountability and school choice, will exacerbate rather than undermine the systematic educational advantages enjoyed by wealthier Americans. Paul Peterson, in his *Saving Schools*, argues that increasingly centralizing American schools have become sufficiently centralized that, as a labor-intensive industry, few productivity gains are available from governance reform, even as demand escalates for the customization of education to individual needs.

Both volumes therefore pin their hopes for change upon political geography—the relationship between people and educational institutions in space. Ryan argues that changing demographic trends with respect to wealth and race create a window for interest convergence between whites and minorities and between rich and poor. Peterson concludes his volume with a fascinating chapter on virtual education, which untethers education from institutions like school districts that are based upon

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physical location. I suggest that virtual schooling also offers important, and unsettling, possibilities when analyzed in Ryan's interest-convergence framework. This is true particularly because of the likely impact online education will have upon the religious-school sector.

I. INTRODUCTION

Two recent books—*Five Miles Away, A World Apart*, by James E. Ryan, and *Saving Schools*, by Paul Peterson—call for “chang[ing] the conversation” about American education.\(^1\) This shared imperative is instructive given that the two volumes diverge in agenda, intellectual frame, and strategy of inquiry. Ryan focuses upon the perennial inequities of American education, where, still in 2012, prosperous white children and less privileged black students living nearly as neighbors inhabit wildly disparate educational worlds. Peterson, although also distressed by inequity, focuses primarily upon low and inconsistent overall educational quality. *Five Miles Away* begins with *Brown v. Board*,\(^2\) and stresses institutions. *Saving Schools* begins earlier, with Horace Mann, and gives most of its attention to personalities and ideas. Ryan writes as the leading K–12 education law expert in the United States; Peterson is one the most distinguished political scientists writing in the field.

The two accounts nevertheless overlap substantially. Both devote considerable attention to issues of education law and of implementation: to the failure, after *Brown*, to integrate American schools; to school finance cases in state court and their ambiguous impact on equality and equity; to accountability regimes like No Child Left Behind;\(^3\) and to school choice. Both detect structural similarities among all these reforms that lead them to doubt that any will fundamentally improve American education or change its educational conversation. Those doubts are rooted in analytic arguments which considerably advance our understanding of education law. As I discuss in Part II of this Essay, Ryan develops the important argument that school accountability and school choice reforms are structured to preserve, not mitigate, the edu-

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cational advantages of wealthier groups. Part III analyzes Peterson's conclusion that the long centralization trend in American education has reached the point where, in a labor-intensive industry, few productivity gains are available from governance reform, even as demand intensifies for the customization of education to individual needs.

Neither author, however, concludes that American education is intractable. Indeed, both take the opposite position. And, strikingly, both argue that when America's educational conversation does change, those changes will be rooted in political geography, that is, in changes to the relationships between people and educational institutions in space. Ryan pins his hopes on "demographic trends [that] are changing the composition of metropolitan areas and creating opportunities for integration—both socioeconomic and racial—that have not existed in the past." Peterson concludes his volume with a fascinating chapter on virtual education, which introduces a relationship between schooling and space that is brand new.

In Part IV of this Essay, I suggest that their shared emphasis upon political geography makes it worthwhile to place these two important volumes in conversation. In particular, virtual education untethers education from institutions like school districts that are based upon physical location, undermining the relationship between geography and schooling at its foundations. Cyberschools rearrange the problem of educational inequity, especially as such schools are combined with the charter-school form. They will enable extensive access across jurisdictional lines while at the same time exacerbating inequities already associated with charter quality and differential access to technology. Less obvious, but potentially more importantly, virtual education could reintroduce religious stratification into American education as the religious-school sector recognizes the technology's potential.

Religion is an instructive case, however, because religious virtual education also offers a new field for Ryan's argument that we should take advantage of changing patterns of geographic stratification to find opportunities for integration and interest convergence. Virtual religious charters offer a constitutional way to include those committed to religious education among those who benefit from robust state support for all public education.

4. Ryan, supra note 1, at 281.
5. Peterson, supra note 1, at 229–63.
At this writing, it is unclear whether virtual schooling will be boon or bane for educational quality and equality in America, and how. What is already certain is that it will be prominent among substantial, and looming, changes in America’s educational conversation.

II. NIXON’S COMPROMISE AND PRAGMATIC REFORM

_Five Miles Away_ provides thick historical and analytic accounts of _Brown v. Board_, _Brown’s_ aftermath, school finance reform, school choice, and the standards and testing movement that are refreshingly insightful, empirical, and fair. These are leavened with the results of interviews Ryan conducted with students in two close-by Virginia school systems, one fairly affluent and high-achieving and the other substantially, though not overwhelmingly, distressed.

The book’s chronological frame should not obscure its central analytic argument. Ryan, over several years, has developed the claim that, since _Brown_, movement towards genuine equality of educational opportunity has been thwarted by the overwhelming political power of (largely white) suburbanites, whose families benefit from inequality and deploy their existing advantage to protect it. Six _Five Miles Away_ dubs this phenomenon “Nixon’s compromise.” The moniker stems from the Supreme Court’s famous 1974 decision in _Milliken v. Bradley_, widely known as “Milliken I.” The _Milliken I_ plaintiffs, students in urban Detroit, argued that any effective remedy for prior _de jure_ school segregation in Detroit would require the participation of the school districts of the Detroit suburbs, because the Detroit school district proper had become overwhelmingly African American. (It remains so to this day.) The Court rejected this position and held that no suburban school district could be included in a desegregation remedy unless it could be shown that that particular district had also itself engaged in _de jure_ racial discrimination.

7. RYAN, _supra_ note 1, at 94.
8. 418 U.S. 717.
9. Id. at 739.
10. Id. at 745.
Milliken I is widely understood as a watershed in the history of school discrimination. Ryan rightly calls it “easily the most important desegregation decision aside from Brown.”11 By making the boundaries between school districts impervious to court-ordered desegregation, the Court protected, enabled, and encouraged white flight to suburban districts.12

Ryan observes that this result was as popular among white liberals and moderates as among conservatives.13 Urban blacks, meanwhile, were themselves less than enthusiastic about racial mixing and the busing of schoolchildren.14 This near-consensus was shrewdly championed by President Nixon, who proposed in 1972 to outlaw busing for the purpose of achieving racial balance.15 At the same time, Nixon offered to provide greater resources to students in poor schools. “The compromise Nixon offered was quite explicit: students in the city would remain in the city and not be permitted to attend suburban schools; in exchange for staying put, they would get more resources.”16

The Supreme Court adopted Nixon’s approach when the Milliken I plaintiffs returned to the Court following their loss to ask that the State of Michigan be required to provide additional resources to Detroit schools.17 The Court acceded to their request.18 The financial remedies of Milliken II, although they imposed duties upon the state treasury, were palatable because they would not directly affect the suburbs.19

Ryan’s claim is that Nixon’s compromise has not only been endorsed by the Supreme Court in one particular case but has emerged as a legal and political trope. It has “shape[d] nearly every modern education reform,” whether advanced through “court decision or legislation,”20 and is ubiquitous at both the state and federal levels. Nixon’s compromise systematically prevails irrespective of the novelty or strength of particular legal or theoretical arguments that might be raised against it. Thus, as Ryan describes in an extraordinarily thorough, detailed, and fair chap-
ter, the school finance cases—claims in state court that poor schools have a right to additional funding under the education clauses of state constitutions—ultimately "followed a similar trajectory" to the desegregation cases, even though the two kinds of cases are based upon entirely disparate legal theories. The same trajectory persisted as the finance cases adjusted their own legal theories from federal constitutional claims to state ones, and from claims emphasizing equity to those that alleged merely that state constitutions require all schools to be adequate.

Ryan depicts Nixon's compromise as something short of an iron law. *Milliken*, he writes, "could have come out differently." By this, Ryan means not to make the uncontroversial claim that *Milliken* is wrong as a matter of law, but that urban schools could have been transformed in the ways that the *Milliken* plaintiffs had hoped. Notwithstanding "the sense of inevitability that pervades thinking about this issue today," there are "some intriguing counterexamples" of desegregated communities that defy the conventional wisdom. But, even if Nixon's compromise is a contingent "accident of history," that accident has loomed large. *Five Miles Away* argues that, with but a few exceptions, the interests of the wealthy and their suburban districts consistently prevail in the face of equity claims by have-nots.

The particular contribution of *Five Miles Away* is its sustained argument that the school reforms of the hour are no different, and will also play out within the structural constraints of Nixon's compromise. Ryan offers an excellent, nuanced treatment of "accountability" regimes like the No Child Left Behind Act, which impose upon public schools regimes of testing, measurement, the dissemination of information, rewards, and sanctions. After a thorough and skeptical review of the arguments and evidence for the claim that such regimes can improve the performance of weak schools, Ryan ultimately concludes that even if such regimes could bring failing schools up to a standard of adequacy—a big if—doing so:

21. *Id.* at 178.
22. *Id.* at 110.
25. *Id.* at 112, 294–95.
26. *Id.* at 114.
27. *Id.* at 295.
still leaves a large gap between the kind of education offered at a typical suburban school and the kind offered at a typical urban school. Proficiency does not guarantee equal opportunity; it promises the basics. President Nixon, in the early 1970s, proposed to the compromise of keeping urban and suburban schools separate but working to make them equal. We have compromised his compromise.28

Ryan makes a parallel argument about school choice. By choice, he means both the voucher programs prominent in the late 1990s and early aughts, and the charter school movement now experiencing explosive growth and widespread acceptance that voucher advocates had sought but never achieved. Ryan is right to identify these movements as species of the same genus. Vouchers, as the name implies, are state-issued subsidies to parents that can be redeemed by a participating school of the parents’ choosing, usually including private schools. Charters, a public/private hybrid, face more stringent regulation than private schools participating in voucher programs, and generally exclude religious schools.29 Both programs share a key feature: they receive a per capita state subsidy, but only when a family elects to enroll its child in that school. Choice schools cannot survive unless parents choose them, which, the argument runs, introduces market discipline into an industry that is otherwise a government monopoly.30

As with accountability, Ryan offers a thorough and fair-minded review of the research evidence on the impact of choice upon academic achievement and concludes that the benefits of choice are slight. He acknowledges that some charters have posted strong academic results but notes, correctly, that this could be due to any number of factors aside from academic quality and that replication has been elusive. Taking up a theme he identified several years ago, Ryan also identifies the “radical potential” of choice31 to integrate schools racially and socioeconomically, by severing the relationship between place of residence and school attendance.32 For these reasons, he endorses interdistrict choice33 and

28. Id. at 260.
31. RYAN, supra note 1, at 10.
32. Id. at 217.
33. Id. at 287.
choice programs that specifically seek to create integrated schools. But Ryan is bearish about the chance of these things happening. Interdistrict choice offends suburban autonomy, and therefore, rarely occurs and is hedged with restrictions where it is allowed. Many programs "seem more like gestures towards choice, designed as much to protect local district autonomy as to offer parents more options." Charters in particular are an example of this, proliferating in the cities but rare in the suburbs. They are "Nixon's compromise all over again."

Given this political reality, *Five Miles Away* advocates the adoption of "universal choice" within "cities and poor suburbs." Such choice would be within-district, but would include public, charter, and private schools and be offered to "all students," rather than, as is usual, being restricted only to "disadvantaged, urban students, and even then serv[ing] a tiny fraction of eligible students." In particular, it should include parents now paying private school tuitions and allow them to benefit from a state subsidy. The book advocates this precisely because of its potential to build a coalition that embraces both poor and middle-class parents. Only "by changing the political dynamics of urban school systems by attracting more middle-income families into that system" can integration be achieved. Even here, Ryan is far from optimistic; indeed, he has become less sanguine about the ability of school choice to enhance equality over time. His is a "radical" proposal, in many places a "non-starter politically." But it has potential: it is "not exactly the same as tilting at windmills."

This move is quintessential James Ryan. Ryan has long staked out a position that simultaneously insists upon hard-headed pragmatism and rejects despair. This has been a welcome corrective to writing about

34. *Id.* at 290.
35. *Id.* at 192–98, 287.
36. *Id.* at 194.
37. *Id.* at 201.
38. *Id.* at 210.
39. *Id.* at 287.
40. *Id.* at 289.
41. *Id.* at 291.
42. See Ryan & Heise, *supra* note 6, at 2085 (noting the "radical potential" of choice); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 314 (1999) ("urg[ing] those interested in improving the educational opportunities for disadvantaged students" to consider choice programs).
43. *Ryan, supra* note 1, at 291.
44. *Id.*
45. *Id.* at 287.
educational inequality, in both the legal academy and in education scholarship, which too often mates soft-headedness with an inveterate pessimism. Schools are vastly unequal in the United States, the latter genre runs, because Americans have no genuine commitment either to equality or to education. Discount American rhetoric; American reality is about power, and those with power are racist, supportive of the class differences that serve them so well, and uncommitted to education. What ought to be, of course, is for us and our institutions to abandon racism, reject classism, and embrace the liberating potential of education for all children. But of course that’s not going to happen; therefore, we are doomed to live with the schools that our actions, rather than our words, say that we want. Some writers then take the additional step of suggesting that because integration cannot happen, we should abandon it as a goal and seek to improve our segregated schools.\textsuperscript{46}

Ryan takes on this mindset with subtlety and vigor. \textit{Five Miles Away} is as important for its effort to change the tone of the conversation as for its arguments about choice and accountability. It rejects discourse that begins and ends with the structural racism and inequities of American education as either the “shame of the nation” or as irrelevant to reality. Ryan very craftily sets up \textit{Five Miles Away} in opposition to Jonathan Kozol and his widely read 1992 \textit{Savage Inequalities}.\textsuperscript{47} \textit{Savage Inequalities} is in love with binaries, school districts that are geographically adjacent but might as well be in different universes. The grinding poverty of the South Bronx or urban Detroit is paired with the unself-conscious opulence of Great Neck and Grosse Pointe.\textsuperscript{48} Kozol’s tone throughout is the despairing moralism of the jeremiad.\textsuperscript{49} Not so Ryan. He deploys the same method—juxtaposing the stories of two close-by Virginia high schools, Freeman High (relatively affluent and relatively white) and Thomas Jefferson (neither of these)—but with opposite rhetorical intentions. Ryan is explicit about this:

Freeman and Tee-Jay . . . are not the type of schools depicted in Jonathan Kozol’s well-known book \textit{Savage Inequalities}, which paints a shocking portrait of urban-suburban disparities that are certainly real in some places but far from the norm . . . .

\textsuperscript{46.} \textit{Id.} at 16, 295.
\textsuperscript{48.} \textit{Id.} at 178, 202–04.
Neither school is at the extreme end of the spectrum in terms of student composition, funding, performance, or facilities. Freeman is not a lily-white, gold-plated suburban school . . . . In turn, Tee-Jay is predominantly black and poor but not exclusively so . . . . The future is less bleak for Tee-Jay, and more uncertain for Freeman, than one might believe from reading accounts that depict urban schools as vermin-infested centers of misery and suburban schools as Shangri-Las.\textsuperscript{50}

What they are, however, is unintegrated and unequal. Their very quotidianess makes it even more troubling that they are "a world apart."

What to do then? For Ryan, the goal is to advance the ball and actually make progress, not to rail at injustice. He has therefore championed, in a sequence of penetrating and sometimes prescient law review articles, an approach that accepts the political reality of suburban power and then inquires how one can within that reality, or, more aptly, at the margins of that reality, craft reforms that might actually make the education of the poor better, the education of everyone more diverse, and the educational system more equitable. Ryan favors the term "nudge": the trick is to recognize the constraints that shape the system, like Nixon’s compromise, and then to deploy that understanding to nudge the system in a productive direction.\textsuperscript{51} Doing so is not necessarily easy, and is far from a sure thing, but it is possible, and it is the only productive approach.

Given this mindset, it is no surprise that Ryan pins his hopes on demographic change. He notes the growth of the overall nonwhite population, increased racial diversity in the suburbs, and the "nascent" racial integration of inner cities as they become more attractive to middle-income families.\textsuperscript{52} Growing numbers of whites living in cities and minorities living in suburbs prefigure, perhaps, a reversal of the white flight that Milliken seemed to have cemented. School districts must seize this trend, attracting or retaining white, middle-income families for the public schools. Such a goal can be advanced by arguments that diversity benefits all students, but the middle-income will not be swayed unless they are also given good schools. If their needs can be met, political coalitions might emerge that could defeat Nixon’s compromise.

\textsuperscript{50} Ryan, supra note 1, at 4.
\textsuperscript{51} Id. at 16, 281.
\textsuperscript{52} Id. at 282–83.
Racially mixed suburbs like Montclair, NJ and Montgomery County, MD offer Ryan and his readers a model.\textsuperscript{53}

This conclusion seems foreordained in light of Ryan’s two conversation-changing moves. If we accept that education reform is governed by Nixon’s compromise—the protection of the prerogatives of relatively wealthy, mostly white suburbanites—but are also determined to nudge the system towards progress, the only viable approach seems to be one in which relatively wealthy, mostly white suburbanites find their prerogatives aligned with the poor, non-white students whose interests Ryan and many of his colleagues in the education-law academy champion. Progress requires a convergence of interest between the haves and have-nots.\textsuperscript{54} Ryan identifies the changing demographics of the American metropolis as the best hope for finding it.

III. IDEAS, CENTRALIZATION, AND CUSTOMIZATION

The ambitions and policy prescriptions of Paul Peterson’s \textit{Saving Schools} differ remarkably from those of \textit{Five Miles Away}, given that the two volumes cover so much of the same terrain. The two do agree about many things. They share a similar approach to \textit{Brown}, acknowledging its importance but treating it as “less of an end than a beginning”\textsuperscript{55} and focusing upon the stubborn resistance of American education to the hopes raised by the civil rights movement. Peterson offers an account of the school finance lawsuits that demanded equality and adequacy quite similar to Ryan’s. And both volumes emphasize school choice reforms and the accountability movement epitomized by the No Child Left Behind Act.

Still, the contrasts are substantial. Ryan’s concerns are squarely located within today’s mainstream law school narrative of education law, framed by the heroic, but unrealized, vision of \textit{Brown} and the contemporary reality of racially and economically stratified schools. Peterson, by contrast, offers a version of the “conservative” counter narrative of contemporary educational policy analysis, identifying educational medi-

\textsuperscript{53} Id. at 294–95.


\textsuperscript{55} Peterson, supra note 1, at 53.
Ocrity as the core crisis of American education, and educational inequity partly as a symptom and partly as a serious but secondary problem. This perspective is pervasive, beginning with Peterson’s engagingly personal introduction, which describes his own schooling “circa 1950” as “a middling experience.” He notes its racial homogeneity, but gives equal attention to its attitudes towards religion and greater emphasis to its largely ho-hum academic offerings. The same perspective leads Peterson to identify the Reagan Administration’s 1983 publication of its *Nation at Risk* report as a “triggering event that mobilized national dissatisfaction” and to treat William Bennett, Reagan’s flamboyant Secretary of Education, as a pivotal personality. And it leads Peterson, one of the most prominent academic advocates for school choice, to devote most of his book’s final part to choice—a part which he titles “Signs of Resurrection.”

That Peterson’s volume differs from Ryan’s in these ways is no surprise. It is the less expected differences between the volumes that are more important and commend Peterson’s book to education lawyers. One of these is particularly apparent. Ryan, the academic lawyer, centers his narrative on the political economy embodied in Nixon’s compromise. Peterson, the political scientist whom one might have expected to focus upon iron laws, undertakes a history of ideas. “Ideas,” writes Peterson, “motivate great undertakings that change the political world.”

That ideas move educational politics is Peterson’s central and most ambitious claim. It shapes the entire volume. It leads Peterson to begin his narrative earlier than Ryan does, devoting a chapter to Horace Mann and another to John Dewey and the Progressives, before arriving at *Brown v. Board*. It also leads Peterson to organize the book around six leading “heroic” personalities: Mann, Dewey, Martin Luther King Jr., union organizer Albert Shanker, Bennett, and educational sociologist James S. Coleman.

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56. Peterson acknowledges the support of the Hoover Institution at the front of his volume. *Id.* at vii.
57. Peterson nevertheless describes the American educational system of the late 1950s as “the envy of the world.” *Id.* at 5.
58. *Id.* at 4.
59. *Id.*
60. *Id.* at 3.
61. *Id.* at 156.
62. *Id.* at 11.
63. *Id.* at 12.
Peterson’s interest in Mann and Dewey are a welcome palliative to the
tendency in legal academia to work with the institutions we have without recognizing the extent to which they are the result of particular legal and political decisions that could have been made, and could still be made, differently. Ryan affirms this point but Peterson gives it life. Mann and the Progressives had very particular ideas about what public schooling should be: free, democratic, and based on expertise. These ideas have been extraordinarily successful, to the extent that they have been systematically codified in state constitutions and state legislative and regulatory codes. But even constitutionalized Progressivism is susceptible to amendment and reinterpretation. Peterson’s longer view portrays a national conversation about education that is less static than when seen through Ryan’s lens. Further change seems more plausible, even inevitable—even change more radical than a nudge. Peterson’s case for the possibility of real change is welcome in legal circles, where we are accustomed to banging our heads against Nixon’s compromise and the apparent deadlock that has resulted.

But Peterson’s approach is also a bracing challenge to lawyers. Peterson elevates ideas as critical catalysts of change. But even as he acknowledges the “new legalism in American education,” few of the ideas in which Peterson is interested are lawyers. Not one of the personalities around whom Peterson structures Saving Schools is an attorney: they are teachers, academics, businesspeople, politicians, and union organizers. Most jarring to the legal reader is Peterson’s chapter, “Martin Luther King Jr. and School Desegregation,” which demotes Thurgood Marshall and his colleagues from the throne to which lawyers customarily assign them. Peterson intends no discredit to Marshall, but sees the idea of racial equality, not the strategy for winning Brown in the Supreme Court, as the pivotal move. “So it is the eloquent minister, not the dogged attorney, whose birthdate is rightly honored as a national holiday.”

This necessarily catches the attention of us lawyers trained to lionize Marshall, his honed strategy and careful briefs. Ideas and arguments are the professional province of the lawyer; they are our stock in trade.

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65. Peterson, supra note 1, at 103.
66. Id. at 53.
We celebrate the legalism in American education because we imagine that it is a fount of powerful ideas. Peterson, surveying the conceptual landscape of American education, concludes otherwise. With respect to the one set of lawyers' ideas that Peterson considers at length, those about school finance equity, he is unimpressed. The idea of fiscal adequacy, on which the school-finance movement has ultimately placed its reliance, "has floundered in one state after another, in part because of its own intrinsic lack of merit." The companion idea of fiscal equity, which adequacy partially displaced when equity arguments failed consistently to win in court, was a better, even a "powerful" idea, but not one that could command consensus in American society. It "came up against the basic fact that those with more money want to spend more on their children's education, just as they want to spend more on housing, transportation, and all the other good things in life. . . . Fiscal equity was divisive."

Ryan shares Peterson's conclusion that courts have had little impact since Brown on questions of equity. But Ryan sidelines legal argumentation because it can offer no effective counterweight to suburban political power. Peterson minimizes it because he does not think legal thinking about education has sufficient intellectual heft. Peterson's interest in ideas rather than argument also shapes his treatment of the Individuals with Disabilities Education Act (IDEA), which offers an important corrective to most lawyers' understanding of special education. Legal academics tend to view the IDEA as an extension of Brown's core idea of equality to the disabled. Dean Martha Minow's recent treatment is paradigmatic. The disabled, like racial minorities, had been denied equal access to schooling; the principle of equity required that this be corrected. For the disabled, of course, the injury could not be remedied merely by throwing open the schoolhouse doors, or by mere integration; the disabled suffered from a lack of meaningful access, and schools had to change to make that access genuine. From these principles emerge the particular animating doctrines of the IDEA: the indi-

68. PETERSON, supra note 1, at 149.
69. Id. at 142.
70. RYAN, supra note 1, at 300.
72. See MARTHA MINOW, IN BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK 71-72, 80 (2010).
73. Id. at 69-70, 74-75.
individual right to a free, appropriate public education (FAPE), the parental right to participate in the development of an individualized education plan (IEP), the preference for mainstreaming, and the requirement that disabled children be searched for and identified.

Peterson, by contrast, sees in the IDEA a paradigm shift that makes it “among the most consequential” of rights-granting moves in American education. “[F]or the first time, federal sanction was given to parents’ deeply held desire to provide their children with a customized education. What had been theorized by Rousseau and championed by Dewey now became federal law.” The idea that individual students could be entitled to “customization and attention to the wishes of the client”—although the entitlement is limited to the disabled—is a sea change in educational law on par with the idea of equity itself.

Peterson does not extend this argument as far as he might. The idea that he places at the center of the IDEA—that public education should be both appropriate and individualized—has had vital and underappreciated consequences. A parent whose child has a legal right to an appropriate education, and who has the legal power to negotiate the details of the educational program his children will receive, is much more like a consumer than like a citizen. The citizen, even if he does not display the passivity in the face of professional expertise idealized by the Progressives, is limited in his ability to affect his child’s education to the options of exit and of political action. The requirement that a parent consent to the IEP, in contrast, gives parents bargaining power to seek the particularized good of their child and family. As in a market, producer and consumer must come to a meeting of the minds.

The parents of typical children, no less than the parents of disabled, appreciate the appeal of free, customized, individualized education. They seek it routinely, but without a legal entitlement and therefore with much less bargaining power. It is self-evident that not only the disabled can benefit personally from customization and from parent advocacy with teeth.

74. 20 U.S.C. §§ 1401(9), 1412(1).
75. Id. §§ 1401(18), 1415(b)(2).
76. See 34 C.F.R. § 300.114(2).
77. See 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(c)(1).
78. Peterson, supra note 1, at 95.
79. Id. at 91.
80. Id. at 45-46, 49-50.
In this way, the IDEA helped jumpstart a shift in American parents’ self-perception vis-à-vis the school system, one that continues to transform their attitudes from passive receivers of expert government services into consumers who ought to be given what they want. Parents who enjoy IDEA rights behave like customers, not like citizens; other parents, who are after all their neighbors, their friends, and themselves, naturally begin to think and act like customers too. The rise of special education thus helped lead to school choice, which invites all parents to use a sort of marketplace, what the literature calls a “quasi-market,” as a tool to customize and to bargain for their children’s education—just as they seek to customize and bargain for what they desire from the “other good things in life.”

Peterson is not naive about the power of ideas. He is as interested in anyone in structural phenomena that constrain those ideas and delimit their path. As noted above, Peterson argues that the idea of fiscal equity ran aground against the self-interest of the affluent, dovetailing with Ryan’s account of Nixon’s compromise. Peterson makes more of a different structural problem, which he labels “the iron law of increasing centralization—and cost.” In no small part because of collective bargaining by teachers, teacher pay rose dramatically in the twentieth century. There was a parallel increase in the national ratio of educational workers, and especially of non-instructional staff, to pupils. But these increases have not generated productivity gains. Peterson, reiterating the argument of a 1966 study by William J. Baumol & William G. Bowen of the performing arts industry, concludes that “[a]s a labor-intensive industry, education is doomed to a treadmill of rising costs and declining adequacy” because it is not in a position to increase productivity per worker. He quotes Baumol and Bowen: “Education, like the arts, affords little opportunity for systematic and cumulative increases in productivity. The most direct way to increase output per hour of teaching—an increase in the size of classes—usually results directly in a dete-
rioration of the product, which is unacceptable to much of the community.” The only path to quality gains, therefore, is for taxpayers to “spend an ever-higher percentage of their income on public education.” Taxpayers are no longer, if they ever were, willing to do this.

This argument generates one of the most surprising aspects of Saving Schools, its unexpectedly lukewarm endorsement of school choice. Although Peterson offers an account of research on the effectiveness of choice considerably more enthusiastic than Ryan’s—along with an entertainingly personal account of his role in some that—research—he sees no panacea. “The school voucher idea changed the conversation about schools,” but its time has not yet come. Although Peterson accepts research showing academic gains as a result of vouchers, he admits the results are less than spectacular. Peterson also accepts the standard view that “the voucher movement stalled somewhere in the first decade of the twentieth century,” beset by opposition from unions, state courts, voters, and legislators.

Peterson makes much the same argument about charter schools. These have been able to gain public and political acceptance. But still, he thinks that charters “could turn out to be little other than a boutique within the public school shopping mall.” They are limited by states’ internal rules and more importantly by their variable quality. And the “charter presence is substantial in only a few parts of the country: Arizona, the District of Columbia, Albany, New York, and some cities in Ohio—to which list should be added New Orleans.”

Still, Peterson gives choice credit “[i]n the world of ideas.” There, “something transformative has already happened. . . . [E]ducation is now being thought of as something that must be customized to the needs and

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86. Peterson, supra note 1, at 151–52 & 297 n.23 (citing Baumol & Bowen, supra note 84, at 171).
87. Id. at 153.
88. Id.
89. Id. at 196–200.
90. Id. at 209.
91. Id. at 208–09.
92. Id. at 207.
93. Id. at 212–17.
94. Id. at 218.
95. Id. at 218–19.
96. Id. at 220.
98. Peterson, supra note 1, at 227.
wants of families and individuals. That families should have a choice of schools is no longer just the ideology of an isolated fringe; it is now broadly accepted as a legitimate claim." Any new conversation about education must accept this transformation of American parents from citizens into quasi-consumers.

IV. PHYSICAL SPACE AND CYBERSPACE

The centrality of Nixon’s compromise to Ryan’s analysis leads him to pin his hopes upon shifts in the demography of race and wealth. If the educational interests of relatively rich, relatively white suburbanites consistently prevail, then equity will increase to the extent that prosperous whites live and attend school in the same places as everyone else. Peterson’s central structural observation—that it is ever more difficult to increase productivity per worker in an industry as labor-intensive as education—leads him just as logically to identify electronic education as the next transformative educational idea. In this Part, I suggest virtual education also has vital implications for Ryan’s arguments about the structure of physical space.

The virtual education idea is simple in theory. If students consume "predeveloped" computerized curricula, and interact with teachers electronically and asynchronously, educators might teach many more students, and some of the more glaring inefficiencies of place-based brick-and-mortar schooling, such as small specialized classes, could be ameliorated. Moreover, virtual classrooms could accelerate pedagogical “customization,” so that many more students could “have educational experiences designed for their specific needs.” Virtual education offered asynchronously is “accessible regardless of space and

99. Id.
100. Id. at 231–34.
101. See, e.g., Susan Essoyan, Hybrid Hawaii Tech. School Sees Rapid Enrollment Growth: ‘One Size Fits One’ at Hawaii Tech Academy, EDUC. WK., June 8, 2011 (reporting that hybrid charter can grow rapidly despite limited physical plant because most students work from home and come to school only occasionally).
102. Peterson, supra note 1, at 253.
Peterson is no utopian. He admits that so far cyberschools have been "hardly transformative." His case study of the Florida Virtual School (FLVS) notes this throughout. He reports, for example, that two of FLVS's most popular courses are "Life Management Skills" and "Health/Physical Education"—a remarkable fact I have not seen in other accounts of FLVS. He also notes that FLVS courses "are taken disproportionately by students in the nonpublic sector," and that FLVS in its current incarnation has the same employee-student ratio as traditional schools. But Peterson is not exaggerating virtual education's potential. Multiple observers suggest that "the education system of the United States stands at the precipice of an online learning revolution,"
and the idea of virtual school has transformative possibilities. It simultaneously could increase both the economic efficiency and pedagogical quality of schooling.

Virtual schooling as an idea also has enormous potential to address Ryan’s five miles away problem. The rich have effected Nixon’s compromise through a geographical strategy: they have walled themselves off in their own jurisdictions, where they can govern their own educational systems using the institutions of local control and local taxation, and where Milliken and Milliken-esque policies at all levels of government protect them from cross-border incursions. Wealthy and middle-class school districts use zoning, taxes, and other devices to exclude the poor. In this way the legal institution of the geographic school district boundary is the primary means by which inequality is maintained. District boundaries are also the primary way that inequality is justified: the principle of local control of education is deeply rooted and attractive in American discourse. So long as schooling requires students to gather in a physical location, schools have to be local. Localism also reflects the attractive idea that neighbors unite to educate their own children together, in their own fashion and in tune with their own preferences. Such justifications of localism resonate across the culture and have been proffered by actors from the Supreme Court to ordinary citizens. But these justifications resonate much less in the face of an educational approach growing in popularity that is completely personalizable, atomistic, and without any necessary connection to any particular facility or community. Although localism justifies inequality, inequality does not justify localism.

If virtual schools render physical space irrelevant, the most important legal and political tools the rich have developed to isolate themselves from the education of the rest of the population are made irrelevant also. Peterson cautions that the rich may be the first beneficiaries of cybered-

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12. See id.
13. See id. at 518 & nn.70–71.
ucation, as they have been of other technological innovations. Today’s unequal distribution of broadband access suggests that virtual schooling could carry with it some fairly entrenched inequities; on the other hand, distributional differences are dominated by an urban/rural divide, which correlates far from perfectly with racial and economic cleavages, and which also is affected by fairly idiosyncratic factors. Nevertheless, Peterson is correct to insist that the cyberschooling idea, and its realization in the longer term, is equalizing:

> [E]ven if outcomes become more unequal in the short run, as always happens when innovations are introduced, the opportunity to learn will be equalized. Access to quality courses will not depend on the price of the house you buy or the quality of the peers in your immediate neighborhood. Any student with a will to learn will have access to the best.

In such a system physical proximity is unnecessary and our particular legal institutions that assume its necessity become unjustifiable. Cyberschools, in short, seem to have more to offer James Ryan than the gradual, spotty, and uncertain process of integration in cities and close-in suburbs in real space.

Indeed, cyberschooling even has potential to help remedy the interstate educational inequities to which nearly all policymakers had resigned themselves. Peterson makes brief mention of FLVS’s success in marketing itself outside the state through a “Global Services Division.”

The potential of cyberschooling should lead both Ryan and Peterson to reassess their conviction that the charter school movement does not have the potential to remake educational law and practice. Chartering is likely to be the principal modality by which cyberschools penetrate the market. Although FLVS is not a charter school, most cyberschools are

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115. See FCC PLAN, supra note 104, at 19 (noting large numbers of Americans without broadband access, including “[m]ore than 10 million school-age children”).

116. See id. at 136; Grubesic, supra note 114, at 428.

117. Peterson, supra note 1, at 262.

118. But see Goodwin Liu, Interstate Inequality in Educational Opportunity, 81 N.Y.U. L. REV. 2044 (2006) (presenting data on these inequities and arguing that Congress is obligated under the Fourteenth Amendment to correct them).

119. Peterson, supra note 1, at 246.

120. Friend & Johnston, supra note 107, at 98.
charters\textsuperscript{121} and one in fifty charter school students is enrolled in a virtual school.\textsuperscript{122} Sixteen states permit virtual schools to charter.\textsuperscript{123} Approximately 86 virtual charter schools served over 31,000 students nationwide during the 2003–04 school year.\textsuperscript{124}

Cybercharters are susceptible \textit{a fortiori}, and especially as now implemented, to many of the criticisms leveled at charters more generally regarding spotty quality, low standards, inequitable access, and unfairness to traditional public schools.\textsuperscript{125} But they also have the potential to create the kind of interest convergence that \textit{Five Miles Away} advocates, while avoiding the bruising political battles that Ryan otherwise correctly anticipates. The laws authorizing cybercharters have not been particularly controversial. And they have generated constituencies outside of underserved groups. Importantly, they have been taken up enthusiastically by homeschoolers, albeit with some opposition from purists in the homeschooling movement.\textsuperscript{126} Traditionally, home schooling rights are protected but homeschoolers, like private schools, must meet state requirements at their own expense.\textsuperscript{127} By enrolling students in a cybercharter, parents can get access to professionally developed materials and professional teaching but still keep children home and retain control over the materials children see and how those materials are used.

More recently, virtual chartering has generated interest from religious schools. The right to enroll in religious schools is guaranteed,\textsuperscript{128} but those

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\item 122. See Brady et al., supra note 109, at 196. This data is inconsistently gathered and reported. For example, it is reported that homeschoolers make up a significant fraction of total charter enrollments, and many of these presumably do their schoolwork online. P. Lines, \textit{When Homeschoolers Go To School: A Partnership Between Families and Schools}, 75 PEABODY J. EDUC. 159 (2000).
\item 123. See Clark, supra note 107, at 57.
\item 124. See id.
\item 126. See Clark, supra note 107, at 57–58.
\end{thebibliography}
schools must pay to duplicate the state-required secular instructional pro-
gram in addition to providing religious education. However, if individ-
ual families can choose to enroll their children in asynchronous private
schools, and students so enrolled can do their computer-based secular les-
sons wherever and whenever they wish, presumably they can choose to
do them while inside of a religious establishment. Variations of this
model are in place in various religious schools around the country.129

Consider some exemplary, stylized arrangements. Take an existing
religious private school, and enroll all of its students in a remote, asyn-
chronous charter school. These students, now at state expense, can
engage in secular studies while sitting in the religious school class-
room.130 The religious teacher might work with half the class on some
religious topic while the other half, on its own for the moment, engages
in secular cyber-study under the teacher’s passive supervision. Or a
cleric might begin a 45-minute English lesson with a prayer—right before
secular studies begin — or interrupt a cyber-biology lesson to admonish
students that “[t]his evolution bit is straight from Satan.”131 Although
actual adult supervision is still often necessary, especially for younger
children, many of the secular educational services that the religious
school classically had to provide at its own expense are now provided by
the state; tuition can go down (or school salaries and profits can rise)
accordingly.132

Indeed, adult supervision is the source of potentially large cost sav-
ings. One of the unattractive features of virtual schooling from parents’
point of view is that it requires, especially for younger children but for
some older ones as well, an adult to be on-site with the child to assist and

129. See J.C. Reindl, Knight Academy Charter School Scheduled to Open in West Toledo,
Knight-Academy-charter-school-scheduled-to-open-in-West-Toledo.html (affiliation of a new
charter with existing Catholic school); Julie Wiener, Has Tech Reached the Tipping Point, (N.Y.)
JEWISH WK., July 26, 2011 (Orthodox Jewish yeshiva in Los Angeles that teaches religious stud-
ies using traditional face-to-face instruction from the first bell until 2 p.m., whereupon all stu-
dents pursue secular studies as cybercharter students under the physical supervision of the reli-
gious teaching staff).

130. See Wiener, supra note 129.
131. Guy Lancaster, “This Evolution Bit is Straight from Satan”: McLean v. Arkansas
Board of Education and the Democratization of Southern Christianity, 33 RELIGION & EDUC. 69,
Of course, non-apocalyptic versions of the creationist counternarrative are also available and
could be presented to students. Cf. Apple, supra note 127, at 518 (noting the admixture of secu-
lar and religious content in the context of home schooling).
132. “Almost” because, especially with younger children, some cyber-charter lessons
require an on-site adult to actively teach the material; cyber-charter do not pay these “teachers.”
This person is not remunerated by the cybercharter’s state funding. The combination of private and asynchronous charter education therefore might cost parents less than asynchronous education alone.

It is hard to see how such arrangements, or a multiplicity of similar ones, could run afoul of any statutory or constitutional principle, particularly if the religious school picks a secular cyber-provider off the shelf rather than itself becoming or developing a virtual program. The whole idea of the remote charter is that a child can do her secular studying anywhere and anytime. Cyber-students are allowed to make their own schedules and allow for interruptions. The technology of remote instruction, in effect, allows for the supplementation of religious education with state-funded secular instruction in a way simultaneously far more pervasive and far less entangling than ever contemplated in the Aguilar/Agostini line of cases in which publicly funded teachers were sent to teach secular subjects in religious schools. More pervasive—because the stream of secular instruction can be turned on and off throughout the day, at the discretion of religious instructors, rather than delivered at an isolated, particularized hour by an employee who comes to the school to deliver it. Less entangling—because there is no state employee on site; secular instruction arrives disembodied, over the internet, and in the identical form that other children, uninvolved in religious education, receive it. Secular education is provided in exactly the same way for students on isolated hilltops in Idaho as it is for kids performing on Broadway in New York City, who are cyber-students for reasons that have nothing to do with religion. These sorts of arrangements simultaneously avoid endorsement concerns that public employees working in religious institutions might come to engage in religious instruction and the entanglement problems that

133. See Ellis, supra note 103, at 144; Edward Lin, Comment, Virtual Schools: Real Discrimination, 32 Seattle U. L. Rev. 177, 186 (2008).

134. See id.

135. Cf. Michelle R. Davis, Hybrid Charters on the Move, Educ. Wk., June 15, 2011 (describing “hybrid charter schools” as those which combine online and face-to-face instruction and noting that “the need for many parents to have their children supervised during the workday . . . is a driving force behind some hybrid charter schools, even if it’s not an academic one”).

136. Concerned about the latter possibility, some states prohibit it. E.g., 24 Pa. Stat. Ann. § 17-1745-A(b) (“No cyber charter school shall be established or funded by and no charter shall be granted to a sectarian school, institution or other entity.”). Cf. N.Y. Charter Schools Act of 1998 §2852(3) (“An existing private school shall not be eligible to convert to a charter school.”).


could arise from efforts to supervise or regulate such instructors in ways that would prevent them from doing so.\textsuperscript{139}

Nor, in my view, would \textit{Locke v. Davey},\textsuperscript{140} which permitted states to exclude religious schools from otherwise general voucher programs supported with state funds, extend to permit states to interrupt their cyber-studies at any time for any reason \textit{except for religion}. \textit{Davey} rested heavily on the fact that the scholarships in question would have been used by students for "an essentially religious endeavor," "a religious calling as well as an academic pursuit."\textsuperscript{141} Cybercharter programs are a secular endeavor and provide only secular materials and instruction at state expense.

Nevertheless, from the point of view of a religious school principal, a tuition-paying parent, or a pedagogical expert, much secular education under this model could be delivered nearly as it traditionally has been in pervasively sectarian religious schools—except that now the state is paying. I conclude that cyberchartering, whatever its other virtues and vices, is a tool that could help achieve many of the interest-convergence benefits Ryan seeks to attain through programs of intradistrict vouchers.\textsuperscript{142} Families enrolled in religious schools would be powerful allies for pro-equity forces. At the same time, this brief snapshot of the interaction of virtual education, the charter school laws, and religion suggests ways in which Ryan’s proposal that interest convergence should be sought by including private school parents in a pro-equity coalition could have surprising consequences. If Peterson’s analysis offers one lesson, it is that big pedagogical ideas are hard to control and their effects are hard to predict. The case of religious schools utilizing the cybercharter form is a case in point. Although neither chartering nor virtual education was developed with the needs or desires of religious educators in mind, such educators may be among their earliest and most enthusiastic adopters. The result will be a certain kind of interest convergence—but also a radical change in the relationship between secular and religious, and public and private, education in America.

Cyberchartering is also likely to work similar disruption in other areas of the law and of educational practice, not all of which can be predicted.

\textsuperscript{139} \textit{Aguilar}, 473 U.S. at 409.
\textsuperscript{141} \textit{Id.} at 721.
\textsuperscript{142} \textit{RYAN, supra} note 1, at 289.
It will change the jurisprudence on free speech rights of students, where the cases imagine a bricks-and-mortar institution that must maintain order and discipline while simultaneously modeling a democratic community that respects individual rights. The law and practice of special education will change when it is no longer the case that the disabled have a special entitlement to customized education and a preference for being mainstreamed into traditional, place-based institutions.

Indeed, the very questions we ask about educational equity will change. Cyberchartering offers a genuinely plausible strategy for displacing geographic place as the basis for allocating educational goods and their associated tax burdens. It is plausible because it relies not on courts, not on legislatures, not even on politics itself, all of which are institutions still in thrall to Nixon’s compromise. Instead it relies on individual consumers, seeking their own children’s best interests in a quasi-market. By establishing communities of interest that transcend racial and class cleavages, it could significantly ameliorate educational stratification that has been the bane of equity-minded policymakers for generations. But the ability to customize education on a statewide, or even national or global basis, will also surely create new kinds of stratification—certainly by religion and surely by other categories as well. These new patterns will bring different and dislocating problems of their own. The broad problem of educational equity will be with us for a long time. But there is every reason to think that virtual education will be the biggest conversation-changer since John Dewey.

143. Cf. Stephanie Klupinski, Getting Past the Schoolhouse Gate: Rethinking Student Speech in the Digital Age, 71 Ohio St. L.J. 611, 643 (2010) (struggles over the reach of school authority over student speech intensify “in the digital age” even when dealing with students who are enrolled in ordinary, brick-and-mortar schools and merely doing their extracurricular speaking on the internet).

144. Cf. Lin, supra note 133, at 187–88 (arguing that cyberschools discriminate against the disabled by “requiring parents” to teach or provide services); Katie Ash, Going Virtual in Special Ed., Educ. Wk., June 16, 2011 (discussing potential of virtual provision of special education services).