2005

School Choice to Achieve Desegregation

Goodwin Liu

William L. Taylor

Recommended Citation

Available at: http://ir.lawnet.fordham.edu/flr/vol74/iss2/16
ARTICLE
SCHOOL CHOICE TO ACHIEVE DESEGREGATION

Goodwin Liu* and William L. Taylor**

INTRODUCTION

Today, in the wake of the fiftieth anniversary of Brown v. Board of Education,1 it seems appropriate to revisit the meaning and impact of that historic decision. In our view, Brown was not grounded in legal concerns about educational quality but rather in the inability of the legalized caste system imposed by segregation laws to withstand honest scrutiny under the Fourteenth Amendment.2 Yet the United States Supreme Court found it instructive to articulate the importance of public education in a democratic society and the harm done by inequality. So the Court spoke of education as

required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.3

At the beginning of a new century, with the legalized caste system largely a relic of the past, there is ample evidence that society has made significant strides toward achieving the lofty educational goals set forth in Brown. On average, black Americans have many more years of educational attainment than they did in the 1950s.4 They are found in greater numbers

---

* Assistant Professor of Law, Boalt Hall School of Law, University of California, Berkeley.
** Chair, Citizens' Commission on Civil Rights, and Adjunct Professor of Law, Georgetown University Law Center.
2. See Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421 (1960). The Brown opinion cited Strauder v. West Virginia, which said that the words of the Fourteenth Amendment gave "to the colored race the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations... which are steps towards reducing them to the condition of a subject race." 100 U.S. 303, 307-08 (1880).
4. In 1965, only 15.2% of African-Americans between the ages of twenty-five and twenty-nine had attended college; by 1995, that number had risen to 44.9%. Among African-Americans in that age bracket, 15.3% had completed four or more years of college.
and proportions in the ranks of skilled workers, professionals, and business people. They are in leadership positions in the armed forces. They register and vote in much larger numbers than they did decades ago, and they have become elected officials in localities, state legislatures, and Congress.

Of course, not all of the gains are attributable directly to school desegregation. Many stem from the civil rights revolution for which Brown was the catalyst, including the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the voting and community empowerment campaigns that followed across the land. But desegregated schools have played an important role because they prepared people for higher education, productive employment, and civic participation. Indeed, a fair accounting of the experience with school desegregation over the past half century shows that, where it has been seriously and intelligently pursued, it has made an important contribution to the educational advancement of African-American children.

Why, then, do we face such enormous problems in public education, with hundreds of thousands of children of color and poor children attending low-quality schools that do not prepare them to be productive workers or citizens? The broad answer, to paraphrase G.K. Chesterton’s observation about Christianity, is not that desegregation has been tried and found wanting, but that in many places it has been found difficult and not tried at all. The major obstacle has been the continued link between school attendance and place of residence. Racial isolation in housing has been far more resistant to change than many people suspected when the fair housing laws were enacted, and the barriers posed by residential segregation have been exacerbated by the sanctification of “local control” by a 5-4 majority of the Supreme Court in the Milliken v. Bradley decision in 1974. With that decision, enclaves of affluent white families in suburban school districts obtained near immunity from the reach of school desegregation, even when such remedies were logistically feasible and necessary to correct a racial wrong.


5. See infra Part I. For a contrasting view, see David Armor, Forced Justice (1994).


8. The Milliken decision limited the legal availability of interdistrict school desegregation remedies to situations where plaintiffs could prove that “there has been a constitutional violation within one district that produces a significant segregative effect in another district.” Id. at 745. In only a few places have these conditions been met in litigation since 1974. See Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 778 F.2d 404 (8th Cir. 1985); Liddell v. Missouri, 731 F.2d 1294, 1302-09 (8th Cir. 1984) (St. Louis); United States v. Bd. of Sch. Comm’rs, 637 F.2d 1101 (7th Cir. 1980) (Indianapolis); Evans
However badly reasoned, *Milliken* seems firmly embedded in the law. Moreover, the prospects for meaningful progress in breaking down patterns for residential segregation, undergirded as they are in many places by exclusionary zoning, are long-range at best. This means that, if extending the gains of school desegregation to many who are now locked in racially isolated, high-poverty schools is regarded as an important societal goal, we must find ways to decouple school access from neighborhoods and local political control.

That has led us to a consideration of whether school choice in some form may be a useful tool in providing poor families of color access to better education. We approach the issue warily because the concept of choice has a checkered history as a civil rights remedy. During the 1960s, when more direct forms of resistance to desegregation began to falter, Southern states trotted out the idea of freedom of choice as a preferred remedy. The problem was that freedom of choice was adopted within the existing superstructure of segregation, which had been mandatory for many years. Unsurprisingly, whites chose almost exclusively to attend the segregated schools they had been attending, and blacks who thought about choosing a formerly white school for their children often faced the prospect of white hostility, economic and physical retaliation, and harassment. If they made no choice, they were assigned to the previously segregated schools. The Supreme Court all but invalidated “freedom of choice” in 1968, holding in *Green v. County School Board* that it could not be used unless it was demonstrated to be effective in achieving desegregation.

Magnet schools, a more recent instrument of public school choice that proliferated in the 1970s and 1980s, have had a more benign history. Magnets were designed to decrease resistance to desegregation by giving parents a variety of educational options offered in a desegregated context. In general, magnet schools have worked fairly well to achieve their objective. White parents, eager to gain access to a public school Montessori program or a language or science program in the early grades, have enrolled their children in desegregated schools, even some located in...

---


10. *Green v. County Sch. Bd.*, 391 U.S. 430, 439-41 (1968). The Court cited a U.S. Commission on Civil Rights report documenting the adverse consequences that black citizens faced if they exercised choice for desegregation. See id. at 440 n.5. Not wishing to set off a new lengthy round of fact-based litigation fourteen years after *Brown*, the Court preferred to use a test of efficacy. See id. at 439 (requiring school districts under obligation to desegregate to “come forward with a plan that promises realistically to work, and promises realistically to work now”).

inner cities. And magnets have often vested more authority in talented principals, enabling them to assemble their own staffs and provide more drive and energy to schools. But in many cases, magnet opportunities have done little to ameliorate socioeconomic isolation, and often more money is spent on magnets than on regular schools, a gap which, if unchecked, can create a new kind of two-tiered system. Finally, affluent white parents who believe their children are entitled to unfettered choice have brought lawsuits challenging the racial balance guidelines of magnet programs in some communities. Some courts have granted relief, although the recent Supreme Court decision upholding limited race-conscious affirmative action in university admissions may cast doubt on these claims.

A similar motivation underlies the even more recent development of charter schools, which at least theoretically are public schools in which operational discretion has been given to the school organizers in return for accountability for results. But the definition of charter schools and the ground rules under which they operate vary from state to state. In some jurisdictions, loose monitoring of charters has enabled unscrupulous school operators to commit significant fraud. And in others, the accountability demands placed on charters require less than is asked of regular public schools under the No Child Left Behind Act ("NCLB"). In many districts, the superintendent and staff do not regard charters as public schools, which means that positive experiences are unlikely to be replicated. Finally, few jurisdictions require racial or socioeconomic desegregation, creating the possibility that charters will serve as refuges for white flight.

13. See id. at 27.
14. See id. at 29.
One other choice mechanism that has the potential to aid desegregation is a provision in the NCLB that establishes a right for parents of children who attend schools in need of improvement to transfer their children to better performing schools. The provision makes no mention of race. But since many low-performing schools are high-poverty and racially isolated, many of the students eligible to transfer will be children of color, and at least some of the transferee schools will have significant numbers of white children. Transfers are mandatory, however, only within school districts. The statute gives only weak encouragement to adjoining school districts in metropolitan areas to make cooperative arrangements with city districts that lack an adequate number of higher performing schools for effective choice. The NCLB transfer requirement took effect in 2002 with a notable lack of enthusiasm from school superintendents. It is still too early to tell how effective it will be.

None of the foregoing is intended to suggest that choice cannot be made to work for laudable educational purposes. But experience does instruct that, even when the aims are highly desirable, the mechanisms for their achievement must be carefully examined to ensure the best prospects for success. With these cautionary thoughts in mind, we argue here that school choice can and should be used to promote desegregation.

Part I of this Article reviews why desegregation remains a critical policy goal, and Part II discusses the limitations of existing choice policies with respect to that goal. In Part III, we propose two desegregative school choice policies. One seeks to encourage racial and socioeconomic diversity in charter schools; the other proposes the targeted use of vouchers to enable disadvantaged urban children to choose not only private schools but also middle-class suburban public schools. In elaborating these proposals, we consider three important concerns in Part IV: whether an expansion of vouchers provides a wedge for ultimately replacing public schools with market-based alternatives; whether "skimming" effects justify skepticism

22. See id. § 6316(b)(11); see also infra notes 71-73 and accompanying text.
23. In May 2004, the Citizens' Commission on Civil Rights published a report on implementation of the No Child Left Behind Act ("NCLB") transfer provision. See Cynthia G. Brown, Citizens' Comm'n on Civil Rights, Choosing Better Schools: A Report on Student Transfers Under the No Child Left Behind Act (2004), available at http://www.cccr.org/ChoosingBetterSchools.pdf. With data from ten states and sixty-eight districts, the report found that almost 70,000 students exercised choice in the 2003-2004 school year. Id. at 44. In some places, participation in the program was limited by the failure of districts to disseminate information to parents, by lack of capacity to receive transferring students, and by other factors not related to parental or student interest. Id. at 66-71; see also Jimmy Kim & Gail L. Sunderman, Does NCLB Provide Good Choices for Students in Low-Performing Schools? (2004) (finding that the NCLB transfer provision is not widely used, does not provide low-income students with better schooling opportunities, and is unworkable in urban districts with many low-performing schools), available at, http://www.civilrightsproject.harvard.edu/research/esea/good_choices.pdf; William L. Taylor, Title I As an Instrument for Achieving Desegregation and Equal Educational Opportunity, 81 N.C. L. Rev. 1751 (2003).
toward choice policies; and whether expanded school choice undermines the role of public schools as a "balance wheel" for our democracy. Answering these objections, we conclude that school choice, when carefully designed and properly implemented, can play an important role in advancing the goal of equality stated in Brown over fifty years ago.

I. WHY DESEGREGATION WORKS

In Brown, the Supreme Court cited social science evidence to support the proposition that segregation of minority schoolchildren "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." While the evidence cited in the opinion and the Court's reliance on it have been abundantly criticized, few commentators have seriously disputed that state-imposed segregation stigmatizes and retards the educational progress of black children, and a growing body of research has supported the efficacy of desegregation remedies in preventing or undoing the harm.

A good part of the research has to do with academic gains associated with desegregation. At the macro level, the gap between white and black students in reading as measured by the widely respected National Assessment of Educational Progress was reduced roughly by half in the 1970s and 1980s. The greatest gains were recorded by black elementary students in the Southeast in the 1970s, the period when school desegregation was occurring all across the region for the first time. This indication of a positive link between desegregation and achievement is reinforced by studies of particular communities that have undergone desegregation. A review by Rita Mahard and Robert Crain of ninety-three research studies during the 1970s and 1980s concluded that desegregation does enhance minority achievement for black students. While debate persists about the significance of gains and the conditions under which they occur, there is substantial evidence that desegregation can be an educationally effective approach.

The gains that have been made through desegregation are seen in measures other than standardized achievement tests. In St. Louis, site of the largest voluntary interdistrict school desegregation program in the nation, around 12,000 African-American children who live in the city have attended public schools in sixteen suburban districts on a voluntary basis each year. Although a high proportion of the transferring students come

from poor families, these students graduate from high school at more than twice the rate of their city peers, and are much more likely to go on to college. Other research confirms that black children educated in desegregated schools are more likely to attend and graduate from college and earn higher grades in college than black children from segregated schools.

The benefits of desegregation also appear to persist in later life endeavors. Researchers who have examined longitudinal data find that graduates of desegregated schools generally held higher status jobs and earned higher incomes than their counterparts from segregated schools. In addition, school desegregation leads students, both black and white, to attend college, work, and live in desegregated settings and to have more interracial interaction later in life—an important attribute for success in our increasingly diverse society.

Given the close linkage between severe poverty and racial isolation in inner-city schools today, the benefits of desegregation are further supported by two congressionally mandated studies. The 1966 Coleman Report, a landmark study of 600,000 children commissioned by the Civil Rights Act of 1964, concluded that disadvantaged children fare better in classrooms comprised largely of advantaged students than in predominantly disadvantaged settings, noting “peer influence” as one of the factors.

A more recent study, the Prospects report, found that economically disadvantaged students scored far lower on tests when they attended schools with high concentrations of poverty (almost all of which were racially isolated) than when they were in mixed-income schools.

What explains the difference in racially isolated schools and those that are desegregated? Research and practical experience suggest several key

---

factors: high expectations and standards, ample resources, good teaching, and accountability.

Middle-class schools are often set in communities where almost everyone—parents, teachers, and students themselves—have high expectations for success. The question for most students in such schools is not whether they will have a chance to go to college, but which college they will attend. With high expectations come high standards. The norms set for student achievement are high, and shoddy work will not pass muster. Disadvantaged students placed in these settings also learn nonacademic lessons in how to “negotiate the system” and to succeed in American society.

Along with high standards and expectations, middle-class schools usually command ample resources—curricular materials, smaller class sizes, and, most important of all, good teachers. This is in part the result of the continued reliance of the public education system on the wealth of local jurisdictions as the primary means of finance. It is also the result of seniority rules that allow the most experienced teachers to avoid being assigned to high-poverty schools.

Further, middle-class parents and communities demand accountability from their public schools. If a principal or teacher is not measuring up, parents and community leaders will demand her replacement, and they have the clout to see that their demands are met. Indeed, if a school system is not responsive, many parents have the means to send their children elsewhere.

These factors likely account for Mahard and Crain’s finding that black children achieve the most substantial gains from desegregation when they participate in metropolitan or county-wide plans—plans that ordinarily achieve substantial desegregation across socioeconomic as well as racial lines. The potential benefits may be negated if desegregation does not begin in the early grades or if rigid ability grouping resegregates classrooms. But in plans that are well designed and well implemented, a

34. See Mahard & Crain, supra note 27, at 105, 122-23.
38. See Mahard & Crain, supra note 27, at 117-19.
39. See id. at 109-13, 120.
positive environment for learning for poor children and children of color often develops.

In contrast to the attributes of these suburban schools, racially and socio-economically isolated schools typically lack the assets that contribute to the effectiveness of middle-class schools. Often they function in an environment overwhelmed by a host of social problems that affect children. Many teachers simply assume that most of their children cannot learn at high levels. Low expectations lead to low standards. Given the way many school finance systems work, schools with poor children often lack critical resources. Well-qualified teachers either do not come or do not stay. And while many parents want the best education for their children, they lack the clout to hold the system accountable for poor teaching or overcrowded classrooms.

School reform legislation at the federal and state levels is designed to address some of the problems in high-poverty schools—by establishing high standards, calling for highly qualified teachers, and setting rules of accountability. And some progress has occurred in states and communities that have made a determined effort. The trouble is that many institutional practices seem intractable. Some teacher organizations refuse to support reforms that make teaching at the most challenging high-poverty schools an attractive option and part of what it means to reach the pinnacle of the profession. Teaching thus remains unlike other professions, such as medicine, where succeeding at the most complex and difficult work often brings the greatest rewards. Similarly, most political leaders have refused to take the steps necessary—including tax increases—to attract high-quality teachers and provide professional development for them. And somehow, despite efforts to hold teachers and education authorities responsible for student progress, students themselves often wind up as the first targets of accountability systems by being classified as “low ability” or held back while substandard teachers remain in place.

Reform must continue and must be intensified and better financed if it is to help the very large numbers of children in racially isolated, high-poverty schools. But experience suggests that it would be foolish from an

---


41. See Richard Rothstein, Getting Good Teachers for Poor Schools, N.Y. Times, Sept. 20, 2000, at B9 (discussing teacher unions’ opposition to salary and seniority reforms). However, not all teacher organizations oppose such measures. See Diane Jean Schemo, When Students’ Gains Help Teachers’ Bottom Line, N.Y. Times, May 9, 2004, at A1 (reporting Denver teacher union’s support for a reformed salary structure that, among other things, rewards teachers for working in high-poverty schools).

42. One example of this tendency is the rise of high-stakes testing with minimal commitment of resources to enable all students to pass the tests. See Ctr. on Educ. Policy, State High School Exit Exams: Put to the Test 13 (2003) (“States should stop treating exit exams as if they are a low-cost or no-cost solution to educational problems.”).
educational standpoint to abandon the quest for desegregation. That is what leads us to consider choice remedies to break the stranglehold that residential segregation and local control have had on efforts to make schools more diverse.

II. EXISTING CHOICE MECHANISMS

During the 1960s, meaningful choice for black children in the South often meant the ability to choose a neighborhood public school that previously admitted whites only. As the Supreme Court recognized in Green v. County School Board,\(^{43}\) counties like New Kent County, Virginia, were not residentially segregated,\(^{44}\) and the possibility of desegregation through conventional neighborhood school assignment underscored the perversity of allowing black children to attend neighborhood schools only if their parents exercised choice. Yet the existence of rural school districts with substantial residential integration, though once common throughout the South, does not characterize the urban centers where many low-income and minority children live today in concentrated poverty and racial isolation. Meaningful choice for these children often means the ability to choose a school other than a neighborhood public school.

For low-income and minority parents who want such choice, there are four possibilities: (1) another public school in the same school district; (2) a charter school; (3) another public school outside of the district; or (4) a private school.\(^ {45}\) We examine each in turn and then offer two ideas for increasing the desegregative impact of school choice.

The first option, intradistrict public school choice, is the most widely available,\(^ {46}\) but, in many inner cities, the least educationally consequential. To be sure, there are selective public schools in urban districts, such as Boston Latin School, Stuyvesant and Bronx Science in New York, and Lowell High School in San Francisco, as well as magnet schools that offer superb educational alternatives. And in a few districts, such as Berkeley, California, and Cambridge, Massachusetts, controlled choice plans help to ensure racial and socioeconomic integration within each school.\(^ {47}\) The reality, however, is that many city schools with predominantly minority and low-income students are located in city school districts with predominantly

---

43. 391 U.S. 430 (1968).
44. See id. at 432 ("There is no residential segregation in the county; persons of both races reside throughout.").
minority and low-income students. The educational challenges faced by a low-performing urban school often pervade many if not most schools within the district. Accordingly, there are few meaningful options for public school choice within district boundaries in inner-city school systems.

In recent years, charter schools have provided additional choices for disadvantaged schoolchildren. But the available evidence suggests that charter schools, as implemented, do not help much in reducing racial and socioeconomic isolation because "[m]ost charter schools are located in urban school districts" and "almost all charter schools enroll students from their home districts." On the whole, charter schools enroll a larger percentage of black students than non-charter public schools (33% to 17% in 2000-2001), a smaller percentage of whites (43% to 59%), and comparable levels of Latinos and Asians. Aggregate data, however, mask troubling school- and district-level trends: 89% of black charter school students attend schools with more than 50% minority enrollment, and 70% attend charter schools with 90% to 100% minority enrollment. Charter schools are typically less racially integrated than their surrounding districts and often less integrated than neighboring public schools. Carol Ascher's study of 552 charter schools in 317 school districts in twenty-six states found that 27% of charter schools, compared to only 10% of their surrounding school districts, enrolled more than 80% minority students. Similarly, "charter schools are more likely to be found on one end of the poverty continuum or the other." Ascher's study found that only 35% of charter schools, compared to 72% of their home school districts, had socioeconomically diverse enrollments (i.e., enrollments in which 20% to 80% of students...
qualified for free or reduced-price lunch). In other words, the percentage of low-income children in nearly two-thirds of charter schools, but in less than one-third of their local districts, was either less than 20% or more than 80%. Thus, "when you look at school- and district-level data, charter schools are more extreme in terms of racial and social class isolation and segregation than the districts in which they are located." Although these data do not definitively show that charter schools exacerbate segregation—for such proof, we need school-level studies that examine whether students attending segregated charter schools left less segregated non-charter schools—the available evidence hardly suggests that charter schools are powerful engines of desegregation.

Many factors likely account for the racial and socioeconomic segregation in charter schools. First, few states have charter laws that require or encourage racial or socioeconomic diversity in charter schools; indeed, nineteen states say nothing about diversity at all. And even in states that require charter schools to achieve a level of diversity reflective of their surrounding school districts, there is little evidence of monitoring, enforcement, or compliance, and the racial balance provision in at least one state’s charter law has been declared unconstitutional. Second, many charter laws require or encourage charter schools to locate in urban areas and to prioritize or admit only students from the local district. Third, many charter schools have admissions policies with academic or other criteria that tend to produce homogeneity among the students enrolled. Some charter schools are designed to serve primarily at-risk students, who

55. See id. at 200-01 (citing Ascher et al., supra note 53, at 12).
56. Id. at 202; see also Frankenberg & Lee, supra note 49, at 14 (collecting studies). Emerging evidence shows a disparity between the educational opportunities available in predominantly minority charter schools and those available in predominantly white charter schools. For example, a 1999 study of twenty-two Phoenix-area charter schools showed that twelve schools had a "college prep" curriculum while ten offered a vocational education program. Of the 1865 students attending the former schools, 86% were white; of the 1635 students attending the latter, less than 40% were white. See Casey D. Cobb & Gene V. Glass, Ethnic Segregation in Arizona Charter Schools, 7 Educ. Policy Analysis Archives 1, para. 87 (1999), available at http://epaa.asu.edu/epaa/v7n1/.
57. See Wells et al., supra note 20, at 215.
58. See id. (citing two studies of California charter schools).
59. Until 2002, a provision of South Carolina's charter law provided that "under no circumstances may a charter school enrollment differ from the racial composition of the school district by more than ten percent." S.C. Code Ann. § 59-40-50(B)(6) (2001). In May 2000, a state circuit court declared the provision unconstitutional on equal protection grounds. See Darcia Harris Bowman, Judge Overturns South Carolina's Charter School Law, Educ. Wk., May 24, 2000, at 25. In July 2002, the provision was amended to exempt charter schools from racial balance requirements upon a finding by the local school district that the charter school "is not operating in a racially discriminatory manner." S.C. Code Ann. § 59-40-70(D) (2003); see Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm., 576 S.E.2d 180 (S.C. 2003) (upholding the amended charter law).
60. See Ryan & Heise, supra note 49, at 2075-77.
61. See Wells et al., supra note 20, at 204-07, 211-13.
are disproportionately urban, poor, and minority. Indeed, Texas and Connecticut have charter laws providing favorable treatment to schools serving 75% or more at-risk or minority students. Finally, targeted and word-of-mouth recruitment “circumscribed by race, social class, and language” may contribute to segregation in charter schools.

In expressing wariness toward intradistrict choice and charter schools, we do not mean to disparage the efforts of innovative educators working in predominantly poor and minority communities, some of whom are succeeding against the odds. Nor do we mean to suggest that inner-city parents are wasting their time if they transfer their children from a low-performing neighborhood school to another public school in the same district. Our point is simply that choice within urban district boundaries does not alter the basic geography of educational inequality. That inequality, which limits the odds of finding high-quality educational opportunities through intradistrict choice, is due in substantial part to the failure of equal protection law to require the elimination of interdistrict disparities in school resources, and to the failure of desegregation law to require suburban jurisdictions, whose local autonomy exists by grace of the state, to help remedy historic state-sponsored racial discrimination in urban school districts. As a result, inner-city schoolchildren have been left to choose among high-poverty, racially isolated schools, while suburbanites have exercised “local control” to insulate their neighborhood schools racially and socioeconomically.

62. In Washington, D.C., for example, the Maya Angelou Public Charter School serves students, often referred by judges, who are involved in the criminal justice system.
63. See Wells et al., supra note 20, at 213-14.
64. Id. at 204. The educational efficacy of charter schools has been a subject of recent controversy. Compare F. Howard Nelson et al., Am. Fed'n of Teachers, Charter School Achievement on the 2003 National Assessment of Educational Progress (2004) (finding few differences of student achievement between charter schools and regular public schools), with Caroline M. Hoxby, A Straightforward Comparison of Charter Schools and Regular Public Schools in the United States (2004), available at http://post.economics.harvard.edu/faculty/hoxby/papers/hoxbyallcharters.pdf (finding that students at charter schools perform better in math and reading than students at neighboring traditional public schools). As one commentator has observed, it is too early to draw firm conclusions about charter school performance because the results of existing studies are limited by difficulties in defining proper comparison groups, the diversity of charter schools and their local environments, and the narrow range of outcome measures available. See Paul T. Hill, Assessing Student Performance in Charter Schools: Why Studies Often Clash and Answers Remain Elusive, Educ. Wk., Jan. 12, 2005, at 33.
68. As Justice Byron White made clear in Milliken, the notion of “local control” in constitutional law effectively means suburban local control. After all, presently constituted school district lines do not delimit fixed and unchangeable areas of a local educational community. If restructuring is required to meet constitutional requirements, local authority may simply be redefined in terms of whatever configuration is adopted, with the parents of the children attending
For poor and minority students in urban areas, the principal means of obtaining a desegregated public education is to cross an urban district boundary into a suburban school. This is easier said than done. But where it has been done, the results have been encouraging. In St. Louis, Boston, Indianapolis, Wilmington, and Hartford, for example, interdistrict choice and transfer policies have facilitated desegregation and improved opportunities for urban schoolchildren while garnering public support. 69 Yet despite these initiatives, "the number of students participating in interdistrict choice is minuscule," comprising less than 1% of public school students. 70

The paucity of opportunities for interdistrict choice is not surprising given the historic reluctance of predominantly white and middle-class suburban communities to welcome poor and minority children from inner cities into their schools. Although some of the reluctance reflects prejudice and intolerance, a further explanation is that suburban taxpayers are wary of spending their local tax dollars on the education of nonresidents. Regrettably, federal and state school choice policies have made little effort to bridge the urban-suburban divide. For example, as mentioned earlier, the NCLB requires school districts receiving Title I funds to provide students in schools identified for improvement with an option to transfer to another public school in the same district, including a charter school, that has not been identified for improvement. 71 But the law makes only perfunctory mention of interdistrict choice. It requires that school districts unable to provide transfer options "must, to the extent practicable, establish a cooperative agreement with other [school districts] in the area for a transfer." 72 Inner-city students seeking transfers to suburban schools should hardly hold their breath for "practicable" cooperative agreements to materialize, for the statute does not provide any tangible encouragement for
neighboring districts to accept transfer students from urban schools.\(^{73}\) Similarly, at the state level, the vast majority of open-enrollment laws, though ostensibly affording students a choice of any school within the state, do not require school districts to accept nonresident students.\(^{74}\) As a result, many districts simply decline to participate in open-enrollment plans due to lack of capacity or lack of interest, or both.\(^{75}\)

Finally, do private schools present opportunities for urban schoolchildren to obtain a desegregated education? The answer, we think, depends on how access to private schools is provided. A universal voucher program with no eligibility requirements based on socioeconomic or educational disadvantage (i.e., a program that is available to poor and middle-class parents on the same terms) would likely increase segregation in both public and private schools. Forty years after white parents in the South fled to private schools to avoid desegregation, "the strongest predictor of white private school enrollment rates . . . [remains] the percentage of students living in the district who are black."\(^{76}\) A voucher program with no eligibility restrictions would enable a portion of the white families remaining in urban school districts to choose private schools, thereby deepening public school segregation and, at the same time, crowding out minority students seeking access to majority-white private schools.

On the other hand, a targeted voucher program adopted with the explicit objective of fostering socioeconomic diversity with restrictions based on income or other indicators of disadvantage would, in theory, enable poor and minority children to attend private schools alongside white peers whose families are able to afford tuition. There is evidence to support this. Relative to their proportions in public schools, white students are overrepresented and black and Latino students are underrepresented in

\(^{73}\) During the rulemaking for Title I of NCLB, one commenter recommended that the Department of Education regulate the state role in encouraging interdistrict transfer agreements. The Secretary of Education declined, explaining that "it would be inappropriate to regulate in this area of State authority," 67 Fed. Reg. 71,710, 71,755 (Dec. 2, 2002)—hardly a persuasive answer in the context of a statute and accompanying regulations that leave virtually no aspect of state authority over education policy immune from federal regulation.

\(^{74}\) See Ryan & Heise, supra note 49, at 2066-67.

\(^{75}\) See id. at 2067.

\(^{76}\) Sean F. Reardon & John T. Yun, Private School Enrollment and Racial Segregation 43 (2002), available at http://www.civilrightsproject.harvard.edu/research/deseg/Private_Schools.pdf (reporting that "the percent black in the district alone explained 49 percent of the variance in white private school enrollment rates"). Controlling for a school district’s poverty rate does not significantly attenuate the positive relationship between percentage of black students and white private school enrollment. See id.; see also Brian P. Gill et al., RAND, Rhetoric Versus Reality: What We Know and What We Need to Know About Vouchers and Charter Schools 173 (2001) (discussing studies suggesting that “a voucher program widely available to white families will lead to increased stratification” by race and socioeconomic class); Reardon & Yun, supra, at 42 (collecting studies finding that white private school enrollment is higher in districts with higher percentages of blacks and that "racial differences in private school enrollment rates cannot be explained by racial differences in income alone").
private schools.\textsuperscript{77} Nationally, white students experience more racial isolation in private schools than in public schools, Latino students experience less, and black students experience similar levels.\textsuperscript{78} For purposes of evaluating a voucher program targeted to inner-city students, however, these national data are not as informative as data from large metropolitan areas where there are high concentrations of poor and minority schoolchildren. In the nation’s twenty largest metropolitan areas, white students remain overrepresented and more racially isolated in private schools as a whole relative to public schools.\textsuperscript{79} However, in each one of these large metropolitan areas, the average black student and the average Latino student go to school with a higher percentage of white students in private schools than in public schools.\textsuperscript{80} In Minneapolis-St. Paul, the average black student has 60.6% white peers in private school versus 43.4% in public school; in Dallas, 42.4% white peers in private school versus 27.7% white peers in public school; in Cleveland, 30.9% versus 22.1%; in Oakland, 28.8% versus 19.2%.\textsuperscript{81} Similarly, the average Latino student in Houston has 46.6% white peers in private school versus 23.3% in public school; in Chicago, 40.1% versus 27.2%; in New York, 23.4% versus 11.5%; in Los Angeles, 23.6% versus 11.3%.\textsuperscript{82} To be sure, the percentages indicate that most private schools attended by minority students are still predominantly minority. But the public-versus-private comparison shows that minority students in large metropolitan areas are more likely to find less severe racial isolation in private schools than in public schools.\textsuperscript{83}

Other data suggest that targeted voucher programs may have desegregative effects. In Cleveland, for example, nearly 70% of students in the city’s public schools, compared to less than 38% of voucher students,

\begin{footnotesize}
\textsuperscript{77} See Reardon & Yun, supra note 76, at 17 tbl.3.
\textsuperscript{78} Whereas the average public school attended by a white student was 80.9% white in 1997-1998, the average private school attended by a white student was 88.4% white, and whereas 46.9% of white public school students attended a school that was 90% to 100% white, 63.6% of white private school students attended such racially segregated schools. See id. at 52 tbs.C1 & C2. The average public school attended by a black student was 32.6% white, while the average private school attended by a black student was 34.3% white. See id. Nevertheless, whereas 34.4% of black public school students attended a school that was 90% to 100% nonwhite, 43.7% of black private school students attended such heavily minority schools. See id. The average public school attended by a Latino student was 29.7% white, while the average private school attended by a Latino student was 41.1% white. See id. And whereas 35.7% of Latino public school students attended a school that was 90% to 100% nonwhite, only 27.1% of Latino private school students attended such heavily minority schools. See id.
\textsuperscript{79} See id. at 39 tbl.16.
\textsuperscript{80} See id.
\textsuperscript{81} See id.
\textsuperscript{82} See id.
\textsuperscript{83} See Jay P. Greene, Civic Values in Public and Private Schools, in Learning from School Choice 83, 97-98 & tbl.4-2 (Paul E. Peterson & Bryan C. Hassel eds., 1998) (showing that in the Northeast, Midwest, West, and South, the percentage of minority students in urban private schools is closer to the national average than the percentage of minority students in urban public schools).
\end{footnotesize}
attend a school with 70% or greater minority enrollment. In addition, 19% of voucher students, compared to 10% of city public school students, attend a school that is within 10% of the average racial composition of the Cleveland metropolitan area. In Milwaukee, the percentage of schoolchildren in 2001-2002 attending 90% minority or 90% white schools was 54.4% among public school students, 49.8% among voucher students overall, and 41.8% among voucher students attending religious schools. Finally, in privately funded voucher programs in New York, Dayton, and Washington, D.C., voucher parents were ten percentage points more likely than parents denied a voucher by lottery to report that their children attended a class where a majority of his or her peers were white.

Targeted voucher programs thus appear to help inner-city minority children to find educational settings that are less racially isolated than their local public schools. Nevertheless, the desegregative effects are modest. This may be attributable in part to the modest voucher payments offered by the programs (currently $1400 to $3000 in the private voucher programs, up to $7000 in the Cleveland program).
to $2250 in Cleveland, and up to $5943 in Milwaukee), which leave many
nonsectarian schools out of reach. Secular private schools are substantially
less racially segregated than either public schools or religious private
schools. 88 They typically draw from a wider geographic area, thus
mitigating the effects of residential segregation, and they often seek racial
diversity more aggressively than religious schools. 89 But they are also
substantially more expensive. In 1999-2000, the average elementary school
tuition was $2451 at Catholic schools, $3503 at other religiously affiliated
schools, and $7884 at nonsectarian private schools. 90 Higher voucher
amounts would enable more inner-city children to attend less segregated,
more costly private schools.

III. NEW CHOICE INITIATIVES

Given these options for school choice and their shortcomings, what can
be done to increase their desegregative potential? We propose two ideas,
one addressing segregation in charter schools and the other addressing
limitations on interdistrict and private school choice.

First, we recommend a funding set-aside in federal and state charter
school programs to create and reward charter schools that reflect the racial
and socioeconomic diversity of the metropolitan area—not the local school
district—where they are located. Charter schools subject to racial balance
provisions that use local district demographics as a benchmark have little
desegregative impact in racially segregated, high-poverty school districts.
But because they typically have control over admissions policies and are
not required to serve exclusively students in the home district, charter
schools are uniquely positioned to draw students from many districts, both
urban and suburban, in a single metropolitan area. For this reason, set-aside
programs should use the racial composition of the broader metropolitan
area as the reference point for measuring and rewarding diversity. In
addition, because diverse charter schools, like racially integrated
nonsectarian private schools, will likely draw students from a wide
geographic area, some portion of incentive funds should be allocated for

88. See Reardon & Yun, supra note 76, at 30-31 & tbl.13, 38, 52 tbl.C-2, 53 tbls.C-3 &
C-4, 54 tbl.C-5. In 1997-1998, the percentage of white peers encountered by an average
black student was 32.6% in public schools, 31.2% in Catholic schools, and 34.6% in other
religious schools, but 40.6% in secular private schools. See id. at 52 tbl.C-2, 53 tbls.C-3 &
C-4, 54 tbl.C-5. In addition, the percentage of black students attending 90% minority
schools was significantly smaller among blacks attending secular private schools (32.0%)
than among blacks attending Catholic schools (48.4%). See id. at 53 tbl.C-3, 54 tbl.C-5.
Similarly, the percentage of white peers encountered by an average Latino student was
35.7% in public schools and 33.2% in Catholic schools, but 51.3% in other religious schools
and 50.4% in secular private schools. See id. at 52 tbl.C-2, 53 tbls.C-3 & C-4, 54 tbl.C-5.
Both secular and non-Catholic religious schools appear to be strong desegregative
alternatives for Latino students.

89. See id. at 38.

SCHOOL CHOICE

transportation and for recruitment of students through systematic outreach to parents of different racial and socioeconomic backgrounds in a language they can understand. In essence, we would like to see some charter schools resemble desegregated magnet schools.

To implement incentives, federal and state governments could offer grants or rewards for charter schools whose enrollment reflects the diversity of the metropolitan area within, say, 10% of the proportion of students within each major racial group and the proportion eligible for free or reduced-price lunches. The Supreme Court’s recent decision in *Grutter v. Bollinger* helps to remove constitutional doubts that might arise from such a race-conscious incentive program. And as a policy matter, state education systems committed to achieving racial diversity on college campuses should not hesitate to embrace the same goal for charter schools. Over the past decade, charter schools have become a well-recognized fixture of school choice. But because “choice” tends to imply that individual preferences, not collective ideals, should guide educational consumption and supply, it is vital that charter laws affirm the “common school” ideal and nurture and reward innovations that best approximate it.

Second, we recommend increasing the desegregative potential of school vouchers targeted to disadvantaged children by making vouchers redeemable at both private and public schools, and by raising the voucher amount so that it pays up to (a) the median tuition among nonsectarian private schools in the local area or (b) the full portion of per-pupil expenditure in a chosen public school attributable to local income or property taxes. Until now, the most desegregative choices for inner-city students—suburban public schools and nonsectarian private schools—have largely been out of reach. But if the rhetoric of equal opportunity animating current discussions of school vouchers is to have real bite, then voucher programs should give poor and minority schoolchildren real choices—indeed, the same choices presently available to suburban, middle-class students by dint of greater wealth. This means a choice both among private schools and among public schools, where exercise of the choice will have desegregative impact.

The fact that the voucher debate has largely focused on private schools reflects, in our view, an unspoken assumption that suburban public schools are off-limits to inner-city children. The Milwaukee, Washington, D.C., and Florida voucher programs provide no assistance for students interested

---

92. Gill et al., supra note 76, at 19 (describing “common school” as a school that “provides access to high-quality education for all children in the community—poor as well as rich, African-American as well as white, and students with disabilities as well as those with unusual talents,” that “involves a healthy social mixing of children from all races and classes,” and that “educates children in the virtues of democratic citizenship”).
93. Our assumption is that receiving schools will be allocated the state per-pupil share for each transferring child, so we peg the voucher amount to the local share. See, e.g., infra note 94 and accompanying text.
in choosing an out-of-district public school. The Cleveland program, at issue in *Zelman v. Simmons-Harris*, allows vouchers to be used in adjacent school districts, guaranteeing suburban schools the maximum voucher amount on top of the per-pupil state allotment for each inner-city student enrolled. But not a single suburban district in Cleveland has elected to participate. As the dissent in *Zelman* observed, the voucher amount ($2250) is not nearly enough to cover local contributions to per-pupil expenditures in any but one suburban district (itself an “academic emergency” district) and thus offers suburban districts no incentive to accept voucher students. By contrast, interdistrict choice has worked in St. Louis in part because suburban jurisdictions enrolling city students receive an incentive payment that covers the per-pupil amount raised through local income or property taxes.

A more robust voucher program targeted to disadvantaged children—one that neither restricts vouchers to private schools nor prices voucher recipients out of nonsectarian private schools or suburban public schools—would sensibly bridge the political divide between private and public school choice. Grants for voluntary public school choice under NCLB could be used to build interdistrict choice into voucher initiatives currently limited to private schools. The public-private divide has figured prominently in how best to educate poor and minority urban schoolchildren largely because “while there is often polite mention of the benefits of diversity, the interdistrict efforts that would actually create that diversity are rarely explored.”

If we are willing to facilitate choice between public and private schools for the sake of equal opportunity, then there is no reason we should not facilitate choice between urban and suburban public schools at the same time for the same reason.

Ideally, an inner-city student’s desire to attend a suburban public school should not be subject to a veto by suburban school districts in the name of

---

94. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 645 & n.1 (2002) (citing Ohio Rev. Code Ann. §§ 3313.976(C), 3317.03(I)(1) (West 2000)). There is no reason why privately sponsored voucher programs could not also allow vouchers to be used for interdistrict public school choice. Indeed, the voucher program sponsored by the Children’s Educational Opportunity Foundation in San Antonio’s Edgewood School District allows low-income students to attend not only private schools but also public schools outside of the Edgewood district. See Howell & Peterson, *supra* note 87, at 38.

95. See *Zelman*, 536 U.S. at 707 & n.17 (Souter, J., dissenting).


local control, as is the case now, for example, under the choice provisions of NCLB. If the political will is lacking in Congress and the states to remove school district vetoes, then at a minimum vouchers should be redeemable at individual public schools that value diversity. Even in resistant districts, there may be school communities that understand and seek the educational benefits of a diverse student body. In St. Louis, for example, a great deal of support among suburban white parents and students has developed for the interdistrict program. All suburban districts in the program except Ladue have continued participation well past the time when under a 1999 agreement they could have given notice of an intention to withdraw.

There are, of course, many important matters to be worked out in the operation of a desegregative choice program. To begin with, schools eligible to participate in a voucher program must meet basic standards of safety, health, and fiscal reliability. Moreover, accountability is a crucial concern. Public schools participating in a choice program will be subject to state accountability systems mandated by the NCLB. The duties of private schools will vary with state laws, but in many jurisdictions, the obligations are minimal. We do not share the belief of many choice advocates that the operation of the private market, by itself, will protect parents. Information is vital to the effective functioning of markets, and many poor or non-English-speaking parents have limited access to information. We thus believe that private schools accepting public funds to educate children must accept the obligation to be held accountable for each child’s academic progress and to publicly communicate information on such progress to the communities they serve.

On all of these issues, the key to success will be effective implementation. Regulation need not be cumbersome. But if children are to benefit from subsidized choice, government must ensure that the schools ultimately receiving funds are appropriate educators and sound guardians of each child’s best interests.

IV. OVERCOMING OBJECTIONS

In this part, we address three concerns implicated by our proposals. The first is that a voucher program, even one that is targeted to disadvantaged

99. See Wells & Crain, supra note 28, at 326.
100. See, e.g., Carolyn Bower, Students Stand Up for Diversity, St. Louis Post-Dispatch, May 23, 2004, at B1 (reporting broad and vocal support among students at Clayton and Mehlville High Schools for continuing the voluntary interdistrict transfer program with St. Louis).
101. Moreover, we emphasize that private schools, though not constrained by the Equal Protection Clause, are nevertheless subject to the nondiscrimination requirements of 42 U.S.C. § 1981 (2000). See, e.g., Runyon v. McCrary, 427 U.S. 160, 172 (1976). In addition, to the extent that private schools accept vouchers supported by federal funds, they are also subject to the nondiscrimination requirements of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.
children, will evolve into a broader, untargeted program that worsens segregation and inequality. The second is that school choice primarily benefits children of parents with the most motivation and resources, while leaving the vast majority of children in failing schools behind. The third is that by sanctioning new arrangements, "the common school" ideal of public education and the role of public schools as the "balance wheel" for society will be weakened.

A. Vouchers and Free-Market Ideology

The intellectual origins of school vouchers suggest that the ultimate aim of voucher proponents is to replace the current system of public education with a virtually unregulated, market-driven alternative. Milton Friedman's voucher proposal over forty years ago imagined a government role in education "limited to assuring that the schools met certain minimum standards such as the inclusion of a minimum common content in their programs, much as it now inspects restaurants to assure that they maintain minimum sanitary standards." Though aware of the resemblance between his proposal and "freedom of choice" plans in the South, Friedman rejected any requirement that schools make efforts to achieve racial integration as a criterion for participating in a voucher system. As mentioned earlier, we oppose universal voucher programs of the sort Friedman envisions. Just as "freedom of choice" during the 1960s predictably replicated the background of racial inequality that had been nurtured and protected under legal mandate, so too an unconstrained voucher program would replicate or exacerbate in schools the racial and socioeconomic inequality that exists in society.

Yet laissez-faire ideology, though prominent in the choice debate, has had less influence on the current design of policy than the highly regulated and redistributive models of choice advocated by War on Poverty-era liberals. Not long after Friedman introduced his voucher proposal, progressive reformers such as Theodore Sizer, Christopher Jencks, and John Coons and Stephen Sugarman introduced voucher plans designed to benefit the most disadvantaged children. These advocates recognized the

102. See John E. Chubb & Terry M. Moe, Politics, Markets and America’s Schools 217 (1990) ("Reformers would do well to entertain the notion that choice is a panacea."); Milton Friedman, Capitalism and Freedom 85 (1962); Milton Friedman, The Role of Government in Education, in Economics and the Public Interest 123 (Robert A. Solo ed., 1955) [hereinafter Friedman, The Role of Government].
103. Friedman, The Role of Government, supra note 102, at 127.
104. See id. at 131 n.2.
potential of school choice to subvert existing patterns of educational inequality, and their ideas appear to occupy the political center of today's voucher debate. Indeed, every public voucher program currently in existence adopts a targeted approach, conditioning eligibility on the basis of income, prior attendance at a low-performing school, or some other measure of educational disadvantage.\(^{106}\)

For now, voucher policies seem to reflect less a free marketplace of educational suppliers and consumers than a targeted social intervention to aid the most disadvantaged. The question, however, is whether current policies will undergo "an incremental shift from targeted programs intended to provide increased educational opportunity for poor families to one subsidizing all private schools—most of which are not attended by poor students."\(^{107}\) Indeed, many voucher opponents see today's targeted programs "as a conservative ploy, a way of using the poor to achieve the traditionalists' long-run goals of free markets and universalism."\(^{108}\) The concern is not unfounded.\(^{109}\) Friedman, who wrote a 1997 article on school choice entitled "Programs for the Poor Are Poor Programs,"\(^{110}\) reacted to the Court's decision in *Zelman* by calling for "a major expansion of

---


106. The Milwaukee voucher program is limited to families that qualify for federal food stamps. See Howell & Peterson, *supra* note 87, at 30. The Cleveland program assigns priority to families with income below twice the federal poverty line. See Ohio Rev. Code Ann. § 3313.978 (West 2005). Florida offers vouchers to students who attend schools identified by the state accountability system as "failing" for any two years of a four-year period. See Fla. Stat. § 1002.38(1) (2005); see also *infra* note 136 (describing a similar eligibility limitation in a newly enacted Ohio voucher program). The Washington, D.C., voucher program recently approved by Congress gives priority to students in public schools identified for improvement or corrective action under the NCLB. See DC School Choice Incentive Act of 2003, Pub. L. No. 108-199, § 306(1), 118 Stat. 3, 129 (2004). Even privately funded voucher programs restrict eligibility based on need. The nationwide Children's Scholarship Fund program, a New York City program sponsored by the School Choice Scholarships Foundation, and a San Antonio program sponsored by the Children's Educational Opportunity Foundation admit only children eligible for free or reduced-price lunch. See Howell & Peterson, *supra* note 87, at 34, 37, 38. A Dayton, Ohio, voucher program sponsored by Parents Advancing Choice in Education is limited to families whose income is less than twice the federal poverty level, and a Washington, D.C., program sponsored by the Washington Scholarship Fund is limited to families with income less than 2.7 times the poverty level. See *id.* at 35.


108. Terry M. Moe, *Schools, Vouchers, and the American Public* 378 (2001). Moe describes suspicions ... within the voucher movement, among representatives of the urban poor—who see vouchers as a way of empowering their own constituents, but do not want to be used, and do not want programs for needy children to serve as a springboard for broader free-market programs that might leave the needy behind again.

109. *See, e.g.*, Witte, *supra* note 86, at 184-87 (cataloging voucher supporters' strategy of using modest, targeted experiments as springboards for universal programs).

parental school choice" that would "make [vouchers] available to all students, not simply to students from low-income families."

We have no doubt that many voucher enthusiasts regard existing programs as a wedge into a broader agenda, and admittedly, our call for targeted vouchers with higher dollar values may generate pressure to expand eligibility. But the success of any drive to make vouchers universal depends less on its proponents' intentions than on political dynamics on the ground, and those dynamics do not bode well for universality. The voucher movement has a constituency among some elements of the conservative spectrum, notably Catholics and born-again Christians. But there is little evidence that the free-market ideology of political and academic elites is widely shared by rank-and-file conservatives. Perhaps the best illustration of this is that "[e]very proposal to provide vouchers on a large scale has failed" both in state legislatures and, more visibly, at the ballot box. "Between 1990 and 1993 alone, for example, fourteen state legislatures considered and ultimately rejected voucher proposals." In addition, voters soundly rejected a 1990 Oregon tuition tax credit initiative by a two-to-one margin; a 1992 Colorado voucher initiative by 67% to 33%; a 1993 California voucher initiative by 70% to 30%; a 1996 Washington state voucher initiative by 66% to 34%; and a 1998 Colorado tuition tax credit initiative by 59% to 41%.

Although these results are partly attributable to robust opposition from teachers' unions and the peculiar dynamics of ballot initiatives, large-scale voucher programs have failed also "because suburbanites did not support them." School choice does not have an ardent following among middle-class voters who, though politically conservative, are largely satisfied with their public schools. Explaining the defeat of Proposition 174, the 1993 California voucher initiative, The Manhattan Institute's associate director John Miller observed the following:

Most suburbanites—the folks who make up the GOP's rank and file—are happy with their kids' school systems. Their children already earn good grades, score well on tests, and gain admission into reputable colleges and universities. Moreover, suburban affluence grants a measure of freedom in choosing where to live and thus provides at least some control over

112. See Moe, supra note 108, at 254, 255.
114. Id. at 2079 (citing Amy Stuart Wells, Time to Choose: America at the Crossroads of School Choice Policy 157-58 (1993)).
116. See id. at 358-69.
118. See Lowell C. Rose & Alec M. Gallup, The 36th Annual Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools, Phi Delta Kappan, Sept. 2004, at 41, 42 (finding that "61% of parents give the schools in their community an A or a B" and concluding that "[t]he trend line showing that the public in general gives reasonably high marks to the public schools continues").
school selection. It’s not that suburbanites refuse to admit the country’s deep education crisis; they just don’t believe the problem affects them personally.\(^\text{119}\)

Suburbanites, “hav[ing] already paid a premium in purchasing their homes in order to ensure that their children attend good public schools,” do not share the sense of frustration with public education that prompts many inner-city parents to support vouchers.\(^\text{120}\)

The most recent statewide voucher proposals in California, Michigan, and Colorado confirm where the political center lies on school vouchers. In 2000, the California ballot included an initiative proposing a $4000 voucher for every child with almost no regulations to ensure accountability and equity. Although proponents and opponents each spent $30 million on their respective campaigns, the universal voucher initiative was defeated by 71% to 29%, almost exactly the same margin by which Proposition 174, a similar free-market proposal, was defeated in 1993.\(^\text{121}\) Also in 2000, Michigan voters considered an initiative proposing a $3300 voucher for every child living in a school district where one-third or more students fail to graduate from high school within four years. Because the initiative was smaller and more targeted than California’s, the Michigan initiative more easily attracted support from religious, business, and urban minority elites, and proponents raised twice as much money as opponents ($13 million to $6 million).\(^\text{122}\) But the scale of the proposal was still unprecedented. At the time, 180,000 children in seven school districts, including Detroit Public Schools, would have qualified for a voucher.\(^\text{123}\) (For comparison, the largest public voucher program in existence, Milwaukee’s, had 13,978 participants during the 2004-2005 school year.\(^\text{124}\)) With the blessing of Republican Governor John Engler, voucher opponents defeated the initiative by 69% to 31%.\(^\text{125}\)

In the wake of the Supreme Court’s \textit{Zelman} decision, Colorado in 2003 became the second state (after Florida in 1999\(^\text{126}\)) to enact a statewide


\(^\text{120.}\) Ryan & Heise, \textit{supra} note 49, at 2081. Similarly, suburban residents, seeing little need for educational alternatives, have been less interested in charter schools than urban residents. \textit{See id.} at 2077 (noting suburbanites’ perception that existence of charter schools signals the failure of public schools).

\(^\text{121.}\) Moe, \textit{supra} note 108, at 366.


\(^\text{125.}\) \textit{See Moe, \textit{supra} note 108, at 367-68}.

\(^\text{126.}\) \textit{See Fla. Stat. § 1002.38} (2005). Florida’s statewide Opportunity Scholarships program, which offers $4355 vouchers to students in persistently failing schools, currently
voucher program. Although the program has since been invalidated under the state constitution, its limitations as a matter of policy design are instructive for our point here. The four-year pilot program applied only to the eleven school districts that had eight or more schools rated low or unsatisfactory by the state accountability system during the 2001-2002 school year. Students were eligible only if they qualified for free or reduced-price lunch, enrolled in a public school the previous year, and performed at an unsatisfactory level in at least one academic area on the most recent statewide assessment. In order to enroll voucher students, nonpublic schools could not discriminate in admissions on the basis of race, color, religion, national origin, or disability, and they had to allow the sending school district to administer statewide academic assessments to voucher students, the results of which were to be reported publicly. Moreover, the total number of voucher students was capped at 1% of each sending district's enrollment in the first year of the program (2004-2005), at 2% in the next year, at 4% in the following year, and at 6% in the fourth year of the pilot. At its peak, the program was projected to provide vouchers for 20,000 students. Although Colorado's program, had it been implemented, would have been almost twice the size of Milwaukee's, its magnitude is still a mere fraction of the significantly broader ambitions decisively rejected in California and Michigan. And its regulatory features are a far cry from the free-market libertarianism advocated by Friedman and others. Although

serves only 720 students. See Alan Richard, Court Showdown over Fla. Vouchers Nears, Educ. Wk., May 25, 2005, at 1. Three lower courts have invalidated the program under the state constitution, and the issue is now pending before the Florida Supreme Court. See id. This spring, when Governor Jeb Bush proposed additional vouchers for 170,000 students who have failed the state reading test three years in a row, the Republican-controlled legislature quickly defeated the measure. See Joetta L. Sack, Gov. Bush's Voucher, Class-Size Proposals Fail in 2005 Session, Educ. Wk., May 18, 2005, at 16. 127. See Owens v. Colo. Cong. of Parents, Teachers, & Students, 92 P.3d 933 (Colo. 2004) (invalidating the voucher program under the state constitutional provision guaranteeing control over instruction to local school districts). 128. See Colo. Rev. Stat. § 22-56-103(10)(a)(1) (2003). 129. See id. § 22-56-104(2)(a),(b). 130. See id. § 22-56-106(1)(b). 131. See id. § 22-56-106(1)(e). 132. See id. § 22-56-110(1). 133. See id. § 22-56-104(5)(a). 134. See id. § 22-56-104(5)(a). 135. This is true even when we account for the fact that Colorado's student population is smaller than California's or Michigan's. The 180,000 students who would have been eligible for a voucher under Michigan's 2000 initiative, see supra note 123 and accompanying text, would have amounted to over 10% of the state's K-12 enrollment. See Digest of Education Statistics, supra note 90, at 51 tbl.37 (providing estimated 2001 fall enrollments). By contrast, the 20,000 voucher-eligible students contemplated under Colorado's program would amount to only 2.7% of the state's K-12 enrollment. See id. California's 2000 initiative would have provided vouchers to all students statewide. See Moe, supra note 108, at 366.
some advocates may eventually seek to transform the program into something more universal and laissez-faire, the reality is that its modest design, narrowly targeted and carefully regulated, is what accounts for its political success. The Colorado program and others like it support the view that if voucher proponents "move[] to the political center, opting for a voucher system that [i]s small and low-risk, regulated to promote accountability and equity, and targeted at children in need, they might... attract[] far higher levels of public (and elite) support."  

We believe that, for the foreseeable future, the political center will continue to reflect the concerns of middle-class suburbanites who are largely content with their neighborhood public schools. Though aware of—and in some cases sympathetic to—the difficulties facing public schools in inner cities, suburban voters are skeptical of proposals that might dramatically alter the school attendance and finance policies responsible for the racial and socioeconomic makeup of schools in their chosen communities. As James E. Ryan and Michael Heise predicted before the Supreme Court decided Zelman, political limitations on the scope and contours of school choice are unlikely to change even with a strongly worded opinion endorsing the use of vouchers at religious schools. Contrary to Friedman’s view that Zelman “clears the way for a major expansion of parental school choice,” the decision actually “do[es] less to remove the real constraints on voucher programs than it [does] to reveal them.” Those constraints, we believe, will inhibit the expansion of vouchers toward free-market universality.

B. "Skimming"

At the same time, however, the political constraints just discussed also limit the extent to which school choice can reduce the racial and socioeconomic isolation of disadvantaged children. Some middle-class whites will be attracted to charter schools that are diverse by race and class. And some inner-city minority students will have an opportunity to attend an integrated private school or a suburban public school under a more robust voucher program. But the reality is that the degree of integration achievable in any local context is circumscribed by political considerations having to do with racial or class perceptions. Even in St. Louis, the largest interdistrict transfer program in the nation, suburban jurisdictions are

---

136. In July 2005, Ohio became the third state to pass statewide voucher legislation. Its program also takes a targeted approach, providing "state-financed scholarships of up to $5000 each for as many as 14,000 students who attend public schools that have been in 'academic emergency' for three consecutive years." Christina A. Samuels & Karla Scoon Reid, Ohio OKs Vouchers for Pupils in Low-Rated Schools, Educ. Wk., July 13, 2005, at 23.


138. Friedman, supra note 111.

required to enroll only 25% black students, and fewer than one-third of black inner-city students participated in the program at its peak.\textsuperscript{140} Clearly, school choice is not a complete solution to the challenge of educating inner-city schoolchildren, and a key concern is whether it helps more than it hurts.

One dimension of this concern is whether choice has a "skimming" effect, benefiting more advantaged students while leaving less advantaged students behind. A Citizens' Commission on Civil Rights study of magnet schools in three communities showed that despite racial desegregation, low-income families were less likely to participate in magnets than in regular schools, a condition the Commission found could be ameliorated by a variety of initiatives.\textsuperscript{141} As for charter schools, the answer varies to a significant extent according to the purposes of specific schools. Although skimming likely occurs in charter schools designed to attract students who meet certain academic criteria, selection in favor of educational disadvantage may occur in charter schools focused on at-risk students.\textsuperscript{142}

As for vouchers, there is some data bearing on the question of skimming. Two recent surveys of existing research agree that vouchers, as currently implemented, have only modest skimming effects based on prior academic achievement or socioeconomic criteria.\textsuperscript{143} Voucher programs "serve relatively low-achieving students; there is no evidence that voucher schools are 'creaming' high-achieving students from the public schools."\textsuperscript{144} In privately funded voucher programs, there appear to be few differences in student and family characteristics between voucher users and the eligible population. For example, in the nationwide program sponsored by the Children's Scholarship Foundation, voucher users were slightly more likely to live with both parents and to have lived in the same residence for two years.\textsuperscript{145} In the San Antonio program sponsored by the Children's Educational Opportunity Foundation, voucher users were slightly less likely to have limited English proficiency, to have parents receiving government assistance, and to be economically disadvantaged.\textsuperscript{146} In both programs, mothers of voucher users had slightly more education.\textsuperscript{147} Evaluations of the Milwaukee and Cleveland programs have also found few differences between voucher students and public school students. On average, parents of voucher students had lower incomes but more education.\textsuperscript{148}

\textsuperscript{140} See Freivogel, supra note 69, at 217.
\textsuperscript{141} See Difficult Choices, supra note 12, at 29-30 (recommending that magnet programs give low-income children priority in enrollment, free transportation, and adequate information).
\textsuperscript{142} See Gill et al., supra note 76, at 152-55 (reviewing studies on charter school enrollment); cf. Wells et al., supra note 20, at 213-14 (observing that, although many states have provisions for serving at-risk students in their charter school laws, it is unclear whether the provisions have much impact on charter school enrollment).
\textsuperscript{143} See Gill et al., supra note 76, at 143-49; Howell & Peterson, supra note 87, at 60-80.
\textsuperscript{144} Gill et al., supra note 76, at 156.
\textsuperscript{145} See Howell & Peterson, supra note 87, at 61-65.
\textsuperscript{146} See id. at 76-78.
\textsuperscript{147} See id. at 61, 77.
\textsuperscript{148} See Gill et al., supra note 76, at 149; Howell & Peterson, supra note 87, at 79.
On the other hand, skimming may occur if private schools are allowed to reject children deemed too expensive or difficult to educate. Where voucher programs do not provide larger vouchers for students with special needs, emerging evidence indicates that students with disabilities are underrepresented compared to their percentage in the public school population.\textsuperscript{149} In Cleveland, for example, according to a 1998 parent survey, 8\% of voucher students had learning disabilities, compared to 15\% of Cleveland public school students.\textsuperscript{150} Comparisons between voucher users and decliners in several privately funded voucher programs show similar disparities.\textsuperscript{151} In Milwaukee, state law requires voucher schools to accept all eligible pupils or to select randomly “to ensure that all eligible pupils, including those with . . . special education needs, have an opportunity to participate.”\textsuperscript{152} But only seven schools enrolling voucher students in 1998-1999 reported offering special education services;\textsuperscript{153} “[i]n consequence, many students with disabilities surely do not apply.”\textsuperscript{154} Under federal law, public schools are required to provide an appropriate public education for all children and to mainstream them except where special facilities are needed.\textsuperscript{155} In our view, to ensure that students with disabilities have equal power to exercise choice, private schools receiving publicly funded vouchers generally should be required to accept children with disabilities, with reimbursement for additional costs.\textsuperscript{156}

More broadly, in examining skimming effects, it is important to bear in mind that current voucher programs, by design, serve severely

\textsuperscript{149} The evidence also shows underrepresentation of students with disabilities in charter schools. See Gill et al., \textit{supra} note 76, at 155.

\textsuperscript{150} See \textit{id.} at 150 (citing research by Paul Peterson, William Howell, and Jay Greene).

\textsuperscript{151} See Howell & Peterson, \textit{supra} note 87, at 74.

\textsuperscript{152} Wis. Legislative Audit Bureau, Audit Summary: Milwaukee Parental Choice Program 9 (2000), \textit{available at} http://www.legis.state.wi.us/lab/reports/00-2full.pdf (last visited Sept. 12, 2005).

\textsuperscript{153} See \textit{id.} at 26.

\textsuperscript{154} Gill et al., \textit{supra} note 76, at 150. Indeed, only 171 of some 8000 voucher students in 1998-1999 were identified as having special education needs. See Wis. Legislative Audit Bureau, \textit{supra} note 152, at 7, 26.


\textsuperscript{156} In 2000, Florida established a voucher program exclusively for students with disabilities (John M. McKay Scholarships for Students with Disabilities) separate from its regular voucher program (Opportunity Scholarships). See Fla. Stat. § 1002.39 (2005). The McKay program, under which 9000 students with special needs attended private schools in 2002-2003, provides voucher amounts up to the cost of special education services needed by each student or the amount of a private school’s tuition and fees, whichever is less. \textit{Id.} §1002.39(6)(b). Early reports indicate that the higher voucher amounts available under the McKay program have encouraged the participation of many private schools, see Beth Kormanik, \textit{Vouchers Aren’t All the Same; Private Schools Prefer McKay Scholarships}, Fla. Times-Union, Aug. 25, 2003, at A1, but has also produced problems of fiscal accountability, see Lori Horvitz, \textit{Cyber High’s Operator Again Gets State Money}, Orlando Sentinel Trib., Mar. 16, 2003, at B1; Kimberly Miller & S.V. Date, \textit{Brokers Get Piece of School Vouchers}, Palm Beach Post, Aug. 10, 2003, at 1A. In March 2005, Utah enacted a voucher program for students with disabilities similar to Florida’s. See Ronnie Lynn, \textit{State’s School-Voucher Program Is Under Way}, Salt Lake Trib., Mar. 11, 2005, at B3.
disadvantaged populations. In 1998-1999, the average family income for voucher students was $18,750 in Cleveland, $16,000 in Edgewood, and around $18,000 in Dayton and Washington, D.C.157 In Cleveland, 70% of voucher families were headed by single mothers; in Washington, D.C., over 75%.158 Although there seems to be a consistent disparity in educational level between voucher parents and public school parents (a disparity likely found in charter schools as well159), the disparity must be put in perspective. In Edgewood, for example, voucher mothers had an average of 12.0 years of education, compared to 10.8 years for public school mothers.160 In Washington, D.C., mothers who won a voucher by lottery and used it had an average of 12.9 years of education, compared to 12.6 years for mothers who won a voucher but did not use it.161 And in the nationwide program, only 23% of mothers of voucher applicants had graduated from college, compared to 20% of mothers eligible to apply.162 By any measure, the families of voucher students are economically and educationally disadvantaged, even if they are slightly less disadvantaged than families of non-voucher students.

To be sure, educational disparities between parents who exercise choice and parents who do not underscore the need for accessible information and outreach systems that help a wide range of parents determine and pursue the best educational options for their children. Because "[a]ll programs of school choice are more likely to be used by better-informed families,"163 their design must include measures to provide information on equal terms to all eligible families. But the broader point we wish to make about selection effects is that, as long as choice programs remain targeted (as voucher programs are now), the concept of skimming has limited meaning. At most, it implicates a distinction between the "disadvantaged" (mothers with 12.0 years of education) and the "very disadvantaged" (mothers with only 10.8 years). As a matter of social policy, we do not routinely reject programs that help the disadvantaged on the ground that they fail to help the very disadvantaged. Section 8 housing vouchers, for example, provide their beneficiaries with opportunities for integrated housing, but do not improve public housing. The Earned Income Tax Credit helps the working poor, but does not aid the chronically unemployed. Affirmative action in higher education generally benefits middle-income minority students, but offers limited help to low-income minority students in gaining access to college. Although we recognize the shortcomings and political risks of such

157. See Gill et al., supra note 76, at 144.
158. See id.
159. See id. at 156.
160. See id. at 149.
161. See id. at 148-49.
162. See Howell & Peterson, supra note 87, at 62 tbl.3-1.
163. Gill et al., supra note 76, at 156.
we support them nonetheless and advocate for additional policies where they leave off. Our perspective on school choice is similar.

We might have a different view if there were strong indications that students who remain in low-performing schools not only do not benefit, but are affirmatively injured when some of their peers choose to go elsewhere. But the available evidence is thin and reflects conflicting theories on whether public schools improve or decline when some students have an option to leave. On one hand, low-performing schools may be harmed when the most motivated parents decide to enroll their children elsewhere, although we have seen no evidence that this occurs when disadvantaged parents exit and leave behind the very disadvantaged. On the other hand, low-performing schools may be helped if the option to transfer induces school improvement, although here too the evidence is not clear-cut.

In our view, the real risk posed by school vouchers in particular and school choice in general is not educational but political. Choice has the potential to help disadvantaged urban children, and we should shape and support choice policies that best tap that potential. But for one reason or another, the majority of students in the country will remain in neighborhood public schools, and school choice does not and will not address their needs. We should not allow choice to be portrayed either as an anathema to public education or as a “panacea” that “has the capacity all by itself” to transform failing schools. It is neither. It is, instead, one piece of the education reform puzzle. And even as we position that piece to help some inner-city children leave low-performing schools, we must keep the other pieces in full view and use them to help the children who remain.

164. Section 8 has been criticized for undermining public housing, the Earned Income Tax Credit reinforces a distinction between the deserving and undeserving poor, and affirmative action arguably distracts public attention from efforts to improve K-12 education.
165. See Gill et al., supra note 76, at 104-11.
166. For an example of a recent study purporting to show that a voucher plan, by giving parents an option to leave low-performing schools, can stimulate school improvement, see Jay P. Greene & Marcus A. Winters, Manhattan Inst., When Schools Compete: The Effects of Vouchers on Florida Public School Achievement (2003), available at http://www.manhattaninstitute.org/html/ewp_02.htm. However, this study does not convincingly demonstrate that achievement gains in low-performing schools are properly attributable to vouchers per se as opposed to the statewide accountability system in which the voucher plan is embedded. Harvard economist Caroline Hoxby has authored perhaps the most prominent research showing that competition between school districts and between public and private schools can have positive effects on public school quality, although her conclusions too are contested. For a recent review of this literature, see Caroline M. Hoxby, School Choice and School Competition: Evidence from the United States, 10 Swedish Econ. Pol’y Rev. 9 (2003); Helen F. Ladd, Comment on Caroline M. Hoxby: School Choice and School Competition: Evidence from the United States, 10 Swedish Econ. Pol’y Rev. 67 (2003).
167. Chubb & Moe, supra note 102, at 217.
In providing more choice and diversification in the mechanisms for educating children, one final concern is that the role of public schools as a unifying force in American society may be impaired. A traditional view of public education is that an important objective was to provide the “common school” where the sons and daughters of mill owners could be educated along with the sons and daughters of mill hands.

But in the view of many, Horace Mann’s commentary on public schools as the “great equalizer of the conditions of men” and the “balance-wheel of the social machinery” has always been a romantic one. On the whole, the public schools have never come close to providing genuinely equal opportunity for poor or minority schoolchildren. The drive for equality during the last half of the twentieth century, initiated by Brown and aided by state court school finance litigation, may have revitalized the idea of the common school fostering opportunity for all. But during the same period, many of the gains were being offset by the increasing physical separation of the rich and the poor. Meanwhile, little progress appears to have been made in the civic and political education of America’s youth, and the revolution in communications and technology has obliterated the near monopoly that schools once had as the source for a common culture.

One thing seems certain. As long as political leaders acquiesce in a system of public education that is largely segregated by race and socioeconomic status, the aspiration to have public schools serve as “common schools” will be hollow. An education system that permits racially and economically exclusive communities to ration access to tax-supported schools in the name of local control may be regarded as “public” only in the most formalistic sense of the word. Instead of circling our wagons in reflexive defense of nominally public schools, more will be accomplished by finding ways—inside or outside the public school system—to multiply the numbers of schools serving racially and socioeconomically diverse student bodies. Our proposals here are an effort to steer the agenda of school choice toward this important goal.

CONCLUSION

While the obstacles to advancing educational opportunity for children of color and the poor remain daunting, this is not a time for despair. The impulse toward equality can be seen in many areas—in efforts to extend and improve Head Start and other preschool programs for poor children; in the eagerness of some communities to continue desegregation programs after their legal obligations have expired; in the readiness of leaders of education reform to attack the dual system under which less is expected of, and provided to, poor and minority children than others; in specific

legislative and litigation initiatives to provide children in high-poverty schools with well-qualified teachers and other key resources.

As always, the problems lie in political leadership and will, and in implementation. Whatever a program is labelled—public school choice, charter school, or voucher—it will succeed in its mission only if its admission practices are equitable, if its resources are adequate, if it is competently and honestly administered, and if it is held accountable for student progress.

Schools that are diverse by race and income have a track record of providing that kind of environment for educational success. We need to be resourceful in finding ways to break the bonds of local control and residential segregation that have prevented the replication of such school environments. If we can find the means to do so, we will give content to Brown’s promise of educational equality over its next fifty years.