

UNIVERSITY OF VIRGINIA SCHOOL OF LAW
Public Law and Legal Theory Research Papers Series

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Working Paper No. 01-17
December 2001

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THE POLITICAL ECONOMY OF SCHOOL CHOICE

James E. Ryan* and Michael Heise**

INTRODUCTION

It may be rare for voices of moderation to shift the terms of any discussion, but this is our goal regarding the debate over school choice. This debate is filled with numerous claims by advocates and foes alike concerning the impact of choice on the future of public schools, the academic prospects of students, and racial and socioeconomic integration.¹ Many of these claims are well known and equally well exaggerated. Proponents of private school choice, for example, suggest that choice is a “panacea” for the ills facing public schools, while opponents suggest that it could decimate public education.² Just as the claims are becoming quite familiar, so too are (most of) the participants: on one side stand the teachers’ unions and civil liberties groups who oppose at least private school choice, while on the other side stand free-market libertarians, religious conservatives, and a surprising number of African-American parents.³

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¹ On the effect of vouchers on public schools, compare, e.g., Jay P. Greene, An Evaluation of the Florida A-Plus Accountability and School Choice Program (arguing that the threat of vouchers in Florida has spurred public school improvements) with Gregory Camilli and Katrina Bulkley, Critique of ‘An Evaluation of the Florida A-Plus Accountability and School Choice Program, 9 Educ. Pol’y Archives (March 4, 2001) (criticizing Greene’s report and arguing that his conclusions are “implausible”). On the effect of school choice on academic achievement, compare, e.g., Paul E. Peterson, School Choice: A Report Card, 6 Va. J. Soc. Pol’y & L. 47, 70-71 (1998) (hereinafter Peterson, School Choice) (arguing that voucher students in private schools in Milwaukee have improved their achievement in math and reading) with John F. Witte, The Market Approach to Education: An Analysis of America’s First Voucher Program 125, 133-43 (2000) (criticizing Peterson’s analysis and arguing that voucher students in private schools in Milwaukee have not improved in math and reading). On the effect of school choice on racial and socioeconomic integration, compare, e.g., Martha Minow, Reforming School Reform, 68 Fordham L. Rev. 257, 270 (1999) (arguing that “[w]ithout vigorous, creative regulatory efforts, vouchers and charter schools will increase the growing racial and ethnic segregation in American schools”) with Jay P. Greene, Buckeye Inst., Choice and Community: The Racial, Economic, and Religious Context of Parental Choice in Cleveland (1999) (arguing that private schools attended by voucher recipients in Cleveland are more integrated than Cleveland’s public schools).

² Compare, e.g., John E. Chubb & Terry M. Moe, Politics, Markets, & America’s Schools 217 (1990) (suggesting that “reformers would do well to entertain the notion that choice *is* a panacea”) with James S. Liebman, Voice, Not Choice, 101 Yale L.J. 277-93 (1991) (arguing that private school choice poses a serious threat to public education).

³ See, e.g., Peter W. Cookson, Jr., School Choice: The Struggle for the Soul of American Education 17-37, 64-66 (1994) (describing proponents and opponents of school choice).

We believe that many claims regarding school choice miss the mark, and that they do so because those making them have failed to focus on the most important stakeholders in this debate: suburbanites, especially suburban parents. Suburbanites, by and large, are not wild about school choice, either public or private. Suburban parents are generally satisfied with the public schools their children attend, and they want to protect both the physical and financial sanctity of these schools.⁴ School choice threatens both. It creates the generally unwelcome possibility that outsiders – particularly urban students – will be able to attend suburban schools at the expense of local taxpayers. Choice programs also raise the possibility that some locally-raised revenues will exit local schools as students leave to attend either private schools or public schools outside of their residential districts. To the extent that choice may threaten the exclusivity and superiority of suburban schools, it may also threaten suburban housing values, which are linked to the quality of neighborhood schools.⁵ Like suburban parents, suburban homeowners without children thus also have a strong, self-interested reason to be wary of school choice.

When suburbanites perceive a threat to their schools, they fight back, and they usually win.⁶ Consider school desegregation and school finance litigation. In the former, efforts to integrate public schools came to a fairly abrupt halt in *Milliken*, precisely at the point where school desegregation threatened suburban schools.⁷ Urban school districts, especially outside the south, were left to experience the benefits and costs of school desegregation, while suburban schools remained outside of the battle zone.⁸ School finance litigation, meanwhile, never got off the ground in the United States Supreme Court, in part because it interfered with the same interest identified in *Milliken* – local control of schools.⁹ What local control meant in desegregation was essentially the ability

⁴ See, e.g., Terry Moe, *Schools, Vouchers, and The American Public* __ (2001) (describing suburban parents' support for local public schools); Peterson, Report Card, *supra* note __, at 56-57(same); David Bostis, *School Vouchers Along the Color Line*, *New York Times*, Aug. 15, 2001, at A23 (same); see also Lowell C. Rose & Alec M. Gallup, *The 32nd Annual Phi Delta Kappa/Gallup Poll Of the Public's Attitudes Toward the Public Schools*, *Phi Delta Kappan*, Sept. 2000, at 57 (noting that a higher percentage of suburbanites give their local schools a grade of "A" or "B" than do urban residents).

⁵ See, e.g., William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* (unpub. manuscript, dated March 12, 1999, on file with authors) (arguing that school quality affects housing values and that local taxpayers will tolerate property taxes provided that they are devoted to local schools).

⁶ Their success is obviously related to their political power, which has grown substantially as a result of post-World War II population shifts away from the cities and into the suburbs. See, e.g., Marilyn Gittell, *The Political Agenda of Education in the States*, in Marilyn Gittell, ed., *Strategies for School Equity* 87 (1998) ("Because of population shifts, suburbs have greater representation in state legislatures, and the cities' needs have been undermined."). For further discussion of this point, see *infra* TAN.

⁷ See *Milliken v. Bradley*, 418 U.S. 717 (1974).

⁸ For two excellent discussions of the impact of *Milliken*, see John C. Jeffries, Jr., Justice Lewis F. Powell, Jr., 312-17 (1994); and J. Harvie Wilkinson, *From Brown to Bakke* 216-49 (1976).

⁹ See *San Antonio v. Rodriguez*, 411 U.S. 1 (1973) (holding that unequal funding of schools does not violate the Equal Protection Clause in part because reliance on property taxes for school finance promotes local control).

of suburban schools to reserve their seats for neighborhood kids; what it meant in school finance litigation was the ability of suburban schools to spend unequal amounts of money – much of it locally raised -- on their own schools. Although school finance litigation has been somewhat successful on the state level, even after court-ordered reform, the general rule is that States must make an effort to provide more money for poorer districts, while wealthier districts are free to continue devoting locally raised funds to local schools.¹⁰

We believe that the same dynamic will shape school choice. In fact, it already has. Most public school choice plans are *intradistrict*, meaning that students can choose schools within a particular district but cannot cross district lines. Even intradistrict “plans” typically do not allow unfettered choice and instead protect the ability of neighborhood kids to attend neighborhood schools.¹¹ Similarly, those states that have *interdistrict* plans almost always make participation voluntary or require schools to accept out-of-district students only when space is available. Most plans also fail to provide funding for transportation, making traveling across district lines much more difficult in reality than it appears in theory. It is perhaps not surprising, then, that very few students attend public schools outside of their home school districts.¹²

The same geographic constraints are also evident in the two most recent forms of school choice: charter schools and voucher programs. Charter school legislation often limits enrollment to children residing in the school district where the charter schools are located. Those states that allow students to cross district lines to attend a charter school almost uniformly give first priority to students living within the district in which the charter school is located.¹³ Similarly, the three publicly-funded voucher programs that exist – in Milwaukee, Cleveland, and Florida – place significant constraints on where the vouchers may be used. In Milwaukee, vouchers may be used only at private schools within the Milwaukee school district. The Cleveland program offers the same option and also theoretically allows vouchers to be used in neighboring suburban schools that volunteer to accept voucher students – but not a single suburban school has done so. Florida allows more choice in theory and provides that students in persistently failing schools can use their voucher at any public or private school. But public and private schools must accept students only if space is available and thus far only two schools have “qualified” for vouchers, which has meant that only 52 students are currently receiving vouchers in Florida.¹⁴

Although we hope to resist the temptation to exaggerate, we feel confident in suggesting that understanding the political economy of school choice – and particularly the incentives and political power of suburban parents -- is the key to understanding the

¹⁰ For discussion of school finance litigation in state courts, see *infra* Part I.A.2.

¹¹ The same phenomenon that we discuss regarding suburbanites, therefore, also seems to exist within some large, urban districts, where parents whose children are in “good” urban schools fight to protect them. For further discussion of this point, see *infra* TAN.

¹² For discussion of intra- and interdistrict public school choice programs, see *infra* Parts I.B.1 & I.B.2.

¹³ For discussion of charter school programs, see *infra* Part I.B.3.

¹⁴ For discussion of existing voucher programs, see *infra* Part I.B.4.

current and future prospects of school choice, both public and private. Our central claim is that, unless the politics surrounding school choice are altered, school choice plans will be structured so as to protect the physical and financial independence of suburban public schools. As a result, school choice plans will be geographically constrained and will generally tend to be intradistrict. Voucher programs in particular are likely to be limited to urban areas, where parents feel little attachment to neighborhood public schools and are desperate for relief.

If our central claim is correct and school choice plans continue to be limited in scope, it becomes possible to provide a more realistic assessment of the costs and benefits of school choice. Limited school choice plans will neither be a panacea for public school students nor will they be much of a threat to the status quo. Instead, as we hope to show, such plans hold the promise of limited academic improvement, little to no gain in racial and socioeconomic integration, and limited gains in efficiency among public schools. This is not to deny that limited school choice plans have real costs or benefits, but rather to make the (hopefully) uncontroversial point that those costs and benefits will be as limited as the plans are. The larger and perhaps more controversial point is that significant gains in academic achievement, racial and socioeconomic integration, and efficiency will never be realized unless choice plans are structured to allow a meaningful opportunity for poorer students to attend schools outside of their neighborhoods and outside of their districts.

Although we are not optimistic that such plans can succeed politically, we do think that some steps can be taken to increase the options available to students within a choice program. The final Part of this Article offers some suggestions in this regard. In particular, we suggest that those interested in long-term change should focus on ways to alter the almost reflexive attachment to neighborhood public schools. We believe that one of the most promising ways to accomplish this goal is to support the increasingly popular drive for universal access to preschool. Preschools are not typically organized on a neighborhood basis and are just as often operated privately; our supposition is that if more parents experience a range of government-funded choices among preschools, this experience could make them supportive of programs that offer a similar range of choices among elementary and secondary schools.

The Article proceeds in three Parts. We begin by documenting a historical pattern in education reform, the central feature of which is that structural reforms tend to stop at the boundaries separating urban and suburban school districts, affecting the former and leaving the latter mostly untouched. We then show how school choice plans thus far conform to this same pattern, and we conclude the first Part by explaining how the political economy of school choice, if unaltered, will produce limited school choice plans. The second Part assesses the probable impact of limited school choice plans on racial and socioeconomic integration, academic achievement, and the efficiency of public schools. We argue that limited choice plans will have a correspondingly limited impact on all three factors and suggest that the theoretical benefits of school choice will never be realized unless choice programs offer a meaningful opportunity for poorer students to escape impoverished schools. The final Part offers some suggestions as to how choice

plans might be expanded in politically acceptable ways and explains why expanding the opportunities for children to attend preschool could be a powerful means of altering parental expectations and preferences regarding the provision of education.

I. SCHOOL CHOICE AND THE SUBURBS

A. The Historical Context

To understand the current political dynamics of school choice, it is helpful to place school choice in historical context by considering the character and progression of earlier educational reforms. In the last fifty years, there have been two substantial and sustained efforts to alter the structure of public education in order to equalize educational opportunities: school desegregation and school finance reform. Both reforms initially sought to equalize opportunities by erasing the boundaries, whether physical or financial, that separated schools and school districts. School desegregation sought to erase physical boundaries between traditionally white and traditionally black schools, while school finance reform tried to eliminate financial boundaries between rich and poor schools by equalizing the resources available to all schools within a state.¹⁵ To a very real extent, both school desegregation and school finance reform pitted equality of opportunity against local control regarding student attendance and finances. Put differently, desegregation and school finance reform threatened the concept of the traditional neighborhood school, attended only by local students and paid for primarily by local residents, who could devote as much money on their “own” schools as they wished.

From one perspective, school choice -- both public and private -- is of a piece with school desegregation and school finance. To be sure, school choice is nascent by comparison and is capable of promoting goals, such as increased liberty and efficiency, that have little to do with equity.¹⁶ It is nonetheless fair to say that school choice represents the latest major attempt to restructure public education in order to equalize opportunities among students. The core principle of school choice is an equitable one, as school choice grants to poorer students an opportunity -- the opportunity to choose their own schools -- that is now reserved for wealthier students.¹⁷ Moreover, school choice is

¹⁵ For further discussion of the initial goals of school desegregation and school finance litigation, see James E. Ryan, *Schools, Race, and Money*, 109 *Yale L.J.* 249, 258-72 (1999).

¹⁶ Chubb & Moe, in their influential book *Politics, Markets, & Schools*, supra note ___ essentially make an efficiency-based argument in favor of school choice. See also Jeffrey R. Henig, *Rethinking School Choice: Limits of the Market Metaphor* 57-58 (1994) (describing theory that school choice will force schools “to increase the quality of education and the efficiency with which they deliver it, or else risk going out of business”).

¹⁷ Some school choice advocates base their arguments in favor of choice on precisely this point. Two excellent examples are Joseph P. Viteritti, *Choosing Equality: School Choice, the Constitution, and Civil Society* (1999); and John E. Coons & Stephen D. Sugarman, *Scholarships for Children* (1992). Notably, it is political conservatives -- not typically known for supporting efforts to ensure equality between the poor and the wealthy -- who often advocate school choice as a means of assuring that poor and middle-class parents have similar choices. Richard D. Kahlenberg, *All Together Now: Creating Middle-Class Schools*

theoretically linked to school desegregation and school finance reform, insofar as school choice will succeed in equalizing educational opportunities only to the extent that it succeeds in limiting local governmental control over student attendance and finances. The relationship is quite simple: to the extent that students have the right to choose their schools, local schools and districts will lose the right to choose their students and limit their revenues to local schools and residents.

The important question for school choice is whether it will share not only a theoretical link to school desegregation and school finance reform, but a practical one as well. In practice, school desegregation and school finance reform have fallen far short of the ideal of equalizing educational opportunity. Both school desegregation and school finance reform have foundered on the shoals of local control – or *suburban* local control, to be more precise. Indeed, if one were to conceive of these reforms as a contest between equality of opportunity and the suburban neighborhood school, one would have to declare the latter the overall winner. Consider first the example of school desegregation, and in particular the reaction to court-ordered busing.

1. School Desegregation

After allowing the South to resist desegregation for more than a decade, the Supreme Court in 1968 finally ordered southern school districts to make substantial efforts to integrate their schools.¹⁸ In 1971, in *Swann v. Charlotte-Mecklenberg*, the Court went further and approved busing students within a district in order to integrate schools.¹⁹ By the end of 1974, however, the Court had imposed a devastating limitation on school desegregation remedies and busing in particular. In *Milliken v. Bradley*, the Court prohibited busing between urban and suburban school districts absent unusual and difficult-to-prove circumstances.²⁰ All-out desegregation would continue within urban districts, which essentially meant that poor black kids and a dwindling number of poor

Through Public School Choice 148 (2000). William Bennett, for example, argues that “poor parents ought to be able to make the same kinds of choices that middle-class parents make for their children.” *Id.*

¹⁸ The Court finally brought down the hammer in *Green v. New Kent County*, 391 U.S. 430 (1968), when it ordered school districts to take affirmative steps to integrate students, and to do so immediately. As the Court said, “[t]he burden on the school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.” *Id.* at 439.

¹⁹ *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1 (1971).

²⁰ *Milliken* held that interdistrict relief could only be ordered upon proof of an interdistrict violation, which the Court suggested might involve drawing district lines upon the basis of race. *Milliken*, 418 U.S. at _____. Such proof was hard to come by primarily because residential segregation between cities and suburbs made altering school district lines that tracked municipal boundaries largely unnecessary. See, e.g., Gary Orfield, et al., *Deepening Segregation in American Public Schools 20* (April 5, 1997). The Supreme Court, however, and lower courts after them, tended to avoid the important question of whether government was responsible for residential segregation. See *id.* at ____ (refusing to address the district court’s finding of government responsibility for residential segregation in metropolitan Detroit because the court of appeals did not rely upon it in the district court’s order); *Wilkinson, Brown to Bakke*, *supra* note ___, at 223-25 (“the Court finessed the question” of residential segregation in *Milliken*). As a result, very few courts provided interdistrict relief. See *infra* TAN for further discussion of the few interdistrict desegregation orders.

white kids would be bused from one urban school to another. Suburban schools, meanwhile, generally would remain inviolable, out of the reach of desegregation decrees and out of the tumultuous integration controversies that wracked cities like Boston.²¹

Milliken is often identified as the reason why school desegregation failed to reach suburban schools in northern and western metropolitan areas. Although an accurate assessment as far as it goes, it is important to recognize that *Milliken* was not decided in a political vacuum. On the contrary, *Milliken* came during a period of intense anti-busing political activity, which began shortly after the Court's decision in *Swann*. Over the five years following *Swann*, the public consistently expressed strong opposition to mandatory busing in polls, and state and national politicians worked hard to limit busing.²²

On the national level, President Nixon blasted busing and defended the neighborhood school. Nixon campaigned on the issue in 1968 and repeated his criticism of busing once in office.²³ In March of 1972, Nixon delivered a televised address devoted exclusively to the topic, in which he again denounced busing to achieve racial balance.²⁴ Nixon made his appearance a few months after federal district court judges in Detroit and Richmond had ordered suburban districts to participate in a metropolitan-wide desegregation busing plan.²⁵ The Supreme Court would eventually overturn these orders,²⁶ but in 1972, it appeared to many that suburbanites might be forced to participate in wide-ranging busing plans.²⁷

In his televised address, Nixon offered a compromise that would surface in various guises time and again in federal and state debates regarding education reform. He proposed legislation that would prohibit busing to achieve racial balance, suggesting that such legislation was consistent with the views of “[t]he great majority of Americans – white and black – [who] feel strongly that the busing of school children away from their

²¹ See Wilkinson, *Brown to Bakke* 213-22 (describing how busing primarily affected poor whites and blacks and noting that *Milliken* “saved” the suburbs”); J. Anthony Lucas, *Common Ground* (1985) (describing desegregation battle in Boston).

²² For an excellent overview of the busing controversy, see Judith F. Buncher, *The School Busing Controversy: 1970-75* (1975) (collecting newspaper editorials and articles on busing decisions and anti-busing legislation).

²³ Gary Orfield, *Must We Bus?* 242-244 (1978).

²⁴ Transcript of Nixon's Statement on School Busing, *New York Times*, March 17, 1972, at 22 (hereinafter *Nixon Busing Transcript*).

²⁵ See *Bradley v. Milliken*, 345 F. Supp. 914, 916 (E.D. Mich. 1972) (describing earlier, unpublished order that required metropolitan-wide desegregation remedy); *Bradley v. Richmond School Bd.*, 338 F. Supp. 67 (W.D. Va. 1972) (ordering the merger of Richmond and two suburban counties to promote desegregation). Nixon made reference to the decisions in his speech, urging that immediate action to stop busing was needed “because of a number of recent decisions of the lower Federal courts . . . ordering massive busing to achieve racial balance.”

²⁶ *Milliken v. Bradley*, 418 U.S. 717 (1974); *Richmond School Bd. v. Virginia Bd. of Educ.*, 412 U.S. 92 (1973) (upholding, by a divided 4-4 vote, court of appeals decision that had overturned the district court's merger order).

²⁷ Orfield, *Must We Bus*, *supra* note ___, at 247.

own neighborhoods for the purpose of achieving racial balance is wrong.”²⁸ At the same time, the proposed legislation would direct additional federal funds to poor, inner-city schools. Nixon exhorted his television audience: “It is time for us to make a national commitment to see that the schools in the central cities are upgraded so that the children who go there will have just as good a chance to get quality education as do the children who go to school in the suburbs.”²⁹ An admirable notion, to be sure, but recall the context: Nixon was giving an anti-busing speech. The compromise Nixon proposed to the nation (and to the courts) was thus quite clear: kids in inner-city schools would not be permitted to attend suburban schools, but they would be entitled to additional resources.³⁰

Members of Congress, meanwhile, tripped over each other in rushing to introduce an array of measures designed to limit busing, ranging from constitutional amendments outlawing busing to legislation that would restrict the ability of federal courts to hear desegregation cases.³¹ Congress even considered a proposal to deny gasoline for school buses that would take students farther than their neighborhood school.³² Congress eventually managed to enact legislation declaring that “the neighborhood is the appropriate basis for determining public school assignments” and purporting to prohibit courts or federal agencies from ordering the busing of any student beyond her neighborhood school.³³ Although important symbolically, the legislation had little effect, as courts interpreted the act to allow busing as a remedy for de jure segregation.³⁴ Congress also passed legislation that was more effective, though less publicized, which prohibited federally funded legal services organizations from working on desegregation litigation.³⁵ The Nixon Administration, meanwhile, not only reduced pressure on school districts to desegregate but intervened in cases to oppose extensive desegregation remedies.³⁶

²⁸ Nixon Busing Transcript, *supra* note ___, at 22.

²⁹ *Id.*

³⁰ It is worth noting that Nixon’s compromise proposal ignored the conclusions of his own Commission for School Finance that such compensatory programs were largely ineffectual. George Metcalf, *From Little Rock to Boston: The History of School Desegregation* 112 (1983).

³¹ For descriptions of the various proposals introduced and considered in Congress, see Orfield, *Must We Bus*, *supra* note ___, at 247-72; Geoffrey R. Stone, et al., *Constitutional Law* 464-66 (4th ed. 2001).

³² Orfield, *Must We Bus*, *supra* note ___, at 255-57.

³³ Equal Education Opportunities Act of 1974, 20 U.S.C. §§ 1701 and 1714.

³⁴ See, e.g., *United States v. Texas Education Agency*, 532 F.2d 380, 394 n.18 (5th Cir.), vacated on other grounds sub nom. *Austin Indep. School Dist. v. United States*, 429 U.S. 990 (1976).

³⁵ The Legal Services Corporation Act, enacted on July 25, 1974, prohibited funds available under the act from being used “to provide legal assistance with respect to any proceeding or litigation relating to the desegregation of any elementary or secondary school or school system.” 42 U.S.C. 2996f(b)(7) (1974).

³⁶ See Orfield, *Must We Bus*, *supra* note ___, at 279-297; Metcalf, *History of School Desegregation*, *supra* note ___, at 112-114; James T. Patterson, *Grand Expectations* 730-735 (1996).

Opposition to busing within Congress was not limited to the traditional group of southern conservatives and northern sympathizers who reflexively opposed strong efforts to desegregate schools. Instead, anti-busing legislation in the early 1970s was just as likely to be introduced and supported by northern moderates and liberals whose constituents were facing the prospect of busing for school desegregation.³⁷ The measure to cut off gasoline for school buses, for example, was proposed by John Dingell, a Democrat from the Detroit suburbs.³⁸ Similarly, Birch Bayh, Democratic Senator from Indiana, introduced legislation in 1974 that would limit busing in general and cross-district busing in particular. At the time, Indianapolis faced the possibility of being ordered to participate in a metropolitan-wide desegregation plan, and Bayh faced a reelection challenge from Richard Lugar, then mayor of Indianapolis and a critic of busing.³⁹

Like President Nixon, those in Congress who introduced or supported anti-busing legislation explicitly sought to protect the neighborhood school and especially, if not exclusively, the suburban neighborhood school. Joseph Biden's actions in this regard are illuminating. A young, ostensibly progressive Democrat from Delaware, in 1975 Biden introduced legislation that would prohibit the federal government from encouraging or requiring busing for the purpose of school desegregation. His sponsorship of anti-busing legislation resulted from the reaction of suburbanites in Delaware to a pending lawsuit in Wilmington that sought to force busing between the city schools and those in surrounding suburbs. Although he initially supported the suit, as the antibusing movement grew in the Wilmington suburbs, Biden reconsidered.⁴⁰ As Gary Orfield described, Biden ultimately did an about face on the issue of busing, "received favorable national press attention as a tough-minded realist, and restored his white political base in the state."⁴¹

Biden was not alone, even among liberal Democrats, in seeking to immunize suburban schools from busing orders.⁴² Indeed, although members of Congress disagreed

³⁷ George Metcalf describes a virtual stampede of liberals rushing to vote in favor of antibusing measures following an outpouring of antibusing sentiment from their constituents. Metcalf, *History of School Desegregation*, supra note __, at 116-17, 162-63.

³⁸ See Orfield, *Must We Bus*, supra note __, at 255. Dingell had opposed measures to limit busing four times prior to his introduction of a measure designed to limit busing. Dingell's switch, Metcalf describes, responded to suburban opposition to desegregation and, like proposals before and since, came accompanied with pledges to increase funding for schools as a substitute for extensive desegregation. Metcalf, *History of School Desegregation*, supra note __, at 163, 193.

³⁹ On Bayh's proposal and political motivation, see Orfield, *Must We Bus*, supra note __, at 263.

⁴⁰ On the Biden episode, see Orfield, *Must We Bus*, supra note __, at 272-73; Metcalf, *History of School Desegregation*, supra note __, at 235-37.

⁴¹ See Orfield, *Must We Bus*, supra note __ at 273.

⁴² See, e.g., Lillian B. Rubin, *Busing & Backlash* 6 (1972) (describing how "[m]any northern liberal Democrats, who until [the early 1970s] had been articulate spokesmen for school integration, cast their votes for these anti-busing" measures). Shirley Chisholm, a black representative from Brooklyn, charged her white suburban counterparts with hypocrisy for their actions to limit busing: "Let me bring it down front to you. Your only concern is that whites are affected. Come out from behind your masks and tell it like it really is. Where were you when black children were bused right past the white schools." Quoted in

on the various proposals introduced to restrict busing, on the question of restricting busing across city-suburban lines, there was a large consensus.⁴³ A similar consensus existed outside of Congress. A poll conducted in 1974, the year that *Milliken* was decided, indicated that 77% of the public opposed busing across city-suburban lines.⁴⁴ Middle class communities that faced the prospects of busing “protested on an unprecedented scale,” and the mass movement taking to the streets in the early 1970s “marched not under the banner of ‘INTEGRATION NOW’ but with signs reading ‘PRESERVE OUR NEIGHBORHOOD SCHOOLS.’”⁴⁵ Not only did white communities oppose busing, but there was little organized support among blacks for busing.⁴⁶ Many blacks, like many whites, preferred sending their children to neighborhood schools rather than placing them on buses to attend distant and perhaps hostile schools.⁴⁷ It is not surprising, then, that members of Congress could agree in principle that a better strategy than integrating suburban and urban students would be to enhance education within urban schools by devoting greater resources to those schools. This, of course, was precisely the compromise proposed by Nixon in his 1972 televised address.

Perhaps not coincidentally, this was also the compromise ultimately adopted by the Supreme Court. Three years after the Court prohibited busing between Detroit city schools and the surrounding suburbs, the Court approved remedial funding for Detroit city schools. In *Milliken II*, the Court held that states could be required to fund remedial and compensatory education programs in formerly segregated schools.⁴⁸ What was true for Detroit became true for a host of other metropolitan areas in the north and west:

id. at 6; see also Alexander M. Bickel, *Undertaking the Busing Snarl*, *The New Republic*, Sept. 23 & 30 (1972), reprinted in Micolaus Mills, ed., *The Great School Bus Controversy* 28-29 (1973) (describing how Northern liberals took the lead in passing measures that virtually mandated neighborhood schools).

⁴³ See Orfield, *Must We Bus*, supra note __, at 233-278.

⁴⁴ NBC Poll, reported in *Washington-Star News*, Nov. 6, 1974. Earlier polls indicated similarly high levels of opposition. See Buncher, *School Busing Controversy*, supra note __, at 207, 210, 228, & 231. Interestingly, opposition to busing seems to have peaked in the fall of 1973, before *Milliken* and during the time when it seemed like busing might cross district lines. In September 1973, a Gallup Poll indicated that only 5% of those surveyed favored busing for racial balance; blacks indicated greater willingness than whites, but only 9% of blacks surveyed favored busing, as compared to 4% of the whites. See id. at 231. The NBC poll discussed in the text indicates that opposition to busing lessened significantly *after* the decision in *Milliken* reduced the threat of cross-district busing.

⁴⁵ Orfield, *Must We Bus*, supra note __, at 6, 248. For an interesting account of the fight over busing in the Richmond Unified District – a large, urban district in northern California -- see Rubin, *Busing & Backlash*, supra note __.

⁴⁶ Wilkinson, *Brown to Bakke*, supra note __, at 232-34; Orfield, *Must We Bus*, supra note __, at 248; Christine H. Rossell, *The Convergence of Black and White Attitudes on School Desegregation Issues During the Four Decade Evolution of the Plans*, 36 *Wm & Mary L. Rev.* 613, 639-645 (1995).

⁴⁷ See Wilkinson, *Brown to Bakke*, supra note __, at 233; Christopher Jencks, *Busing – The Supreme Court Goes North*, *N.Y. Times Mag.*, Nov. 19, 1972, reprinted in *School Bus Controversy*, supra note __, at 19. See also Metcalf, *History of School Desegregation*, supra note __, at 192 (noting that Detroit’s black mayor, Coleman Young, declared after the *Milliken* decision that he would shed “no big tears for cross-district busing” and instead demanded equal funding for Detroit schools).

⁴⁸ *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*).

students in urban school districts would be confined to those districts but would receive additional resources under the guise of “desegregation” remedies.⁴⁹

It would be easy, and it would likely be accurate, to suggest that the Supreme Court was influenced by the dominant and widespread political opposition to busing, especially busing between urban and suburban schools.⁵⁰ The 5-4 decision was far from pre-ordained; no governing precedents dictated the outcome. If anything, precedent supported the inclusion of the suburbs in a metropolitan-wide desegregation plan, making “the brief for busing between city and suburb,” in the words of Judge Wilkinson, “look[] like a winner.”⁵¹ The Court also ignored evidence of governmental involvement in residential segregation, which would have justified – on the Court’s own view of the case – an interdistrict remedy.⁵² Under the circumstances, external explanations of the Court’s decision seem more plausible than internal ones, and a solid external reason for the decision is that it coincided with the (often strongly held) views of most Americans.

Whether political pressure motivated the majority in *Milliken I* and *Milliken II*, however, is less important for purposes of this Article than is the fact that the political pressure existed. Rather than contradict popular opinion or political actions, both decisions reinforced and ultimately superseded widespread political activities designed to accomplish the same goal. The Court, like state and federal politicians, acted to protect “local control” of the schools, which in the context of *Milliken* and interdistrict integration meant the physical independence of the suburban neighborhood school.⁵³ The Court’s efforts largely succeeded. After *Milliken*, lower courts ordered interdistrict busing

⁴⁹ See Ryan, *Schools, Race, & Money*, supra note ___, at 263-64.

⁵⁰ Justice Marshall, in dissent, stated as much: “Today’s holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution’s guarantee of equal justice than it is the product of neutral principles of law.” *Milliken I*, 418 U.S. at 814 (Marshall J., dissenting). For a similar but more strident argument, see Nathaniel R. Jones, *An Anti-Black Strategy and the Supreme Court* 4 *J. Law & Educ.* 203 (1975). Jones, General Counsel of the NAACP at the time (and later a federal court of appeals judge), argued that *Milliken* represented “the sad but inevitable culmination of a national anti-black strategy” and that it should be “viewed in light of the political climate created by the [Nixon] administration.” *Id.* at 203.

⁵¹ The quote is from Wilkinson, *Brown to Bakke*, supra note ___, at 222. As for the precedent: *Green* and *Swann* required school districts to desegregate immediately and to “achieve the greatest possible degree of actual desegregation,” and *Swann* approved busing as a permissible desegregation tool. See *Green v. New Kent County*, 391 U.S. 430, 438 (1968); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971). *Keyes*, moreover, held that proof of segregation in one part of a district created a presumption that any and all segregation within the district was the result of state action. *Keyes v. School Dist.*, 413 U.S. 189, 201 (1973). An analogous presumption in *Milliken* was readily available: because the State government was involved in segregation within Detroit, it could be presumed that segregation *between* Detroit and the suburbs was the product of state action.

⁵² See *id.* at 223-24; Jones, *An Anti-Black Strategy*, supra note ___, at 206; Gary Orfield, et al., *Dismantling Desegregation* 10-15 (1996).

⁵³ See *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) (suggesting that school district lines should be protected when possible because “[n]o single tradition in public education is more deeply rooted than local control over the operation of schools”).

in only four metropolitan areas: Indianapolis, Little Rock, Wilmington, and Louisville.⁵⁴ In addition to these court orders, lower federal courts approved a settlement in a St. Louis desegregation case that involved voluntary interdistrict busing,⁵⁵ and a small number of metropolitan areas in the south were integrated because the school districts encompassed both city and suburb.⁵⁶ On the whole, however, suburban school districts received a pass and were exempted from busing plans. As Judge Wilkinson described the Court's approach, later replicated by lower courts: "With busing, [the Court] declared an all-out war, but then decided that much of the citizenry was not obliged to participate."⁵⁷

It is tempting to imagine that opposition to cross-district busing is a thing of the past and that suburbanites would now welcome the opportunity to open their schools to students from poor, urban neighborhoods. Tempting, but largely untrue. Although there are signs of progress regarding attitudes toward racial and socioeconomic integration of schools, as well as some regional variations, there is little sign that opposition to mandatory interdistrict integration has abated. In fact, the busing controversy that enveloped the country in the early 1970s is currently being replayed in Connecticut, and the sequel is turning out to be a miniaturized version of the original.

In 1996, the Connecticut Supreme Court ruled in *Sheff v. O'Neill* that de facto segregation violated the state constitution, a holding that essentially outlawed current school district lines and required the state to take affirmative steps to ensure that all schools are racially balanced.⁵⁸ One obvious legislative response that would remedy the identified violation would be cross-district busing. Yet the one legislative response that state political leaders took off the table, almost immediately, was cross-district busing.⁵⁹ Harkening back to Nixon's compromise in 1972, the governor and state legislators instead proposed to spend more money on racially isolated urban schools and slowly

⁵⁴ See *United States v. Board of Sch. Comm'rs*, 637 F.2d 1101 (7th Cir. 1980); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 778 F.2d 404 (8th Cir. 1985); *Newburg Area Council v. Board of Educ.*, 510 F.2d 1358 (6th Cir. 1974); *Evans v. Buchanan*, 582 F.2d 750 (3d Cir. 1976).

⁵⁵ See *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir. 1984). For further discussion of this plan, which is currently being dismantled, see *infra* TAN.

⁵⁶ Charlotte-Mecklenberg is the most well known. Others included several large districts in Florida, as well as the Las Vegas metropolitan area and the Nashville-Davidson county district in Tennessee. See Orfield, *Must We Bus*, *supra* note __, at 412 (containing table listing metropolitan-wide desegregation plans); Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 *Minn. L. Rev.* 825, 832-33 (1996) (same).

⁵⁷ Wilkinson, *Brown to Bakke*, *supra* note __, at 215.

⁵⁸ See *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996). For discussion of the decision and some of the commentary about *Sheff*, see James E. Ryan, *Sheff, Segregation and School Finance Litigation*, 74 *N.Y.U. L. Rev.* 529 (1999) (hereinafter Ryan, *Sheff, Segregation and School Finance*).

⁵⁹ The Governor, for example, said a few days after the decision that "[a]s long as I'm governor, [busing] will not be one of the options." Robert A. Frahm, *Court Orders Desegregation, Rowland Rules Out Busing, Vows to Keep Local School Control*, *Hartford Courant*, July 10, 1996, at A1. For descriptions of similar reactions by state and local officials, see Ryan, *Sheff, Segregation and School Finance*, *supra* note __, at 566-67 & n. 117.

offer more opportunities for interdistrict school choice.⁶⁰ In a nonsequitur that Nixon would have appreciated, the Governor's spokesman stated: "The Governor and the legislature have argued that one of the best ways to address racial balance is to improve the quality of all schools"⁶¹ Given the attitude of the Governor and the legislature, it is not surprising that very few students in Connecticut have crossed district lines to attend school since the 1996 decision.⁶² Meanwhile, racial isolation in the Hartford District – which spurred the suit in the first place – has actually worsened, while spending in the District has increased fairly dramatically.⁶³

What the national experience with busing demonstrated and the Connecticut experience confirms is quite straightforward: there is a great deal of opposition to forced interdistrict integration. At the same time, outside of a few civil rights groups, there is not much organized support for it. Black parents, who might be the most natural supporters of interdistrict busing, have always been divided on the issue, with a large number opposing a policy that forced their children to take long rides to schools that did not welcome them. With strong opposition and weak support, it is little wonder that mandatory interdistrict busing has occurred in very few jurisdictions and that even voluntary interdistrict busing plans are relatively rare and uniformly quite modest.⁶⁴ Put simply, the Supreme Court in 1972 helped halt desegregation when it reached the suburban border, and very few courts or legislatures have managed to open that border since. In consequence, suburban school districts have been able to remain physically independent of urban school districts. As the next section describes, they have also been able to remain financially independent.

⁶⁰ See Ryan, Sheff, Segregation and School Finance, *supra* note __ at 567 & n.119; Jeff Archer, Opposing Sides Agree Conn. Integration Efforts Need More Money, *Educ. Week*, Jan. 10, 2001.

⁶¹ Quoted in Rick Green, Sheff Case Goes Back to Court, *Hartford Courant*, Mar. 6, 1998, at A3.

⁶² In the 2000-01 school year, for example, approximately 2,000 students (out of 540,000 in Connecticut) participated in the State's "open choice" plan, which allows for interdistrict transfers. Rick Green, Desegregation Effort Called "Dismal": Analysts Say Racial Isolation In Schools Is Getting Worse, *Hartford Courant*, Aug. 7, 2000, at A3; Rick Green, Out-of-Town Schools Draw Support, *Hartford Courant*, April 20, 1999, at A1. The open choice plan does not currently meet demand for interdistrict transfers, see Green, Desegregation Effort, *supra*, and the low enrollment figures are due in part to the fact that "[f]ew suburban districts allocate more than a few dozen seats for the program, and many allocate none," Green, Out-of-Town Schools, *supra*. An additional 6,400 students attend regional magnet schools, but here, too, demand outstrips supply. See Archer, Opposing Sides, *supra* note __; Rick Green, Magnet Schools Drawing a Crowd; Demand is High, But Funding Falls Short, *Hartford Courant*, April 22, 2001.

⁶³ See Robert A. Frahm, Sheff Plaintiffs Back to Prod Desegregation, *Hartford Courant*, Dec. 29, 2000, at A1.

⁶⁴ For discussion of voluntary interdistrict integration plans, see *infra*, TAN.

2. *School Finance Reform*

Almost all school finance systems rely on a mixture of state and local revenue; traditionally, localities provided the bulk of funding through property tax revenues.⁶⁵ Inequalities arise because localities have differing amounts of property wealth and thus can raise disparate amounts of funding for schools based on similar property tax rates – i.e., the more property wealth, the easier it is to raise funds for schools. States make varying efforts to equalize funding, but the persistence of inequalities, not to mention the persistence of funding suits, demonstrates that such efforts typically fall short.⁶⁶

School finance litigation began at a time when many civil rights advocates were growing frustrated with the slow and uneven pace of school desegregation. Advocates hoped that by attacking funding inequalities, they would be able to improve the education available to poor and minority students. Like desegregation proponents, early school finance reformers essentially proposed a tying strategy. Whereas school desegregation would tie the fate of white and black students together by placing them in the same schools, school finance equalization would tie the fate of poor and wealthy schools together by ensuring equal access to resources.⁶⁷

The earliest proposals to reform and equalize school finance systems thus concentrated on fiscal neutrality, under which all schools within a state would have access to the same resources. Under the scheme developed by several academics and proposed in early school finance litigation, states would set a hypothetical property tax base for all districts and then fund the difference between the amount raised by taxing the actual property tax base in the district and the amount that would be raised with the hypothetical base.⁶⁸ Although the amount of funding each school district received would depend on the district's tax rate, all school districts would draw from – and thus have a

⁶⁵ For an overview of school finance systems, see Alan R. Odden & Lawrence O. Picus, *School Finance: A Policy Perspective* (1992).

⁶⁶ For discussion of the cause of inequalities and states' responses to them, see GAO Report, *School Finance: State Efforts to Equalize Funding Between Wealthy and Poor School Districts* (June 1998) (hereinafter GAO School Finance Report). See also Peter Enrich, *Leaving Equality Behind*, 48 Vand. L. Rev. 101, 104-05 (1995) (describing variations in property wealth among school districts, along with reliance on property taxes for school funding, as source of expenditure variations among districts).

⁶⁷ Sources for this paragraph include Ryan, *Schools, Race, and Money*, supra note __, at 259-60; Ryan, Sheff, *Segregation, and School Finance*, supra note __, at 563-64; Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 Ga. L. Rev. 543, 553-57 (1998).

⁶⁸ Three law professors – John Coons, William Clune, and Stephen Sugarman – most famously championed this approach. See John Coons, et al., *Equal Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 Cal. L. Rev. 305 (1969); John Coons et al., *Private Wealth and Public Education* (1970). The California Supreme Court, after concluding that California's system of school funding violated the California Constitution, suggested as an alternative that the state adopt the system of fiscal neutrality proposed by Coons and his colleagues. See *Serrano v. Priest*, 487 P.2d 1241, 1265, n.37 (1971). For a history of school finance litigation, including discussion of the legal strategy and the California litigation, see Kirk Vandersall, *Post-Brown School Finance Reform 11-22*, in Marilyn Gittell, ed., *Strategies for School Equity* (1998).

common interest in – the same pot of money. For this scheme to work completely, notice that either the hypothetical tax base would have to be higher than any actual tax base in the state or property-wealthy districts whose tax base exceeded the hypothetical one would have to transfer funds back to the state for redistribution to poorer districts. The former option is not feasible in most states, as some districts have astronomically high property values and states would bankrupt themselves were they to set the statewide tax base at equivalent or greater amounts.⁶⁹ That leaves the second option, which is practically feasible but has proven to be politically controversial, as we shall describe.

The Supreme Court put an early end to school finance litigation in the federal courts, ruling in *San Antonio v. Rodriguez* that unequal school funding schemes do not violate the United States Constitution.⁷⁰ After concluding that education was not a fundamental right, the Court held that the Texas school finance scheme rationally promoted the tradition of local control over education, a tradition that the Court also relied upon in *Milliken* to justify limiting desegregation decrees.⁷¹ Whereas in *Milliken* the Court employed the principle of local control to protect the physical sanctity of suburban schools, in *Rodriguez* the Court used the same principle to protect the financial independence of wealthier schools, most of which happen to be suburban schools.⁷²

Despite the early blow it inflicted, *Rodriguez* did not end all school finance litigation. Advocates turned their attention to state constitutions and state courts, where they have experienced mixed results. Since 1974, litigants have challenged the finance schemes in over forty states, and nearly twenty state supreme courts have declared their respective school funding programs unconstitutional.⁷³ Prior to 1989, those challenging school finance systems primarily sought equalization of resources, either through the

⁶⁹ See Coons, et al., *Private Wealth and Public Education*, supra note __, at 270-73; Arthur E. Wise, *Rich Schools, Poor Schools: The Promise of Equal Educational Opportunity* 203-04 (1968).

⁷⁰ 411 U.S. 1 (1973).

⁷¹ See *id.* at 51-55.

⁷² As of 1990-91, for example, students in the largest urban districts received on average \$873 less per pupil than did students in suburban districts. See Council of Great City Schools, *National Urban Education Goals: Baseline Indicators, 1990-91*, at 85 (1992) (reporting that, in 1990-91, the average per-pupil expenditure in the forty-seven largest urban school districts was \$5,200, compared to an average expenditure of \$6,073 in suburban schools and \$5,476 in rural schools). The latest report from the Council of Great City Schools indicates that the average per-pupil expenditure in urban schools has fallen below the national average for the first time in two decades. See *Beating the Odds. Milliken and Rodriguez* also have worked together in a number of industrialized, northern states with substantial minority populations: these states have the greatest spending disparities, the highest levels of segregation, and expenditures correlate with the racial composition of districts – i.e., the higher the percentage of minority students, the lower the expenditures. See House Comm. On Educ. & Labor, 102d Cong., *Report on Shortchanging Children: The Impact of Fiscal Inequity on the Education of Students at Risk* 19-23 (Comm. Print 1991) (prepared by William L. Taylor & Dianne M. Piche).

⁷³ For a description of and citation to the cases, see Ryan, *Schools, Race & Money*, supra note __, at 266-269 & nn. 72-86.

adoption of a fiscally neutral finance scheme or the actual guarantee of equal funding.⁷⁴ Since, 1989, however, adequacy-based challenges have largely supplanted equality-based theories. Most litigants now contend *not* that all students are entitled to the same resources, but rather that all students should receive the funds necessary to finance an adequate education.⁷⁵

Much has been and could be said about these cases.⁷⁶ For our purposes, two features of this litigation bear emphasis. The first has to do with the remedies that have been provided, and the second has to do with the changing nature of the claims that have been brought. As for the remedies, the most remarkable feature of school finance litigation is that even successful equalization cases have not led to equal funding, nor have any of the suits done much to alter the basic structure of school finance schemes.⁷⁷ Aside from Hawaii, which has only one school district for the entire state,⁷⁸ only a single state – Nevada -- has adopted an equalized school finance scheme, under which all districts could raise the average per-pupil funding at the same tax rate.⁷⁹ Inequalities caused by differing property values thus continue to exist in nearly every state, even in those states whose courts have ordered equalization.⁸⁰

The reason is not hard to fathom. As suggested above, in order to equalize funding, legislatures would have to do one of two things: raise all districts to the level of the highest spending districts or bring all districts down to a specified level and essentially cap any spending beyond that level. The first option is financially impractical in most states.⁸¹ The second option is financially possible, but it is so controversial as essentially to be politically unfeasible.⁸²

⁷⁴ See Enrich, *Leaving Equality Behind*, supra note __, at 121-42; Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”: From Equity to Adequacy*, 68 *Temple L. Rev.* 1151, 1152-53 (1995).

⁷⁵ See Ryan, *Schools, Race, & Money*, supra note __, at 268-69 (describing shift in theories and pointing out that not all cases since 1989 have shifted from equity to adequacy claims).

⁷⁶ For an excellent overview of the cases and discussion of the commentary, see Enrich, *Leaving Equality Behind*, supra note __.

⁷⁷ There is a good deal of disagreement in the literature regarding the precise impact of court decisions on school funding. For a discussion of the literature and an argument that court decisions have exerted little independent influence on spending levels, see Heise, *Hollow Victories*, supra note __, at 585-628. There is no disagreement, however, regarding the central point made in the text, namely that no school finance suits have led to equalized funding among school districts in any state.

⁷⁸ See John A. Thompson, *Notes on the Centralization of the Funding and Governance of Education in Hawaii*, 17 *J. Educ. Fin.* 286, 286 (1992).

⁷⁹ See GAO School Finance Report, supra note __, at 2-4.

⁸⁰ See *id.* at 2-8; see also Vandersall, supra note __, at 17-18 (discussing studies indicating little improvement in funding equity during the 1980s, despite successful school finance litigation).

⁸¹ See, e.g., Enrich, *Leaving Equality Behind*, supra note __, at 156 (noting that “bringing all districts up to the spending or service level of the top districts would be prohibitively expensive in most states”); Thomas Vitullo-Martin, *Charter Schools and Tax Reform in Michigan* 121-22, in Marilyn J. Gittell, ed., *Strategies for School Equity: Creating Productive Schools in a Just Society* (1998) (noting that if Michigan attempted

The controversy stems from the fact that equalizing funding by controlling local spending requires either a cap on local spending and/or the recapturing of some locally raised revenues. Neither measure is politically popular, to say the least. Local citizens, and especially parents, do not like to be told that they cannot raise and spend local revenues on their own schools.⁸³ They especially dislike the idea that locally raised revenues might be recaptured and redistributed to the rest of the state.⁸⁴ This distaste of recapture is worth a closer look, as it is quite relevant to school choice plans that could result in the expenditure of local revenue outside of local schools or on students from different districts.

Opposition to recapture arises not simply from opposition to the redistribution of wealth, but to the unique status of property tax revenues in the eyes of most voters. As one commentator describes, “[v]oters in well-financed school districts and their legislators strongly oppose any effort at redistribution from their districts. . . . They have an expectation that property taxes are ‘theirs’ to be spent in their local community, not in the rest of the state.”⁸⁵ Thus, in places like Texas, Kansas, and Vermont, recapture plans – dubbed Robin Hood schemes – have provoked continued and intense political squabbling, as well as litigation.⁸⁶ Donator districts in Kansas, for example, whose taxes

to bring all districts up to the level of the expenditure levels of the wealthiest districts, “it would require an additional \$7 billion, as much again as it was [already] spending”).

⁸² For discussion of the political difficulties raised by limiting spending or redistributing locally-raised revenues, see, e.g., Enrich, *Leaving Equality Behind*, supra note __, at 157-59; Molly S. McUsic, *The Law’s Role in the Distribution of Education: The Promise and Pitfalls of School Finance Litigation* 108-15, in Jay P. Heubert, ed., *Law & School Reform: Six Strategies for Promoting Educational Equity* (1999) [hereinafter McUsic, *Promise and Pitfalls of School Finance Litigation*]; Margaret E. Goertz, *The Courts and Reform in New Jersey*, in Marilyn J. Gittell, ed., *Strategies for School Equity: Creating Productive Schools in a Just Society* (1998).

⁸³ Consider, for example, the recent controversy when school board officials initially refused to let parents in Greenwich Village raise funds to keep a popular teacher on the staff at a local school; the parents eventually won this battle. See *NYC Parents Willing to Pay Teacher’s Salary, Get to Keep Her*, Sept. 26, 1997 (available at <http://www.cnn.com/US/9709/26/teacher.uproar>). Consider, as well, the fact that parents in California have organized numerous private foundations to supply additional funding to local schools in an effort to avoid the equalizing requirements of *Serrano*. See Fischel, *Homevoter Hypothesis*, supra note __, at 84. See generally Kern Alexander, *Equitable Financing, Local Control, and Self-Interest* 304-07, in Julie K. Underwood and Deborah A. Verstegen, eds., *The Impacts of Litigation and Legislation on Public School Finance* (1990) (arguing that attachment to local control is motivated primarily by desire of those in wealthy districts to retain ability to devote substantial resources exclusively to their own schools).

⁸⁴ For discussion of this point, see, e.g., Enrich, *Leaving Equality Behind*, supra note __, at 156-59; William H. Clune, *New Answers to Hard Questions Posed by Rodriguez*, 24 *Conn. L. Rev.* 721, 731, 739 (1992).

⁸⁵ McUsic, *Promise and Pitfalls of School Finance Litigation*, supra note __, at 109.

⁸⁶ For discussions of legislative reactions in Texas, see, e.g., Albert Cortez, *Organizing Change in Texas* 177-97, in Gittell, *Strategies for School Equity*, supra note __; Mark Yudof, *School Finance Reform in Texas: The Edgewood Saga*, 28 *Harv. J. on Leg.* 499 (1991); Sam Howe Verhovek, *Texans Reject Sharing School Wealth*, *N.Y. Times* A12 (May 3, 1993). For Kansas, see, e.g., Fischel, *Homevoter Hypothesis*, supra note __, at 59-60. For Vermont, see, e.g., Joetta L. Sack, *In Vermont’s Funding Shakeup, A Bitter*

were recaptured, filed suit on the ground that the state had taken the districts' property without compensation.⁸⁷ (Some of these districts also considered seceding from the State).⁸⁸ Four wealthy donor districts in Texas recently filed a similar suit, challenging the constitutionality of Texas' recapture scheme.⁸⁹ In Vermont, meanwhile, the Robin Hood finance plan continues to spark colorful protests. These range from novelist John Irving's highly-publicized decision to pull his son from public schools and start his own private school, to the public sledge-hammering of a station wagon once owned by the chief sponsor of the finance plan and purchased by protestors for the purpose of allowing voters to demonstrate their displeasure.⁹⁰

From one perspective, this response by voters is irrational, insofar as the majority of taxpayers are usually better off under a recapture scheme that targets a few wealthy districts than they are under a scheme that uses statewide taxes to help poorer districts. The reaction to Robin Hood plans is thus at least in part a visceral response to what seems like an improper taking of property. As William Fischel describes:

If all voters cared about was keeping their own taxes low, intercommunity property tax transfers should be the rule rather than the exception. Yet such expropriation is hardly ever undertaken when local property taxes fund the bulk of schools and other local services. In such situations, I submit that people view their property taxes as different from other taxes. They are part of their own city's or town's property, and voters are almost as loathe to grab their neighbor's "property" as they would be to use the power of the state to take their neighbors' homes without compensation.⁹¹

From another perspective, however, the response of local voters is quite rational, given how incentives shift once the source of funding shifts. When locally raised revenues are devoted to local schools, local citizens have a strong incentive to be generous: extra funding leads (or is perceived to lead) to better quality schools, which in turn raises the value of homes. When locally raised revenues must be transferred back to the state for redistribution, there is obviously less incentive to be generous and a greater temptation to free ride.⁹² The diminished incentive to raise local money for schools could in turn depress the overall amount spent on education, which could lead to

Pill for the 'Gold Towns,' *Educ. Week on the Web* (Oct. 28, 1998) (www.edweek.org) (hereinafter Sack, Bitter Pill).

⁸⁷ See *Unified School Dist. No. 229 v. State*, 885 P.2d 1170 (KS 1994) (concluding that recapture did not constitute impermissible taking of property).

⁸⁸ See Augenblick, *Role of State Legislatures*, *supra* note __, at 98.

⁸⁹ See Bess Keller, *Districts File Lawsuit Against Texas' School Finance System*, *Educ. Week on the Web* (Apr. 18, 2001) (describing suit filed by "[f]our Texas school districts that were forced by state law to share their tax revenue with poorer districts").

⁹⁰ See Sack, *Bitter Pill*, *supra* note __, at 3-5.

⁹¹ Fischel, *Homevoter Hypothesis*, *supra* note __, at 60.

⁹² For discussion of this point, see Fischel, *Homevoter Hypothesis*, *supra* note __, at 48-67; McUsic, *Promise and Pitfalls of School Finance Litigation*, *supra* note __, at 112-15.

an overall decline in the value of schools – and a concomitant drop in housing prices.⁹³ This was essentially the experience in California after the California Supreme Court ordered equalized spending. The voters responded by enacting Prop 13, which capped property taxes and thereby limited the local revenue available for schools.⁹⁴ The State has never made up the difference, and spending in California has plummeted: once the 5th highest spending state, California now ranks 43rd in funding per pupil.⁹⁵

Whether as a result of pure politics or as a result of learning from California’s experience, almost no school finance systems – even those reformed in response to a court order – limit the amount that local districts can raise.⁹⁶ Similarly, very few rely on explicit recapture provisions.⁹⁷ The typical response to court-ordered equalization has been to increase state aid to poorer districts.⁹⁸ State aid to wealthier districts is usually held constant or increased at a slower rate than aid to poorer districts,⁹⁹ but wealthier districts themselves are typically allowed to “us[e] their wealth to spend beyond the means of the other districts.”¹⁰⁰ Providing more state aid to poorer districts while holding such aid to wealthier districts constant is, of course, redistributive, and it is often controversial.¹⁰¹ But the controversy generated by this response is nowhere near as

⁹³ See Fischel, Homevoter Hypothesis, *supra* note __, at 3-6; McUsic, Promise and Pitfalls of School Finance Litigation, *supra* note __, at 111-14.

⁹⁴ William Fischel has tirelessly and effectively promoted this point in various articles and books. For a recent formulation, see Fischel, Homevoter Hypothesis, *supra* note __, at 49-62.

⁹⁵ California ranked 5th in spending in 1970. U.S. Dep’t of Commerce, 1970 Stat. Abs. U.S., tbl. 181, at 122. In 1999, California ranked 43rd. U.S. Dep’t of Commerce, 2000 Stat. Abs. U.S., tbls. 275, at 172.

⁹⁶ See John Augenblick, The Role of State Legislatures in School Finance Reform: Looking Backward and Looking Ahead 93 [hereinafter Augenblick, Role of State Legislatures], in Marilyn J. Gittell, ed., *Strategies for School Equity: Creating Productive Schools in a Just Society* (1998) (noting that Colorado and Washington are among the very few states that place limits on how much revenue school districts can choose to raise on their own).

⁹⁷ See Augenblick, Role of State Legislatures, *supra* note __, at 93; McUsic, Promise and Pitfalls of School Finance Litigation, *supra* note __, at 111; Enrich, Leaving Equality Behind, *supra* note __, at 158. See also Gittell, *supra* note __, at 70-83 (listing legislative school finance reforms current to 1997).

⁹⁸ See William N. Evans, et al., Schoolhouses, Courthouses, and Statehouses After Serrano, 16 *J. Pol’y Analysis & Man.* 10, 12 (1997) (concluding from study of litigation and legislative responses that “[c]ourt-ordered reform reduced inequality by raising spending at the bottom of the distribution while leaving spending at the top unchanged”); McCusic, Promise and Pitfalls of School Finance Litigation, *supra* note __, at 109-110 (discussing legislative responses to court orders); GAO School Finance Report, *supra* note __, at 20-29 (discussing state efforts at equalization)

⁹⁹ Evans, et al., *supra* note __, at 12-13.

¹⁰⁰ Enrich, *supra* note __, at 158.

¹⁰¹ The long-running controversy in New Jersey is probably the most well-known example. For an insightful discussion of the school finance saga in that State, see Goertz, Courts and Reform in New Jersey, *supra* note __. One important point to emphasize about the New Jersey litigation is that it has not led to the same result reached in California; unlike in California, education spending in New Jersey has continued to rise despite equalization orders. One reason for this appears to be that the remedy in New Jersey does not limit local spending nor require recapture; instead, it requires that the State insure that the poorest 28 districts are able to spend at the same level as the wealthiest districts. See *id.*; see also Paul L. Tractenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29

intense as that created by recapture provisions – a point that legislatures will have to bear in mind when and if they determine how to finance interdistrict school choice plans.

The second feature of school finance litigation worth emphasizing is the switch in litigation strategies from equity to adequacy claims. Legislators are not the only ones to have recognized the political difficulty in equalizing resources. Advocates have as well, and they have generally altered the goal of school finance litigation. Instead of seeking equal funding or equal access to resources, most school finance suits now seek sufficient resources to fund an adequate education.¹⁰²

A number of considerations prompted the switch in strategies and goals, including the fact that strict equality of resources could actually harm some urban districts, whose property values are higher than the state average.¹⁰³ It seems clear, however, that one important consideration was political. Seeking adequate instead of equal resources is politically less controversial, as it does not raise the specter of leveling down through spending caps or recapture provisions. As one commentator described, adequacy arguments are “less threatening” than equality arguments, because they do not threaten the ability of wealthy districts to retain a superior position.¹⁰⁴ “Adequacy does not require that different districts be equally able to provide resources, but only that the state ensure a reasonable level of resources for all. Thus, there is no conflict with reliance on local property taxation as a mainstay of school finance . . . nor does adequacy constrain the prerogative of a local district to dedicate additional resources to its schools.”¹⁰⁵ Perhaps because they are less threatening, adequacy suits have proven more successful in court than have equality suits.¹⁰⁶

Even successful adequacy suits, however, presuppose that existing funding inequalities will remain. More precisely, adequacy suits abandon the idea of tying districts together financially by requiring access to equal resources. Those districts that can fund a greater-than-adequate education are free to do so. While not all of these districts are in the suburbs, the vast majority are.¹⁰⁷ The progression of school finance

Rutgers L.J. 827, 933-939 (1998). The lesson that Goertz concludes from New Jersey is that to insure support from the “groups with influence in the legislature,” namely “high-wealth communities, other suburban communities with Republican legislators, and the major education interest groups,” school finance reforms “cannot level down spending [nor] take money away from wealthy communities.”

¹⁰² See supra TAN.

¹⁰³ See, e.g., Heise, *Hollow Victories*, supra note __, at 579-84 (discussing reasons for switch to adequacy claims, which include the fact that some urban districts would lose funds if state per-pupil spending were equalized).

¹⁰⁴ Enrich, *Leaving Equality Behind*, supra note __, at 168-69.

¹⁰⁵ *Id.* at 170; see also McUsic, *Promise and Pitfalls of School Finance Litigation*, supra note __, at 119 (arguing that adequacy claims have “political” advantages over equality claims, including the fact that “[u]nder adequacy claims, [wealthy] districts remain free to exploit their local property wealth in pursuit of educational excellence).

¹⁰⁶ See Ryan, *Schools, Race, and Money*, supra note __, at 267-269 (describing and citing second- and third-wave cases).

¹⁰⁷ See supra TAN (describing differences in expenditures among suburban, urban, and rural districts).

suits has thus paralleled the progression of desegregation suits, in that both reforms have preserved the boundaries between urban and suburban districts. Indeed, the parallel between adequacy suits and *Milliken II* relief is quite striking: both channel resources to poor, often urban districts while protecting the independence and sanctity of wealthy, usually suburban districts.

The desegregation and school finance experiences, we suggest, offer some important insights into the prospects for school choice plans, either public or private. It seems clear from the experience with desegregation, stretching from the busing crises to the *Sheff* decision, that suburban districts and their legislators can be expected to resist any attempt to join them forcibly with urban districts. One would therefore expect that suburban districts would oppose any choice plan – be it public or private – that *requires* suburban schools to accept interdistrict transfers. Such a plan would be little different from a one-way mandatory interdistrict busing plan. At the same time, the experience thus far with school finance reform suggests that it will be politically difficult to use local revenues to fund school choice plans that allow students to leave the district or public schools altogether, as such plans would be functionally similar to recapture provisions that require the redistribution of locally-raised school revenues.¹⁰⁸ Put simply, the dynamics of school finance reform suggest that states will likely have to bear most if not all of the responsibility for funding interdistrict or private school choice. This will obviously limit the amount of money available to students, which in turn will limit their options.

Taken together, the progression of school desegregation and school finance reform indicates that school choice plans are likely to be fairly limited in scope and ambition. Politically, school choice seems most likely to succeed when it is confined to districts where there is not a great deal of attachment to neighborhood schools, which is most likely to be true in urban districts where neighborhood schools are not very good. Even within urban districts, however, there may be opposition to school choice if some neighborhood schools are much better than others. The dynamic between suburban and urban districts that we describe thus may also exist *within* some urban districts, making widespread intradistrict choice plans politically difficult to adopt and implement there. Any effort to extend choice beyond a particular district or to include private schools will be even more difficult politically, in large part because such plans threaten (or will be perceived to threaten) suburban schools. What we should expect to see, in short, are scattered, geographically constrained choice plans that are used primarily in urban areas with a large number of inadequate schools. What we should not expect to see, unless some significant political changes occur, are statewide or even robust regional choice plans. Although school choice in general is in what one could call the toddler years, the pattern that is emerging conforms to these expectations.

¹⁰⁸ Cf. Vitullo-Martin, *Charter Schools and Reform in Michigan*, supra note __, at 122 (arguing that, “in political reality, [the state] could not direct local school districts to spend local education tax dollars on charter schools that were not controlled by local authorities, nor require local taxpayers to pay the costs of out-of-district students to those schools”)

B. The Shape of School Choice

Formal school choice plans come in four main varieties: intra- and interdistrict public school choice, charter schools, and voucher plans. Although vouchers for private schools generate the most controversy and have attracted the most attention, they represent a tiny portion of the existing school choice universe. Most school choice currently occurs among public schools. Moreover, within the realm of formal public school choice plans, most students choose among schools within one district. The largest school choice “program,” of course, is not formalized at all, but rather occurs when parents select where to live based on the quality of public schools in a residential area.¹⁰⁹ The existence of this type of school choice, which by conservative estimates encompasses at least 25% of public school students, is widely recognized but rarely discussed.¹¹⁰ The fact that such a large number of parents have already exercised a form of school choice, however, is a crucial starting point in understanding the shape of current school choice plans as well as the political dynamics surrounding proposals to expand school choice.

1. Intradistrict Public School Choice

The next most popular form of school choice, after what could be called residential school choice, allows students to attend a non-neighborhood school within a single school district. Approximately four to five million students are involved in intradistrict choice plans.¹¹¹ Although this number dwarfs the number of students involved in other types of school choice, it still only encompasses approximately 8 - 10% of all public school students.¹¹² Even this relatively modest figure may give a misleading impression regarding the degree of choice made available in intradistrict plans, most of which are designed to protect the neighborhood school.

There are three types of intradistrict plans. By far the most popular offer students the opportunity to attend one or more specialized schools within a district. These schools tend to offer alternative or accelerated programs and often use selective admission criteria. Famous examples include Boston’s Latin School, Bronx Science, and Lowell High School in San Francisco.¹¹³ In addition, a number of districts have created magnet

¹⁰⁹ Martha Minow, *Choice or Commonality: Welfare and Schooling After the End of Welfare as We Knew It*, 49 *Duke L.J.* 493, 506 n.34 (1999).

¹¹⁰ For an exceptional discussion of residential school choice, including discussion of the estimated number of families exercising such choice, see Jeffrey R. Henig & Stephen D. Sugarman, *The Nature and Extent of School Choice*, in Stephen D. Sugarman & Frank Kemerer, eds., *School Choice and Social Controversy: Politics, Policy, and Law* 14-17 (1999).

¹¹¹ See Henig & Sugarman, *Nature and Extent of School Choice*, *supra*, at 17; *Public School Choice Programs, 1993-94: Availability and Student Participation*, NCES IB-9-96, at 2 (Dec. 1996).

¹¹² See Henig & Sugarman, *Nature and Extent of School Choice*, at 32 n.8.

¹¹³ See Henig & Sugarman, *Nature and Extent of School Choice*, at 17-18.

schools in order to foster voluntary racial integration.¹¹⁴ Like traditional alternative schools, magnet schools typically offer specialized programs or curricular themes. Because they are designed to encourage racial integration, they often employ racial balance criteria in selecting students.¹¹⁵ Although specialized or magnet schools obviously increase the public school options available to students and parents, notice that these programs do nothing to alter the traditional organization of public schooling: the default in these districts is that students are assigned to neighborhood schools. This default further suggests that there may be resistance to widespread choice plans even within urban districts, especially if those districts are characterized by residential segregation by race and income and feature schools that range in quality. We should expect, in these circumstances, opposition to widespread intradistrict choice from those parents whose children attend the better schools within the district.

A more far-reaching but much less prevalent type of intradistrict choice plan requires all parents within a district to select a school for their child. Students are not assigned to neighborhood schools, and there is no guarantee that parents who choose a neighborhood school for their child will receive their first choice. Parents typically list several choices among district schools, and school officials then make the final assignments, usually with an eye toward creating racially and/or socioeconomically integrated schools.¹¹⁶ While confined to single districts, these controlled-choice plans are nonetheless fairly radical in their departure from the traditional neighborhood assignment plan. They are also, probably for that reason, quite rare. Developed first in Cambridge, Massachusetts in 1981, such plans currently exist in little more than a handful of districts nationwide.¹¹⁷

Rounding out the picture are districts that allow for individual student transfers out of neighborhood schools. These programs can either be formalized, such as the one in New York City, or remain fairly informal, with principals of neighborhood schools retaining a good deal of discretion as to whether to accept non-neighborhood students.¹¹⁸ In either case, first priority is given to neighborhood children. In New York, for example, students are allowed to choose among any public school, but cross-community transfers are allowed only when space is available. Given that most public schools in New York are already overflowing with neighborhood kids, there is usually no space for

¹¹⁴ A 1995 study reports that 1.2 million students attended magnet schools that year, most of them within their home districts, most of which, in turn, were urban districts. See Rolf Blank, et al., *After 15 Years, Magnet Schools in Urban Education*, in Richard Elmore & Bruce Fuller, eds., *Who Chooses, Who Loses? Culture, Institutions, and the Unequal Effects of School Choice* (1996).

¹¹⁵ Henig & Sugarman, *Nature and Extent of School Choice*, supra note ___, at 18.

¹¹⁶ For discussion of these “controlled choice” plans, see, e.g., Viteritti, *Choosing Equality*, supra note ___, at 58-60; Kahlenberg, *All Together Now*, supra note ___, at 116-30; Henig, *Rethinking School Choice*, supra note ___, at 111.

¹¹⁷ See Henig, *Rethinking School Choice*, at 111; Henig & Sugarman, *Nature and Extent of School Choice*, supra note ___, at 19.

¹¹⁸ See Henig & Sugarman, *Nature and Extent of School Choice*, supra note ___, at 20.

outsiders, rendering school choice more theoretical than real for the overwhelming majority of New York public school students.¹¹⁹

2. *Interdistrict Public School Choice*

A large gap also separates the theory and reality of interdistrict choice programs. These programs come in two varieties: statewide open enrollment plans and more targeted urban-suburban choice plans created to foster racial integration. Neither type of plan has led to much movement across district boundaries. Indeed, despite what might seem like a large number of programs, the number of students participating in interdistrict choice is miniscule. As of 1993, only about 200,000 students nationwide were involved in such plans; that figure represented *less than one half of one-percent* of all public school children.¹²⁰ Although growing rates of participation have since been reported in various states, the figures are tiny and suggest that participation is still limited to less than one percent of all public school students.¹²¹ A closer look at the open enrollment and urban-suburban choice plans reveals several structural limitations that help protect the autonomy of suburban districts and also help explain why participation rates are low.

On paper, eighteen states have open enrollment plans, which ostensibly allow students to attend any school within the state.¹²² Minnesota began this trend in the late 1980s and has since been followed by seventeen other states, most of which created their plans in the early 1990s.¹²³ Despite the promise of open enrollment statewide, a number of formal caveats and practical obstacles limit the options available to students. The most important caveat, at least for purposes of this paper, is that participation in most state plans is at least partially optional. In all but four states, local districts can decide whether or not they wish to participate as receiving districts; fewer states (but still a majority) allow districts to control exit from as well as entry into the district.¹²⁴ All plans,

¹¹⁹ See Mark Schneider, et al., *Institutional Arrangements and the Creation of Social Capital: The Effects of Public School Choice*, 91 *Am. Pol. Sci. Rev.* 85 (1997); Henig & Sugarman, *Nature and Extent of School Choice*, *supra* note __, at 20.

¹²⁰ Henig & Sugarman, *Nature and Extent of School Choice*, *supra* note __, at 22.

¹²¹ See Henig & Sugarman, *supra* note __, at 22. In Iowa, for example, participation rates grew to 2.6% in 1996-97, after the plan had been in place for seven years; in Minnesota the figure grew over a comparable period of time to 2.3%. Celia Rouse & M. McLaughlin, *Can the Invisible Hand Improve Education? A Review of Competition and School Efficiency 14*, National Research Council (1998) (unpub. paper, on file with authors). These rates of growth lead Henig & Sugarman to estimate that currently there are approximately 300,000 students participating in interdistrict choice programs; this estimated figure still represents only 6/10 of one percent of all students. See Henig & Sugarman, *supra*, at 29.

¹²² See, e.g., Nina Shokraii Rees, *School Choice 2000: What's Happening In the States*, at xxii (2000) (listing states); Kahlenberg, *All Together Now*, *supra* note __, at 151.

¹²³ See Henig, *Rethinking School Choice*, *supra* note __, at 224. For an excellent description of various states' open enrollment plans as of 1993, see Louanne Bierlein, *A National Review of Open Enrollment/Choice: Debates and Description* (July 1993) (hereinafter Bierlein, *National Review*).

¹²⁴ See Bierlein, *National Review*, *supra* note __, at B1-B49; see also Henig & Sugarman, *supra* note __, at 21 (noting that in Ohio, where districts have the option of participating or not, "the major urban school districts have opted not to participate for fear of losing far more students than they could expect to attract").

moreover, give first priority to students living within a desired district to attend the districts' schools. That is, no plans require districts to accept students unless space is available.¹²⁵

From an historical perspective, it is not surprising that the plans are structured this way. That almost all open enrollment plans are voluntary and allow districts to reject incoming transfers is understandable when considered within the context of interdistrict desegregation. In light of the intense opposition to mandatory interdistrict integration, discussed above, it would be odd for state legislatures to require districts to accept out-of-district transfer students. It is thus probably no coincidence that the states that require districts to accept transfer students – such as Iowa, Nebraska, Utah, and Washington – tend to have relatively few urban areas, relatively small percentages of minority students, and had limited experience with school desegregation.¹²⁶ In addition, that all plans, even the few mandatory ones, allow for transfers only if space is not already taken by resident students is consistent with the traditional preference for neighborhood schools. Indeed, this feature is similar to the one that exists in those districts that allow intradistrict transfers only if space is not already taken by neighborhood residents.¹²⁷

These structural limitations obviously reduce the options available to students. In some states, the majority of districts simply have opted out of the program. As of 1995-96, for example, only 89 of Massachusetts 331 districts accepted transfer students.¹²⁸ In Arkansas, as of 1993, only 163 out of 319 districts were participating.¹²⁹ Although most states with open enrollment plans report much higher rates of district participation,¹³⁰ the fact that districts will nonetheless accept transfer students only when space is available restricts the actual number of possible transfers. We have been unable to find data regarding the actual or reported capacities of districts, so it is difficult to assess with any precision how many transfer options are available in the various states. It is therefore difficult to gauge whether the remarkably low participation rates are due more to lack of space (whether alleged or real) or to lack of interest. Undoubtedly space constraints and personal preferences *both* play a role in limiting participation, but it is impossible to tell without more data which factor is more important.

There is good reason to suppose, however, that at least relatively high-spending districts have an incentive to limit or block the transfer of students into their districts. As discussed above, school financing is organized by district and disparities exist among

¹²⁵ Bierlein, National Review, supra note __, at B1-B49.

¹²⁶ See Bierlein, National Review, supra note __, at B20—23 (Iowa); B30-33 (Nebraska); B40-42 (Utah); B44-45 (Washington). For more information about the demographics of public schools in these four states, including in their urban school districts, see Quality Counts '98: The Urban Challenge, Education Week, Jan. 8, 1998, at 153-55 (Iowa); 195-97 (Nebraska); 254-56 (Utah); 262-64 (Washington).

¹²⁷ See supra TAN.

¹²⁸ David J. Armor & Brett M. Peiser, Interdistrict Choice in Massachusetts, in Paul E. Peterson & Bryan C. Hassell, eds., Learning From School Choice 160 (1998).

¹²⁹ Bierlein, National Review, supra note __, at B11

¹³⁰ Bierlein, National Review, supra note __, at B1 -- B49.

different districts. Interdistrict transfers thus pose more complicated financial (and political) questions than do intradistrict transfers.¹³¹ Although funding schemes for interdistrict plans vary in their details, states generally require receiving districts to pick up part of the tab for incoming transfers. States typically allow state aid to follow the student, and sometimes require sending districts or parents to pay partial tuition, but states usually do not fully reimburse receiving districts at the district's per-pupil expenditure amount. Because incoming students represent additional costs, receiving districts, especially high-spending districts, have an incentive to reject transfer students. Such districts can act on that incentive either by formally opting out of a state's interdistrict plan or by claiming not to have space available for transfer students.¹³² The latter option seems readily available, given that States do not seem to monitor district capacity and instead allow districts simply to self-report regarding available space.¹³³ Notice that this structure conforms to what one would expect from the experience with school finance reform: local districts are rarely *required* to spend local revenues on students exiting local districts or transferring in from neighboring districts.

Even where space is available, additional limitations in most state plans make exercising choice practically difficult. Most states do not provide funds for transportation.¹³⁴ Parents who wish to exercise choice are responsible for transporting their children either to the out-of-district school or to the district boundary lines. Although some states provide transportation subsidies for low-income students, these subsidies often come in the form of reimbursements, requiring parents first to pay the costs of transportation.¹³⁵ In addition, not all states require parents to receive information about the existence of interdistrict choice programs, let alone the availability of transportation subsidies.¹³⁶

In most states, therefore, exercising interdistrict choice is not for the faint of heart. Because some districts may have opted out and others may report no available space, options for parents interested in sending their children to another district may be limited

¹³¹ For an insightful discussion of some of the financing difficulties – as well as some of the potential benefits – surrounding interdistrict choice plans, see Stephen D. Sugarman, School Choice and Public Funding, in Sugarman & Kemerer, *School Choice and Social Controversy*, supra note __, at 119-21.

¹³² Cf. Henig & Sugarman, *Nature and Extent of School Choice*, supra note __, at 21 (noting that, “in practice, . . . receiving districts can probably block in-transfers they oppose by refusing to acknowledge that they have space available”).

¹³³ See Bierlein, *National Review*, supra note __, at B1 (noting that “[c]apacity is most often defined by the school districts”).

¹³⁴ See Henig, *Rethinking School Choice*, supra note __, at 225 (noting that “parents are normally left responsible for transportation costs”); Bierlein, supra note __, at B2-B3.

¹³⁵ See Bierlein, supra note __, at B3 (noting that five states, as of 1993, reimbursed low-income parents for some transportation costs); Armor & Peiser, *Interdistrict Choice in Massachusetts*, supra note __, at 160 (noting that transportation subsidies for Massachusetts’ open enrollment plan were available to low-income students “through the receiving district”).

¹³⁶ Bierlein reports that, as of 1993, seven states required the distribution of data regarding open enrollment programs; she does not indicate whether those states specifically require that information about transportation subsidies be included. See Bierlein, *National Review*, supra note __, at B2.

in the first instance. Where options remain available, parents who wish to participate in open enrollment plans must be both motivated to learn about those options and have the time and resources to help transport their children to school. Obviously not all parents would send their children to other districts were doing so easier, but clearly the existing interdistrict choice plans are not designed to maximize interdistrict transfers. On the contrary, many plans seem more like gestures towards choice, designed as much (if not more) to protect local district autonomy as they are to enhance parental or student autonomy.

Telling proof of this point is found in Minnesota, long hailed as a progressive pioneer in the territory of school choice. Although Minnesota has had an open enrollment plan for more than a decade, the NAACP recently sued the State on grounds similar to those presented in the Connecticut *Sheff* case.¹³⁷ Plaintiffs argued that the de facto racial and socioeconomic segregation between the city of Minneapolis and the surrounding suburbs violated the city students' fundamental right to an adequate education, as guaranteed in the State Constitution.¹³⁸ The parties ultimately settled. The settlement requires eight suburban districts collectively to make 500 seats available for low-income city students each year for the next four years, and it also requires the State to pay for transportation costs, which it was not doing under the open enrollment plan.¹³⁹ One of the striking aspects of this case is that it highlights the deficiencies in the existing open enrollment plan. Open enrollment in Minnesota existed on paper, but it obviously was not doing much to alleviate the racial and socioeconomic segregation between city and suburban districts. The plan failed in this regard, at least in part, because the State let it fail: it did not provide any funds for transportation, and state officials did not require suburban schools to accept inner-city students.¹⁴⁰

Just as the case itself is striking, so, too, is the settlement. Plaintiffs initially argued that students in metropolitan Minneapolis area should have the option to attend *any* public school in the region,¹⁴¹ but they ultimately settled for what appears to be a

¹³⁷ NAACP v. Minnesota, No. MC 95-14800 (Minn. filed Sept. 30, 1998) and Xiong v. Minnesota, No. MC 98-002816 (Minn. filed Feb. 23, 1998). See generally Richard D. Kahlenberg, *All Together Now* 175-77 (2001) (discussing litigation).

¹³⁸ See Kahlenberg, *All Together Now*, supra note ___, at 175; Statement of Minneapolis NAACP and Parents: Settlement Proposal (Feb. 19, 1999) (available at <http://cfl.state.mn.us/naacp0219.htm>) (last visited May 19, 2001) (hereinafter NAACP Proposal).

¹³⁹ See Minneapolis Public Schools, NAACP Settlement Information (available at <http://www.mpls.k12.mn.us/new/news%20release/naacp5.htm>) (last visited May 19, 2001).

¹⁴⁰ See Henig, *Rethinking School Choice*, supra note ___, at 167 (noting that state officials in Minnesota “have been very wary about requiring suburban school districts to accept inner-city residents”). According to opponents of school choice in Minnesota, wealthy suburban districts, in turn, tended to “exclude low-income and minority students from nearby cities.” Cookson, *School Choice*, supra note ___, at 45.

¹⁴¹ See NAACP Proposal, supra note __ (proposing that parents in Minneapolis and the surrounding suburbs have the right to choose “to send their children to any suburban school or to any Minneapolis school”).

quite modest increase in the existing open-enrollment plan.¹⁴² Even this limited program generated a good deal of controversy, with community members likening interdistrict choice to “forced busing” and protesting the fact that local school revenues would be expended on outsiders.¹⁴³ At the same time, however, that a settlement was reached at all suggests that there is *some* tolerance among suburban districts for at least limited enrollment by urban students. In these respects, the Minnesota settlement typifies the limited urban-suburban choice programs targeted to achieve racial diversity, which constitute the second type of interdistrict choice plan.

Some of these “plans” are not full-fledged plans as such, and do not claim to be, but rather involve the creation of one or more urban magnet schools that accept suburban students. There are currently over one million students in nearly 2,500 magnet schools.¹⁴⁴ Although most of these schools accept only resident students, some accept out-of-district students as well.¹⁴⁵ Interdistrict magnet schools, like their intradistrict counterparts, are designed to foster racial integration and typically use racial balance criteria in selecting students, a move that has created both political and legal controversies.¹⁴⁶

In addition to interdistrict magnet schools, a very few suburban districts participate in programs that allow a limited number of urban students to attend suburban schools. These include suburban districts surrounding Boston and Springfield, Massachusetts, Hartford, Rochester, Milwaukee, and St. Louis.¹⁴⁷ All of the programs,

¹⁴² In fairness to plaintiffs, it must be noted that under the existing open enrollment plan, most students transferring to suburban districts from the city were white, and most of the students transferring to city schools were minorities. By targeting low-income city students for transfers to suburban schools, the settlement may help curtail or reverse the segregating effects of the open enrollment plan. See Anne O’Connor, School Settlement Aims to Reverse Trend Set Under Open Enrollment, *Star Tribune*, March 22, 2000.

¹⁴³ Cite reports in Angela’s materials.

¹⁴⁴ See Blank, et al., *Magnet Schools In Urban Education*, supra note __, at __.

¹⁴⁵ We have been unable to find precise figures on enrollment in interdistrict magnet schools. Given that there are no more than 300,000 students in all interdistrict programs combined, see supra TAN, the figure must be below 300,000.

¹⁴⁶ Politically, magnet schools are controversial because they cost more to operate and restrict admissions, taking away resources for other public schools while simultaneously limiting the opportunities of resident students to attend the schools in order to assure racial balance. See Kahlenberg, *All Together Now*, supra note __, at 128-29; Viteritti, *Choosing Equality*, supra note __, at 57-58. . Legally, magnet schools are controversial insofar as the use of racial balance criteria might be unconstitutional outside of a remedial context. See, e.g., *Tuttle v. Arlington Cty. School Board*, 195 F.3d 698 (4th Cir. 1999) (holding unconstitutional the use of race in assigning students to magnet schools) *Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998) (holding unconstitutional the use of race in selecting students for academically elite public schools). The constitutional question remains unsettled, though given its importance in both grade schools and universities, the Supreme Court will surely have to address it soon. See generally Note, *The Constitutionality of Race-Conscious Admissions Programs in Public Elementary and Secondary Schools*, 112 *Harv. L. Rev.* 940 (1999).

¹⁴⁷ For discussion of the Boston and Springfield METCO programs, see Susan Eaton, *The Other Boston Busing Story* (2001); Armor & Peiser, *Interdistrict Choice in Massachusetts*, supra note __, at 161-70;

except for the one in St. Louis, are very limited in scope. Boston's METCO program, which began in the 1960s as a purely voluntary effort to promote racial integration, started with 220 students and involved only 3,100 students by the year 2000.¹⁴⁸ Hartford's program also began in the 1960s, with 265 students, and by the 1980s involved a little more than a thousand students; it has expanded recently, but this has been in response to the Connecticut Supreme Court's unique decision in *Sheff*, outlawing de facto school segregation.¹⁴⁹ The programs in Rochester and Milwaukee are similarly small, involving roughly 600 and 5,000 students.¹⁵⁰

These programs are limited in scope not because of lack of demand. The programs have long waiting lists; indeed, the waiting lists in Boston and Rochester are four and five times greater, respectively, than the number of students participating in the program.¹⁵¹ The scope of the programs is instead intentionally limited to ensure space for district residents or simply to preclude a large number of urban transfer students. Like open enrollment plans, none of these programs *require* suburban districts to make space available by expanding facilities or increasing staff.¹⁵²

The only (temporary) exception to this pattern, and the only relatively large-scale interdistrict choice program, exists in St. Louis. This plan resulted from the settlement of a desegregation lawsuit, which many suburban leaders reasonably believed would lead to the consolidation of suburban districts with the St. Louis district.¹⁵³ To avoid this result, suburban districts agreed to a "voluntary" interdistrict choice plan, under which sixteen suburban districts were required to accept transfer students, with a goal of increasing

Kahlenberg, *All Together Now*, supra note __, at 152. For discussion of the Hartford and Rochester programs, see, e.g., Kahlenberg, *All Together Now*, supra note __, at 151-52. Joseph Viteritti discusses the Milwaukee program in *Choosing Equality*, supra note __, at 98-99, and the St. Louis program is the subject of a recent book, see Amy Stuart Wells and Robert L. Crain, *Stepping Over the Color Line: African-American Students in White Suburban Schools* (1997). In addition to these interdistrict programs, there are a number of metropolitan-wide districts, mostly in the south, that allow city residents the opportunity to attend suburban schools. See supra TAN (discussing metropolitan districts).

¹⁴⁸ Eaton, *The Other Boston Busing Story*, supra note __, at 5. See also Kahlenberg, supra note __, at 152; Armor and Peiser, *Interdistrict Choice in Massachusetts*, supra note __, at 161.

¹⁴⁹ See Kahlenberg, *All Together Now*, supra note __, at 151-52; see also supra TAN (discussing interdistrict choice in Connecticut).

¹⁵⁰ See Kahlenberg, *All Together Now*, supra note __, at 152; Viteritti, *Choosing Equality*, supra note __, at 99.

¹⁵¹ The Rochester program serves 600 students, while 3,000 are on the waiting list. Kahlenberg, *All Together Now*, supra note __, at 152. The Boston program serves 3,100, while 13,000 are on the waiting list. Eaton, *Other Busing Story*, supra note __, at 5-6; see also Anand Vaishnav, *For Metco Students, The Ride Was Worth It*, *Boston Globe* (June 8, 2001) (reviewing Eaton).

¹⁵² As Susan Eaton observed in her study of Boston's METCO program, "METCO operates on terms that suburbanites can accept. It does not greatly alter the status quo of either suburbia's schools or their larger communities." Eaton, *The Other Busing Story*, supra note __, at 221.

¹⁵³ See Wells & Crain, *The Color Line*, supra note __, at 97-102 (describing litigation and settlement, and emphasizing the aggressive tactics of the district court judge, which led suburban residents to fear that a trial would ultimately result in their districts being consolidated with the St. Louis city district).

black enrollment to at least 15% but no greater than 25% of the districts' total. The settlement also called for the creation of urban magnet schools. This program is easily the largest of its kind in the country, involving in the mid-1990s 12,700 black students who transferred to suburban schools and 1,500 white suburban students who attended urban magnet schools. The program is also quite expensive, as the settlement requires the State to provide an "incentive payment" to suburban school districts, which equals the per-pupil cost of transfer students. The settlement also requires the State to pick up the tab for transportation, which in 1995 averaged a remarkable \$2,000 per student.¹⁵⁴

Despite the large number of students involved, it helps to place this program in perspective to recognize that the 12,700 urban transfers represents less than one quarter of the entire St. Louis student population, and the 1,500 suburban transfers represent a tiny fraction of the student population in the suburban districts.¹⁵⁵ As Professors Wells and Crain describe in their recent book on the program, many black parents in St. Louis simply chose to keep their children in St. Louis schools, and obviously the great majority of white suburban parents opted against sending their children to urban magnet schools.¹⁵⁶ White suburbanites, meanwhile, at best tolerated the program. Even those sympathetic with the program told Wells and Crain time and again, in words President Nixon would have appreciated, "that the millions of dollars the state pays to bring nearly 13,000 African-American students to suburban schools would be better spent 'fixing up' the city schools."¹⁵⁷ It appears that suburbanites may soon get their wish, as the plan, which was never meant to be permanent, is being dismantled. State funding for the program will continue for another ten years, and the St. Louis school district will have to continue its magnet school programs indefinitely. Beginning in 2002, however, suburban school districts will no longer have to accept transfer students.¹⁵⁸ Thus, in the end, even the most ambitious interdistrict choice program in the country bowed to suburban autonomy.

This is not to suggest that interdistrict choice in general or urban-suburban transfers in particular can never work. In some ways, the paucity of urban-suburban integration is an accident of local government law and tradition, as most school districts track municipal boundaries. In many places in the south, however, school districts encompass both cities and the surrounding suburbs. These metropolitan districts tend to be much more racially stable, have higher achievement levels, and have much higher approval ratings among parents than do urban-only districts, and they serve as examples of relatively successful urban-suburban integration.¹⁵⁹ In addition, evidence suggests that

¹⁵⁴ For this paragraph, see Wells & Crain, *The Color Line*, supra note __, at 99-105.

¹⁵⁵ See Kahlenberg, *All Together Now*, supra note __, at 153.

¹⁵⁶ Wells & Crain, *The Color Line*, supra note __, at 151-79.

¹⁵⁷ Wells & Crain, *Stepping Over the Color Line*, supra note __, at 336.

¹⁵⁸ For discussion of the dismantling of the St. Louis plan, see Caroline Hendrie, *Settlement Ends St. Louis Desegregation Case*, Education Week on the Web, March 24, 1999 (<http://www.edweek.org>).

¹⁵⁹ See, e.g., Orfield, *Metropolitan School Desegregation*, supra note __, at 832-833 (extolling benefits of metropolitan desegregation plans); Gary Orfield & David Thronson, *Dismantling Desegregation: Uncertain Gains, Unexpected Costs*, 42 *Emory L.J.* 759 (1993) (same).

parents who participate in interdistrict choice plans are quite satisfied with the plans, and the waiting lists in places like Boston and Rochester indicate that more parents would participate if they had the opportunity.¹⁶⁰ There is also evidence that suburban receiving districts in metropolitan choice or desegregation plans eventually came to accept and support at least limited urban-suburban integration.¹⁶¹ And there is evidence, finally, that the students from urban areas who transfer to suburban schools improve their academic achievement, as well as their academic aspirations, as compared to students who remain behind.¹⁶²

Despite the example of metropolitan districts and the promise of interdistrict choice plans, however, existing interdistrict choice programs currently offer quite limited opportunities, at best, for students to transfer from one district to another. They also largely preserve the ability of districts to serve their own students first or to reject all outsiders. Although some suburban districts have volunteered to accept a limited number of transfer students, either pursuant to statewide open enrollment plans or targeted urban-suburban plans, these districts do not appear eager to expand the number of transfer students. State legislatures, in turn, appear equally reluctant to force local districts to open their borders and accept outsiders into their schools.

The promise of interdistrict choice thus remains largely unfulfilled.¹⁶³ Indeed, in recent years interdistrict choice programs have largely been eclipsed by a remarkably popular new form of choice: charter schools. Perhaps not surprisingly, charter schools offer choices mostly within particular districts.

¹⁶⁰ On parental satisfaction, see, e.g., Wells & Crain, *The Color Line*, supra note __, at 180-218; Orfield, *City-Suburban Desegregation*, supra note __; Armor & Peiser, supra note __, at 183.

¹⁶¹ See, e.g., Kahlenberg, *All Together Now*, supra note __, at 153-55 (describing support for interdistrict desegregation plans in St. Louis, Wilmington, and Indianapolis); Orfield, *Metropolitan School Desegregation*, supra note __, at 845-46 (describing support for such programs in North Carolina); Davison M. Douglas, *Reading, Writing and Race: The Desegregation of the Charlotte Schools 215-54* (1995) (describing the success and community support of district-wide segregation in the Charlotte-Mecklenberg metropolitan school district); Wells & Crain, *The Color Line*, supra note __, at 309-334 (describing reaction to the St. Louis plan). The picture in St. Louis, described by Wells & Crain, was complicated; not all suburbanites supported the program, and many who did support it did so half-heartedly. As Wells & Crain explain, with their own measure of condescension, many suburbanites who supported the desegregation plan did so in a condescending way, viewing the plan as charity toward African-Americans. See id. at 324-25 (describing one suburbanite, “with her comfortable suburban lifestyle and minivan”, as representative of many suburbanites, who are “generally nice and likeable people” though not especially sensitive on racial issues).

¹⁶² See Kahlenberg, *All Together Now*, supra note __, at 151; Orfield, *Metropolitan School Desegregation*, supra note __, at 847. Although studies regarding academic achievement cannot perfectly control for self-selection bias and therefore must be interpreted with caution, a study of the St. Louis plan suggests that the schools themselves play an important role in influencing academic achievement. That study found that students who attended city magnet schools began with higher test scores than those who transferred to suburban schools but that the latter eventually outperformed the former. See Wells & Crain, *The Color Line*, supra note __, at 183-84 (discussing study).

¹⁶³ Cf. Eaton, *The Other Boston Busing Story*, supra note __, at 251 (“In the current discussions about school reform, while there is often polite mention of the benefits of diversity, the interdistrict efforts that would actually create that diversity are rarely explored.”).

3. Charter Schools

A charter school is a cross between a public and private school.¹⁶⁴ Authorized by state statutes, the schools are publicly funded, tuition-free, nonsectarian schools that operate pursuant to a contract between the school and the chartering agency, which is either the local school board, a state agency, or a state-designated agency.¹⁶⁵ The schools themselves can either be newly created, converted public schools, or converted private schools. They can be opened and operated by any number of groups, including teachers, parents, and private corporations, although some states require the charter school creators to be a non-profit group.¹⁶⁶ The schools are freed from complying with various regulations – relating to such issues teacher hiring, curriculum, calendar, and length of school day – in exchange for accountability for performance.¹⁶⁷ The core idea behind charters is to grant greater flexibility to schools in exchange for greater accountability, which includes the threat of closure if the schools fail to perform adequately.¹⁶⁸ Although the charter periods can vary from between three and fifteen years, charters typically last for five years, after which the school must be reviewed before the charter is renewed.¹⁶⁹

Unlike interdistrict choice plans, which either have grown slowly or withered, charter schools are the kudzu of school choice. Minnesota opened the first charter school in 1992. Four years later, in 1996, four hundred charters were operating in 17 states.¹⁷⁰ Another four years after that, there were roughly 2,000 charter schools operating in 34 states.¹⁷¹ The number of students attending charter schools grew exponentially during the same period. Starting from a few hundred in 1992, enrollment in charter schools last year exceed 500,000 students.¹⁷² This figure is both twice the enrollment in charter schools

¹⁶⁴ See generally Bruce V. Manno, et al., *Beyond the Schoolhouse Door*, Phi Delta Kappan (June 1, 2000) (explaining theory and structure of charter schools).

¹⁶⁵ See *id.*; U.S. Dep't of Educ., *Overview of Charter Schools* (available at http://www.uscharterschools.org/pub/uscs_docs/gi/overview.htm) (last visited July 31, 2001) (hereinafter *Overview of Charter Schools*).

¹⁶⁶ See Manno, et al., *supra* note ___. See also U.S. Dep't of Educ., *The State of Charter Schools 2000*, at 12 (2000) (available at <http://www.ed.gov/pubs/charter4thyear>) (hereinafter *State of Charter Schools*).

¹⁶⁷ See Manno et al, *supra* note ___.

¹⁶⁸ See *Overview*, *supra* note __ (“The basic concept of charter schools is that they exercise increase autonomy in return for this accountability.”).

¹⁶⁹ See *id.*

¹⁷⁰ *State of Charter Schools*, *supra* note ___, at 10-11. An additional eight states, for a total of 25, had enacted legislation authorizing charter schools. See Henig & Sugarman, *Nature and Extent of School Choice*, *supra* note ___, at 23.

¹⁷¹ *Survey of Charter Schools, 2000-01, Introduction*, Ctr. for Educ. Reform (available at http://edreform.com/charter_schools/report/survey01.html) (last visited June 21, 2001).

¹⁷² *Charter School Highlights and Statistics*, Ctr. for Educ. Reform (available at <http://www.edreform.com/pubs/chglance.htm>) (last visited June 21, 2001).

just two years ago and is nearly twice the estimated figure of students involved in interdistrict choice programs.¹⁷³

Statutes authorizing charter schools, which now exist in 37 states and the District of Columbia, vary a great deal in terms of funding, who can authorize charters, whether there are caps on the annual or total number of charters, and the degree to which charter schools are exempt from traditional school laws and regulations.¹⁷⁴ Although these variations make it precarious to generalize, charter statutes and charter schools do share certain common features that are relevant for our purposes. First, almost all charter schools enroll students from their home districts.¹⁷⁵ This typically results from statutes restricting enrollment or granting a preference to resident students. Ten of the thirty-eight charter statutes explicitly limit enrollment to district residents.¹⁷⁶ In addition, residency preferences are allowed or required in all but two states that nominally allow charter schools to draw students from the entire state.¹⁷⁷ These preferences allow or require charter schools to draw first from district residents and to allow out-of-district students only if space is available; given that most charter schools report having a waiting list, it is reasonable to presume that residency preferences operate in practice to exclude at least some non-residents.¹⁷⁸ In addition, very few states provide funding for

¹⁷³ For 1998 enrollment figures, see State of Charter Schools, *supra* note ___, at 18; for interdistrict choice figures, see *supra* TAN.

¹⁷⁴ See Charter School Laws: State by State Ranking and Profiles, Ctr. for Educ. Reform (available at http://edreform.com/charter_schools/laws/rankings.htm) (last visited Aug. 3, 2001). The Center for Education Reform classifies charter legislation generally as either strong (meaning the laws foster the development of numerous, independent charter schools) or weak (meaning the laws inhibit the development of charter schools or significantly limit their autonomy). For the CER's most recent rankings, see Charter School Laws: Scorecard and Ranking 2001, Ctr. for Educ. Reform (available at http://www.edreform.com/charter_schools/laws/ranking_2001.htm) (last visited Aug. 3, 2001).

¹⁷⁵ See Henig & Sugarman, Nature and Extent of School Choice, *supra* note ___, at 23.

¹⁷⁶ These include Florida, Georgia, Illinois, Mississippi, Missouri, New Mexico, Rhode Island, South Carolina, Virginia, and the District of Columbia. See Fla. Stat. Ann. § 228.056 (West 2001); Ga. Code Ann. § 20-2-2066 (2001), 105 Ill. Comp. Stat. Ann. 5/27A-4 (West 2001); Miss. Code Ann. § 37-28-1 (2001), Mo. Rev. Stat. § 160.410 (2001); N.M. Stat. Ann. § 22-8B-4.1 (Michie 2000); Charter School Legislation: Profile of Rhode Island's Charter School Law, Ctr. for Educ. Reform (available at http://www.edreform.com/charter_schools/laws/RhodeIsland.htm) (last visited Aug. 3, 2001); S.C. Code Ann. §59-40-50, Va. Code Ann. § 22.1-212.6 (Michie 2000). Other states have double standards: locally granted charters may have to limit enrollment to district residents while state granted charters may admit students statewide. See, e.g., Mich. Comp. Laws § 380.504 (2001).

¹⁷⁷ See, e.g., Cal. Educ. Code § 47605 (Deering 2001) ("Preference shall be extended to pupils currently attending the charter school and pupils who reside in the district."); Ohio Rev. Code Ann. § 3314.06 (West 2001) ("[P]reference shall be given to students attending the school the previous year and to students who reside in the district in which the school is located."). Of the 28 states that allow statewide enrollment, only Nevada and Minnesota do not allow or require residency preferences.

¹⁷⁸ As of 2000-01, 7 out of every 10 charter schools had waiting lists. State of Charter Schools, *supra* note ___, at 1.

transportation of non-district residents to attend charter schools, which also works to limit attendance to resident students.¹⁷⁹

The second common feature of charter statutes has to do with funding. The details of funding schemes vary from state to state, and they also vary within states, depending on whether the charter is granted by a local school board or a state agency.¹⁸⁰ In general, however, charter schools are financed by a combination of state and local aid. Public schools in districts in which charter schools are located thus stand to lose state aid for students in charter schools, as well as some portion of locally-raised revenue.¹⁸¹ As a result, charter school proposals often provoke funding battles, especially when local boards are responsible for granting the charter. Local school boards have an obvious financial incentive to block charter schools; as one observer commented, allowing local boards to authorize charters is akin to allowing “the New York Times to decide whether the Wall Street Journal can sell papers in new York City.”¹⁸² Perhaps not surprisingly, local school boards have proven more reluctant to grant charters than have other granting agencies.¹⁸³ In districts where there is a good deal of support for existing public schools, obtaining a charter from a local school board is especially difficult, if not quixotic.¹⁸⁴

This last point leads to the third and final common feature of charter schools, namely their location. Most charter schools are located in urban school districts. A New York Times report in December 2000, for example, estimated that approximately two-

¹⁷⁹ Only two states, Connecticut and Massachusetts, provide charter schools limited state aid for transporting out-of-district students. See Conn. Gen. Stat. Ann. § 10-6633 (West 2001); Mass. Gen. Laws Ann. Ch. 71, § 89 (2001). Most statutes simply do not mention transportation.

¹⁸⁰ In Arizona, for example, charters granted by local agencies may negotiate for funding in their contract with the locality. State charters, however, receive funding calculated by the same formula used to calculate aid to district schools. See Ariz. Rev. Stat. § 15-185 (2000). See also La. Rev. Stat. Ann. § 3995 (West 2001) (establishing similar two-track system of funding).

¹⁸¹ See, e.g., Del. Code Ann. Tit. 14, § 408 (2000) (entitling charter schools to 100% of state and local per-pupil funding).

¹⁸² Quoted in Lias Black, *Elective Excellence: School Officials Measure Responses to Non-Traditional Schools*, Chicago Tribune, Aug. 30, 2000.

¹⁸³ The Center for Education Reform found that 57% of all charters were granted by bodies other than local chartering boards in 2001, which is remarkable considering that only 18 (out of 34) states allow alternative chartering entities to grant charters without local approval. Furthermore, as of 2000-01 states requiring local approval had an average of 9.6 charters per state. In contrast, states with multiple chartering entities and strong appeals processes had an average of 80.8 charters per state. Survey of Charter Schools 2000-2001: Key Findings, Ctr. for Educ. Reform (available at http://www.edreform.com/charter_schools/report/survey01.pdf) (last visited August 6, 2001).

¹⁸⁴ The difficulty faced by those attempting to locate the Thomas Jefferson Charter School in the Chicago suburbs is perhaps the most egregious example. At least 11 suburban districts had rejected the proposal by June of 1997. In Elk Grove Township, the district fought off the school for four years until, in 2000, a court ruled in favor of the State Board of Education’s decision to overturn the district’s rejections. Noreen S. Ahmed, *District 59 May Drop Fight Over Charter School*, Chicago Tribune, November 22, 2000. The judge’s decision, not surprisingly, was perceived by residents as a blow to local control. Becky Beaupre, *Judge Permits First Suburban Charter School*, Chicago Sun-Times, September 30, 1998.

thirds of all charter schools were located in cities.¹⁸⁵ In some states, this concentration is mandated or encouraged by charter statutes. At least thirteen statutes explicitly provide that authorizing agencies, whether local or state, should give priority to charter schools that serve poor, minority, and/or low-achieving students, and more often than not, these students are located in urban districts.¹⁸⁶ In two states, Ohio and Missouri, charter schools are by law allowed only in urban districts.¹⁸⁷ In one other, Wisconsin, charters can more easily be opened in Milwaukee than elsewhere in the State, by virtue of the fact that charters can be authorized by several different agencies in Milwaukee, while they can only be authorized by local school boards everywhere else.¹⁸⁸ In addition to these statutory provisions that encourage the concentration of charters in failing, urban districts, constituent demand and local politics push in the same direction.

Suburbanites seem much less interested in charter schools, which undoubtedly has something to do with the fact that suburban residents are generally more satisfied with their public schools than are urban residents and thus see less of a need for alternatives.¹⁸⁹ In fact, news reports suggest that suburbanites see charter schools not only as unnecessary but as an insult to their public schools and a threat to suburban property values.¹⁹⁰ As one resident of Glen Cove, a New York suburb, told a New York Times reporter, “I don’t think charter schools are meant for these kinds of communities.” In explaining her opposition to a proposed charter school, she stated that “[w]e want to keep our community desirable. The connotation of a charter school is, ‘The schools are lousy, they’re not meeting the needs of our children.’ Our property values go down, our taxes will increase because we’ll need to pay more money to keep up the standards.”¹⁹¹ Another community member echoed this point. “There’s nothing wrong with our public schools,” she exclaimed, “and I take great offense to people coming in here and telling me otherwise.”¹⁹²

¹⁸⁵ Kate Zernike, *Suburbs Face Tests as Charter Schools Continue to Spread*, New York Times A1 (Dec. 18, 2000).

¹⁸⁶ See Ark. Code Ann. § 6-23-304 (Michie 2001), Cal. Educ. Code § 47605 (Deering 2001), Colo. Rev. Stat. Ann. § 22-30.5-109 (West 2000), Conn. Gen. Stat. § 10-66bb (2001), Del. Code Ann. tit. 14 § 503 (2000), D.C. Code Ann. § 38-1702.1 (2000), 105 Ill. Comp. Stat. Ann. § 27/A-8 (West 2000), Mass. Gen. Laws Ann. ch. 71, § 89 (West 2001), Mo. Rev. Stat. § 160.405 (2001), N.Y. Educ. Law § 2852 (McKinney 2000), N.C. Gen. Stat. § 115C-238.29C (2000), Tex. Educ. Code Ann. § 12.1011 (Vernon 2001).

¹⁸⁷ Ohio Rev. Code Ann. § 3314.01 (West 2001) and Mo. Rev. Stat. § 160.410 (2001).

¹⁸⁸ Wis. Stat. Ann. § 118.40 (West 2001).

¹⁸⁹ See, e.g., Black, *Elective Excellence*, supra note __ (explaining that suburban Chicago communities are indifferent to charters, which are perceived as alternatives to failing schools; Emily Wax, *Alexandria Votes to Consider Charter Schools; Arlington Rejects Similar Plan*, Wash. Post, **need date** (noting that public meetings to discuss charter school proposals have been sparsely attended in Arlington and Alexandria due to lack of interest.).

¹⁹⁰ See, e.g., Editorial, *Give Charters A Better Chance*, Chicago Tribune, May 20, 1999 (discussing report that suggests suburbanites view charter schools as a threat to district authority and local control).

¹⁹¹ Quoted in Zernike, *Suburbs Face Tests*, supra note __, at A1.

¹⁹² Quoted in Zernike, *Suburbs Face Tests*, supra note __, at A1.

Charter schools can send the same message in urban school districts, of course, and many urban leaders and educators also see charter schools as a threat to existing public schools.¹⁹³ The difference, however, is that urban residents are generally more prepared than suburban residents to admit that their public schools are failing and that alternatives are needed.¹⁹⁴ Urban educators, in turn, seem generally more willing to endorse alternatives, both because of a greater degree of desperation and because the large size of urban districts makes it relatively easier to absorb a few charter schools.¹⁹⁵ In addition, some educators see charter schools as a way of attracting middle-class residents back to city schools. The suburbs, by contrast, are generally already filled with middle-class residents, and charter schools may, because of the signals they send, drive some of them away.¹⁹⁶

Charter schools are thus an interesting phenomenon, politically. They draw broad and bi-partisan support on the national level and in many state legislatures.¹⁹⁷ In particular, charter schools seem much more popular than interdistrict choice programs, as demonstrated not only by charter schools' remarkable rate of growth but also by the amount of attention and commentary they have received, which all but eclipses the attention given to interdistrict programs. Although the charter *concept* is generally popular, however, the assumption underlying much of the support appears to be that charter schools are mostly appropriate for students in failing, urban districts. They are rarely viewed or created as a means of offering significant opportunities for interdistrict school choice,¹⁹⁸ and they are often greeted with hostility when proposed in suburban districts. Charter schools thus are seen by many as an innovative, not to mention relatively low-cost, way of reforming failing, urban school systems. In this sense, charter schools are quite similar to the few existing voucher plans.

¹⁹³ See, e.g., Kit Wagar, Lawmakers Ponder Possible Removal of Accreditation, Kan. City Star, Oct. 20, 1999 (noting that urban lawmakers' argued that charter schools in Kansas City would weaken public schools).

¹⁹⁴ See supra TAN (noting different levels of satisfaction among parents of students in suburban schools and parents of students in urban schools); see also Moe, Vouchers and Public Opinion, supra note __, at __ (explaining that those most supportive of school choice are those who are interested in removing their children from the public schools they are attending).

¹⁹⁵ See Zernike, Suburbs Face Tests, supra note __, at A1 (noting that critics of charter schools in suburban districts point to the fact that because "cities have so many more students, and their budgets are so much bigger, . . . losing even a few thousand students to charter schools does not seem to have as big an impact" there as it does in smaller, suburban districts).

¹⁹⁶ See Zernike, Suburbs Face Tests, supra note __, at A1.

¹⁹⁷ See, e.g., Peterson, Report Card, supra note __, at 51-53. [Cite to federal program for charter school support and note that supported by Bush Administration; cite to reports of bi-partisan support in state legislatures.]

¹⁹⁸ There are some limited exceptions, as some states allow out-of-district students to enroll in (at least) state-created charter schools, see supra TAN, and a few others allow for regional charter schools. See, e.g., Alaska (Alaska Stat. §14.03.260 (Michie 2000)), Massachusetts (Mass. Gen. Laws Ann. ch. 71, § 89 (West 2001)), and Pennsylvania (Pa. Stat. Ann. tit. 24, §17-1718A (West 2001)).

4. School Vouchers

Publicly-funded vouchers have for a while seemed right around the corner, but they have yet to arrive in force. Three limited programs have been created in the last decade, in Milwaukee, Cleveland, and Florida.¹⁹⁹ All provide vouchers that can be used at private schools, including religious schools, and all have been challenged on constitutional grounds, though each is currently operating.²⁰⁰ Despite the lavish attention each program has received, very few students receive vouchers through them. Milwaukee's program is the oldest and largest of the three. It began in 1990 and currently allows for a maximum of 15,000 vouchers to be distributed to low-income students, but as of last year, a bit less than 10,000 students took advantage of the plan.²⁰¹ The Cleveland program began more recently and involved, as of 1998-99, 3,500 students.²⁰² The Florida program is the most recent and offers vouchers to students in persistently failing schools.²⁰³ In 1999, the first year of its operation, only two schools qualified and only 52 students accepted vouchers to attend private schools.²⁰⁴ In the following year, no additional schools qualified.²⁰⁵ At the moment, then, less than 15,000 students receive publicly-funded vouchers, which is less than one tenth of one percent of all elementary and secondary students and is smaller than the number of students currently receiving privately-funded vouchers.²⁰⁶

¹⁹⁹ Much has been written about these plans. For a basic description of all three, see, e.g., Henig & Sugarman, *Nature and Extent of School Choice*, supra note __, at 26-28; Moe, *Vouchers & Public Opinion*, supra note __, at 36-38. See also Viteritti, *Choosing Equality*, supra note __, at 98-113 (discussing Milwaukee and Cleveland plans). In addition to these programs, Maine and Vermont provide money for students in rural districts too small to run their own schools to attend private schools, and many states pay the costs of at least some disabled students to attend private schools. See Stephen D. Sugarman, *School Choice and Public Funding*, in Sugarman & Kemerer, *School Choice and Social Controversy*, supra, at 128-29. Although the Vermont and Maine plans have caught the attention of voucher supporters, see *id.* at 128, vouchers for students in districts too small to run schools, like payments to private schools for disabled students, are tangential to the general battle over vouchers, and we treat them accordingly.

²⁰⁰ See Henig & Sugarman, *Nature and Extent of School Choice*, supra note __, at 26-28. For discussion of the various legal challenges that have been filed against the programs, see e.g., Alison Frankel, *On the Way to a Supreme Court Test*, *American Lawyer*, May 2000. One of the most recent and significant decisions came from the United States Court of Appeals for the Sixth Circuit, which ruled that the use of vouchers at private religious schools violates the Establishment Clause. That ruling has been stayed, however, pending the Supreme Court's review of the decision, which will occur this Term. [Cite to cases.]

²⁰¹ See Bruce Fuller, et al., *School Choice: Abundant Hopes, Scarce Evidence of Results 62* (Policy Analysis for California Education 1999); *Milwaukee Parental Choice Program Facts and Figures for 2000-01* (Wisconsin Department of Public Instruction) (<http://www.dpi.state.wi.us>) (noting that a total of 9,638 students were enrolled in the Milwaukee voucher program as of September 2000).

²⁰² Henig & Sugarman, *Nature and Extent of School Choice*, supra note __, at 27.

²⁰³ See Fl. Stat. Ann. § 229.0537 (describing "opportunity scholarship program").

²⁰⁴ See Andrea Bullups, *Improved Results Likely to Limit Florida's Education-Voucher Plan*, *Wash. Times*, June 21, 2000, at A4.

²⁰⁵ See Bullup, *Improved Results*, supra note __, at A4.

²⁰⁶ Private scholarship programs exist in over 30 cities nationwide and involve over 50,000 students, usually low-income. See Fuller, et al., *School Choice: Abundant Hopes, Scarce Evidence*, supra note __, at 63-64. It is certainly useful to note that these private scholarships, like publicly-funded voucher

More voucher plans have been rejected than passed. Though a disappointment to their proponents, the plans that have been proposed and rejected are to us as instructive as the few plans that have been adopted. Every proposal to provide vouchers on a large scale has failed, whether that proposal emerged from the ballot initiative process available in some states or through traditional legislative channels.²⁰⁷ The three existing publicly funded voucher plans, by contrast, target either low-income families or children in failing schools. What is more, two of those plans limit the use of the voucher to private schools within city limits, while the third plan pushes in the same direction.²⁰⁸ This pattern should by now seem both familiar and perfectly predictable, insofar as existing voucher plans offer some poor, minority students a limited opportunity to escape dreadful public schools but do not provide them a ticket good for entry into the suburban public school of their choice. Vouchers thus continue the theme we have seen played out in a number of contexts and over a number of years: a dash of urban school reform that does not pose much threat to the physical or financial independence of suburban schools.

To better appreciate the current politics of vouchers, a small dose of historical background is useful.²⁰⁹ The idea and implementation of school vouchers predates the establishment of the public school system in this country. Adam Smith, Thomas Paine, and John Stuart Mill all argued in favor of voucher plans, suggesting that the government should require all children to obtain some education and should give at least poor parents

programs, target low-income students and offer them some choice of private schools (but no ability to enter good, suburban public schools). See *id.* It is also likely, as Professor Moe has argued, that the existence of private vouchers helps keep the issue of publicly-funded vouchers visible. See Moe, *Vouchers and the American Public*, *supra* note __, at 38. We will not devote much attention to private vouchers, however, because they are really a sideshow to the debate over publicly-funded vouchers and will likely remain so. As Henig and Sugarman rightly describe, most of the private scholarships provide only partial and modest funding for private school tuition, and, more importantly, it “is currently unimaginable that private charity could sustain a nationwide private scholarship scheme that would provide choice opportunities for all the low-income families wishing to pursue them.” Henig & Sugarman, *Nature and Extent of School Choice*, *supra* note __, at 28.

²⁰⁷ For discussion of the failed proposals, see Moe, *Vouchers and the American Public*, *supra* note __, at 37; Mark Walsh, *Voucher Initiatives Defeated in Calif.*, *Mich. Educ. Week*, Nov. 15, 2000, at __; John J. Miller, *Why School Choice Lost*, *Wall St. J.* Nov. 4, 1993, at A14; Robert C. Bulman & David L. Kirp, *The Shifting Politics of School Choice*, in Sugarman & Kemerer, *School Choice & Social Controversy*, *supra* note __, at 46-52.

²⁰⁸ The Milwaukee plan offers vouchers to low-income families for use only at private schools within the city boundaries. The Cleveland plan offers vouchers to low-income families for use either at private schools within city boundaries, or at public schools in adjacent districts that agree to accept voucher students (none have). The Florida plan, finally, offers voucher for students in persistently failing schools, for use at private schools or neighboring public schools that have space. For an overview of the key provision of these plans, see *Tax-Supported K-12 Voucher Programs: Key Legislative Provisions*, Center for Educ. Reform (http://edreform.com/school_choice/legislation.html) (last visited July 10, 2001) For further discussion of the details of the plans, see *infra* TAN.

²⁰⁹ For larger doses, see, e.g., Henig, *Rethinking School Choice*, *supra* note __, at 55-96; Cookson, *School Choice*, *supra* note __, at 17-37; Bulman & Kirp, *Shifting Politics of School Choice*, *supra* note __, at 36-52; Amy Stuart Wells, *Time to Choose: America at the Crossroads of School Choice Policy* 150-66 (1993).

tuition money to spend at whatever school they chose.²¹⁰ In a number of American colonies, a crude type of voucher plan existed, under which parents who qualified as paupers would receive public money to send their children to private schools, which in turn became known as pauper schools.²¹¹ With the advent of the common school in the 19th century, however, the idea of vouchers receded, in part because a core idea of the successful common school movement was that public schools would provide a free education to all classes of children – poor and rich – under the same roof.²¹²

It took noble laureate and economist Milton Friedman to revive the voucher idea in the 1950s. Consistent with his libertarian bent, Friedman argued that education should be provided based on free-market principles, and that the government should hand over some money to parents and then let the emerging market and parents decide where children attended school.²¹³ Friedman’s proposal received some attention, but his timing was somewhat off, given that the 1950s saw the Supreme Court outlaw school desegregation in *Brown*. A number of southern states, in response, closed their public schools and offered money to students to attend private, segregated academies.²¹⁴ Government-provided tuition for private schools thus became associated with southern resistance to school desegregation, which in turn undoubtedly set back the cause of vouchers – and, indeed, may help explain why some civil rights groups, including the NAACP, continue to oppose vouchers today.²¹⁵

Beginning in the late 1960s, and continuing today, some academics and advocates proposed voucher plans that were not designed to create a free market in education but rather to offer poor students opportunities to attend better, private schools.²¹⁶ The federal government even attempted in the early 1970s to create a voucher demonstration project designed to enhance educational opportunities for poor children, but only one district accepted the government’s invitation to participate in the project and private schools were

²¹⁰See Wells, *Time to Choose*, supra note ___, at 150.

²¹¹ See David Tyack & Elizabeth Hansot, *Managers of Virtue: Public School Leadership in America, 1820-1980* (1982).

²¹² See John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause* __ Mich. L. Rev. __, __ (forthcoming 2001); Minow, *Choice or Commonality*, supra note ___, at 526; Robert B. Westbrook, *Public Schooling and American Democracy*, in Roger Soder, ed., *Democracy, Education, and the Schools* 125, 131 (1996).

²¹³Milton Friedman, *The Role of Government in Education*, in R.A. Solo, ed., *Economics & The Public Interest* (1955); Milton Friedman, *Capitalism & Freedom* 85-98 (1962).

²¹⁴ See Henig, *Rethinking School Choice*, supra note ___, at 101-06.

²¹⁵ See, e.g., Eric Harrison, *Milwaukee School Choice Proposal Ignites Bitter Racial, Political Battles*, L.A. Times, Aug. 3, 1990, at A4 (describing opposition to Milwaukee voucher plan by the president of the Milwaukee NAACP, who compared the choice plan to the “Freedom of Choice” plans used in the South to forestall desegregation).

²¹⁶ See Wells, *Time to Choose*, supra note ___, at 151-52; Henig, *Rethinking School Choice*, supra note ___, at 64-66.

not included, rendering the experiment basically a flop.²¹⁷ Since then, the federal government has toyed with numerous proposals, ranging from federal income tax credits for private school tuition to plans that would allow poor students to use federal money for tuition at private schools.²¹⁸ None of these proposals, however, including the most recent one from the current Bush Administration, has passed into law.²¹⁹

The lack of success on the federal level should not obscure the fact that the idea of vouchers became quite “hot” in the 1990s, in part because of the attention generated by Chubb and Moe’s pro-voucher book, *Politics, Markets, and America’s Schools*.²²⁰ Nor should it obscure the fact that, at the state level, there has been a great deal of activity on the voucher front in the last decade, with limited success. As mentioned, proposals for large scale voucher programs suffered defeat in every state where they were introduced. Between 1990 and 1993 alone, for example, fourteen state legislatures considered and ultimately rejected voucher proposals.²²¹ Voucher or tax-credit initiatives also appeared on a number of state ballots in the 1990s, including ones in California, Colorado, Oregon, and Washington.²²² In each case, voters not only rejected the proposals, but did so by wide margins.²²³ School choice proponents typically blamed the losses on teachers’ unions and the fact that the unions greatly outspent voucher proponents on initiative campaigns.²²⁴ Although the formidable opposition of teachers’ unions must have played some role in the defeat of these initiatives, it is hard to accept that as the sole explanation, in part because voucher initiatives have failed even when proponents outspent opponents. Just last year in Michigan, for example, proponents in Michigan outspent opponents by \$7 million; yet a voucher proposal that would have given \$3,300 to children in failing

²¹⁷ For discussion of the experiment, which occurred in Alum Rock, California, see Bulman & Kirp, *Shifting Politics of School Choice*, supra note __, at 40-43.

²¹⁸ See Henig, *Rethinking School Choice*, supra note __, at 71-72; Wells, *Time to Choose*, supra note __, at 152-57.

²¹⁹ On the Bush Administration’s decision not to push for the inclusion of vouchers in an education bill being considered by Congress, see, e.g., Howard L. Reiter, *Bush’s Beginning: The Way of All Conservative Flesh*, *Hartford Courant*, June 24, 2001, at C1.

²²⁰ See John E. Chubb & Terry M. Moe, *Politics, Markets, & America’s Schools* (1990). Chubb & Moe’s book is commonly credited with reviving interest in vouchers. See, e.g., Cookson, *School Choice*, supra note __, at 36; Henig, *Rethinking School Choice*, supra note __, at 87; Wells, *Time to Choose*, supra note __, at 154-55; Viteritti, *Choosing Equality*, supra note __, at 86-87.

²²¹ See Wells, *Time to Choose*, supra note __, at 157-58.

²²² See Miller, *Why School Choice Lost*, supra note __, at A14. All told, “[v]oters of various states have been asked 10 times to approve either vouchers or tuition tax credits for private school tuition, and they have said no each time.” Walsh, *Voucher Initiatives Defeated*, supra note __, at __.

²²³ See Miller, *Why School Choice Lost*, supra note __, at A14; Moe, *Vouchers & The American Public*, supra note __, at 365-69. California and Michigan voters most recently rejected voucher proposals in November 2000, and again did so by wide (more than 2-1) margins. See Walsh, *Voucher Initiatives Defeated*, supra note __, at __; Moe, *Vouchers & The American Public*, supra, at 366-69.

²²⁴ See, e.g., Robert D. Novak, *Halfhearted Fight for Choice*, *Wash. Post*, Oct. 18, 1993, at __ (describing blaming loss of voucher initiative in California on lack of funding to match the amount spent by teachers’ unions opposed to the initiative).

schools and allowed other districts to authorize vouchers failed by a wide margin.²²⁵ Similarly, proponents of the most recent California voucher initiative spent slightly more than opponents, and the proposal was nonetheless crushed at the polls by a 71 to 29 percent margin.²²⁶

Voucher ballot initiatives lost in California and elsewhere not only, and perhaps not even primarily, because teachers' unions opposed them, but also because suburbanites did not support them.²²⁷ As one pro-choice advocate explained, regarding the defeat of the 1993 voucher ballot initiative in California: "School choice failed in California because Republican voters didn't want it."²²⁸ The initiative rejected by California voters would have provided a \$2,600 voucher for use at virtually any private school in the state. Voucher proponents tried to explain the defeat by pointing to powerful teachers' unions and a biased media, but Miller suggested that the explanation had more to do with suburban apathy:

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 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.²²⁹

Voucher opponents, continued Miller, exploited these sentiments by focusing on the financial costs of a wide-scale voucher program, which would provide money to parents whose children were already attending private schools and thereby decrease the amount of money available for suburban public schools.²³⁰ Voucher opponents used similar

²²⁵ See Moe, *Vouchers & The American Public*, supra note __, at 367-68; Walsh, *Voucher Initiatives Defeated*, supra note __, at __.

²²⁶ See Moe, *Vouchers & The American Public*, supra note __, at 366-67; Walsh, *Voucher Initiatives Defeated*, supra note __, at __.

²²⁷ In this respect, it might be helpful to consider that teachers' unions also strongly opposed Prop 209 in California, which proposed banning any racial preferences in public education and employment and which secured passage. See Annie Nakao, *Prop 209 Lead Shrinks In Poll*, *San F. Exam.*, Oct. 30, 1996, at A-1.

²²⁸ Miller, *Why School Choice Lost*, supra note __, at A14.

²²⁹ *Id.* See also David Barulich, *Four Reasons Why Voucher Plans Lose Elections*, *Educ. Week*, Sept. 6, 2000, at __. Barulich campaigned in favor of the same California initiative and said that his "most difficult encounters were casual conversations in living rooms with white, middle-to-upper class conservative voters . . . who expressed deep reservations about vouchers." *Id.*

²³⁰ Miller, *Why School Choice Lost*, supra note __, at A14. For an insightful and nuanced account of the fight over the California voucher initiative, see Moe, *Vouchers and The American Public*, supra note __, at 359-65. Moe suggests that the money spent by teachers' unions played a role, but so, too did the public's ambivalence over vouchers, and he also suggests that the deck is usually stacked against initiatives – i.e., it is much easier to defeat than to secure passage of an initiative. See *id.* On the last point, an instructive

tactics in fighting the most recent ballot initiatives, in Michigan and California, with similar results.²³¹

What Miller and others allude to is an odd disjuncture between the leadership of the two main political parties and their rank-and-file members on the issue of school vouchers. On the one hand, vouchers are typically associated with the Republican Party, and many leaders within that Party do support vouchers.²³² Many suburban members of the Party, however, remain skeptical of -- if not strongly opposed to -- large-scale voucher programs. They do so at least in part out of self-interest: they have already paid a premium in purchasing their homes in order to ensure that their children attend good schools, and they -- like their neighbors -- want to protect both the schools and their property values.²³³ A wide-ranging voucher program, that allows resident students to exit freely and non-resident students to enter suburban schools, might take money away from the local schools and introduce lower-income and minority students. As Bill Burrow, associate director of the first President Bush's Office on Competitiveness, explained, "school choice is popular in the national headquarters of the Republican party but is unpopular among the Republican rank-and-file voters who have moved away from the inner city in part so that their children will not have to attend schools that are racially or socio-economically integrated."²³⁴ These voters have paid what one economist calls the "Johnny Can Read Premium," namely the inflated housing prices in good school districts.²³⁵ "Suburbanites," according to this economist, "fear 'radical' or 'extreme' measures that would open up their schools to the riffraff from surly neighborhoods -- and wash away the [Premium], because no longer would aspiring parents have to 'move on up' to get their kid into a decent school."²³⁶

This chasm within the Republican Party may help explain why, when push comes to shove, leaders in the Republican Party often back away from voucher plans. Governor Wilson, for example, came out in opposition to the 1993 California ballot initiative, just as Republican Governor Engler (as well as Republican Senator Spencer Abraham)

counter-example, again, is the passage of Prop 209 in California, which was obviously able to overcome the status quo bias that Moe suggests plays a key role in the initiative process.

²³¹ See Walsh, Voucher Initiatives Defeated, supra note __, at __

²³² See Henig, Rethinking School Choice, supra note __, at 81-96; Cookson, School Choice, supra note __, at 17-37.

²³³ See Thomas W. Hazlett, It's Soccer Moms vs. Poor Kids -- In a Rout, Reason Mag. Online, Feb. 1997 (<http://www.reason.com/9702/co.hazlett.html>) (last visited May 11, 2001) (calling this "the ugly financial story lurking behind the soccer-mom pandering on education").

²³⁴ See Cookson, School Choice, supra note __, at 68.

²³⁵ Hazlett, Soccer Moms, supra note __, at 2; see also George Cantor, Why Issue of School Vouchers Fails To Excite Suburban Voters, Detroit News, Jan. 12, 1997 (available at <http://detnews.com/96/outlook/9701/16/01120015.html>).

²³⁶ Hazlett, Soccer Moms, supra note __, at 2.

opposed a recent voucher initiative in Michigan.²³⁷ Similarly, Governor Whitman toyed with a modest voucher proposal for New Jersey students but ultimately let it die in the face of legislative opposition from both Democrats and Republicans.²³⁸ Most recently, the second-President Bush gave up fairly quickly and without much fight his initial plan to allow poor students to use federal money to pay for private school tuition.²³⁹ Surely these Republican leaders were not trying to court the teachers' unions by opposing or dropping their calls for vouchers; more likely, they were responding to the less-than-enthusiastic message being sent by their constituents.

On the other side of the aisle, there is also a gap between the leadership of the Democratic Party and some of that Party's core constituents, although the arrows here point in the opposite direction. The leadership of the Democratic Party remains opposed to vouchers for private schools, and this undoubtedly reflects the influence of teachers' unions within the Democratic Party.²⁴⁰ African-Americans, however, especially those younger than 50, consistently express strong support for vouchers.²⁴¹ Although this support represents a switch from the 1950s and 1960s, when vouchers were associated with southern resistance to desegregation, it is not altogether surprising. African-Americans are disproportionately represented in failing, urban school systems,²⁴² and one would expect that they are as a result most desperate for relief and most open to change. Given that parents are most likely to support vouchers when they are dissatisfied with

²³⁷ On Wilson's position, see Miller, *Why School Choice Lost*, supra note __, at A14. On Engler's and Abraham's opposition, see Walsh, *Voucher Initiatives Defeated*, supra note __, at __; Moe, *Vouchers & The American Public*, supra note __, at 367.

²³⁸ See Bulman & Kirp, *Shifting Politics of School Choice*, supra note __, at 50-51. Recent political events in New Jersey are also worth noting. Bret Schundler, as a candidate for governor, does not seem to be pushing for vouchers nearly as strongly as he did while mayor of Jersey City. Compare, e.g., Bret Schundler, *The Simple Logic of School Choice*, NY Times, October 28, 1993 (arguing in favor of vouchers and describing legislative efforts to create voucher program in Jersey City) with Schundler for Governor: *On the Issues* (available at <http://www.schundler2001.org/issues>) (downplaying support for vouchers). This is perfectly consistent with the thesis that suburbanites are driving school choice: as mayor of a poor city dominated by minorities, Schundler could expect a good deal of support for vouchers among his constituents. As a gubernatorial candidate in a state dominated by suburbanites, however, Schundler cannot risk alienating suburban voters by pushing too strongly for vouchers.

²³⁹ See Reiter, *Bush's Beginning*, supra note __, at C1; Lizette Alvarez, *Senate Rejects Tuition Aid, A Key to Bush Education Plan*, Wash. Post, June 13, 2001, at A26.

²⁴⁰ See, e.g., Cookson, *School Choice*, supra note __, at 39; Peterson, *Report Card*, supra note __, at 53.

²⁴¹ See, e.g., Moe, *Vouchers and the American Public*, supra note __, at 212-217 (finding that "the parents who most favor vouchers are those who are low in social class, black or Hispanic, and from disadvantaged school districts," and that "minorities are especially favorable toward vouchers even [when] income and education are controlled"); Bulman & Kirp, *The Shifting Politics of School Choice*, supra note __, at 38 ("In 1997, 72 percent of African Americans favored the right to choose a private school at 'governmental expense,' compared to just 48 percent of the general population."); Viteritti, *Choosing Equality*, supra note __, at 5 (noting that blacks and those in lower-income brackets are the "most sympathetic to the idea of vouchers"); Bostis, *Vouchers Along the Color Line*, supra note __, at A23 (reporting results of four annual surveys, between 1996 and 2000, each of which indicated that "[m]ore African-Americans supported school vouchers than opposed them, and blacks consistently supported them more than whites did").

²⁴² See Ryan, *Schools, Race, and Money*, supra note __, at 272-73.

their children's public schools and are interested in sending their own children to private school, the support for vouchers among African-Americans is understandable.²⁴³

With these political dynamics in mind, it becomes easier to understand why the three publicly-funded voucher programs in existence today look the way they do. The programs in Milwaukee and Cleveland offer vouchers to a limited number of poor students to attend private schools.²⁴⁴ The Milwaukee plan explicitly limits the use of vouchers to private schools within city boundaries, thus assuring that Milwaukee voucher students will not even enter suburban private schools, much less suburban public schools.²⁴⁵ The Cleveland plan allows students (in kindergarten through eighth grade) to use the vouchers at any private school within Cleveland and also at any suburban public school that agrees to accept voucher students.²⁴⁶ As of this writing, not a single suburban district has agreed to accept Cleveland voucher students. Florida's plan, which is the most recently adopted and the only ostensibly statewide program, allows students in failing schools to use vouchers (aka "Opportunity Scholarships") at private or public schools. The program pushes students to choose nearby public or private schools, however, as it fails to provide transportation to private schools and explicitly requires parents to transport their children to public schools in other districts, which must accept voucher students only if space is available.²⁴⁷

The existing voucher programs are not designed to provide poor students the opportunity to attend elite private schools. The voucher amounts are fairly modest and enable students to enroll primarily in private, religious schools. Milwaukee's voucher program is the most generous, providing students roughly \$5,300 to use for private school tuition.²⁴⁸ The Cleveland program is the least generous, providing a maximum of \$2,500 and requiring parents to pay a portion of private school tuition.²⁴⁹ The Florida program, finally, provides a maximum of \$4,000 per pupil.²⁵⁰ The vouchers represent less than the average amount spent per pupil, either in the Cleveland or Milwaukee districts or in Florida, primarily because the voucher amount is roughly the amount of

²⁴³ See Moe, *Vouchers & The American Public*, supra note __, at 212-17; Bostis, *Vouchers Along the Color Line*, supra note __, at A23. The failure of most Democratic leaders to respond to African-American support for vouchers may be due not only to the leadership's ties to teachers' unions, but also to the fact that older African-Americans – who are more likely to vote than those younger – tend to oppose vouchers. Given that African-Americans in general are unlikely to vote for Republicans in any event, Democrats who oppose vouchers may not risk losing many votes. Bostis, supra, at A23.

²⁴⁴ See supra TAN.

²⁴⁵ Wis. Stats. § 119.23(2)(a) (providing that eligible pupils may use vouchers at "any private school located in the city" of Milwaukee).

²⁴⁶ See Oh. Stats §§ 3313.974 – 3313.979.

²⁴⁷ See Fl. Stats. § 229.0537.

²⁴⁸ See Milwaukee Parental Choice Program Facts and Figures for 2000-01, Wis. Dept. of Pub. Instruction, at 1 (available at <http://www.dpi.state.wi.us/dip/dfm/sms/mpcfnf00.html>) (last visited July 10, 2001).

²⁴⁹ See Erik Roush, *Cleveland Voucher System*, Policy Brief, Legislative Budget Office, Jan. 28, 1999, at 1 (available at <http://www.lbo.state.oh.us>) (last visited July 11, 2001).

²⁵⁰ See Nina Shokrii Rees, *School Choice: What's Happening in The States 2000*, at __.

state aid provided to students and does not include local revenues.²⁵¹ While the voucher amounts have been criticized as being too low, the voucher programs have also been criticized as being too expensive or unfairly funded. In Ohio, for example, the program is more expensive than the voucher amount suggests because the State continues to allow local districts to count voucher students for purposes of receiving state aid.²⁵² And in Wisconsin, where the State has reduced aid to other districts in order to fund the Milwaukee voucher program, districts outside of Milwaukee charge that the funding scheme is unfair.²⁵³ The funding controversies generated by these programs undoubtedly help explain why the vouchers are fairly modest and are provided only to a limited number of students.²⁵⁴ The controversies are also ongoing and threaten the stability of even these limited plans.²⁵⁵

Just as these programs are not designed to send voucher students to the local equivalents of Exeter or Andover, it is also obvious that these programs are not designed to open up suburban public schools to inner-city students. This fact is apparent from the structure of the programs, and it is understandable in light of the political forces that shaped the plans. In Milwaukee and Cleveland, for example, minority leaders teamed with state and local Republican leaders to create these programs, which in turn reflect

²⁵¹ Funds for the Cleveland plan are allocated from state aid for disadvantaged pupils, and the voucher amount is substantially less than the average per-pupil amount, which is over \$7,000. See Roush, *Cleveland Voucher System*, supra note __, at 2-3. The Milwaukee plan is funded 50% by a reduction in state aid to the Milwaukee school district and 50% by a statewide reduction in aid. See MPCP Facts and Figures, supra note __, at 1-2. The voucher amount is less than the average per-pupil amount, which in 1997-98 was just shy of \$6,500. See Lynn Olson, *Fighting Back*, supra note __, at 268. The Florida plan is funded by transferring state aid from local districts to students who accept the opportunity scholarships, see Fl. Stats. § 229.0537(6), and the amount is less than the statewide average per-pupil expenditure, which in 1999-2000 was \$5,436.

²⁵² See Roush, *Cleveland Voucher System*, supra note __, at 2-3. A recent proposal to increase the amount of the voucher available to Cleveland students, from \$2,500 to \$4,814, has apparently stalled in the State legislature. See S.B. 89, Bill Analysis, Leg. Service Comm'n (<http://www.lsc.state.oh.us/analyses124/index.html>) (last visited July 20, 2001).

²⁵³ See Julie Blair, *Fight Erupts Over Way Wis. Pays for Vouchers*, *Educ. Week*, May 23, 2001, at __. The financial story in Wisconsin is actually more complicated than this, because the state allows local districts that lose money to raise local taxes and then kicks in additional state aid when local taxes are increased. As a result, some districts outside of Milwaukee have actually made money as a result of the voucher funding scheme. See *id.*

²⁵⁴ The Milwaukee program is explicitly limited to no more than 15% of the Milwaukee Public Schools' enrollment, while the Cleveland program is limited by the amount of funds allocated by the legislature. See Wis. Stat. § 119.23; Oh. Rev. Code §§ 3313.974-3313.979. Currently, less than 5% of the students in the Cleveland school system receive vouchers. See Viteritti, *Choosing Equality*, supra note __, at 109-110. The Florida program has no set limit on the number of participants; all who attend persistently failing schools are eligible. See Fl. Stat. Ch. 229.0535 – 229.0537. In reality, however, there may be very few schools that qualify as persistently failing, a possibility suggested by the fact that in two years, only two schools have qualified and only 52 students are receiving vouchers. See supra TAN.

²⁵⁵ Legislators in Wisconsin, for example, are considering requiring Milwaukee to foot the bill for the entire voucher program, which would require a \$30 million tax increase for Milwaukee citizens. See Blair, *Fight Erupts*, supra note __, at __.

their respective interests.²⁵⁶ The minority leaders pushing for the programs were interested primarily in improving the educational opportunities available to students in failing schools, and they tended not to be particularly interested in enhancing opportunities for racial integration.²⁵⁷ Republican leaders, meanwhile, seized the opportunity to support a market-based educational reform that would operate largely within the confines of urban school districts.²⁵⁸ Urban vouchers allow Republican leaders to push a policy that is ideologically attractive and politically low-risk, insofar as it leaves suburbanites alone. If anything, urban vouchers will win the support and votes of suburbanites, insofar as they offer relatively low-cost assistance to urban students.²⁵⁹ Suburbanites, at least in polls, express support for programs that offer greater assistance to inner-city students in failing schools.²⁶⁰ At the same time, however, criticizing the bureaucracy of urban school districts as inefficient and corrupt is a popular sport among many legislators and governors, some of whom must believe that doing so plays well in the suburbs.²⁶¹ All of which suggests that a reform that does not provide large sums of money to city-school bureaucrats, but instead allows parents to escape the clutches of those bureaucrats, is likely to be pretty popular among suburbanites – provided that city kids stay in the city.

To get a more concrete sense of the political dynamics at work, it may be helpful to consider the situation in Milwaukee. The story of the Milwaukee voucher program has been told often enough that there is now a conventional narrative, which describes how a

²⁵⁶ For the legislative and political history of the Milwaukee program, see Jim Carl, *Unusual Allies: Elite and Grass-roots Origins of Parental Choice in Milwaukee*, 98 *Teachers Col. Rec.* 266 (1996); Cookson, *School Choice*, supra note __, at 64-68; Viteritti, *Choosing Equality*, supra note __, at 98-108. For the Cleveland program, see Viteritti, *Choosing Equality*, supra note __, at 108-113. In Florida, the Opportunity Scholarship Program was endorsed by a number of African-American state legislators, as well as the Urban League of Greater Miami. See Prepared Testimony of The Honorable Jeb Bush to the House Budget Committee, *Fed. News Svce*, Sept. 23, 1999, at 3.

²⁵⁷ See Viteritti, *Choosing Equality*, supra note __, at 98-109; Carl, *Unusual Allies*, supra note __, at 268-75.

²⁵⁸ See Viteritti, *Choosing Equality*, supra note __, at 109 (noting that a minority representative of a poor Cleveland neighborhood found “a willing ally and advocate in Republican Governor George Voinovich, a former Cleveland mayor who had originally proposed a choice bill to the legislature that would have set up programs in eight urban districts” and describing the Cleveland program as a “compromise” of his original plan); Carl, *Unusual Allies*, supra note __, at 275-76 (describing Republican Governor Thompson’s support for the voucher plan).

²⁵⁹ Cf. Moe, *Vouchers and the American Public* 318-19 (noting that more than one-third of those who generally oppose vouchers would be willing to support voucher programs for the inner-city poor; these programs are supported 57 percent to 35 percent among Democrats and 52 percent to 42 percent among Republicans).

²⁶⁰ See, e.g., Lowell C. Rose & Alec M. Gallup, 30th Annual Phi Delta Kappa/Gallup Poll of the Public’s Attitudes Toward the Public Schools 49 (1998) (reporting that 86 percent of those surveyed believe it is “very important” “to improve the nation’s inner-city schools” and that 66 percent say that they would be willing to pay more taxes to do so).

²⁶¹ An example of this tendency is found in the increasing number of state takeovers of failing urban school districts. See James E. Ryan, *The Influence of Race in School Finance Reform*, 98 *Mich. L. Rev.* 432, 446-47 & n.57 (1999).

liberal, African-American state legislator, Annette “Polly” Williams, teamed up with Republican leaders to launch what essentially amounted to a pilot voucher program.²⁶² Initially, the program was limited to 1,000 students, who could use the vouchers in non-sectarian private schools within the city limits.²⁶³ Polly Williams, so the story (correctly) goes, pushed the choice program in part because she was fed up with school desegregation within Milwaukee, which she believed unfairly burdened black parents and students and was ineffective.²⁶⁴ Her allies in the fight for a voucher program were equally uninterested in desegregation, while those civil rights groups that remained committed to racial integration – the NAACP chief among them – opposed the voucher plan.²⁶⁵ Given this political line-up, it is not surprising that the voucher plan that finally emerged offered no means by which city students could attend suburban schools, whether public or private, nor is it that surprising that the conventional account suggests that vouchers were offered as an alternative to a failed attempt to desegregate the schools.

What does not make it into the conventional account of the voucher program, and what makes Milwaukee so interesting and instructive, is that the Milwaukee metropolitan area has operated a voluntary desegregation program for the last twenty-five years.²⁶⁶ Known as the Chapter 220 plan, this program allows approximately 5,500 Milwaukee students to attend suburban schools that have volunteered to accept the students, while 1,300 suburban students attend city magnet schools.²⁶⁷ Although state leaders, including former Governor Tommy Thompson, have occasionally proposed ending the program, it has survived and remains quite popular, at least among Milwaukee residents.²⁶⁸ Indeed, while 5,000 city students attend suburban schools, another 3,800 remain on a waiting list

²⁶² See sources cited supra note ____.

²⁶³ See Wells, *Time to Choose*, supra note ___, at 160-61.

²⁶⁴ See Bulman & Kirp, *Shifting Politics of School Choice*, supra note ___, at 48. Bulman & Kirp quote Williams as saying: “We don’t want this desegregation. Desegregation in the city of Milwaukee is terrible, and I’d like to see it abolished and go back to educating our children in our neighborhoods regardless of color. And it doesn’t matter if they’re all Black schools.” *Id.* Although this statement is clear enough, further proof of Williams’ lack of interest in integration is found in her unsuccessful effort, prior to pushing the voucher proposal, to create a separate and independent school district in a predominantly minority state legislative district. See *id.* at 49; see also William Snider, *Dissatisfied Black Leaders Draw Ire With “Mostly Black” District Plan*, *Educ. Week on the Web*, Nov. 4, 1987 (<http://www.edweek.org>) (last visited July 10, 2001).

²⁶⁵ See Viteritti, *Choosing Equality*, supra note ___, at 102; Harrison, *Milwaukee School Choice Proposal*, supra note ___, at A4.

²⁶⁶ See Michael Stolee, *The Milwaukee Desegregation Case*, in John L. Rury & Frank A. Casell, eds., *Seeds of Crisis: Public Schooling in Milwaukee Since 1920*, at 256-60 (1993).

²⁶⁷ For an overview of the program as of 1994, see *An Evaluation of the Chapter 220 Program*, State of Wis. Leg. Audit Bureau (Nov. 1994). For more recent figures on participation, see Alan J. Borsuk, *Eyes on Milwaukee for School Choice*, *Milwaukee J. Sentinel*, Aug. 21, 2000 (available at <http://www.childrenfirstamerica.org>) (last visited July 10, 2001); Viteritti, *Choosing Equality*, supra note ___, at 99.

²⁶⁸ See Joseph A. Ranney, “Absolute Common Ground”: The Four Eras of Assimilation in Wisconsin Education Law, 1998 *Wis. L. Rev.* 791, 816 n.96.

to do so.²⁶⁹ What is more, a legislative audit of the program in 1994 found that minority transfer students performed better on statewide achievement tests than minority students in the Milwaukee city schools, including those students who tried to transfer to suburban schools but were unable.²⁷⁰ Those who would support expanding this demonstrably effective program, however, clearly lack sufficient political power, which just as clearly resides with those who support the Milwaukee voucher program. Thus, while the number of city students attending suburban schools has remained steady for the last ten years,²⁷¹ during that same time period the State legislature expanded the number of vouchers available to Milwaukee students from 1,000 to 15,000.²⁷²

The lesson from Milwaukee is not that school integration in general, or urban-suburban integration in particular, is a failure and has lost all support among African-Americans. What we take from Milwaukee is that there is continued support for suburban-urban integration programs among African-Americans, and at least limited tolerance of such programs among suburban districts.²⁷³ At the same time, however, there is obviously much stronger political support for school choice that is limited to urban areas. What the Milwaukee voucher program represents, in effect, is yet another version of the compromise proposed by Nixon in his anti-busing speech in 1972: a reform nominally directed at increasing the educational opportunities for urban students, most of whom are poor minorities, that protects the sanctity of suburban public schools.

C. Pulling Together the Politics of Choice

1. The Radical Potential of School Choice

In most areas of the country, school districts or neighborhood schools within large districts are quite segregated by race and/or income. This is typically a result of the fact that school districts tend to track municipal boundaries and attendance zones within districts track different neighborhoods. Because municipalities, often through exclusionary zoning, are segregated by income (and thus, to a large degree, by race), so too are the districts that track them. The same is true with regard to neighborhoods within larger districts.²⁷⁴ Districts that have higher property values and residents in higher income brackets have a double advantage of being able to spend more locally

²⁶⁹ See Lynn Olson, *Fighting Back*, in *Quality Counts '98: The Urban Challenge*, supra note __, at 269.

²⁷⁰ *An Evaluation of Chapter 220*, supra note __, at 4.

²⁷¹ Telephone Interview of James McIntosh, Chapter 220 Financial Officer, Wisconsin Department of Public Instruction, July 11, 2001.

²⁷² See Bulman & Kirp, *Shifting Politics of School Choice*, supra note __, at 49-50.

²⁷³ Although initially part of a legal settlement, the program has continued past the deadline, in 1993, for the termination of the settlement. See *Evaluation of Chapter 220 Program*, supra note __, at 12. Cf. Eaton, *The Other Boston Busing Story*, at 12-13 (noting that, despite media reports of growing disenchantment among African-Americans with busing in Boston and elsewhere, "the waiting list for METCO continues to grow, even though it buses students much farther than typical desegregation plans").

²⁷⁴ For more detailed discussion, along with support, of these points, see Ryan, *Schools, Race, & Money*, supra note __, at 272-84; Ryan, *Influence of Race*, supra note __, at 435-36. See also *infra* TAN.

raised revenues on students who are easier to educate because they come to school with few of the problems that attend students living in poverty. If states and districts adhere to a neighborhood school policy and allow local districts to raise and spend what they wish on local schools, schools will obviously continue to be segregated by race and income, and they will continue to be funded unequally.²⁷⁵

Recognizing these basic facts unveils the radical potential of school choice. Simply put, allowing students to choose freely among schools could transform the way that education is provided in this country. To accept school choice in its most aggressive form is to accept the idea that all students should be able to choose from a range of schools. Further, if one believes that schools should really compete for students – and compete fairly – then all students should have an equal opportunity to attend all schools. It seems arbitrary to limit choice to a particular type of school, whether public or private, or to schools in a particular geographic area. A robust school choice plan would mean no privilege for those living in a particular area to attend good schools, and it would also mean that all students would have a ticket (call it a universal voucher) good for entry at any school. Under these circumstances, students would have the widest range of choices practicable, and schools would have to compete on the basis of services provided with similar resources. A universal school choice plan thus would undermine if not completely decimate the rationales for local control of public schools, as local restrictions on attendance and unequal expenditures among localities would be inconsistent with allowing students to choose freely and requiring schools to maximize their efficiency by competing fairly with one another.

What we would like to suggest is that, while advocates and commentators involved in school choice debates seem either unable to grasp or unwilling to emphasize the radical potential of school choice, suburbanites intuitively recognize this potential.²⁷⁶ The typical story about school choice, especially private school choice and to a lesser extent choice among charter schools, suggests that the most important opponents of school choice are the teachers' unions. It is certainly true that teachers' unions are formidable opponents of certain kinds of school choice, and that this opposition has shaped and will continue to shape school choice plans. The unions' steadfast opposition to vouchers and their eventual, grudging acceptance of charter schools, for example, certainly helps explain why far more students attend charter schools than receive publicly-funded vouchers.²⁷⁷ Yet the pattern we have just described suggests that teachers' unions are certainly not the only important characters involved in the school choice drama. If they were that powerful, it would be hard to explain why there are any

²⁷⁵ See, e.g., Eaton, *The Other Boston Busing Story*, *supra* note __, at 252 (“Because our local communities, especially in the northern metropolitan areas, are still heavily segregated by race and income level, dividing school districts along municipal lines is, for all practical purposes, segregation by race and class.”).

²⁷⁶ We speculate in the Conclusion as to why this point, and the views of suburbanites regarding choice, have not been a more prominent feature of the school choice debate and commentary. See *infra* TAN.

²⁷⁷ See, e.g., William G. Buss, *Teachers, Teachers' Unions, and School Choice*, in Sugarman & Kemerer, *School Choice and Social Controversy*, *supra* note __, at 300-05 (describing position of teachers' unions regarding charter schools).

voucher programs at all.²⁷⁸ Moreover, given their strong connection to the Democratic Party, it is hard to point to teachers' unions as the explanation as to why many Republican leaders turn out to have feet of clay when faced with a decision as to whether to support specific voucher plans.

What the pattern suggests instead is that suburbanites are the key players in *all* school choice plans, public or private. Think first of the fact that suburbanites strongly support local control over student attendance, as demonstrated by their intense resistance to interdistrict desegregation, and that they also strongly support a certain degree of local control over locally-raised revenues, as demonstrated by the myriad battles over school finance reform. Then consider the fact that most choice plans, public and private, involve choices within particular school districts, most typically within urban districts. Plans that allow interdistrict choice are not only less prevalent, but they almost always contain restrictions – allowing districts to opt out of participation or to accept transfers only if space is available – designed to protect the autonomy of local school districts. Those plans that *require* suburban schools to accept urban students are extremely rare, almost always the result of court order or settlement and, for that reason, not necessarily stable – as the dismantling of the St. Louis plan demonstrates. Think as well of the fact that charter schools most often, by practice or design, draw students from within the district in which they are located, and that they, too, are located most often in urban areas. Consider, finally, that two of the three voucher plans in existence specifically target poor, urban students and constrain their choices to schools within city limits, while the third allows greater choice in theory but places practical obstacles in the way of those who wish to use their vouchers outside of their home districts.

What do all of these plans have in common? They protect the ability of suburban parents to send their kids to suburban public schools, to spend locally raised revenues primarily if not exclusively on local kids, and to shield their kids from having to attend school with more than a relative handful of “outsiders.” At the same time, the plans represent some attempt to reform urban school systems and improve the opportunities available for students currently stuck in failing city schools. All of this fits perfectly within a worldview that believes that educational crises exist in the cities but not in the suburbs and that some efforts should be made to address those crises, provided that doing so does not simultaneously pull down suburban schools. This was the worldview essentially expressed by Nixon in his anti-busing speech, designed quite obviously to appeal to the silent majority (of mostly suburbanites) who supported his presidency. And it is the worldview that has been echoed and implemented time and again by suburbanites faced with the prospect of having to share their schools (or their local tax dollars) with urban students.²⁷⁹

²⁷⁸ Teachers' unions opposed the voucher plans ultimately adopted in Cleveland, Milwaukee, and Florida. See Bulman & Kirp, *The Shifting Politics of School Choice*, supra note __, at 47-50; Viteritti, *Choosing Equality*, supra note __, at 98-113; Frankel, *Supreme Court Test*, supra note __.

²⁷⁹ See supra TAN.

Polling about school choice, which shows a decent if varying amount of support for the concepts of both public and private choice, does not get at this particular political constraint.²⁸⁰ To see this constraint, one must descend into the realm of the actual and examine both what has occurred in the field already and how suburbanites have reacted. There is no hard data to prove the point, to be sure; instead there is a consistent series of events. It is certainly true that the plural of anecdote is not “data,” but it seems equally true that a pattern of events, consistent across both time and place, offers a pretty firm basis for drawing some general conclusions. Here, the pattern is unmistakable: suburbanites like their public schools, want to be able to devote local money to “their” schools, and want generally to limit attendance to local residents. Existing school choice plans, in turn, tend to conform to these preferences.

2. Suburban Political Power

If it is clear enough that existing school choice plans conform pretty well to the wishes of suburbanites interested in protecting their schools and preserving their property values, it remains to explain why this is so. The answer, we think, is pretty obvious: political strength. In most state legislatures, where choice plans are crafted, suburban legislators hold the balance of power.²⁸¹ Although legislators obviously respond to special interest groups on some issues, public choice theory posits and empirical studies confirm that they are more likely to follow the wishes of their constituents on high-visibility issues.²⁸² As George Stigler put it, an “obvious characteristic of democratic

²⁸⁰ Polling about school choice is, in any event, of questionable reliability. Very few people are familiar with different types of choice plans, so it is hard to know how fixed their stated preferences are. In addition, pollsters often ask about choice in general and not about the details of plans, and the details of choice plans presumably would affect people’s views about them. Finally, it seems clear that people say things that they think the pollsters want to hear when asked about education, even though it is totally implausible that the resulting appearance of support for a position actually exists. For example, 70% of those polled in 1999 stated that they agreed that the spending in wealthy districts should be “capped so that poor districts are not left behind.” See Ted Halstead and Michael Lind, *Taking Charge*, Wash. Monthly, April 1, 2001. Given the harsh opposition to school finance plans that cap spending or redistribute local funds, described above, it is very difficult to place much faith in the results of this poll.

²⁸¹ See, e.g., Gittell, *supra* note __, at 238 (“Suburban interests and power are pervasive in almost all state legislatures and in the state education bureaucracies.”); Margaret Weir, *Central Cities’ Loss of Power in State Politics*, 2 *Cityscape* 23 (1996) (examining how large cities have fared in state politics and concluding that such politics “are increasingly driven by a suburban-based politics of ‘defensive localism’ that seeks to limit State action in addressing urban economic and social problems”); see also William Schneider, *The Suburban Century Begins*, *Atlantic Monthly*, July 1992 (noting that, because of population shifts, “[w]e are now a suburban nation with an urban fringe and a rural fringe” and arguing that national politics is now driven by the concerns of suburban voters).

²⁸² On this aspect of public choice theory, see, e.g., Denzau & Munger, *Legislation & Interest Groups: How Unorganized Interests Get Represented*, 80 *Am. Pol. Sci. Rev.* 89 (1986); Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 *U. Chi. L. Rev.* 63, 88 & n.58 (1990); Neil Komesar, *Imperfect Alternatives, Choosing Institutions in Law, Economics, and Public Policy* 53-82 (1994); Daniel A. Farber & Philip P. Frickey, *Law & Public Choice: A Critical Introduction* 19 (1991); James Q. Wilson, *The Politics of Regulation*, in James Q. Wilson, ed., *The Politics of Regulation* 357-72 (1980). For empirical studies supporting this theory, see, e.g., K. Schlozman & J. Tierney, *Organized Interests & American Democracy* 261-317 (1986). For a particularly relevant case study, indicating that legislators in education funding battles tend to follow their constituents’ wishes over the wishes of organized interest

political life [is that] special minorities . . . can exploit uninterested majorities but will be exploited by interested majorities.”²⁸³ Within the realm of state and local politics, few if any issues are more highly visible than those concerning schools and education; electoral majorities, in other words, are keenly interested in education issues. Suburban legislators thus have the political power, as well as the political incentives, to protect the interests of their constituents.²⁸⁴

At the same time, it is important to recognize that there are not many organized groups pushing in the opposite direction – that is, pushing to expand the opportunities for choice beyond particular districts or to abolish neighborhood schools. Those advocating for school choice, especially private school choice and charter schools, are typically not especially interested in (or, in the case of some minority leaders like Polly Williams, are opposed to) enhancing opportunities for racial or socioeconomic integration.²⁸⁵ Civil rights groups that remain committed to integration, by contrast, appear to be devoting more of their energy to blocking attempts to expand private school choice than to seeking ways to use choice to enhance integration. The NAACP, for example, has formed a partnership with People for the American Way for the stated purpose of preserving public education.²⁸⁶ The partnership’s main activity, however, appears to be fighting against vouchers rather than offering much in the way of new programs generally or new ideas for increasing integration in particular.²⁸⁷ Similarly, although the NAACP Legal Defense Fund was heavily involved in the *Sheff* litigation and appears ready to litigate to force racial and socioeconomic integration, much if not most of the LDF’s energy appears devoted toward preserving existing mandatory desegregation plans rather than toward creating new voluntary ones.²⁸⁸ Given the strength of suburban voters and legislators, it is hard to imagine that even a strong push toward expanding school choice into the suburbs would be hugely successful. As it stands, however, no one is really even pushing that hard.

All of which means that, unless the politics change, the radical potential of school choice will be contained and school choice plans will continue to be confined within particular, mostly urban districts. The next Part will try to gauge what we can expect from such limited plans.

groups, see Dorothy Brown, *The Invisibility Factor: The Limits of Public Choice Theory & Public Institutions*, 74 Wash. U. L.Q. 179 (1986).

²⁸³ George Stigler, *The Citizen and the State* 162 (1975).

²⁸⁴ See, e.g., David M. Herszenhorn, *Rich States, Poor Cities and Mighty Suburbs; In Connecticut and New Jersey, Urban Poverty Confronts Leafy Affluence*, NY Times, Aug. 19, 2001, at 39 (describing suburban political dominance in New Jersey and Connecticut and reluctance of suburban legislators to devote resources to urban areas, including urban schools).

²⁸⁵ See *supra* TAN.

²⁸⁶ [Cite web materials]

²⁸⁷ [Same]

²⁸⁸ Confirm with Dennis Parker of LDF.

II. THE CONSEQUENCES OF CONSTRAINED CHOICES

If our assessment of the political economy of school choice is correct, and if the political dynamics do not change substantially, we should continue to see school choice plans that are confined to single districts. Even within single districts, we should expect to see mostly limited choice plans that allow some students to attend specialized non-neighborhood schools, either public or private, but that also preserve the traditional neighborhood school. In this Part we try to assess the likely impact of such limited school choice plans along three dimensions: racial and socioeconomic integration, academic achievement, and productive competition among schools. These three are the most discussed and most important criteria for assessing school choice plans. Our analysis relies on data regarding the current demographics of school districts and neighborhoods, studies of the impact of previous and existing choice plans, and economic literature on school competition. We cannot pretend, of course, to predict with precision the impact of limited school choice plans; variations among the thousands of school districts, residential mobility, and the limits of existing research are but three factors that counsel caution in trying to predict the future here. Nonetheless, we have enough information to provide a general sense of what we can expect limited choice plans to accomplish.

A. Racial and Socioeconomic Integration

One of the more controversial questions that looms over choice programs involves their implication for racial and socioeconomic integration. The implications are historically framed in an unflattering light. As Betsy Levin, among others, reminds us, in the middle of the twentieth century, school choice flourished in the South principally as a mechanism to thwart desegregation efforts.²⁸⁹ Prohibiting school choice was thus one step toward desegregating southern schools. Despite the fact that school choice has recently been used *integrate* rather than *segregate* schools,²⁹⁰ Levin speculates that school choice would unwind decades of school integration efforts, fuel increased socioeconomic stratification and isolation, and thereby enhance rather than ameliorate social inequities.²⁹¹

Professor Levin is not alone in her speculations. One of the recurring arguments against school choice plans in general and vouchers in particular is that they will lead to

²⁸⁹ Betsy Levin, Race and School Choice, in *School Choice and Social Controversy: Politics, Policy, and the Law* 267-68 (Stephen D. Sugarman & Frank R. Kemerer, eds.).

²⁹⁰ See, e.g., Viteritti, *Choosing Equality*, supra note __, at 58-60 (discussing “controlled choice” plans); Kahlenberg, *All Together Now*, supra note __, at 116-30 (same); Henig, *Rethinking School Choice*, supra note __, at 111 (same).

²⁹¹ Levin, *Race and School Choice*, supra note __, at 286.

greater racial and socioeconomic isolation.²⁹² This argument reflects a belief that if more families are empowered to choose among education options, families who are the most well informed, motivated, and economically well-off are more likely to avail themselves of greater school choice.²⁹³ Indeed, even choice proponents recognize the salience of the “skimming problem” as well as the need for policymakers to address this problem when crafting choice programs.²⁹⁴ The argument also reflects a belief that white and black parents, if given the choice, will opt for schools that are more racially homogenous than current public schools.

Making dire predictions about the impact of school choice on racial and socioeconomic integration is a powerful rhetorical strategy, but it is crucial to examine the often unstated assumptions that underlie such predictions. Suggestions that school choice will exacerbate racial and socioeconomic isolation often rest on an implicit premise that the nation’s public schools are fairly well integrated by class and race. As we explain below, in the main this premise is simply false. Most children in this country attend schools that are segregated by race and by class.²⁹⁵ In order to get anywhere on this issue, we believe that assessments of the effects of choice programs must be approached from a comparative perspective. That is, existing integration levels in public schools must be the starting point in determining the likely impact of school choice, both public and private.

1. Residential Patterns and School District Demographics

School enrollment patterns and residential patterns are tightly linked in this country, because the overwhelming majority of public school students attend neighborhood schools. Public schools will therefore tend to be as segregated as the neighborhoods in which they are located. Neighborhoods in most metropolitan areas, in turn, are remarkably segregated by class and by race.

A common measurement of residential segregation is the dissimilarity index, which measures the percentage of residents in a neighborhood who would have to move in order for the neighborhoods to reflect the proportion of whites and minorities (or poor and middle-class families) in a particular geographic area. The higher the index number, the greater the segregation, with a score of 0 indicating perfect balance and a score of 100 indicating complete apartheid. Looking at segregation by race, in 1990, the average dissimilarity index was 77.8 percent for Northern cities and 66.5 percent for Southern

²⁹² See, e.g., Amy S. Wells, *The Sociology of School Choice: Why Some Win and Others Lose in the Educational Marketplace*, in *SCHOOL CHOICE: EXAMINING THE EVIDENCE* 30 (Edith Russell & Richard Rothstein eds., 1993); McCusick, *School Finance Litigation*, in Heubert, ed., *supra* note __, at 125-28 .

²⁹³ See, e.g., Peter W. Cookson, *School Choice* (1994); Henry M. Levin, *Education as a Public and Private Good*, in Neal E. Devins, ed., *Public Values, Private Schools*(1989); Jonathan Kozol, *Savage Inequalities* (1991); Amy S. Wells, *A Time to Choose* (1993).

²⁹⁴ Terry M. Moe, *Private Vouchers* 23 (1995). See also Terry M. Moe, *Schools, Vouchers, and the American Public* 10 (2001) (“readers should be aware that I am a supporter of vouchers”).

²⁹⁵ See Viteritti, *Choosing Equality*, *supra* note __, at 49; see also *infra* TAN.

cities.²⁹⁶ Racial segregation is down a bit from levels recorded in the 1970s,²⁹⁷ but African-Americans remain more segregated than any other racial or ethnic group now or in the history of the United States.²⁹⁸ They are also more segregated today than they were in 1940, despite decades of efforts to increase residential integration.²⁹⁹

Indeed, one-third of all African-Americans live under “hypersegregated” conditions, which means essentially that they live in large, contiguous, racially homogeneous neighborhoods clustered around city centers. These African-Americans, living in cities like Atlanta, Baltimore, Chicago, Dallas, Detroit, Los Angeles, Milwaukee, and New York are not likely to encounter any whites in their own neighborhoods, the neighborhoods adjacent to theirs, or the ones adjacent to those.³⁰⁰ It is ironic, if not perverse, that blacks who live in these large urban centers are “are among the most isolated people on earth.”³⁰¹

Hispanics have experienced similar, though less dramatic, residential segregation. Although segregation in school or housing patterns is often discussed solely in terms in blacks and whites, attention should also be paid to Hispanics, who comprise the fastest growing segment of the public-school population.³⁰² In 1990, the dissimilarity index for Hispanics living in the largest 100 metropolitan areas in the United States was 45.1.³⁰³ This figure dropped slightly, to 44.6, by 2000.³⁰⁴ This slight decline, however, masks an increase in segregation among Hispanic immigrants; that is, housing segregation increased for those areas experiencing rapidly increasing Hispanic populations.³⁰⁵

Just as residential areas are often segregated by race and ethnicity, they are also economically segregated. In 1990, the dissimilarity index for poor households in the 100

²⁹⁶ Douglas Massey & Nancy Denton, *American Apartheid: Segregation and the Making of the Underclass* 222, tbl.8.1 (1993).

²⁹⁷ While most observers agree that residential segregation lessened between 1970 and 1990, little agreement exists on the precise magnitude. Massey and Denton, for example, suggest that segregation decreased by 7.5 percent. Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 222 (1993) tbl.8.1. A more optimistic view—a 16.7 percent decline—is advanced by Cutler and colleagues. David M. Cutler et al., *The Rise and Decline of the American Ghetto*, 107 *J. Pol. Econ.* 455, 495 (1999).

²⁹⁸ Massey & Denton, *American Apartheid*, supra note ___, at 2.

²⁹⁹ Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 *Colum. L. Rev.* 1965, 1980 (2000).

³⁰⁰ Massey & Denton, *American Apartheid*, at 74-78.

³⁰¹ *Id.* at 77.

³⁰² Gary Orfield & John T. Yun, *Resegregation in American Schools* 5 (June 1999) (available at <http://www.harvard.edu/civilrights/publications/resegregation99.html>).

³⁰³ David Rusk, Report for Common Schools Task Force 4 (Aug. 29, 2001) (unpub. report, on file with authors).

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 1, 4.

largest metropolitan areas in the country was 36.1. This number was higher than the number in 1970, indicating an increase in economic segregation. Economic segregation, moreover, is shaped by and corresponds with racial segregation. Although half of the poor people in metropolitan areas are white, three-quarters of poor whites live in middle-class neighborhoods. Neighborhoods of concentrated poverty “are overwhelmingly black ghettos and Hispanic barrios.”³⁰⁶

This leads to the last and final point about racial³⁰⁷ and socioeconomic residential segregation. A good deal of residential segregation takes place between municipalities rather than within a particular town or municipality. Residential segregation most visibly tracks boundaries separating cities and their suburbs.³⁰⁸ Since the middle of the twentieth century whites and middle-class blacks have left cities in droves, leaving behind cities increasingly dominated by poor minorities.³⁰⁹ By the end of 1970s, the pattern of an urban core dominated by blacks surrounded by a ring of predominately white suburbs emerged.³¹⁰ That pattern has continued, with large numbers of Hispanics joining poor African-Americans in the cities.³¹¹ The consequence of this demographic shift has been to concentrate poverty in urban neighborhoods that are isolated by race and ethnicity. And what is true for urban neighborhoods is true for urban schools.

The numbers tell the story, and the numbers are stark. Most African-American and Hispanic students are in urban schools that are predominately minority. In 1996-97, for example, nearly 70% of African-American and nearly 75% of Hispanic students attended schools that were between 50% and 100% minority.³¹² Perhaps even more striking, over one-third of African-American and Hispanic students attend schools that are almost exclusively (over 90%) minority.³¹³ The overwhelming majority of white

³⁰⁶ The figures in this paragraph come from Rusk, Report, supra note ___, at 5; see also Massey & Denton, *American Apartheid*, supra note ___, at ___.

³⁰⁷ Unless otherwise indicated, when speaking of racial segregation, we are referring to segregation between African-Americans and whites, as well as segregation between Hispanics and whites. Put differently, for sake of convenience we use “racial” segregation to refer to both racial and ethnic segregation.

³⁰⁸ Indeed, racial segregation between cities and their suburbs has become so pronounced that social scientists no longer find it helpful to measure segregation within cities alone. Massey & Denton at 61.

³⁰⁹ See, e.g., Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 *Cornell L. Rev.* 729 (2001)(considering the costs and benefits of black suburbs).

³¹⁰ See Thomas F. Pettigrew, *Racial Change and Social Policy*, 441 *Annals of Am. Acad. Pol. Sci.*, 114, 122 (1979)(“This doubled proportion of blacks in central cities is the basic fact underlying the spatial maldistribution of the races; and it is the largest single reason for the vast residential separation of black and white citizens today”).

³¹¹ See Massey & Denton at 67-74.

³¹² Orfield & Yun, *Resegregation*, supra note ___, at 14, tbl. 9.

³¹³ *Id.*

students, in turn, attend schools that are predominately white; indeed, the average white student attends a school that is 81.2% white.³¹⁴

If we shift our gaze from national statistics and focus on some large, urban districts, the intensity of racial and ethnic segregation becomes clear. As of 1995, *all* of the students in East St. Louis, Illinois and in Compton, California, were minority.³¹⁵ Close to all – between 93% and 96% -- of the students in Washington, D.C., Hartford, New Orleans, San Antonio, Camden, Los Angeles, Oakland, and Atlanta were minority.³¹⁶ In Richmond, Virginia, and Newark, New Jersey, over 90% of the students were minority.³¹⁷ In Chicago, as of 1996-97, just under 90% of the students were minority, while in Detroit in the same year, close to 95% of the students were minority.³¹⁸ In New York, meanwhile, nearly 84% of the over one million public school students are minorities.³¹⁹

Where there is racial and ethnic isolation of minorities, there is also usually concentrated poverty. The correlation is startling. Generally speaking, the larger the percentage of white students, the smaller the percentage of poor students. Less than 10% of schools whose enrollment is between 10% and 20% minority are predominately poor – meaning at least half of the students are eligible for free or reduced price lunch. Exactly *half* of the schools that are 50% to 60% minority are predominately poor. And nearly 90% of schools that are 90% to 100% minority are predominately poor.³²⁰ If we narrow our focus again, and look at particular urban districts, the extent of poverty in urban public school districts becomes clear. Over two-thirds of the students in Atlanta, New York, New Orleans, Los Angeles, Chicago, St. Louis, Camden, Jersey City, Newark, and Bridgeport, are poor. So, too, are nearly two-thirds of the students in Oakland, Washington, D.C., Baltimore, Detroit, Kansas City (Missouri), Buffalo, and Dallas.³²¹

The racial and economic segregation that exists in America's schools, it bears emphasizing, typically occurs *between* districts rather than within the same district. A recent study of all schools that reported data on poverty and race – a bit over 33,000 schools – revealed that most poor primary school students are clustered in majority-poor districts.³²² The same is true with both African-American and Hispanic students; most

³¹⁴ Id. at 16.

³¹⁵ Craig D. Jerald & Bridget K. Curran, *By the Numbers: The Urban Picture*, Educ. Wk, Jan. 8, 1998, at 56.

³¹⁶ Id.

³¹⁷ Id.

³¹⁸ Orfield & Yun, *Resegregation*, supra note __, at 8.

³¹⁹ Jerald & Curran, *By the Numbers*, supra note __, at 56.

³²⁰ These figures are reported in Orfield & Yun, *Resegregation*, supra note __, at 18, tbl. 13.

³²¹ The district poverty figures are reported in Jerald & Curran, *By the Numbers*, supra note __, at 64-65; see also infra Table 1.

³²² Duncan Chaplin, *Estimating the Impact of Economic Integration of Schools on Racial Integration 2-3* (Oct. 15, 2001) (unpub. paper, on file with authors).

attend schools within majority-minority school districts.³²³ This has very important implications for school choice, because it means that even if schools within districts were perfectly integrated, schools within those districts would remain majority poor and majority-minority. In order to reduce isolation by race, ethnicity, and poverty, integration must occur between rather than within districts.³²⁴

2. *Gauging the Impact of School Choice*

Public schools today, as the demographic statistics indicate, are very segregated by race and income.³²⁵ Urban schools in particular principally serve poor, minority students, and most minority students attend urban schools.³²⁶ If school choice plans are confined to single districts, and are implemented primarily in urban districts, the effect of such plans on racial and socioeconomic integration is thus likely to be marginal. The reason is pretty simple: if those in a school district are predominately minority and poor, shuffling them around through choice plans to other schools within the district will not have much impact on integration levels. Put bluntly, school choice in many urban districts simply cannot do much harm or good in terms of integration because there simply are not enough white and middle-class students in those districts.

This is not to deny that there may be some movement on the margins, in either the direction of greater or lesser degrees of racial integration. Much will depend on the structure of the plan and the demographics of particular districts. If choice is confined to public (and charter) schools only, there may be slightly more or slightly less integration in particular schools as students move from one setting to another. But it seems implausible that such school choice plans will significantly modify current levels of segregation.

Evidence from charter schools bolsters this point. The most comprehensive picture of charter schools' racial and socioeconomic profiles comes from a far-ranging evaluation of the 1,605 charter schools operating in the 1998-99 in 31 states and the District of Columbia.³²⁷ Researchers found that, in general, racial and socioeconomic

³²³ Id. at 6.

³²⁴ Cf. id. (concluding that “most segregation (both racial and economic) is *across* and not *within* districts”).

³²⁵ In 1990-91, for example, African-American and Hispanics accounted for more than 68 percent of the enrollment in the nation's largest 47 public school districts. See Council of Great City Sch., National Urban Education Goals: Baseline Indicators, 1990-91, at xi (1992). During the same school year, of the students attending the nation's largest 47 school districts, more than 50 percent were eligible to receive a reduced (or free) lunch. Id. at xi. Closely related to socioeconomic status is that students attending urban public schools are more likely than their suburban counterparts to live in single-headed households and change schools frequently. Laura Lippman et al., *Urban Schools: The Challenges of Location and Poverty* (US Dept of Educ., NCES report 96-184)(1996), at vii, 6.

³²⁶ See Ryan, *Schools, Race, and Money*, supra note __, at 272 & n.92.

³²⁷ Beryl Nelson, et al., *The State of Charter Schools: National Study of Charter Schools 1* (U.S. Dept. of Educ. 2000).

characteristics of charter schools were similar to those found in public schools.³²⁸ More specifically, approximately 70 percent of charter schools are “not distinct from” the characteristics of the surrounding public school districts.³²⁹ However, researchers also note that in some states charter schools serve “significantly higher percentages of minority or economically disadvantaged students.”³³⁰ For example, approximately 17 percent of charter schools serve a higher percentage of minority students than their surrounding district, while approximately 14 percent of charter schools serve a lower percentage.³³¹ Similarly, charter schools enroll a “slightly higher percentage” of low-income students than do all public schools in the 27 states where charter schools operate.³³² On the basis of emerging evidence, then, it appears that charter schools generally avoid exacerbating -- and may marginally decrease-- racial and socioeconomic segregation.³³³

If instead of a choice plan confined to public schools, an urban district institutes a voucher program, those who use the vouchers to attend private schools may move from a relatively segregated to a relatively integrated setting. This is because in a number of cities, private schools are more racially and socioeconomically integrated than are the public schools.³³⁴ Poor, minority students who chose private schools may well find themselves in either a more integrated setting, or one that is equally isolated by race and socioeconomics but consists not of poor minorities, but middle-class whites. Evidence from the Cleveland and Milwaukee voucher programs support this hypothesis, as reports suggest that voucher students are in more integrated settings than are non-voucher students who remain in city public schools.³³⁵

³²⁸ Id. at 2.

³²⁹ The term “not distinct from” means that the racial and socioeconomic composition of the charter school was within 20 percent of the surrounding public school district averages. Id. at 30.

³³⁰ Id. (These states include: Connecticut, Illinois, Louisiana, Massachusetts, Michigan, Minnesota, New Jersey, North Carolina, and Texas.)

³³¹ Id. at 2, 31.

³³² Id. at 34 (39 percent of charter school students and 37 of the public school population were eligible for free or reduced lunch programs).

³³³ See, e.g., M. Buechler, *Charter Schools: Legislation and Results After Four Years* (unpublished manuscript—Indiana Univ. Educ. Policy Center, Policy Rep. PR-B13) (1996), at 26-27.

³³⁴ See, e.g., Nicole Garnett, *The NAACP’s Parent Trap*, 2 *Weekly Standard* 16 (1996-97) (reporting that “[m]any of the private and religious schools in inner-city Milwaukee are more integrated than their public counterparts, some of which are virtually all black”); Jay Greene, *The Racial, Economic, and Religious Context of Parental Choice in Cleveland* 5-8 (unpub. paper, prepared for Annual Meeting of the Assoc. for Policy Analysis and Management) (Oct. 8, 1999) (reporting similar dynamic in Cleveland). See generally Paul E. Peterson & Jay P. Greene, *Race Relations & Central City Schools: It’s Time for an Experiment with Vouchers*, *Brookings Review* at 36 (Spring 1998) (reporting statistics that show that private schools are typically “less racially isolated than their public school peers”).

³³⁵ See Fuller & Mitchell, *Study of Milwaukee Choice Plan*, *supra* note __, at 5; Greene, *Context of Parental Choice in Cleveland*, *supra* note __, at 5-8.

Vouchers for private schools, however, can only do so much in terms of enhancing racial and socioeconomic integration. To begin, the politics of vouchers have thus far resulted in fairly limited programs, where a small percentage of public school students receive vouchers for use at private schools. In Cleveland, Milwaukee, and Florida, for example, only a tiny percentage of public school students are receiving vouchers. If this trend continues, obviously the impact of a voucher program on integration levels will necessarily be slight, given the limited scope of the programs. A select few students may find themselves in more integrated settings than the ones they departed, but this will do little to alter the demographics of public schools or the overall levels of integration in urban districts.

On the other hand, if the programs are expanded in size, existing private schools will be unable to accommodate all of the voucher students. This is true not only because there is a limited supply of private schools generally, but also because voucher programs have not been – and will not likely be – sufficiently generous to allow voucher students to attend expensive private schools. The private schools available for voucher students will thus continue to be even more limited than the already limited supply of private schools generally. Although it seems fair to assume that new private schools would develop in response to an expanded voucher program, these schools presumably would be filled primarily with voucher students and thus would do little to alter the demographic profile of the schools attended by these students.

In general, then, where choice plans are confined to single districts and those districts themselves are racially and socioeconomically homogeneous, choice will have little overall impact on integration levels. In districts that are racially and socioeconomically diverse, but where there is a good deal of residential segregation by race and class, school choice could improve levels of segregation if choice plans are widespread (and perhaps if choices are constrained in order to achieve some measure of racial and socioeconomic balance). Thus far, however, widespread choice plans even within single districts are quite exceptional; most choice plans are more modest, providing a limited number of students the opportunity to attend special private or public schools.³³⁶ If these trends continue, some movement at the margins will occur, but it is difficult to predict the direction of that movement. In some districts, minorities or whites may cluster in charter schools, increasing slightly the level of segregation in the district. In other districts, minorities may take their vouchers to integrated or predominately white private schools, increasingly slightly the level of integration in the district. But these changes on the margin, which garner a great deal of attention in the academic literature on charter schools and vouchers,³³⁷ should not blind us to the larger picture.

Unless the politics change, the larger picture will remain one that is dominated by racial and socioeconomic segregation, with a splash of exceptional areas where integration can and does occur. To provide a better glimpse of this picture and a more concrete sense of the likely impact of choice, and to give a better sense of the various

³³⁶ See supra TAN for further discussion of intradistrict choice plans.

³³⁷ See sources cited supra notes ___ to ___.

possibilities for choice within particular districts, we have organized data drawn from a representative sample of American public school districts across the country. As is clear from the table below, we endeavored to report demographic data from four different types of school districts – large urban, small urban, suburban, and rural. Within each of those classifications, we provide data on three different school districts from different geographic locations within the United States.

TABLE 1:
RESIDENTIAL³³⁸ AND PUBLIC SCHOOL ENROLLMENT,³³⁹ BY RACE, AND POVERTY RATE³⁴⁰

	<i>Res.</i> <i>White</i>	<i>Res.</i> <i>Black</i>	<i>Res.</i> <i>Hisp.</i>	<i>Res.</i> <i>(othr.)</i>	<i>School</i> <i>White</i>	<i>School</i> <i>Black</i>	<i>School</i> <i>Hisp.</i>	<i>School</i> <i>(othr.)</i>	<i>School</i> <i>Poverty</i>
<i>Urban:</i>									
NYC	39.5	28.7	24.4	7.4	15.7	35.8	37.5	11.0	69.6
Los Angeles	35.8	14.0	39.9	10.3	10.9	13.8	68.5	6.8	73.3
Chicago	37.3	39.1	19.6	4.0	10.3	53.7	32.6	3.4	70.1 *
<i>Small-Urban:</i>									
Charl.-Meck.	64.6	31.8	1.4	2.2	50.9	41.7	2.9	4.5	38.1
Indianapolis	75.2	22.6	1.1	1.1	38.4	58.5	2.4	0.8	53.5 *
Portland, OR	82.6	7.7	3.2	6.5	66.7	16.0	6.4	10.9	38.2
<i>Suburban:</i>									
Plano, TX	85.4	4.0	6.2	4.3	75.5	6.1	7.6	10.8	3.5
Bellevue, WA	85.0	2.2	2.5	10.3	70.1	3.7	6.5	19.6	7.8
Loudoun Cty., VA	87.7	7.1	2.5	2.7	81.9	8.7	4.7	4.7	4.2
<i>Rural:</i>									
Gilbert, AZ	84.8	1.5	11.6	2.1	84.4	2.2	10.6	2.8	9.1
Moore, OK	88.5	1.8	3.4	6.4	80.1	4.3	3.9	11.6	10.3
St. Johns Cty., FL	88.3	8.7	2.3	0.8	86.2	11.0	1.7	1.1	15.1

³³⁸ 1990 U.S. Census data. See Statistical Abstract of the United States 47-49 (1998), tbl.48; and supplemental U.S. Census data, available at: <http://venus.census.gov/edrom/lookup/>.

³³⁹ Fall 1997 enrollment. See Nat'l Ctr. for Educ. Statistics, Digest of Education Statistics: 2000 99 (2001) tbl.93.

³⁴⁰ Except where otherwise indicated, data on school poverty, expressed as a function of the percentage of a school district's students eligible for the free or reduced lunch program, are drawn from Nat'l Ctr. for Educ. Statistics, Characteristics of the 100 Largest Public Elementary and Secondary School Districts in the United States: 1999-2000 28-29 (2001), Tbl.9. Data for district figures noted with (*) are drawn from The Council of the Great City Schools, Nat'l Urban Education Goals: Baseline Indicators, 1990-91 118-211 (1992). However, we could not locate reliable school free or reduced lunch program eligibility data for all school districts, and those districts are noted with (). For these districts we report general school poverty rate data for 5-17 year-olds drawn from Nat'l Ctr. for Educ. Statistics, Digest of Education Statistics: 2000 116 (2001) tbl.95.

The school poverty rate is typically lower than the percentage of students eligible for free and reduced priced lunch, as students whose families are above the poverty level by a certain amount are eligible for federal lunch programs. See 42 USCA § 1758 (b)(1)(B) (providing, inter alia, that students from families below 185 percent of the federal poverty level are eligible for reduced price lunch). The difference in school poverty between some of the districts is thus slightly exaggerated because of the different data used. The exaggeration, however, is slight, given that the two types of data relate in important ways – i.e., the lower the school poverty rate, the lower the percentage of students eligible for free and reduced price lunch. Put differently, it is very safe to conclude that there is a stark difference in student poverty in urban districts, on the one hand, and suburban districts on the other. As between the two types of data, finally, for purposes of our discussion, we feel that eligibility for the free or reduced lunch program is a more helpful, accurate, and probative proxy for student socioeconomic status. It is also the criteria used to determine federal Title I aid, which is designed to assist “poor” students. See 20 U.S.C. §§6301-6514 (1994).

The data presented in Table 1 reflect the general trends outlined above and raise several points that warrant discussion. To begin, white enrollment in the nation's largest districts (*e.g.*, New York City, Los Angeles, and Chicago) is comparatively minimal, principally because these districts experienced significant losses of white students over the decades for an array of reasons. Equally important, the percentage of poor students in these districts is quite high, nearing or exceeding 70% in each one. The high degree of racial and socioeconomic isolation within these districts indicates that intradistrict choice plans there would have little chance of significantly altering levels of integration. To the extent that the relatively few white and non-poor students are clustered in particular schools, intradistrict choice *may* improve integration, at least if choice is crafted to achieve greater integration.³⁴¹ On the other hand, to the extent those students are evenly distributed, choice could increase segregation. Both movements, though, will be at the margins. No matter how evenly disbursed the students are within these districts, schools will remain majority-minority and majority poor.

Another feature to notice about the demographics of large urban districts is that the proportion of whites remaining in these large cities exceeds, in many instances by more than 100 percent, the proportion of white students attending public schools. Thus, not only do whites avail themselves of school choice by departing urban areas when their children reach school age (or never living in cities to begin with), those white residents who do live in the nation's largest cities avail themselves of private schools at a rate that greatly exceeds their non-white counterparts. White families' mobility—both in terms of departing urban for suburban areas and departing public for private schools—fuels a disproportionate absence of white schoolchildren in urban public schools and generates a level of racial isolation in urban public schools that exceeds what residential integration levels predict. This, again, suggests that choice plans that include vouchers for private schools may raise integration levels by tapping into the white student population in private schools. It also suggests that plans limited to choice among public schools in these districts have no real chance – absent significant demographic changes – of altering the drastic degree of racial isolation that currently exists.

If we turn our attention to smaller urban districts, we see a good deal of variation even among just the three sample districts. Some of the variation is due to different demographics within traditionally drawn urban districts. Indianapolis is majority-minority, for example, while Portland is majority white, which will affect the opportunities for increased racial integration through intradistrict choice. Similarly, there

³⁴¹ Were these districts to adopt a controlled choice plan, for example, that required all parents to choose their children's schools and assigned students in a way that avoided socioeconomic isolation, it is possible that all schools could be predominately "middle-class" schools. Although this possibility may be less remote than the possibility of greatly increasing urban-suburban choice plans, it must be recognized that controlled choice plans like those in Cambridge and Buffalo are quite rare. See *supra* TAN. School choice plans in most urban districts, as we have discussed, usually preserve neighborhood schools and offer a select group of students additional options outside of their neighborhoods. The chance that neighborhood assignments would be abolished and that all students in these large urban districts would be able (or be required) to choose their schools thus seems fairly slight.

are fewer poor students in Portland than in Indianapolis, which would make it easier to achieve socioeconomic integration in Portland because fewer students would have to be moved in order to achieve this goal.

Some of the variation among these districts has less to do with the demographics of the cities themselves and more to do with how the district lines are drawn. Many northern and western metropolitan areas are divided into a large number of relatively small, independent school districts that usually track city or municipal lines. This approach contrasts with a number metropolitan areas in the south, such as Charlotte-Mecklenberg, that organize school districts along county lines.³⁴² County-wide school district attendance zones, drawn partly in response to prior desegregation efforts, reduce the possibility for nearby predominately white public school districts and thereby enhance the prospect for integrated schools.³⁴³ Because they also include suburban areas, the overall poverty rates in such districts also tend to be lower than in districts that only include central cities.

Choice within districts that include cities and suburbs will typically have a greater chance of improving racial and socioeconomic integration than will choice plans confined to districts that only include central cities. But the choice will have to be fairly widespread and will essentially require the abandonment of neighborhood assignments or neighborhood preferences. This may be especially difficult to accomplish in a number of these southern districts, which are just now being released from desegregation decrees that required busing in order to achieve and maintain integration. (Charlotte-Mecklenberg itself was just declared unitary in September 2001.).³⁴⁴ Often the drive for unitary status is motivated by a desire within the district to return to neighborhood schools; those neighborhood schools, in turn, because of lingering residential segregation, would be largely segregated by race.³⁴⁵ Under those circumstances, the odds that a district released from a busing plan will choose to adopt a choice plan that rejects neighborhood assignments seems fairly slim.

On the other hand, if the drive for unitary status is not a popular one, and there is political support for continuing integration efforts, switching from mandatory busing to controlled choice may actually be easier in these metropolitan districts than elsewhere. In Charlotte-Mecklenberg, for example, most reports suggest that the desegregation plan was politically popular, and that the drive for unitary status was not widely supported.³⁴⁶

³⁴² Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 *Minn. L. Rev.* 825, 841 (1996) (emphasizing the importance of the South's county-line school districts on bolstering school integration levels).

³⁴³ *Id.*

³⁴⁴ See *Belk v. Charlotte-Mecklenberg Board of Education*, 2001 WL 1104486, at *1 (4th Cir. 2001).

³⁴⁵ In Charlotte-Mecklenberg, for example, residential areas continue to be very segregated by race. See *Belk*, 2001 WL 1104486, at *11 (Traxler, J. concurring). See generally Orfield & Yun, *Resegregation*, *supra* note __, at 3-4 (arguing that the dismantling of desegregation decrees is causing schools, especially in the south, to resegregate).

³⁴⁶ See Ed Week stories; Wells study.

Charlotte-Mecklenberg thus may be fertile ground for a widespread, intradistrict choice plan that offers an alternative means to maintain racial and socioeconomic integration.³⁴⁷

The sample districts, finally, show that white students as a percentage of overall students in all non-urban schools significantly exceeds 50 percent. The rural schools are roughly between 85 and 89 percent white, as are the suburban schools. Largely tracking national trends, poverty is least likely in suburban schools. Although a greater percentage of students in rural districts are poor, district poverty in the sample rural districts is below that of the urban districts. What this suggests is that most schools in suburban and rural areas can be majority “middle-class” without having to move many, if any students. It also suggests that there is not likely to be significant racial or ethnic integration in these districts because the students are overwhelmingly white. Lastly, the demographics of these districts confirm our general point that, despite some regional variations, choice plans that are either limited to single districts or limited to select groups within districts will generally have little impact on current racial and socioeconomic integration levels.

B. Academic Achievement

For many involved in the choice debate, the ultimate barometer of success or failure is academic achievement.³⁴⁸ We tackle this issue second not because we quarrel with that ranking of priorities, but rather because academic achievement is intertwined with integration. To be sure, exactly what causes some students to perform well and others to perform poorly is endlessly debated in the literature. There is consensus that a student’s own socioeconomic status, as well as the socioeconomic status of the student’s peers, greatly affects the student’s academic achievement and social behavior.³⁴⁹ There is also some consensus that good teachers, strong principals, small class sizes, and parental involvement in schools can improve achievement, but the significance of these variables

³⁴⁷ Districts, of course, may be constitutionally prohibited from explicitly using racial criteria in student assignment, including any school choice plan. The extent to which race can be used in student assignment, outside of the remedial context, remains an unsettled constitutional question. See generally Harvard Note, *supra* note __. The use of socioeconomic status for student assignment is more clearly constitutional, as it would not trigger strict scrutiny. For just this reason, Wake County, North Carolina recently adopted a socioeconomic integration plan to take the place of its racial integration plan. See Kahlenberg, *All Together Now*, *supra* note __, at 251-54.

³⁴⁸ See, e.g., Judith Powell et al., *Evaluation of Charter School Effectiveness* (unpublished manuscript)(1997), at v-1 (charter school research); Henry M. Levin, *Educational Vouchers: Effectiveness, Choice, and Costs*, 17 *J. Pol’y Analysis & Mgmt.* 373, 374 (1998)(voucher program research)[hereinafter Levin].

³⁴⁹ James Coleman was the first to report this, in his famous 1966 study for the Department of Education, which has since become known simply as “The Coleman Report.” See James S. Coleman, Et al. U.S. Dep’t of Health, Educ. & Welfare, *Equality of Educational Opportunity* 304 (1966) (finding that “student body characteristics” account for an impressive percent of variance” in student achievement, and that “[c]hildren from a given family background, when put in schools of different social compositions, will achieve at quite different levels”). Scores of subsequent studies have confirmed Coleman’s conclusion. For citations to the literature, see Ryan, *Schools, Race, and Money*, *supra* note __, at 167; Kahlenberg, *All Together Now*, *supra* note __, at 26-28.

remains subject to debate.³⁵⁰ Added to these specific areas of contest is the more general dispute over the extent to which expenditures are correlated with achievement – i.e., over whether money “matters.”³⁵¹

We do not wish to add more fuel to these debates (although we must note that it seems clear that something as complex as academic achievement almost assuredly does not pivot on a single variable, such as funding or teacher quality). Instead, we would like to focus on a fact that is beyond dispute: schools with a majority of poor students rarely, if ever, perform as well as their middle-class counterparts. This holds true even when substantial resources are provided to these schools. There are several reasons why this is so, as we explain below, but the most important point is the clear and undisputed one that schools of concentrated poverty almost always perform poorly. If school choice plans, as we predict, do little to alter the demographics of schools or to break apart and preclude schools of concentrated poverty, it follows that those plans will likely do little to alter the achievement levels within those schools. Again, there will likely be some movement in both directions at the margins, but the larger picture will be one of stasis. We begin with evidence regarding the relationship between concentrated poverty and academic achievement, and then turn to emerging data on existing choice programs, which thus far support our hypothesis that limited choice plans will have a limited impact on student achievement.

1. Concentrated Poverty and Academic Achievement

The Heritage Foundation recently issued a report, entitled *No Excuses*, which was designed to prove that high-poverty schools can still reach high levels of performance.³⁵² The report instead demonstrates the opposite, by essentially highlighting the exceptions that prove the rule. The author excitedly reported that he “found not one or two [but] twenty-one high-poverty, high-performing schools.”³⁵³ The Department of Education, by

³⁵⁰ For further discussion of research on this point, see *infra* notes ___ and ___. See generally Kahlenberg, *All Together Now*, *supra* note ___, at 86-90 (discussing research).

³⁵¹ For articles generally skeptical of a correlation between educational spending and educational opportunity, see Eric A. Hanushek, *The Impact of Differential Expenditures on School Performance*, 18:4 *EDUC. RESEARCHER* 45 (1989); Eric A. Hanushek, *Throwing Money at Schools*, 1 *J. POL’Y ANALYSIS & MGMT.* 19 (1981); ALLAN R. ODDEN & LAWRENCE O. PICUS, *SCHOOL FINANCE: A POLICY PERSPECTIVE* 277-81 (1992); Eric A. Hanushek, *When School Finance “Reform” May Not Be Good Policy*, 28 *HARV. J. ON LEGIS.* 423 (1991); Eric A. Hanushek, *Money Might Matter Somewhere: A Response to Hedges, Laine, and Greenwald*, 23:4 *EDUC. RESEARCHER* 5 (1994); ERIC A. HANUSHEK ET AL., *MAKING SCHOOLS WORK: IMPROVING PERFORMANCE AND CONTROLLING COSTS* (1994); Clayton P. Gillette, *Opting Out of Public Provision*, 73:4 *DENV. U. L. REV.* 1185, 1213-14 (1996). For articles generally supportive of a correlation between expenditures and educational opportunity, see Larry V. Hedges et al., *Does Money Matter? A Meta-Analysis of Studies of the Effects of Differential School Inputs on Student Outcomes*, 23:3 *EDUC. RESEARCHER* 5 (1994); Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 *HARV. J. ON LEGIS.* 293 (1991); Christopher F. Edley, Jr., *Lawyers and Education Reform*, 28 *HARV. J. ON LEGIS.* 457 (1991).

³⁵² Samuel Casey Carter, *No Excuses: Lessons from 21 High-Performing, High-Poverty Schools* (Heritage Foundation 2000).

³⁵³ *Id.* at 2.

contrast, has identified *seven thousand* high-poverty, *low-performing* schools.³⁵⁴ Twenty-one is obviously more than one or two, but it is also a lot less than seven thousand, making pessimism rather than celebration seem the appropriate response to the *No Excuses* report.

The sad truth is that high-poverty schools, especially high-poverty urban schools, almost always have lower levels of academic achievement than do low-poverty schools. Studies reaching this conclusion abound. A 1997 longitudinal study of 40,000 students, for example, concluded that “the poverty level of the school (over and above the economic status of an individual student) is negatively related to standardized achievement scores.”³⁵⁵ This study confirmed that “the poverty level of certain schools places disadvantaged children in double jeopardy. School poverty depresses the scores of all students in a school where at least half the students are eligible for subsidized lunch, and seriously depresses the scores when over 75 percent of students live in low-income households.”³⁵⁶ A similar study conducted in 1993 found that students in low-poverty schools typically score 50 to 75% higher on reading and math tests than students in high-poverty schools.³⁵⁷

In addition to depressing achievement, attending a high-poverty school also depresses academic attainment. Students attending high-poverty schools are more likely to drop out than students attending low-poverty schools.³⁵⁸ This helps explain why dropout rates remain alarmingly high in many cities. The average dropout rate in the nation’s forty-seven largest school districts is nearly twice the national average of 11%.³⁵⁹ In 1991, the rate exceeded 25 percent for more than 62 percent of the country’s largest public schools.³⁶⁰ Problems also persist for those students who remain in high-poverty, urban schools. Urban teachers report spending more time on classroom order and discipline than their non-urban counterparts,³⁶¹ as well more problems relating to student absenteeism,³⁶² pregnancy,³⁶³ and weapons possession.³⁶⁴ Those who manage to

³⁵⁴ See Kenneth J. Cooper, *School Defies Its Demographics*, Wash. Post, June 7, 2000 at A3.

³⁵⁵ Michael Puma, et al., *Prospects: Final Report on Student Outcomes* 73 (1997).

³⁵⁶ *Id.* at 12.

³⁵⁷ Michael Puma, et al., *Prospects: The Congressionally Mandated Study of Educational Growth and Opportunity – Interim Report* 44 (1993).

³⁵⁸ See Kahlenberg, *All Together Now*, supra note ___, at 54.

³⁵⁹ See Council of Great City Sch., *National Urban Education Goals: Baseline Indicators, 1990-91*, at xvi.

³⁶⁰ *Id.*

³⁶¹ Laura Lippman et al., *Urban Schools: The Challenges of Location and Poverty* (US Dept of Educ., NCES report 96-184)(1996), at 116, figs.4.44 & 4.45.

³⁶² *Id.* at 114, figs.4.41 & 4.42.

³⁶³ *Id.*, at 124, figs.4.56 & 4.57.

³⁶⁴ *Id.* at 120, figs.4.50 & 4.51.

graduate from high-poverty, urban schools, finally, are less likely to attend college than those who graduate from low-poverty schools.³⁶⁵

There are a number of reasons why high-poverty schools tend to produce such dismal academic records. One of the most important is peer influence. In 1966, James Coleman released a mammoth and controversial report on the nation's schools, which concluded that in determining achievement, family influence matters the most, followed by the socioeconomic status of the student's classmates.³⁶⁶ What mattered very little, he concluded, was spending.³⁶⁷ Although scores of social scientists continue to debate the latter proposition about the influence of spending,³⁶⁸ a remarkable consensus has formed on the point that the socioeconomic status of one's peers matters a great deal.³⁶⁹ Indeed, study after study confirms that "the social composition of the student body is more highly related to achievement, independent of the student's own social background, than is any other school factor."³⁷⁰ Education commentators of every stripe, from conservative Chester Finn to liberal Jonathan Kozol, acknowledge the strength and consistency of these findings.³⁷¹ Simply put, "if there is one thing that is more related to a child's academic achievement than coming from a poor household, it is going to school with children from other poor households."³⁷²

The explanation for this effect is both straightforward and intuitive. Students from higher socioeconomic backgrounds tend (like their parents) to have higher expectations and aspirations regarding academic achievement and attainment. In schools, as in other communities, most participants tend to conform to the dominant culture. In schools that are majority middle-class, that culture typically is one that values academic achievement and generally expects students to attend college. This school environment, in turn, is contagious; it affects most students and thus tends to raise the aspirations and

³⁶⁵ See Kahlenberg, *supra* note __, at 54 ("Few students graduating from high-poverty high schools are likely to be going on to college: just 15 percent of inner-city graduates do.").

³⁶⁶ See Coleman Report, *supra* note __, at 304.

³⁶⁷ See *id.* at 1-5.

³⁶⁸ See sources cite *supra* note __.

³⁶⁹ See Gary Orfield & Susan Eaton, *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education* 53 (1996) (stating that the powerful influence of the socioeconomic status of peers on student achievement is "one of the most consistent findings in research on education").

³⁷⁰ James S. Coleman, *Toward Open Schools*, 9 *Public Interest* 20-21 (Fall 1967) (summarizing findings of Coleman Report). For discussion of the numerous studies confirming this point, see, e.g., Kahlenberg, *All Together Now*, *supra* note __, at 26-28.

³⁷¹ See Chester E. Finn, "Education That Works: Make the Schools Compete," 65 *Harv. Bus. Rev.* 64 (1987) (acknowledging that "disadvantaged children [tend] to learn more when they attend[] school with middle-class youngsters"); Jonathan Kozol, interview with Ted Koppel, *ABC News, Nightline*, Sept. 17, 1992, (stating that "money is not the only issue that determines inequality. A more important factor, I am convinced, is the makeup of the student enrollment, who is sitting next to you in class") (quoted in Kahlenberg, *All Together Now*, *supra* note __, at 37).

³⁷² James Guthrie, quoted in Trine Tsouderos, *Kids in City's Poor Schools Get Worse Scores*, *Tennessean*, Dec. 27, 1998, at __.

motivation of poorer students. In schools that are majority poor, by contrast, expectations and motivations tend to be fairly depressed.³⁷³ Indeed, in poor, predominately African-American schools in inner cities, researchers have found that the dominant school culture often actively denigrates academic success, associating success in school with “acting white.”³⁷⁴ This results not from some moral failing of poor or minority students, but rather from the starkly different realities confronting these students. Presented with few positive role models and surrounded by poverty and despair, poorer students have little reason to expect that hard work in school could lead to success afterward, and poor, minority students may come to define themselves in opposition to white, middle-class culture.³⁷⁵

Underscoring the importance of peers are examples and studies that show positive gains from socioeconomic integration and relatively little gain from increased funding in predominantly poor schools. As for the former, the overwhelming weight of the research suggests that one of the most promising ways to improve student academic achievement is to put poorer, struggling students into majority middle-class schools, with students who want to excel academically and whose families support such goals.³⁷⁶ By contrast, there

³⁷³ For discussion of numerous studies confirming these observations, see Kahlenberg, *All Together Now*, supra note __, at 48-58.

³⁷⁴ See, e.g., Singithia Fordham & John U. Ogbu, *Black Students’ School Success: Coping with the “Burden of ‘Acting White,’”* 18 *Urb. Rev.* 176 (1986).

³⁷⁵ The existence of an “oppositional culture” in poor, African-American neighborhoods and schools has received increased academic attention. See, e.g., id; Philip J. Cook & Jens Ludwig, *The Burden of “Acting White”: Do Black Adolescents Disparage Academic Achievement?”* in Christopher Jencks & Meredith Phillips, eds., *The Black-White Test Score Gap* 376-84 (1998). The theory is that when subordinated minorities, including African-Americans, have been defeated in attempts to assimilate, they develop a sense of collective identity in opposition to the majority culture. See id. at 181. Thus, “if whites speak Standard American English, succeed in school, work hard at routine jobs, marry, support their children, then to be ‘black’ requires one to speak Black English, do poorly in school, denigrate conventional employment, shun marriage, and raise children outside of marriage. To do otherwise would be to ‘act white.’” Massey & Denton, supra note __, at 168. Significantly, although most recent studies focus on African-Americans, adherence to an “oppositional culture” seems to have more to do with class than with race, as studies indicate that poor whites are also more likely than affluent whites to devalue education and denigrate middle-class achievement norms. See Kahlenberg, *All Together Now*, supra note __, at 52. Nonetheless, the theory remains, as one would expect, fairly controversial. See, e.g., Richard H. Sander, *Book Review*, 44 *J. Legal Educ.* 143, 150 (1994) (reviewing Massey & Denton’s *American Apartheid* and challenging the “generalizations” that “fit well into the common media images picturing the deepening failure of inner-city schools”).

³⁷⁶ Richard J. Murnane, *Evidence, Analysis, and Unanswered Questions*, 51 *Harv. Educ. Rev.* 483, 486 (1981). See also Kahlenberg, supra note 000, at 25-29 (describing numerous studies confirming this point); Ryan, *Schools, Race, & Money*, supra note __, at 287 & n.167, 297-301 (same); James S. Liebman, *Voice, Not Choice*, 101 *Yale L.J.* 259, 293 (1991) (noting that “a fourth to a third of the effect of socioeconomic status [on educational outcomes] comes not from the wealth and educational attainments of Jane’s and Johnny’s own parents but from the wealth and attainments of their *classmates*’ parents). Importantly, the evidence also suggests that the introduction of poorer students into more affluent schools does not depress the achievement of affluent pupils, provided that the schools remain majority middle-class. See, e.g., Kahlenberg, *All Together Now*, supra note __, at 38-42. Although this may seem too good to be true at first, it makes sense when one recognizes that the majority culture of a school determines the school environment. See id. at 39-42. There is also evidence indicating that poorer students are more sensitive to

is very little evidence that increased expenditures in predominantly poor schools has thus far improved academic achievement. *Milliken II* funding, for example, has been of very limited success, even when quite generous.³⁷⁷ Similarly, the largest federal compensatory program, Title I, has been notoriously ineffective in boosting achievement.³⁷⁸ In cities that spend “substantially more than their surrounding suburbs,” moreover, Gary Orfield and Susan Eaton find that performance is still worse when the city schools are segregated by race and socioeconomic status.³⁷⁹ Other studies, finally, have found that poor students in middle-class schools have higher rates of academic achievement than do poor students in predominately poor schools, even when the predominately poor schools spend more per pupil.³⁸⁰ As David Rusk, author of one of these studies, concluded: to improve education, we should focus less on “moving money” and instead move families and students.³⁸¹

This is not to suggest that peers are the sole determinant of academic success, nor that increasing expenditures would necessarily be futile. In addition to peers, the quality of teachers clearly influences academic achievement, as does the degree of parental involvement in the school.³⁸² But just as motivated peers are typically found in more

the school environment than affluent students, which also makes sense when one recognizes that poorer students often have weaker family backgrounds, spend less time under adult supervision, and are thus more influenced by peers than are their more affluent counterparts. *Id.* at 41 (discussing research on this point).

³⁷⁷ See Ryan, *Schools, Race, & Money*, *supra* note __, at 289-91.

³⁷⁸ See, e.g., Gary Natriello & Edward McDill, Title I: From Funding Mechanism to Educational Program, in Gary Orfield & Elizabeth DeBray, eds., *Hard Work for Good Schools: Facts not Fads in Title I Reform* 33-34 (1999) (reviewing research on Title I and concluding that, despite billions of dollars spent and huge increases over time in funding, the program has produced only “small, short-term, achievement effects”).

³⁷⁹ See Orfield & Stanton, *Dismantling Desegregation*, *supra* note __, at 83.

³⁸⁰ See Ryan, *Schools, Race & Money*, *supra* note __, at 298-300 (discussing studies); Kahlenberg, *supra* note __, at 28, 36-37 (same).

³⁸¹ David Rusk, *To Improve Education, Stop Moving Money, Move Families*, 11 *Abel Report* 1, 5 (1998). Rusk found that 61 percent of low-income students in Alamo Heights passed the Texas Assessment of Academic Skills, while only 39 percent of low-income students in San Antonio passed, even though San Antonio spent more per pupil. Alamo Heights, however, had only 17 percent low-income population, while San Antonio’s student poverty rate was 88 percent. *Id.* at 5. Benefits from greater socioeconomic integration of students, it should be noted, bear on non-academic student behavior as well. See, e.g., Susan E. Mayer, *How Much Does a High School’s Racial and Socioeconomic Mix Affect Graduation and Teenage Fertility Rates?*, in *The Urban Underclass* 321, 327 (Christopher Jencks & Paul E. Peterson, eds., 1991)(reporting that high school students attending higher socioeconomic schools are less likely to drop out and become pregnant than similar students attending lower SES schools).

³⁸² On the influence of good teachers on achievement, see, e.g., Ronald Ferguson, *Can Schools Narrow the Black-White Test Score Gap*, in *The Black-White Test Score Gap*, *supra* note __, at 318, 365-66; Mark Kelman & Gillian Lester, *Jumping the Queue* 138-45 (1997); Adam Gamoran, *Resource Allocation and the Effects of Schooling: A Sociological Perspective*, in David Monk & Julie Underwood, eds., *Microlevel School Finance: Issues and Implications for Policy*, 207, 211-213 (1988). On the influence of active parents on achievement, see, e.g., Timothy Keith, et al., *Effects of Parental Involvement on Eighth Grade Achievement: LISREL Analysis of NELS-88 Data* (1992); Esther Ho Sui-Chu & Douglas J. Williams, *Effects of Parental Involvement on Eighth-Grade Achievement*, 69 *Sociology of Educ.* 136 (1996); Chubb & Moe, *Politics, Markets, & Schools*, *supra* note __, at 16; Joyce Levy Epstein, *Parental Involvement: What Research Says to Administrators*, 19 *Educ. and Urban Soc’y* 119 (1987). Small class sizes have also

affluent schools, so too are high-quality teachers and active parents.³⁸³ This combination of deficits, more than any single one, creates nearly insuperable obstacles for high-poverty schools, as Richard Kahlenberg forcefully describes in an important recent book:

The portrait of the nation's high-poverty schools is not just a racist or classist stereotype: high-poverty schools are marked by students who have less motivation and are often subject to negative peer influences; parents who are generally less active, exert less clout in school affairs, and garner fewer financial resources for the school; and teachers who tend to be less qualified, to have lower expectations, and to teach a watered-down curriculum.³⁸⁴

These factors point to a devastating paradox. Racial and socioeconomic patterns currently interact with public school student assignment policies in a manner that consigns those students most in need of high quality educational services to educational environments less equipped to deliver them.

The question, of course, is whether school choice will change any of this. Our analysis in the first part suggests not. Instead, it suggests that most school choice plans will do little to alter the demographics of schools, and thus will do little to break apart the concentrated poverty that exists in many urban school districts. If choice schools remain similar in socioeconomic status to current public schools, there is little reason to hope that choice alone will improve academic achievement. Concentrated poverty in choice schools, in other words, will be just as daunting an obstacle as it is in existing public schools.

To be sure, there may be some movement toward improvement. We could imagine some greater parental involvement, for example, when parents choose their child's school. It would be fanciful, however, to expect consistent and significant increases, given that parents often are unable in light of work demands to participate more than they do and given that choice schools may be farther from a student's home, making participation more difficult for parents. We could also imagine that some high-quality teachers will be drawn to choice schools, especially if those schools offer teachers more autonomy.³⁸⁵ But it seems unrealistic to expect, absent greater pay, a significant migration of strong teachers to choice schools. It seems equally unrealistic to expect that sufficient resources will be devoted to choice schools to support greater pay for teachers than is currently available in most middle-class, suburban schools. Indeed, school choice is often proposed as an alternative to increasing expenditures in predominately poor

been found to boost achievement, although it is unclear whether this effect would hold in the absence of good teachers. See generally Kahlenberg, *All Together Now*, supra note __, at 89.

³⁸³ For an exhaustive review of the literature on this point, see Kahlenberg, supra note __, at 61-76.

³⁸⁴ *Id.* at 47.

³⁸⁵ Cf. Caroline Hoxby, *Would School Choice Change the Teaching Profession?*, Nat'l Bureau of Econ. Res. Working Paper No. 7866 (Aug. 2000), at <http://www.nber.org/papers/w7866>.

schools, and it often entails providing students (either directly in the form of vouchers or indirectly in the form of charter schools) *less* funding rather than more.³⁸⁶

In general, then, unless school choice results in greater socioeconomic integration, with all of its attendant benefits, we should not see significant improvements in academic achievement. Although some types of school choice plans, such as interdistrict public school choice and vouchers for private schools, may offer a very limited number of poor students the opportunity to attend higher socioeconomic status schools, most school choice plans do not offer similar opportunities. And the political constraints we describe above suggest that increasing such opportunities will be difficult, such that most school choice programs will not lead poor kids into middle-class schools. Shuffling poor kids around to various schools that remain dominated by poor students, however, is simply not a good formula for success. Data on charter schools and voucher programs support this point.

2. Evidence From Existing Choice Plans

Evidence on the actual or potential benefits of school choice, especially when that choice might involve private schools, has always been controversial. The controversy originated again with Professor Coleman, who along with several colleagues published the first major quantitative study exploring differences in student achievement between public and private (principally Catholic) schools. Coleman and his colleagues found that students in private schools performed slightly better, after controlling for student race and socioeconomic background.³⁸⁷ Their findings, not surprisingly, attracted criticism.³⁸⁸ More recently, for every study finding an advantage for private schools,³⁸⁹ another study concludes that little or no such advantage exists.³⁹⁰ Indeed, the controversy surrounding the research is becoming so searing that at least one observer worries that the debate itself will blunt the potential influence of high quality research on the growing policy debate surrounding vouchers.³⁹¹

Despite the swirling controversy, some helpful (and relatively uncontroversial) conclusions may be drawn. To begin, there is little evidence yet that charter schools significantly improve student achievement. Some of this has to do with the lack of data:

³⁸⁶ See *supra* TAN.

³⁸⁷ See James S. Coleman, Thomas Hoffer, and Sally Kilgore, *High School Achievement: Public, Catholic, and Private Schools* (1982).

³⁸⁸ See, e.g., Arthur S. Goldberger and Glen G. Cain, *The Causal Outcomes in the Coleman, Hoffer, and Kilgore Report*, 55 *Soc. of Educ.* 103 (1982) (criticizing the Coleman et al. study for flaws in sampling, research design, and sample bias).

³⁸⁹ See, e.g., Caroline M. Hoxby, *The Effects of Private School Vouchers on Schools and Students*, in Helen F. Ladd ed., *Holding Schools Accountable* (1996).

³⁹⁰ See, e.g., Adam Gamoran, *Student Achievement in Public Magnet, Public Comprehensive, and Private City High Schools*, 18 *Educ. Eval. & Pol'y Analysis* 1 (1996).

³⁹¹ Jeffrey R. Henig, *School Choice Outcomes*, in Sugarman & Kemerer, eds., *School Choice and Social Controversy*, *supra* note __, at 98 (1999).

there is little systematic student achievement data for charter schools that are amenable to sophisticated and nuanced analyses. What data do exist, however, are either inconclusive or point in opposite directions. For example, a 1999 study of Arizona charter schools (examining 1997 and 1998 student data) concludes both that “it appears that charter schools are not performing very differently from other regular (Arizona) public schools.”³⁹² That same report also notes, however, that the achievement data “provides *some* indication of student progress in charter schools.”³⁹³ A similar evaluation of Arizona charter schools one year later found more positive results. Researchers from the Goldwater Institute evaluated three years of data (1997-99) and concluded that “students enrolled in charter schools for two and three consecutive years have an advantage over students staying in TPSs (traditional public schools) for the same period of time.”³⁹⁴

None of these reports, however, nor any commentators of which we are aware, claims that charter schools have yet succeeded in significantly boosting achievement. This may be due in part to the fact that many charter schools are fairly new. It is nonetheless consistent, however, with earlier research demonstrating the importance of the socioeconomic status of schools. Charter schools tend to reflect the status of the districts in which they are located; it would be surprising, therefore, if these schools consistently posted significantly stronger academic results.

There is more positive news regarding students in voucher programs, but the scholarly debate on this question often generates more heat than light. Studies of the publicly-funded Milwaukee voucher program illustrate the scholarly controversy.³⁹⁵ On the one hand, a study by the State appointed program evaluator found no systematic differences between voucher students in Milwaukee’s private schools and their counterparts in Milwaukee’s public schools.³⁹⁶ Re-analyzing the same data, other researchers did find systematic differences.³⁹⁷ In a third independent analysis of the

³⁹² Lori A. Mulholland, Arizona Charter School Progress Evaluation (unpublished paper, on file with authors) (March 1999), at 39.

³⁹³ *Id.*

³⁹⁴ Lewis Solomon et. al., Does Charter School Attendance Improve Test Scores?: The Arizona Results (unpublished paper) (March 2001).

³⁹⁵ It should be noted that while academic disputes concerning such technical issues such as sample bias, control groups, and regression equations are usually confined to academic journals, such disputes surrounding the Milwaukee voucher program spilled into the national press. See, e.g., Bob Davis, Class Warfare: Dueling Professors Have Milwaukee Dazed Over School Vouchers, *Wall St. J.* A1 (Oct. 11, 1996).

³⁹⁶ See John F. Witte, Troy D. Sterr, and Christopher A. Thorn, Fifth Year Report: Milwaukee Parental Choice Program (1995); John F. Witte, *The Market Approach to Education: An Analysis of America’s First Voucher Program* 125, 133-43 (2000) (criticizing Peterson’s analysis and arguing that voucher students in private schools in Milwaukee have not improved in math and reading).

³⁹⁷ See Jay P. Greene, Paul E. Peterson, and Jiangtao Du, The Effectiveness of School Choice in Milwaukee: A Secondary Analysis of Data from the Program’s Evaluation (paper presented at Annual Meeting of the American Political Science Association, San Francisco, August 30, 1996); Paul E. Peterson, School Choice: A Report Card, 6 *Va. J. Soc. Pol’y & L.* 47, 70-71 (1998) (hereinafter Peterson, School

Milwaukee data, Professor Rouse found a modest systemic advantage for private schools in mathematics achievement and no such advantage in terms of reading scores.³⁹⁸ In his survey of the empirical research on the influence of educational vouchers on student academic achievement, Professor Levin—no advocate of vouchers³⁹⁹—concurred in “Rouse’s careful analysis.”⁴⁰⁰

Debated (or mixed) also aptly describe results from similar research efforts on the growing number of privately-funded voucher programs. For example, in their study of the impact of the private vouchers on student achievement, Howell and colleagues found statistically significant achievement gains in African-American students after two years of participating in such programs in New York City, Washington, D.C., and Dayton, Ohio.⁴⁰¹ These findings quickly attracted criticism.⁴⁰² In their response to the criticism, Howell and colleagues underscored the complexities of the technical issues raised in efforts to measure independent factors influencing student academic achievement without the benefit of a sterile laboratory and the availability of clean, controlled experimental research design.⁴⁰³

Overall, although the existing empirical work assessing the impact of vouchers on student achievement and other outcomes remains in some dispute, some fairly clear findings are beginning to emerge. As Jay Greene observes, in the last few years there have been seven random-assignment⁴⁰⁴ and three nonrandom-assignment studies of school choice experiments, from eight different programs, conducted by several different researchers.⁴⁰⁵ Although they disagree on the magnitude, the authors of all ten voucher studies find at least some academic benefits to students enrolled in the voucher

Choice) (arguing that voucher students in private schools in Milwaukee have improved their achievement in math and reading).

³⁹⁸ See Cecilia Elena Rouse, *Private School Vouchers and Student Achievement: An Evaluation of the Milwaukee Parental Choice Program*, __ *Quarterly J. Econ.* (May 1998).

³⁹⁹ To his credit and mindful of the bitter academic disputes that have clouded research into the efficacy of school vouchers, Professor Levin reveals his position that while educational vouchers generate positive individual gains, he concludes they are off-set by the negative social consequences. Levin, *supra* note __, at 374.

⁴⁰⁰ Levin, *supra* note __, at 378.

⁴⁰¹ William G. Howell et al., *Test-Score Effects of School Vouchers in Dayton, Ohio, New York City, and Washington, D.C.: Evidence from Randomized Field Tests*, (paper presented at the annual meeting of the American Political Science Association, Washington, D.C., Sept. 2000).

⁴⁰² [insert criticism to PACE; Katie Zernike, NYT article].

⁴⁰³ See William G. Howell et al., *The Effect of School Vouchers on Student Achievement: A Response to Critics*, (Occasional Paper, Program on Education Policy and Government, Harvard University, undated).

⁴⁰⁴ What Professor Hoxby has described as the “gold-standard” of research designs. See [insert Hoxby “gold standard” quote.] See also Jay P. Greene, *The Surprising Consensus On School Choice*, 144 *Pub. Interest* 19, 19 (2001).

⁴⁰⁵ Greene, *The Surprising Consensus* *supra* note __ at 22, 26 (2001).

programs.⁴⁰⁶ That one or even a few of the studies might be flawed is a possibility. The probability that all ten studies might be wrong is highly unlikely.

That there are some consistent academic benefits associated with voucher programs that place students in private schools is again consistent with the research regarding the importance of socioeconomic integration. Many private schools, including urban, Catholic schools, are more integrated by class (and race) than public schools.⁴⁰⁷ To the extent poorer students are using their vouchers to enter higher socioeconomic status schools, existing research would predict that their academic performance would improve. However, if and when space runs out in existing private schools and poor voucher students end up in newly-created, predominately-poor private schools, we should expect the academic benefits associated with private school vouchers to dissipate. The example of Catholic schools is again helpful, as much of the success among Catholic schools is confined to “middle-class parochial schools.”⁴⁰⁸ Just as socioeconomic research would predict, high-poverty Catholic schools do not perform as well as their more affluent counterparts.⁴⁰⁹

C. School Choice and School Competition

School choice advocates often fail to acknowledge the import of the research regarding the influence of a school’s socioeconomic status on achievement, and instead argue that choice will improve the efficiency and achievement of public schools by increasing competition. This argument, to be sure, comports with general economic theory, which posits that schools will respond to increased competition by increasing their efficiency and productivity.⁴¹⁰ This competition can emerge from other public schools (including charter schools) and private schools (through voucher programs). However, more refined applications of economic and political theory to the particular complexities incident to the education context provide less definitive guidance.

For example, as Professor Caroline Hoxby notes, existing theory on the potential effects of increased competition on public schools is indecisive.⁴¹¹ The general theoretical predictions—flowing out of Tiebout’s seminal work⁴¹²—include the following. First, schools will have incentives to become more productive and effective because increased Tiebout choice will fuel additional information. Parents, once armed with more information and choice, can better leverage these assets into more

⁴⁰⁶ See *id.*

⁴⁰⁷ See Anthony S. Bryk, et al., *Catholic Schools and the Common Good* 70, 73 (1993); Greene & Peterson, *Race Relations and Central City Schools*, *supra* note __, at 36.

⁴⁰⁸ Kahlenberg, *All Together Now*, *supra* note __, at 102.

⁴⁰⁹ See Bryk, et al., *supra* note __, at 264-66.

⁴¹⁰ See, e.g., Milton Friedman, *Capitalism and Freedom* (1982).

⁴¹¹ Hoxby, *AER Report*, *supra* note __, at 1210.

⁴¹² See generally Charles M. Tiebout, *A Pure Theory of Local Public Expenditures*, 64 *J. Pol. Economy* 416 (1956).

discriminating selections regarding how (and where) they educate their children. Second, student self-sorting is increased by increasing Tiebout choice, and parents will sort themselves (that is, the schoolchildren) in a manner that maximizes the educational benefits for their children. Third, the same self-sorting that might increase family-level utility might simultaneously decrease net social utility by reducing the socially optimal level of peer interactions.⁴¹³

In theory, then, choice might spur productive competition and raise the achievement levels of all schools. On the other hand, it might result in advantaged (e.g., by wealth or achievement) students clustering in advantaged schools, with which less advantaged schools could not realistically compete. (Consider here the inequalities among colleges and universities.). Given the indecisive theoretical implications of competition, the need for empirical assessments becomes even more acute. Until recently, however, little data that bear on the theory existed. Although new data is emerging, they are scant and support only tentative conclusions.⁴¹⁴ Finally, as is frequently the case in the education literature, existing evidence on many salient points is mixed.⁴¹⁵

Some conclusions are nonetheless possible. On balance, research findings tilt in a direction that supports the proposition that increased school competition results in some increased school effectiveness. In a widely cited paper assessing competitive effects generated by *public* schools, Professor Hoxby found positive effects on student achievement, further noting that these effects are more pronounced in districts with less educated adults and in districts located in states with higher degrees of local control.⁴¹⁶ Additional findings suggest that competition can increase high school graduation rates,⁴¹⁷

⁴¹³ See Hoxby, AER Report, *supra* note __, at 1210-12.

⁴¹⁴ Cecilia E. Rouse and Michele McLaughlin, Can the Invisible Hand Improve Education?: A Review of Competition and School Efficiency (unpublished manuscript, on file with authors) (1998), at 50.

⁴¹⁵ Compare Jay P. Greene, An Evaluation of the Florida A-Plus Accountability and School Choice Program, The Manhattan Institute (Feb. 2001)(finding positive competitive effects in Florida); Frederick Hess et al., Coping with Competition: How School Systems Respond to School Choice, at 10 (unpublished manuscript on file with authors) (finding positive competitive effects in Arizona); with Haggai Kupermintz, The Effects of Vouchers on School Improvement: Another Look at the Florida Data, 9 Educ. Pol’y Analysis Archives 1, 2 (Mar. 2001)(arguing that the improvements in the Florida program are a function of one of the three tested areas), available at <http://epaa.asu.edu/epaa/v9n8/>; Gregory Camilli and Katrina Bulkley, Critique of ‘An Evaluation of the Florida A-Pule Program,’ 9 Educ. Pol’y Analysis Archives (2001) (challenging Greene’s findings on the Florida program), available at <http://epaa.asu.edu/epaa/v9n7/>; Christopher R. Geller et al., The Effect of Private School Competition on Public School Performance, Columbia University, Nat’l Ctr. for the Study of Privatization in Education, Occasional Paper No. 15 (Feb. 2001)(finding little evidence of competitive effects in Georgia) (unpub. paper, on file with authors).

⁴¹⁶ Caroline Hoxby, Does Competition Among Public Schools Benefit Students and Taxpayers?, Nat’l Bureau of Econ. Res., Working Paper No. 4979 (1994), available at <http://www.nber.org/papers/w4797>. See also Rouse & McLaughlin, The Invisible Hand, *supra* note __, at 40.

⁴¹⁷ See Thomas S. Dee, Competition and the Quality of Public Schools, 17 Econ. Educ. Rev. 419 (1998).

lead to greater resources being directed to the classroom,⁴¹⁸ and increase overall school performance.⁴¹⁹

If we assume, as seems quite plausible, that there are positive benefits to competition, the question that remains for school choice programs is whether they will spur much competition. The evidence suggests, as one would expect, that limited choice plans have limited competitive effects. Consider, for example, the evidence from Arizona. Because of the number of charter schools there, Arizona provides something approaching a natural experiment for assessing their competitive effects on other public schools. By 1998, Arizona's charter school legislation had spawned 222 charter schools that served approximately 20,000 students (2.3 percent of Arizona's total school age population).⁴²⁰ Due to the development of charter schools, some Arizona public school districts lost more than 10 percent of their student enrollment.⁴²¹

Through a survey of teachers' impressions of change in school policy or practice implemented at the leadership level between 1994 and 1997, researchers sought to assess school district-level changes attributable to the emergence of competition from charter schools. They observe some competitive effects, described as mainly "beneficial, especially for lower-performing public (non-charter) school districts."⁴²² They characterize the size of the effects as "modest," and note the presence of a "ceiling effect."⁴²³ That is, public school districts do not appear to respond to competitive pressures generated by charter schools beyond a "certain level."⁴²⁴ This, of course, makes perfect intuitive sense: the more limited the competition, the more limited the response.

Another source of data regarding school competition flows from voucher programs. The scant data that exists here, however, remain in serious dispute. Assessments of the competitive effects of Florida's voucher program illustrate this point. The Florida A-Plus Program, first administered in 1998, assigns annual grades to every public school in Florida. A school's grade is based on its students' performances on the Florida Comprehensive Assessment Tests (FCAT) in reading, writing, and math. If a school receives two "F" grades in a four-year period, students assigned to those schools are eligible for state vouchers that can be redeemed at another private or public school in

⁴¹⁸ See Thomas S. Dee, Expense Preference and Student Achievement in School Districts, Univ. Maryland Dep't of Econ. Working Paper (1997); Caroline Hoxby, Do Private Schools Provide Competition for Public Schools?, Nat'l Bureau of Econ. Res. Working Paper No. 4978 (1995), available at <http://www.nber.org/papers/w4978>.

⁴¹⁹ See Greene, Evaluation of the Florida A-Plus Program, *supra* note ____.

⁴²⁰ Frederick Hess et al., Coping with Competition: How School Systems Respond to School Choice, at 10 (unpublished manuscript on file with authors).

⁴²¹ *Id.*

⁴²² *Id.* at 28.

⁴²³ *Id.* at 25-26.

⁴²⁴ *Id.* at 26.

Florida. As mentioned above, after the program's second year of operation only two schools received two failing grades within the four-year window. Students attending those two schools were eligible for state-funded vouchers. Approximately 50 students availed themselves of the voucher opportunity and most chose to attend nearby private, religiously-affiliated schools. The 2000 FCAT results did not generate any additional schools that met the two "F" grades within a four-year period threshold. Consequently, no additional schools had their students offered tuition vouchers.⁴²⁵

Jay Greene has explored the hypothesis that Florida schools receiving one "F" grade have the greatest incentive to improve student performance to avoid the prospect of losing students due to the availability of state-funded vouchers.⁴²⁶ In his analysis of FCAT score changes from 1999 to 2000, he finds that schools that received grades of "A," "B," or "C" did not change appreciably. Schools that received a grade of "D" "appear to have achieved somewhat greater improvements than those achieved by schools with higher state grades."⁴²⁷ Moreover, school that received "F" grades in 1999 experienced statistically significant increases in their test scores that were "more than twice as large as those experienced by schools with higher state-assigned grades."⁴²⁸ By comparing only those schools that had received a "high-F" grade with schools that had received a "low-D," Greene ascribes the gains achieved by "higher-scoring F schools" that exceeded those realized by the "low-D" schools to the competitive threat posed by the prospect of vouchers.⁴²⁹

However, others ascribe the "dramatic improvements" in Florida's failing schools to other factors.⁴³⁰ Camilli and Bulkley, for example, challenge Greene's findings on methodological grounds.⁴³¹ Another observer agrees with Green's findings about score improvements, especially by low-scoring schools, but argues that those schools attention to the writing component of Florida's testing regime was the crucial difference that generated the improved scores and not the "voucher effect."⁴³²

⁴²⁵ See Greene, Evaluation of the Florida A-Plus Program.

⁴²⁶ Id. at 6.

⁴²⁷ Id.

⁴²⁸ Id. at 6, 7.

⁴²⁹ Id. at 8.

⁴³⁰ See Haggai Kupermintz, The Effects of Vouchers on School Improvement: Another Look at the Florida Data, 9 Educ. Pol'y Analysis Archives 1, 2 (Mar. 2001)(arguing that the improvements are a function of one of the three tested areas), at <http://epaa.asu.edu/epaa/v9n8/>; Gregory Camilli and Katrina Bulkley, Critique of 'An Evaluation of the Florida A-Pule Program,' 9 Educ. Pol'y Analysis Archives (2001), at <http://epaa.asu.edu/epaa/v9n7/>. For a reply to the latter critique, see Jay P. Greene, A Reply to 'Critique of 'An Evaluation of the Florida A-Pule Program, (2001), available at <http://www.ksg.harvard.edu/pepg/>.

⁴³¹ Camilli and Bulkley, Critique, supra note __, at 15(arguing that Greene's neglect of regression to the mean and identifying the voucher program's unique net effect bias his analysis). For Greene's response, see Greene, A Reply, supra note __.

⁴³² Kupermintz, The Effects of Vouchers on School Improvement, supra note __ at 11 (arguing that the improvements are a function of one of the three tested areas).

Although Greene's analysis is tantalizing, at this point the jury remains out as to the competitive effects of voucher programs. Common sense, however, suggests that if vouchers are provided to a limited number of students, public schools will have limited incentives to change. At the moment, both publicly and privately sponsored voucher programs involve very small percentages of students, usually less than one percent of the district's total enrollment. The publicity surrounding vouchers, coupled with the actual loss of even a small number of students, may spur some response from public school officials who wish to avoid the embarrassment of students and parents lining up to apply for vouchers and clamoring to exit the public schools. But if the amount of exit from schools is capped at a low amount, few tangible consequences will follow for public schools that lose a few students. This will be true not only for voucher plans, but for any school choice plan that offers a limited number of students an exit option. Thus far, almost none of the existing choice plans – whether they involve charter schools, interdistrict choice, or intradistrict choice, -- are a real threat to existing public school enrollments or funds. As with integration and achievement, then, it seems safe to conclude that limited choice plans will have limited effects on competition among schools and therefore a limited capacity to force public schools to improve as a response.

In sum, both proponents and opponents of choice policies—especially charter schools and voucher programs—can point to empirical evidence supporting their positions. Our sense of the emerging data is that, in general, it tends to lean in a direction favoring choice policies. However, while we concede that reasonable people can (and do) differ in their interpretations of the admittedly limited and scant data, we also believe that any optimism about whatever success is enjoyed by existing choice programs must yield to the constraints we identify and discuss in this Article. Simply put, even if current choice programs are succeeding in terms of enhancing integration, student achievement, and public school efficiency, further success is capped by the very structure of choice programs. More specifically, the ability of suburbs to insulate their public schools from the ambit of choice programs will effectively foreclose choice programs from achieving the full benefits promised by theory. Given suburbs' political and economic incentives, we currently see little reason for much optimism – unless, of course, there are promising ways to alter those political and economic incentives.

III. EXPANDING SCHOOL CHOICE

If our analysis above is correct, school choice plans that essentially shuffle poor and minority kids among different schools will have limited impact on student achievement, racial or socioeconomic integration, or the efficiency of public schools. One obvious response is to expand school choice programs, especially in ways that will increase opportunities for socioeconomic integration. Given the strong relationship between student achievement and the socioeconomic status of a student's peers, choice plans that increase socioeconomic integration are quite likely to increase student achievement as well. And given the strong correlation between race and poverty, choice plans that increase socioeconomic integration are also likely to increase racial

integration.⁴³³ Expanding school choice programs, finally, would increase the competition faced by public schools, which might induce those schools to innovate and improve.

This is not to suggest that simply expanding school choice will lead to improvement along all three axes. Depending on how it is structured, an expanded school choice program could lead to increased racial and socioeconomic stratification. If all students in a state, for example, received a voucher for use at private schools, and private schools could in turn charge tuition that is higher than the voucher amount, it is quite easy to imagine that the program would increase economic stratification among schools.⁴³⁴ Similarly, simply expanding any and all types of school choice will not necessarily lead to improvements in public schools. Although competition might induce efficiency gains, school choice might also sever the relationship between home values and the quality of local public schools by expanding the opportunities for residents to attend school outside of their neighborhoods or local districts. This, in turn, could reduce the incentive of homeowners to monitor their local schools, which might cancel out any efficiency gains that stem from increased competition.⁴³⁵

Despite the complexities and uncertainty, it seems fairly clear that, at least from the perspective of those trapped in failing, predominantly poor urban schools, expanding opportunities for school choice is worth the risk. Students in such schools, almost by definition, do not have much to lose.⁴³⁶ Moreover, the main alternative to expanding choice -- increasing funding in order to reduce class size, hire better teachers, and address the special needs of poorer students -- does not seem obviously more promising. In addition to the political hurdles facing proposals to increase funding for urban schools,⁴³⁷ the efficacy of increased funding remains, as we describe above, debatable. Even where increased funding does eventually lead to improvements in academic achievement, funding alone does not address racial or socioeconomic isolation,⁴³⁸ nor does it do much

⁴³³ For a review of the social science evidence on this point, see *supra* TAN; Ryan, *Schools*, *supra* note __, at 284-301. See also Chaplin, *The Impact of Economic Integration*, *supra* note __.

⁴³⁴ See, e.g., Liebman, *Voice not Choice*, *supra* note __, at __ (raising this objection to vouchers); McCusick, *School Finance Litigation*, *supra* note __, at 125-28 (same).

⁴³⁵ See, e.g., Rouse & McLaughlin, *The Invisible Hand*, *supra* note __, at 8 (suggesting that school choice “may decrease the monitoring incentive of residents living near ‘good’ schools since property values would no longer be as dependent on the quality of the neighborhood schools”); cf. Fischel, *Homevoter Hypothesis*, *supra* note __, at 4-7 (arguing that homeowners monitor government policies that affect their property values). To the extent school choice breaks the link between the quality of local schools and property values, it could also reduce incentives to support generous funding of schools by non-parent homeowners. See McCusick, *School Finance Litigation*, *supra* note __, at 121.

⁴³⁶ For statistics describing the state of urban schools, see, e.g., Ryan, *Schools, Race, and Money*, *supra* note __, at 272-75. For a startling anecdotal account of several urban school systems, see Jonathon Kozol, *Savage Inequalities* (1989).

⁴³⁷ See Ryan, *Influence of Race*, *supra* note __, at 480 (summarizing findings of study that suggests urban minority districts fare poorly in school finance litigation and reform). See also Jencks & Philips, *Black-White Test Score Gap*, *supra* note __, at __.

⁴³⁸ For more discussion of this point, see Ryan, *Schools, Race, and Money*, *supra* note __, at 286-307.

on its own to increase the efficiency of public schools. Under these circumstances, it seems at least worthwhile to experiment with expanded choice programs that can increase socioeconomic and racial integration, especially given the apparently strong support for such programs among the parents of students currently stuck in failing schools. Attention to the details of programs will be crucial, to be sure, but the fact that choice programs can be structured in ways that help, harm, or do nothing for the neediest students is not in itself reason to shy away from experimenting with choice.⁴³⁹

The risk calculus for those already in good schools, as we have explained, is much different. Students in adequate or excellent schools might indeed gain under a choice program, as they and their parents become able to find schools more suited to their needs, interests, or values. On the other hand, they may indeed have something to lose if choice is expanded. Students in good public and private schools might lose at least some of their competitive advantage over students in poor schools. It is also possible that expanded choice programs could lead to a decline in the quality of education or overall student achievement at some existing schools, if choice results in decreased funding or a substantial increase in students with special needs. Just as importantly, it seems likely that, regardless of the actual consequences of expanded school choice, many suburban parents will *perceive* it as threatening. Many parents of students in good suburban schools already exercised a form of school choice when they chose their places of residence, and many of them are quite content with the status quo. Even if expanding school choice would *in fact* make their children better or at least no worse off, suburban schools are likely to be risk averse and to be wary of proposals to expand choice programs in ways that affect either the student population or the funding of suburban schools.

The central question remaining thus comes into fairly sharp relief: are there politically acceptable ways to expand school choice in order to increase and improve the opportunities for students in failing public schools? Put more bluntly: are there plausible ways to increase the opportunities for poor students to attend middle-class public or private schools? Our answer is “yes, but . . .” In the short run, advocates can pursue a number of promising strategies, some with proven track records, to expand school choice in politically acceptable ways. These strategies include replicating and strengthening some existing choice programs, such as the controlled choice program in Cambridge, Boston’s METCO program and Milwaukee’s Chapter 220 program,⁴⁴⁰ as well as devising politically feasible incentives for suburban districts to accept urban students and suburban parents to choose urban schools. The precise strategy or strategies to employ will depend on local circumstances; there is no single strategy suitable for all locales.

⁴³⁹ There is an interesting parallel here to school desegregation. Decried as a failure by opponents (just as school choice is), social science evidence suggests more accurately that sometimes desegregation is successful in raising achievement and improving race relations, sometimes it is not, and sometimes it makes things worse. Much depends, as intuition would suggest, on how the desegregation plan is structured. See *School Desegregation: A Social Science Statement*, in Brief of the NAACP, DeKalb County, Georgia, in support of respondents Pitts et al., at 6a-7a, *Freeman v. Pitts*, 503 U.S. 467 (1992). The same is true for school choice plans.

⁴⁴⁰ For descriptions of these plans, see *supra* TAN.

But: it is important to recognize that although opportunities to expand choice exist, they are at present fairly limited. Unless political coalitions or preferences change, suburban parents will likely tolerate only a limited number of urban students in suburban schools, while only a limited number of suburban parents will choose urban schools.⁴⁴¹ For this reason, we believe that advocates interested in expanding opportunities for school choice should also consider ways to alter the current political landscape. One promising long-term approach, which we discuss at the end of this Part, is to bolster access to preschools and to use the experience that parents have in selecting preschools to loosen their reflexive attachment to neighborhood schools.

A. Working Within Existing Political Constraints

There is a tendency in academic writings to offer a new, universal solution to an identified problem. We think this tendency must be resisted here. It surely would be elegant if we could offer a single solution to the problem of how to expand school choice in productive and equitable ways. The diversity of school districts and residential patterns, unfortunately, makes a universal solution impossible. In addition, although proposing new solutions may seem more creative, it would be a mistake, we think, to jettison all existing programs in favor of a novel plan. Instead, those interested in expanding choice should look first to the possibility of replicating and strengthening some existing choice programs. An additional strategy entails devising politically feasible incentives for expanding choice. We discuss each approach in turn, emphasizing, again, that local circumstances will dictate which approach or combination of approaches is most appropriate.

1. Replicate and Strengthen Existing Programs

Each of the four types of school choice plans – intradistrict, interdistrict, charter schools, and vouchers – can offer opportunities for poorer students to escape predominantly poor schools, depending on the demographics of particular districts or metropolitan areas. Each can also offer greater opportunities for racial integration. For school districts that are economically and racially diverse, but in which there is a good deal of residential segregation, expanding opportunities for intradistrict choice is obviously a promising strategy. This could be accomplished by increasing the number of magnet schools, allowing for transfers among different schools within the district, or adopting the sort of “controlled choice” plan created in Cambridge and implemented in a handful of other cities, including Montclair, New Jersey and Buffalo, New York.⁴⁴²

⁴⁴¹ Edward Zelinsky has made a similar point regarding efforts to increase residential integration in the suburbs, arguing that such efforts will likely succeed only when “the preferences of the American people” support more integration. Edward A. Zelinsky, *Metropolitanism, Progressivism, and Race*, 98 *Colum. L. Rev.* 665, 667-68 (1998). We believe that the same point is true regarding efforts to expand school choice.

⁴⁴² For further discussion of controlled choice plans, see *supra* TAN.

Controlled choice would obviously create the most opportunities for choice, as it would eliminate neighborhood assignments and convert all schools into choice schools; it would also avoid some of the inequities created by magnet schools, which serve a limited number of students and often drain off an inordinate amount of resources from a district's budget.⁴⁴³ It is unclear, however, how many districts would be amenable to controlled choice; that some districts have adopted the plan indicates that controlled choice is not out of the question, but the paucity of the plans also suggests that they are politically difficult to implement. For those interested in creating controlled choice plans or in encouraging their proliferation, the first step would be to study the political dynamics in places like Cambridge, Montclair, and Buffalo in an effort to learn how to create – if possible -- a political climate conducive to such plans.⁴⁴⁴

In metropolitan areas where districts, rather than neighborhoods, are segregated by class and race, interdistrict choice will accomplish more than intradistrict choice. Enhancing opportunities for interdistrict choice will not be easy, and it is not likely that suburban schools in the near future will accept a very large number of urban transfer students. But there are examples of successful, if limited, programs that allow urban students to attend suburban schools. Boston's METCO program, Hartford's Project Concern, and Milwaukee's Chapter 220 program all offer a limited number of urban students to attend suburban schools.⁴⁴⁵ The keys to their success, which could be replicated in other metropolitan areas, seem to be allowing suburban schools to limit the number of transfer students admitted and providing generous funding to schools that accept transfers. Both steps obviously reduce the actual and perceived sacrifice demanded of suburban districts by limiting the burden on those districts, which in turn obviously limits the scope of the programs. Nonetheless, advocates of expanding interdistrict choice should pursue efforts to create programs modeled on the METCO program and others similar to it.

They should also consider combining such programs with the creation of additional interdistrict magnet schools in urban areas, so that the flow of students goes both ways. Magnet schools do create some problems of equity, which might be exacerbated if the schools not only draw resources away from other schools within the district but do so to educate kids from wealthier suburban districts.⁴⁴⁶ However, to the extent magnet schools succeed in improving the academic achievement of some district

⁴⁴³ See, e.g., Kahlenberg, *All Together Now*, supra note __, at 116-30 (comparing benefits of controlled choice to benefits of magnet schools).

⁴⁴⁴ For studies of the Cambridge plan, see, e.g., Norma Tan, *The Cambridge Controlled Choice Program: Improving Educational Equity and Integration* (1990); Christine H. Rossell & Charles L. Glenn, *The Cambridge Controlled Choice Plan*, 20 *Urban Rev.* 89 (1988). For Montclair, see, e.g., Beatriz C. Clewell & Myra F. Joy, *Choice in Montclair, New Jersey* (1990). For Buffalo, see, e.g., Christine H. Rossell, *The Buffalo Controlled Choice Plan*, 22 *Urban Educ.* 328 (1987). For a general study of controlled choice, see Charles V. Willie & Michael Alves, *Controlled Choice: A New Approach to Desegregated Education and School Improvement* (1996).

⁴⁴⁵ See supra TAN for a discussion of these plans.

⁴⁴⁶ See Kahlenberg, *All Together Now*, supra note __, at 128-30 (describing the "new forms of unfairness" created by magnet schools).

students and in attracting parents and students from the suburbs, they may serve as examples of how schools could be structured and financed in ways that improve achievement *and* racial and socioeconomic integration. Again, given the state of many urban school districts, some additional investments in magnet schools seem worth the risk.

On a broader scale, efforts should be made to strengthen existing open enrollment plans and to create open enrollment plans in the roughly thirty states where none exist.⁴⁴⁷ To increase the effectiveness of such plans, several steps, in increasing order of difficulty, should be taken. First, information about the programs should be made more available to parents, so that they are aware of their choices and can receive assistance in making the best choices for their children. Second, greater transportation assistance should be provided. Depending on the distances involved, as well as the availability of public transportation, offering free transportation could be fairly expensive. It is thus overly facile to suggest simply that states provide free transportation for any and all interdistrict transfers. As it stands, however, few state plans even address transportation issues; at the very least, states should devote attention and some resources to enhancing opportunities for choice by providing some transportation assistance.⁴⁴⁸ Finally, efforts should be made to include more districts in the plan, both as sending and receiving districts. This is the most important and the most difficult improvement that could be made, and there is not a single strategy guaranteed to succeed. Requiring all districts to participate is one possibility, but it will not be politically plausible in some states, and it will not always be effective if districts can exclude students simply by saying that they lack space. A more promising approach, which we will discuss in more detail below, would be to create incentives for districts to open their schools to incoming transfers.

Similar steps could be taken to replicate, expand, and strengthen existing charter school programs, and advocates should look to existing examples of “strong” charter laws for guidance as well as political leverage.⁴⁴⁹ The precise steps necessary to increase opportunities for racial and socioeconomic integration will depend on the demographics of the district or region in which charter schools are contemplated. In districts that are diverse racially and economically but are marked by residential (and thus public school) segregation, simply expanding the number of charter schools would be a useful first step. One way to do this would be to press states to allow not just districts to approve charters but to provide the same authority to state agencies and state-delegated entities, such as universities. States that do not limit granting authority to local districts have a larger number of charter schools, which is not surprising given the incentives of local districts to squash charter applications.⁴⁵⁰ Advocates should also seek more equitable funding of charter schools to ensure that they have a fair chance of competing with existing public schools and providing a good education. Again, advocates can look to existing examples

⁴⁴⁷ For descriptions of existing open enrollment plans, see *supra* TAN.

⁴⁴⁸ For similar suggestions regarding information and transportation, see John E. Coons & Stephen D. Sugarman, *Making School Choice Work For All Families* 66-69, 87 (1999).

⁴⁴⁹ For descriptions of existing charter programs, see *supra* TAN.

⁴⁵⁰ See *supra* TAN.

of states that fund charter schools at levels comparable to traditional public schools. They can also encourage states to take advantage of the funding made available by the federal government for the creation and maintenance of charter schools.⁴⁵¹

In states or regions where districts, rather than neighborhoods, are segregated by race and income, advocates should seek to increase the opportunities for students to cross district boundaries to attend charter schools. To begin, advocates could attempt to ensure that there are a decent number of charter schools that are open to non-resident students. One way to do this, which several states have already implemented,⁴⁵² is to require that charter schools authorized by state agencies be open to all students within the state on an equal basis.⁴⁵³ Another method, also implemented by several states,⁴⁵⁴ would be to allow several districts to co-sponsor charter schools. Given existing politics, this may not result in a large number of regional charter schools that span urban-suburban boundaries, but it at least creates the option. Once options for interdistrict charter schools exist, advocates should focus on the same sort of details that need to be attended to regarding any interdistrict choice program. They should ensure that parents are sufficiently informed of their options, and they should work to ensure that some provision is made for transporting students.

As for vouchers, finally, two types of programs currently exist: the programs in Cleveland and Milwaukee provide vouchers to poor students in urban districts, and the program in Florida provides vouchers to students in persistently failing public schools.⁴⁵⁵ These existing programs offer vouchers to relatively few students and provide those students little more than the opportunity to attend a private school within the student's resident district. Even these limited programs, to be sure, can offer the few students lucky enough to receive vouchers a ticket into a better school. In urban districts where a sufficient number of private schools have space available and are willing to accept voucher students, even restricted voucher programs can move some students from failing, racially and economically isolated schools into more academically productive and integrated environments. Simply replicating such programs, therefore, would benefit at least some students.⁴⁵⁶ And replicating these limited programs in other states and cities

⁴⁵¹ Since 1994, the federal government has offered grants (totaling \$600 million) to states to support the creation of charter schools, through the Public Charter Schools Program, and in 2000, Congress approved an additional \$25 million for grants designed to help finance charter facilities. See Elementary and Secondary Education Act of 1965, Title X, Part C, as amended, 20 U.S.C. 8061-8067; see also www.charterfriends.org/federal-legislation.html (describing new program).

⁴⁵² See supra TAN.

⁴⁵³ Advocates might also try to encourage the federal government to give a preference in its funding grants to open enrollment charter schools. See infra TAN.

⁴⁵⁴ See supra TAN.

⁴⁵⁵ See supra TAN.

⁴⁵⁶ As opponents of vouchers like to point out, see, e.g., McCusick, *School Finance Litigation*, supra note __, at 127-28, this will do little for those who remain behind in failing public schools and indeed could make a bleak situation even worse as motivated students and parents exit the system. But this is true of any non-comprehensive choice or integration scheme, including those public school choice programs often favored by opponents of vouchers, such as METCO, which – just like a limited voucher program -- allow a few

certainly seems possible; it seems implausible that vouchers are politically acceptable only in Milwaukee, Cleveland, and Florida.⁴⁵⁷

While programs modeled on those existing in Milwaukee, Cleveland, and Florida would help some students, many more would be left unassisted. The harder questions facing voucher advocates are whether the voucher programs can increase in size and whether the opportunities available to voucher students can be expanded. The crushing defeats of state-wide voucher initiatives suggest that we should not expect to see a universal voucher program any time soon, but the steady growth of vouchers in Milwaukee simultaneously suggests that over time, voucher programs can grow.⁴⁵⁸ Starting small may be necessary for political and financial reasons; but as Milwaukee shows, programs need not remain small over time. If voucher programs remain popular and show signs of success, the number of vouchers available obviously should increase, although it is impossible to predict just how much growth we should expect.

As for expanding the schools at which vouchers can be used, one obvious strategy would be to remove geographical restrictions and allow vouchers to be used at *any* public or private school. Expanding voucher programs to include all private schools seems a realistic prospect, given that private schools are uniformly afforded the option as to whether they wish to participate at all in accepting voucher students.⁴⁵⁹ Expanding

students to escape failing urban schools. Critics of choice plans that are not universal can always point to those left behind, and this is indeed a difficult and delicate question, which we touch on below. The real question, though, is a relative one, and it seems far from clear that the second-best solution to a universal choice plan is a universal system of involuntary assignment based on residence, especially when those with the means will always have the option of choosing their place of residence (and thus their children's public school) or choosing a private school. Cf. Charles L. Glenn, Kahris McLaughlin, and Laura Salganik, *Parent Information for School Choice: The Case of Massachusetts 18 (1993)* ("An inevitable cost of freedom is to experience remaining constraint as galling. So long as children are simply assigned to school involuntarily on the basis of where they live, of course, the issue of disappointment does not arise."). Another alternative, which has been proposed by some commentators, is mandatory socioeconomic integration within and across district lines. See, e.g., McCusick, *School Finance Litigation*, *supra* note __, at 131-34. If successful, this might be the most productive policy, but this alternative seems politically implausible, for the reasons we discuss in detail in Part I.

⁴⁵⁷ Just as those interested in replicating controlled choice programs would do well to study the political dynamics that led to the creation of such programs, those interested in voucher programs would do well to study the dynamics in Cleveland (and the Ohio Legislature), Milwaukee (and the Wisconsin Legislature), and the Florida Legislature. For an overview of the political dynamics of vouchers, as well as discussion of the political alliance that led to the Milwaukee voucher program, see Bulman & Kirp, *Shifting Politics of School Choice*, *supra* note __, at 47-52. See also Hubert Morken & Jo Renee Formicolo, *The Politics of School Choice (1999)* (containing a somewhat disjointed discussion of the players involved and strategies employed in school choice initiatives, including those in Cleveland and Milwaukee).

⁴⁵⁸ For discussion of the state initiatives, see *supra* TAN. For description of Milwaukee's voucher plan, see *supra* TAN.

⁴⁵⁹ At the same time, it must be noted that both the Cleveland and Milwaukee programs limit the use of vouchers to private schools located within their respective school districts. It is unclear what explains this limitation. If it is political opposition, which we simply have not been able to document, then even *allowing* all private schools to participate may be more controversial than we envision. If the limitations stem instead from practical considerations, such as the difficulty of providing transportation, including private schools may be politically feasible but ensuring access to distant schools may not be.

choice to include out-of-district public schools is trickier and raises the same political questions facing those who wish to expand interdistrict public school choice programs. The same options for expansion, as well as the accompanying obstacles, exist here. All schools might be required to accept voucher students, a plausible possibility in light of existing interdistrict choice programs that require all districts to accept transfer students. But such a requirement will be politically impossible in some states and might prove ineffective if schools can thwart potential transfers by claiming to have no space available. An alternative would be to encourage suburban schools to agree to accept a limited number of voucher students, along the lines of programs like METCO in Boston and Project Concern in Hartford. A third option would be to create incentives for suburban schools to accept voucher students, a topic to which we will turn momentarily.

For now, it is worth pausing to acknowledge that none of the strategies identified will alone significantly expand school choice. Each step suggested is a relatively small one. Although small steps taken together might actually open up choice to a fairly large number of students, the political constraints we have identified will still work to limit choice programs. As a consequence, questions of fairness regarding those “left behind” will continue to hang over efforts to expand choice. For example, it is questionable whether expanding choice in the ways we suggest would generate sufficient competition among schools that we could be confident that those who cannot or do not choose a school nonetheless benefit from the existence of choice. In addition, it is worth considering the possibility that attention and resources devoted to school choice will divert and exhaust attention and resources that otherwise would have been directed at the entire population of students in failing school systems. We can only flag these issues; we cannot offer a way to resolve them, in part because it is simply too difficult to predict all of the medium- and long-term consequences of choice on existing public schools. Given the sorry state of many urban school systems and the dim prospects (not to mention glacial pace) of system-wide reform, we think that offering immediate help to even just a portion of students in failing schools is worth taking some risks. It is obvious that others may reasonably view the potential costs and benefits differently, but we remain convinced that it is worth thinking of ways to provide meaningful choice to as many students in failing school systems as is politically possible.

2. Creating Incentives for Expanding Choice

In addition to replicating existing programs, advocates for expanding choice might consider employing various incentives to make choice more attractive to potential participants. Incentives could be targeted in at least one of three ways: to make good schools or school systems more willing to accept transfer students; to encourage middle-class children to attend urban schools; or to encourage the creation of public or private schools that accept students without regard to place of residence. Imagining possible incentives is not difficult. In fact, commentators have already proposed a number of potential incentives, and some choice plans already rely on incentives to encourage the exercise or acceptance of choice. The hard part is thinking of effective incentives that are themselves politically feasible.

Begin with incentives to encourage good schools or school systems to accept voucher students. A number of liberal proponents of school choice have suggested giving poor students a voucher (for use at public or private schools) valuable enough to make the recipients financially attractive to schools.⁴⁶⁰ It is certainly plausible that if a voucher is worth a lot of money, good public and private schools would be willing – perhaps even eager if the voucher is really valuable -- to accept voucher students. But there is a pretty obvious dilemma here, which is often ignored by commentators who advocate this approach.⁴⁶¹ The dilemma is this: it will be very difficult politically to make vouchers worth enough to make voucher students politically and financially acceptable to good (and adequately-funded) schools.

Consider a suburban public school whose per-pupil expenditure is at or above the statewide average, which is true of most suburban schools. Now imagine that the voucher is to be used by a poor student from an urban district. For the strictly self-interested suburban district, the voucher amount will not only have to ensure that the district loses no money but will also have to ensure that the district is compensated for the extra costs associated with educating poorer students.⁴⁶² This would mean that the state would have to fund a voucher that is worth more than the amount spent per-pupil within the district. Exactly how much more is anyone's guess, but even if the compensation amount is relatively small, a voucher worth the average expenditure per-pupil in suburban districts would still require a fairly large increase in state funding that is devoted initially to poor students and ultimately to suburban districts or private schools. It is hard to imagine the political forces that could combine to achieve this result. Suburban districts are not typically desperate for money and are wary of accepting transfer students, so it is hard to see them taking the lead on this issue, and urban districts

⁴⁶⁰ Proposals of this sort have been around for quite some time, having been offered in the late 1960s and early 1970s by the likes of Christopher Jencks, TheodoreSizer, and Henry Levin, all left-leaning proponents of school choice. See Christopher Jencks, *Is the Public School Obsolete?*, *Pub. Interest* 18 (Winter 1966); Judith Arren & Christopher Jencks, *Education Vouchers: A Proposal for Diversity and Choice*, in George R. La Noue, ed., *Educational Vouchers: Concepts and Controversies* 53 (1972); Theodore R. Sizer, *The Case for a Free Market*, *Sat. Rev.*, Jan. 11, 1969, *reprinted in* James A. Mecklenburger & Richard W. Hostrop, eds., *Education Vouchers: From Theory to Alum Rock* 30 (1972); Henry M. Levin, *The Failure of Public Schools and the Free Market Remedy*, 2 *Urb. Rev.* 32, 35-36 (1968). Contemporary commentators have proposed similar incentives. See, e.g., Cookson, *School Choice*, *supra* note __, at 131-37 (describing ambitious proposal that would entail giving all children shares in an educational trust fund in reverse proportion to their families' income – i.e., the poorer the family, the greater the value of the share).

⁴⁶¹ For a proposal that, despite its normative appeal, is especially fanciful, see Cookson, *School Choice*, *supra* note __, at 131-37 (suggesting not only that poorer students receive more money for education than wealthier students, but that this system be funded by equalizing school finance schemes and requiring the federal government to contribute 15% of the necessary funds (which would represent nearly a doubling of current federal expenditures on education)).

⁴⁶² Many of those poorer students will also be racial minorities. To the extent that racism affects the calculus of suburban school officials and suburban parents, the compensation payment will either have to be even higher or may simply be unable to overcome resistance. We are not suggesting, of course, that race will play a role in every case in every suburb, but it would blink reality to suggest that race will never play a role in any case in any suburb.

would likely lose money under this scheme and therefore should not be expected to champion it.

This is not to say that providing additional compensation to schools that accept poorer students, either through a voucher program or a public interdistrict program, is impossible or futile. Some form of bonus payment could be used to *help* motivate schools to accept students. That money could come from state governments and perhaps also from the federal government, which already provides funding ostensibly for poor students in the form of Title I grants.⁴⁶³ Our point is simply that it is unrealistic to think that the bonus payments will be high enough such that money alone will be dispositive. Additional money might help, but it will be difficult to raise for large numbers of students, and it will likely not be enough to erase the reluctance of good school systems to open their doors to poorer students.

The Chapter 220 program in Milwaukee perfectly illustrates our points. Under that interdistrict choice plan, any suburban district that accepts a transfer student from the Milwaukee School System receives from the state an amount that equals the district's average expenditure per-pupil. In addition, districts that accept transfer students equal to at least five percent of the district's total student population receive, as a bonus, an additional payment that is worth 20% of the district's average expenditure per-pupil.⁴⁶⁴ By any measure, this is a fairly generous program, yet it has not done much on its own to induce suburban districts to accept transfer students.

To begin, the Chapter 220 program is the result of a lawsuit; suburban districts agreed initially to accept transfers not because of the money involved but because of a court settlement.⁴⁶⁵ Nearly half of these suburban districts, moreover, have accepted fewer transfer students than they agreed to in the settlement.⁴⁶⁶ Indeed, growth in the number of participants in the program has slowed significantly in the last decade because of a shortage of seats in suburban districts and because of "suburban community

⁴⁶³ More than half of the states have some type of "compensatory" program that is designed to channel additional funds to poor students and/or poor districts, but wealthier students on average still receive more funding (through state and local sources) than do poor students. See General Accounting Office, *School Finance: State and Federal Funding to Target Poor Students* 7 (1998). Title I is supposed to devote resources to poor students and schools with concentrated poverty, although the funding is much more widely dispersed than this initial purpose would permit. See 20 U.S.C. §§ 6301-6514; see also Kahlenberg, *All Together Now*, *supra* note ___, at 160 (noting that "Title I appears to survive largely because its preferential philosophy has in practice been undercut, so that 90 percent of districts actually benefit"). One way to use this funding as a form of compensatory payment would be to allow Title I money to follow poor students to whatever school they attend, which is not currently permitted under the law. See Chester E. Finn, Jr., *Fixing Schools Without a Voucher Fight*, *NYT* Jan. 13, 2001, at A21. The political difficulty, of course, is that this change would require contracting the beneficiaries of Title I funds to ensure that the money is devoted only to poor students.

⁴⁶⁴ See *Evaluation of Chapter 220 Program*, *supra* note ___, at 21.

⁴⁶⁵ See *id.* at 11.

⁴⁶⁶ See *id.* at 48.

resistance to expanding the program.”⁴⁶⁷ Clearly the bonus payment, which would bring financial rewards to suburban districts, was insufficient to motivate many suburbs to accept large numbers of transfer students. At the same time, it is unlikely that the bonus payments will be increased. Political leaders already complain that the program is too expensive, and political momentum in the district has shifted to the more modest voucher program, which provides much less money per pupil and confines students to private schools within city limits.⁴⁶⁸ Bonus payments thus might encourage suburban districts to participate in a program like Chapter 220, or the METCO program in Boston, but they are unlikely to lead suburban districts to accept large numbers of poorer students from urban school systems.

Another way to encourage movement between suburban and urban districts is to encourage middle-class suburban students to attend urban schools. The traditional incentive used to prod such movement is the creation of magnet schools in urban districts that are open to suburban and urban students alike. Magnet schools have been able to attract some suburban students into urban school systems, and they do offer urban students the opportunity for a more socioeconomically integrated environment, as well as a more academically challenging one. But the number of suburban students who choose urban magnet schools is usually relatively small, and the number of urban students who can attend them is also quite small.⁴⁶⁹ As described above, magnet schools, though fairly popular, also often provoke some controversy, insofar as they entail the redistribution of resources away from urban students to suburban ones. This is not to say that creating more magnet schools is a bad idea or a futile one, but simply to point out that magnet schools will likely never be more than one small way to increase school choice.⁴⁷⁰

In addition to interdistrict magnet schools, some commentators suggest that *intradistrict* choice plans might encourage middle-class parents to remain in or move to cities, which would increase socioeconomic integration in urban schools by increasing the supply of middle-class students.⁴⁷¹ It is certainly conceivable that robust intradistrict choice plans in urban districts could act as an incentive to encourage potential suburbanites to reside in cities. Those parents, however, would have to be reasonably assured that their children could choose a good school. For this to happen, private schools would likely have to be included in the mix, as most urban districts are not going to have a sufficient supply of good public schools to guarantee to the parents inclined to move to the suburbs that their children will be able to choose a high-quality school if they remain in a city. For the same reason, vouchers would have to be available to every

⁴⁶⁷ See *id.* at 4, 23. Suburban districts are allowed to determine the number of seats available for transfer students and can reduce that number in order to meet any increases in resident enrollments. *Id.* at 14.

⁴⁶⁸ See *supra* TAN.

⁴⁶⁹ See Kahlenberg, *All Together Now*, *supra* note ___ at 129-30 (citing statistics). R. Crain (1999), *Effects of magnet school education* (this might be either an NCES or ERIC pub.)

⁴⁷⁰ Cf. Jennifer Hochschild, *The New American Dilemma: Liberal Democracy and School Desegregation* 72 (1984) (suggesting that “magnets are better characterized as a drop in the bucket than a cure for what ails us”).

⁴⁷¹ See, e.g., Heise and Nechbya, *supra* note ___.

student in the district and not limited to poor students or those attending persistently failing schools. At the moment, the prospects of providing every student in an urban district a voucher seem quite dim, as the experience in both Milwaukee and Cleveland indicate.⁴⁷² Thus, while a robust intradistrict choice plan could be an effective incentive for attracting middle-class parents into poorer, urban districts, a robust plan at the moment seems out of the picture. Although more limited choice plans -- ones that involve only public and charter schools, for example -- might lead some middle-class parents to remain in urban school systems, it seems unrealistic to expect them to have a significant impact.

A final target for incentives are charter or private schools that would accept students without regard to place of residence. One way to encourage the creation of charter schools that do not have geographical limitations on admissions is to provide more money to such schools, and specifically to provide additional money for transportation. The federal government, which already provides money to states for the creation and maintenance of charter schools,⁴⁷³ could play an important role here. That is, it might be politically feasible to channel additional federal resources to charter schools that draw students from more than one neighborhood or district, which might encourage the creation of such schools in the first place and might help new and existing schools cover transportation costs.

As for private schools, commentators have offered a number of ideas as to how private schools might be encouraged to admit an economically, geographically, and/or racially diverse group of students. Most proposals either would give poorer students additional funding, which we have already discussed, or they would require private schools that accept voucher students to hold open a number of seats for poorer students. Private schools, for example, might be allowed to charge whatever they like for tuition, but if they accept voucher students, they would have to accept a certain percentage of students who could not pay any tuition beyond the voucher amount.⁴⁷⁴ The latter proposals are intriguing and would probably work *if* vouchers are universally available. If vouchers are not universally available, however, and in fact are given only to poor kids, there can be no tit-for-tat, where private schools get to accept some voucher students and charge them additional tuition in exchange for accepting some poor kids. The question thus facing private schools – unless forced to participate in a voucher scheme, which seems *very* unlikely – will simply be whether they wish to accept some poor students who have a voucher to spend. Some religious schools that do not charge much tuition will do so, as they already have, and some of those schools may be more racially and

⁴⁷² See *supra* TAN.

⁴⁷³ See *supra* TAN.

⁴⁷⁴ For an especially thoughtful proposal along these lines, see Coons & Sugarman, *Making School Choice Work*, *supra* note __, at 78-79. Coons & Sugarman, once the leading academic proponents of school finance equalization, see Coons et al., *Private Wealth and Public Education*, *supra* note __, have since become champions of targeted voucher programs designed to help disadvantaged students. See, e.g., Coons & Sugarman, *Scholarships for Children*, *supra* note __. (1992).

economically diverse than the public schools.⁴⁷⁵ But existing private schools can accommodate relatively few children who are in public schools,⁴⁷⁶ so the fact that some private schools at the moment could offer a more racially and socioeconomically diverse environment does not tell us much about the likely environment facing voucher students who would not fit into existing private schools.

For that environment to be racially and socioeconomically diverse, more middle-class students are going to have to exercise school choice. And that remains the nub of the problem. Existing choice programs can be replicated and strengthened, and incentives can be used to encourage the expansion of school choice. Taken together, all of these efforts, which we have tried to catalogue, might add up to substantial increases in the availability and scope of school choice. But until suburban parents come to see school choice as a potential benefit rather than a threat, increasing school choice in meaningful ways will remain difficult. There will be less overall support for choice, as many suburbanites will continue to believe that it is unnecessary and potentially threatening to their schools, and there will be resistance to opening up the suburbs for those seeking to exercise choice. The final issue to discuss, then, is whether there is any hope that the politics we have described might change, such that suburbanites become more supportive of choice.

B. Working To Alter The Politics of Choice

There are at least two ways that the politics of school choice might be altered. One method would be to encourage the formation of larger, more organized, and more unified coalitions in support of school choice. The school choice “movement” at present is quite fragmented and unorganized.⁴⁷⁷ The groups and advocates involved tend to push for certain types of school choice and to resist or refuse to support other types. The most important divide is between public and private school choice programs.⁴⁷⁸ Some groups, like the NAACP and teacher’s unions, support public school choice but adamantly

⁴⁷⁵ See *supra* TAN.

⁴⁷⁶ Currently about 90% of all school-age children are in public schools and 10% are in private schools. Existing private schools obviously cannot accommodate more than a small fraction of students currently attending public schools.

⁴⁷⁷ See Chubb & Moe, *Politics, Markets & America’s Schools*, at 207 (“To the extent the movement for choice can be called a movement at all, it is an extremely fragmented and conceptually shallow one. It lacks mission.”); accord Morken & Formicola, *Politics of School Choice*, *supra* note __, at 286 (“[T]here is no unity among the existing educational reform groups as to what the best kind of school choice is. The result is that there is a fragmentation among the organizations as to what is the most practical type of school choice to support financially or politically.”).

⁴⁷⁸ See, e.g., Henig, *supra* note __, at 215 (“Some advocates of public-school choice invest the line separating public and private schools with almost mystical significance. Crossing that line is taboo, because once it is crossed, it will be impossible to stem the flow of vital life forces from the public sector.”); see also Chubb & Moe, *Politics, Markets & America’s Schools*, at 219-26 (proposing school choice plan that would give parents a voucher for tuition and would convert all public schools into tuition schools).

oppose private school choice.⁴⁷⁹ Other groups, such as the Institute for Justice, appear most interested in private school choice, while providing some support for charter schools.⁴⁸⁰

In theory, if the various groups that support school choice could form a unified coalition in favor of choice, the chance of expanding school choice programs would improve. One could imagine, again in theory, the NAACP and the Institute for Justice agreeing to support both public and private school choice, provided that both types of choice offer substantial opportunities for poorer students to attend predominately middle-class schools. If such a coalition were to form, the political pressure to expand opportunities for choice, both public and private, would obviously increase, and we might see state legislatures begin to adopt an array of choice measures in response. If school choice interest groups remain fragmented, by contrast, it seems unlikely that legislatures will be motivated to adopt any school choice plan that is likely to upset suburban voters.

It is unclear, of course, if even a unified coalition in favor of school choice would be successful in moving legislatures to adopt choice programs that interfere with the current prerogatives of suburban schools. But that is not the biggest problem with this idea. Rather, the largest obstacle has to do with the various interest groups themselves. Put bluntly, it does not seem likely that these groups would be willing to work together and to compromise their positions in order to present a unified front. Although both the NAACP and the Institute for Justice, for example, claim to be working in behalf of minority parents and students, it seems close to fanciful to suggest that they might work together to support a mutually acceptable choice plan. Given the different philosophies of these groups, as well as their differing views regarding other programs, such as affirmative action, the possibility of their putting aside their differences (and their mutual distrust) in order to work together for school choice seems remote.⁴⁸¹ What is true for the NAACP and the Institute for Justice seems true for other groups as well. It is hard to imagine, for example, teacher's unions agreeing to work together with groups that support private school choice.

⁴⁷⁹ See *supra* TAN.

⁴⁸⁰ See <http://www.instituteforjustice.org/cases/index.html> (describing cases in which the Institute for Justice is involved).

⁴⁸¹ The Institute for Justice, for example, describes itself as “our nation's only libertarian public interest law firm,” and goes on to state: “Once people turned first to the ACLU whenever government violated their rights. No longer. As that group has fought in recent years to create a right to welfare, to preserve racial preferences, and to prop up the pillars of the welfare state, people have increasingly sought a principled alternative that will protect individual rights rather than expand government. That alternative is the Institute for Justice. If you seek a courtroom champion for individual liberty, free market solutions, and limited government, look only as far as the Institute for Justice.” Quoted at <http://www.instituteforjustice.org/profile/index.html>. This philosophy, as well as the Institute for Justice's opposition to existing affirmative action programs, is not shared by the NAACP. See, e.g., Press Release, NAACP Supports University of Michigan Decision to Appeal Court's Decision Striking Down Affirmative Action (March 30, 2001) (available at <http://www.naacp.org/news/releases/michiganaffirmativeaction/033101.shtml>).

If altering the politics of choice through the creation of new coalitions seems unlikely, perhaps the preferences of suburbanites themselves could be altered. That is, perhaps it is possible to convince some suburban parents that school choice, both public and private, is something from which they could benefit, which in turn would increase support for and decrease opposition to more expansive school choice plans. This is obviously not a small task, nor is it one that can be accomplished overnight. But there currently exists an intriguing opportunity to make progress along this front. That opportunity can be found in state and federally-funded preschool programs.

The provision and organization of preschool education differs dramatically from the provision and organization of elementary and secondary education. Most preschools⁴⁸² are privately run, and most parents pay tuition on their own for preschools.⁴⁸³ A substantial and growing minority of children, however, participate in state or federally-funded programs. The oldest and most well-known of these is the Federal Head Start program, which provides funds to local agencies to support preschools for children living in poverty. As of 1998, there were 822,000 children in Head Start schools.⁴⁸⁴ In addition, the federal Individuals with Disabilities Education Act supports preschool programs for children with disabilities, and in 1998 served 572,000 children.⁴⁸⁵ Title I, finally, also provides federal funds for high-poverty school districts, which can be used to support preschool programs. As of 1996-97, there were over 260,000 students in Title I prekindergarten programs.⁴⁸⁶

At the state level, government-funded programs now exist in 41 states and the District of Columbia.⁴⁸⁷ Most of this growth has occurred in the last twenty years, and the growth continues to accelerate. In 1991-92, for example, 290,000 children participated in state prekindergarten programs.⁴⁸⁸ As of 1998-99, that figure had more than doubled, to 725,000.⁴⁸⁹ Despite this explosive growth, there is still plenty of room for more, as the majority of children are not currently enrolled in government-funded preschools. Most states, for example, either explicitly limit their programs or give a

⁴⁸² Although some commentators assiduously use either the term “preschool” or “prekindergarten program,” implying that there is a significant difference between the two, we use the terms interchangeably to refer to any program that provides some instruction and thus differs from traditional daycare programs.

⁴⁸³ See NCES statistics on pre-K programs.

⁴⁸⁴ Karen Schulman et al., *Seeds of Success: State Prekindergarten Initiatives 1998-1999* at 8, Children’s Defense Fund (1999)

⁴⁸⁵ See Schulman, *Seeds of Success*, supra note ____, at 8.

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.* at 13. Government funded programs exist in Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

⁴⁸⁸ *Id.* at 4.

⁴⁸⁹ *Id.*

preference to a targeted population – usually children living in poverty or at risk because of family circumstances. In 1995, Georgia became the first state to offer universal access to preschool for all four-year olds in the state,⁴⁹⁰ and in 1997, New York adopted a similar plan that is supposed to go into effect in 2002.⁴⁹¹ Universal access, however, remains the exception. Even targeted programs, moreover, are not reaching all poor children: as of 1996, only 36% of children between the age of 3 and 5 and whose families earned less than \$15,000 annually were in preschool programs.⁴⁹²

The structure and details of federal and state programs vary quite a bit from state to state and community to community, making it difficult to describe a “typical” prekindergarten program. What most programs have in common, however, is that funding is provided to both public and private preschools. The federal Head Start program, for example, provides money to both public schools and private agencies,⁴⁹³ and, indeed, most Head Start programs are operated by private agencies, including church-based preschool programs.⁴⁹⁴ Most state programs also provide money to both public and private schools. Of the 42 states that sponsor programs, only seven limit funding to public schools, and six of the seven programs are relatively older ones, begun before 1985.⁴⁹⁵ The other 35 states fund both public and private programs. States will either provide funding directly to private providers or will provide funds to school districts, which are then allowed (or required) to subcontract with private agencies.⁴⁹⁶ Hawaii actually has a preschool voucher program, which provides certificates to poor families that can be used to enroll their children in any licensed public or private preschool program.⁴⁹⁷

That funding is provided to public and private agencies does not necessarily mean that parents have a choice among programs. Some programs, like Head Start, do not offer much choice to parents: those living in the community where the program operates

⁴⁹⁰ Rachel Schumacher at al., *State Initiatives to Promote Early Learning: Next Steps in Coordinating Subsidized Child Care, Head Start, and State Prekindergarten*, 55 (Center for Law and Social Policy, April 2001).

⁴⁹¹ Linda Jacobson, *Plans for ‘Universal’ Preschool Gain Ground in New York State*, Education Week (October 25, 2000).

⁴⁹² Schulman, *Seeds of Success*, supra note ___, at 5.

⁴⁹³ 42 U.S.C. § 9836; 45 C.F.R. § 1302.2.

⁴⁹⁴ See Schulman, *Seeds of Success*, supra note ___, at 7.

⁴⁹⁵ The District of Columbia, Kansas, Louisiana, Maine, New York, Wisconsin and West Virginia. Anne Mitchell, *Prekindergarten Programs in the States: Trends and Issues*, 2 (2001) (copy on file with author).

⁴⁹⁶ The first type of program has been implemented in eleven states: Arkansas, California, Georgia, Hawaii, Iowa, Massachusetts, Michigan, New Mexico, Tennessee, Vermont, and Washington. Seventeen state programs also directly fund federal Head Start programs. The second type of program has been implemented in nineteen states: Alabama, Arizona, Colorado, Florida, Illinois, Kentucky, Maryland, Minnesota, Missouri, Nebraska, New Jersey, New York, Ohio, Oklahoma, Rhode Island, South Carolina, Texas and Virginia. Schulman, *Seeds of Success*, supra note ___, at 49.

⁴⁹⁷ *Id.* at 44.

are eligible to attend only the local program.⁴⁹⁸ Other programs offer a limited range of choices. In Georgia, for example, families can choose between public and private programs, but children residing in the attendance zone or district where the preschool program is located may be given first preference.⁴⁹⁹ Finally, some programs, such as Hawaii's, do not seem to place any geographic restrictions on choice.⁵⁰⁰ Even where choice is not restricted, however, transportation is not typically provided, and the lack of public or government-funded transportation can effectively restrict choice to local programs for some parents.

Our message to those seeking to expand school choice⁵⁰¹ is pretty simple: support and try to shape efforts to expand access to government-funded preschools. Expanding access to government-funded preschools is an increasingly popular cause, supported by Democrats and Republicans alike.⁵⁰² Part of the support stems from research that demonstrates both short- and long-term benefits from pre-school,⁵⁰³ and part stems from the recognition that welfare reform, which pushes parents back into the workforce, requires some attention to child care.⁵⁰⁴ Whatever the precise motivation for support, however, it is clear that government funding and popular support for preschool education are growing. Between 1991 and 2000, for example, state spending on preschool programs increased by over \$1 billion – from \$700 million⁵⁰⁵ to nearly \$2 billion.⁵⁰⁶

⁴⁹⁸ See Zigler, *supra* note __, at __; Schulman, *Seeds of Success*, *supra* note __, at __.

⁴⁹⁹ OSR guidelines indicate that a provider may, but is not required to, give enrollment priority to students living in local school attendance zones or school districts. Georgia Office of School Readiness, 2001-2002 Georgia Pre-K Program Guidelines § 3.3 (available online at <http://www.osr.state.ga.us/FYIGuide2002.html>).

⁵⁰⁰ Schulman, *Seeds of Success*, *supra* note __, at 44.

⁵⁰¹ Given our description of the political dynamics surrounding choice, we recognize, alas, that there may not be many who currently fall into this group. Part of our hope in writing this Article, however, is that membership in this group will expand once the issues raised in this Article become more widely known. A vain hope perhaps, but a hope nonetheless.

⁵⁰² A 1989 bipartisan education summit initiated by the first President Bush, for example, recommended universal access to prekindergarten by the year 2000. Schulman, *Seeds of Success*, *supra* note __, at 1.

⁵⁰³ Some studies have indicated that children who participate in early childhood education programs are less likely to be held back or placed in special education programs later in their academic careers, Edward Zigler & Susan Muenchow, *Head Start: The Inside Story of America's Most Successful Educational Experiment 204* (New York, NY: BasicBooks, a Division of HarperCollins Publishers, Inc., 1992). Other studies indicate that participation in early childhood education is associated with increased employment and postsecondary education. Schweinhart & Weikart, *Significant Benefits: The High/Scope Perry Preschool Study Through Age 27* (Ysplanti, MI: Migh.Scope Education Research Foundation, 1992). See also L.A. Karoly et al., *Investing in Our Children: What We Know and Don't Know About the Costs and Benefits of Early Childhood Intervention* (Santa Monica, CA: RAND, 1998).

⁵⁰⁴ OECD Country Note: Early Childhood Education and Care Policy in The United States of America, 15 (2000) ("Most welfare recipients are single mothers who cannot work without child care."). See also Jacqueline L. Salmon, *For Many Children, Nowhere to Go*, *The Washington Post* A1 (September 19, 1999) (describing a nation-wide "child-care crunch").

⁵⁰⁵ Schulman, *supra* note __, at 4.

⁵⁰⁶ Mitchell, *supra* note __, at 5.

In addition to supporting efforts to expand access to preschools, advocates for school choice should seek to ensure that choice remains a component of government-funded programs. The fact that most programs fund public and private preschools makes this a completely plausible goal. Indeed, perhaps the key point to recognize here is that government-funded preschools operate on a different basis than do most public elementary and secondary schools. The default rule for preschools is not generally the neighborhood school. The status quo, therefore, is not as much of an obstacle in this context as it is in the context of school choice at the elementary and secondary level. Even teacher's unions, which strongly support the drive for increased access to preschool, are not insisting that funding only go to public programs.⁵⁰⁷ If state and federal governments continue to fund *both* public and private programs, as seems likely, a prominent reason to oppose choice – to keep money out of the hands of private schools – disappears.

The theory behind our suggested strategy is that experience may change perceptions. To the extent that parents experience school choice for their pre-school aged children, and to the extent that they appreciate having that choice, it seems reasonable to expect that some of them would continue to support choice programs that involve elementary and secondary schools. Working families in particular may find that being able to choose schools that are closer to their places of employment is preferable to the current system, which assigns most students to schools that are close to their homes. Suburban parents in general may discover that the ability to choose among a more diverse array of educational setting is valuable and worthy of support.

For this to work, access to government-funded preschools must expand to include parents who are currently not receiving assistance, including suburban, middle-class parents. This could happen by making preschool universally available at the government's expense, as it is in Georgia, or by instituting a sliding-scale benefits program, where the amount provided for tuition would depend on the parents' income level.⁵⁰⁸ It could also happen by simply allowing government-funded students to attend pre-schools with children whose parents pay full tuition, which does not typically happen under current programs. Whatever the method, however, the key is to increase parental involvement in government-funded school choice programs at the preschool level, and to make efforts to inform those parents (and others) that school choice exists at this level.

There are, to be sure, a number of obstacles to increasing access to and choice among preschools. These include cost in general, transportation costs in particular, and ensuring that full-day programs are available for families with two parents who work full time. None of these obstacles, however, seem insuperable, and programs across the country have addressed them. Indeed, the fact that Georgia has implemented a program

⁵⁰⁷ Sarah Feldman, Remarks to the AFT QuEST Conference, July 12, 2001 (available at http://www.aft.org/press/2001/quest01_speech.html). In her remarks, the President of the AFT endorsed universal early childhood education initiatives and pointed to the Head Start model as a prototype.

⁵⁰⁸ The latter program was suggested by Feldman in her report. See *id.*

that provides universal access to preschool suggests that doing so is politically feasible. That Hawaii has instituted what amounts to a preschool voucher program is further evidence of the possibilities that exist in this context. In short, although there will be hurdles to overcome, and costs and other logistics may place constraints on programs, there is a great deal of room for creative thinking and innovative programs in this context, which could simultaneously assist young children and boost the cause for expanding school choice at the elementary and secondary school level.

In addition to the obstacles facing efforts to expand access to preschool, finally, it is obviously possible that the experience of choice among preschools may not be enough to alter every or even most parents' perceptions of the costs and benefits of choice at the elementary and secondary level.⁵⁰⁹ At the same time, however, it seems plausible that some would change their perception, and it also appears from most studies that increasing access to preschool in itself is a worthy goal,⁵¹⁰ separate and apart from its impact on subsequent school choice policies. The potential benefits, both direct and indirect, of increasing access to preschools thus seem worth the costs. Indeed, given the current intransigence that characterizes school choice politics, efforts to alter preferences and perceptions, even if they take a while to come to fruition, seem uniquely worthwhile.

CONCLUSION

We end on a note of (very) cautious optimism. The political economy of school choice, which we have tried to explicate, suggests that the biggest obstacle to expanding choice in meaningful ways stems from suburban opposition to any changes to the status quo that might upset their privileged position. This opposition has been a constant in the area of school reform, and it has worked to shape reforms so as to leave the financial and physical independence of suburban schools intact. Emerging school choice programs conform to this historical pattern, as most leave suburban schools untouched: they typically need not accept transfer students involuntarily, nor must their students participate in choice programs. If this pattern remains unaltered, we should not expect school choice to accomplish very much, either in terms of racial or socioeconomic integration, academic achievement, or beneficial competition among public schools.

We hope that this article constitutes, at the very least, a first step toward altering that pattern. Before obstacles can be overcome, they must be identified. Although it seems obvious to us that suburbanites constitute the largest obstacle to increasing opportunities for choice, their role in school choice has until now remain largely

⁵⁰⁹ The existence of government-funded choice at the college and university level, for instance, which occurs through federal Pell grants and state grants, apparently has done little to increase support for such choice at the elementary and secondary level. Although it is possible that parents would continue to think of elementary and secondary school as separate from preschools, it seems to us that there is a closer connection between these schools than there is between elementary and secondary schools and colleges and universities. That is, we suggest that choice at the outset of a child's education may have more influence on parents' views about choice among elementary and secondary schools than does choice at the post-secondary school level.

⁵¹⁰ See sources cited *supra* note ____.

unexplored. This might seem mysterious at first, and readers may be wondering, as we did, why this point has remained somewhat obscure in choice debates. It becomes possible to understand, however, once the politics of choice are better understood. Neither side in the choice debate has much of an incentive to emphasize suburban opposition to school choice. Those in favor of school choice, especially private school choice, surely gain nothing by highlighting suburban opposition. It is much better for their cause if they can portray choice as universally popular and single out culprits like teacher's unions as the reason why such a popular cause is often stymied. Conversely, those who oppose school choice often argue that limited programs, such as the ones that exist in Cleveland and Milwaukee, are the proverbial camel's nose under the tent; allow limited choice programs, the argument goes, and the next thing you know vouchers will be given mostly to white middle-class parents looking to flee public schools. It does not help this argument, of course, to point out that the odds of expanding choice are at the moment quite slim, given suburban support for local public schools and opposition to broad school choice plans.

Identifying suburban opposition may indeed be the first step to overcoming that opposition, but past experience and the emerging pattern among school choice programs should give pause to anyone attempting to do so. There are ways, to be sure, to take small steps toward expanding school choice, as we have described. Existing programs may be replicated elsewhere and strengthened, and incentives can be used to ease the path toward expansion. Taken together, these steps could add up to significant expansions in some states and communities. Over the long term, however, change seems to await an alteration of suburban perceptions and preferences. And this, finally, is where preschools may help. To the extent government-funded preschool programs can become an attractive alternative model for how education is provided, and to the extent parents support that alternative model, the cause of expanding school choice will be advanced. There is no guarantee, of course, that perceptions and preferences will change, but providing parents the experience of school choice at the very beginning of their children's education seems more promising than any alternative we have seen or considered.