

Black America and School Choice: Charting a New Course

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I. INTRODUCTION: THE ROLE OF AUTONOMY IN ACCESSING QUALITY EDUCATION

As scholars debate the purpose of public education and the value of school choice,¹ Americans are demanding more and better educational choices for their children.² Many school reform advocates are troubled by racially disparate educational outcomes,³ while others are absorbed with improving quality and raising education standards overall.⁴ Conditions of extreme racial inequity in public schools were documented in a study of Negro education as

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1. There is little consensus about the role of public education in the United States. Some view the teaching of civic responsibility as the primary goal of education. *See, e.g.,* *Sheff v. O'Neill*, 678 A.2d 1267, 1285 (Conn. 1996) (“[S]chools are an important socializing institution, imparting those shared values through which social order and stability are maintained.”) (quoting *Plyler v. Doe*, 457 U.S. 202, 222 n.20 (1982)); James A. Peyser, *School Choice: When, Not If*, 35 B.C. L. REV. 619, 623 (1994) (stating that original goals of public schools and compulsory education were to unify American society around common set of civic virtues and moral values). Others see a need to prepare future generations to regain a competitive edge in the global economy. *See, e.g.,* U.S. DEP’T OF EDUCATION, NATIONAL COMM’N ON EXCELLENCE IN EDUCATION, *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* 5 (1983) (“Our once unchallenged preeminence in commerce, industry, science and technological innovation is being overtaken by competitors throughout the world.”); Anthony D. Demma, Jr., Comment, *Educational Accountability in Florida: Meaningful Reform or Marginal Tinkering?*, 19 FLA. ST. U L. REV. 1145, 1148 (1992) (stating that National Commission’s findings “point to the development of a serious competitive disadvantage”).

2. *See* Stuart Biegel, *School Choice Policy and Title VI: Maximizing Equal Access For K-12 Students in a Substantially Deregulated Educational Environment*, 46 HASTINGS L.J. 1533, 1583 (1995) (stating that parents are “now demanding greater accountability from their schools”).

3. *See* Helaine Greenfeld, Note, *Some Constitutional Problems with the Resegregation of Public Schools*, 80 GEO. L.J. 363, 365-66 (1991) (stating that members of African-American community and those long associated with civil rights movement have “desire to find solutions to the problems in their neighborhoods and in their cities. . . . Without serious attention to the increasing problems of minority groups, and particularly minority children, we risk losing any chance to reverse the damaging trend”); *see also* Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 ST. LOUIS L.J. 885 (1993) (“I am deeply troubled by recent Supreme Court decisions which ignore the tremendous racial imbalances in our public schools and express a zeal to declare an end to federal court supervision over school desegregation. The Supreme Court’s eagerness to proclaim ‘Victory!’ against governmentally created segregation is woefully premature.”).

4. *See, e.g.,* JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS AND AMERICA’S SCHOOLS* 6-11 (1990); Note, *The Limits of Choice: School Choice Reform and State Constitutional Guarantees of Educational Quality*, 109 HARV. L. REV. 2002 (1996).

early as 1916.⁵ Separate and horridly unequal conditions characterized public education earlier this century, when black children were taught in one room shacks in conditions that were “miserable beyond all description.”⁶ Despite the work of civil rights lawyers,⁷ the quality of educational opportunities for black students relative to whites has improved only moderately. Black children have less access than white students to the limited number of quality public education programs,⁸ and they are significantly overrepresented in the worst.⁹

Urban schools generally face incredible, if not intractable, problems, as “dropout rates hover well above 50 percent, truancy is the norm rather than the exception, violence is common, students struggle for basic literacy . . . and the physical condition of the schools is a disgrace.”¹⁰ Black males appear to be faring most poorly under current conditions.¹¹

5. See Hon. Gerald W. Heaney, *Busing, Timetables, Goals, and Ratios: Touchstones of Equal Opportunity*, 69 MINN. L. REV. 735, 752 & n.111 (1985) (citing study conducted by United States Department of the Interior).

6. *Id.* at 752 (quoting national study).

7. See *id.* at 761–63 (describing origins of legal battle).

8. See Angelia Dickens, *Revisiting Brown v. Board of Education: How Tracking Has Resegregated America's Public Schools*, 29 COLUM. J.L. & SOC. PROBS. 469, 474 (1996) (stating that “a large majority of African-American students are denied the best education their school systems have to offer”); Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 MINN. L. REV. 825, 837 (1996) (stating that “the most privileged children receive the best education”).

9. Cf. Dorothy A. Brown, *The Invisibility Factor: The Limits of Public Choice Theory and Public Institutions*, 74 WASH. U. L.Q. 179, 222 (1996) (stating that whiteness assures inner-city whites that their children are “not receiving the worst education”); Amy J. Schmitz, Note, *Providing an Escape for Inner-City Children: Creating a Federal Remedy for Educational Ills of Poor Urban Schools*, 78 MINN. L. REV. 1639, 1643 n.33 (1994) (concluding that children “starting life in most adverse conditions, who have most need for quality education, receive worst education”) (citing NATIONAL COMM’N ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 181–84 (1991)).

10. PETER W. COOKSON, JR., *SCHOOL CHOICE: THE STRUGGLE FOR THE SOUL OF AMERICAN EDUCATION* 2 (1994); see also Susan P. Leviton & Matthew H. Joseph, *An Adequate Education for All Maryland's Children: Morally Right, Economically Necessary, and Constitutionally Required*, 52 MD. L. REV. 1137, 1142 (1993) (“[T]o those who need the best our education system has to offer, we give the least. The least well-trained teachers. The lowest-level curriculum. The oldest books. The least instructional time. Our lowest expectations. Less, indeed, of everything that we believe makes a difference.”) (quoting *The Commission on Chapter 1, Making Schools Work for Children in Poverty*, EDUC. WK., Jan. 13, 1993, at 46, 47); Schmitz, *supra* note 9, at 1639 (concluding that “[c]hildren in impoverished, urban areas attend dangerous and decrepit schools, where they receive low quality education which fails to prepare them for meaningful participation in the community”).

11. See generally Daniel Gardenswartz, Comment, *Public Education: An Inner-City Crisis! Single-Sex Schools: An Inner-City Answer?*, 42 EMORY L.J. 591, 600–02 (1993) (describing broken family environments and impact of negative male role models on school performance); Greenfeld, *supra* note 3, at 363–64 (describing poor academic performance and social dysfunction of black male students); Norman Williams, Jr., Note, *Using Discourse Ethics to Provide Equality in Education for African American Children Forty Years After Brown v. Board of Education*, 5 B.U. PUB. INT. L.J. 99, 107–09 (1995) (describing statistical differences between academic performance and other indicators among black males and females suggesting that racism has had harsher impact on men). In addition to falling standards and low levels of achievement, a study of Florida schools shows that black students are more likely to be expelled or suspended than white students. Black students often receive harsher punishments than white students for the same behavior; boys are disciplined more than girls; and “poor, black male students were over-represented among students who were disciplined.” Diane Rado, *Race, Gender Tied to School Discipline*, ST. PETERSBURG TIMES, Jan. 20, 1995, at 1B (citing study of discipline in Florida schools). Similar findings were made in DeSoto, Texas, where blacks make up only 35% of the student population, but 64% of the students expelled. See Alexei Barrionuevo, *NAACP Says DeSoto Schools Show Bias; Superintendent Vows Inquiry*, DALLAS MORNING NEWS, Apr. 26, 1995, at 34A (discussing proposed

To address this problem, several states have introduced schools specifically for black males.¹² One such program in Michigan was immediately challenged as unconstitutional in a lawsuit sponsored by the American Civil Liberties Union (ACLU) and the National Organization for Women (NOW).¹³ In Detroit, a proposal to convert three elementary schools into all-black male academies received widespread parental support to wage a "united front against a problem that many believe threatens the black family, black culture and black male-female relationships."¹⁴ The schools were to focus exclusively on black males at risk to help address complex inner-city problems.¹⁵ One writer discussed the crisis in Detroit as follows:

In one particular elementary school located in Detroit's inner-city, a majority of the students are born to unwed mothers, walk by crack houses on their way to school, and are habitually recruited by neighborhood gangs. The school's janitor was killed in a "drive-by" shooting, a preschool child was shot in the head, and a third grade boy had his mother pull him out of school because he owed a drug dealer \$300 and he felt that he needed the "cover." To say that this environment has created unique and vexing problems for the Detroit Board of Education would be a gross understatement.¹⁶

After examining the crisis situation facing urban males in Detroit,¹⁷ a task force proposed the creation of a school to serve up to 250 boys.¹⁸ The academic program included a curriculum "superior to those in the coeducational public schools 'in areas such as linguistics, social sciences, math and technology. Other planned programs would focus on career development, test-taking skills, and social responsibility.'"¹⁹ The school's ultimate purpose was called into question when opponents pointed out that some of the males

African-American advisory committee to address discrimination), see also Philip TK Daniel & Karen Bond Coriell, *Suspension and Expulsion in America's Public Schools: Has Unfairness Resulted from a Narrowing of Due Process?*, 13 HAMLIN J. PUB. L. & POL'Y 1, 32-34 (1992) (discussing disparate impact of suspensions and expulsions on minority students); Janet Bingham, *Minority Suspensions a Shock: School Officials Ask Why Rates So High*, DENVER POST, Jan. 13, 1996, at 1A (reporting that 59% of black male middle and high school students were suspended in Colorado Springs; statewide, minorities made up 26% of enrollment but 41% of those suspended).

12. Some programs feature all-male classrooms; others devote entire schools to young men at the elementary and high school levels. The schools are commonly referred to as All Black Male Academies (ABMA), and have been proposed in California, Illinois, Maryland, Minnesota, New York, and Wisconsin. See Greenfeld, *supra* note 3, at 363; Williams, *supra* note 11, at 102.

13. See *Garrett v. Board of Educ.*, 775 F. Supp. 1004 (E.D. Mich. 1991).

14. Williams, *supra* note 11, at 103 (citation omitted).

15. See Greenfeld, *supra* note 3, at 364 (describing epidemic of drugs, crime, violence, and dysfunctional families).

16. Gardenswartz, *supra* note 11, at 592 (citations omitted).

17. See *id.* at 610.

18. See *id.* at 611.

19. Williams, *supra* note 11, at 103 (quoting Male Academy Grades K-8. A Demonstration Program for Males At-Risk 13 (Mar. 26, 1991) (unpublished study, on file with Detroit Public Schools)).

admitted were not "at risk" as defined in the mission statement.²⁰ Another legitimate objection centered on the fact that there were no programs to address the fate of girls who were at risk in the Detroit school system.²¹ Ultimately, the school board's plan was struck down because of its gender exclusivity.²² A settlement eventually allowed the schools to open on a coeducational basis.²³ However, as one mother of three boys argued, "[W]e have zillions of schools that are mixed, so what's wrong with one that is not?"²⁴ Perhaps a more effective response to the claim that at-risk females were entitled to comparable services would have been to reorganize the plan to allow simultaneous operation of all-female academies.²⁵ Because no student would have been involuntarily placed in the schools, for which "applications overwhelmingly outpaced available admission slots,"²⁶ the final result deprived the public schools of the opportunity to operate in the tradition of some of America's most highly regarded private schools.²⁷

One writer suggests that the legal standard applied to all-female schools demonstrates that sex-based regulations might withstand heightened scrutiny when "there exists a strong correlation to remedial aspects of past discrimination and if the effect of the classification would not be likely to further outdated stereotypes and generalizations regarding women and men."²⁸ However, even though U.S. District Court Judge George Woods acknowledged the "status of urban [black] males as an 'endangered species,'" he found it insufficient to justify a gender-based school.²⁹ The ultimate effect of the equal protection challenge was to force at-risk black males and their educators to reconcile themselves to an attenuated version of the original plan. This case

20. See *Garrett v. Board of Educ.*, 775 F. Supp. 1004, 1006 n.3 (E.D. Mich. 1991) (describing male academy admission program where one-third of applicants admitted were in low need category).

21. See *Williams*, *supra* note 11, at 102.

22. See *Garrett*, 775 F. Supp. at 1014 (holding that program denied equal opportunities to women).

23. See *Williams*, *supra* note 11, at 106.

24. *Id.* at 105 (quoting Brenda J. Gilchrist, *Lawsuit Challenges All Male Academies: District Charged with Sex Discrimination*, DET. FREE PRESS, Aug. 6, 1991, at 3A).

25. See *Garrett*, 775 F. Supp. at 1006 n.4 (declining to reach constitutionality of this alternate plan, noting that question was not before court).

26. *Gardenswartz*, *supra* note 11, at 610.

27. There are many outstanding single-sex private schools. For example, Miss Porter's School for Girls in Farmington, Connecticut enjoys an excellent reputation. *But cf.* Bennett L. Safenstein, *Revisiting Plessy at the Virginia Military Institute: Reconciling Single-Sex Education with Equal Protection*, 54 U. PITT. L. REV. 637, 641 (1993) (criticizing language referring to "respected tradition" of single-sex schooling as illegitimate justification for excluding women from quality education programs).

28. *Gardenswartz*, *supra* note 11, at 622; see also *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982) (holding that classifications must be free from fixed notions concerning gender role and not designed to exclude or protect members of one gender presumed to suffer from inherent handicap or innate inferiority); *Vorchheimer v. School Dist.*, 532 F.2d 880 (3d Cir. 1976) (upholding voluntary program of single-sex high schools in Philadelphia against equal protection challenge).

29. *Garrett*, 775 F. Supp. at 1014; see also *Williams*, *supra* note 11, at 108-09 (describing problems facing urban males and females). The district court judge acknowledged that the "purpose for which the academies came into being" is the status of the black male as an "endangered species." Yet the court remained unconvinced that exclusion of women was substantially related to achievement of the school board's objectives. See *Garrett*, 775 F. Supp. at 1007.

forcefully presents the issue that lies at the heart of the school choice movement:

“Who shall be empowered to make decisions affecting the education of Detroit’s children? Will it be the leadership of the ACLU and NOW, most of whom reside outside the city of Detroit? Or will Detroit’s parents and voters retain the right to expend their tax money as they see fit on behalf of their children’s education?”³⁰

Hence the role of constitutional adjudication will continue to be of particular interest to those who seek to improve the quality of educational opportunities for African-American children.³¹

Black Americans acknowledge that court-ordered integration and other desegregation policies have failed to integrate most urban schools³² or significantly increase access to quality educational programs.³³ The public school integration that was the promise of *Brown v. Board of Education*³⁴ has been, in other words, “sparingly delivered.”³⁵ Where integration has occurred, it has often resulted in heightened racial tension.³⁶ The cogent lesson of the failed effort to integrate the nation’s schools is that racial desegregation must be completely voluntary in order to realize long-term success.³⁷ This lesson may explain why school choice advocates have not identified racial integration as a primary objective of their initiatives. One writer notes that “America’s long and divisive experiment with school integration may be quietly coming to an end.”³⁸ Instead, advocates of choice favor race-neutral policies that focus on the quality of education; choice and quality are thought to be linked.³⁹

30. Williams, *supra* note 11, at 105 (quoting Lawrence C. Patrick, Sr., *Detroit Parents Should Have Right to Choose*, DET. FREE PRESS, Oct. 29, 1991, at 9A)

31. See Frank J. Macchiarola et al., *The Judicial System & Equality in Schooling*, 23 FORDHAM URB. L.J. 567, 569 (1996) (stating that one negative consequence of judicial activism is that “an overly active judiciary has suggested that courts have more answers to student success than they actually do”)

32. See Deborah E. Beck, *Jenkins v. Missouri: School Choice as a Method of Desegregating an Inner-City School District*, 81 CAL. L. REV. 1029, 1029 (1993) (“Almost forty years after *Brown v. Board of Education* mandated school desegregation, thousands of inner-city children continue to attend identifiably one-race schools. For these children, the right to a desegregated education has little meaning”); Marilyn V. Yarbrough, *Still Separate and Still Unequal*, 36 WM. & MARY L. REV. 685, 688 (1995) (stating that racial segregation has reached highest level since 1968).

33. See Dickens, *supra* note 8, at 472–73 (noting that tracking disproportionately places black students in inferior education programs).

34. 347 U.S. 483 (1954).

35. Macchiarola et al., *supra* note 31, at 585; see also James Traub, *Can Separate Be Equal? New Answers to an Old Question About Race and Schools*, HARPER’S MAG., June 1994, at 36

36. See *infra* Part II.

37. Cf. Derrick Bell, *The Dialectics of School Desegregation*, 32 ALA. L. REV. 281, 295 (1981) (arguing that effective integration also requires “blacks and white [to] meet as peers, with each able and willing to recognize the values and contributions of the other and without whites exercising dominance and control in every aspect of the relationship”).

38. Book Note, *The Desegregation Dilemma*, 109 HARV. L. REV. 1144, 1144 (1996) (reviewing DAVID J. ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* (1995))

39. See, e.g., STEVEN F. WILSON, *REINVENTING THE SCHOOLS: A RADICAL PLAN FOR BOSTON* 20 (1992).

Efforts to create and sustain high levels of academic achievement by African-American children require new strategies. Educational alternatives that foster advanced social development, academic excellence, and collaborative governance that is free of bias and racially disparate outcomes are arguably the key to effective education for black America's children. Policymakers historically have been unwilling or unable to establish programs that effectively lead to racial integration and educational equality.⁴⁰ The school choice movement is a response to this problem. It is aimed at offering parents the widest range of educational choices and lessens the mounting frustration of legislators who must answer to diverse constituencies.⁴¹ Advocates embrace school choice as a means of increasing competition among schools and providing needed alternatives to deteriorating, badly managed, and obsolete educational programs.⁴²

Among the newer school choice initiatives, charter schools represent a unique opportunity for reforming public education. Charter schools are publicly funded, secular institutions that operate under a license granted to applicants who present a proposal that becomes the basis for the contract with state authorities. They operate outside the local school board, free from many of the policies and regulations that govern other public schools. The higher degree of autonomy in running the school is given in exchange for a greater degree of accountability.⁴³

Part II of this Essay summarizes the general failure of public school desegregation efforts, noting the high price of desegregation for black America. It also chronicles several disappointing and painful examples of the nature and source of mounting racial tensions that often accompany what otherwise appear to be successfully integrated schools. Part II concludes by highlighting the dilemma for middle-class blacks by relating the experience of another group of parents, far removed from the crisis in Detroit's inner city. These parents sought both quality and integration under what many presumed to be ideal circumstances. The four leaders of the parent group were all educators who fought to have *The Adventures of Huckleberry Finn* removed from the eighth grade curriculum of a New Haven Public School. As a principal organizer of

40. See Robert A. Frahm, *Sergi Shifts Focus from School Choice*, HARTFORD COURANT, Jan. 25, 1997, at A1 (noting statement of Connecticut Commissioner of Education Theodore Sergi that "there is not a single city or state in the nation that has succeeded fully both in raising student achievement and eliminating racial segregation").

41. See Brown, *supra* note 9, at 212-13 (describing impact of public choice and economic theories on legislative action); Angela G. Smith, *Public School Choice and Open Enrollment: Implications for Education, Desegregation, and Equity*, 74 NEB. L. REV. 255, 281 (1995) (noting that disagreement about role of public education is highlighted by "distinct and different approaches to school choice legislation").

42. See CHUBB & MOE, *supra* note 4, at 207; see also Note, *supra* note 4, at 2002 (stating that "a true free market for education, like any other market, requires a threat of failure; otherwise, competition will not push schools to improve the quality of their educational services").

43. See NATIONAL SURVEY AND ANALYSIS OF CHARTER SCHOOL LEGISLATION: A REPORT TO THE CITIZENS OF THE STATE OF CONNECTICUT, at I-1 (Institute for Responsive Education Report, 1996) [hereinafter NATIONAL SURVEY].

this parent group, I witnessed first-hand the shocking rudeness that these parents encountered, which forced them to assess realistically what black children actually experience in what are perceived to be high quality educational programs.

Part III summarizes the role of school choice in the education debate and focuses upon the options presented by public, as opposed to private, school choice plans. In Part III, I distinguish charter schools from other choice plans by highlighting their various approaches to policymaking. I explain how charter schools provide autonomy in the selection of means to achieve desired educational ends. Their focus upon independent, collective management provides a mechanism through which black America can receive greater benefits from school choice. Even though the Charter Movement is still in its infancy, the innovative teaching and learning models developed in charter schools are expected, over the long run, to translate into benefits for children district-wide. While charters are believed to have independent value apart from academic outcomes, they warrant support for their potential to improve measurably the quality of public education overall. In Part IV, I conclude that charter schools—which involve parents in the education of their children—offer a viable option for the effective education of black children in the years to come.

II. THE FAILURE OF SCHOOL DESEGREGATION

That the quality of public education is separate and unequal along racial lines is, for some, a historically significant, continuing reality that demands nothing less than constitutional adjudication.⁴⁴ The quest for equal educational opportunities has led to constitutional challenges involving almost every major metropolitan school district.⁴⁵ These cases, which began with *Brown* in 1954 and continue to this day, have resulted in few educational improvements.⁴⁶

44. One court concluded that when a state has "created a dual system," it has a continuing obligation to dismantle it. *See, e.g., Jenkins v. Missouri*, 593 F. Supp. 1485, 1504 (W.D. Mo. 1984).

45. *See, e.g., Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964) (invalidating Virginia plan that closed public schools, leaving black students without education while providing tuition grants and property tax credits to white students attending private school); *Goss v. Board of Educ.*, 373 U.S. 683 (1963) (invalidating desegregation plan in Tennessee because it perpetuated segregation); Daniel J. McMullen & Irene Hirata McMullen, *Stubborn Facts of History—The Vestiges of Past Discrimination in School Desegregation Cases*, 44 CASE W. RES. L. REV. 75, 76 (1993) (estimating that hundreds of districts are involved in litigation over desegregation of previously de jure segregated public schools).

46. *See Beck, supra* note 32, at 1036 (stating that "court's preoccupation with the legal requirement of numerically desegregated schools has caused it to lose sight of a policy concern desegregation was designed to address—improvement of educational opportunity for minority students"). Macchiarola et al., *supra* note 31, at 568 ("[A]ll too often judicial intervention has shown itself to be inattentive to a philosophy of education and a sense of what school effectiveness is about. For with all of the new judicial activity and with all of the effort to guarantee rights . . . our schools seem to be deteriorating.") Judicial intervention continues to generate a sense of futility. A proposed all-black male school in Detroit was defeated in the face of widespread parental support: "[I]t might be wise to reflect on the relative ease with which self-appointed do-gooders such as the ACLU and NOW, supported by an oppressive federal judiciary

In 1984, for instance, the plaintiff in *Jenkins v. Missouri*⁴⁷ alleged that the state not only created, then failed to dismantle, its dual educational system after *Brown*, but also perpetuated the system of segregation through unfair housing practices, discriminatory relocation of blacks displaced by highway construction projects and urban development, and support of racially identifiable interdistrict vocational and special education programs.⁴⁸

Shortly after *Brown*, various states began resisting court-ordered desegregation.⁴⁹ Federal troops were on standby to deal with growing threats of violence and intimidation by state officials.⁵⁰ Arkansas amended its constitution, declaring *Brown* to be unconstitutional, and passed legislation relieving white school children from compulsory school attendance laws if they were enrolled in racially mixed schools.⁵¹ Ten years after *Brown*, 97.8% of black pupils in eleven southern states still attended segregated schools.⁵² From 1964–69, the Court imposed a new timetable declaring the initial “all deliberate speed” formula constitutionally impermissible.⁵³ Widespread plans to utilize busing as a means of integrating public schools were met with measured resistance and violence.⁵⁴ Hostility in jurisdictions such as North Carolina led to a ban on involuntary busing and, most infamously, in liberal enclaves such as Boston, busing orders “provoked widespread violence and deep bitterness among whites.”⁵⁵ When former President Gerald Ford sought to intervene, advocating the restriction of federal court authority to utilize busing as a remedy of last resort, NAACP officials argued that his action would be “viewed by white militants as a reward for violence.”⁵⁶ To the

are able to undermine, to the detriment of the children, the legal and prudent decisions of elected officials and parents.” Williams, *supra* note 11, at 105. In response to the district court’s ruling in the case, the principal at one of the academies remarked that the decision was clearly “an example of a white federal judge making a decision for the African-American community which he does not live in and which he does not understand.” *Id.* at 102 n.25 (quoting Brenda J. Gilchrist, *Single-Sex Schools Are Unconstitutional*, DET. FREE PRESS, Aug. 16, 1991, at 1A).

47. 593 F. Supp. 1485.

48. *See id.* at 1488.

49. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 79 (1991) (“By 1957, only three years after *Brown*, at least 136 new laws and state constitutional amendments designed to preserve segregation had been enacted.”).

50. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 12 (1958) (noting that federal troops accompanied black children in face of hostilities). *But see* David L. Norman, *The Strange Career of the Civil Rights Division’s Commitment to Brown*, 93 YALE L.J. 983, 984 (1984) (“During the first ten years after *Brown*, the federal government had a very limited role in furthering school desegregation.”).

51. *See* Aaron v. Cooper, 257 F.2d 33, 35 (8th Cir.), *aff’d*, 358 U.S. 1 (1958).

52. *See* U.S. COMM’N ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN: EQUALITY OF EDUCATIONAL OPPORTUNITY 46 (1975).

53. *See* Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969) (holding that “the obligation of every school district is to terminate dual school systems at once”); Griffin v. County Sch. Bd., 377 U.S. 218, 232 (1964) (asserting that “relief needs to be quick and effective”).

54. *See* Wendy R. Brown, *School Desegregation Litigation: Crossroads or Dead End?*, 37 ST. LOUIS U. L.J. 923, 924 (1993) (stating that in struggle for integration, “[l]ives were lost. White segregationists terrorized Black children and their families who sought to enforce the desegregation principle.”).

55. *Busing: Ford’s New Route*, NEWSWEEK, May 31, 1976, at 26, 26.

56. *Id.*

extent that a sufficient constitutional challenge to segregated schools required malicious intent or de jure segregation, the South supplied ample record of the intent of its policymakers, with bold pronouncements coming from politicians like Mississippi Governor Ross Barnett, who declared that he would rot in jail before he let “one nigra cross the sacred threshold of our white schools.”⁵⁷ In the North and West, establishing intent to maintain segregation was more difficult. By 1970, 39.4% of southern black children were enrolled in predominantly black schools, while 57.6% were racially isolated in the North.⁵⁸

Court orders to desegregate city schools led most notably to white flight.⁵⁹ With decreasing numbers of white children in urban school districts, racial isolation actually increased. Suburban school districts were nearly 100% white and exempt from desegregation orders.⁶⁰ School systems that had not required segregation by law were not required to integrate their schools and could not be compelled to participate or help remedy the racial segregation in those districts that had engaged in illegal segregation.⁶¹ Recent cases continue to restrict the remedial powers of federal courts attempting to eliminate segregation in public education.⁶² Thus, millions of dollars and hundreds of cases later, the majority of public schools are still not integrated to any significant degree. Nationwide, one-third of minority children are racially isolated in public schools; in the Northeast, the ratio jumps to one-half.⁶³ The lack of sufficient funding, deteriorating infrastructure, and inadequate public support for public schools has had predictable consequences for black children⁶⁴ and has required increased litigation aimed at remedying large

57. ROSENBERG, *supra* note 49, at 78 (quoting Governor Barnett)

58. See JEROME A. BARRON & C. THOMAS DIENES, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICY* 622 (1975).

59. Today, after two decades of progress, racial isolation is fast approaching the early 1970s pre-busing level. See James S. Kunen, *The End of Integration, A Four Decade Effort Is Being Abandoned, as Exhausted Courts and Frustrated Blacks Dust Off the Concept of Separate but Equal*, TIME, Apr. 29, 1996, at 39; see also Leroy D. Clark, *The Future Civil Rights Agenda: Speculation on Litigation, Legislation and Organization*, 38 CATH. U. L. REV. 795, 800 (1989) (stating that *Milliken v. Bradley*, 418 U.S. 717 (1974), assured that white flight would succeed in hindering school desegregation efforts).

60. See, e.g., *Milliken*, 418 U.S. 717 (rejecting interdistrict remedy for desegregation of public schools in Detroit).

61. See *id.* at 737–53.

62. See *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995) (holding that district court orders imposing large fiscal burdens in form of salary increases and remedial education programs violated limits of court's discretion); *Freeman v. Pitts*, 503 U.S. 467, 495–96 (1992) (holding that racial assignments were improper as remedy for demographic changes that are unrelated to prior constitutional violations); *Board of Educ. v. Dowell*, 498 U.S. 237, 249–50 (1991) (holding that federal court of appeals could not reinstitute desegregation plan merely because some previously integrated schools reverted back to one-race schools once district adopted neighborhood assignment policy); *Missouri v. Jenkins*, 495 U.S. 33, 50 (1990) (holding that tax increase imposed by district court to fund desegregation plan contravened principles of comity that must govern court's equitable discretion).

63. See Kunen, *supra* note 59, at 39–40.

64. Urban schools with high concentrations of black and Latino students are traditionally underfunded when local property taxes provide the financial base. See Carter, *supra* note 3, at 887–88 (describing how tax-based public school funding creates intradistrict inequities); Michael Heise, *State Constitutions, School*

funding disparities. Although the Constitution theoretically prohibits school districts from purposefully maintaining predominantly black schools with inferior teachers, buildings, textbooks, and facilities, equal funding is as elusive as ever.⁶⁵

Inequality in funding was an important consideration for black leaders supporting the litigation in *Brown* and its progeny, but dispelling the myth of racial inferiority was deemed more critical.⁶⁶ Nonetheless, black leaders must be held accountable for their uncritical acceptance of judicial pronouncements directed at the “hearts and minds” of black children.⁶⁷ Supreme Court Justice Clarence Thomas, while chairman of the Equal Employment Opportunities Commission, described the major flaw of *Brown* as its failure to rely upon the dissent in *Plessy*.⁶⁸ Justice Thomas argued that *Brown*’s focus on psychological environment overlooks the real problem with segregation—its origins in slavery.⁶⁹ Justice Thomas recently renewed his objection in his concurring opinion in *Missouri v. Jenkins*,⁷⁰ where he criticized the majority for relying upon questionable social science research and resting upon assumptions of black inferiority:⁷¹

Finance Litigation, and the “Third Wave”: From Equity to Adequacy, 68 TEMP. L. REV. 1151, 1151–66 (1995) (describing three different legal approaches to challenging inequities in school finance systems); Peysner, *supra* note 1, at 625 (stating that in Massachusetts, more than 60% of “K–12 spending is funded by local property taxes. Because wealthier communities have higher property values, their capacity for raising money is much greater than poorer towns and cities.”); Joshua Wolf Shenk, *Saving Education: The Public Schools’ Last Hurrah?*, CURRENT, July–Aug. 1996, at 3, 9 (stating that “[t]he ‘equalization’ movement, which seeks to pool tax money at the state level for more equitable redistribution to schools, is a welcome step toward alleviating often-glaring discrepancies in teacher salaries, school facilities, and supplies”); see also Craig A. Ollenschleger, *Another Failing Grade: New Jersey Repeats School Funding Reform*, 25 SETON HALL L. REV. 1074, 1078–79 (1995) (noting that states have spent large sums defending school systems in courts). See generally *Brown*, *supra* note 9, at 188–202 (discussing evolution of funding reform from 1970s through 1990s).

65. Despite findings of gross inequality, adequate remedies are almost nonexistent. Technically, the Constitution prohibited qualitative disparity under the separate but equal doctrine. See, e.g., *Pitts v. Board of Trustees*, 84 F. Supp. 975, 979–82 (E.D. Ark. 1949) (noting need to proceed slowly and with care, court granted defendant school district “reasonable time” to remedy grossly unequal school facilities, including inferior teachers, libraries, transportation arrangements, and lack of running water and toilets).

66. As one commentator has written:

One of the primary reasons we insisted at the 1950 NAACP convention that the NAACP only sponsor cases attacking segregation head-on, and not cases seeking only equalization of school facilities, was our belief that integration was crucial to combatting the generally accepted American mainstream notion that black people are educationally inferior to white people.

Carter, *supra* note 3, at 889.

67. In the landmark case overturning the separate but equal doctrine, Chief Justice Warren delivered the opinion of the Court, stating: “To separate them [blacks] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954).

68. See Clarence Thomas, *An Afro-American Perspective: Toward a “Plain Reading” of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 1987 HOW. L.J. 691, 699 (citing *Plessy v. Ferguson*, 163 U.S. 557 (1896)).

69. See *id.* at 700.

70. 115 S. Ct. 2038 (1995).

71. See *id.* at 2065 (“Segregation was not unconstitutional because it might have caused psychological feelings of inferiority. . . . Psychological injury or benefit is irrelevant to the question whether state actors

Given that desegregation has not produced the predicted leaps forward in black educational achievement, there is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment. Indeed, it may very well be that what has been true for historically black colleges is true for black middle and high schools. Despite their origins in “the shameful history of state-enforced segregation,” these institutions can be “both a source of pride to blacks who have attended them and a source of hope to black families who want the benefits of . . . learning for their children.”⁷²

A recent Connecticut case manifests the same flaw. The state’s highest court ruled in *Sheff v. O’Neill*⁷³ that racial isolation was harmful to the large number of minority children consigned to Hartford’s substandard school system.⁷⁴ The Connecticut Supreme Court followed the lead of the Supreme Court of the United States in *Brown* by taking judicial notice of intangible elements of psychological harm.⁷⁵ Arguably the court could have found that racial isolation was harmful to all of Connecticut’s children and issued mandates to desegregate all Connecticut schools.⁷⁶ Instead, the court declared that under the state’s constitution, only plaintiffs in the urban schools had been denied equal educational opportunity because of isolation and remanded the issue to the legislature for redress.⁷⁷ There is doubt as to whether the same legislature, which has at least tacitly endorsed the current organization of school systems across the state, can now produce an adequate remedy. The Governor and Connecticut parents have rejected pupil reassignment and forced busing as a remedy.⁷⁸ Many whites oppose sending their children into the city, just as many blacks see the potential (even probable) harm of sending their children to the suburbs. In particular, most blacks doubt that their children’s needs will be met in suburban schools.⁷⁹

have engaged in intentional discrimination—the critical inquiry for ascertaining violations of the Equal Protection Clause.”).

72. *Id.* (quoting *United States v. Fordice*, 505 U.S. 717, 748 (1992) (citation omitted)), *see also* James Traub, *Ghetto Blasters: The Case for All-Black Schools*, *NEW REPUBLIC*, Apr. 15, 1991, at 21 (discussing benefits of all-black schools).

73. 678 A.2d 1267 (Conn. 1996).

74. *See id.* at 1270–71.

75. *See id.* at 1293.

76. The alleged harm to minority plaintiffs was that racial isolation (segregation based upon race and poverty) under a state operated system amounted to unlawful discrimination against them, according to Articles 1 and 8 of the Connecticut Constitution. White suburban children were not declared to have been harmed, although the benefits of an integrated system received judicial notice. *See id.* at 1285

77. *See id.* at 1270–71.

78. *See* Matthew Daly, *Rowland Calls Sheff Ruling ‘Easy Way Out’. Governor Says Changes May Not Come for Years*, *HARTFORD COURANT*, July 11, 1996, at A1 (stating Connecticut Governor John Rowland “reiterated his opposition to involuntary busing or an end to local control of schools”)

79. Similarly, black parents in DeKalb County, Georgia, who challenged a busing plan were “highly skeptical about measures to reassign students on the basis of race.” Robert Anthony Watts, *Shattered Dreams and Nagging Doubts: The Declining Support Among Black Parents for School Desegregation*, 42 *EMORY L.J.* 891, 895 (1993). As Doris Wilkinson has noted:

Professor Drew Days has noted that black America has paid, in some instances, a high price for desegregation.⁸⁰ This view is the dominant perspective among those who have examined the behavioral, academic, psychological, and cultural consequences of *Brown* and its progeny.⁸¹ *Brown* reinforced centralization of the education establishment and resulted in the forced integration of certain schools and districts. Dr. Doris Wilkinson, Professor of Sociology at the University of Kentucky, has compared the education of black America during the era of Jim Crow with the post-*Brown* developments described above.⁸² She concludes:

[P]ublic school integration and the associated demolition of the black school has had a devastating impact on African American children—their self-esteem, motivation to succeed, conceptions of heroes or role models, respect for adults, and academic performance. Racial animosities have also intensified. Unless rational alternatives are devised that take into account the uniqueness of the African American heritage, busing and compulsory school integration will become even more destructive to their health and ultimately to the nation as a whole.⁸³

At this political moment, integration of the schools has been an abysmal failure. Although this mandated change was a necessary prerequisite for granting access to public accommodations and all other institutions in the United States, in the school setting, it is malfunctioning. . . . The data are sparse and inconsistent on the benefits of busing and school "integration." It is known, however, that African American children are failing, dropping out at alarming rates, and graduating without basic literacy skills. In addition, their developmental and cultural needs are not being met.

Doris Y. Wilkinson, *Integration Dilemmas in a Racist Culture*, 33 SOCIETY 27, 31 (1996).

80. As Professor Drew Days has argued:

For example, schools that served not only as educational institutions but as community centers in predominantly black neighborhoods have been closed; the burden of busing has fallen disproportionately upon black children; black teachers and administrators have been dismissed and demoted disproportionately; and black students have encountered increased disciplinary action in recently desegregated schools.

Drew S. Days, III, *Brown Blues: Rethinking the Integrative Ideal*, 34 WM. & MARY L. REV. 53, 55 (1992).

81. See Wilkinson, *supra* note 79, at 31 ("Suppressed motivation, low achievement, poor test performance, and attrition rates for these [black] children are major signals of the failure of school integration. Also, in the desegregated schools, racial hostility and 'hate speech' have reached an all-time high. Similarly, violence is a frequent mode of conflict resolution."); see also Williams, *supra* note 11, at 101 ("From an early age, African-American students must endure psychological and emotional stress in order to enjoy the benefits of predominantly white educational institutions . . ."); Book Note, *supra* note 38, at 1145. David Armor's empirical research demonstrates that the claimed benefits of integration for minority children is unsupported. For example, the gains attributed to integration are likely caused by improvements in the educational status of black parents, and desegregation may actually lower black children's self-esteem. According to Armor, none of the studies shows conclusively that racial harmony improves as a result of integration; other achievement-related benefits have also been oversold. See *id.*

82. See Wilkinson, *supra* note 79, at 27–28.

83. *Id.* Wilkinson also quotes a public school teacher of 25 years who attended segregated schools growing up:

"The black child has gotten cheated through integration" because "the black child has to prove himself [or herself]. With integration, [we] got more money, better facilities, better textbooks. [But] what is missing is nurturing and the caring. This has had negative effects. Kids who could have been leaders are pretty much ignored. [You] can't ignore somebody and expect them to behave, to fit in."

The teachers, administrators, and school boards of both urban and suburban school districts are overwhelmingly white, and relatively few black children attend suburban schools, representing most of the "integration" that exists in public schools.⁸⁴ Minority children ride the bus to attend schools with strangers—children belonging to another neighborhood, racial group, and social class. With only a handful of black students in each classroom, they experience prolonged isolation in predominantly white settings, where they are often "exposed to denigrating racial imagery from the teachers, tracking, low expectations, or race hatred."⁸⁵

According to one writer, "[t]he basic assumption of those endorsing the theory that a school district has overcome its history of racial discrimination is that a school district can be expected to treat minority students fairly without court supervision because there are no longer racial barriers."⁸⁶ However, this illogical approach to equal educational opportunities has negatively impacted black students from both middle- and low-income families, the former often as much as the latter.⁸⁷ Black America has devoted its energy and resources to fighting a losing battle.

The Court's rejection of the most viable school desegregation plans,⁸⁸ coupled with the reality that integration policies have "not produced the hoped-for improvement of the quality of educational opportunities for African Americans"⁸⁹ requires a reformulation of the meaning of *Brown* rather than more fruitless school desegregation litigation. Accordingly, I would reinterpret the constitutional imperative of *Brown* as requiring equal access to quality educational programs.⁹⁰ Thus, a school district that did not purposefully assign students based on their race would fall within the zone of defensibility, if not actual compliance, with the mandate of *Brown* if it made concerted efforts to raise substantially the quality of educational opportunities afforded to black children in their own neighborhoods. At the very least, good faith

Id. at 29 (alterations in original).

84. See, e.g., Alexei Barrionuevo, *First Black Trustee in Lancaster Vows to Press for Change*, DALLAS MORNING NEWS, May 15, 1995, at 15A (noting that student population of City of Lancaster is 60% black and Hispanic, while corresponding teacher population is only 8.5% black and Hispanic); Jeffrey Bils, *In Suburbs Schools Face Diversity Gap: More Non-White Students, but Few Minority Teachers*, CHI. TRIB., Sept. 8, 1996, at 1 (noting that more than 99% of new teachers hired in suburban Chicago schools districts were white); Grace Schneider, *Moving in Floyd, Struggling in Clark: Minority-Teacher Hiring Results Mixed*, COURIER-J., July 24, 1995, at 1A (stating that local "black parents and community leaders have complained for years that the number of minority teachers and administrators does not come close to mirroring the racial composition of either district"); *infra* text accompanying note 101

85. Wilkinson, *supra* note 79, at 31.

86. Gary Orfield & David Thoronson, *Dismantling Desegregation: Uncertain Gains, Unexpected Costs*, 42 EMORY L.J. 759, 783 (1993).

87. See *infra* notes 113–52 and accompanying text (discussing incidents of racism affecting low and middle-income blacks).

88. See *supra* notes 60–62.

89. Macchiarola et al., *supra* note 31, at 585.

90. *But cf.* Beck, *supra* note 32, at 1046 (describing continuing violation of minority children's constitutional right to enroll in desegregated schools at earliest possible time, despite their urgent need)

efforts to convert litigation resources into education resources for those with the most pressing needs would help to promote equal protection. The Detroit School Board's efforts to establish all-male academies were persuasive because officials assumed an affirmative obligation to work with parents and to involve the community in bringing about the desired changes to the troubled system.⁹¹ Much of the education literature supports Helaine Greenfeld's theory that what equal protection may require, in this situation, is "providing African-American and white students with what they both need, respectively, to derive an equal benefit from their schooling."⁹²

The question of how best to insure equal benefits from schooling presents a challenge best explored in studies conducted on the long-term individual and social benefits of quality primary and secondary education and those related to the educational needs of African-American children. John Powell suggests that racially integrated schools present the best educational environment for all students.⁹³ Powell lauds the benefits of integration under what could arguably be described as ideal circumstances—"poor and middle-class minorities and whites [living] in the same communities, [developing] a shared need to care about the problems tearing away at the nation's cities"⁹⁴—and he presents an intuitively powerful argument for continuing the battle to integrate every facet of American life: neighborhoods, schools, and even families. Nonetheless, when white Americans have been presented with the choice to create the society Powell envisions or to remain separate and unequal, they have consistently chosen the latter. Powell's theories highlight the potential result of a remedy suggested by Patricia Williams.⁹⁵ Williams's discussion of the

91. See *supra* text accompanying notes 14–19.

92. Greenfeld, *supra* note 3, at 378. For a comprehensive discussion of a long-term project that applied social and behavioral science principles to meet the needs of inner-city children in an educational environment, see JAMES P. COMER, SCHOOL POWER: IMPLICATIONS OF AN INTERVENTION PROJECT 60–75 (1993). See also James P. Comer & Norris M. Haynes, *Meeting the Needs of Black Children in Public Schools: A School Reform Challenge*, in THE EDUCATION OF AFRICAN-AMERICANS 67–68 (Charles V. Willie et al. eds., 1991) (analyzing school reform research and noting that while prominent models offer some potential benefits in improving achievement among blacks, the "structure of public education and the philosophies that have guided its development and implementation have neglected to recognize and incorporate salient features of black culture and the black experience in America").

93. See John A. Powell, *Living and Learning: Linking Housing and Education*, 80 MINN. L. REV. 749, 784–88 (1996). Powell argues that social reasons for seriously pursuing integration originate from ideas of just and participatory society and not merely from the Equal Protection Clause. The results of integrated education are that academic achievement improves for minority students who are bused to white schools, the gap in test scores narrows, black children educated in integrated schools gain employment and admission to college at higher rates, and the academic achievement of whites either improves or remains stable. See *id.* at 788–92; see also JoAnn Grozuczak Goedert, *Jenkins v. Missouri: The Future of Interdistrict School Desegregation*, 76 GEO. L.J. 1867, 1880 (1988) (stating that educational achievement data suggest that "significant benefits . . . arise only when socioeconomic, as well as racial, integration occurs"). But cf. Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 776 (1986) (describing primary benefits of integration as preparing nonwhites for "racially diverse world" and giving them access to benefits of white power).

94. Powell, *supra* note 93, at 787–88.

95. See PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 188 (1991).

best way to integrate this world suggests that perhaps it should be done from the inside out:

[I]n a technological age, guerrilla warfare must be redefined. I dream of the New Age manifesto. We must all unite, perhaps with the help of white male college graduates who are willing to smuggle small hermetically sealed vials of black sperm into the vaulted banks of unborn golden people; we must integrate this world from the inside out. We must smuggle not the biological code alone, but the cultural experience. We must shake up biological normativity, bring our cause down to particulars, to the real terms of what is at stake in the debate. We must be able to assert the battle from within, and in the most intimate terms conceivable.⁹⁶

Thus, the voluntary integration envisioned by Powell has not materialized, and the forced integration contemplated by Williams, similar to court-ordered busing in the school desegregation cases, can only be accomplished at a considerable cost to black America. Nationwide, increased levels of racial hostility have been directed at blacks.⁹⁷ Racism does not respect socioeconomic class. Black children living in urban communities and shipped to suburban schools have been the targets of racial hostility as frequently as blacks living in predominantly white neighborhoods and attending suburban schools.⁹⁸

Many integration policies focus on black access to predominantly white schools in predominantly white suburbs. Yet shipping black children to predominantly white environments has often proven detrimental to their well-being. Race-related incidents have ranged from the inadvertent humiliation of young children barely old enough to understand racial difference to targeted vilification of particular black students. In one incident, "[w]hen [a] little girl told her kindergarten classmates that she wanted to be an angel when she grew up, they laughed."⁹⁹ The teacher explained: "'The students had never seen a black angel.'"¹⁰⁰ As of December 25, 1995, only one of the 900 teachers in this St. Cloud, Minnesota, school district was black.¹⁰¹ Presumably, thousands of the district's children have never seen a black teacher.¹⁰² Black

96. *Id.*

97. Cf. Robin D. Barnes, *Blue by Day and White by [K]night: Regulating the Political Affiliations of Law Enforcement and Military Personnel*, 81 IOWA L. REV. 1079, 1117-20 (1996) (citing prominent examples of racial violence).

98. See *infra* notes 111-16 and accompanying text.

99. Rob Hotakainen, *State Is Urged to Stem Racism; Multicultural Education Called Key to Diversity*, STAR TRIB. (Minneapolis-St. Paul, Minn.), Dec. 25, 1995, at 1B

100. *Id.*

101. See *id.*

102. Many black children attend schools with few or no black teachers. West Hills School, discussed *infra*, had no black teachers at the middle school level (and only one in the elementary school) before the controversy over *Huckleberry Finn*. This problem exists in many jurisdictions. The affirmative action committee of the Osceola County Schools in Florida worked for two years on the question of recruiting

parents in Minnesota¹⁰³ and a coalition of community groups called Minority Education Partnership, Inc.¹⁰⁴ have expressed concern over race relations in the state. The partnership's executive director commented:

When I talk to white students about racism, especially in Greater Minnesota, it's something that they don't know a lot about. . . . And in the meantime, they continue to perpetuate the cycle of racism and oppression in ways they're not even aware of. And I'm sure you've heard many people say, "I just didn't know. Sorry, I just didn't know." Well, I think we've come to a point in time where not knowing is not acceptable. You have to know.¹⁰⁵

While Minnesota parents have concluded that academic achievement is more important than racial balance, they concede that schools with high minority enrollments should get equal resources.¹⁰⁶ If equality of resources is the overriding concern, then perhaps these parents have also come to a quiet realization that forced integration has served mainly to promote unrealistic expectations concerning access to equal educational opportunities.

Racist incidents directed at blacks are sometimes minimized by discussions of white disaffected youth or the low-achieving white male who is prone to scapegoating racial minorities. When these incidents occur in elite communities, the response is one of bewilderment. The following incidents in Cambridge, Massachusetts, and Greenwich, Connecticut demonstrate that such incidents do occur in wealthy and upper-middle-class districts.

The Commonwealth Day School, a 90% black private elementary school, was driven out of a wealthy, liberal community in Cambridge, Massachusetts, following a successful campaign that included a petition signed by Harvard Law School Professor Laurence Tribe.¹⁰⁷ Court orders prevented the owners

black and Hispanic teachers and administrators. Their number one recommendation was that the Board of Education hire one full-time minority recruiter whose primary duty would be to seek out talented minority teachers and administrators. When the Board rejected the recommendation, the committee's director reminded the all-white school board: "Your child[ren] can walk into every school in Osceola County and see their role models. That's not true of every minority student." Geoff Clark, *School Board Policy Not Racist, but Result Is*, ORLANDO SENTINEL, Dec. 18, 1994, at 1.

103. See Hotakainen, *supra* note 99. For an extended review of the history of racism in Minnesota's school system, see Cheryl W. Heilman, 127 *Booker v. Special School District No. 1: A History of School Desegregation in Minneapolis, Minnesota*, 12 LAW & INEQ. J. 127 (1993).

104. See Hotakainen, *supra* note 99.

105. *Id.*; see also Drew Silvern, *Cover-Up Racist Incident Is Denied: Poway Students Appeared in Black Face*, SAN DIEGO UNION TRIB., Jan. 12, 1994, at B1 (discussing how principal wrote of racist incident as "poor judgment" on part of California high school students who used invitation to KKK picnic as source for historic skit depicting Klan meeting in which student appeared in blackface). A Minnesota art teacher was not disciplined after drawing a watermelon and cotton patch on a picture other students had drawn of a biracial student. See James Walsh, *Troubleshooter Is Sent to Quell School Tension*, STAR TRIB. (Minneapolis-St. Paul, Minn.), Apr. 25, 1992, at 1B.

106. See Hotakainen, *supra* note 99.

107. See Edward Wagner, *Liberal Establishment on Tory Row*, NAT'L REV., Dec. 31, 1989, at 19, 19-20 (noting that petition opposed school's application for special permit to conduct elementary school).

from opening the school for nearly two years before they gave up the fight and sold the property.¹⁰⁸ While their opponents claimed to be concerned about traffic and safety, none of these issues arose during the nearly fifty-year tenancy of a prep school in the same location before the Commonwealth Day School purchased the property. Nor have there been any court orders to shut down the (“lily-white”)¹⁰⁹ Buckingham, Browne & Nichols school located just a few blocks away.¹¹⁰

Scandal rocked a similarly well-to-do northeastern community in 1995. Five white male seniors at a high school in Greenwich, Connecticut, inscribed a coded message in a school yearbook that spelled out “kill all niggers.”¹¹¹ Robert Babcock, the affirmative action administrator for the state department of education, said most complaints about racist situations come from suburban schools with few black students.¹¹²

For middle-class blacks who find security in the comfort of America’s middle class in predominantly white environments, the threat of betrayal by whites is ever present. Charles Lawrence of the Georgetown University Law Center details a compelling story about the anguish experienced by his sister’s interracial family when an incident occurred that disabused them of the belief that they had found friendship and acceptance in a predominantly white Delaware community.¹¹³ One evening, four high school seniors painted an eight by twenty-five foot soccer kickboard, depicting racist and anti-Semitic slogans such as “Save the land, join the Klan” and “Down with Jews”; the

108. *See id.* at 20.

109. *Id.* at 19.

110. *See id.* at 20.

111. David Stout, *Dismayed Greenwich Confronts a Message of Hate in a Yearbook*, N.Y. TIMES, June 15, 1995, at B1 (noting that only three percent of student population is black) An anti-Semitic yearbook incident had occurred in California the year before. A 13-year-old girl was targeted for vilification on her first day of class when she wore a Star of David. She was called a “stupid Jew” in English class, given the Nazi salute in the hallway, and “Jew” was scrawled over her picture in the yearbook. *See* Catherine Brudge, *Educators Battle Rise in Racism*, SACRAMENTO BEE, Aug. 25, 1994, at N1.

112. One black student at Sheehan High School in Wallingford, Connecticut, has been called “nigger” to his face, has argued with whites over being stereotyped, and has seen the Klan visit the school. *See* Trevor W. Coleman, *Yearbook Incident a Reflection*, HARTFORD COURANT, June 25, 1995, at H1. Students around the country have been victimized by racism in recent years. Following a freshman year filled with racist incidents, a 15-year-old returned to a Boston high school during her sophomore year to find a drawing of a burned black man with a gun pointed to his head on a blackboard in her home room. Only 60 of the 1200 students at the school are members of a minority group. *See* Jordana Hart, *Bigotry at School Still Felt*, BOSTON GLOBE, Dec. 6, 1992, at 1; *see also* E. Richard Walton, *School Woes: Middlebury KKK Posters Latest in Racial Incidents*, FLA. TIMES UNION, Mar. 2, 1996, at 1 (referring to incident in which Florida high school student hung five posters featuring white hooded Klansmen recruiting students to KKK); Tawanda D. Williams, *North Hills Offers Plan to Combat School Bias*, PITT. POST, Apr. 6, 1994, at C5 (discussing how 10 black students at suburban Pennsylvania school with 1026 nonblack students have had racial epithets hurled at them and have been taunted and spat at by group of whites); UPI (Regional News), May 14, 1993, available in LEXIS, Nexis Library, UPI File (discussing situation in which students wore KKK insignia on their clothes and placed “white” and “colored” signs on drinking fountains in central Illinois middle school).

113. *See* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 459–60 (describing how much of family’s anguish came from parents who rushed to defend students, insisting that incident was only joke).

students also drew twelve hooded Klansmen, swastikas, and a burning cross, along with a cartoon figure of Lawrence's nephew, identified by name.¹¹⁴ To the right of the boy's head was a bullet, and farther to the right was a gun with the barrel directed toward his head and the words "Kill the Tarbaby" underneath.¹¹⁵ When the incident was dismissed by other parents as a prank, Lawrence's sister's heartache was compounded by the failure of the people with whom she lived and worked to "recognize that she had been hurt, to understand in even the most limited way the reality of her pain and that of her family."¹¹⁶

Similar stories of gross indifference emerge in mixed-race and predominantly black environments as well as from both government and privately sponsored expressions. James Forman chronicles the oppressive nature of government speech directed at black Alabama residents when state officials seeking to signify their opposition to *Brown* incorporated the Confederate flag into the state flag and hung it over the state capitol building. He further describes his last year of high school in Georgia as follows:

It is the spring of 1984 in Atlanta, and the groundskeeper at Franklin Delano Roosevelt High School is starting his morning routine . . . carefully unfurling and raising a series of flags. First is the American flag, last is the Atlanta Public Schools flag, and sandwiched between the two is the Georgia State flag. I am drawn to this flag, particularly to its wholesale incorporation of Dixie. I observe the same scene almost every morning, and almost every morning I hate the fact that I watch. . . .

. . . I think of the incongruity of having black children, in a largely black city, watch a black man raise the symbol of the Confederacy for us all to honor. . . . My eyes close tightly, my fists clench, and I slowly force from my mind images of the flag, of the Ku Klux Klan, of Bull Conner and George Wallace—of black people in chains, hanging from trees, kept illiterate, denied the opportunity to vote.¹¹⁷

The nation's initial experience with desegregation renders the incidents noted above relatively mild by comparison.¹¹⁸ Yet they demonstrate that

114. *See id.* at 460.

115. *See id.*

116. *Id.* at 460–61.

117. James Forman, Jr., Note, *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505, 526 (1991). The Confederate flag has long been recognized as a symbol of white racism. *See, e.g.*, *Augustus v. School Bd.*, 507 F.2d 152 (5th Cir. 1975) (holding that school officials could ban use of Confederate flag by individual students at school functions on grounds that flag caused racial tension); *Melton v. Young*, 465 F.2d 1332 (6th Cir. 1972) (finding no constitutional violation in public school's suspension of student for wearing jacket bearing rebel flag).

118. *See* J. Harvie Wilkinson III, *The Law of Civil Rights and the Dangers of Separatism in Multicultural America*, 47 STAN. L. REV. 993, 996 (1995) (describing courage of early black integrationists who braved threat of mob violence to enter Little Rock High School).

communities in turmoil offer far from ideal learning environments for students, especially when racist incidents are exacerbated by the official response to offending conduct. For example, the Brentsville, Virginia varsity baseball team scratched a circular symbol in the dirt near their dugout before every game as a good luck ritual.¹¹⁹ It was similar to a racist symbol called "the well" which represents "four hooded Ku Klux Klansmen looking at a black man they have just thrown down a well."¹²⁰ The superintendent recommended that the assistant coach be fired for knowingly allowing varsity players to use the racist symbol, and school officials decided to implement programs to teach racial tolerance.¹²¹ The director of the school system's multicultural program warned that they do not expect teachers to become "'extreme, to provide an Afro-centric curriculum,'" but naturally to include other cultures.¹²² If the teachers and coaches could *naturally* include other cultures, then the incident itself would have been atypical. Moreover, the characterization of an Afro-centric curriculum as "extreme" speaks volumes about the selection of this individual to lead the "diversity" training programs.

Similar issues arose in 1995 in a New Haven, Connecticut, magnet school. West Hills Middle School is part of a kindergarten through eighth grade integration magnet program that a local newspaper described as one of the city's "elite and most racially diverse schools."¹²³ In 1995, the school's student population was approximately forty-four percent white and fifty-six percent black, Asian American, and Latino combined,¹²⁴ and the school employed two blacks out of approximately fifty professional teachers and administrators.¹²⁵

In February 1995 (Black History Month), eighth graders were required to read Mark Twain's *The Adventures of Huckleberry Finn*.¹²⁶ The book's main black character, Jim, is modeled after the minstrel show characters of whom

119. See Eric L. Wee, *Lessons in Tolerance, Brentsville High Plans Multicultural Programs*, WASH POST., Sept. 7, 1995, at V1.

120. *Id.*

121. *See id.*

122. *See id.*; see also Andrea Stone, *Past Truths with a Present Spin: Events Are Reshaped with Passage of Time*, USA TODAY, May 19, 1995, at 4A (describing Senate rejection of new national history teaching standards for elementary and secondary schools).

123. Karla Schuster, "Huckleberry Finn" Banned from Lessons, NEW HAVEN REG., Mar. 17, 1995, at A11 (discussing controversy over removal of *Huckleberry Finn* from curriculum)

124. See Karla Schuster, *Magnet School Lottery Draws Fire*, NEW HAVEN REG., Mar. 10, 1996, at A1

125. See Statement of Patricia Augustine Reaves, Cochair of West Hills Middle School Parent Advisory Committee and Elementary School Teacher, New Haven Public Schools (Feb. 26, 1997) (on file with the *Yale Law Journal*) [hereinafter Reaves Statement].

126. Every year the book is taught in thousands of schools across the nation and controversy erupts over its value. See Gerald Graff & James Phelan, *How to Deal with the "Huck" Problem*, WASH POST, Aug. 17, 1995, at A29. The general response to problems surrounding the decision to teach the book is to defend it as an American classic. See Jonathan Rabinovitz, *Huckleberry Finn Without Fear*, N Y TIMES, July 25, 1995, at B1 (describing national conference on preparing teachers to teach *Huckleberry Finn* in 1990s).

Twain was so fond.¹²⁷ Furthermore, the book uses the word "nigger," arguably one of the most controversial racial epithets, 213 times.¹²⁸ According to psychologists at the Yale Child Study Center, from a developmental perspective, twelve and thirteen year-olds are ill-prepared to benefit from the book because of its degrading and derogatory characterizations of blacks.¹²⁹ Many education scholars agree that some high schoolers, let alone younger adolescents, are not able to process the racial dynamics.¹³⁰ The book is best taught in historical context, with a host of specific comparative readings.¹³¹ When one of the few black characters in students' required reading over eight years of education is referred to as "nigger" over 200 times in one thin volume, Twain's book represents 213 separate assaults on students' psyche.¹³²

According to the President of New Haven's Black Parent Teacher Organization, a public school teacher whose eighth grader was also reading *Huckleberry Finn* at West Hills, the problem is racism.¹³³ The bastardized version of slavery presented in the book represents what America would like to perceive as truth/reality: "Huckleberry Finn is pernicious to our children because it diminishes the atrocities committed during the institution of chattel slavery in this country. There is no horror, rape, castration, mutilation, torture,

127. See Allen Carey-Webb, *Racism and Huckleberry Finn: Censorship, Dialogue and Change*, ENO. J., Nov. 1993, at 24 (describing Twain's fondness for minstrel shows).

128. See *id.*

129. See Statement of Dr. Norris M. Haynes, Psychologist, Yale Child Study Center (Feb. 27, 1997) (on file with the *Yale Law Journal*); Statement of Dr. Edward Joyner, Executive Director, Yale Child Study Center (Mar. 3, 1997) (on file with the *Yale Law Journal*).

130. See, e.g., Carey-Webb, *supra* note 127, at 27 (relating anecdotes in which college classmates recalled feeling uncomfortable in high school discussions of *Huckleberry Finn*); cf. Kevin Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV. 813, 816 (1993) (stating that as 16-year-old high school junior, he saw *The Adventures of Huckleberry Finn* as "the epitome of a racist novel").

131. See Carey-Webb, *supra* note 127, at 28 (proposing "principles and caveats" for teaching of *Huck Finn*).

132. The failure to include works written by educated blacks in the nineteenth century left the students with a false sense of history. For this reason, the sanitized version of the book was no better than the original. Replacing the word "nigger" with "Negro" would not have diminished the reaction of students like Doron Flake, an eighth grader who said to his mother, after a day of reading the book out loud in the class: "We are the drug dealers, we're the murderers, we're the rapists, we're everything that's negative. Do I have to go to school and be Jim too?" Susan A. Zavadsky, *Mom, Son's Stand on "Huck" Makes ABC News*, NEW HAVEN REG., July 28, 1995, at A3. Another commentator has noted that cultural values are transmitted through works such as *Huckleberry Finn*. Referring to that work, Victor Goode wrote:

A basic and historic function of education is the transmitting of normative cultural values.

Unfortunately, this acculturation process may be tainted by cultural racism. Cultural racism is expressed through historical myths that romanticize the past. It is also evident in language, symbols, and in the imposition of white ethnocentric standards on other racial groups.

Victor Goode, *Cultural Racism in Public Education: A Legal Tactic for Black Texans*, 33 HOW. L.J. 321, 321 (1990).

133. See Jimmy-Lee Moore, *Why Huckleberry Finn*, ADVANCE (New Haven Federation of Teachers, Union Newsletter), Summer 1995, at 3 (describing "malicious malignant cancerous [racism] that has been voraciously feasting upon our society since 1492"). Moore is a teacher in the gifted and talented program at the East Rock Community School. See *id.*

lynching, violence, resolve, true malevolence, beatings, and/or screaming."¹³⁴ Parents met with school administrators and asked them to withdraw the book from the eighth-grade curriculum.¹³⁵ There was a consensus among a diverse group of parents that the middle-school curricula need to affirm the positive aspects of black heritage in order for black children to develop positive self-esteem.¹³⁶

Black parents believed that no other group that brought a similar claim would have been treated with such indifference or subjected to such delay.¹³⁷ After the book was suspended from classroom use pending a final decision, the language arts teacher distributed a homework assignment about the book which also contained the word "nigger."¹³⁸ Parents sat in the classes in rotating shifts for two days to prevent this from happening again.¹³⁹ The teacher was visibly upset, and the principal apparently told staff members that the reputation of the entire school was at stake.¹⁴⁰ The school's administration supported the teacher and repeatedly cancelled important school meetings, making relations between parents and administrators more strained than ever.¹⁴¹ A mixed-race group of parents agreed wholeheartedly that the book should be removed.¹⁴² It was withdrawn from the curriculum and the school was pressured to hire more black teachers.¹⁴³ The justification given by the superintendent for finally pulling the book was that the school was in danger of being "torn apart."¹⁴⁴

134. *Id.*

135. See Schuster, *supra* note 123.

136. See Reaves Statement, *supra* note 125.

137. See *infra* text accompanying notes 145–46. Black students, of course, are not the only minority group to experience humiliating bias. In one episode, after classmates harassed and humiliated a Jewish middle school girl, the girl's grandmother offered to treat the entire eighth grade of her school to a showing of *Schindler's List* and to have a Holocaust survivor speak with the students. The girl's social studies teacher rejected the offer and said, "I have to get through the Civil War." Bridge, *supra* note 111.

138. See Homework Assignment Given to Eighth Graders at West Mills Middle School (Mar. 1, 1995) (on file with the *Yale Law Journal*) (including vocabulary skills exercise containing the following fill-in-the-blank question: "Don't ever tell me any more that a nigger ain't got any _____ talent.")

139. See Reaves Statement, *supra* note 125.

140. See *id.*

141. See Letter from Janice K. Romo, Principal of West Hills Middle School, to Parents of School's Students (Mar. 22, 1995) (on file with the *Yale Law Journal*) (postponing meeting for third time)

142. See Reaves Statement, *supra* note 125.

143. All three of the teachers hired at the middle school since the incident are African American. See *id.*

144. Schuster, *supra* note 123 (quoting Superintendent Reginald Mayo). A letter was sent to the superintendent on March 23, 1995, affirming that racial harmony was not threatened. It reads in pertinent part as follows:

We believe that the decision was good for all of the children. Moreover, no one has reported a decrease in harmony among those parents and children who have always maintained racial and ethnic diversity in their social interactions [As a parent volunteer,] I am at the school every morning for approximately 15–20 minutes, the seventh and eighth graders and parent volunteers wait in the gym until homeroom starts. I am happy to report that the kids are getting along just fine

Memorandum from Robin Barnes to Dr. Reginald Mayo, Superintendent of New Haven Public Schools (Mar. 23, 1995) (on file with the *Yale Law Journal*).

Some white parents, clearly surprised by the strong show of black parental support, objected to its removal and declared the book a literary classic.¹⁴⁵ As a black parent involved in this incident, I responded to this claim by offering the following analogy: In almost every video store in America, in the “classics” section, is the movie *Heidi*. The story depicts an unlovable old man whose heart is softened by the love and encouragement of his orphaned granddaughter. Americans have watched the movie for years and gained a stronger appreciation of the role of intergenerational support in their lives. But if for some reason, the old man had referred to his granddaughter as “the little bitch” or “my bitch” or “that bitch” 213 times, certainly school administrators would not require students to watch the film. As Pulitzer Prize winner Jane Smiley wrote:

The sort of meretricious critical reasoning that has raised Huck’s paltry good intentions to a “strategy of subversion” (David L. Smith) and a “convincing indictment of slavery” (Eliot) precisely mirrors the same sort of meretricious reasoning that white people use to convince themselves that they are not “racist.” If Huck *feels* positive toward Jim, and *loves* him, and *thinks* of him as a man, then that’s enough. He doesn’t actually have to act in accordance with his feelings.¹⁴⁶

Meanwhile, black parents were told that their children were not complaining, and there were reports of retaliation against the children of the most actively involved parents.¹⁴⁷ Black parents then embarked upon a course of action that effectively precluded school officials from continuing falsely to represent the school as a model of diversity.¹⁴⁸ For example, when one of the teachers was considered for the guidance counseling position at the school, the black parent group sent the superintendent a letter, which reads in part:

Our past experience with the school’s teachers and administrators has convinced a significant number of parents that the overwhelming[ly] white, female faculty and staff at the school have demonstrated almost

145. See Jerry Dunklee, *Huck Finn Debate Simmers at City School*, NEW HAVEN REG., July 19, 1995, at A10.

146. Jane Smiley, *Say It Ain’t So, Huck: Second Thoughts on Mark Twain’s “Masterpiece”*, HARPER’S MAG., Jan. 1996, at 61, 63.

147. Retaliation included suspensions for minor infractions. Most notably, the eighth grade language arts teacher, who was not at the center of the controversy, engaged in what appeared to be retaliatory behavior against eighth grader Doron Flake, who felt that the book reinforced negative media images of blacks. At the end of the school year, teacher Joy Niziolek left a stack of *Huckleberry Finn* books on his desk. According to his mother, Doron “moved the books over to the window sill and tried to ignore them and the feelings of discomfort and anxiety they elicited.” The assistant principal assured his mother that there was no malicious intent on Niziolek’s part, that she “mistakenly” left them there while packing them away. Letter from Marcella Flake to Joy Niziolek 1 (May 25, 1995) (on file with the *Yale Law Journal*).

148. See Letter from Parents’ Group to Dr. Reginald Mayo, Superintendent of New Haven Public Schools 1 (Nov. 18, 1995) (on file with the *Yale Law Journal*).

no understanding of, or commitment to, issues of diversity despite assertions to the contrary.¹⁴⁹

During the *Huckleberry Finn* incident, several meetings and discussions were scheduled to bring understanding and closure to the discussion, but none of the teachers attended.¹⁵⁰ The absence of virtually all of the school's teaching and most of its professional staff demonstrated how little they cared about the substance of the discussion on diversity and about how they were perceived.

This controversy demonstrates the tension between one group of parents (mostly black) who wanted meaningful involvement in school policies, and another group (mostly white) that expected to maintain control. The letter quoted above reiterated the impact of the exclusionary practices on the school environment. The parents referred to a pattern of inviting only the white parents who were active in the school to participate in decisionmaking at the school, even though the parents most actively involved in the diversity issues had made it clear that they, too, expected to participate.¹⁵¹ The black parents charged school officials with excluding them altogether, providing such short notice as to make participation almost impossible. As further comment on their motivations, administrators at West Hills were accused of diluting the strength of black parental participation by alternating contact between the assertive group of black parents with the less informed passive group, allowing administrators to maintain the appearance of inclusion as they continued business as usual.¹⁵²

Racial integration in public education has been a slow and difficult process. Many wonder whether the alleged benefits of integration can ever be fully achieved in environments like the one described above, where students and their parents are no longer separate but are hardly treated as equals. For the most part, public education since *Brown* continues along separate and unequal lines. In response to the mandate from the Connecticut Supreme Court in the *Sheff* case described above, the Governor has appointed an Educational Improvement Panel to make recommendations and propose remedies for the troubled school system.¹⁵³ The proposed solutions include increased opportunities for school choice: regional magnets, interdistrict public schools, and more charter schools.¹⁵⁴ School choice may be the one movement capable of responding to the needs of diverse communities with a message we

149. *Id.*

150. The Mark Twain House in Hartford hosted a seminar for teachers following the incident at which most of the 31 teachers were from Connecticut, "but none were from New Haven." Robert Frahm, *Twain Scholars Defend Huck at Hartford Seminar*, HARTFORD COURANT, July 25, 1995, at A1

151. See Letter from Parents' Group to Dr. Reginald Mayo, *supra* note 148, at 1

152. See *id.* at 2.

153. See Rick Green, *Panel Adopts 15 Ideas for Schools Remedy. "Choice" 1 of Desegregation Options*, HARTFORD COURANT, Jan. 17, 1997, at A1; Jonathan Rabinovitz, *Report Urges School Choice in Connecticut*, N.Y. TIMES, Jan. 23, 1997, at B1.

154. See Rabinovitz, *supra* note 153.

all understand: that "separate but equal" in public institutions is impermissible only when involuntarily imposed.¹⁵⁵ However, state legislatures, cognizant of the problem with racial segregation, have passed school choice legislation that takes into account patterns of racial segregation that may lead to increased isolation.¹⁵⁶ Even so, school choice programs have engendered their fair share of controversy and skepticism that they will produce more integration. Examining questions of racial equity rather than integrative potential surrounding school choice initiatives is a prerequisite for proper evaluation of their presumptive benefits, which may include structural change to the schools, recognition of individuality, increased competition, accountability, improved educational outcomes, and equal educational opportunities.¹⁵⁷ If choice delivers all that its proponents promise, then racial integration in public schools will evolve as an independent act of volition. Without court intervention, most parents, black and white, seek quality first, and those who want quality and integration may be willing to work hard to achieve and maintain it.

III. PUBLIC SCHOOL CHOICE

To understand the role of school choice in the education debate, as well as the differences between public choice programs, it is necessary to look at the major areas of discussion concerning effective schooling and education reform. There are five fundamental characteristics necessary for creating successful schools: (1) "a dynamite principal with ample authority and support, and who is held accountable"; (2) high quality teachers; (3) a rigorous academic program; (4) active parental involvement; and (5) sufficient financial support.¹⁵⁸ Although the literature on effective schooling abounds, none of these characteristics is self-defining and, as demonstrated below, each of the elements listed above has been the subject of interesting research. For example, research on effective schools in the United States and the United Kingdom demonstrates that to improve output, principals need strong instructional

155. See Alex M. Johnson, Jr., *Bid Whist, Tonk & United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1432-55 (1993) (arguing for voluntary nonintegration).

156. For example, in Connecticut, financial incentives are offered to interdistrict state charter schools that have the reduction of racial isolation as one of their objectives. See Memorandum to Potential Charter School Developers from Yvette Melendez Thiesfield, Program Manager, Connecticut Department of Education 1 (Oct. 15, 1996) (on file with the *Yale Law Journal*). Similarly, the state's new charter school legislation requires that admission to the new state-funded schools be conducted through a lottery system. See An Act Concerning Public Charter Schools § 2, P.A. No. 96-214, 1996 Conn. Legis. Serv. 660-61 (West).

157. See COOKSON, *supra* note 10, at 35.

158. Shenk, *supra* note 64, at 3. Other authorities are in substantial agreement. Jaap Scheerens provides a comprehensive evaluation of the most widely cited national and international research on school effectiveness. Scheerens concludes that at the level of school organization, the most important contributing factors in creating schools that work are "pressure for achievement as an explicit choice in school policy, aspects of instructional leadership, recruitment of qualified staff, evaluative potential of the school, financial and material resources of the school, and school climate." JAAP SCHEERENS, *EFFECTIVE SCHOOLING: RESEARCH, THEORY, AND PRACTICE* 95 (1992).

leadership rather than administrative acumen.¹⁵⁹ Traditionally, there has been an emphasis on internal maintenance, on “running a smooth ship,” rather than on achieving strong results from teaching.¹⁶⁰ Whereas accountability generally implies a standard of fiscal responsibility, or successful outcomes related to identifiable goals, in the education arena it has largely become a shorthand phrase for test results.¹⁶¹ Despite recognition that the sum total of the educational enterprise cannot be judged or viewed only through the lens of standardized assessment, test scores remain the primary measure of success for all educational programs.¹⁶² The importance of staff development to creating quality teaching staff and exceptional learning environments is acknowledged as an important feature of educational improvement, but is not often put into practice for technical and political reasons.¹⁶³ Effective opportunities for

159. See SCHEERENS, *supra* note 158, at 17; see also Samuel Krug, *Leadership and Culture: A Quantitative Perspective on School Leadership and Instructional Climate*, in EDUCATIONAL LEADERSHIP AND SCHOOL CULTURE 163, 169 (Marshall Sashkin & Herbert J. Walberg eds., 1993) (describing importance of principal who defines school's mission, manages curriculum and instruction, supervises teaching, monitors student progress, and promotes instructional climate)

160. See SCHEERENS, *supra* note 158, at 17.

161. The current problems with accountability in public education can be compared to those in charter schools. Lack of innovation is viewed as a primary detriment to public education. The primary goal of charter school legislation is the encouragement of innovative schools that will eventually lead to widespread education reform. See Ember Reichgott Junge, *Charter Schools Will Work Better than Private School Vouchers*, STAR TRIB. (Minneapolis-St. Paul, Minn.), Jan. 23, 1996, at 11A (describing Minnesota charter legislation as having produced much innovation in 18 schools in just three years). Charter schools are required to have high academic standards and are expected to outperform their public counterparts. See ABBY R. WEISS, GOING IT ALONE: A STUDY OF MASSACHUSETTS CHARTER SCHOOLS 18 (Institute for Responsive Education Report, 1997) (“One of the major questions that critics and proponents of charter schools will be asking is: What is the effect of these schools on mainstream education?”) The mission must include improved educational outcomes, and failure to achieve these results could result in revocation of the charter. See *infra* text accompanying note 212. On the other hand, when public schools begin to fail, they often receive more tax dollars rather than face extinction. Because most charter schools are not bound to automatic pay raises or lengthy renewal and tenure contracts for teachers and staff, they can rest assured that teachers and administrators who perform poorly need only be endured until the end of a relatively short contract period. In public education, it amounts to heresy to suggest that tenure and automatic pay raises undermine quality and that the focus should be on rewarding excellence. For example, in 1995, only five out of 900 principals and assistants received negative evaluations in Broward County, Florida. Deficient personnel were often transferred rather than dismissed. See Charlotte Greenberg, *Set Stringent Standards, Then Reward Excellence*, SUN-SENTINEL, June 22, 1996, at 11A.

162. See CHUBB & MOE, *supra* note 4, at 71 (“[A]cademic achievement is the most common indicator of school performance in education research [and] the measure of effectiveness that school reformers now rely on most.”); David A. Squires & Edward T. Joyner, *Tune and Alignment: Potent Tools for Improving Achievement*, in RALLYING THE WHOLE VILLAGE: THE COMER PROCESS FOR REFORMING EDUCATION 98–99 (James P. Comer et al. eds., 1996) [hereinafter RALLYING THE WHOLE VILLAGE] (“Standardized test results receive wide publicity, and the public judges schools partially on the results of these tests.”) According to Scheerens, “[i]t is no exaggeration to conclude that in all the theories and models discussed in this chapter [on school effectiveness theory development] proper evaluation emerges as an essential prerequisite to effectiveness, whereas unsound evaluation or no evaluation at all is associated with bad or even perverted organizational functioning.” SCHEERENS, *supra* note 158, at 27; cf. Ernest L. Boyer, *Foreword to School Choice: Examining the Evidence* at xiii (Edith Rasse & Richard Rothstein eds., 1993) (finding that focus on academic achievement emphasizes “private benefits of schooling, and departs sharply from a vast body of work by well-regarded thinkers and writers underscoring the social imperatives of education and recognizing that schools also promote the common good”).

163. See Michael G. Fullan, *Staff Development, Innovation, and Institutional Development*, in CHANGING SCHOOL CULTURE THROUGH STAFF DEVELOPMENT 3–4 (Bruce Joyner ed., 1990) (concluding that training teachers and fostering their growth and professional development on continuing basis requires

professional growth and improved academic outcomes require consensus about the school's mission and the relationship between the curriculum, teaching methods, and goals to be achieved. These elements are often lacking. Moreover, inadequate assessment of student needs makes it harder to identify learning objectives, and intervention, therefore, comes too late.

Learning from successful education models can be a daunting task for some schools because the top examples all seem to have different models for student achievement; there is no one-size-fits-all model.¹⁶⁴ Beyond school-based initiatives, parental involvement has become the rallying cry from those most interested in giving parents credit for the educational success of children or assigning blame for the lack thereof.¹⁶⁵ As education costs continue to rise, lack of financial support is as much a concern as lack of parental support in some schools. The overriding question presented by these issues is who among the potential producers of education is best equipped to serve the needs of the students and overcome many of the problems in education. This is where school choice initiatives vary. Most school choice programs, which include inter/intradistrict magnets and interdistrict public schools, take the traditional approach and leave the task of educational policymaking to professional educators. Charter schools, on the other hand, by opening up the arena to nonprofessionals, can be seen as the equivalent of authorizing paralegals to run law firms and perform routine legal services, tasks that have traditionally only been executed by lawyers.

Although numerous new and innovative ideas regarding any one part of an educational program could become part of a school choice plan, the most politically viable choice initiatives fall into two basic categories. Private school

"wisdom, skill, and persistence," in addition to overcoming political obstacles associated with "power, bureaucratic positioning, and territoriality"). The most effective innovation requires considerable technical assistance following programmatic change, which substantially increases the level of teacher commitment and practice mastery. *See id.* at 5. Schools that cannot afford to send instructors to regional or national meetings or fund elaborate in-service training programs often must rely on teacher-led discussions of various teaching models and techniques. Even the cheapest forms of staff training are expensive for schools facing budget cuts. This is largely due to the expense of hiring substitutes to cover the classes of teachers released to participate in the training sessions.

164. The Comer Model focuses upon whole child development and shared governance. *See James P. Comer et al., The School Development Program, in RALLYING THE WHOLE VILLAGE, supra* note 162, at 1; *see also Leviton & Joseph, supra* note 10, at 1140 n.19. "Success For All" is a literacy program that includes one-on-one instruction, specialized curricula, and home visits. *See Leviton & Joseph, supra* note 10, at 1140 n.17. Core Knowledge encourages greater inclusion in our national literate culture by developing a model curriculum and building blocks of knowledge that will prevent the creation of an educational underclass. *See E.D. HIRSCH, JR., CULTURAL LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW* 139-45 (1987). Accelerated Schools set high standards and provide a challenging curriculum for all children, including those traditionally placed in remedial classes. *See Leviton & Joseph, supra* note 10, at 1141 n.20.

165. *See Ron Baker, Parents Must Get Involved for Education to Improve, MORNING CALL* (Allentown, Pa.), Nov. 30, 1995, at A21. A report issued in 1995 by several publishing groups found that 60% of American households did not purchase a single book in 1994. *See id.* A congressional study, entitled *Adult Literacy in America*, found that nearly half of adults read and write so poorly that they have difficulty holding a job in the modern workplace. *See id.*

choice initiatives, which have been widely discussed in legal scholarship, offer financial subsidies such as tuition vouchers or tax credits for students wishing to attend private, often parochial, schools.¹⁶⁶ Private sectarian and nonsectarian schools have been credited with producing higher academic achievement in a cost-efficient manner.¹⁶⁷ Public choice plans, on the other hand, are often part of an existing school district or receive public funding, and all operate under local or state school boards. Under the top three plans—magnets, inter/intradistrict public schools, and charters—public school students may apply for enrollment at schools other than those to which they would be assigned under existing regulations.¹⁶⁸ Admission is usually then determined by lottery.¹⁶⁹ Intradistrict public choice often begins as a remedy for past discrimination leading to segregation in a particular school district. Officials are able to override parental choice in an effort to maintain a certain racial balance in the district.¹⁷⁰ Most schools are located within a single district, but students who become part of regional plans do cross district lines.¹⁷¹

Interdistrict plans are more expensive to operate because students usually require daily transportation to get from one district to another, and there are often differences in per pupil expenditures between the two districts.¹⁷² Typically, the “receiving” (suburban) school district will take students from urban districts according to the amount of space available in its classrooms.

166. See, e.g., Michael J. Stick, *Educational Vouchers: A Constitutional Analysis*, 28 COLUM. J.L. & SOC. PROBS. 423, 427–29 (1995) (stating that voucher plans provide subsidy for each child for parents to use at school of their choice); Joe Price, Note, *Educational Reform: Making the Case for Choice*, 3 VA. J. SOC. POL'Y & L. 435, 463–65 (1996) (noting that some plans are restricted to public and private nonsectarian schools, while others include all primary and secondary schools). The primary benefits include increased competition in the education market leading to increased productivity, more educational choices for parents, and reduction in the financial burden of parents who choose to send their children to religious schools. See Price, *supra*, at 456–48; see also Diane Ravitch, *D.C.'s Schools: Under the Gundersen: A Plan for Reforming a System That Seems to Think Poor Kids Can't Learn*, WASH. POST, Dec. 10, 1995, at C2 (noting that other voucher plans have been limited to students from low-income families). A major controversy over vouchers is whether they have the effect of advancing religion, when used for parochial schools, in violation of the First Amendment. See William D. Anderson, Jr., Note, *Religious Groups in the Educational Marketplace: Applying the Establishment Clause to School Privatization Programs*, 82 GEO. L.J. 1869, 1880–902 (1994).

167. Cf. Paul E. Peterson et al., *School Choice in Milwaukee*, PUB. INTEREST, Fall 1996, at 38, 49–56 (arguing that Milwaukee private school choice program has increased student achievement at lower per pupil cost than public schools).

168. See COOKSON, *supra* note 10, at 14–16.

169. See, e.g., Sandra Evans, *Public Schools Sprout Options. Special Programs Offered for Even the Youngest*, WASH. POST., Feb. 25, 1996, at A1 (noting that “Fairfax and Arlington schools fill slots for their alternative schools through a lottery”); Howard Libit, *Lottery Used to Fill Magnet High Schools. 250 8th Graders Picked from 607 Applicants for High-Tech Program*, BALTIMORE SUN, Mar. 6, 1997, at 1B.

170. Cf. Peyser, *supra* note 1, at 621 (arguing that choice is becoming more relevant).

171. See COOKSON, *supra* note 10, at 15.

172. Contending that its sending fees are inflated, one New Jersey school district has supported a bill to lower the fees that “sending districts” must pay to “receiving districts.” See Randy Diamond, *Sending Districts Press for School Reforms*, RECORD (Bergen, N.J.), Sept. 27, 1993, at A3.

The "sending" (urban) district may have to reimburse the receiving district for every student transferred.¹⁷³

Magnet schools are a widely known and popular public choice plan. Magnets were designed to ameliorate the hypersegregative state of certain school districts.¹⁷⁴ Magnet programs target specific city schools and upgrade the quality of the educational program and facility in order to lure white students into the city.¹⁷⁵ Federally funded magnet school programs respond to the dilemma presented by white flight, namely, a disproportionately small number of white children in urban school districts. Magnets combine large financial expenditures with the use of racial quotas.¹⁷⁶ Thus, monies are often poured into city schools in order to desegregate a learning environment, even when those same funds might be better spent simply raising the quality of the education for urban children. In one city, more than \$500 million was spent to construct new magnet schools and to remodel existing schools, but white students still made up less than three percent of the district's total enrollment.¹⁷⁷ Kansas City spent 1.4 billion dollars to upgrade its schools under the most extensive magnet school plan in the nation.¹⁷⁸ After seven years of monitoring, the gap between local and statewide test scores was still significant.¹⁷⁹

Racial balance is not the equivalent of district-wide proportional representation under magnet integration policies. Students are not admitted to magnet schools in numbers that reflect the demographics of the district; instead, they are admitted under formulas that essentially ask how much integration is too much before the white population becomes unstable.¹⁸⁰ In Kansas City, "more than 3000 black students languished on magnet school waiting lists while available magnet schools sat half-empty waiting for the

173. See Smith, *supra* note 41, at 267-68.

174. For example, in 1980, St. Louis schools were deemed to exemplify state-ordered segregative measures reaching back to the antebellum period. See *Adams v. United States*, 620 F.2d 1277, 1288 (8th Cir. 1980). The school district agreed to a settlement plan that allowed blacks to attend magnet schools and that attempted to attract whites from virtually all-white city schools. See *Liddell v. Missouri*, 731 F.2d 1294, 1309-10 (8th Cir. 1984).

175. But see Beck, *supra* note 32, at 1035 (noting that in Kansas City "a highly touted and extraordinarily expensive magnet school program . . . failed to lure a significant number of white students"); Kimberly C. West, Note, *A Desegregation Tool That Backfired: Magnet Schools and Classroom Segregation*, 103 YALE L.J. 2567, 2568-79 (1994) (noting that many magnet schools are segregated by classroom).

176. In Cambridge, Massachusetts, the "idea and ideal of desegregation was at the forefront in developing [the city's] choice plan." As with most other magnet school programs, parents list their first, second, and third choices, and assignments are made based upon preferences and racial balance. See Smith, *supra* note 41, at 270. Minnesota's open enrollment program allows students in large districts to transfer to the schools of their choice as long as their movement does not upset racial balance. See *id.* at 274.

177. See Beck, *supra* note 32, at 1035-36.

178. See Orfield & Thoronson, *supra* note 86, at 782.

179. See *id.*

180. See, e.g., Days, *supra* note 80, at 55-56 (noting that "where magnet schools offering innovative educational programs have replaced formerly all-black facilities, black student enrollment in the special programs has been limited by the need to maintain racial balance").

requisite number of white students to enroll.”¹⁸¹ One black parent said that when her daughter “didn’t get in the first time, I applied again and said she was white.”¹⁸² The district settled on a plan that allowed six black children to enroll for every four whites.¹⁸³

Other integrative policies have required formerly racially exclusive public schools with superior academic programs to admit a certain percentage of black children to diversify the student population and increase minority access to quality educational programs. Schools adopting these policies run the risk of being sued for denying admission to whites. Some of the schools are not part of a choice initiative per se, because students must compete for admission. For example, when a white female was denied admission to one of Boston’s most elite high schools, her family charged school officials with reverse discrimination because she scored higher on the entrance exam than some of the black students admitted, even though there were whites admitted who also scored lower and none of the students admitted were unqualified to attend the school.¹⁸⁴ Similar to the case of the all-black male academy in Detroit,¹⁸⁵ a settlement was reached in the case that allowed her to attend the school. The end result in both cases is the same: The policy’s intended beneficiaries lose out to competing interests. Thus, similar to most public school choice programs, this reverse discrimination challenge opens the door once again for the ratio of white admissions to desirable schools to continue to rise disproportionately. According to Joseph Viteritti:

If there is any evidence that choice has benefitted more advantaged families, it is most apparent in public school choice programs, now extant in 29 states, where students compete for limited space in sought-after schools, often favoring those who are most articulate, most informed, and least in need of improving their lot.¹⁸⁶

In the next Part, I turn to an examination of one school choice option—charter schools—that could help solve the diversity dilemma I have described. Charter schools on the whole are least likely to favor one group of students over another because diverse groups of parents and educators are often linked to, if not part of, the coalitions founding the schools.

181. Beck, *supra* note 32, at 1036.

182. Kunen, *supra* note 59, at 39.

183. See Beck, *supra* note 32, at 1036.

184. See Leonard Greene, *Ruling Opens Door to Challenges That Could Spell Doom for Blacks, Hispanics*, BOSTON HERALD, Aug. 23, 1996, at 4. The girl was from a well-off family that managed to get three of its children into the most prestigious school in Boston. When the third daughter was accepted by the presumptive second-best school in the city, her family went to court and challenged the admissions policy of the first school, arguing that racial quotas resulted in denial of her application in violation of her constitutional rights to equal protection under the law. See *id.*

185. See *supra* text accompanying note 23.

186. Joseph P. Viteritti, *Stacking the Deck for the Poor: The New Politics of School Choice*, BROOKINGS REV., June 22, 1996, at 10–11.

IV. THE POTENTIAL OF CHARTER SCHOOLS

It is increasingly important for black America to assess which public school choice programs offer worthwhile alternatives to the current system. Charter schools may provide an appropriate means for parents to have meaningful involvement in the education of their children because they provide an unprecedented opportunity for parent involvement in the operation and design of a school.¹⁸⁷ Under most charter legislation, parents can actually apply to open a school that they have designed.¹⁸⁸ Charter schools strengthen parental commitment to the schools their children attend because parents select a particular school after deciding that it meets their families' needs and because they are assured continued participation in how the school is to be run.¹⁸⁹ There are few restraints upon parents and administrators who want to experiment with educational programs and special services.¹⁹⁰ However, as public institutions, charter schools remain nonsectarian, and admissions may not be unlawfully restricted.

Charter legislation allows private persons and institutions of higher education to develop and implement plans for individual public schools.¹⁹¹ The critical difference between magnet and charter schools is the latter's goal of educational reform. Reform, rather than integration, is the overriding legislative purpose of charter schools.¹⁹²

The Charter Movement itself appears to be most concerned with creating a process whereby the constituent community retains decisionmaking power over all aspects of the school program.¹⁹³ Innovation and reform are the linchpins of the Charter Movement's promise to produce schools with greater accountability and less bureaucracy.¹⁹⁴ The Connecticut State Department of Education introduced the goals of the state's charter legislation as follows:

187. See *infra* notes 201-04 and accompanying text.

188. See CENTER FOR SCH. CHANGE AND THE EDUC. COMM'N OF THE STATES, CHARTER SCHOOLS: WHAT ARE THEY UP TO? A 1995 SURVEY 16 (Education Commission of the States & Center for Social Change, 1995) [hereinafter CHARTER SURVEY] (demonstrating that parents are ranked first, followed by teachers, and interested community members, as most common partners involved in designing nation's charter schools).

189. Charter developers rank their top three reasons for opening a school as follows: (1) quality of teaching and learning; (2) autonomy in running the school according to a certain principles and/or philosophy; and (3) more parental control. See *id.* at 15; see also WEISS, *supra* note 161, at 7-8.

190. See CHARTER SURVEY, *supra* note 188, at 14, 18 (demonstrating wide variety of models for schools and services offered).

191. See *id.* at 1 ("A charter proposal is written by a team of individuals interested in establishing the new school. Charters have been granted to parents, teachers, community groups and other organizations.").

192. See *supra* notes 189-90 and accompanying text.

193. See WEISS, *supra* note 161, at 11 (citing governance issues as greatest challenge facing charter schools).

194. See Ravitch, *supra* note 166. The schools themselves have been called one of the fastest-growing innovations in education policy. Over 20 states have passed charter legislation. Nationwide, over 200 schools have been granted charters that are designed to operate outside of most rules and regulations. See generally NATIONAL SURVEY, *supra* note 43, at I-1 (discussing key questions surrounding charter schools); WEISS, *supra* note 161, at 6, 7 (discussing benefits of charter schools).

Legislation passed this session can prove to be a catalyst in the restructuring of our public schools. Charter schools can serve as another vehicle in the creation of innovative and diverse educational settings for our students. Through a charter, a private entity or coalition of private individuals, is given the public authority to run an independent public school which is legally autonomous from the local school district. If properly developed, they can create opportunities for improved student learning and academic excellence for all students by allowing for flexibility in the design of each school's educational program without compromising accountability for success.¹⁹⁵

Out of all the public choice initiatives, charters provide the only viable means of local control. Supporters of charter schools see them as a means of achieving the benefits of the conceptually inviting but essentially impotent initiatives toward site-based management.¹⁹⁶ Site- or school-based management reform is designed to alter governance structures to give administrators, teachers, and parents real power and authority to work together to make major changes in established educational practices.¹⁹⁷ As one commentator has stated: "I suspect the truth is that charter schools represent something far more threatening to the fabric of public education than simply adding more competition. The real issues are power, governance and decision-making authority."¹⁹⁸ Governance and decisionmaking power are key elements for improving the quality of educational opportunities for black children.¹⁹⁹ Autonomy enables parents to help devise the programs that most easily fit the practical, emotional, and educational needs of their children.

For those who believe that integration is important to some socially desired end, the opportunity to develop a truly innovative multiracial educational program exists.²⁰⁰ If parents decide that school outings and field trips offer a more educationally sound experience than access to the Internet, that decision can be made at the school level. If teachers desire to eat lunch with their

195. Connecticut Dep't of Educ., Charter School Application Form 1996, at 1 (on file with the *Yale Law Journal*) [hereinafter Charter School Application Form].

196. See Peyser, *supra* note 1, at 629. School-based or site-based management (SBM) is designed to promote bottom-up change. It empowers teachers to assume responsibilities previously held by school principals or central office administrators. It involves teachers in selecting staff, controlling budgets, developing curriculum and teaching methodologies, and discussing conduct codes and issues of discipline. See generally Colloquy, *Site-Based Management: Making It Work*, 53 EDUC LEADERSHIP 4 (Dec 1995/Jan 1996).

197. See Thomas R. Guskey & Kent D. Peterson, *The Road to Classroom Change*, 53 EDUC LEADERSHIP 10 (Dec. 1995/Jan. 1996).

198. Arthur J. Ellis, *Charter Schools Redefining Future of Public Education*, ROCKY MTN NEWS, June 9, 1994, at 50A.

199. See COMER, *supra* note 92, at 47-54.

200. Angela Smith describes choice advocates as falling within three categories: those interested in educational reform; those who advocate plans to advance social policy, usually racial balance and equality of education opportunity; and those who recognize that broader choice implicitly recognizes the wide ranges of interest and needs among those who otherwise comprise a heterogeneous population. See Smith, *supra* note 41, at 256-57.

students, rather than alone or with others in a teachers' lounge, they are free to do so, often without the burden of a union contract which might forbid that activity.²⁰¹ One study hypothesizes that teachers' unions have influenced school budgets, hiring matters, and educational programs in a manner that standardizes the workplace, so that resources are reallocated from programs for the disadvantaged and gifted into more traditional teaching areas.²⁰² It is difficult to achieve reform under these circumstances; hence, along with the dramatic increase in school reform initiatives,²⁰³ politicians and teachers' unions have increasingly come under attack.

The underlying assumption driving the charter movement is that we achieve more successful schools only by utilizing the knowledge of all stakeholders, including parents, teachers, business and community leaders, to design and operate them through shared governance.²⁰⁴ The most controversial plans effectively remove local boards of education as the governing authority over these schools.²⁰⁵ Under charter legislation, school funding is tied to enrollment.²⁰⁶ Charter developers provide a detailed plan

201. See NATIONAL SURVEY, *supra* note 43, at IV (noting that only one-half of states enacting charter laws discuss collective bargaining in their legislation). Many teachers unions oppose charter schools, as well as other choice programs:

The loudest critics of choice are the teachers unions and school district administrators, who together with school committees and university education departments comprise the core of the education establishment. The most obvious reason for their resistance to actually implementing parental choice is that they have a vested interest in the status quo. Public school systems have a virtual monopoly on elementary and secondary education in this country, and like all monopolists they want to protect their franchise.

Peyser, *supra* note 1, at 622.

202. See Paul W. Grimes & Charles A. Register, *Teachers Union and Black Students' Scores on College Entrance Exams*, 30 INDUS. REL. 492, 493 (1991).

203. See Jonathan B. Cleveland, *School Choice: American Elementary and Secondary Education Enter the "Adapt or Die" Environment of a Competitive Marketplace*, 29 J. MARSHALL L. REV. 75, 95 (1995) (stating that "[s]chool reform re-emerged during the 1980s as an issue demanding national attention"); Michael Heise, *Goals 2000: Educate America Act: The Federalization and Legalization of Educational Policy*, 63 FORDHAM L. REV. 345, 363 (1994) (describing "dramatic increase in state educational reform initiatives" in 1980s). Further, Peyser has noted that choice offers the opportunity to

help liberate education from the clutches of politics by shifting power to parents and individual schools at the expense of school committees and local school departments. In so doing, schools will be able to establish curricula that develop character and a moral sense, without having to compromise with every disgruntled parent and fearful politician. Rather than take their case to the school committee, parents who do not like the values of a particular school will be able to leave for another school more to their liking.

Peyser, *supra* note 1, at 624-25.

204. See Introduction to Materials Presented at Charter School Developers Conference, Columbia University Teachers College, Jan. 16-18, 1997, at 21 (on file with the *Yale Law Journal*).

205. Legislation differs from state to state on the issue of autonomy. In some states, the local school board has some control over granting charters and may be the final or at least negotiating authority for the charter school budget. This is generally thought to be a prescription for disaster. School boards who have long been in charge of public education have a conflict of interest that is difficult to ignore. Research demonstrates that "the needs of teachers and principals for control over their jobs most often take precedence over the needs of individual children and their families, [thus resource allocation has] more to do with the equitability of adult working conditions than with the production of responsive learning environments for children." SCHEERENS, *supra* note 158, at 17 (internal quotation marks omitted).

206. See, e.g., Conn. Pub. Act 96-214 §§ 5(b)-(c), 1996 Conn. Legis. Serv. 660, 663 (West) (amended by Conn. Pub. Act 96-244 §§ 56-57, 1996 Conn. Legis. Serv. 787, 817-18 (West)). One Michigan Court

for opening a school, as well as methods of self-assessment.²⁰⁷ The charter application must describe with specificity the school's mission and vision, the range of community support for the school, and the relationship between its curriculum and instructional program to improved educational outcomes.²⁰⁸ Admission is conducted by lottery. As a public institution, charter schools must operate in accordance with the law, using nondiscriminatory admissions policies particularly with respect to students with special educational needs and those learning English as a second language.²⁰⁹

Black critics of charter schools view them largely as quick fix, reform on-the-cheap measures that ignore the urgent needs of urban schools where, they argue, the majority of black children will continue their enrollment after "charter school mania" has died down.²¹⁰ It is true that unless a sufficient number of charters are granted to individuals with truly innovative designs and pressing concern for the needs of black children,²¹¹ the schools may well only benefit a handful of blacks and quite a few whites under the guise of education reform.

Charter schools are unique among public choice initiatives because their continued existence is tied to their performance.²¹² Charter schools that fail

struck down as unconstitutional the state's original charter school legislation, holding that the Michigan State Board of Education had violated a ban on public funding of private schools. See Peter J. Perla, *The Colorado Charter Schools Act and the Potential for Unconstitutional Applications Under Article IX, Section 15 of the State Constitution*, 67 U. COLO. L. REV. 171, 172 (1996) (noting that subsequent legislation decreased charter school autonomy by subjecting them to greater regulation)

207. See CHARTER SURVEY, *supra* note 188, at 1.

208. See Charter School Application Form, *supra* note 195, at 12-18, see also NATIONAL SURVEY, *supra* note 43, at III-2, III-3.

209. See CHARTER SURVEY, *supra* note 188, at 1, see also NATIONAL SURVEY, *supra* note 43, at V-1-V-3.

210. See generally John E. Cawthorne, *Charter Schools and School Vouchers: A Measured Approach* (1997) (unpublished manuscript, on file with the *Yale Law Journal*) Cawthorne is the Vice President for Education at the National Urban League. He notes the following problems with Charter schools: They serve only a small number of students, they do not always serve the needs of the parents and community, and some schools are rumored to discourage applications from children with special needs. See *id.*

Similarly, teachers' union officials predict that school choice of the nature envisioned under the charter school movement will ultimately drain public schools of talented students and staff and force them to educate only the kids that no one else wants. See Abramo Ottolenghi, *School Choice: Parental Empowerment, or Sabotage of Public Schools?*, COLUMBUS DISPATCH, Sept. 14, 1994, at 9A. School districts will be left to fight for funds to run costly special needs programs for learning disabled, physically challenged, and emotionally disturbed children. See *id.* However, there is nothing to preclude the establishment of school choice programs that benefit only a certain class of children. For example, plaintiffs in a class action lawsuit asked the defending school district to make private tuition vouchers available solely to black children who are not receiving the desegregated education to which they are entitled. See Beck, *supra* note 32, at 1031 (citing *Rivarde v. Missouri*, 930 F.2d 641 (8th Cir. 1991)). Likewise, one grant program was designed to address the "severe social and economic problems that often follow adolescent pregnancies." William D. Anderson, Jr., Note, *Religious Groups in the Educational Marketplace: Applying the Establishment Clause to School Privatization Programs*, 82 GEO. L.J. 1869, 1877 (1994).

211. See, e.g., Leviton & Joseph, *supra* note 10, at 1142 (describing failure to implement programs that work).

212. See CHARTER SURVEY, *supra* note 188, at 1; NATIONAL SURVEY, *supra* note 43, at III-2-III-14 (describing various charter statutes that condition renewal of charter on reapplication, and provide for denial of renewal for failure to fulfill required conditions, failure to meet educational objectives, failure to observe sound fiscal practices, violations of law, or other good cause)

to meet the goals outlined in their mission statements will not be renewed after the initial charter term. Beyond issues of performance and fiscal management, charter school developers will also face the challenge of dealing with questions surrounding actual or perceived racial bias, but they must resolve such controversies in ways that insure fair treatment of students and convene governing boards that insure equal access to a representative body of parents, or jeopardize their continued existence. If some magnet and suburban schools with relatively small numbers of black students have not been held accountable for their actual or tacit consent to hostile or indifferent treatment of black students and exclusionary practices that shut black parents out of school policymaking positions, then charters provide the potential for change.²¹³ Charter schools represent a choice program that opens the education market to new entrants and launches schools with "coherent missions, curricula, and pedagogies, and [where] both staff and parents would gravitate to the schools that they believe are right for them."²¹⁴

V. CONCLUSION

One proponent argues that the very nature of school choice has significant independent value apart from academic achievement or other goals articulated by state legislatures. The promises of school choice are not purely or even significantly academic:

Choice provides a sense of ownership to the teachers, parents, and students, thereby restoring morale and renewing commitment and creativity to the educational process. Student aspirations to graduate increase, as do parent and student satisfaction levels with the chosen school. Thus school choice may effectively establish and maintain beneficial school communities and cultures, thereby contributing indirectly to students' academic and personal growth.²¹⁵

As an African-American parent who has sent one daughter to predominantly white schools most of her life, I know that we have indeed paid the price that Dr. Wilkinson so candidly described. The single most important thing that the movement toward school choice demonstrates is that constitutional declarations have little meaning in the lives of children when their parents are precluded from active participation in the design and implementation of school programs. No doubt many of the parents involved in establishing the all-black male academies understood that their efforts would benefit children who were not their own. Many educators welcome and achieve

213. See *supra* notes 188-93 and accompanying text.

214. WILSON, *supra* note 39, at 3.

215. Kevin Banasik, Book Review, 31 HARV. J. LEGIS. 519, 523 (1993) (reviewing COOKSON, *supra* note 10) (summarizing Cookson's argument).

success with students whose parents are unwilling or unable to take part in school programs.²¹⁶

We are all entitled to greater and varied involvement in the educational programs of our children. Moreover, this involvement will benefit our children, whose performance, academic achievement, and social development will all dramatically improve. As one commentator has noted: "Studies have repeatedly shown that effective schools share the characteristics of participant ownership, freedom from external constraints, and a strong and distinctive culture."²¹⁷

Schools that effectively educate African-American children can be opened and run by those with the experience and the desire to maintain and preserve a school culture and community morale in which black children know firsthand that they can become valedictorians, top scorers on standardized tests, class presidents, and editors of student newspapers. They can be an effective arm of communities in transition as black America faces a twenty-first century that looks all too similar to the nineteenth.

216. See Leviton & Joseph, *supra* note 10, at 1139–41

217. WILSON, *supra* note 39, at 65.

