

THE NEW WHITE FLIGHT

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ABSTRACT

White charter school enclaves—defined as charter schools located in school districts that are thirty percent or less white, but that enroll a student body that is fifty percent or greater white— are emerging across the country. The emergence of white charter school enclaves is the result of a sobering and ugly truth: when given a choice, white parents as a collective tend to choose racially segregated, predominately white schools. Empirical research supports this claim. Empirical research also demonstrates that white parents as a collective will make that choice even when presented with the option of a more racially diverse school that is of good academic quality.

Despite the connection between collective white parental choice and school segregation, greater choice continues to be injected into the school assignment process. School choice assignment policies, particularly charter schools, are proliferating at a substantial rate. As a result, parental choice rather than systemic design is creating new patterns of racial segregation and inequality in public schools. Yet the Supreme Court’s school desegregation jurisprudence insulates racial segregation in schools ostensibly caused by parental choice rather than systemic design from regulation. Consequently, the new patterns of racial segregation in public schools caused by collective white parental choice largely escapes regulation by courts.

This article argues that the time has come to reconsider the legal and normative viability of regulating racial segregation in public

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schools caused by collective white parental choice. The article makes two important contributions to the legal literature on school desegregation. First, using white charter school enclaves as an example, it documents the ways in which school choice policies are being used to allow whites as a collective to satisfy their preference for segregated predominately white schools. Second, the article sets forth both constitutional and normative arguments for regulating the private choices that result in stark racial segregation patterns in public schools.

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INTRODUCTION

Public schools today remain deeply segregated by race.¹ In a 2017 interview, New York Times Magazine author Nikkole Hannah Jones provided a sobering but prescient analysis of why modern school segregation persists: white parents want it that way.² Jones's analysis challenges conventional explanations for the persistence of school segregation. The dominant narrative is that school segregation is an unfortunate but inevitable byproduct of residential segregation. Because students are typically assigned to attend a school near the neighborhood in which they live, the narrative suggests that patterns of residential racial segregation also exist in public schools.³ Courts reinforce this narrative by emphasizing the link between residential segregation and school segregation in cases challenging racial segregation in schools.⁴ As such, most scholars theorize that addressing residential segregation, particularly severing the ties between residence and school assignment, will go a long way towards ameliorating modern day school segregation.⁵

1. See, e.g., U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-345, K-12 EDUCATION: BETTER USE OF INFORMATION COULD HELP AGENCIES IDENTIFY DISPARITIES AND ADDRESS RACIAL DISCRIMINATION [] (2016) (finding that "[f]rom school years 2000-01 to 2013-14 . . . the percentage of all K-12 public schools that had high percentages of poor and Black or Hispanic students grew from 9 to 16 percent . . ."); GARY ORFIELD & CHUNGMEI LEE, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 24 (UCLA CIVIL RIGHTS PROJECT 2007) (finding that white students were the most racially isolated group of students and that "[t]he average white student attends schools where 77 percent of the student enrollment is white . . .").

2. See Sean Illing, *Schools are Segregated Because Whites Want them That Way*, VOX, (Oct. 26, 2017), <https://www.vox.com/identities/2017/10/26/16533878/race-education-segregation-nikkole-hannah-jones> ("What people also don't want to acknowledge is that schools are segregated because white people want them that way. It's not simply a matter of zip codes or housing segregation or class; it's because most white Americans do not wish to enroll their children in schools with large numbers of Black kids. And it doesn't matter if they live in the North or the South, or if they're liberal or conservative.").

3. See, e.g., Erika K. Wilson, *Toward a Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416, 1418-24 (2014) (discussing the ways in which "current patterns of segregation and inequality in school districts today are the result of private forces that shape residential location choices").

4. See, e.g., *Hart v. Cmty. Sch. Bd. of Brooklyn*, 383 F. Supp. 699, 755 (E.D.N.Y. 1974) ("We cannot ignore the fact that 'the system of geographic school attendance, imposed upon segregated housing patterns, provides the broad base for racial isolation in Northern Schools.'"); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 202 (1973) ("The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.").

5. See generally Erica Frankenberg, *The Role of Residential Segregation in Contemporary School Segregation*, 45 EDUC. & URB. SOC'Y 548 (2013) (analyzing the reciprocal relationship between housing and schooling segregation patterns); Gary Orfield, *Housing and the Justification of School Segregation*, 143 PENN. LAW REV. 1397, 1398 (1995) (noting that

Although residential segregation is undoubtedly a significant part of the reason schools are segregated, framing the issue as an inevitable byproduct of housing segregation obscures the very important role played by white parental choice. Failure to accurately frame the narrative leads to remedies that insufficiently address the problem. Thus, Jones's assertion that white parental choice is the root cause of modern school segregation deserves critical analysis.

To that end, since *Brown v. Board of Education*, whites as a collective have assiduously avoided having their children attend desegregated schools.⁶ In the aftermath of *Brown*, school choice policies that allowed parents to choose rather than be assigned to a school were one of the preeminent tools of white resistance to school desegregation.⁷ The passage of time has not changed this pattern. Empirical research reveals that white parents consistently choose schools based on race, preferring schools that have fewer students of color and a majority of white students.⁸ Research shows that the preference exists even when school quality is controlled for, meaning that whites tend to choose predominately white schools even when presented with the choice of a more integrated school that is of good academic quality.⁹ Recent patterns of white flight from high quality public schools with large Asian-American student bodies underscores

"[s]egregated urban school systems are built on a base of housing segregation."'). *But cf.* Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. CHI. L. REV. 1329, 1396 (2016) (noting that residential segregation has declined but that school segregation has not followed a similar trajectory because "residential segregation is just one of the drivers of school segregation").

6. *See generally* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983) (describing the many forms of white resistance to *Brown* and the judicial remedies used to try and combat that resistance).

7. *See* Richard W. Brown, *Freedom of Choice in the South*, 28 LA. L. REV. 455, 456–459 (describing the ways in which freedom of choice plans were used by schools throughout the South to avoid desegregating schools) (1968); *Green v. Cty. Sch. Bd. of New Kent Cty.*, 391 U.S. 430, 441–42 (1968) (ruling unconstitutional a freedom of choice plan that allowed students to choose whatever school they wanted to attend and that whites used to avoid desegregating schools).

8. *See, e.g.,* Susan L. DeJarnatt, *School Choice and the (Ir)rational Parent*, 15 GEO. J. ON POVERTY L. & POL'Y 1, 20–23 (2008) (summarizing the results of empirical qualitative and quantitative studies on the impact of race on school selection in a public school choice program and noting that "[i]nterviewees acknowledged that they rejected schools based on their racial composition or location in Black neighborhoods").

9. *See, e.g.,* Chase M. Billingham & Matthew O. Hunt, *School Racial Composition and Parental Choice: New Evidence on the Preferences of White Parents in the United States*, 89 SOC. EDUC. 99, 99–113 (2016) (finding that "[t]he proportion of Black students in a hypothetical school had a consistent and significant inverse association with the likelihood of white parents enrolling their children in that school net of the effects of the included racial proxy measures," such as academic quality).

the notion that white flight might be driven by race rather than school quality.¹⁰

The collective desire of white parents to avoid schools with significant numbers of students of color is so well entrenched that recruiting white students, or preventing white flight, is a centerpiece of most modern school desegregation efforts.¹¹ Making matters worse, the Supreme Court's school desegregation jurisprudence insulates from judicial scrutiny segregation in public schools that is deemed to be the result of private individual choice.¹² Consequently, school segregation and inequality that is attributed to white parental choice is scarcely regulated by courts.¹³ However, the Supreme Court has suggested that such choice may be regulated indirectly through non-race conscious but race cognizant policies.¹⁴

Despite the connection between white parental choice and school segregation, greater choice continues to be interjected into the school assignment process.¹⁵ In many states, school choice assignment

10. See, e.g., Anjali Enjeti, *Ghosts of White People Past: Witnessing White Flight from an Asian Ethnoburb*, PAC. STANDARD MAG. (Aug. 25, 2016), <https://psmag.com/news/ghosts-of-white-people-past-witnessing-white-flight-from-an-asian-ethnoburb> (describing patterns of white flight from high achieving schools with large numbers of Asian-American students); Suein Hwang, *The New White Flight*, WALL ST. J., Nov. 19, 2005, at A1 <https://www.wsj.com/articles/SB113236377590902105> (chronicling the flight of white parents from certain highly regarded schools in California because the schools were considered "too Asian" with some parents expressing concern about their child being the only white student in the class).

11. See Amy Stuart Wells et al., *The Space Between School Desegregation Court Orders and Outcomes: The Struggle to Challenge White Privilege*, 90 VA. L. REV. 1721, 1730–33 (2004) (chronicling efforts to desegregate public schools and noting that in cities across the country "Black communities lost neighborhood schools in the name of appeasing white parents who would otherwise flee the public system"); Erica Frankenberg & Chinh Q. Le, *The Post-Parents Involved Challenge: Confronting Extralegal Obstacles to Integration*, 69 OHIO ST. L.J. 1015, 1049–56 (2008) (describing the origins of magnet schools and how effective they have been in desegregating public schools).

12. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 121 (1995) ("The Constitution does not prevent individuals from choosing to live together, to work together, or to send their children to school together, so long as the State does not interfere with their choices on the basis of race."); *Freeman v. Pitts*, 503 U.S. 467, 495 (1992) ("Residential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies.")

13. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) ("School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.").

14. See *id.*

15. See, e.g., Erica Frankenberg & Genevieve Siegel-Hawley, *Choosing Diversity: School Choice and Racial Integration in the Age of Obama*, 6 STAN. J. C.R. & C.L. 219, 224–56 (2010)

policies are proliferating substantially.¹⁶ Although the term school-choice encompasses a broad array of school assignment policies,¹⁷ school choice policies that allow parents greater choice in the type of *public* school they will attend, particularly charter schools, are gaining the most traction.¹⁸

Charter schools are schools that are publicly funded, privately run, and subject to fewer state regulations.¹⁹ The proliferation of charter schools is often posited as a potential solution for segregated and unequal schools.²⁰ Yet given the proclivity of whites as a collective to choose predominately white schools, interjecting more choice into school assignment policies raises questions about the normative value of increased school choice, and in some instances the legality. Indeed, in some parts of the country that are embracing school choice, white charter school enclaves are forming. This article defines white charter school enclaves to mean charter schools that are greater than fifty percent white, located in school districts that are less than thirty

(documenting the proliferation of school choice, particularly charter schools, because of federal funding incentives); Nikkole Hannah Jones, *Have We Lost Sight of the Promise of Public Schools?*, N.Y. TIMES MAGAZINE (Feb. 21, 2017), <https://www.nytimes.com/2017/02/21/magazine/have-we-lost-sight-of-the-promise-of-public-schools.html> (noting the rise of parental pressure and school acquiescence to calls for school choice).

16. See, e.g., T. Keung Hui, *School-choice Supporters Celebrate Gains in NC, but Press for More*, CHARLOTTE NEWS & OBSERVER (Jan. 24, 2018), <https://www.newsobserver.com/news/local/education/article196211384.html> (describing the ways in which school choice in North Carolina has expanded and enrollment in traditional public schools has declined); David Pickens, *Public School Choice is Harder Than It Looks*, WASH. POST (Jan. 5, 2018), https://www.washingtonpost.com/opinions/public-school-choice-is-harder-than-it-looks/2018/01/03/fe791068-df91-11e7-89e8-edec16379010_story.html?utm_term=.29c5fe5d3b5b (describing the challenges of implementing public school choice, but noting that in Washington, D.C., “[s]chool choice is no longer a niche phenomenon. . . . More than three-quarters of the city’s students are enrolled in a school outside their neighborhood”).

17. School choice refers to a range of school assignment policies, including charter, magnet, or even private schools via educational vouchers. The key tenet of school choice policies is that it untethers school assignment from residence such that parents and students have a choice in where they attend school. See generally James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2063–85 (2002), for a discussion of the various types of school choice policies.

18. See Lauren Camera, *Charter School Enrollment on The Rise*, U.S. NEWS & WORLD REPORT, Nov. 10, 2015, <https://www.usnews.com/news/blogs/data-mine/2015/11/10/charter-schools-continue-to-flourish>, (reporting that over the last five years charter school enrollment has grown by sixty-two percent); T. Keung Hui, *Popularity of Charter Schools is Causing this NC School District to Lose Students*, NEWS & OBSERVER, January 7, 2019, <https://www.newsobserver.com/news/politics-government/article223935160.html> (noting that charter school enrollment in Durham, NC public schools doubled since 2014).

19. See Preston C. Green III et al., *Having It Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools*, 63 EMORY L.J. 303 (2013) for a more in-depth discussion of the mechanics of charter schools.

20. See *infra* Section I.B.

percent white.²¹ Nationwide there are currently “115 charters at which the percentage of white students is *at least 20 points higher* than at any of the traditional public schools in the districts where they are located.”²²

Much of the scholarship in the legal literature examining school segregation focuses on the role played by structural devices.²³ Less attention is paid to the role that parental choice and the lack of regulation surrounding parental choice plays. Although a handful of scholarship has addressed the role that parental choice plays in patterns of school segregation, much of that scholarship focuses on the limits of choice for parents of color that causes school segregation rather than the way white parents exercise choice.²⁴ This article fills that void in the legal literature. It makes two important contributions.

First, it documents the way in which school choice is being used as a vehicle to allow whites as a collective to satisfy their aggregate preference for predominately white schools. It provides concrete examples of school choice policies that are leading to the formation of white charter school enclaves. Second, it makes both constitutional and normative arguments for regulating parental choice that leads to the creation of white charter school enclaves. The article proceeds as follows:

Part I provides an overview of the rise of school choice policies. It historicizes school choice by analyzing the racialized roots of school choice. It makes the claim that inherit in any right to choose is a right to exclude, and that within the context of school choice, that right to exclude is often delineated by race. Part II demonstrates that white students are the most racially segregated and isolated group of

21. See Emmanuel Felton, *Nearly 750 Charter Schools are Whiter than the Nearby School Districts*, THE HECHINGER REPORT (June 17, 2018), <https://hechingerreport.org/nearly-750-charter-schools-are-whiter-than-the-nearby-district-schools/>.

22. *Id.*

23. I use the term structural devices to mean system-related issues, such as how education is provided or regulated. See, e.g., Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48 WAKE FOREST L. REV. 287, 288–93 (2013) (examining the role that education federalism and the commitment to local control of public education plays in school segregation and inequality). See generally Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157 (2000) (identifying litigant and judicial neglect of active school desegregation cases as a significant contributor to increased school segregation and equality).

24. See, e.g., Osamudia R. James, *Opt-out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1085–88 (2014); Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 843–48 (2011); John A. Powell, *The Tensions Between Integration and School Reform*, 28 HASTINGS CONST. L.Q. 655, 671–69 (2001).

students. It argues that whites as a collective consistently choose segregated schools. It provides empirical support for that claim and then introduces theories that potentially explain why whites choose segregated schools.

Part III analyzes the ways in which school choice through charter proliferation is serving as a conduit for whites to exercise white flight without residential mobility. It specifically outlines and traces the rise of predominately white charter school enclaves located within racially diverse school districts. Part IV examines constitutional and normative rationales for regulating the aggregate white choice that leads to the creation of white charter school enclaves. Part V concludes.

I. THE PROLIFERATION OF SCHOOL CHOICE ASSIGNMENT POLICIES

School choice assignment policies are currently used as the primary method of improving public education. To understand how white collective choice influences the outcomes produced by choice policies, it is important to understand both the history of school choice policies and the underlying ideologies behind using school choice as a means of public education reform. This section historicizes school choice by examining the racialized roots of school choice and examining the underlying rationales for expanding school choice. It concludes by demonstrating the ways in which the right to choose implicitly includes a right to exclude and how that right to exclude is shaped by race.

A. *The Racialized Roots of School Choice Policies*

School choice has historically been used as a tool of both liberation and subordination for students of color, particularly Black²⁵

25. When using the term “Black,” I use the upper-case “B” to reflect the view, articulated by other scholars, that Black people are a specific cultural group and that the term “Black” is worthy of being capitalized as a proper noun. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) (“When using ‘Black,’ I shall use an upper-case ‘B’ to reflect my view that Blacks, like Asians, Latinos, and other ‘minorities,’ constitute a specific cultural group and, as such, require denotation as a proper noun.”); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1710 n.3 (1993) (“I use the term ‘Black’ throughout the paper for the reasons articulated by Professor Kimberlé Crenshaw. I share her view that ‘Blacks, like Asians, Latinos, and other ‘minorities,’ constitute a specific cultural group and, as such, require denotation as a proper noun.’”) (citing Crenshaw, *supra*); Catharine MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. WOMEN IN CULTURE & SOC’Y 515, 516 (suggesting that the letter “B” in Black should be capitalized because Black is

students.²⁶ Understanding the historical connection between race and school choice is critical to understanding how choice is being deployed by white parents today in ways that reinforce segregation and inequality in public schools. As such, this Part traces the early history of school choice, noting the ways in which race intersected with race during three different waves of the school choice policies: (i) school choice to resist school desegregation; (ii) school choice to desegregate school systems by retaining and recruiting white students; and (iii) school choice to improve schooling options for low-income students of color. Each of these waves is discussed in turn.

The first wave of school choice was rooted in southern white resistance to *Brown v. Board of Education*.²⁷ The concept of school choice for public schools was first popularized by economist Milton Friedman.²⁸ Friedman set forth a vision for reorganizing public education that involved having the government fund public education but not administer it.²⁹ Using a market-based consumer-sovereignty framework, Friedman argued that the government should give consumer-parents a set sum of money that they could then use to select a public or private school for their child to attend.³⁰ Introducing the element of consumer-parental choice into the school selection process would, according to Friedman, spur competition amongst schools that would improve the quality of all schools.³¹ Friedman's consumer-sovereignty model primarily contemplated parents

not "merely a color of skin pigmentation, but . . . a heritage, an experience, a culture and personal identity . . .").

26. See James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 GEO. L.J. 1287 (2005), for a comprehensive overview of the history of school choice and the ways in which it has been used as a force for Black liberation and Black subordination.

27. It is important to note that choice was also used by school systems in the North to evade school desegregation in the wake of the great Black migration from southern to northern states. While many northern states had statutes outlawing school segregation, such statutes were at times not enforced and choice was used in that context as well to evade school desegregation. See DAVISON M. DOUGLASS, *JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865-1954*, at 146 (2005) (describing a school assignment scheme in New Rochelle, New York in which white parents were given the choice to transfer to a predominately white school, while Black children were denied that choice).

28. See Milton Friedman, *THE ROLE OF GOVERNMENT IN EDUCATION: ECONOMICS AND THE PUBLIC INTEREST* 3 (Robert A. Solo ed., 1955).

29. See *id.* at 12.

30. *Id.* at 14.

31. See *id.* ("The result of these measures would be a sizable reduction in the direct activities of government, yet a great widening in the educational opportunities open to our children. They would bring a healthy increase in the variety of educational institutions available and in competition among them.").

exercising choice to send their children to private schools using government vouchers, but it continues to be used today as a justification for public school choice by those who favor free-market-based public school reform.³²

Importantly, Friedman's scholarly intervention on school choice must be contextualized within the socio-political landscape post-*Brown*. Friedman's work was published in 1955, the same year that the Supreme Court declared in *Brown II* that schools must be desegregated with "all deliberate speed."³³ Friedman acknowledged but denied criticisms that his ideas regarding school choice were written in direct response to the Court's mandate in *Brown I and II* to desegregate.³⁴ Nevertheless, he also conceded that the issue of school segregation highlighted tensions between individual freedoms and individual rights, most notably the right to freedom of association and the right to equal protection under the law.³⁵ He further acknowledged that although he deplored racial segregation, he would favor school segregation over forced school desegregation because of the importance that he placed on the individual's freedom to associate.³⁶ He proclaimed that the current system in which the government administered public schools presented the binary of forced segregation or forced desegregation.³⁷ He suggested that his proposal of having the government fund but not administer schools, and allowing parents to choose where their children would go to school, presented a more desirable "third alternative."³⁸

White Southerners looking to avoid desegregation wholly embraced Friedman's third alternative as blueprint for reorganizing public education in a way that favored choice. Indeed, in many ways Friedman's articulation of choice as a third alternative to forced segregation or forced desegregation laid the groundwork for Southern

32. See *infra* Section I.B.

33. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

34. Friedman, *supra* note 28, at 5–6 n.2.

35. *Id.*

36. See *id.* ("[T]he relevant test of the belief in individual freedom is the willingness to oppose state intervention even when it is designed to prevent individual activity of a kind one thoroughly dislikes.").

37. See *id.* ("[S]o long as the schools are publicly operated, the only choice is between forced nonsegregation and forced segregation; and if I must choose between these evils, I would choose the former as the lesser.").

38. See *id.* (arguing that the proposed school choice plan that results in the government funding but not administering public schools "is not therefore inconsistent with forced segregation or forced nonsegregation It makes available a third alternative").

resistance to *Brown*. For example, in line with Friedman's proposal to have the government finance but not administer public education, some districts closed public schools and provided direct or indirect assistance for white students to attend private schools.³⁹ The lower federal courts and eventually the Supreme Court found these practices unconstitutional.⁴⁰ Schools in the South then turned to freedom of choice plans wherein students could voluntarily choose whatever school they wanted to attend. Given the history of Black subordination, oppression, and intimidation in the South, Black students rarely elected to attend majority white schools and white students never saw any reason to leave majority white schools.⁴¹ The Supreme Court eventually found that such freedom of choice plans were also unconstitutional.⁴² Various iterations of assignment plans that put the onus on students and parents to choose their own schools as a means of desegregating were proposed, but found unconstitutional by lower courts as well.⁴³

Although choice was initially used to resist school desegregation, the tables eventually turned. In the second wave of school choice, choice was used to diversify schools, namely to retain white students. In the aftermath of *Brown*, rampant white flight from urban areas occurred as a method of resisting school desegregation.⁴⁴ The

39. See generally Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436 (1973) (describing the ways in which various school districts in the South closed public schools and administered tuition grants and other forms of aid that allowed white students to attend private schools).

40. See *Evers v. Jackson Mun. Separate Sch. Dist.*, 328 F.2d 408 (1964) (finding unconstitutional a school choice plan); *Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218 (1964) (finding that closing the public schools and issuing grants that white students used to attend segregated white schools was unconstitutional).

41. See, e.g., *Green v. Cty. Sch. Bd. of New Kent Cty.*, 391 U.S. 430, 441 (1968) ("The New Kent School Board's 'freedom-of-choice' plan cannot be accepted as a sufficient step to 'effectuate a transition' to a unitary system. In three years of operation not a single white child has chosen to attend Watkins school and although 115 Negro children enrolled in New Kent school in 1967 (up from 35 in 1965 and 111 in 1966) 85% of the Negro children in the system still attend the all-Negro Watkins school. In other words, the school system remains a dual system.").

42. See *id.* at 441–42 (holding that the school board was required to "formulate a new plan . . . and fashion steps which promise realistically to convert promptly to a system without a 'white school' and a 'Negro' school, but just schools.").

43. See, e.g., *Monroe v. Bd. of Comm'rs of City of Jackson*, 427 F.2d 1005, 1006 (6th Cir. 1970) (finding unconstitutional a school assignment plan that assigned students to schools based on their race but also included a "free transfer provision permitting any pupil to transfer out of the school in his attendance zone into a school of his choice.").

44. See Christine H. Rossell, *Applied Social Science Research: What Does It Say About the Effectiveness of Desegregation Plans?*, 12 J. LEGAL STUD. 69, 80–94 (1983) (examining the relationship between school desegregation and white flight). See generally JAMES S. COLEMAN

Supreme Court's 1974 ruling in *Milliken v. Bradley* made matters worse by setting forth a very stringent legal standard that made it nearly impossible for plaintiffs to put forward the evidence necessary to obtain an inter-district desegregation order.⁴⁵ Indeed, the Court's decision in *Milliken* effectively immunized suburban districts from court ordered desegregation, arguably incentivizing white flight to the suburbs.⁴⁶ As a result, urban areas were populated with predominately people of color and the schools reflected those demographics as well.

After *Milliken*, urban school district policies aimed at attracting white students became a focal point of school desegregation efforts. Such policies included "controlled choice" in which parents could rank the schools of their choice based on their own personal preference and school district officials would consider those preferences when assigning students to schools.⁴⁷ Controlled choice was billed as increasing the likelihood that white students would remain enrolled in relatively diverse school districts.⁴⁸

In addition to controlled choice, magnet schools that offered specialized programs or themes that students could choose to attend, were also used as a tool to desegregate urban schools by attracting white students.⁴⁹ In fact, in school desegregation cases, courts required

ET AL., TRENDS IN SCHOOL SEGREGATION, 1968-73 (The Urban Institute 1975), for a robust discussion of the connection between school desegregation remedies and white flight, and documentation of the decline in white student enrollment in urban cities with large Black populations.

45. *Milliken v. Bradley*, 418 U.S. 717, 744-45 (1974) ("Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district.").

46. See Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N. CAROLINA L. REV. 1597, 1608 (2003) (arguing that *Milliken* had the effect of encouraging white flight because "whites who wish to avoid desegregation can do so by moving to the suburbs").

47. See Michael Alves & Charles Willie, CONTROLLED CHOICE ASSIGNMENTS: A NEW AND MORE EFFECTIVE APPROACH TO SCHOOL DESEGREGATION 5-7, (Education Alliance Press 1996) (defining "controlled choice" as a school choice system that "provides education opportunities for individuals by permitting each student to choose a number of schools that he or she would like to attend and to rank-order these by personal preference [r]egardless of one's residential neighborhood, race, ethnicity, socioeconomic status, gender, aptitude, or other attributes").

48. See *id.* at 44 (examining the results of controlled choice in a sample school district and finding that "there [had] been a significant increase in the proportion of school-age children attending the public schools, 'including 32% increase in new white students and a 13% increase in new minority students during a four-year period'").

49. See generally Kimberly C. West, *A Desegregation Tool that Backfired: Magnet School and Classroom Segregation*, 103 YALE L.J. 2567 (1994) (discussing the ways in which magnet

the establishment of magnet schools as a means of encouraging desegregation, particularly encouraging white students to enroll in urban public schools.⁵⁰ Although magnet schools aided in desegregating schools, they also placed a heavy burden on Black students, as schools in Black neighborhoods were closed and converted to magnet schools in hopes of inducing white students to attend.⁵¹ Thus, Black students bore the burdens of increased choice but reaped few benefits.

Finally, in the third and on-going wave of school choice, choice is being used ostensibly to improve the schooling options for low-income students of color. Choice for the purposes of improving the schooling options of students of color is rooted in the decline of court-mandated school desegregation. In a series of cases decided in the 1990s, the Supreme Court emphasized that much of the segregation and inequality in schools was the result of private choices of individuals regarding where they wanted to live, which in turn led to segregated schools given the connection between residence and school assignment.⁵² The Supreme Court even found unconstitutional a district court order that sought to increase the desegregative attractiveness of a predominately Black urban school district in hopes of attracting white students. The Court reasoned in part that the current segregation was attributable to private decisions about residential location that were beyond the remedial purview of a federal court.⁵³

By emphasizing the role of individual choice rather than state action in creating segregated and unequal conditions in public schools,

schools originated to maintain racial integration and diversity in public schools and the ways in which the use of magnet schools for desegregative purposes is failing.)

50. See, e.g., *Liddell v. City of St. Louis*, 567 F. Supp. 1037 (E.D. Mo. 1983) (requiring the establishment of magnet schools as part of the St. Louis school system desegregation plan).

51. See, e.g., *Alves & Willies*, *supra* note 44, at 41 (noting that in the Milwaukee school system “nine times more [B]lacks than whites were transported to and from school for the purpose of achieving racial balance,” due to a 1979 court order.).

52. See *Freeman v. Pitts*, 503 U.S. 467, 495 (1992) (“Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts.”); see also *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 24–50 (1991) (articulating the standard for releasing a school district from federal court supervisions of “whether the vestiges of past discrimination had been eliminated to the extent practicable” and finding that residential segregation that is result of private choices made by individuals is beyond the scope of the articulated standard).

53. See *Missouri v. Jenkins*, 515 U.S. 70, 116 (1995) (“The continuing ‘racial isolation’ of schools after de jure segregation has ended may well reflect voluntary housing choices or other private decisions.”).

the Supreme Court and lower federal courts signaled to many that the judiciary would not be a part of improving schooling options, particularly for students of color.⁵⁴ As a result, parents of color increasingly looked to school choice as the most viable option for improving the educational opportunities available for their children.⁵⁵ Indeed, school choice became a rallying cry for parents of color frustrated with the failure of the courts to deliver on *Brown*'s implicit promise of equal education for all children.⁵⁶ To be sure, school choice has proliferated over the last ten years, with students of color being the primary users of school choice generally and charter schools specifically in many areas.⁵⁷ As described in the section that follows, the underlying ideologies used to support school choice reform remain contoured by race generally and the history of racial exclusion in public education specifically.

B. *Ideologies Underlying School Choice Reform*

Parents often make decisions about where to live based on the quality of the schools in an area.⁵⁸ They typically do so because geography and bureaucracy limit their ability to otherwise choose a

54. See, e.g., Gary Orfield, *Housing and the Justification of School Segregation*, 143 U. Pa. L. Rev. 1397, 1404 (1995) (“[Because courts] see housing segregation as unrelated to school desegregation and essentially private, they are likely to conclude that school officials may accept a ‘natural’ spread of residential segregation occurring through private choice and not public action, and therefore to accept the spread of school segregation as natural.”); Wendy R. Brown, *The Convergence of Neutrality and Choice: The Limits of the State’s Affirmative Duty to Provide Equal Educational Opportunity*, 60 Tenn. L. Rev. 63, 69–79 (1992) (describing federal court and supreme court cases that used individual choice “to justify the continued existence of inequality between Blacks and whites”).

55. See Erika K. Wilson, *Blurred Lines: Public School Reforms and the Privatization of Public Education*, 51 WASH. U. J.L. & POL’Y 189, 208–21 (2016) (chronicling the embrace of school choice as an effective means of public school reform by low-income parents of color).

56. See, e.g., Karla Scoon Reid, *Minority Parents Quietly Embrace School Choice*, EDUC. WEEK (Dec. 5, 2001), <http://www.edweek.org/ew/articles/2001/12/05/14introminority.h21.html> (“Many minority parents are impatient at what they see as the plodding pace of school reform; they’re concerned that their own children won’t benefit from long-term improvements to the current public school system.”).

57. See, e.g., GROVER J. “RUSS” WHITEHURST ET AL., SEGREGATION, RACE AND CHARTER SCHOOLS: WHAT DO WE KNOW? 6 (Center on Children and Families at Brookings 2016) (“[C]harter schools often enroll more Black and poor students than traditional public schools in the same areas, and are more likely to be at one extreme or the other of racial and economic composition than traditional public schools.”); Kelly E. Rapp & Suzanne E. Eckes, *Dispelling the Myth of “White Flight”: An Examination of Minority Enrollment in Charter Schools*, 21 EDUC. POL’Y 615 (2007) (finding the enrollment in charter schools was very diverse with low-income students of color making up the largest segment of charter school students).

58. See generally Jennifer Jellison Holme, *Buying Homes, Buying Schools: School Choice and the Social Construction of School Quality*, 72 HARV. EDUC. REV. 177 (2002).

public school. Put another way, once a family chooses where they want to live, they typically have no input over which public school their child will attend. Instead, their child is assigned to a public school in large part based on attendance zones crafted by school district officials that are tethered to students' addresses.⁵⁹ Thus, in choosing a home, parents are also choosing a public school.⁶⁰ School choice reforms seek to change this paradigm by untethering school assignment from residential location. The justifications for removing school assignment from residential location are rooted in both the free market and equity.

The free market-based rationale for school choice leans heavily on the "third alternative" framework set forth by Milton Friedman. The basic premise of the free market based rationale for increased school choice is that public schools exist within an education market. Within the education market, public schools are akin to a "non-competitive monopoly supported by taxes,"⁶¹ insofar as they do not have to compete for students but are instead assigned students who are required to attend, unless they opt-out by deciding to enroll in a private school or be homeschooled.

The market-based rationale for school choice portends that disrupting the monopolistic characteristics of school assignment will improve the quality of public schools for all students. By allowing parents to choose rather than be assigned to schools, decentralization, competition, and parental (or consumer) sovereignty is purportedly injected into the education market.⁶² As such, market-like outcomes allegedly follow: schools will have to compete for students, the better schools will obtain the most students, while the poor schools will fail and be forced to change the way they operate, or close altogether.⁶³

59. School districts draw boundary lines around certain neighborhoods and allow students within the designated boundary lines to attend certain schools. This is one reason that school segregation often mirrors neighborhood segregation. *See id.*

60. It is worth noting that many parents lack the social and financial capital to have unfettered choice in home location. As such, the privilege of choosing a school while choosing a home has typically been the province of affluent and typically white parents. *See* Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139, 193 (2016), for a critique of the notion that when one chooses a home, they also choose a school.

61. *See* Myron Orfield & Thomas Luce, *Charters, Choice, and the Constitution*, 2014 U. CHI. LEGAL F. 377, 377–80 (2014) (discussing how the acceptance of a market-based ideology led education reformers to embrace "choice and competition . . . as the path to improve American education, particularly for the least fortunate").

62. *See* JOHN CHUBB & TERRY MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 30–35 (Brookings Institution Press 1990).

63. *Id.* at 33 ("[A] basic property of markets that operates on the population of schools as

The proliferation of school choice reforms is undergirded by the free market-based ideology and the hope that it holds promise for improving the quality of American education.⁶⁴

In contrast to the free market-based rationale, the equity-based reform rationale suggests that increased parental choice will improve the school options available for low-income students of color.⁶⁵ Choice will allow them to attend higher performing schools, despite living in a racially segregated low-income neighborhoods.⁶⁶ A normative underpinning of the equity rationale is that low-income families of color should be able to choose which school their children attend, just like more affluent and typically white families.⁶⁷ The equity-based reform rationale also suggests that school choice could be a means of creating integration and true racial diversity in public schools by decoupling residential segregation from school segregation.⁶⁸ Although school choice reform is undergirded by equitable principles, scholars and advocates have also warned about the potential perils of choice—notably the ability of choice to foster segregation as it did in the immediate aftermath of *Brown*.⁶⁹ Yet the warning signs are not being heeded.

Instead, the free- market-based and equity-based ideologies for school choice reform are coalescing in ways that have allowed for broad-based support in some states for school choice reform. The

a whole [is] natural selection. Schools that fail to satisfy a sufficiently large clientele will go out of business Of the schools that survive, those that do a better job of satisfying consumers will be more likely to prosper and proliferate.”).

64. *Id.* at 6–11 (detailing the connection between poor American academic performance and the desire for market-based reform).

65. See Douglass A. Archibald, *School Choice, Magnet Schools, and the Liberation Model: An Empirical Study*, 77 SOC. OF EDUC. 283, 284 (2005) (describing the liberation model of school choice which posits that “school choice will reduce economic segregation among children in public schools by creating access for lower-income families to schools outside their neighborhoods”); JULIAN R. BETTS & TOM LOVELESS, *GETTING CHOICE RIGHT: ENSURING EQUITY AND EFFICIENCY IN EDUCATION POLICY* (Brookings Institution Press 2005).

66. Archibald, *supra* note 65, at 284.

67. *Id.*

68. See, e.g., Genevieve Siegel-Hawley & Eric Frankenberg, *Does Law Influence Charter School Diversity? An Analysis of Federal and State Legislation*, 16 MICH. J. RACE & L. 321, 334–36 (2011) (describing the ways in which school choice reform has been tethered to increasing diversity and integration in public schools); see generally Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791, 795–800 (2005) (arguing that “school choice can and should be used to promote desegregation.”).

69. See Stephen Eisdorfer, *Public School Choice and Racial Integration*, 24 SETON HALL L. REV. 937, 943 (1993) (“In practice, public school choice has the potential to foster or perpetuate racial segregation in the schools in several different ways.”). See also powell, *supra* note 24, at 679.

support comes from conservative neoliberals who believe that the market always does a better job of allocating resources to poor communities of color that are desperately seeking better public school options.⁷⁰ As a result, school choice reform, particularly charter schools, have proliferated substantially over the last thirty years.⁷¹ School choice as a means of reform continues to dominate the school reform landscape, despite recognition by scholars that the market based framework is flawed insofar as it fails to account for how race and racism warp the “education market” for low-income students of color.⁷²

C. *Implicit in the Right to Choose is the Right to Exclude*

As outlined in the previous section, school choice continues to exist within a racialized context. This is the case because, although *Brown I* afforded students the right to access public education on a non-racialized basis⁷³, the exact parameters of that right were ambiguous at best.⁷⁴ The Supreme Court instead left the responsibility of determining what the right should look like to the same local

70. See, e.g., Jon Valant, *Donald Trump, Betsy DeVos, and the Changing Politics of Charter Schools*, BROOKINGS INS. (Feb. 7, 2017), <https://www.brookings.edu/blog/brown-center-chalkboard/2017/02/07/donald-trump-betsy-devos-and-the-changing-politics-of-charter-schools/> (“Early voucher and charter programs were rooted in political alliances between conservatives, motivated by market efficiency and individual liberty, and civil rights groups, motivated by equity and opportunity.”); Tawnell D. Hobbs, *U.S. Putting \$253 Million into Charter School Expansion*, WALL ST. J. (Sept. 28, 2017), <https://www.wsj.com/articles/u-s-putting-253-million-into-charter-school-expansion-1506640733> (describing Secretary of Education Betsy DeVos’s position that charter schools will expand options and make all schools better).

71. See, e.g., REBECCA DAVID & KEVIN HESLA, ESTIMATED PUBLIC CHARTER ENROLLMENT, 2017-2018, at i (NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS 2018) (documenting the increased enrollment in charter schools, finding that “[i]n 2017-18, more than 7,000 charter schools enroll nearly 3.2 million students . . . [and] between 2016-17 and 2017-18, estimated charter school enrollment increased by more than 150,000 students.”).

72. Powell, *supra* note 24, at 671–80; James, *supra* note 21, at 1106–119.

73. See *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 495 (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”).

74. See Harris, *supra* note 25, at 1751 (“In fact, it is unclear what definition of equality was articulated by *Brown I*, and in this ambiguity, the property interest in whiteness continued to reside.”). See also Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407, 1415 (1990) (“Are segregated schools inherently unequal because they make Black children feel ‘inferior’ or because kids who are made to feel inferior do not enjoy the benefits of public education? Must schools be integrated in fact to insure [sic] that the Black children will no longer feel inferior and therefore fulfill educational potential? Even if segregation with the ‘sanction of law’ has a ‘greater’ impact on the minority children, does it not have a similar impact when conditions are still segregated despite the removal of such laws? Unfortunately, these questions are not just rhetorical. They emphasize the ultimate and still unresolved uncertainty unleashed by *Brown*.”).

officials who promulgated segregation.”⁷⁵ This led to local officials throughout the South structuring the right afforded by *Brown* as individual choice, in line with Friedman’s “third alternative.”⁷⁶

Yet Friedman’s articulation of school choice anticipated the right to exclude. Friedman suggested that removing the government from the school assignment process and instead substituting individual parental choice would allow parents to gravitate towards schools that met, among other things, their racial associational preferences.⁷⁷ He noted, “the appropriate activity for those who oppose segregation and racial prejudice is to try and persuade others of their views; and if they succeed, the mixed school will grow at the expense of the non-mixed school.”⁷⁸

Friedman thus applied a free-market analogy suggesting that if there was a market for racially integrated schools, it would emerge. Friedman further opined that by allowing individual parental choice to determine school assignment, and removing government from the equation, whatever occurred could not be said to offend anyone’s individual liberties. In other words, whether individuals chose segregated or non-segregated schools, so be it, so long as their associations were not being coerced by the government.

An obvious corollary that emerges from Friedman’s proposal is that associational choice allows exclusion to occur through failure to associate in the aggregate, rather than government action. Stated differently, choice allows those parents who have an aversion to placing their children in integrated schools to not do so. They can exclude by simply failing to choose.

In a vacuum, exclusion through failure to choose is not necessarily problematic, particularly when examined through the lens of individual freedoms. But school choice was not occurring in a vacuum then, nor is it occurring in a vacuum now. Instead, school choice occurs against a historical backdrop of white power and Black subordination.⁷⁹ Because whites have historically held positions of

75. See *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 299 (1955) (“Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.”).

76. See *supra* Section I. A.

77. Friedman, *supra* note 28, at 5–6 n.2.

78. *Id.*

79. See generally Erika K. Wilson, *The Legal Foundations of White Supremacy*, 11 DEPAUL J. FOR SOC. JUST. 1 (2018) (describing the significance of race as a marker of resource

power, wealth, and access to other tangible and intangible resources, when they exclude by failing to choose to associate with students of color, the consequence is a form of segregation that is palpable and harmful to students of color.⁸⁰ The consequence is also a pernicious form of resource deprivation, both tangible and intangible. The Court in *Brown I* recognized as much.⁸¹ Other scholars have as well.⁸²

Simply put, the harm inflicted by exclusion through failure to choose lies not in the desire of whites not to associate, but in a stigmatic degradation and resource deprivation that occurs for students of color as a result.⁸³ As described in the next section, race and racism in America will always shape the import of exclusion by means of failure to choose, particularly as whites as a collective tend to choose schools for their children based on race.

II. WHITES CHOOSE SEGREGATED SCHOOLS

A. *White Students Are Enrolled in Clusters and Spatially Isolated*

Over the last thirty years, the number of white students attending public schools steadily declined.⁸⁴ By 2014, the combined numbers of students of color in public schools was projected to slightly eclipse the aggregate number of white students, meaning that for the first time, white students would no longer be the racial majority in United States public schools.⁸⁵ Despite a decline in the overall percentage of white

distribution).

80. See *id.* at 2–14 (identifying “three pillars of the legal foundations of white supremacy,” which have created a “political, economic and cultural system in which whites overwhelmingly control power and material resources”); Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 404–409 (2012) (documenting the harms of racial isolation and poverty in public schools).

81. See *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 494 (“Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.”).

82. See, e.g., Anne Richardson Oakes, *From Pedagogical Sociology to Constitutional Adjudication: The Meaning of Desegregation in Social Science Research and Law*, 14 MICH. J. RACE & L. 61, 85–91 (2008) (describing the “harm-benefit” theory that racial segregation harms minority students and how it has been deployed by scholars and lawyers).

83. *Id.*

84. See Jens Manuel Krogstad & Richard Fry, *Dept. of Ed. Projects Public Schools Will Be A Majority Minority This Fall*, PEW RESEARCH CENTER (Aug. 18, 2014), <http://www.pewresearch.org/fact-tank/2014/08/18/u-s-public-schools-expected-to-be-majority-minority-starting-this-fall/> (documenting declining white enrollment from 63.4% in 1997 to 49.7% in 2014).

85. *Id.*; see also *A Diverse, New Majority: Students of Color in the South’s Public Schools*, SOUTHERN EDUC. FOUND. at 5 (2010) <http://www.southerneducation.org/getattachment/>

students in public schools, white students are often the majority in the schools they attend because they are clustered together within public schools, isolated from large numbers of students of color. Indeed, the most recent demographic data from the U.S. Department of Education shows that about nationally eight out of ten white students, or eighty percent, of white students attend a school in which at least half or more of their peers are also white.⁸⁶ Further, a smaller but noteworthy twenty-two percent of white students attend schools in which ninety percent or more of the students are also white.⁸⁷

The clustering of white students is more acute in specific regions and states. For example, in Washington D.C., during the 2013-2014 school year, white and Asian students made up approximately ten percent of all public-school students, yet these students in Washington D.C. attended a school where more than half of her classmates were also white and Asian.⁸⁸ Similarly, in New York City, from 1998-2010, the typical white student attended a school where only twelve percent of her classmates were Black, even though Black students constituted greater than thirty percent of the students in the New York City public schools.⁸⁹

More recent evidence of similar clustering and spatial isolation exists in suburban districts as well. For example, during the 2015-2016 school year in North Carolina's Charlotte-Mecklenburg School District, sixty-one percent of the District's white students attended only thirty-nine out of one hundred and sixty eighty schools in the District, meaning that most white students were clustered in only twenty-three percent of the District's schools.⁹⁰ Further, in the same

884678f3-ca14-474f-a5e4-be2fa687136c/2010-A-New-Diverse-Majority-Students-of-Color-in-t.aspx ("For the first time in the nation's history, children 'of color' constitute a new diverse majority of those enrolled in the South's public schools. This shift is largely due to a dramatic increase of Latinos, Asian Pacific Islanders, and other population groups in the region. Most students in this new majority are also low income.").

86. Abigail Geiger, *Many Minority Students Go to Schools Where at Least Half of Their Peers are Their Race or Ethnicity*, PEW RESEARCH CENTER (Oct. 25, 2017), <http://www.pewresearch.org/fact-tank/2017/10/25/many-minority-students-go-to-schools-where-at-least-half-of-their-peers-are-their-race-or-ethnicity/>.

87. *Id.*

88. GARY ORFIELD & JONGYEON EE, *OUR SEGREGATED CAPITAL AN INCREASINGLY DIVERSE CITY WITH RACIALLY POLARIZED SCHOOLS* 12 (UCLA Civil Rights Project 2017).

89. 5 JOHN KUSCERA & GARY ORFIELD, *NEW YORK STATES EXTREME SCHOOL SEGREGATION INEQUALITY, INACTION AND A DAMAGED FUTURE* 65 (UCLA Civil Rights Project 2014).

90. See Ann Doss Helms, *Racial Breakdown Highlight School Differences and CMS Challenges*, CHARLOTTE OBSERVER (Nov. 18, 2015) <https://www.charlotteobserver.com/news/local/education/your-schools-blog/article45254790.html>.

school district, “white students account[ed] for no more than 10 percent of students at 66 schools, and no more than 5 percent at 45 of them.”⁹¹

Moreover, white student clustering and isolation is even more acute when white private school enrollment is factored into the equation. White students are grossly overrepresented in private schools. Nationally, “the percentage of white enrollment in private schools exceeded the percentage of whites among the nation’s school-age children by 15 percentage points.”⁹² Notably, in 2012, forty-three percent of the nation’s private school students attended virtually all-white schools, or schools that were ninety percent or more white.⁹³ Thus, not only are white students clustered together when they are enrolled in public schools, but the data also suggest that they experience high levels of both enrollment and racial segregation in private schools, giving further support for the claim that white students are clustered and socially isolated.

Insofar as public-school enrollment is concerned, residential segregation and the connection between residence and school assignment undoubtedly plays a role in white student clustering and isolation. Yet white parental choice is a salient factor. Empirical research shows that white parents choose to live in predominantly white neighborhoods. When given a choice, they also choose to send their children to schools that have a minimal number of students of color. Thus, whites as a collective are choosing racially segregated schools. The section that follows provides empirical support for the claim that whites are choosing school segregation. It also examines various theories to contextualize why whites are doing so.

B. *The Role of Choice in White Student Clustering and Spatial Isolation*

Rationality is a substantial theoretical underpinning of the proliferation of school choice policies. The free-market-based theory that underpins school choice policies presumes that when given an opportunity to directly choose a school, parents will make decisions based on rational criteria such as academic quality, curriculum or

91. *Id.*

92. See SOUTHERN EDUCATION FOUNDATION, RACE AND ETHNICITY IN A NEW ERA OF PUBLIC FUNDING OF PRIVATE SCHOOLS 19 (2016).

93. *Id.* at 44.

extracurricular activities.⁹⁴ Yet research shows that parents make expedient choices that lie outside the bounds of rationality, including making decisions based on race.⁹⁵ Indeed, the clustering and racial segregation of white students in public schools arguably foreshadows the ways in which white families as a collective make concerted decisions about schools based at least in part on race.

The tendency of whites to choose racially segregated schools manifests itself in two noteworthy ways: first, through residential self-segregation and second, through direct choice. This section provides an illustrative but non-exhaustive review of empirical literature supporting the claim that whites are choosing segregated schools through both residential segregation and direct choice.

1. Indirect Choice of School Segregation Through Residential Location

Empirical research shows that whites typically choose to live in predominantly white neighborhoods. In a seminal study, sociologists used qualitative and quantitative methods to examine the causes and consequences of residential segregation throughout the United States.⁹⁶ They concluded that a significant cause of residential segregation was white preference, namely that whites prefer to live in areas with other whites and that they accomplish that in part through pricing-out mechanisms: buying in areas that are generally out of reach financially to non-whites, particularly Blacks.⁹⁷ More recent empirical research has reached similar conclusions.⁹⁸

94. See, e.g., Chubb & Moe, *supra* note 62, at 225–28.

95. See Susan L. DeJarnatt, *supra* note 8, at 17 (summarizing empirical evidence noting the role that race plays in white parents school selection process); Amy Stuart Wells & Allison Roda, *School Choice Policies and Racial Segregation: Where White Parents' Good Intentions, Anxiety, and Privilege Collide*, 119 AM. J. EDUC. 261, 277 (2013) (finding that “72% of the 19 white parents [they] interviewed said race was an important factor when choosing schools”).

96. David Cutler, Edward Glaeser, & Jacob L. Vigdor, *The Rise and Decline of the American Ghetto*, 107 J. OF POL. ECON., 455, 496 (1999) (describing results of a qualitative and quantitative study, noting that whites still prefer to live with whites and that “[d]ecentralized racism operating through pricing mechanisms has replaced centrally, legally enforced racism, and racial differences in housing persist”).

97. *Id.*

98. See, e.g., Maria Krysan et al., *Does Race Matter in Neighborhood Preferences? Results from a Video Experiment*, 115 AM. J. SOC. 527, 527 (2009) (“[N]et of social class, the race of a neighborhood’s residents significantly influenced how it was rated. Whites said the all-white neighborhoods were most desirable. The independent effect of racial composition was smaller among Blacks and Blacks identified the racially mixed neighborhood as most desirable.”); Michael O. Emerson, Karen J. Chai & George Yancey, *Does Race Matter in Residential Segregation? Exploring the Preferences of White Americans*, 66 AM. SOC. REV. 922, 932 (2001)

Importantly, when non-whites with the financial means to do so thwart the pricing-out mechanisms approach to exclusion by buying homes in predominately white neighborhoods, white flight ensues. Empirical research demonstrates that white flight is likely to occur if more than a minimal number of non-whites move into a predominately white neighborhood.⁹⁹ Remarkably, white flight occurs at *all class levels*, ruling out the possibility that the flight is rooted in class avoidance rather than race avoidance. In fact, one empirical study demonstrated that whites are more likely to flee middle-class or upper-middle-class neighborhoods that receive an influx of non-whites.¹⁰⁰

Finally, although much of the anecdotal narrative surrounding the connection between residential segregation and housing segregation suggests that school segregation is an unintended byproduct of residential segregation,¹⁰¹ some empirical research suggests the opposite—white residential segregation may be driven by preferences for predominately white schools.¹⁰² Indeed, school district boundary lines can arguably serve a recruitment function, inducing families to

(“[When residential demographics are above] 15 percent Black, whites state that they are unlikely to buy the house. The strength of this stated unlikeliness increases with increases in the percent Black. Our findings suggest a low probability of whites moving to neighborhoods with anything but a token Black population, even after controlling for the reasons they typically give for avoiding residing with African Americans.”).

99. Kyle Crowder, *The Racial Context of White Mobility: An Individual-Level Assessment of the White Flight Hypothesis*, 29 SOC. SCI. RES. 223, 223 (2000) (“[T]he annual likelihood of leaving the neighborhood increases significantly with the size of the minority population in the neighborhood, and Whites are especially likely to leave neighborhoods containing combinations of multiple minority groups.”).

100. Samuel H. Kye, *The Persistence of White Flight in Middle-Class Suburbia*, 72 SOC. SCI. RES. 38, 49 (2018) (finding that the odds of white flight are significantly greater for all groups in middle-class neighborhoods, rather than their poorer counterparts).

101. See, e.g., Valerie Strauss, *The Reason America’s Schools are So Segregated – And the Only Way to Fix It*, WASH. POST (Dec. 14, 2016), https://www.washingtonpost.com/news/answer-sheet/wp/2016/12/14/the-reason-americas-schools-are-so-segregated-and-the-only-way-to-fix-it/?noredirect=on&utm_term=.7338bfff0da7 (“[S]chool segregation is primarily a problem of neighborhoods, not schools. Schools are segregated because the neighborhoods in which they are located are segregated.”).

102. See Peter Rich, *Race, Resources, and Test-Scores: What Schooling Characteristics Motivate The Housing Choices of White and Black Parents?* (Working Paper, 2018) (on file with author) (conducting empirical research and finding that “white parents are more likely than non-white parents to move into neighborhoods whether school districts and local schools are predominately white,” a finding that could not be explained by race-neutral factors such as “poverty levels, class sizes, per pupil funding, and test scores”); Jack Dougherty et al., *School Choice in Suburbia: Test Scores, Race, and Housing Markets*, 115 AM. J. EDUC. 523, 543 (2009) (finding a correlation between changing racial composition within school districts and a decrease in housing prices when racial composition became less white).

move into neighborhoods that will allow them access to predominantly white schools for their children.¹⁰³

Given the connection between residential location and school assignment, choosing to live in a predominantly white neighborhood by default means also choosing a predominantly white school for children. Whether the choice is made consciously or unconsciously, the result is the same: a substantially increased likelihood of one's children attending predominantly white schools. Thus, by choosing to live in predominately white neighborhoods, whites as a collective are also choosing segregated schools.

2. School Segregation Through Direct Choice

Another way that whites tend to choose segregated schools is through direct choice. When asked directly, many white parents indicate that racial diversity is a trait that they will weigh positively when choosing a school.¹⁰⁴ Few parents will admit outwardly to considering race in a negative manner when choosing a school.¹⁰⁵ Instead, they arguably make race-related choices by using proxies for race such as perceived academic quality, test scores, or perceived safety, in ways that create racialized outcomes.

For example, parents across all races tend to rely on their own social networks and word of mouth to determine what constitutes a high quality school.¹⁰⁶ Parental social networks are highly stratified by race and class, with middle/upper class whites largely talking to one

103. See Erika K. Wilson, *Toward A Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416, 1431 (2014) (arguing that boundary lines give meaning to geographic space in ways that may induce parents to move into homogenous school district boundaries).

104. See, e.g., PHI DELTA KAPPAN, THE 49TH ANNUAL PDK POLL OF THE PUBLIC'S ATTITUDES TOWARD THE PUBLIC SCHOOLS 6 (2017) (querying parents on attitudes towards diversity in public schools and finding that 48% of whites described racial and ethnic diversity in schools as being highly important).

105. See, e.g., Chase M. Billingham & Matthew O. Hunt, *supra* note 9, at 101 (2016) ("Parents are often reluctant to express racially oriented motivations for their behavior As a result, it is important to distinguish between respondents' expressed opinions and their behaviors."); Mark Schneider et al., *School Choice and Culture Wars in the Classroom*, 79 SOC. SCI. Q. 489 (1998) ("In [their] sample of parents, [they] found that racial similarity is hardly ever reported to be a relevant criterion in evaluating the quality of schools and education. Less than 1 percent of the parents [they] surveyed ranked race as important, and consequently [they] are unable to investigate further the effects of race and class on who evaluates race as an important criterion in education.").

106. See, e.g., Jellison Holme, *supra* note 58, at 189; Wells & Roda, *supra* note 95, at 280 (describing the ways in which upper-class white parental social networks were used to help parents obtain information necessary to choose schools).

another.¹⁰⁷ Information obtained and acted upon through such networks is arguably filtered through a racialized lens. Empirical research shows that information disseminated by white middle- and upper-middle-class parents through their social networks regarding what constitutes a “good” school is often based upon the children enrolled in each school, namely whether there are other children whom they would consider of the same status as themselves or greater, as opposed to actual objective measures of quality.¹⁰⁸

The information filtered down through status-oriented networks results in a self-fulfilling prophecy: the schools deemed to be good schools via word of mouth continue to receive positive feedback in social networks and enroll more white students. Conversely the schools deemed not to be good schools are avoided by white parents.¹⁰⁹ To the extent white parents obtain their information about what constitutes a good school from one another, schools are more likely to contain high levels of people like them, who share a similar race- and class-based status.¹¹⁰

Further, research also shows that when choosing schools, whites consciously seek schools for their children that will place them in the racial majority and schools where there are fewer students of color, particularly Black students.¹¹¹ Admittedly, research also shows that parents of color also prefer schools in which their children are in the racial majority, but their preference is not as strong.¹¹² Moreover, given the historical significance of all-white spaces, the result of their preference is not exclusionary.

For example, a seminal study of transfer requests involving a Montgomery County, Maryland magnet school program revealed that

107. Wells & Roda, *supra* note 95, at 281.

108. See, e.g., Jellison Holme, *supra* note 58, at 194 (“[T]he parents in the study surmised a great deal about a school’s quality by the status of its students: those schools serving higher-status (white and/or wealthier) students were presumed to be good while those serving lower-status students (lower income and/or students of color) were presumed to be unsatisfactory.”).

109. *Id.*

110. See Susan L. DeJarnatt, *supra* note 8, at 28 (“The literature reviewed here demonstrates that, consciously or unconsciously, the race of the school’s students plays a major role in the perception people have about whether a school is ‘good.’”).

111. See, e.g., Justine S. Hastings, Thomas J. Kane, & Douglas O. Staiger, *Heterogeneous Preferences and the Efficacy of Public School Choice24* (May 2009) (unpublished manuscript) (http://justinehastings.com/wp-content/uploads/2016/12/HKS_Combined_201006.pdf) (finding that parents in an experiment involving the Charlotte Mecklenburg School system all preferred schools in which their race was in the clear majority, but that the preference was especially high for white parents).

112. *Id.*

“white families were most likely to request transfer into schools with low proportions of minorities (these schools were also located in higher income neighborhoods), while minority families were more likely to opt for schools with higher proportions of minority students (which tended to be in low-income neighborhoods.)”¹¹³ Other research also substantiated the Montgomery County study, finding that whites tend to seek schools with fewer students of color, particularly Black students.¹¹⁴

Undeniably, there continues to be a significant correlation between the racial and socio-economic demographics of a school and academic performance, particularly as measured by test scores.¹¹⁵ As a result, it is challenging to disentangle whether choices are truly being made based on academic quality or race related school demographics.

Yet noteworthy empirical research concludes that even after controlling for academic quality, race is a significant factor in the school choice decision for many white parents. For example, one study examined the role that school demographics play in the likelihood of white parents enrolling their child in a hypothetical school. The study explicitly controlled for three factors for which race might serve as a proxy: low test scores, building renovations, and safety.¹¹⁶ The study concluded that no matter how high the hypothetical schools’ test scores were, how new the buildings were, or how safe the school was, “the likelihood that white parents [would] choose a hypothetical school for their children drop[ed] significantly as the proportion of Black students in the student body increase[ed].”¹¹⁷ Another study examining magnet school applications in a large urban school district found that “white families avoid schools with higher percentages of non-white students . . . [and that avoidance] [could not] be accounted

113. Jeffrey Henig, *Choice in Public Schools: An Analysis of Transfer Requests Among Magnet Schools*, 71 SOC. SCI. Q. 69 (1990).

114. Mark Schneider & Jack Buckley, *What Do Parents Want from Schools? Evidence from the Internet*, 24 EDUC. EVALUATION & POL’Y ANALYSIS 133, 141 (2002) (reviewing internet searches for schools in Washington D.C. and finding that parents used available demographic data to select schools with fewer African-American students and schools located in areas with fewer African-American residents).

115. See, e.g., Derek W. Black, *Middle-Income Peers As Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 404–409 (2012) (describing the correlation between predominately minority high-poverty schools and lower academic achievement than their white peers).

116. Chase & Billingham, *supra* note 9, at 110.

117. *Id.* at 112.

for by other school characteristics such as test scores, safety, or poverty rate.”¹¹⁸

Thus, empirical research supports the claim that whites are choosing segregated predominately white schools. Whether the choice is made indirectly through residence or directly through conscious school assignment, the data supports the claim that they are choosing segregated schools. Research and data also bear out the harsh reality that they are choosing segregated predominately white schools for reasons that cannot be explained by race-neutral factors such as academic quality, test scores, or safety. The section that follows outlines theories for why they may be choosing segregated schools and the implications for school choice policies.

C. *Why Whites Choose Segregated Schools*

Understanding why whites choose segregated schools can help policymakers more effectively evaluate the efficacy of certain school choice assignment policies. Stated differently, developing theories that help to explain why whites choose segregated schools is critical to evaluating how school choice policies may either contribute to or destabilize whites’ ability to choose segregated schools. This section sets forth and examines a non-exhaustive set of theories for why, even when controlling for race-neutral proxies such as academic quality, whites may choose segregated schools.

One theory that may explain why whites choose segregated schools is the racial proxy hypothesis. This hypothesis has been applied primarily to explain why racial segregation in housing persists. It suggests that whites prefer to live in predominately white neighborhoods not out of antipathy towards Blacks or non-whites, but due to “fear of the liabilities whites associate with integrated neighborhoods, such as crime, deterioration, and the decline of property values.”¹¹⁹

Applying the racial proxy hypothesis to the education context, whites may be choosing segregated schools not due to racial prejudices, but because of concerns about race-neutral factors such as test scores, safety, or overall academic quality. If the racial proxy hypothesis is accurate, from a policy perspective, one solution might

118. Salvatore Saporito, *Private Choices, Public Consequences: Magnet School Choice and Segregation by Race and Poverty*, 50 SOC. PROBS. 181, 181 (2003).

119. Maria Krysan et al., *supra* note 98, 115 AM. J. SOC. 527, 529 (2009).

be to reassure parents by addressing non-race related factors such as test scores, safety, or overall academic quality. Yet as noted in the previous section, even when race-neutral proxies are controlled for, some empirical research still suggests that whites will avoid schools with high numbers of students of color, particularly Black students, and will instead choose predominately white schools.¹²⁰ Thus, although the racial proxy hypothesis could potentially explain some of why whites choose segregated schools, it likely does not tell the entire story.

Another theory that may be useful in explaining why whites choose segregated schools lies in competition-based theories of race relations. These theories contemplate a scenario where groups or individuals are competing for the same limited resources.¹²¹ Competition amongst different ethnic groups for the same limited resources may in turn lead to an increased likelihood of collective action by one ethnic or racial group aimed at preserving their access to the limited resources.¹²²

In the case of white student enrollment patterns, whites may be engaging in the collective action of choosing predominately white schools as a means of protecting what they see to be a limited resource, high-quality public schools.¹²³ Thus, for whites, the growing non-white enrollment may be a threat to their majoritarian interests and status. Consequently, moving away from schools with high minority enrollment may be a means of “locking-out” students of color, and hoarding valuable educational resources. This theory is particularly salient considering that whiter, more affluent schools tend to have higher quality tangible educational inputs such as good teachers, curriculum, and facilities.¹²⁴

120. See *supra* Section II.B.

121. HUBERT BLALOCK, TOWARD A THEORY OF MINORITY-GROUP RELATIONS 73 (1967) (summarizing competition-based discrimination as the notion that “two or more individuals are striving for the same scarce resources, so that the success of one implies a reduced probability that others will also attain their goals”).

122. *Id.*

123. See Susan Olzark, Suzanne Shanahan, & Elizabeth West, *School Desegregation, Interracial Exposure, and Antibusing Activity in Contemporary Urban America*, 100 AM. J. SOC. 196, 200-01 (1994) (“[R]ace and ethnic competition for scarce resources lies at the heart of ethnic collective action, whether this competition is generated objectively by growing minority enrollments in schools or is subjectively perceived as a threat to the status of the majority ethnic community.”).

124. Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 404-08 (2012) (describing six major academic categories in which predominately poor and minority schools have lower quality educational

Yet another potential theory that might explain whites' collectively choosing segregated schools is rooted in social status theories. Apprehension about attending schools with large numbers of students of color may be related to the belief that having non-white, particularly Black, students in the school lowers the perceived quality of the school.¹²⁵ To the extent that whites generate status from the schools their children attend, and status is correlated with attending predominantly white schools, they may have a collective interest in choosing predominantly white schools.

A final theory that may explain why whites are collectively choosing predominately white schools is implicit bias. Implicit bias posits that unconscious stereotypes or shortcuts embedded in the human mind related to characteristics such as race, ethnicity, age, and even appearance, cause individuals to evaluate some groups more harshly and disparately than they might other groups.¹²⁶ Implicit bias results in individuals making unconscious distinctions about different groups that are based on deeply embedded (usually negative) stereotypes.¹²⁷ Implicit biases are especially prevalent when it comes to issues of race.¹²⁸

When faced with schools with large numbers of students of color, whites may have some implicit biases regarding the intellectual capability, social status, or potential for violence that may cause them to avoid having their children attend schools with large numbers of students of color, particularly Black students. Implicit bias admittedly explains behavior on an individual rather than structural level. Nevertheless, the aggregate implicit biases of whites towards students of color may indeed account for their tendency to choose segregated, predominantly white schools for their children.

input than middle-class predominately white schools).

125. See Derek H. Alderman, *School Names as Cultural Arenas: The Naming of U.S. Public Schools After Martin Luther King, Jr.*, 23 URB. GEOGRAPHY 601, 601 (2002) (detailing a controversy in Riverside, California in which white parents feared that renaming a predominantly white school after Martin Luther King, Jr., would lead elite colleges to believe the school was predominately Black and therefore lower status, decreasing students' chances of admission).

126. See generally MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE* (2013).

127. *Id.*

128. See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1494 (2005) ("[M]ost of us have implicit biases in the form of negative beliefs (stereotypes) and attitudes (prejudice) against racial minorities.").

In sum, whites may be choosing predominantly white schools because race serves as a proxy for school-based amenities such as test scores, safety, or overall quality of education. They may also be choosing segregated schools to hoard quality education, for the purposes of enhancing or maintaining their own status, or because of unconscious implicit biases. These theories provide an illustrative but non-exhaustive list of the reasons that whites may be choosing segregated schools. Whatever their reasons, the intersection between school choice assignment policies and the collective tendency of whites to choose predominately white schools has important normative and legal consequences. The section that follows demonstrates how whites as a collective are using school choice assignment policies to produce pockets of white charter school enclaves that are effectively immunized from legal scrutiny.

III. CHOICE AND WHITE CHARTER SCHOOL ENCLAVES

One of the rationales for enacting school choice policies is to ensure that patterns of residential segregation are not replicated in public schools. However, in some places, school choice policies are having the opposite effect. Instead of creating more integrated schools, or at least not replicating patterns of residential segregation, school choice policies are producing schools that are more segregated than they would be if students were assigned to schools based on their residence.¹²⁹

The school choice exacerbating segregation is beginning to gain traction in the public discourse. Indeed, significant attention is being paid to the extent to which school choice policies, particularly the proliferation of charter schools, causes high levels of segregation for poor and minority students.¹³⁰ Yet less attention is being paid to how

129. See, e.g., NICOLE MADER, ET AL., *THE PARADOX OF CHOICE: HOW SCHOOL CHOICE DIVIDES NEW YORK CITY ELEMENTARY SCHOOLS 4* (The New School, Center for New York City Affairs 2018), <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5aeb1c3352f537d3541623b/1525461450469/The+Paradox+of+Choice.pdf> (finding that an unintended consequence of school choice policies in New York City was that it caused school segregation, above and beyond the impact of persistent and pervasive housing segregation, noting that if “all children in public elementary schools went to their zoned schools . . . the city’s schools would be marginally less segregated than they are now.”).

130. See Press Release, NAACP, Statement Regarding the NAACP’s Resolution on a Moratorium on Charter Schools (Oct. 15, 2016) (<http://www.naacp.org/latest/statement-regarding-naacps-resolution-moratorium-charter-schools/>) (calling for a moratorium on the expansion of charter schools, citing among other concerns, the role of charter schools in fostering de facto racial segregation); see also Ivan Moreno, *U.S. Charter Schools Put Growing Numbers in Racial Isolation*, ASSOCIATED PRESS (Dec. 3, 2017), <https://apnews.com/>

charter school proliferation is creating high levels of segregation for white middle-class students. Across the country, in school districts with high concentrations of students of color, pockets of predominately white charter schools are emerging. These charter schools enroll a student body that is greater than fifty percent white, although white student enrollment in the school district in which the charter schools are located is less than thirty percent. This article uses the term white charter school enclaves to describe such schools.

White charter school enclaves are enabling a new form of white flight: white flight without residential mobility. White charter school enclaves do not emerge by accident. Instead, they emerge because of factors such as the type of charter school, the admissions policies for the charter school, and the way the charter school is formed. A nuanced analysis differentiating between the various types of charter schools and their impact on patterns of white student segregation in charter schools has largely been overlooked in the legal literature. This section fills that void. It describes the wide-ranging diversity in the categories of charter schools. It then provides illustrative but non-exhaustive examples of how white charter school enclaves are being formed.

A. *The Diversity of The Charter School Landscape*

The expansion of school choice policies generally, and charter schools particularly, is increasingly playing a pivotal role in satisfying whites' aggregate preference for their children to attend predominately white schools. This is especially true in urban areas undergoing gentrification,¹³¹ but is also prevalent in diverse non-urban school districts. To understand the connection between charter school growth and the role it is playing in satisfying aggregate white demand for predominately white schools, it is important to recognize the diversity of the charter school landscape. Charter schools are not monolithic. They vary in many ways including, for example, in their pedagogical approach and institutional set-up. Four types of charter schools are worth highlighting to demonstrate how charter school

e9c25534dfd44851a5e56bd57454b4f5?utm_campaign=SocialFlow&utm_source=Twitter&utm_medium=AP (noting that 1,000 of the country's 6,747 charter schools had a student of color enrollment rate of 99% or higher).

131. See generally Erika K. Wilson, *Gentrification and Urban Public School Reforms: The Interest Divergence Dilemma*, 118 W. VA. L. REV. 677 (2015) (discussing how school choice policies are used to facilitate and sustain gentrification).

growth satisfies the aggregate white demand for predominately white schools.

The first category of charter schools is “traditional charter” schools. All charter schools are created by an agreement between a charter operator (usually a non-profit, for-profit, or local school district) and an entity given the authority under state law to authorize the creation of charter schools.¹³² The charter operators for traditional charter schools are typically centralized charter management organizations (“CMOs”). CMOs are non-profits that operate a network of charter schools with a common mission or instructional design.¹³³ Traditional charter schools “stress high standards in academics and behavior, rigorous classes, lots of homework, and other earmarks of a ‘back-to-basics’ approach.”¹³⁴ Well-known examples of the traditional charter schools include the Knowledge is Power Program, or “KIPP” schools,¹³⁵ and the Success Academy Charter Schools.¹³⁶

Traditional charter schools are often located in urban areas.¹³⁷ There is a wide range in the quality of traditional charter schools. Some are viewed as a welcome refuge from poorly performing traditional public schools such that students desiring to enroll must win a seat via an admissions lottery.¹³⁸ Others are not in high-demand

132. See generally Nicole Stelle Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 VAND. L. REV. 1, 13 (2017); Stephen D. Sugarman & Emlei M. Kuboyama, *Approving Charter Schools: The Gate-Keeper Function*, 53 ADMIN. L. REV. 869, 870–71 (2001) (providing an overview of how charter schools are created as a matter of law).

133. See Joan F. Goodman, *Charter Management Organizations and the Regulated Environment: Is It Worth the Price?*, 42 EDUC. RESEARCHER 89, 89–90 (2013) (explaining how CMO’s operate).

134. DICK M. CARPENTER II, *PLAYING TO TYPE: MAPPING THE CHARTER SCHOOL LANDSCAPE* 6 (Thomas B. Fordham Institute 2006).

135. See Otis Baker, *Knowledge is Power, but at a Cost: KIPP CMO Report*, YALE EDUCATION STUDIES (April 4, 2017), <http://debsedstudies.org/knowledge-is-power-but-at-a-cost-kipp-cmo-report/> (offering an overview of the KIPP school and its educational philosophy).

136. See Ian Livingston, *Examining the Success of Success Academy Charter Schools*, BROOKINGS INST. (Sept. 10, 2015), <https://www.brookings.edu/blog/brookings-now/2015/09/10/examining-the-success-of-success-academy-charter-schools/> (explaining the Success Academy’s history and educational philosophy).

137. Goodman, *supra* note 133, at 89–90.

138. See, e.g., Press Release, Nicole Sizemore, *After Success Academy’s Annual Lottery, 14,000 Children are Left on Waitlist*, SUCCESS ACADEMY (April 6, 2017), <https://www.successacademies.org/press-releases/after-success-academys-annual-lottery-14000-children-are-left-on-waitlist/> (“More than 17,000 children were entered into yesterday’s admissions lottery for 3,017 available seats at Success Academy in 2017-18. Parents from every corner of New York City applied, driven by a severe shortage of high-quality schools and the network’s decade-long track record of achievement. This is the fourth consecutive year the

due to poor performance and/or management. Often, they are forced to resort to unsavory recruiting tactics to obtain students willing to enroll.¹³⁹

Traditional charter schools have a tremendous impact on patterns of racial segregation in public schools. They tend to enroll predominately students of color and low-income students.¹⁴⁰ In many ways, traditional charter schools are the face of the charter school movement. Schools like KIPP or the Success Academy Schools play a prominent role in mainstream coverage of charter schools and are often billed as saving large swaths of students of students of color from failing public schools.¹⁴¹ Indeed, the high number of students of color in traditional charter schools often obscures the growing number of white students enrolled in charter schools.¹⁴² It also provides a defense against claims that charter schools are serving as shelters for white students seeking to flee racially diverse public schools.¹⁴³ Yet, as discussed below, the concentrated clustering of white students enrolled in certain kinds of charter schools does indeed suggest that white students are in some instances using charter schools as a haven to escape racially diverse public schools.

The second category of charter schools are “prestige” charter schools. Prestige charter schools offer a holistic, often progressive approach to teaching students. In prestige charter schools, “students assume ownership of tasks and accountability for their learning.”¹⁴⁴ They often offer innovative curricula or distinct pedagogical approaches. In contrast to traditional charter schools, prestige charter schools tend to be stand-alone charters, meaning that they are created and organized by individuals or entities such as businesses, faith-based groups).¹⁴⁵ They also encourage very active parent participation.

Success wait list exceeds 10,000 kids.”).

139. See, e.g., Kate Zernike, *A Sea of Charter Schools in Detroit Leaves Students Adrift*, N.Y. TIMES (June 28, 2016), <https://www.nytimes.com/2016/06/29/us/for-detroits-children-more-school-choice-but-not-better-schools.html> (describing the proliferation of charter networks in Detroit, their struggles to retain students, and their recruitment tactics).

140. Goodman, *supra* note 133, at 89.

141. See, e.g., WAITING FOR “SUPERMAN” (Paramount Vantage 2010).

142. *Id.*

143. See, e.g., Rapp & Eckes, *supra* note 57, at 629 (arguing that high number of students of color enrolled in charter schools in 32 states “dispel the myth that white students are fleeing to charter schools”).

144. Carpenter, *supra* note 134, at 4.

145. See *infra* Section III.B.

Prestige charter schools often enroll a disproportionate number of white students.¹⁴⁶

The third category of charter schools are conversion charter schools. Conversion charter schools are schools that were converted to charter schools after performing poorly as traditional public schools.¹⁴⁷ They are “essentially indistinguishable from conventional neighborhood public schools.”¹⁴⁸ Conversion schools enroll a student body that typically mirrors the population in the neighborhood in which the school is located. They often enroll large numbers of students of color and low-income students.¹⁴⁹

The final category of charter schools are neighborhood preference charter schools. These have a diversity of characteristics. Indeed, traditional, prestige, or conversion schools can also be neighborhood schools. Yet neighborhood charter schools warrant their own category because as described in Section III.C *infra*, neighborhood charter schools often have a significant impact on white student enrollment.

Although the typology of charter schools provided above is non-exhaustive, they all contribute to patterns of racial segregation and inequality in the charter school landscape. Traditional charter schools and conversion charter schools play a significant role in the hyper-segregation of Black and Latino students in charter schools. Prestige charter schools and neighborhood preference charter schools contribute greatly to the patterns of white student segregation within charter schools. The paragraphs below describe and analyze the latter two types of charter schools and the ways in which they serve as conduits for white flight without residential mobility.

B. *Prestige Charter Schools*

A prominent way in which choice and charters are being used to satisfy the aggregate white preference for segregated schools is through the growth of prestige charters schools. In addition to the organizational structure described in Section III.A *supra*, prestige

146. *Id.*

147. See generally *Conversion Charter Schools: When Teachers and Parents Lead the Charge*, APRIL 2014 NEWSLETTER (National Charter Research Center) Apr. 17, 2014, <https://charterschoolcenter.ed.gov/newsletter/april-2014-conversion-charter-schools-when-teachers-and-parents-lead-charge> (noting that in many states the conversion from a traditional public school to a charter school can be spearheaded by the school district, parents, or other stakeholders, depending upon state law).

148. Carpenter, *supra* note 134, at 5.

149. *Id.*

charter schools have two other predominant characteristics. First, they are demographically distinct from the local public-school district of which they are apart, enrolling a higher percentage of white students than the percentage of white students enrolled in the district.¹⁵⁰ Second, they have stellar reputations that lead to their being oversubscribed, such that there is a waiting list due to the “cachet” of the schools. The popularity of these charter schools often leads to increases in the percentage of white students and depressed percentages of students of color.¹⁵¹

One reason prestige charter schools have demographics that differ from the local public-school district is because they adopt a pedagogical approach that is more likely to appeal primarily to white and economically advantaged families.¹⁵² In other words, the curricular typology of the charter school can serve as a magnet that induces a disproportionate number of white parents to enroll their children. Indeed, studies on charter schools shows that charters with progressive niche curricular themes such as Montessori, dual language, or project-based curriculum tend to enroll a disproportionate number of white and more economically advantaged students.¹⁵³ In contrast, charter schools with ethnocentric curricular themes enroll a disproportionate number of students of color.¹⁵⁴ Thus, the adoption of certain curricular themes can heavily influence the racial composition of a charter school, in some instances drawing white students in numbers that greatly outstrip their representation in the school district where the charter school is located.

150. See Elizabeth Brown & Molly Vollman Makris, *A Different Type of Charter School: In Prestige Charters, a Rise in Cachet Equals a Decline in Access*, 33 J. EDUC. POL’Y 85, 86 (2017) (detailing that prestige charter schools accept students who are more advantaged compared to the typical student body at the district schools).

151. See *id.* at 88 (finding that parents will choose dual-language, “niche” charter schools because they are “trendy”).

152. *Id.* at 89 (describing how advantaged families avoid the parochial test-driven charter schools in favor of alternative non-test driven charter schools).

153. See, e.g., Mira C. Debbs, *Racial and Economic Diversity in U.S. Public Montessori Schools*, J. MONTESSORI RES., Vol. 2, No. 2 at 27 (Fall 2016) (“Charter Montessori schools are whiter on average and enroll fewer low-income students than do district/magnet Montessori schools.”); Perry Stein, *Are dual-language programs in urban schools a sign of gentrification?*, WASH. POST, (July 3, 2018), https://www.washingtonpost.com/local/education/are-dual-language-programs-in-urban-schools-a-sign-of-gentrification/2018/07/03/926c4a42-68c2-11e8-9e38-24e693b38637_story.html?utm_term=.2085d7022743 (reporting that dual language charter schools in Washington, D.C. are disproportionately white).

154. See Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TUL. L. REV. 563, 602–12 (2001) (documenting the rise of charter schools with ethnocentric curriculum and analyzing their constitutionality).

The Central Park School for Children (“CPSC”) in Durham, North Carolina provides an illustrative example of how a niche-themed curriculum can create a prestige charter school that attracts a disproportionate number of white students. CPSC is known for its niche project-based curriculum.¹⁵⁵ It has student body that is 52.52 percent white,¹⁵⁶ although whites only make up 18.8 percent of the population in the Durham County Public School District where the charter school is situated.¹⁵⁷ The school is so popular amongst Durham residents, particularly white Durham residents, that substantially more students apply than the school can accept, leading to a very lengthy waitlist of children hoping to gain admission to the school.¹⁵⁸ Similar examples of niche-curricular themed prestige charter schools essentially serving as white charter school enclaves also exist in cities across the country.

In Charlotte, North Carolina for example, the Charlotte Lab School offers among other things a focus on bilingual education.¹⁵⁹ The school is oversubscribed such that it requires a lottery for admission.¹⁶⁰ The school enrolls approximately sixty percent white students, while the Charlotte-Mecklenburg district in which it is situated has a white enrollment of only twenty-eight percent.¹⁶¹ Charter schools in states such as Michigan¹⁶² and New Jersey¹⁶³ have similar demographic differences.

155. See Central Park Charter School, *About Us*, CENTRAL PARK SCHOOL FOR CHILDREN, <http://www.cpscnc.org/AboutUs> (last updated June 16, 2017) (describing the school as a “child-centered, progressive charter school . . . [in which] classes engage the whole child with a hands-on, project based approach”).

156. See State Board of Education, *North Carolina Public Schools Statistical Profile*, STATE BOARD OF EDUCATION, Table 10, <http://apps.schools.nc.gov/ords/f?p=145:73::NO::> (select “School Year 2017-18” in “Select School Year” field).

157. See State Board of Education, *North Carolina Public Schools Statistical Profile*, STATE BOARD OF EDUCATION, Table 10, <http://apps.schools.nc.gov/ords/f?p=145:15::NO::> (select “School Year 2017-18” in “Select School Year” field).

158. See Central Park Charter School, *Lottery Results - Frequently Asked Questions*, CENTRAL PARK SCHOOL FOR CHILDREN, <http://cpscnc.org/LotteryFAQ> (last updated March 26, 2018) (noting that for the 2017-2018 academic year, “1000 prospective students applied for approximately 70 available spaces”).

159. See *Mission and Core Values*, CHARLOTTE LAB SCHOOL, <http://www.charlottelabschool.org/mission-and-core-values.html> (last visited Feb. 8, 2019).

160. See *Applying to Lab*, CHARLOTTE LAB SCHOOL, <http://www.charlottelabschool.org/labenrollment-109673.html> (last visited Feb. 8, 2019).

161. State Board of Education, *supra* note 156, at Table 37.

162. The Mount Clemens Montessori Academy in Mount Clemens, Michigan enrolls a student body that is sixty-five percent whereas the Mount Clemens district where it is situated is twenty-two percent white. Similarly, the Black River Charter school in Holland, Michigan is seventy-four percent white while the Holland public school district is only thirty-eight percent white. Felton, *supra* note 21. See Mike Wilkinson, *School choice producing segregation in*

Further, the institutional design of the charter school may also contribute to the creation of prestige charter schools. Prestige charter schools are more likely to be “stand-alone” start-up charter schools, founded by socially advantaged parents or parent groups.¹⁶⁴

For example, in some gentrifying urban cities, prestige charters emerged after white parents lobbied for the creation of start-up charter schools as an alternative to the predominately Black traditional public schools.¹⁶⁵ Importantly, perception of school quality is often shaped through the racialized lens of homogenous social networks.¹⁶⁶ As a result of the parent involvement in the creation of the charter school, a prestige charter school may develop a stellar reputation amongst predominately white social networks. The reputation may lead to increased interest amongst white parents such that admission to the school is only feasible through a lottery process and a wait-list emerges. The Hoboken Charter School in Hoboken, New Jersey¹⁶⁷ and the Atlanta Neighborhood Charter School in the gentrifying Grant Park neighborhood in Atlanta are two examples of standalone prestige charter schools that serve as white charter school enclaves.¹⁶⁸

In sum, prestige charter schools can create white charter school enclaves that are akin to islands of white students in a sea of districts

districts across the state, BRIDGE (Sep. 20, 2016), <https://www.bridgemi.com/talent-education/school-choice-producing-segregation-districts-across-state> for a more comprehensive examination of how school choice is creating white charter school enclaves throughout Michigan.

163. The Red Bank Charter School in Red Bank, New Jersey, utilizes a language arts literacy niche-curricular theme. The school body is fifty percent white while the Red Bank district where the charter school is situated enrolls a total student body that is less than ten percent white. Advocacy groups filed a complaint with the United States Department of Justice alleging that the charter school fostered racial segregation in violation of Title VI of the 1964 Civil Rights Act. See CIVIL RIGHTS COMPLAINT FAIR SCHOOLS RED BANK AND THE LATINO COALITION, <https://static1.squarespace.com/static/57e71c3f3e00be6f7ce6fc0e/t/58292ac79f7456b3bc35f385/1479092935638/RB+civil+rights+complaint+November+15+2016.pdf>.

164. See Brown & Vollman Makris, *supra* note 150, at 96–97.

165. See, e.g., *Save Our Schools-Se. & Ne. v. D.C. Bd. of Educ.*, No. Civil Action 04-01500 WL 1827654, at *1 (D.D.C. July 3, 2006) (describing the creation of the Two Rivers charter school on Capitol Hill in Washington D.C.).

166. See *supra* Section II.B.

167. The Hoboken Charter School is fifty percent white while the Hoboken School district is only twenty-five percent white. See STATE OF NEW JERSEY SCHOOL PERFORMANCE REPORT 2, <https://www.state.nj.us/education/pr/1415/80/806720930.pdf>.

168. See Kathrine B. Hankins, *The Final Frontier: Charter Schools as New Community Institutions of Gentrification*, 28 URB. GEOGRAPHY 113 (2007), for an analysis of the creation of the Atlanta Neighborhood Charter School and impact on racial segregation in the Atlanta public schools.

that otherwise enroll predominately low-income students of color. As discussed in the section that follows, neighborhood charter schools can also have the effect of creating white charter school enclaves.

C. *Neighborhood Preference Charter Schools*

Although many charter school enrollment policies disentangle school assignment from residence, a growing number of charter schools provide enrollment preferences to students who live within close geographic proximity to the charter school. Indeed, several states include within their charter school enabling legislation provisions allowing for neighborhood preference to be part of the charter admission process.¹⁶⁹ Arguments made in favor of neighborhood preferences for charter schools are that they cut down on commute time, allow children to attend a school that is part of their local community, and enhance the connection that parents, students and the community have to the charter school.¹⁷⁰ Notably, many of the arguments advanced in favor of providing a neighborhood preference for charter school enrollment are similar to the arguments advanced in favor of localism or local control of public education.¹⁷¹

Yet, just as a preference for localism in public education reinforces racial segregation in schools, the neighborhood preference for charter schools allows for the creation of predominantly white charter school enclaves that satisfy the aggregate white preference for predominately white schools. In addition, patterns in the siting of charter schools, such that traditional schools tend to be in predominately minority neighborhoods while prestige schools tend to be in neighborhoods with more whites,¹⁷² makes it even more likely that neighborhood

169. See Education Commission of the States, *50 State Comparison*, EDUCATION COMMISSION OF THE STATES (Jan. 2018), <http://ecs.force.com/mbdata/mbquestNB2C?rep=CS1706>, for a comprehensive list of state charter legislation and permissible admissions preferences.

170. See, e.g., Alexandra Matos, *New Policy Aims to Help DC Students Enroll in a Charter Near Their Home*, WASH. POST (Jan. 30, 2017), https://www.washingtonpost.com/local/education/new-policy-aims-to-help-dc-students-enroll-in-charter-schools-near-their-homes/2017/01/30/6511bd88-e70f-11e6-bf6f-301b6b443624_story.html?utm_term=.8a8b846b1a43 (noting that neighborhood preferences in charter enrollment would allow students to walk to school).

171. See Wilson, *supra* note 60, at 183 (describing and critiquing localism in context of public education).

172. See ERICA FRANKENBERG ET AL., CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR NEW CIVIL RIGHTS STANDARDS 57–62 (UCLA Civil Rights Project 2010) (analyzing the way in which charter school citing impacts enrollment demographics).

enrollment preferences will reinforce the same segregation that exists in the residential context.

Amongst charter school legislation that allows for neighborhood preferences, the definition of “neighborhood” varies considerably. The variations in the definition of “neighborhood” leads to different and disparate impacts on charter school enrollment patterns. For example, in some states, “neighborhood” is defined in a way that will give preference to students who previously attended a public school that was turned into a charter school (a conversion charter).¹⁷³ The purpose and effect of the neighborhood preference in that instance is to provide students who attended a traditional public school that was closed the opportunity to still attend a neighborhood school. As noted above, the demographic makeup of conversion charter schools is typically disproportionately low-income students of color, so the demographic makeup of the charter school will mirror that. In other states, “neighborhood” is defined in a way that is broad enough to encompass wide swaths of communities and neighborhoods.¹⁷⁴ In such places, the neighborhood preference may have a negligible impact on charter school enrollment demographics.

Particularly troubling and worth highlighting are the statutes that define “neighborhood” in a manner with either deliberate indifference or with actual intent to create predominately white charter schools. Indeed, some states define “neighborhood” in a manner that closely aligns with patterns of racial residential segregation. In North Carolina, for example, the state legislature recently passed a bill that will allow four predominantly white Charlotte suburbs to operate and run their own municipal charter schools and to give enrollment preference to students who live within the municipalities.¹⁷⁵

The four municipalities, Cornelius, Huntersville, Matthews, and Mint Hill, are respectively 86.1 percent,¹⁷⁶ 80.9 percent,¹⁷⁷ 81.6

173. See, e.g., ALA. CODE § 16-6F-5–6 (2018); D.C. CODE ANN. § 38-1802.06 (West 2019).

174. In New York, for example, charter schools are divided into thirty-two different “community school district” zones and priority is given to students who live in the community school district where the charter school is located. See N.Y. EDUC. LAW § 2852, 2854 (McKinney 2015).

175. See Act of June 7, 2018, N.C. Sess. Law No. 2018-3 (2018), available at <https://www.ncleg.gov/Sessions/2017/Bills/House/PDF/H514v7.pdf>.

176. U.S. Census Bureau *Quick Facts: Cornelius town, North Carolina*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/corneliustownnorthcarolina/PST045217> (last visited Feb. 10, 2019).

177. U.S. Census Bureau *Quick Facts: Huntersville town, North Carolina*, U.S. CENSUS

percent,¹⁷⁸ and 76.2 percent¹⁷⁹ white. In contrast, the Charlotte-Mecklenburg School District, in which these municipalities are situated, has only twenty-nine percent white student enrollment.¹⁸⁰ Such a system of municipality-based neighborhood preference runs a very high risk of creating predominately white charter school enclaves.

Georgia provides another example. Its charter legislation indicates that any new start-up charter must enroll any student who lives in the attendance zone specified in the charter application.¹⁸¹ Thus, the legislation gives the charter operator the authority to both define the attendance zone that it will serve and provide priority admission to students who live within the defined attendance zone. A significant consequence of this type of charter legislation is that it allows charter schools to set up in predominately white neighborhoods and serve primarily those children.

For example, Lake Oconee Academy is a charter school in Greene County, Georgia.¹⁸² For years, using the broad authority afforded to it under the Georgia statute, it created priority attendance zones that encapsulated the majority white gated communities that surrounded the school.¹⁸³ As a result, Lake Oconee Academy enrolled a student body that was seventy-three percent white¹⁸⁴, while only twelve percent¹⁸⁵ of the students enrolled in the Greene County school district are white. Although the Lake Oconee Academy recently changed its admission policy, instituting a county-wide preference and a lottery when enrollment is oversubscribed,¹⁸⁶ the die was already

BUREAU, <https://www.census.gov/quickfacts/fact/table/huntersvilletownnorthcarolina/PST045217> (last visited Feb. 10, 2019).

178. U.S. Census Bureau *Quick Facts: Matthews town, North Carolina*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/matthewstownnorthcarolina/PST045217> (last visited Feb. 10, 2019).

179. U.S. Census Bureau *Quick Facts: Mint Hill town, North Carolina*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/minthilltownnorthcarolina/SBO050212> (last visited Feb. 10, 2019).

180. See Charlotte-Mecklenburg Schools, *Month 1, 2016-17 School Diversity Report* (last visited Feb. 16, 2019), http://www.cms.k12.nc.us/cmsdepartments/StudentPlacement/PlanningServices/Documents/PMR%20Month%201bySchool_2016_Diversity-final.pdf.

181. GA. CODE ANN. § 20-2-2066 (West 2018).

182. See LAKE OCONEE ACADEMY, <http://www.lakeoconeeacademy.org/> (last visited Feb. 10, 2019).

183. Felton, *supra* note 21, (noting that in the early years of its existence “Lake Oconee Academy created a priority attendance zone for the gated communities that surround it.”)

184. *Id.*

185. *Id.*

186. See LAKE OCONEE ADMISSIONS: ATTENDANCE ZONE,

cast, as the school has developed a reputation for not being welcoming or friendly to low-income students of color.¹⁸⁷

In summary, this section analyzed how legislation that allows charter schools to enact neighborhood preferences in admission can play a pivotal role in creating white charter school enclaves. Critically, not all neighborhood preferences for charter school admission are created equal. Variations in the definition of what constitutes a “neighborhood” for purposes of the preference can substantially impact demographic enrollment patterns. Nevertheless, as described in this section, various types of legislation allow neighborhood preferences in charter admission to be used to create white charter school enclaves that both insulate white students from large numbers of students of color and allow whites to engage in white flight without residential mobility. As described in the section below there are viable constitutional and normative rationales for regulating school choice to prevent the creation of white charter school enclaves.

IV. REGULATING CHOICE

White charter school enclaves are proliferating across the country. Nationwide, during the 2015-2016 school year, there were at least “747 public charter schools . . . that enroll[ed] a higher percentage of white students than any of the traditional public schools in the school districts where they are located.”¹⁸⁸ The problem is particularly acute in certain states. In North Carolina, for example, researchers found that “of the 19 charter schools that opened between 2005 and 2012, 13 [or 68 percent] had white percentages higher than their corresponding [school] district.”¹⁸⁹ Similarly, in Minnesota “fifteen out of twenty-eight (54 percent) of the very white mostly suburban charters had white student percentages more than five percentage points higher than the traditional school(s) within whose attendance boundary they were located.”¹⁹⁰ Thus, the proliferation of charters that are serving as white charter school enclaves and allowing for white flight without residential mobility is a far reaching problem.

<http://www.lakeoconeeacademy.org/attendance-zone> (last visited Feb. 10, 2019).

187. See Felton, *supra* note 21.

188. *Id.*

189. Helen F. Ladd, Charles T. Clotfelter, & John B. Holbein, *The Growing Segmentation of the Charter School Market in North Carolina* 8 (Nat'l Bureau of Econ. Research, Working Paper No. 201078, 2015).

190. Myron Orfield & Thomas Luce, *Charters, Choice, and the Constitution*, 2014 U. CHI. LEGAL F. 377, 393 (2014).

The stock narrative deployed to justify the existence of white charter school enclaves amongst more racially diverse school districts is that segregation that reflects parental choice rather than intentional state action cannot and should not be regulated.¹⁹¹ This section provides a counternarrative. It sets forth constitutional and normative arguments for regulating patterns of racial segregation in schools that are ostensibly the result of private choice rather than systemic design.

A. *The Constitutional Case for Regulating Choice*

Racial segregation in schools is only unconstitutional if it is the product of intentional state action.¹⁹² A significant challenge to finding that predominately white charter school enclaves are unconstitutional lies in demonstrating that they are the product of intentional state action.¹⁹³ Put another way, the challenge lies in demonstrating that the choices of individual parents are too attenuated from the state to hold the state liable for racial segregation. A two-part inquiry exists here: first, determining whether charter schools are *state actors* subject to the mandates of the Constitution and second, determining whether the existence of predominately white charter school enclaves is a function of intentional *state action*. Each of these steps are discussed in turn.

1. State Actor

In examining whether an entity is a state actor, courts examine a number of factors, including: (i) whether the state should be responsible for challenged conduct because there is “a close nexus between the state and the challenged conduct”; (ii) whether the entity is performing a government function, and; (iii) the degree of control between the entity and the state, particularly whether the state uses its coercive power or provides significant encouragement in ways that

191. See *supra* note 12 and accompanying text.

192. See *Freeman v. Pitts*, 503 U.S. 467, 495 (1992) (finding that racial segregation in schools is “a product not of state action but of private choices, it does not have constitutional implications”).

193. This Section is limited to an analysis of the state action portion of any constitutional analysis because it is the largest hurdle to overcome. If state action can be attributed, the constitutional analysis might then turn on individual factors relevant to specific white charter school enclaves outside the scope of this article.

enable the challenged action.¹⁹⁴ More concretely, courts also look to see if the state substantially funds the entity.¹⁹⁵

The formation of charter schools is governed by state statutes called enabling acts that proscribe regulations and procedures for forming charter schools.¹⁹⁶ Once charter schools are formed, they are publicly funded and subject to state regulation, but privately operated and exempt from some of the regulations that apply to traditional public schools.¹⁹⁷ Importantly, the admissions policies of charter schools are governed by state statutes or regulations in some, but not all, states.¹⁹⁸ In some states, the individual charter school has carte blanche control over its admissions policy.¹⁹⁹ Finally, charter schools provide education to the school-aged public free of charge, a mandatory function of the state government in all fifty states.²⁰⁰

The extent of state involvement in the formation, funding, and regulation of charter school admissions policies arguably militates in favor of finding that charters schools are state actors. Indeed, several federal courts have affirmed this notion, holding that they are state actors subject to the mandates of the constitution.²⁰¹ Yet because charter schools are privately run, in some ways they are a hybrid between public and private entities,²⁰² arguably serving as private entities providing a public service. A spate of cases demonstrates that charter schools will not *per se* be considered state actors.

For example, courts have rejected the reasoning that a charter

194. See, e.g., *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (examining the factors used to analyze a state action question in a Fourteenth Amendment challenge).

195. *Id.*

196. Thomas A. Kelley III, *North Carolina Charter Schools' (Non-?) Compliance with State and Federal Nonprofit Law*, 93 N.C. L. REV. 1757, 1767 (2015).

197. *Id.*

198. Stephen D. Sugarman & Emlei M. Kuboyama, *Approving Charter Schools: The Gate-Keeper Function*, 53 ADMIN. L. REV. 869, 893 (2001) (noting that the content of charter legislation varies from state to state but that many set forth regulations regarding admissions policies).

199. *Id.*

200. See Education Commission of the States, 50-STATE REVIEW (2016), <https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf> (summarizing the right to education clauses in all fifty state constitutions and noting that there is language that mandates the creation of a free public education system in every state).

201. See, e.g., *Scaggs v. New York Dep't of Educ.*, No. 06-CV-0799(JFB)(VVP), 2007 WL 1456221, at *13 (E.D.N.Y. May 16, 2007); *Riester v. Riverside Cmty. Sch.*, 257 F. Supp. 2d 968, 971 (S.D. Ohio 2002).

202. See Christopher Lubienski, *Instrumental Perspectives on the "Public" in Public Education: Incentives and Purposes*, 17 EDUC. POL'Y 478, 482–83 (2003) (analyzing the ways in which charter schools are hybrid public private entities).

school is a state actor because it is performing a service typically provided by the state.²⁰³ Courts have also rejected arguments that statutes that call charter schools “public schools” are sufficient to make a charter school a state actor.²⁰⁴ Finally, courts have rejected the argument that extensive regulation by the state makes charter schools “public” actors.²⁰⁵

In the context of white charter school enclaves, the challenged conduct would likely be the student assignment policies. Notably, several of the cases in which courts found that charter schools were not state actors were cases challenging charter school employment rather than actions that impact students.²⁰⁶ Consequently, to the extent that the challenged practices are related to student assignment, there may be a stronger argument that charter schools are state actors given the extent of state regulation of charters as it pertains to student-related practices, particularly student assignment policies.²⁰⁷

Scholars continue to debate whether the state action doctrine applies to charter schools.²⁰⁸ It arguably remains an open question.

203. See *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 816 (9th Cir. 2010) (rejecting the claim that a charter school was a state actor for purposes of a 42 U.S.C. § 1983 claim, reasoning in part that the school’s “provision of educational services is not a function that is traditionally and exclusively the prerogative of the state, and therefore is not a basis for holding that Horizon acted under color of state law in taking the alleged actions relating to Caviness’s employment”).

204. See, e.g., *Caviness*, 590 3d. at 813–14; *I.H. ex rel Hunter v. Oakland Sch. for Arts*, 234 F. Supp. 3d 987, 992 (N.D. Cal. 2017).

205. *Sufi v. Leadership High Sch.*, No. C-13-01598 (EDL), 2013 WL 3339441, at *9 (N.D. Cal. July 1, 2013) (finding that the level of control the state exerted over the charter school as evidenced by the state’s statutory scheme for charter schools was insufficient to make the charter school a state actor).

206. See, e.g., *id.*

207. See, e.g., *Milonas v. Williams*, 691 F.2d 931, 940 (10th Cir. 1982) (distinguishing a case claiming violations of constitutional rights in a private school employment context from the present case in which private school students alleged violations of their constitutional rights, reasoning that “the plaintiffs in the present case are not employees, but students, some of whom have been involuntarily placed in the school by state officials”). But cf. Preston C. Green III. et al, *Charter Schools, Students of Color, and the State Action Doctrine: Are the Rights of Students of Color Sufficiently Protected*, 18 WASH. & LEE J.C.R. & SOC. JUST. 253, 274 (2012) (arguing that students of color attending charter schools should be worried about the potential lack of constitutional due process protections because of the murkiness in the application of the state action doctrine to charter schools).

208. Compare Wendy Parker, *supra* note 155, at 604 (arguing that charter schools are state actors because they are funded by public money, created and defined by state legislation, and fulfill state function), and Gillian E. Metzger, *Privatization As Delegation*, 103 COLUM. L. REV. 1367, 1495 (2003) (“Charter schools most likely would be found part of the government for constitutional purposes, given that they are officially denominated public schools, often are created by the state, and operate subject to the state’s direct oversight.”), with Aaron Saiger, *Charter Schools, the Establishment Clause, and the Neoliberal Turn in Public Education*,

Given the variances in extent and types of state regulation of charter schools, the answer may vary from jurisdiction to jurisdiction. Yet in some instances a case might certainly be made that charter schools are state actors for purposes of challenging student assignment policies that facilitate the existence of white charter school enclaves.

2. Intentional State Action

Assuming a court found that a charter school is a state actor, a thornier state action question lies in wait. In addition to demonstrating that a charter school is a state actor, it would also be necessary to show that the existence of a white charter school enclave is the result of intentional state action rather than private individual choice. In the public education context, the Supreme Court has held that racial segregation in schools caused by individual private choices does not violate the constitution, no matter how stark the racial segregation.²⁰⁹ Notably, both the Supreme Court and lower federal courts typically discuss the role of choice in causing school segregation through the lens of housing. They often find that segregation caused by individual residential choices is an unfortunate reality that lies outside of the Court's remedial purview.²¹⁰

Yet the conditions that lead to the existence of white charter school enclaves are more complex. They cannot be pinned solely on racial segregation in residential location choice. Indeed, school choice often disaggregates school assignment from residence precisely to

34 CARDOZO L. REV. 1163, 1178 (2013) (“[W]hether a school is public school or a state actor is a context-dependent inquiry. Whether charters are public or private need not be answered identically for all purposes, for all constitutional purposes, or even for all federal constitutional purposes.”), and Nicole Stelle Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 VAND. L. REV. 1, 54 (2017) (“[T]he application of the state action doctrine to charter schools may vary from state to state, along with the extent of state control over charter school operations.”).

209. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 121 (1995) (“The Constitution does not prevent individuals from choosing to live together, to work together, or to send their children to school together, so long as the State does not interfere with their choices on the basis of race.”); *Freeman*, 503 U.S. at 495 (“Residential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies.”).

210. See, e.g., *Thomas Cty. Branch of NAACP v. City of Thomasville Sch. Dist.*, 299 F. Supp. 2d 1340, 1368 (M.D. Ga. 2004) (finding that segregation in schools was the result of housing patterns and choices and noting that “[w]hile the record in this case establishes that many poor Black children in Thomasville, Georgia are not receiving what this Court would consider an adequate education, the record is clear that Defendant has not engaged in intentional discrimination based upon race. . . . Therefore, this Court does not have the authority to grant the relief sought by Plaintiffs.”), *aff’d in part, vacated in part, rev’d in part sub nom* *Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325 (11th Cir. 2005).

avoid replicating patterns of residential racial segregation. As such, the Supreme Court cases holding that school segregation caused by private residential choices do not violate the Constitution are not dispositive. Instead, the analysis must go much further.

Parents choose to send their children to a charter school. Predominately white charter schools in the middle of more racially diverse school districts do not bar non-white children from enrolling. They are ostensibly open to all students. From that vantage point, the segregation patterns are arguably a matter of student and parental choice.

However, research is clear that whites as a collective, when given a choice, will choose predominately white schools with fewer students of color.²¹¹ A question therefore emerges as to when the state does (or should) bear constitutional liability for aiding and abetting choices that it knows (or should know) will lead to racial segregation. Put another way, is the state liable (or should it be) for crafting school assignment policies that serve as a conduit for racial segregation?

There is precedent for finding that state policies that aid and abet segregation in the context of public schools are a form of intentional and unconstitutional state action. Federal courts have held that state school assignment policies that play a facilitative role in satisfying parental preference for school segregation are unconstitutional.²¹² Courts have reached that conclusion even when states adopt race-neutral assignment policies predicated on individual choice that ultimately lead to racial segregation in schools.²¹³

For example, in *Columbus Bd. of Ed. v. Penick*, the Supreme Court upheld a district court finding that optional attendance zones that had the effect of allowing white students to “choose” to attend schools outside of their assigned predominately Black neighborhood schools were unconstitutional.²¹⁴ The Court reasoned that when a school system adopts a policy or practice “with full knowledge of the

211. See *supra* Section II.B.

212. See, e.g., *Green v. Cty. Sch. Bd. of New Kent Cty., Va.*, 391 U.S. 430 (1968) (finding unconstitutional a freedom of choice school assignment plan that failed to achieve school desegregation and allowed white parents to maintain their preference for attending all white schools); *Stout by Stout v. Jefferson Cty. Bd. of Educ.*, 882 F.3d 988, 1008 (11th Cir. 2018) (finding that discriminatory intent of private individuals could be imputed to state actors, where private individuals successfully lobbied for municipal secession from a county-based school district).

213. See, e.g., *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 212–214 (1973).

214. 443 U.S. 449, 461 n.8 (1979).

predictable effects of such adherence [to the policy] upon racial imbalance in a school system [it] is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.”²¹⁵ Thus, the adoption of a choice- based school assignment policy was deemed a form of sufficient state action that led to racial segregation in the schools and was therefore unconstitutional.²¹⁶

Further, the Supreme Court in *Dayton Bd. of Ed. v. Brinkman* reached a similar conclusion, finding that state enactment of optional attendance zones, which had the effect of reifying rather than dismantling a prior de jure system of segregated schools, were unconstitutional.²¹⁷ The Court further reasoned that while the patterns of racial segregation were attributable in part to parent and student choice, the school board’s actions (or lack thereof) “exacerbated the racial separation existing at the time of *Brown I*,” and were therefore unconstitutional.²¹⁸

Lastly, in *United States v. Fordice*²¹⁹ Mississippi adopted race-neutral policies to dismantle its prior system of segregated public universities. All students could choose which school to attend, but the individual choices produced nearly all-white and all-Black colleges and universities.²²⁰ The Supreme Court acknowledged that racial segregation patterns that were a function of student choice could be an unconstitutional form of state action. The Court noted, “in a system based on choice, student attendance is determined not simply by admissions policies, but also by many other factors . . . [a]lthough some of these factors clearly cannot be attributed to state policies, many can be.”²²¹ The Court went on to find that Mississippi’s system of choice-based enrollment was a form of state action that led to racial segregation and that was therefore unconstitutional.²²²

Relying upon the school desegregation precedent described above, the argument for finding intentional state action in the case of white charter school enclaves would be the following: to the extent state education policy provides expanded choice, it plays a role in

215. *Id.* at 465 (citation omitted).

216. *Id.*

217. 443 U.S. 526, 534 (1979).

218. *Id.* at 539.

219. 505 U.S. 717 (1992).

220. *Id.* at 722–23.

221. *Id.* at 729.

222. *Id.* at 729, 742–43.

creating patterns of racial segregation that lead to white charter school enclaves. Put another way, this pattern of segregation in which white charter enclaves exist amongst more diverse traditional public schools is not inevitable. Rather, it is the direct result of a state policy that aids and abets the collective white preference for predominantly white schools.

Just as the Court in *Columbus*, *Dayton*, and *Fordice* found that state policies, which had the predictable effect of causing or worsening segregation, were forms of intentional state action, so might the Court find that the expansion of school choice policies is also intentional state action. Particularly in the case of white charter school enclaves, once an enrollment pattern results in a disproportionate enrollment of white students relative to their enrollment in the district, continued operation of the admissions policy for the charter school without any modification has the foreseeable effect of causing or exacerbating racial segregation.

B. *Legal Challenges to Regulating Choice*

Charter school segregation admittedly presents new and more nuanced forms of racial segregation than what the Supreme Court has traditionally faced in examining racial segregation of traditional public schools.²²³ In *Fordice* and *Dayton*, for example, the school systems were previously de jure segregated, thereby imposing on the districts an affirmative obligation to dismantle the previously de jure segregated systems.²²⁴ White charter school enclaves arguably impose no affirmative duty to desegregate the schools because there was no prior system of de jure segregation. As such, the school desegregation framework may not completely capture whether state policies that facilitate discrimination through choice are unconstitutional.

Yet the Supreme Court has acknowledged that the Constitution should be read to outlaw “sophisticated as well as simple-minded modes of discrimination.”²²⁵ *Columbus*, *Fordice*, and *Dayton* are still good law. The principles articulated in those cases apply outside the context of previously de jure segregated school systems. The Supreme Court has held as much in *Keyes v. School District No. 1*, finding that school systems that suffered from de facto segregation can also be

223. To date, the Supreme Court has not ruled on a case involving racial segregation of charter schools.

224. See *Fordice*, 505 U.S. at 742–43; *Dayton*, 443 U.S. at 534.

225. *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

deemed unconstitutional and tabbed with an affirmative duty to desegregate.²²⁶

Moreover, in considering the constitutionality of racial segregation that is the result of individual choices, when states enact policies to facilitate or serve as a conduit for such choices, state constitutional provisions might also come into play. Some state constitutions, such as New Jersey's, outlaw segregation in public schools.²²⁷ Other state constitutions have right-to-education clauses or equal protection clauses that might be interpreted more broadly than the Equal Protection Clause in the federal Constitution.²²⁸

In sum, there are viable grounds upon which constitutional challenges to white charter school enclaves might be made. The likelihood of success in such challenges may vary depending upon the state statutory scheme governing charter schools and the facts surrounding a challenged white charter school enclave. Even if one could successfully challenge the constitutionality of white charter school enclaves, pressing questions remain about the normative value of regulating or attempting to regulate choice that produces such enclaves. The section that follows examines the normative arguments for and against regulating choice that produces white charter school enclaves.

C. *The Normative Case for Regulating Choice*

School choice as an operative construct is undergirded by several normative values. These values include autonomy, freedom, and dignity, to name a few. As such, one of the primary arguments against regulating the choice that leads to the creation of white charter school enclaves is that regulation would infringe upon the autonomy, freedom, and dignity inherent in any choice-based system.

Notably, the values undergirding school choice are all individualized. They focus on the gain to the individual student without considering the whole system of public schools. Public school

226. 413 U.S. 189, 207–208 (1973) (applying the affirmative duty to desegregated requirement to a school district that was de facto segregated after finding that even though the segregation was de facto, there was segregative intent).

227. N.J. CONST., art I, § 5.

228. See, e.g., Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915 (2016) (analyzing the ways in which the right to education clause in state constitutions can and has been used to secure positive liberty in ways unavailable through the federal constitution).

systems, however, serve important democracy enhancing functions.²²⁹ Public education ostensibly serves as a citizen training ground, educating citizens so that they can actively participate in the American democracy, contribute to the economy, and make their communities better places.²³⁰

Thus, while school choice is undergirded by important normative values, those normative values must be weighed or prioritized against the equally important normative values underlying the system of public education. The evidence suggests that segregated education provides a lesser education qualitatively and quantitatively for both white students²³¹ and students of color.²³² For white students, integrated education provides them with tangible social-psychological benefits that make them better citizens.²³³ For students of color, integrated education increases their access to both intangible and tangible educational inputs.²³⁴ As a result, allowing white parents to make choices that entrench racial segregation in schools has negative consequences that undermine the democracy enhancing function of the system of public education.

Moreover, most choices operate within specific factual and historical contexts. School choice was historically used as a mechanism for whites to resist attending desegregated schools. Further, since *Brown*, whites as a collective have continued to choose segregated, predominantly white schools when given a choice. School segregation patterns that are a function of choice allow us to ignore deeply entrenched structural racism and inequality. Justifying white

229. See generally David F. Labaree, *Consuming the Public School*, 61 EDUC. THEORY 381 (2011).

230. *Id.*

231. See 8 GENEVIEVE SIEGEL-HAWLEY, HOW NON-MINORITY STUDENTS ALSO BENEFIT FROM RACIALLY DIVERSE SCHOOLS 1–2 (2012), <http://www.school-diversity.org/pdf/DiversityResearchBriefNo8.pdf> (“Diverse schools are linked to a host of positive learning outcomes for white students. These include more robust classroom discussions, the promotion of critical thinking and problem-solving skills and higher academic achievement.”)

232. See Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, *Parents Involved v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Nos. 05-908 & 05-915) (explaining the benefits of desegregated schools for students of color and the detriments of segregated schools for students of color).

233. See Siegel-Hawley, *supra* note 228, at 2 (“Compared to racially isolated educational settings, racially integrated schools are associated with reduced prejudice among students of different racial and ethnic backgrounds, a diminished likelihood of stereotyping, more friendships across racial lines and higher levels of cultural competence.”).

234. See Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, *supra* note 229, at 6–10.

charter school enclaves by claiming that individuals have an autonomy and dignity interest in choosing predominately white schools belies the historical context of the harm caused by segregated schools to Blacks and the benefit derived to whites.

Lastly, not all choice constructs are built equally. Indeed, it is arguably the case that “[i]nstitutions and practices in society are designed to be responsive to white preference and to frustrate African American preference.”²³⁵ Other scholars have written about the ways in which school choice serves as a system of racial subordination for low-income students of color.²³⁶ To the extent that school choice allows whites to do what the law does not—to separate themselves from students of color, hoarding resources in the process—parental choice needs to be regulated.

V. CONCLUSION

The proliferation of school choice policies is changing the landscape of racial segregation in public schools. School choice once offered promise for producing integrated schools by disconnecting residence from school assignment such that patterned residential segregation would not be replicated in the public schools. Yet, rather than ameliorating racial segregation in schools, some school choice policies are making patterns of racial segregation in public schools worse. This is the case because whites as a collective tend to choose segregated, predominately white schools. School choice policies, particularly the proliferation of charter schools, provide an avenue for whites to satisfy their collective preference for segregated schools.

As this Article demonstrates, the proliferation of school choice policies (particularly charter schools) allows the creation of white charter school enclaves that serve as a conduit to white flight without residential mobility. In that respect, white charter school enclaves are like the white segregation academies that emerged in the aftermath of *Brown*.²³⁷ The segregationist history of American public education is thus repeating itself. But we are not powerless against these patterns

235. Powell, *supra* note 24, at 675–76.

236. See, e.g., James, *supra* note 22, at 1102 (“In addition to the problematic impact of race on the education market, choice also masks racial subordination in public education in the form of unreasonable educational alternatives, education policy problematically informed by cultural-deficit models, and negative-racialized schooling experiences.”).

237. See note 41, *supra*, for a more detailed discussion of the history of segregation academies as a means of resistance to school desegregation in the South.

of racial segregation. As this article sets forth, a constitutional and normative path towards regulating choice exists and should be explored.