PUBLIC SCHOOL CHOICE AND RACIAL INTEGRATION

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The history of public education in America has been, almost from the beginning, the history of efforts to *reform* public education. This is both understandable and appropriate. Public education is the means through which we shape the American polity for the next generation. Debates about public education are debates about what the America of the future should be. Efforts to reform public schools are, at one remove, efforts to reform American society.

"School choice" is rallying cry of one of the most visible public school reform movements of the present era. The most enthusiastic school choice proponents characterize it as "the panacea" for whatever is wrong with public education in America.[1] Presidents Reagan and Bush both publicly espoused one or another of the reforms of the school choice movement.[2] The Bush administration made school choice one of the principal themes of its school policies.[3] In some form choice is on the agenda of public school re-

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[1] JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS 217 (1990). Chubb and Moe assert that

> [w]ithout being too literal about it, we think reformers would do well to entertain the notion that choice *is* a panacea. This is our way of saying that choice is not like the other reforms and should not be combined with them as part of a reformist strategy for improving America's public schools. Choice is self-contained reform with its own rationale and justification. It has the capacity *all by itself* to bring about the kind of transformation that, for years, reformers have been seeking to engineer in myriad other ways.

Id.

[2] *See, e.g.*, Ronald Reagan, Statement to the White House Conference on Choice in Education, January 10, 1989, *reprinted in* NANCY PAULU, IMPROVING SCHOOLS AND EMPOWERING PARENTS: CHOICE IN AMERICAN EDUCATION—A REPORT BASED ON THE WHITE HOUSE WORKSHOP ON CHOICE IN EDUCATION 29 (1989); George Bush, Statement to the White House Conference on Choice in Education, January 10, 1989, *reprinted in id.* at 31.

[3] America 2000 Excellence in Education Act, H.R. 2460 and S. 1141, 102d Cong., 1st Sess. (1992).

formers in virtually every state in the union.[4] School choice has generated or provoked an enormous literature—popular, scholarly, and otherwise.[5]

School choice can mean different things in the mouths of different speakers.[6] Among the public school reforms urged—not necessarily all by the same, or even allied, proponents—in the name of school choice are the following[7]:

1. Replacing the existing system of publicly financed schools with a system of vouchers issued to parents of all school-age children, which parents may use in their discretion at schools operated by public entities or private entities. Various proposals envision varying degrees of public regulation of such schools, ranging from detailed regulations regarding educational standards, program offerings, and admission criteria, to no public regulation at all. Various proposals envision different levels of voucher payments, ranging from a small fraction of the actual tuition charge to the full charge at elite private institutions.

2. Supplementing of the existing system of publicly financed schools with a system of vouchers issued to some limited class of parents, typically parents of school-age children located in urban areas, which parents may use in their discretion at schools operated by public entities or private entities. As above, these proposals vary in the degree of public regulation of eligible schools and the amount of the voucher.

3. Permitting parents to enroll school-age children in any public school, anywhere in the state, that will accept them. Proposals differ as to how much discretion schools have in selecting or rejecting applicants, how much tuition they may charge, how much

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4 CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, SCHOOL CHOICE 99-112 (1992).

5 *See, e.g.*, ERIC CLEARINGHOUSE ON EDUCATIONAL MANAGEMENT, BIBLIOGRAPHY ON SCHOOL CHOICE, VOUCHERS, AND OPEN ENROLLMENT (1993) (abstracting 247 journal articles and reports written between 1987 and 1992).

6 MYRON LIEBERMAN, PRIVATIZATION AND EDUCATIONAL CHOICE 236 (1989); ABIGAIL THERNSTROM, SCHOOL CHOICE IN MASSACHUSETTS 9 (1991); Peter K. Rofes, *Public Law, Private School: Choice, the Constitution, and Some Emerging Issues*, 21 J.L. & EDUC. 503, 504-06 (1992).

7 For various types of school choice proposals, see CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, *supra* note 4, at 1-3; EDUCATION COMMISSION OF THE STATES, POLICY GUIDE: A STATE POLICY MAKER'S GUIDE TO PUBLIC SCHOOL CHOICE (1989), *reprinted in* U.S. DEP'T OF EDUC., REGIONAL STRATEGY MEETINGS ON CHOICE IN EDUCATION (1989); Joe Nathan, *Progress, Problems, and Prospects of State Educational Choice Plans*, *in* CHOICE IN EDUCATION: POTENTIAL AND PROBLEMS 263, 267-72 (William Lowe Boyd & Herbert J. Walberg eds., 1990).

of that tuition is paid by public funds, and out of whose budget those public funds come.

4. Permitting parents to enroll school-age children in any public school within the school district in which they reside. Proposals differ as to what types of criteria school districts or their component schools may use in limiting the choices available to parents and how students are selected where the number of otherwise eligible applicants exceeds the available capacity of any particular school.

5. Designating certain public schools as open to enrollment by any eligible student in the district or, sometimes, within the state.

Many of the elements in this loose collection of proposals are existing practices or familiar proposals repackaged under the rubric of school choice. Several states currently offer subsidies for private education[8] and many more have considered it at one time or another. Many states have long permitted public school districts to accept tuition-paying students from outside of the district.[9] Although most school districts profess a policy of neighborhood schools, in practice many permit transfers among schools on a case-by-case basis if parents are sufficiently persuasive or insistent.[10] General district-wide transfer plans and "freedom of choice" plans were common in southern school districts between 1954 and 1968.[11] Finally, elite or specialized schools that are open to students throughout the district, such as Bronx High School of Science, Boston Latin School, and Philadelphia's Central High and Girls High Schools, have long been familiar in the larger urban districts and proliferated during the 1980s as an element of school desegregation plans.[12]

The school choice movement does, however, represent some-

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8 *See, e.g.*, Mueller v. Allen, 463 U.S. 388 (1982) (Minnesota tuition tax credit); West Morris Regional Bd. of Educ. v. Sills, 58 N.J. 464, 279 A.2d 609 (New Jersey private school transportation subsidy), *cert. denied*, 404 U.S. 986 (1971).

9 *See, e.g.*, N.J. STAT. ANN. § 18A:38-3 (West 1989).

10 SUSAN PERKINS WESTON, U.S. DEP'T OF EDUC., CHOOSING A SCHOOL FOR YOUR CHILD (1989), *reprinted in* MYRON LIEBERMAN, PUBLIC SCHOOL CHOICE: CURRENT ISSUES/FUTURE PROSPECTS 153, 156 (1990) (describing this phenomenon and recommending that parents seek transfer of their children to the public schools they prefer, even in school districts that do not officially permit it).

11 *See, e.g.*, Green v. County Sch. Bd. of New Kent County, Va., 391 U.S. 430 (1968); *see generally*, Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 735 (1986).

12 *See, e.g.*, CHRISTINE H. ROSSELL, THE CARROT OR THE STICK FOR SCHOOL DESEGREGATION POLICY: MAGNET SCHOOLS OR FORCED BUSING 23-26, 41-65 (1990); Gewirtz, *supra* note 11, at 761-71.

thing genuinely new. It seeks to take various practices and proposals that have been isolated phenomena and peripheral to previous public school reform movements, unify them under a set of common themes, and make them central to public school reform.

Broadly speaking, proponents of school choice make four types of claims. First, school choice is a more efficient way of delivering education. Currently public education is a public monopoly, with all the defects of a monopoly. Breaking the monopoly and forcing schools to compete in the marketplace will not only better match student needs and parental desires with educational resources, but will produce better education for all at lower cost.[13]

Second, school choice is the remedy to the fatal organizational defects of public education.[14] Education is most effectively delivered in settings in which schools are highly autonomous and school principals and teachers have the maximum amount of discretion and independence. This is incompatible with the current system of democratic control and bureaucratic organization.

Third, school choice grants more liberty and autonomy to parents.[15] As currently organized, public schools do not respect or honor either the value choices of parents or their special understanding of, and commitment to, their own children.

Fourth, school choice gives poor parents some of the options that more affluent parents have always had.[16] Affluent families have always been able to choose their children's schools by sending their children to private schools or by moving to school districts, or attendance zones within school districts, that operate the schools they want. School choice gives poor parents the functional equivalent of this same opportunity.[17]

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13 MILTON FRIEDMAN, CAPITALISM AND FREEDOM 85-107 (1962); LIEBERMAN, *supra* note 6.

14 CHUBB & MOE, *supra* note 1, at 217.

15 JOHN E. COONS & STEVEN SUGARMAN, EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL (1978).

16 Chester E. Finn, Jr., *Why We Need Choice, in* CHOICE IN EDUCATION: POTENTIAL AND PROBLEMS 3, 5-7 (William Lowe & Herbert J. Walberg, 1990); Gewirtz, *supra* note 11, at 778-82.

17 For the most part, the proponents of school choice have not followed this claim to its logical consequence. They have not included programs promoting housing choice as part of the range of school choice reforms. Nonetheless, there is evidence that successful programs promoting housing choice for poor urban residents are not only the most authentic kind of school choice, but have other socially desirable consequences as well. *See, e.g.*, James E. Rosenbaum et al., *Can the Kerner Commission's Housing Strategy Improve Employment, Education, and Social Integration for Low Income Blacks?*, 71 N.C. L. REV. 1519 (1993); Florence Wagman Roisman & Hilary Botein, *Housing Mobility and Life Choices*, 27 CLEARINGHOUSE REV. 4 (Special Issue 1993).

Opponents of the various school choice proposals contest all these claims or assert that there are other countervailing concerns.[18]

Although the most radical school choice reforms would disestablish the existing system of public schools and replace it with a system of education vouchers good at schools operated by both public and private entities, virtually all the school choice proposals that have actually been implemented have been limited to offering parents choices among public schools, either within a single district or across district lines within a single state.[19] Debates over "public school choice" have focused less on the desirability or undesirability of the concept—virtually all commentators can point to some version of public school choice that they regard is at least marginally beneficial[20]—than on the details of implementation.

Within this smaller realm, policy debates have emerged over what the systemic constraints upon parental choice should be.[21] Clearly limitations of space will make it impossible for every parent to enroll his or her child in his or her preferred school. Should

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18 *See, e.g.*, James S. Liebman, *Voice, Not Choice*, 101 YALE L.J. 279 (1991) (comprehensively reviewing policy and legal objections) (book review); Albert O. Hirschman, *Exit and Voice: An Expanding Sphere of Influence*, *in* RIVAL VIEWS OF MARKET SOCIETY AND OTHER RECENT ESSAYS 77, 77-89 (1986) (economic efficiency); Michael Krashinsky, *Why Education Vouchers May Be Bad Economics*, 88 TCHRS. C. REC. 139 (1986) (same); Valerie E. Lee & Anthony S. Bryk, *Science or Policy Argument? A Review of the Quantitative Evidence in Chubb and Moe's Politics Markets, and America's Schools*, *in* SCHOOL CHOICE: EXAMINING THE EVIDENCE 185, 185-208 (Edith Rasell & Richard Rothstein eds., 1993) (democratic control and bureaucracy); Marla E. Sukstorf et al., *A Re-examination of Chubb and Moe's Politics, Markets, and America's Schools*, *in* SCHOOL CHOICE: EXAMINING THE EVIDENCE 209-18 (Edith Rasell & Richard Rothstein eds., 1993) (same); Donald R. Moore & Suzzanne Davenport, *School Choice: the New Improved Sorting Machine*, *in* CHOICE IN EDUCATION: POTENTIAL AND PROBLEMS 187, 187-224 (William Lowe Boyd & Herbert J. Walberg eds., 1990) (liberty, autonomy, and benefit to poor families); Amy Stuart Wells, *The Sociology of School Choice: Why Some Win and Others Lose in the Educational Marketplace*, *in* SCHOOL CHOICE: EXAMINING THE EVIDENCE 29, 29-48 (Edith Rasell & Richard Rothstein eds., 1993) (same). Some of the most vigorous critiques of school choice proposals come from proponents of *different* school choice proposals. *See, e.g.*, LIEBERMAN, *supra* note 10 (critiquing public school choice); THERNSTROM, *supra* note 6 (same); John E. Coons, *Perestroika and the Private Provider*, *in* LIBERATING SCHOOLS: EDUCATION IN THE INNER CITY 181, 181-198 (David Boaz ed., 1991) (same).

19 CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, *supra* note 4, at 99-112. The one highly visible exception is a small program undertaken in Milwaukee. *See* John F. Witte, *The Milwaukee Parental Choice Program*, *in* SCHOOL CHOICE: EXAMINING THE EVIDENCE 69, 69-110 (Edith Rasell & Richard Rothstein eds., 1993); James B. Egle, Comment, *The Constitutional Implications of School Choice*, 1992 WIS. L. REV. 459.

20 *See, e.g.*, *Position Statements on Choice from National Organizations*, *in* U.S. DEP'T OF EDUC., *supra* note 7 (collecting position papers prepared by various organizations).

21 *See, e.g.*, U.S. DEP'T OF EDUC., GETTING STARTED: HOW CHOICE CAN RENEW YOUR PUBLIC SCHOOLS 19-24 (1992); THERNSTROM, *supra* note 6, at 9-36.

there be any constraints other than that of space? Should eligibility standards be set for some or all schools? If so, by some central body or by the administrators of the schools themselves? If the latter, how much discretion should school administrators have in setting their eligibility standards and selecting their own students? How should students be selected if there are more eligible applicants than spaces at a particular school? If parents do not affirmatively choose a school, should students automatically be assigned to their neighborhood school? If not, what happens to children whose parents express no affirmative choice or do not enter the system until after the date for making choices is past? Should there be constraints upon parent choice to discourage racial segregation or foster racial integration?

All of these questions are obviously of great practical importance; some raise much larger policy issues. The last question—What constraints, if any, should be imposed on parental choice to prevent racial segregation or foster racial integration in the public schools?—is especially emotional. The debate on this question is driven by both historical and practical considerations. The widest experience with public school choice has been with the various voluntary transfer and freedom of choice plans adopted by formerly *de jure* segregated school districts in the wake of *Brown II*.[22] These plans were intended to create a structure that was nominally nondiscriminatory and racially neutral while maintaining the reality of racial segregation. Generally speaking, they were effective in doing so.[23]

A dozen years after the Supreme Court rejected transfer and "freedom of choice" plans as a remedy for *de jure* segregation in the south, the Reagan administration commenced an active campaign of replacing desegregation plans, especially in the north and west, that involved mandatory student assignments with "voluntary choice" plans, sometimes involving the creation of "magnet schools" in minority neighborhoods.[24] While there remains an active debate among advocates of school desegregation as to feasibility and effectiveness of magnet schools as a device for

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[22] Brown v. Board of Educ., 349 U.S. 294 (1955).

[23] *See* Green v. County Sch. Bd. of New Kent County, 391 U.S. 430 (1968); Monroe v. Board of Comm'rs, 391 U.S. 450 (1968); *see generally*, Gewirtz, *supra* note 11, at 735. Transfer policies were used in the north, as well as the south, to maintain racial segregation in the schools. *See* Charles L. Glenn, *The Massachusetts Experience with Public School Choice, in* NATIONAL GOVERNORS ASSOCIATION, TIME FOR RESULTS: TASK FORCE ON PARENTAL ENVOLVEMENT AND CHOICE, SUPPORTING WORKS 31, 35-37 (1986).

[24] Gewirtz, *supra* note 11, at 770-71.

desegregation,[25] the Reagan administration initiative was perceived as an overt strategy to undo efforts to desegregate public school systems in the north and west.[26] Thus, for historical reasons, even public school choice proposals trigger fears and suspicions that one of the intended effects of school choice is to terminate efforts to desegregate schools in the north and west and resegregate schools in the south.[27]

In practice, public school choice has the potential to foster or perpetuate racial segregation in the schools in several different ways. Parents of white students are extremely reluctant to have their children attend schools with substantial minority enrollment or located in minority neighborhoods, regardless of any other characteristics of the school.[28] More affluent and educated families make school choice decisions based upon more, and more sophisticated, data, and utilize the choice programs more aggressively.[29] For the most part, these "active choosers" do not make choices on the basis of the distinctive educational characteristics of the various schools, but on other considerations, such as location.[30] In communities where income and education are correlated with race, these children are disproportionately white. A public school choice plan might thus permit white active choosers

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25 *Compare* ROSSELL, *supra* note 12, *with* JENNIFER L. HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION 75-79 (1984).

26 Gewirtz, *supra* note 11, at 770-71.

27 The fact that the school choice movement has been actively promoted by the Reagan and Bush administrations and supported by proponents of the civil rights policies of these administrations has, of course, done nothing to calm those anxieties. This anxiety may not be wholly fanciful. *See* Jim Hilton, *Note, Local Autonomy, Educational Equity, and Choice: A Criticism of a Proposal to Reform America's Educational System*, 72 B.U. L. REV. 973, 975-76 (1992) (discussing connection between opponents of school desegregation in Boston and supporters of Massachusetts's school choice legislation).

28 ROSSELL, *supra* note 12, at 115 (reviewing literature). It should be emphasized that while this may be the result of subjective racial prejudice, it need not be. White parents may, in the absence of better information, treat the racial makeup of a school's enrollment as a proxy for the quality of the school and the achievement level of the students. *Id.* at 16-19.

29 Moore & Davenport, *supra* note 18; LIEBERMAN, *supra* note 10, at 35-38; Liebman, *supra* note 18, at 285-86 & nn.145-47; Wells, *supra* note 18; Barbara Strobert, Factors Influencing Parental Choice in Selection of a Magnet School in the Montclair, New Jersey, Public Schools 97-103 (unpublished dissertation, Columbia Teachers College, UMI Order No. 9121214, 1991); Amy Stuart Wells, *Public School Choice: Issues and Concerns for Urban Educators*, ERIC/CUE Digest No. 63, EDRS 322275 (1990) (reviewing literature).

30 CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, *supra* note 4, at 12-16.

to selectively enroll in schools that are predominantly white rather than schools that are racially balanced or predominantly minority.

On the other hand, minority families, even minority active choosers, may not aggressively choose schools that are predominantly white. While this may be a matter of ideological choice,[31] it may also be the result of other factors: the heavier reliance by many minority parents on information provided by friends or relatives who already have children in the school, which inclines choices toward schools that already have a substantial minority enrollment; fear that their children will be unwelcome or unable to compete; and alienation from, and cynicism about, public schools as an institution.[32]

These problems are likely to be exacerbated if the children in families that do not affirmatively exercise their opportunity to choose are automatically assigned to their neighborhood schools, because this makes it easy for active choosers to identify and avoid racially balanced or minority schools. For similar reasons, it is likely to be exacerbated if white families in urban areas with substantial minority populations have the option of choosing to enroll in suburban schools that are almost entirely white.[33] Finally, it is also likely to be exacerbated if some schools can select their students on the basis of grades, test scores, or past disciplinary record, all of which can serve as proxies for race, or at least have the foreseeable effect of disproportionately favoring white students over minority students.[34]

The most comprehensive study of the impact of school choice plans on racial segregation concludes that school choice plans that do not include both racial controls on transfers and selective location of especially desirable "magnet schools" in minority neighborhoods are likely to increase the degree of racial segregation.[35]

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31 Wells, *supra* note 18, at 39.

32 Wells, *supra* note 18, at 34-47 (case study of minority families participating in the school choice program in St. Louis); Strobert, *supra* note 29, at 97-103; *see generally*, Gewirtz, *supra* note 11, at 741-49 (exploring internal and external constraints that might lead minority parents not to utilize choice to enroll their children in white schools).

33 LIEBERMAN, *supra* note 10, at 35-38.

34 Moore & Davenport, *supra* note 18, at 190-203; THERNSTROM, *supra* note 6, at 82-86.

35 ROSSELL, *supra* note 12, at 106-08, 197-200; *see also*, Michael Alves & Paul L. Pryde, Jr., *Comments and General Discussion*, *in* SCHOOL CHOICE: EXAMINING THE EVIDENCE 135, 135-37 (Edith Rasell & Richard Rothstein eds., 1993). The data on school transfers from Minneapolis under Minnesota's statewide school choice program are especially striking. In 1988-89, 47% of the students in Minneapolis were minority, but only 19% of the applicants for transfer to suburban schools outside the city were mi-

As a result of the potential that public school choice programs will foster or perpetuate racial segregation, many proponents of school choice have advocated what has come to be known as "controlled choice." Advocates of this approach argue that parents' choices should be subject, among other things, to constraints designed to foster racial integration or at least restrain tendencies toward racial segregation.[36] There are two distinct types of controls a school district might impose. "Racial balance" controls seek to keep the racial makeup of each of the schools in the district approximately equal to the racial makeup of the district as a whole. Thus, in a district where the student enrollment is sixty percent minority, whites might be prohibited from enrolling in schools that are less than fifty percent minority and minority students might be prohibited from enrolling in programs that are more than seventy percent minority.[37] "Anti-tipping" controls seek to keep whites from fleeing the district. If school officials feel that the tipping point[38] is forty percent minority in a district where the enrollment is sixty percent minority, they might prohibit minority students from enrolling in schools that are more than forty percent minority, even though this guarantees that some other schools in the district must have minority enrollments in excess of the district-wide

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nority. Most of the white applicants were located in neighborhoods near the suburban border whose schools were predominantly minority. LIEBERMAN, *supra* note 10, at 35-38; *but see* Stephen Plank et al., *Effects of Choice on Education*, *in* SCHOOL CHOICE: EXAMINING THE EVIDENCE 111, 129 (Edith Rasell & Richard Rothstein eds., 1993) (concluding that while magnet schools increased interracial exposure for whites and decreased interracial exposure for African-Americans, other "schools of choice" were neutral as to interracial exposure). Plank and his colleagues do not seem, however, to have distinguished between "controlled choice" and "uncontrolled choice" in their study.

36 *See, e.g.*, U.S. DEP'T OF EDUC., *supra* note 21, at 19-24; Evans Clinchy, *Providing Data and Policy Recommendations in Answer to Twelve Questions Raised by the Task Force*, *in* NATIONAL GOVERNORS ASSOCIATION, TIME FOR RESULTS: TASK FORCE ON PARENTAL ENVOLVEMENT AND CHOICE, SUPPORTING WORKS 54, 77-79 (1986).

37 See, for example, model policy recommended in TIMOTHY W. YOUNG & EVANS CLINCHY, CHOICE IN PUBLIC EDUCATION 147-52 (1992); *see generally*, THERNSTROM, *supra* note 6, at 12-23 (surveying "controlled choice" programs in Massachusetts).

38 "Tipping point" commonly refers to the level of minority enrollment that sets in motion a spiral of defections by white students. Researchers have placed the tipping point at various points between 30% and 40%. Christine H. Rossell & Willis D. Hawley, *Understanding White Flight and Doing Something About It*, *in* EFFECTIVE SCHOOL DESEGREGATION 157, 165-71 (Willis D. Hawley ed., 1981). It is clear, however, that there is no single tipping point. Whether, and at what level of minority enrollment, a school will tip is dependent on a variety of factors, including, but certainly not limited to, the perceived quality of the school, the availability of other alternatives to white parents, the social class of the families of the white and minority students in the school, and whether the school is a neighborhood school in a changing neighborhood.

average.[39]

Controlled choice, however, has its critics.[40] They argue that the element of "control" in controlled choice so overwhelms the element of "choice" that controlled choice is not really a school reform at all. More particularly, they argue that the controls designed to achieve racial integration entail discrimination on the basis of race against both white students and minority students and that "anti-tipping" controls especially disadvantage minority students, disproportionately denying them the opportunity to obtain admission to their preferred choices. Such controls, they argue, are an unconstitutional form of racial discrimination.[41]

Anti-tipping controls certainly disproportionately limit the opportunities of minority students to enroll in white schools.[42] That is, after all, their intent. Whether "racial balance" controls disproportionately limit the choices of either whites or minorities is a much more uncertain question. It appears to depend on such factors as the racial makeup of the school district, the extent to which the various schools have space available, and the degree of residential segregation.[43] There is some evidence that controls in Boston and Minneapolis disproportionately restrict the choices of white students,[44] but one certainly cannot generalize from this scanty data.

Claims that racial controls in public school choice plans are unconstitutional are, of course, a special case of the more general claim that any racially conscious student assignment policy is unconstitutional. To assess the strength of the claim specifically as applied to controlled choice plans, it is useful to consider first the more general claim.

The constitutional objection to racially conscious student assignment policies is that they treat individuals differently on the basis of race. For example, in a school district with two elementary

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39 *See, e.g.*, Parents Ass'n of Andrew Jackson High Sch. v. Ambach, 598 F.2d 705 (2d Cir. 1979) (barring minority transfer to schools with 50% or greater minority enrollment, even though minorities made up more than 73% of the enrollment in the community as a whole); Johnson v. Board of Educ., 604 F.2d 504 (7th Cir. 1979).

40 THERNSTROM, *supra* note 6, at 27-37; David Boaz, *Public School Monopoly: America's Berlin Wall, in* LIBERATING SCHOOLS: EDUCATION IN THE INNER CITY 34-36 (David Boaz ed., 1991); LIEBERMAN, *supra* note 10, at 27-31.

41 Michael Heise, *An Empirical and Constitutional Analysis of Racial Ceilings and Public Schools*, 24 SETON HALL L. REV. 921 (1993).

42 Heise, *supra* note 41; *see Johnson*, 604 F.2d at 510-13 (describing effect on transfers by minority students under "anti-tipping" controls).

43 THERNSTROM, *supra* note 6, at 23.

44 LIEBERMAN, *supra* note 10, at 36-37; THERNSTROM, *supra* note 6, at 28 n.22.

schools, School M predominantly minority, School W predominantly white, some minority students in School M may be reassigned to School W, but no white students in School M will be reassigned to School W. Similarly some white students in School W may be transferred to School M, but no minority students will be transferred to School M. Regardless of whether the reassignment or non-reassignment pleases or displeases the students involved, it clearly does entail treating students differently on the basis of their race.[45] In the conventional "two-tiered" equal protection analysis this involves a "suspect" classification that is permissible only if supported both by a showing that this classification is justified by a sufficiently compelling governmental interest and "necessary" to advance that governmental interest.[46]

Claims that racially conscious school assignment policies are unconstitutional arise in at least three different settings. Racially conscious assignment policies that are intended to foster or perpetuate racial segregation are the essence of *de jure* segregation. They are clearly unconstitutional.[47] On the other hand, racially conscious assignment policies which are designed to remedy *de jure* segregation are clearly permissible, at least until the effects of *de jure* segregation are fully eliminated.[48]

Even where racial segregation in the schools is not the result of past or present *de jure* segregation, state or local officials may conclude that racial integration is desirable or even necessary to achieve the educational mission of the public schools. They might put the rationale in the following terms:[49]

> Segregated education denies a quality education to both

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45 Not all plans to remedy school segregation necessarily entail race-conscious student assignment policies. The school district might, for example, convert School M to a K-3 school and School W to a 4-6 school, each serving the entire school district. All assignments in this type of plan are made without regard to race. *See* Fuller v. Volk, 230 F. Supp. 25 (D.N.J. 1964), *vacated*, 351 F.2d 323 (3d Cir. 1965); Vetere v. Allen, 245 N.Y.S.2d 480 (App. Div.), *aff'd*, 206 N.E.2d 174, *cert. denied*, 382 U.S. 825 (1965). In general, however, the larger the school district and more thoroughly segregated its residential patterns, the less likely it is that a student assignment plan can be devised that is not race conscious.

46 *See, e.g.*, Board of Regents v. Bakke, 438 U.S. 265, 305 (1978); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273-74 (1986).

47 Brown v. Board of Educ., 347 U.S. 483 (1954).

48 Swann v. Charlotte-Mecklenburg Bd. of Educ. 402 U.S. 1, 28 (1971).

49 *See, e.g.*, HOCHSCHILD, *supra* note 25, at 172; Owen M. Fiss, 78 HARV. L. REV. 564, 567-70 (1965). Obviously not all educators would subscribe to all of these arguments, and some would not subscribe any of them. Among African-Americans there is clearly a contrary stream of thought that says that school desegregation is no longer a worthy goal and that reformers should focus their efforts on improving schools attended by African-American children.

white students and minority students. It makes it impossible to teach interracial cooperation and tolerance, indispensable skills for whites as well as racial minorities in a society that is increasingly heterogeneous and multi-racial. These skills are not merely learned in the classroom. They are also learned in the lunch line, the schoolyard, and the halls. They are taught by example as well as by precept. Genuine racial integration of the public schools is a necessary (though not sufficient) condition for learning and teaching interracial tolerance and cooperation. If white students attend schools where there are no minorities or minorities attend schools where there are no whites, this indispensable condition cannot be met.

Segregated education is unequal education. It isolates minorities from the mainstream of society and denies them both the opportunity to test themselves against members of the white majority and the confidence borne of experience that they can successfully compete in school or life with members of the white majority. On the other hand, minority students who attend racially integrated schools have better long-term life prospects than those who attend racially segregated schools.

De facto segregation creates a class of "minority schools" in whose quality the white majority in society has no economic or personal stake. Taxpayers, voters, parents, and school children pejoratively perceive the small number of schools in which the black and Hispanic students are concentrated as "minority schools." With a handful of notable exceptions, such "minority schools" receive less resources and are less successful by every measure. The vast majority of voters, taxpayers, and parents, however, have no economic or personal stake in this failure. It takes place somewhere else, to someone else's children, and is someone else's responsibility to fix. So long as the white majority has no economic or personal stake in the quality of education that minority children receive, these children will not receive educational opportunities equal to those received by white children.

The constitutional objections to race-conscious student assignment policies to remedy *de facto* segregation have been litigated in a variety of cases, almost exclusively in the state courts. Courts have invariably upheld the constitutionality of such plans, whether adopted voluntarily by local school districts, imposed by state education departments, or imposed by the courts under state constitutional provisions that prohibit *de facto* segregation.[50]

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[50] *See, e.g.*, Offermann v. Nitkowski, 378 F.2d 22 (2d Cir. 1967); Crawford v. Board of Educ., 551 P.2d 28 (Cal. 1976); Tometz v. Board of Educ., 237 N.E.2d 498 (Ill. 1968); School Comm. v. Board of Educ., 227 N.E.2d 729 (Mass. 1967), *appeal dis-*

The United States Supreme Court dismissed appeals from two of these state court decisions "for lack of substantial federal question."[51] The Court has never addressed the subject in a plenary opinion. The Court has, however, commented upon the issue in *dictum* in several cases. In *Swann v. Charlotte-Mecklenburg Board of Education*,[52] the Court contrasted the narrow remedial powers of the federal courts with the broader policy-making powers of local school officials:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary power of school authorities; absent a finding of constitutional violation, however, that would not be within the authority of a federal court.[53]

In the companion case of *North Carolina Board of Education v. Swann*,[54] the Court contrasted the power of school officials to require busing to achieve racial balance with their lack of power to prohibit busing where doing so perpetuates *de jure* segregation, and reiterated the thought expressed in *Swann* in slightly different language:

> We observed in Swann . . . that school authorities have wide discretion in formulating school policy, and that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements.[55]

The Court next commented on this issue in *Board of Regents v. Bakke*.[56] *Bakke* concerned a medical school's policy of reserving a

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missed, 389 U.S. 572 (1968); Board of Educ. of Englewood Cliffs v. Board of Educ. of Englewood, 257 N.J. Super. 413, 608 A.2d 914 (App. Div. 1992), *aff'd mem.*, 132 N.J. 327, 625 A.2d 483, *cert. denied*, 62 U.S.L.W. 3375 (1993); Booker v. Board of Educ., 45 N.J. 161, 212 A.2d 1 (1965); Morean v. Board of Educ., 42 N.J. 237, 200 A.2d 97 (1964); Addabbo v. Donovan, 209 N.E.2d 112 (N.Y.), *cert. denied*, 382 U.S. 905 (1965); Pennsylvania State Human Rights Comm'n v. Chester Sch. Dist., 233 A.2d 290 (Penn. 1967); Citizens for Better Educ. v. Goose Creek Consol. Indep. Sch. Dist., 719 S.W.2d 350 (Texas Ct. App. 1986), *appeal dismissed*, 484 U.S. 804 (1987); Citizens Against Mandatory Bussing v. Palmason, 495 P.2d 657 (Wash. 1972).

51 *Citizens for Better Educ.*, 484 U.S. 804 (1987); *School Comm.*, 389 U.S. 572 (1968).

52 402 U.S. 1.

53 *Id.* at 16.

54 402 U.S. 43 (1971).

55 *Id.* at 45. In another case decided the same day, *McDaniel v. Barresi*, the Court upheld a voluntary plan to assign children on the basis of race to achieve racial balance, but the Court clearly understand the plan to have been formulated to remedy *de jure* segregation. 402 U.S. 39, 41 (1971).

56 438 U.S. 265 (1978).

number of slots in its entering class each year for racial minorities. By a 5-4 margin, the Court struck down this policy on the grounds that any governmental action that distributes a benefit or imposes a burden upon an individual on the basis of race is impermissible, absent a sufficiently strong governmental justification.[57] By a different 5-4 margin, however, the Court declared in *dictum* that universities could utilize race conscious admission criteria to select students where maintaining "diversity" of their student body was integral to their educational mission. The Court declared that this was a "compelling" governmental justification for a race conscious admission policy.[58] The Court observed in a footnote that the university admission policy was fundamentally different from a racially conscious public school pupil assignment plan because it denies the applicant a place in the program altogether, while the pupil assignment plan merely changes the location at which the pupil receives a comparable public school education.[59]

A Los Angeles organization, Bustop, Inc., sought on several occasions to put before the Court the claim that a racially conscious pupil assignment plan imposed by the California state courts on the Los Angeles school district to eliminate *de facto* segregation that was racially discriminatory in violation of the Equal Protection Clause. The organization sought a stay of the state court remedial order in 1978. Then-Justice Rehnquist denied the stay with the explanation that

> this is not the traditional argument of a local school board contending that it has been required by court order to implement a pupil assignment plan which was not justified by the Fourteenth Amendment to the United State Constitution. The argument is indeed novel, and suggests that each citizen of a State who is either a parent or a schoolchild has a "federal right" to be "free from racial quotas and to be free from extensive pupil transportation that destroys fundamental rights to liberty and privacy." While I have the gravest doubts that the Supreme Court of California was *required* by the United States Constitution to take the action that it has taken in this case, I have very little doubt that it was *permitted* by that Constitution to take such action.[60]

Justice Powell denied a second stay application relying on the reasons given by Justice Rehnquist.[61]

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[57] *Id.* at 320.

[58] *Id.* at 311-15.

[59] *Id.* at 300 n.39.

[60] Bustop, Inc. v. Board of Educ., 439 U.S. 1380, 1382-83 (Rehnquist, Circuit Justice 1978).

[61] Bustop, Inc. v. Board of Educ., 439 U.S. 1384 (Powell, Circuit Justice 1978).

The case came back to the Court four years later under the caption *Crawford v. Board of Education*[62] as a challenge to a subsequent California constitutional amendment barring the state courts from ordering busing or mandatory pupil assignments to achieve racial balance. The Court found it unnecessary to reach Bustop's constitutional claim, upholding the constitutional amendment on other grounds.[63]

In the companion case to *Crawford*, however, *Washington v. Seattle School District No. 1*,[64] the Supreme Court struck down a state voter initiative that removed from school districts the power to voluntarily implement school desegregation to remedy racial imbalance. The proponents of the voter initiative did not argue that the type of school desegregation plans barred by the initiative violated the federal Constitution, and the Court did not address this issue.[65] Despite this disclaimer, the majority opinion described the desegregation plans that would be barred by the initiative in considerable detail[66] and set forth the educational rationales for such plans sympathetically.[67] The Court expressed the view that such plans may be controversial but declared that

> in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process.[68]

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62 458 U.S. 527 (1982).

63 *Id.* at 535 n.11.

64 458 U.S. 457 (1982).

65 *Id.* at 472 n.15.

66 *Id.* at 459-61.

67 *Id.* at 472-74.

68 *Id.* at 474. *See also* Freeman v. Pitts, 112 S. Ct. 1430, 1445 (1992) (seemingly expressing a similar sentiment).

The dissent in *Seattle School District*, written by Justice Powell and joined by three other Justices, commented on this issue in three separate footnotes. *See* 458 U.S. at 491 n.6, 497 n.12 & 501 n.17 (Powell, J., dissenting). The first of these footnotes included the following remark:

> Indeed, in the absence of a finding of segregation by the School District, mandatory busing on the basis of race raises constitutional difficulties of its own. Extensive pupil transportation may threaten liberty or privacy interests. . . . Moreover, when a State or school board assigns students on the basis of their race, it acts on the basis of a racial classification, and we have consistently held that "[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."

Id. at 491 n.6 (Powell, J., dissenting) (quoting Personnel Admin'r of Massachusetts v. Feeney, 442 U.S. 256 (1979)) (other citations omitted).

In a subsequent footnote the dissent declared:

> It is far from clear that in the absence of a constitutional violation, mandatory busing necessarily benefits racial minorities or that it is even

Given the seeming force of the constitutional objection to racially conscious student assignment plans to remedy *de facto* segregation, why have the courts not found it more persuasive, particularly in light of the fact that the same types of objections have prevailed in cases involving employment,[69] public contracts,[70] and higher education?[71]

A number of interrelated themes emerge from the various opinions. First, the educational justifications for racial integration are strong and lie close to the central mission of the public schools. The goals of teaching tolerance and cooperation among the races, of molding a polity that is free of racial prejudice, of preventing minority students from becoming isolated from the rest of the educational system, and eliminating, or preventing the emergence of, a problematic class of "minority schools," all seem integral to the educational mission of the public schools.[72]

In this respect, public schools are different from public housing, public employment, or public contracts. Racial integration is integral to the mission of the public schools; it has no necessary connection with the mission of public employment, public housing, or public contracts.[73]

> viewed with favor by racial minorities. . . . As the Court indicates, the busing question is complex and is best resolved by the political process.

Id. at 497 n.12 (Powell, J., dissenting) (citations omitted).

Finally, in a third footnote, Justice Powell stated that

> [i]n my view, the local school board—responsible to the people of the district it serves—*is* the best qualified agency of a state government to make decisions affecting education within its district. As a policy matter, I would not favor reversal of the Seattle Board's decision to experiment with a reasonable mandatory busing program, despite my own doubts as to the educational or social merit of such a program.

Id. at 501 n.17 (Powell, J., dissenting) (citation omitted). It hard to know quite what to make of these footnotes—which at once suggest possible constitutional objections and also urge that the decision to institute such policies be left exclusively to ordinary political processes—except that the dissent, like the majority, was not seriously attempting to actually resolve these issues.

69 Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

70 Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

71 Board of Regents v. Bakke, 438 U.S. 265 (1978).

72 Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971); Citizens for Better Educ. v. Goose Creek Consol. Indep. Sch. Dist., 719 S.W.2d 350, 352-53 (Texas Ct. App. 1986), *appeal dismissed*, 484 U.S. 804 (1987); Booker v. Board of Educ., 45 N.J. 161, 170-71, 212 A.2d 1, 6-7 (1965); Board of Educ. of Englewood Cliffs v. Board of Educ. of Englewood, 257 N.J. Super. 413, 464-65, 470, 608 A.2d 914, 943, 945 (App. Div. 1992), *aff'd mem.*, 132 N.J. 327, 625 A.2d 483, *cert. denied*, 62 U.S.L.W. 3375 (1993); Citizens Against Mandatory Bussing v. Palmason, 495 P.2d 657, 663 (Wash. 1972).

73 *See Wygant*, 476 U.S. at 275-76 (rejecting claim that racial integration of the faculty of a public school lacks sufficient connection with the educational mission of the school to justify giving preference in layoffs to minority teachers to maintain racial

The educational justifications for integration cannot be achieved by merely including a token number of minorities in schools that are otherwise white, or whites in schools that are otherwise minority. It must involve placing every student in a racially integrated school, or as close an approximation of that outcome as is feasible. In this respect, public schools are different from post-secondary education. A university may have a legitimate interest in assuring that the students that it selects for its student body experience the educational benefits of "diversity." This interest can, however, be fully protected by sprinkling, for example, a relatively small number of minority students in a predominantly white student population. The university has no legitimate interest, however, in what happens to the students who are not admitted or who never apply. A school district cannot be so parochial. It has an interest in all the students in the system and must assure them all the educational benefits of an integrated education.[74]

Second, the goal of racial integration is not to benefit minority students at the expense of white students. Racially conscious student assignment policies do not in principle deny anyone the benefits of a public education. To the contrary, the intended effect of these policies is to provide a better education for all students, white and minority alike. This goal may be imperfectly realized in reality, sometimes acutely so. In principle, at least, it means that no one suffers any educational harm from racially conscious student assignment policies. In this respect, too, public education is different from post-secondary education, employment, public housing, or public contracts, where racially conscious policies grant a benefit or impose a burden on one person on the basis of his or her race at the expense of another.[75]

Third, student assignment policies, including racially conscious student assignment policies, involve complex educational policy choices. These choices may involve technical issues of educational policy which require the expertise of professional educators. Alternatively, they may involve important value choices best resolved through political processes. Except in the clearest cases, courts feel technically ill-equipped and institutionally out-of-place when called upon to second guess the choices made by locally accountable school officials. As a result, the courts are strongly predisposed to defer to the judgment

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balance); *see also* United States v. Board of Educ., 832 F. Supp. 836 (D.N.J. 1993) (expanding the rationale of Wygant).

74 *Booker*, 45 N.J. at 180-81, 212 A.2d at 11-12 (calling for "greatest dispersal" of minority students in the schools "consistent with sound educational values and procedures").

75 *Bakke*, 438 U.S. at 300 n.39; *Goose Creek*, 719 S.W.2d at 352; *Englewood*, 257 N.J. Super. at 468-69, 608 A.2d at 944-45.

of local school officials in all but the clearest cases of wrongdoing.[76]

Fourth, even in school systems that are not *de jure* segregated, race-conscious student assignment policies operate remedially. *De facto* segregation is the result of racial segregation in housing. Racial segregation in housing is, for the most part, not the consequence of choice on the part of minorities or of chance. Public and private discrimination are certainly contributing factors. Racially conscious student assignment policies simulate, however imperfectly, what the school system would look like if there were no racial discrimination in the housing market.[77]

Fifth, racially conscious student assignment policies operate in the context of a public school system in which virtually all school assignments are involuntary. Students must attend school. They are ordinarily assigned to schools involuntarily, usually based upon the happenstance of their home addresses. They may be reassigned to other schools on any of a variety of grounds: overcrowding; school closures; the construction of a new school; unsafe conditions; need to balance class sizes in various schools; and changes in bus routes. Parents have no legally protected right to have their children attend any particular school, or to have any individual say in what school their children attend. Thus, racially conscious student assignment does not deprive families of anything to which they are otherwise entitled.[78]

Finally, public education is mass education. It does not purport to provide each student with the education that is most perfectly tailored to his or her desires, or even to his or her educational needs. At best, school systems provide the mass education that is most beneficial to most of the students. Some families will inevitably and justifiably be dissatisfied. That, however, is merely the unavoidable consequence of providing mass education. Except in extreme circumstances, families are not entitled to a program tailored to the individual needs or desires of their child nor, in general, are they entitled to exercise any individual control over the educational programs that their children receive. Thus, the fact that race-conscious student assignment policies leave some students or their families dissatisfied does not deprive those students of any rights they would otherwise have.[79]

In light of these themes, does it make a difference that the ra-

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[76] Washington v. Seattle Sch. Dist. No.1, 458 U.S. 457, 474 (1982); Vetere v. Allen, 206 N.E.2d 174, 174-76 (N.Y.), *cert. denied*, 382 U.S. 825 (1965).

[77] Crawford v. Board of Educ., 551 P.2d 28, 34, 40-41 (1976).

[78] Bustop, Inc. v. Board of Educ., 439 U.S. 1380, 1382-83 (Rehnquist, Circuit Justice 1978); Citizens Against Mandatory Bussing v. Palmason, 495 P.2d 657, 662-63 (Wash. 1972).

[79] *Palmason*, 495 P.2d at 665.

cially conscious student assignment policies occur in the setting of a public school choice program? For "racial balance" controls, it arguably makes a difference in three ways. First, in the context of a public school choice plan, student assignments are, at least presumptively, no longer involuntary. Families are free to select the school they prefer. "Racial balance" controls that restrict the choices of some families on the basis of their race arguably deprive them of the opportunity to choose schools available to all other families.

This argument, however, is easy to overstate. No public school choice plan guarantees every family its first choice. Families will be driven back to the their second, third, or fourth choice because of lack of space in the most popular programs, or because their child cannot satisfy the eligibility requirements. How severe these limitations on choice will be depends on circumstances in the school district largely out of the family's control.

Second, the effect of "racial balance" controls is that one child gets into his or her program of choice at the expense of another child, and does so on the basis of race. Arguably this now resembles the situation in *Bakke*, *Wygant*, and *Croson*. This comparison, however, is unsound. As characterized by Justice Powell in *Bakke*,[80] even racially conscious non-choice student assignment plans routinely deny some students the opportunity to attend the school they really wish to attend, their own neighborhood school, and give that spot to some other student on the basis of race. Unlike post-secondary admissions, however, controlled choice policies do assure the child a place in another school, presumably equally good and offering the additional educational benefits of racial integration.

Third, in an ideal world the provision of school choice would obviate the need for special efforts to maintain racial balance. The school a child attends would no longer depend upon the happenstance of his or her home address. Even in communities that are strongly racially segregated, all families could, if they so choose, send their children to racially integrated schools. There are no "minority" schools, although there may be schools that market themselves to minority families by offering programs that appeal especially to the preferences of those families. There are no racially linked differences in the quality of schools, because parents who are dissatisfied with their child's current school can select another next year. Schools in minority neighborhoods that wish to be racially balanced can do so by offering programs that appeal especially to families of white students.

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[80] *Bakke*, 438 U.S. at 300 n.39.

In this ideal world, the justification for "racial balance controls" does not entirely disappear—educators may still wish to maintain racial integration to make possible the teaching of interracial tolerance and cooperation, just as they may insist that all students learn spelling or attend physical education classes—but it is surely much less compelling. Racial balance controls would no longer operate to neutralize the legacy of segregation and discrimination, but would rather operate to restrict choices freely made by minorities and whites alike.

Although this vision clearly inspires some school choice proponents,[81] it is merely a vision.[82] The reality is that the choices of white and minority families are still influenced by considerations of race, and that in the absence of controls, school choice leads to racial segregation in all but the most exceptional school districts.[83]

In sum, for "racial balance" controls, it makes little difference to the constitutional analysis that the racially conscious student assignment policies occur in the setting of a public school choice program. The educational justification for integrated education remains unchanged. Indeed, all the themes outlined above still make themselves heard, except perhaps that of the involuntariness of public education.

Anti-tipping controls present a more serious constitutional question. The same considerations that lead courts to uphold the constitutionality of racially conscious student assignments in general are applicable to racially conscious constraints on school choice. Restricting transfers on the basis of race, not to achieve racial balance, but to preserve racial imbalance, is *de jure* segregation.[84] It can only be sustained if necessary to advance a compelling governmental interest. Preventing tipping, and thus preserving a degree of racial integration in schools that would otherwise be wholly single-race schools, does advance the government's interest in integrated education. This interest is at least as compelling as the interest of post-secondary educational institutions in "diversity." The level of the cap on minority enrollment, however, must be shown to be no lower than necessary to serve this interest.

The courts in the two cases that have addressed this issue, *Johnson v. Board of Education*[85] and *Parent Association of Andrew Jackson High*

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81 THERNSTROM, *supra* note 6, at 27-36; Boaz, *supra* note 40, at 34-36; LIEBERMAN, *supra* note 10, at 27-31.

82 Gewirtz, *supra* note 11, at 760.

83 ROSSELL, *supra* note 12, at 106-08, 197-200; *see also* Alves, *supra* note 35, at 135-37.

84 United States v. Charleston County Sch. Dist., 960 F.2d 1227, 1234-36 (4th Cir. 1992).

85 604 F.2d 504 (7th Cir. 1979).

School v. Ambach,[86] have followed just this analysis. In both cases, the court held that the anti-tipping controls could be sustained only upon a showing a compelling governmental interest and found that preventing tipping and preserving some degree of integration was such an interest. Both courts, however, struggled with the issue of whether the cap on minority enrollment was really at the highest level that would still prevent tipping. In *Johnson*, the court accepted the district claim that this was so. In *Ambach*, the court was left unsatisfied and remanded the case twice for additional proofs on this issue.

That controlled choice is constitutional does not, of course, assure that it is wise educational policy. That depends upon whether the school choice movement can actually achieve an acceptable approximation of the ideal world of choice that its proponents envision. If it can, controlled choice will in all likelihood cease naturally to have any impact on the choices available to families. It will quietly wither away. If it cannot, proponents of public school choice in urban areas will themselves be obliged to choose between openly abandoning the goal of racially integrated education or embracing some version of controlled choice.

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[86] 598 F.2d 705 (2d Cir. 1979), *after remand*, 738 F.2d 574 (2d Cir. 1984).