STILL SERVING TWO MASTERS? EVALUATING THE CONFLICT BETWEEN SCHOOL CHOICE AND DESEGREGATION UNDER THE LENS OF CRITICAL RACE THEORY

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* I would like to thank Drs. Suzanne Eckes (Indiana University), David Stovall (University of Illinois – Chicago) and Graduate Assistants Richard Hayman, Shawn Waltz and Roslyn Bacon for their constructive feedback. I would also like to thank Preston Green and Erica Frankenberg for their untiring support in the development of this research and its analysis.

I. INTRODUCTION

School voucher programs—or state-sponsored educational programs designed to use public money to finance public school students' education at private institutions—have been the subject of intense debate. Much of the debate has questioned the funding of religious institutions, which at one point raised Establishment Clause questions.[1] When the Supreme Court of the United States ruled in *Zelman v. Simmons-Harris*,[2] there were effectively no extant federal Establishment Clause issues with private school voucher programs.

Newer scholarship and legal attacks on private school vouchers, however, focus on state challenges to school voucher programs.[3] For example, states have challenged the constitutionality of funding formulas and requirements to establish uniform school systems.[4] Relatively little attention is paid to the impact of school voucher programs on racial demographic numbers, especially voucher students' impact on the demographic numbers of the private schools they attend, or how those racial demographic numbers support or interfere with school districts' compliance with federal desegregation orders. As such, little is known about how private school voucher programs impact efforts towards school desegregation. History, however, instructs even the casual observer that school choice has often resulted in increased private efforts towards segregation.[5]

This Article chronicles the history of school choice and school desegregation policies in an effort to highlight the inability of the federal government to effectively and simultaneously implement both school choice and school desegregation policies. The purpose of the Article is not to support either school choice or school desegregation as a preferred method of pursuing school desegregation. Instead, this Article seeks only to bring to light the troubling divergence of the federal governments embracing of both school choice and school desegregation policies.

Without doubt, the United States has struggled long and hard to achieve racial integration in its schools. From before *Brown v. Board of Education of Topeka, Kansas*[6] to the Civil Rights Act of 1964[7] and well into contemporary times, the country has yet to find the delicate balance of assuring parental choice in the education of school-aged children and the federal preference for racial integration in publicly funded schools. Since 1974, and coinciding with

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[1] *See infra* Part III.

[2] Zelman v. Simmons-Harris, 536 U.S. 639, 649–53 (2002).

[3] *See infra* Part III.E.

[4] *See* Preston C. Green, III & Peter Moran, *The State Constitutionality of School Voucher Programs: Religion is Not the Sole Determinant,* 2010 B.Y.U. EDUC. & L.J. 275, 278 (2010).

[5] *See infra* Part II.B.i–iv.

[6] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) [hereinafter *Brown I*].

[7] Civil Rights Act of 1964, 42 U.S.C. §§ 2000 et seq. (1964).

the decision in *Milliken v. Bradley I*,[8] desegregation gains in education have consistently been rolled back. The one institution in the United States that almost assuredly impacts all citizens is also the one institution where desegregation was hardest sought and hardest fought. Assuming that school desegregation is still a preference of the federal government, it now appears that an era of parental choice may reverse what small measure of desegregation was achieved through the Civil Rights Movement; or, in the alternative, outside pressures to desegregate public schools may stymie efforts to implement school choice policies. This paper considers both policies from the assumption that school desegregation policies are preferred over school choice policies by federal policymakers for two reasons: 1) school desegregation policies developed before modern school choice policies; and 2) school desegregation policies have not been explicitly overturned in federal courts or Congress.

This Article provides a historical analysis of federal and state case law and policy, as well as a similar historical review of the United States' fight for desegregated schools, in an effort to shed light on the reasons that two separate policies aimed at reforming public schools in the United States are failing. Specifically, private school voucher programs and school desegregation efforts are almost always in conflict with each other. Part II discusses the historical incompatibility of school choice and school desegregation efforts. Part III details the methods by which school voucher programs have become a nearly irrevocable addition to education policy in the United States. Part IV highlights the impact private schools have on segregation. Part V considers whether state-based challenges may be a threat to the rise of private school voucher programs.

II. SCHOOL CHOICE AND SCHOOL DESEGREGATION: AN ATTEMPT TO SERVE TWO MASTERS?

School choice policies and efforts towards achieving civil rights in education have long been at odds with each other.[9] After *Brown I* [10] and *Brown II*,[11] intellectuals and politicians began to advocate for policies that expanded the ability of parents to choose the educational setting(s) of their school-aged children.[12] Immediately after the Court's seminal decision requiring educational equity, some states and districts used school choice policies to stymie the pro-

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[8] Milliken v. Bradley, 418 U.S. 717, 752–53 (1974).

[9] *See* Martha Minow, *Confronting the Seduction of Choice: Law, Education and American Pluralism*, 120 YALE L.J. 814, 816–18 (2011); *see also* Erica Frankenberg & Genevieve Siegel-Hawley, *Choosing Diversity: School Choice and Racial Diversity in the Age of Obama*, 6 STAN. J. C.R. & C.L. 219, 222–23 (2010) [hereinafter *Choosing Diversity*].

[10] *See generally Brown I*, 347 U.S. at 495.

[11] *See generally* Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) [hereinafter *Brown II*].

[12] *See* Minow, *supra* note 9, at 821–22.

gress of school desegregation.[13] Southern states, in particular, implemented a set of plans commonly referred to as Massive Resistance, which used various forms of school choice, to prevent even token measures of school desegregation.[14] Through a series of federal court cases, the federal judiciary rebuffed Massive Resistance.[15] The executive and legislative branches of the federal government would also explicitly repudiate Massive Resistance through the adoption of civil rights-based legislation. In particular, both the Civil Rights Act of 1964[16] and the Elementary and Secondary Education Act[17] contributed to, if not mandated, desegregation and rebuked the arguments of those advocating for school choice as a method of maintaining segregation.[18] In combination, the Civil Rights Act of 1964 and the Elementary and Secondary Education Act forced districts to value desegregation over school choice; prior to these federal acts, school choice had primarily been used to perpetuate segregation.[19]

Traditionally in the United States education has been the province of local governments.[20] However, since the mid-twentieth century, the federal government has expanded its role in education to protect the civil rights of public school students.[21] In particular, the federal government, despite a stated policy preference for both desegregated schools and school choice policies, has en-

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[13] James E. Ryan, *Brown, School Choice and the Suburban Veto*, 90 VA. L. REV. 1635, 1636 (2004).

[14] *Choosing Diversity*, *supra* note 9, at 223.

[15] *See generally* Cooper v. Aaron, 358 U.S. 1 (1958) (reinforcing the unconstitutionality of segregation in public schools and holding that state officials could not purposefully delay implementation of desegregation); Griffin v. Cty. Sch. Bd. of Prince Edward Cty., 377 U.S. 221 (1964) (holding that county could not close public schools while supporting private segregated White schools in an effort to oppose desegregation of public schools); Green v. Cty. Sch. Bd. of New Kent Cty., 391 U.S. 430 (1968) (finding school choice plan an inadequate enforcement of desegregation where no White child chose to attend the formerly black school in the three years the plan had been in place, and the schools remained largely segregated); United States v. Scotland Neck City Sch. Bd., 407 U.S. 484 (1972) (enjoining implementation of a statute that would create a new school district, largely black, in a city that was trying to dismantle a racially divided district); Wright v. City of Emporia, 407 U.S. 451 (1972) (holding that city could not establish a separate school district that would, in effect, disrupt desegregation of the county school system).

[16] Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (1964).

[17] Elementary and Secondary Act of 1965, Pub. L. No. 89–10, 79 Stat. 27 (1965).

[18] Joseph P. Viteritti, *The Federal Role in School Reform: Obama's Race to the Top*, 87 NOTRE DAME L. REV. 2087, 2090 (2012).

[19] Nick Lewin, *The No Child Left Behind Act of 2001: The Triumph of School Choice over Racial Desegregation*, 12 GEO. J. POVERTY L. & POL'Y 95, 108–13 (2005).

[20] *Choosing Diversity*, *supra* note 9, at 221; *see also* Rosyln A. Mickelson & Stephanie Southworth, *When Opting Out is Not a Choice: Implications for NCLB's Transfer Option from Charlotte, NC*, 38 EQUITY & EXCELLENCE EDUC. 1, 1–3 (2005).

[21] *Choosing Diversity*, *supra* note 9, at 221.

dorsed an increased use of school choice in public education.[22] Magnet schools—an early form of federally supported school choice—provided a pathway to both school choice and desegregation and had been generally successful at accomplishing both goals with the generous financial assistance of the federal government.[23] More recently, charter schools have been less effective at integration.[24] The decrease in the "magnetizing" effect of magnet schools has been linked to the federal government's decreased emphasis on desegregation.[25] Notwithstanding their proven track record, magnet school funding has decreased while charter school funding has increased.[26] The heavy focus on funding charter schools—a form of school choice—is problematic. Academic achievement data does not link substantial academic gains to student enrollment in charter schools, and it is generally accepted in peer-reviewed research that charter schools aid in the resegregation of public school students.[27]

School choice policies offend traditional notions of civil rights beyond contributing to the resegregation of schools. As they are currently implemented, school choice policies often wrest the management and supervision of schools away from local and politically accountable control in predominantly minority areas;[28] thus, school choice policies effectively force minority stakeholders into educational systems dominated by unelected White boards.[29] Removing local political accountability for school boards may result in fewer poor performing schools closing[30] and greater numbers of entry points into the school-to-prison pipeline.[31] Given the judicial blind spot created by the federal courts' interpre-

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[22] *Id.* at 221–22.

[23] *See generally id.* at 224–36.

[24] *Id.* at 240–45.

[25] *Id.* at 226.

[26] GENEVIEVE SIEGEL-HAWLEY & ERICA FRANKENBERG, REVIVING MAGNET SCHOOLS: STRENGTHENING A SUCCESSFUL CHOICE OPTION: A RESEARCH BRIEF 5 (2012), http://files.eric.ed.gov/fulltext/ED529163.pdf.

[27] Viteritti, *supra* note 18, at 2113–14.

[28] Danielle Holley-Walker, *A New Era for Desegregation*, 28 GA. ST. UNIV. L. REV. 423 (2012) [hereinafter *A New Era*].

[29] Steven L. Nelson, *Gaining "Choice" and Losing Voice: Is the New Orleans Charter School Takeover a Case of the Emperor's New Clothes? in* ONLY IN NEW ORLEANS: SCHOOL CHOICE AND EQUITY POST-HURRICANE KATRINA (Luis Miron, Joseph Boselovic & Brian Beabout eds., 2015) [hereinafter *Gaining Choice and Losing Voice*]; *see also* Steven L. Nelson, Balancing School Choice and Political Voice: An Analysis of the Legality of Public Charter Schools in New Orleans, Louisiana Under Section 2 of the Voting Rights Act (Dec. 2014) (unpublished Ph.D. dissertation, Pennsylvania State University) (on file at University Park, Pennsylvania State University) [hereinafter *Balancing School Choice and Political Voice*].

[30] Steven L. Nelson, *Killing Two Achievements with One Stone: The Intersectional Impact of Shelby County on the Rights to Vote and Access High Performing Schools*, 13 HASTINGS RACE & POVERTY L.J. 225 (2016) [hereinafter *Killing Two Achievements*].

[31] Steven L. Nelson & Jennifer E. Grace, *The Right to Remain Silent in New Orleans: The*

tation of both the Equal Protection Clause and the Voting Rights Act, two key civil rights statutes, minority parents have very little judicial recourse against this move away from popular democracy and the equal ability to partake in the political process.[32]

Recent federal policy aimed at school accountability has escalated pressures to incorporate school choice policies. These policies have created the promise of academic gain while placing desegregation efforts in imminent jeopardy. The Bush administration linked school choice policies to accountability measures in the now overturned No Child Left Behind Act of 2002, suggesting chartering traditional public schools as one method of turnaround strategy under the provisions of No Child Left Behind that required the reconstitution of schools.[33] Efforts to promote diversity were, however, absent in the revival of school choice in the No Child Left Behind Act.[34] Similarly, President Obama's highly competitive Race to the Top Grant placed states reticent to incorporate school choice models at a competitive disadvantage.[35] Both the Bush and Obama policies were important impetuses for the development of school choice models. States were at an explicit disadvantage for not allowing or limiting choice models under Race to the Top. No Child Left Behind forced thousands of districts across the country to implement the Act's choice provisions soon after the Act went into effect.[36]

The contention between school choice and desegregation policies was clear in the regulations promulgating No Child Left Behind. Even states that historically used choice to segregate schools and that were under court-ordered desegregation plans were required to seek relief from those same desegregation plans to pursue banning school choice policies.[37] For example, No Child Left Behind's choice provision did little to provide equity[38] for minority parents and

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Role of Self-Selected Charter School Boards on the School-to-Prison Pipeline, 40 NOVA L. REV. 447 (2016).

[32] Steven L. Nelson & Heather N. Bennett, *At the Intersection of the Voting Rights Act, the Equal Protection Clause and the School Choice Movement: Have the Courts Built a House of Cards?* 10 DUKE J. CONST. L. & PUB. POL'Y 153 (2016) [hereinafter *House of Cards*].

[33] *Choosing Diversity*, *supra* note 9.

[34] *Id.*

[35] Viteritti, *supra* note 18, at 2114.

[36] Lewin, *supra* note 19, at 95.

[37] *Id.*

[38] Although some use the terms interchangeably, equity and equality represent two different concepts. Equality would guarantee that all are offered exactly the same thing, and equity would guarantee that we would make efforts to remedy the past wrongs of the country by offering historically and contemporaneously marginalized and disenfranchised groups disproportionate opportunities. To analogize this concept, assume that A and B must share one apple. Equality would dictate both receive one half of the apple. Equity, on the other hand, would dictate that we consider whether either has already—at the unjust cost of the

students in Charlotte, North Carolina because the city's infrastructure lacks high performing schools; thus, recent federal policy shunting desegregation efforts in favor of school choice policies have failed to deliver on the promise of more and better quality education.[39] Similarly, in New Orleans, Louisiana, No Child Left Behind stripped political power from the city's voters, who were predominantly Black, while placing the replacement charter schools in an "accountability cycle."[40]

These results are not astonishing: the federal government has failed to endorse school choice models that are more effective at desegregation, such as managed choice or inter-district choice.[41] School choice policies that are confined to poor, urban boundaries are unable to achieve equity due to their geographic limitations.[42] It, therefore, seems less-than-coincidental that both political parties rejected proposed No Child Left Behind provisions mandating vouchers, which could have been more damaging to efforts towards educational equity in terms of academics and segregation.[43] The Supreme Court's ultimate barrier to integration, *Milliken v. Bradley*,[44] endorsed and protected "White flight"[45] and hollowed attempts at desegregation since there were too few White students to have meaningful desegregation.[46]

Undoubtedly, the school choice movement has many proponents, but even these allies are supporters of school choice for divergent (and sometimes nefarious) reasons.[47] Evidence of this disparate support can be found in the fact that school choice plans seeking integration engender vitriolic reactions.[48] This reaction occurs despite the voluntary nature of desegregation plans[49] and de-

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other—consumed other products. In that case, A may be entitled to less of the apple than B if A had already eaten an orange that he had unjustly taken from B or had otherwise and unethically impeded B's ability to obtain the orange.

[39] Mickelson & Southworth, *supra* note 20, at 3.

[40] Danielle Holley-Walker, *The Accountability Cycle: The Recovery School District Act and New Orleans' Charter Schools*, 40 CONN. L. REV. 125, 130, 141–42 (2007) [hereinafter *The Accountability Cycle*].

[41] *Choosing Diversity*, *supra* note 9, at 226.

[42] Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791, 801–02 (2006).

[43] David Hursh, *Assessing No Child Left Behind and the Rise of Neoliberal Education Policies*, 44 AM. EDUC. RES. J. 493, 502 (2007).

[44] Milliken v. Bradley, 418 U.S. 717, 751–52 (1974).

[45] *See infra* Part B.i.

[46] Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Court's Role*, 81 N.C. L. REV. 1597, 1607–08 (2002).

[47] Stephen Eisdorfer, *Public School Choice and Racial Integration*, 24 SETON HALL L. REV. 937, 942–43 (1994).

[48] *See* Minow, *supra* note 9, at 827.

[49] *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 719 (2007) [hereinafter *Parents Involved*].

spite efforts at various forms of integration not based on race.[50] School choice policies may have less to do with educational programming and more to do with considerations such as racial composition and location of particular schools.[51]

Some scholars have, however, advocated for the use of school choice—even though it causes segregation—as a method to overcome the brutal historical struggle for desegregation that has placed minority students in a worse position than before desegregation efforts began.[52] Robin Barnes goes as far as arguing that magnet schools (which are known for successfully accomplishing academic improvement and desegregation) are premised on the idea that Whites' comfort levels with the proportion of minority students should dictate the number of minority students enrolled in magnet schools.[53] Although Barnes also predicted that school choice, and particularly charter schools, would result in greater local (and minority) control of education politics and policy,[54] this prediction has not come to fruition.[55]

Recent federal reforms have generally aimed for school choice through privatization.[56] Some scholars have proposed other methods of using school choice to promote diversity while maintaining public accountability, though they realize that school choice typically enables segregation.[57] These scholars have argued that suburban school districts should enroll students from urban districts.[58] This argument is unrealistic because it assumes that suburban districts are willing to accept students from urban areas, which is highly unlikely since families participating in White flight are specifically attempting to avoid such students. Furthermore, it assumes that the monetary advantage of accepting urban students can overcome racist attitudes. This is not always the case, as has been proven in Kansas City, Missouri.[59] Kansas City's public schools did not experience dramatic improvements with increased state funding

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[50] Erica Frankenberg, Preston C. Green III & Steven L. Nelson, *Fighting Demographic Destiny: A Legal Analysis of Attempts of the Strategies That White Enclaves Might Use to Maintain School Segregation*, 24 GEO. MASON U. C.R. L.J. 39, 46 (2013).

[51] Eisdorfer, *supra* note 47, at 943.

[52] Robin Barnes, *Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375, 2380 (1997).

[53] *See id.* at 2402.

[54] *See id.* at 2405–08.

[55] *See, e.g.*, *House of Cards*, *supra* note 32, at 7–8; *The Accountability Cycle*, *supra* note 40, at 140; *see generally*, *Balancing School Choice and Political Voice*, *supra* note 29, at 7–8; *Gaining Choice and Losing Voice*, *supra* note 29, at 239.

[56] *See* Hursh, *supra* note 43, at 502.

[57] *See* Ryan, *supra* note 13, at 1636.

[58] *See* Liu & Taylor, *supra* note 42, at 795; Ryan, *supra* note 13, at 1645–46.

[59] Preston C. Green III & Bruce D. Baker, *Urban Legends, Desegregation, and School Finance: Did Kansas City Really Prove that Money Doesn't Matter?* 12 MICH. J. RACE & L. 57, 90–95 (2006).

aimed at providing equitable funding for school districts with fewer monetary resources due to enrolling higher proportions of lower income students.[60] Notably, Preston Green and Bruce Baker found that Kansas City did not fair any worse than neighboring school districts.[61] Still, increased funding to the public schools in Kansas City did not result in drastically better academic performance for students.[62] Additionally, such a plan offensively places the burden of pursuing educational equity squarely on the victims of past state sponsored segregation, a notion rejected by the Supreme Court in *Green v. County School Board of New Kent County*.[63] Their argument also fails to consider the detrimental effect of shipping minority students out of their neighborhoods on a daily basis.[64]

Moreover, these same scholars assert that the federal government could financially incentivize racial diversity in charter schools.[65] This plan might also not pass muster under the Court's most recent voluntary school desegregation case, *Parents Involved in Community Schools*.[66] Perhaps it is time to usher in a new era of school desegregation efforts and push back against efforts at academic accountability.[67]

A. *Derek Black's Analysis of the Public Good: A Need to Expand the Framework?*

Professor Derek Black asserts that school choice policies offend the concept of the public good.[68] Black states that demographic inclusion and competition

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[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] Green v. Cty. Sch. Bd. of New Kent Cty., 391 U.S. 430, 436 (1968).

[64] *See* Barnes, *supra* note 52, at 2385.

[65] *See* Liu & Taylor, *supra* note 42, at 809; Ryan, *supra* note 13, at 1646 (arguing that policies that constrain financial solutions to educational equity have shaped solutions that have come in the form of desegregation and school choice).

[66] *See generally* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007). In *Parents Involved*, the Supreme Court reasserted that diversity in public schools was a compelling state interest, but the Court also severely restricted the ability of states to pursue diversity when targeting specific and individual students. *See id.* In particular, Justice Kennedy's concurrence articulates a number of ways that states may pursue diversity in public schools. *See id.* at 782–98. Justice Kennedy's opinion, which created a plurality in favor of diversity as a compelling state interest, states that even voluntary integration plans could not target specific students, but those students could be targeted en masse via neighborhood specific plans. *See id.* Thus, a federal incentive would likely have to target diversity via proxy—e.g., neighborhood or socioeconomic status—which is less likely to produce the exact types of diversity being sought or run afoul of Justice Kennedy's tenuous concurrence on that upheld diversity as a compelling state interest. *Id.*

[67] *See A New Era*, *supra* note 28, at 443.

[68] *See generally* Derek Black, *Charter Schools, Vouchers and the Public Good*, 48 WAKE FOREST L. REV. 445, 447 (2013).

for resources (financial, human, and physical) are contrary to the ideal of public schools pursuing a common and public good.[69] In the context of private school vouchers, Black finds that one large, urban school district's use of school choice reinforced racial segregation.[70] According to Black, implementing school choice policies may force already cash-strapped school districts to overcome the burden of educating the students who are most difficult to educate.[71] Black also questions the public's nature and ability to fulfill common rather than individual agendas of school choice models while assuring that school choice models can facilitate the public good.[72] As such, Black concludes that school choice models are not currently constructed to pursue the public good, as far as the common good is defined through utilitarianism.[73] In essence, Black argues that education is viewed far too individualistically despite the fact that education, as a public good, impacts and benefits society as a whole.[74]

Black is, perhaps, too gun-shy in his argument. Since school choice models often violate principles barring segregation, school choice models are not only against the public good, but also violate principles of longstanding public policy, perhaps even overturning *Brown sub silentio*. When given the chance(s) to void school choice policies, the Court should do so unless such policies could co-exist with the holding of *Brown I*. The Supreme Court has explicitly forbidden the segregation of public school students, and the public policy behind this prohibition should extend to even private school students if those students' educations are funded with public money. While it is rather difficult to overcome the impact of the Court's decision in *Milliken*, the government at all levels should continue to advocate for a more inclusive and desegregated schooling experience for school-aged children. School desegregation is and should be seen as the rule of law in education unless the Supreme Court is willing to outright reject or otherwise limit its holding in *Brown I*.

B. *The Troubling Historical Intersection Between Desegregation and School Choice*

The reality that school choice creates the opportunity for further segregation is not shocking. In nearly every contemplation of school choice since federally-mandated school desegregation, the purpose or impact of school choice has been discriminatory.[75] This section will discuss White flight, segregation academies, freedom of choice plans, and school closures resulting from monetary divestment, all of which aimed to avoid school desegregation. Although these

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[69] *Id.* at 463, 469.
[70] *Id.* at 468.
[71] *Id.* at 473.
[72] *Id.* at 447.
[73] *Id.* at 448–49.
[74] *See id.*
[75] *See infra* Parts B–E.

efforts are addressed separately, it should be noted that efforts to avoid desegregation often operate in cooperation with each other.

1. Understanding White Flight

White flight is the exodus of White families from urban schools.[76] White flight arises when middle-class (and usually White) parents want to avoid enrolling their students in predominantly (or increasingly) minority schools.[77] A positive correlation exists between Black school enrollment and White flight.[78] It is, therefore, reasonable to state that higher proportions of Black students induce middle-class White families to flee schools (and communities). As proof, simply examine public school enrollment in various inner-city school districts.[79] In Washington, D.C. White student public school enrollment dropped 80% after forced integration.[80] In Jefferson County (Louisville), Kentucky, the White public school population decreased by nearly a quarter after the city and county schools were merged and desegregated in 1975.[81]

Some Supreme Court precedent has served to encourage the use of White flight as a means to avoid desegregation.[82] *Milliken v. Bradley* restricted desegregation activities to urban areas and suburban areas with a "provable" history of aiding in discrimination against minorities.[83] The effect of *Milliken* was to require urban Whites to integrate their public schools while allowing suburban Whites—who might be the same people, due to the transient nature of our society[84]—to attend segregated schools.[85] Post-*Milliken*, artificial and arbitrary jurisdictional population limitations can stymie attempts at integration because those seeking to avoid desegregation orders and other efforts at desegregation need only move into a neighboring school district to avoid the desegregation of public schools.[86] Thus, the ability to access racially mixed schools now depends on residential housing patterns rather than a national commitment to desegregated schools.[87]

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[76] *See* CHARLES T. CLOTFELTER, AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 75–76 (2004).

[77] *See* Michael E. Lewyn, *The Courts v. the Cities*, 25 URB. LAW. 453, 456 (1993).

[78] Linda Renzulli & Lorraine Evans, *School Choice, Charter Schools and White Flight*, 52 SOC. PROBS. 398, 400 (2005).

[79] *See, e.g.*, Lewyn, *supra* note 77; CLOTFELTER, *supra* note 76.

[80] Lewyn, *supra* note 77, at 454.

[81] CLOTFELTER, *supra* note 76, at 75–76.

[82] Lewyn, *supra* note 77, at 457–58.

[83] Milliken v. Bradley, 418 U.S. 717, 744–45 (1974).

[84] *Id.* Of course, geographic boundaries are a terrible way to have decided *Milliken* since it is very likely that urban Whites who played a critical role in the state-sponsored discrimination in Detroit were the same people that simply moved to the suburbs.

[85] Lewyn, *supra* note 77, at 458.

[86] CLOTFELTER, *supra* note 76, at 77.

[87] *Id.*

Overcoming residential housing patterns requires overcoming *Milliken,* which has come to represent an almost complete ban on mandatory cross-jurisdictional integration plans.[88] Because of residential housing patterns, there are not enough Blacks in the suburbs or Whites in the cities to obtain meaningful desegregation in most areas of the country.[89] Thus, White flighters could completely avoid desegregation orders by moving to certain suburbs.[90] The suburbs were almost exclusively White, and the few minorities in the suburbs were isolated in a few school districts within metropolitan areas falling outside of predominately White school districts.[91] Thus, integrated schools were not a threat for the suburban White flighter.[92]

In "metropolitan counties" (outlying counties on the outskirts of major cities), White flighters enjoyed even greater success avoiding desegregation. Metropolitan counties allowed Whites to completely avoid desegregation, especially post-*Milliken*, while still living in the metropolitan area.[93] Thus, White flighters could enjoy all of the amenities of the inner city while avoiding living situations that placed White flighters as neighbors, community members, and/or schoolmates with Black Americans.

White flight can also occur within the city limits—from public schools to private schools.[94] Segregationist practices used by private schools have led to further segregation in public schools.[95] White students enrolled in private schools are, by definition, not included in the pool of White students available to desegregate public schools. White flight from public to private schools causes segregated public schools because White students are removed from diverse schools in favor of predominantly White schools.[96] Private schools have been and continue to be whiter and wealthier than public schools when controlling for jurisdiction.[97]

In Atlanta, White flight manifested itself in both flight from the city and flight into private schools.[98] Some of the private schools were segregation academies sponsored by groups like the Ku Klux Klan.[99] As further evidence of the racial animus behind White flight, in Atlanta White flight occurred only after federal desegregation orders were enacted which transferred Black stu-

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[88] *Id.*

[89] *See* Chemerinsky, *supra* note 46, at 1607.

[90] *See id.*

[91] *See id.* at 1605.

[92] *Id.*

[93] CLOTFELTER, *supra* note 76, at 90–91.

[94] Renzulli & Evans, *supra* note 78, at 400.

[95] CLOTFELTER, *supra* note 76, at 122–23.

[96] *Id.*

[97] *Id.*

[98] *See generally* KEVIN M. KRUSE, WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM 169–70 (2005).

[99] *Id.* at 170.

dents into previously all-White schools.[100] Bans on mass transit further prevented easy access to predominantly White suburban areas.[101] These bans assured that a critical mass of Blacks could never fully participate in future efforts to desegregate the Atlanta suburbs.[102]

2. Segregation Academies

Segregation academies provided another form of school choice.[103] They played a critical role in preventing Black students from realizing desegregated classroom experiences.[104] Segregation academies were "private schools" developed with the intent of stifling the enforcement of desegregation orders.[105] Since the Fourteenth Amendment applies only to state actors, segregation academies at their inception appeared sheltered from governmental intervention, especially in the form of desegregation orders.[106] Segregation academies also used religion as a shelter against government regulation in an attempt to promote racist policies.[107] Segregation academies were a financially realistic alternative for White families seeking to avoid desegregated schools.[108]

Though supporters of segregation academies viewed their schools as part of a greater conservative movement, this view is not, however, support in fact.[109] The creation of segregation academies was an attempt at overcoming the call for integration, and this fact was not hidden.[110] The Southern Independent School Association, an association of all-White private schools, presented evidence that parents who chose to send their children to all-White private schools believed that segregation would produce long-term benefits for their students.[111] Furthermore, as demands for integrated schools increased, both en-

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[100] *Id.* at 168–70.

[101] *Id.* at 248–49.

[102] *Id.*

[103] *See generally* James C. Harvey, *The Mississippi Textbook Case*, 6 N.C. CENT. L.J. 48 (1974).

[104] Frank R. Parker, *Protest, Politics and Litigation: Political and Social Change in Mississippi, 1965 to Present*, 57 MISS. L.J. 677, 693 (1987).

[105] Teresa A. Clark, *Civil Rights—Private School's Policy of Refusing to Admit Black People Solely Because of Their Race Violates Civil Rights Act of 1866—42 U.S.C. § 1981—*Gonzalez v. Fairfax-Brewster School, Inc., *363 F. Supp. 1200 (E.D. Va. 1973)*, 7 LOY. L. REV. 634, 634 (1974).

[106] *Id.* at 634–35.

[107] JOSEPH CRESPINO, IN SEARCH OF ANOTHER COUNTRY: MISSISSIPPI AND THE CONSERVATIVE COUNTERREVOLUTION 66–67 (William Chafe et al. eds., 2007).

[108] Parker, *supra* note 104, at 693.

[109] CRESPINO, *supra* note 107, at 106–74.

[110] Ryan, *supra* note 13, at 1636.

[111] Clark, *supra* note 105, at 637.

rollment and the number of segregation academies increased.[112] Similarly, the population of Blacks had, and still has, a positive correlation with the amount of White flight to segregation academies.[113]

States resisting orders to desegregate public schools had few private schools before 1964.[114] Ultimately, the age of segregation academies, at least in terms of their development, ended in the early 1970s (when the most serious efforts at desegregate schools also ended).[115] Of course, by the mid 1970s, segregation academies were so entrenched in the everyday life of some states that the phrases "Christian schools" and "segregation academies" were synonyms.[116] The growth of private school enrollment in the states resisting integration orders ran in opposition of the prevailing trend in private school enrollment.[117]

Nationally, private schools have seen decreasing enrollment numbers, but in the South private school enrollment has skyrocketed.[118] At one point, an estimated half-million students were enrolled in segregation academies.[119] Some churches did not support segregation academies as methods of avoiding desegregation, but other churches enabled the use of segregation academies through supporting the establishment of such schools.[120]

Segregation academies were typically private in name only.[121] Government officials made every attempt to aid segregation academies, both overtly and covertly.[122] Originally, segregation academies qualified for tax-exempt status from the Internal Revenue Service; however, these exemptions were later ruled impermissible.[123] Nevertheless, the ban on tax exemptions lasted only eleven years.[124] Some states also provided financial aid to White students in an attempt to promote segregation academies.[125] Through tuition grant programs, which served as predecessors to modern school voucher programs, states provided grants in an effort to transfer public funds to private segregation academies.[126] These grants-in-aid were also later found unconstitutional.[127] Other

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[112] Anthony M. Champagne, *The Segregation Academy and the Law*, 62 J. NEGRO EDUC. 58, 59 (1963).

[113] CRESPINO, *supra* note 107, at 246–47.

[114] *Id.* at 240.

[115] *Id.* at 247.

[116] *Id.* at 247–48.

[117] Ryan, *supra* note 13, at 1636–37.

[118] *Id.* at 1637.

[119] Champagne, *supra* note 112, at 59.

[120] CRESPINO, *supra* note 107, at 64–66.

[121] *Id.* at 228 (noting that White enrollment in public schools dropped from 771 to 28 in Holmes County, Mississippi after court-ordered desegregation).

[122] *Id.*

[123] Harvey, *supra* note 103, at 49.

[124] CRESPINO, *supra* note 107, at 230.

[125] Harvey, *supra* note 103, at 49.

[126] CRESPINO, *supra* note 107, at 240.

states, such as Mississippi, school districts were selling off assets to segregation academies at alarmingly discounted rates.[128]

3. Freedom of Choice Plans

Very little public school desegregation occurred immediately after *Brown I* and *Brown II* and the myriad of cases spawned by those decisions.[129] Likewise, private school enrollment did not spike immediately after *Brown*.[130] States wishing to avoid integration of their public schools used various strategies to overcome federal pressures to desegregate their schools.[131] Efforts to divest funds from public schools or close schools altogether were commonplace in response to orders to integrate public schools in the South.[132] In perhaps the most extreme example of school closures, the Prince Edward County School Board shuttered its public schools for years while simultaneously establishing a fund to support White-only segregation academies.[133] The federal courts later found these actions unconstitutional.[134]

Where reallocation of withdrawn public school funds to segregation academies was found unconstitutional, local governments often resorted to pupil assignment plans.[135] Pupil assignment plans—restricted transfer options and kept students in the school where they were previously enrolled in before the desegregation orders—led to freedom of choice plans.[136] Freedom of choice plans required Black parents and students to take the lead in integrating schools, as opposed to forcing school boards to make efforts to desegregate their schools.[137] Freedom of choice plans were also notoriously unsuccessful at integrating schools since the plans placed the onus of enforcing *Brown*'s promise on those families that *Brown* sought to protect from discrimination and retribution for seeking to desegregate schools.[138] Freedom of choice plans usually resulted in all-Black schools remaining homogeneous and all-White schools experiencing very little desegregation.[139] A federal lawsuit was necessary to end freedom of choice plans that had stymied efforts at integration for more

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[127] Harvey, *supra* note 103, at 49.

[128] CRESPINO, *supra* note 107, at 241–43.

[129] Harvey, *supra* note 103, at 48.

[130] Ryan, *supra* note 13, at 1636.

[131] *See infra* Part II.B.ii–iv.

[132] R.H. Jump & J.L. MacMillan, *The Private, Racially Segregated, Sectarian School*, 29 MERCER L. REV. 1099, 1099–100 (1978).

[133] *Id.* at 1101.

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] Parker, *supra* note 104, at 691.

[138] Jump & MacMillan, *supra* note 132, at 1102.

[139] Parker, *supra* note 104, at 691.

than a decade.[140] *Green v. County School Board of New Kent County*,[141] a response to a freedom of choice plan in rural Virginia, mandated affirmative actions to eliminate racial discrimination's "root and branch".[142] The Supreme Court, thereafter, placed this burden squarely on local school boards.[143]

4. School Closures Resulting from Monetary Divestment

Prince Edward County, Virginia, had a history of school discrimination.[144] In fact, a lawsuit against the Prince Edward County School Board was part of the consolidated cases that became known as *Brown v. Board of Education*.[145] Post-*Brown* attempts to desegregate Prince Edward County Schools were met with resistance.[146] To some extent, this rural county in Virginia was the seat of massive resistance in the South.[147] White parents in Prince Edward County sought to operate all-White private schools.[148] Roughly a decade after *Brown* the Court grew weary of the slow pace of desegregation and attempted to enforce desegregation orders immediately, as opposed to allowing local governments to achieve desegregation with "all deliberate speed".[149] However, desegregation was destined for failure because the Court had tasked the people most likely to oppose desegregated schools with assuring said desegregation.[150]

As a response to desegregation, the White citizens closed the public schools and awarded tuition grants to White families to attend segregated private schools.[151] Though initially funded through private donations, tuition grants in Prince Edward County were later government-sponsored.[152] Funding was also divested from the public schools.[153] The local government opened an all-Black tuition-based private school to appease Black parents who were angry about the

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[140] Green v. Cty. Sch. Bd. of New Kent Cty., 391 U.S. 430, 441 (1968).

[141] *Id.*

[142] Harvey, *supra* note 103, at 48.

[143] *Id.*

[144] *See* Griffin v. Cty. Sch. Bd. of Prince Edward Cty., 377 U.S. 218, 220–22 (1964).

[145] *Id.* at 221.

[146] *Id.* at 221–22.

[147] J. Rupert Picott & Edward H. Peeples, Jr., *A Study in Infamy: Prince Edward County, Virginia,* 45 PHI DELTA KAPPAN 393, 394 (1968).

[148] Green v. Cty. Sch. Bd. of New Kent Cty., 391 U.S. 430, 431–33, 441 (1968) (explaining that the "freedom of choice" plan at issue was residual from state sanctioned segregation and finding that no White children had transferred to the Black school).

[149] Robert L. Carter, *The Warren Court and Desegregation,* 67 MICH. L. REV. 237, 244 (1968).

[150] *Id.* at 245.

[151] Picott & Peeples, *supra* note 147, at 394.

[152] Griffin v. Cty. Sch. Bd. Of Prince Edward Cty., 377 U.S. 218, 222 (1964) (granting legislation in special session that, among other things, gave local governing bodies the ability to appropriate funds for tuition grants to children in non-sectarian private schools).

[153] Picott & Peeples, *supra* note 147, at 394.

school closures.[154] Only one application for enrollment was submitted for that school.[155] The all-White private school received support through assignment of funds from traffic tickets.[156] The little money allotted for public schools was disproportionately apportioned: all-White private school students received twice the money that was allotted for a Black student in public schools.[157] As if local support was not enough, Prince Edward County received national financial support,[158] further enhancing the county's efforts at maintaining closed and/or segregated schools.

With the schools closed to avoid desegregation, Black students were required to forego enrollment in schools to avoid endangering the lawsuit to compel desegregated schools.[159] Both the Virginia Supreme Court and the federal courts held that the school closures in Prince Edward County were unconstitutional.[160] The Virginia Supreme Court addressed the issue before the Supreme Court could, and the resultant action of the Prince Edward County schools was to move to a freedom of choice plan.[161] Virginia also repealed the state compulsory attendance laws and opted to make school attendance a local issue.[162] When the Supreme Court addressed the matter of integrating the Prince Edward County public schools (or at least forcing the county to resume public education) in *Griffin*, the Court foreclosed using school closures as a method to end-run *Brown*.[163] After *Griffin*, White segregationists concluded that the outright defiance of desegregation was no longer feasible.[164] The county, however, continued to attempt to divest funds from education and attempt other subtle rebukes of desegregation.[165] Two things were clear after *Griffin*: Prince Edward County was required to operate desegregated schools[166] and public education would resume in Prince Edward County, even if that public education was a shell of its former self.[167]

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[154] *Id.* at 395.

[155] *Id.*

[156] JILL OGLINE TITUS, BROWN'S BATTLEFIELD: STUDENTS, SEGREGATIONISTS AND THE STRUGGLE FOR JUSTICE IN PRINCE EDWARD COUNTY, VA. 163 (2011).

[157] *Id.* at 163.

[158] Picott & Peeples, *supra* note 147, at 395.

[159] TITUS, *supra* note 156, at 42.

[160] Picott & Peeples, *supra* note 147, at 394–95.

[161] Griffin v. Cty. Sch. Bd. of Prince Edward Cty., 377 U.S. 218, 221–22 (1964).

[162] *Id.* at 222.

[163] TITUS, *supra* note 156, at 160.

[164] *Id.* at 163.

[165] *Id.*

[166] *Griffin*, 377 U.S. at 232–33.

[167] TITUS, *supra* note 156, at 161.

III. SCHOOL VOUCHER PROGRAMS PRESUMPTIVELY LEGAL UNDER FEDERAL LAW

School choice policies as implemented since the mid-1950s have been the enemy of school desegregation policies.[168] From the inception of school choice policies, efforts at parental choice have aimed to thwart efforts at school desegregation.[169] In particular, school choice policies arose after federal mandates for desegregated schools and petered out when the federal government discontinued serious and vigorous efforts at school desegregation.[170] Those advocating for school desegregation policies are unsurprisingly opponents of school choice.[171] Some have even initiated legal actions to pushback efforts at school choice.[172] One would assume that the federal courts would undertake efforts to impede the enactment of school choice policies given that school choice policies had been historically conceived to maintain segregated public schools, in contravention of Supreme Court edicts to the contrary. In lieu of barring (or intensely scrutinizing) school choice policies, the Supreme Court upheld the implementation of school choice policies, specifically private school vouchers, which had been used to support segregation academies and to divest funds from public education.[173]

A. *Zelman v. Simmons-Harris: How the Establishment Clause Practically Etched Private School Vouchers in Stone*

Although the Establishment Clause is not specifically race-related, opponents of school voucher programs—whether based on race or not—have sought to use the Establishment Clause to stymie the growth and implementation of private school voucher programs, often arguing that the use of religious-based, private school vouchers violates constitutional requirements banning the establishment of a state religion.[174] The Establishment Clause, however, is not a suitable defense to the implementation of school voucher programs. In the

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[168] Ryan, *supra* note 13, at 1644 ("School choice was once an obstacle to school integration.").

[169] *Id.*

[170] *Id.* at 1635 (explaining that school choice was a method that Southern states used to effectuate resistance to desegregation).

[171] See, for example, the work of the UCLA Civil Rights Project. *See* Erica Frankenberg, Genevieve Siegel-Hawley & Jia Wang, *Choice Without Equity: Charter School Segregation*, 19 EDUC. POL'Y ANALYSIS ARCHIVES 1, 6 (2011), http://epaa.asu.edu/ojs/article/view/779 [hereinafter *Choice Without Equity*].

[172] *See infra* Part III.E.

[173] *E.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding the use of private school vouchers as part of a school choice program purporting to provide better educational opportunities for students in Cleveland, Ohio).

[174] *Id.* at 643 (where stakeholders of the predominately Black school district encompassing Cleveland, Ohio attempted to thwart the expansion of the state-sponsored private school voucher program).

most important school voucher case to appear before the Supreme Court, the Court found that the Establishment Clause was not a bar to the implementation of school voucher programs where those programs neither endorsed religion nor gave the appearance of endorsing religion.[175] In the Cleveland school voucher case, the Supreme Court allowed the State of Ohio to move forward with the overhaul of a school district in Cleveland, even in the face of protests from citizens regarding the potential of mixing religion and state funding.[176]

In *Zelman*, the Supreme Court confronted the question of whether school voucher programs ran afoul of the Establishment Clause of the First Amendment.[177] The answer was a resounding "no."[178] In *Zelman*, the Cleveland school voucher program came under attack for failing to give a meaningful opportunity for participants to choose secular options in the voucher program.[179] The Supreme Court held that the Cleveland school voucher plan did offer opportunities at public education through alternate measures of parental choice, such as charter schools.[180] In sum, the Supreme Court rejected any notion that the State of Ohio, in creating the Cleveland voucher plan, created the public perception that the state was endorsing religion.[181] In fact, the Court provided guidance to future plaintiffs (and legislators): if a jurisdiction is using multiple methods to reform education, plaintiffs should be careful in lodging a lawsuit against the jurisdiction since the jurisdiction's use of multiple methods may shield it from claims arising under the Establishment Clause.[182]

The *Zelman* holding declaring that the voucher program does not offend the Establishment Clause provides instruction on developing voucher programs that do not offend the First Amendment.[183] According to *Zelman*, school voucher programs must not give money directly to religious institutions for the purpose of schooling.[184] The Court specifically documents that parents chose the schools, and thus, the decision to fund the schools was the result of private decision-makers as opposed to the government.[185] Furthermore, the Court expressly mentioned that breaking the chain of decision-making (so that the decision is no longer the government's but an independent party's) is important to overcoming an Establishment Clause claim.[186] *Zelman* instructs plaintiffs that the courts will allow voucher programs – even those that fund sectarian schools

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[175] *Id.* at 652–53.
[176] *See generally id.*
[177] *Id.* at 643–44.
[178] *Id.* at 644.
[179] *Id.* at 655.
[180] *Id.* at 647–48.
[181] *Id.* at 654–55.
[182] *Id.* at 652–53.
[183] *See id.*
[184] *Id.* at 661.
[185] *Id.* at 654–55.
[186] *Id.*

– if those programs do not explicitly endorse religion, even when the participants of the program at issue do endorse religion.[187] Thus, it is unlikely that the Supreme Court would strike down a school voucher program based upon the Establishment Clause, unless the particular program flagrantly violated the First Amendment.

Although the Supreme Court's ruling in *Zelman* resolved the federal Establishment Clause question, some state supreme courts had already addressed the state constitutionality of private school vouchers programs in relation to religious instruction.[188] In *Chittenden Town School District v. Department of Education*, the Supreme Court of Vermont held that the town of Chittenden (which did not have enough students to operate a high school) could not, under the state constitution, provide payment for private, sectarian school tuition when the private school was contracted to educate the town's public school students.[189] The court in *Chittenden* reasoned that there were no controls to prevent the use of public money to provide religious education.[190] While the *Chittenden* court expressed the benefits of private, sectarian education, the court also acknowledged that the private, sectarian school in question required all students—regardless of funding—to participate in general Catholic rituals.[191] Likewise, the school sought to develop the Catholic identity of students, as well as establish Christian evangelists.[192] *Chittenden* exemplifies how state constitutional protections have the potential to minimize the school choice gains provided by the Supreme Court in *Zelman*. Further examples of state constitutional lawsuits against private school vouchers are discussed later in this Article.[193]

B. *42 U.S.C. § 1981*

Post-*Zelman* there is no legitimate cause of action against school voucher programs under the Establishment Clause of the First Amendment. Most state statutes establishing school voucher programs are unlikely to hand money directly to private, sectarian schools. Instead, most school voucher programs are likely to offer money directly to parents who make a decision on where to enroll their student(s). This, as the Court points out in *Zelman*, precludes an Establishment Clause claim by creating an intervening private action.[194] It is not the state that chooses to support the private, sectarian school; it is the individual parents who are making these decisions. The Establishment Clause is not, therefore, applicable to an analysis of the legality of school voucher pro-

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[187] *Id.* at 658.

[188] *E.g.*, Chittenden Town Sch. Dist. v. Dept. of Educ., 738 A.2d 539, 541–42 (Vt. 1999).

[189] *Id.*

[190] *Id.*

[191] *Id.* at 542–43.

[192] *Id.* at 542.

[193] *See infra* Part III.D.

[194] Zelman v. Simmons-Harris, 536 U.S. 639, 658 (2002).

grams. While the Constitution of the United States of America, by way of the Establishment Clause, does not forbid school voucher programs, some plaintiffs — especially those arguing from a racial perspective — may seek to have school voucher programs stymied using 42 U.S.C. §1981, a federal civil rights statute.[195]

Title 42 U.S.C. § 1981, also known as §1 of the Civil Rights Act of 1866, prohibits the use of racial discrimination in the making and enforcement of private contracts.[196] The statute gives all people in the United States an equal right to "enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of laws and proceeding . . . ."[197] Section 1981, along with other sections of the Civil Rights Act, attempts to snuff out discrimination, both public and private.[198] Since school voucher programs rely on private contracts to arrange services, school voucher programs may fall under 42 U.S.C. § 1981.

Whether school voucher programs fall under the regulations of 42 U.S.C. § 1981 is important to an analysis of the legality of school voucher programs. Even if school voucher programs are evidently discriminatory, plaintiffs will have to prove that the discrimination found in school voucher programs is intentional.[199] The instructive case on this topic is *Runyon v. McCrary*.[200] In *Runyon*, Black students were denied admission into an all-White private school.[201] The parents of these Black students initiated an action pursuant to § 1981.[202] In evaluating the case, the Supreme Court held that the record supported the lower courts' decision that the private school operated in a discriminatory manner by not allowing Black students admission into the school.[203] Though the Court never explicitly mentions the need to prove intentional discrimination, the Court's line of reasoning indicates an emphasis on the intentionality of the discrimination in the private school setting.[204] The court specifically mentions the lower courts' rejection of the school's contention that racially discriminatory policies are protected by the Constitution.[205]

The analysis in *Runyon* is problematic for plaintiffs hoping to use § 1981 to thwart the advancement of school voucher programs. Because school voucher programs do not, in general, discriminate on their face, plaintiffs will have no viable claim under § 1981.[206] For instance, even if a school voucher program

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195 42 U.S.C. § 1981 (2009).

196 Runyon v. McCrary, 427 U.S. 160, 168 (1976).

197 42 U.S.C. § 1981 (2009).

198 *Runyon*, 427 U.S. at 170.

199 *Id.* at 166 (noting the Court's issue with the discriminatory policy).

200 *Id.* at 170.

201 *Id.* at 163–65.

202 *Id.* at 165–66.

203 *Id.* at 186.

204 *Id.* at 172–73.

205 *Id.* at 166–67.

206 *Id.* at 166 (noting the Court's issue with the discriminatory policy).

was found to place students in highly segregated schools, in a manner that caused each subgroup of students to be more segregated than in public schools, a plaintiff would have to prove that the legislature—when enacting the school voucher enabling legislation—intended a discriminatory outcome or that the agencies managing the school vouchers engaged in actions intended to steer students into specific, racially identifiable schools. Proving intentional discrimination is difficult in its own right. Proving intentional discrimination when there is an intervening force, such as private parental decisions, is even more difficult and very unlikely.

C. *Are Private School Vouchers an Abandonment of Desegregation-Based Educational Equity? Considering Racially Isolated Private Schools*

The research on private school segregation is scant, at best. Reardon and Yun, however, commissioned an empirical study on segregation in private schools in the United States.[207] Their study used racial isolation indices to determine segregation within individual private schools.[208] The study's authors addressed whether the nation should support private schools through voucher programs, especially if they are more segregated than our nation's public schools.[209] Despite the sharp rise in vouch programs, a general discussion about school segregation and private schools is suspiciously absent.[210] Notably, even though reports that voucher programs are less popular now than ever,[211] some states continue to see increasingly large participation in voucher programs.[212] For instance, although federal government intervention alleging disparate racial impact in the Louisiana charter program, more students continue to enroll in the voucher program.[213]

Reardon and Yun's work indicates that private schools are segregated at similar or higher levels than public schools.[214] These researchers uncovered many new findings regarding segregation in private schools.[215] For instance, Whites are overrepresented in private school enrollment at all levels, although such

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[207] Sean F. Reardon & John T. Yun, *Private School Racial Enrollments and Segregation* (2002), http://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/private-school-racial-enrollments-and-segregation.

[208] *See id.* at 3.

[209] *Id.* at 12–13.

[210] *Id.* at 13.

[211] William G. Howell, Paul E. Peterson, & Martin R. West, *Meeting of the Minds*, 11 EDUC. NEXT 1, 25–26 (2011), http://educationnext.org/meeting-of-the-minds/.

[212] Danielle Dreilinger, *School Voucher Enrollment Goes Up 38 Percent Despite Lawsuits, Budget Fight*, TIMES-PICAYUNE (Oct. 21, 2013, 10:51 PM), http://www.nola.com/education/index.ssf/2013/10/school_voucher_enrollment_goes.html.

[213] *Id.*

[214] Reardon & Yun, *supra* note 207, at 3–4.

[215] *Id.* at 3.

overrepresentation is smaller for lower income ranges.[216] Most minority students in the United States who attend private schools attend private schools that are predominately minority.[217] Latino students are, to some extent, less segregated from White students than they would be in the public school setting.[218] However, not all private schools are equally segregated; Catholic schools are the most segregated.[219] While the work of Reardon and Yun appears slightly outdated, more recent data on racial isolation and exposure in private schools is provided only in aggregate at the national, state, and local level.[220] No recent efforts are attempting to determine racial isolation or exposure in private schools at an individual level. Moreover, there is little evidence that would support the hypothesis that private schools have become increasingly diverse since 2002.

Based on prior legal analysis, potential plaintiffs are unlikely to defeat a school voucher program in federal court.[221] *Zelman* appears to have foreclosed the Establishment Clause as an option to defeat school voucher programs.[222] *Zelman* held that no Establishment Clause claim existed where the state's involvement with religious institutions was interrupted by the actions of private individuals.[223] To avoid an Establishment Clause claim, legislatures may simply allow for some parent choice to intervene in the decision-making process.[224] On the other hand, opponents of school voucher programs cannot effectively use § 1981, a key antidiscrimination statute, as currently constructed.[225] Although § 1981 aims to prevent discrimination in the formation of contracts, § 1981 targets only intentional discrimination.[226] Plaintiffs must prove that the segregation of minority private school voucher students was purposeful to ultimately defeat a school voucher program in court under § 1981.[227] Overt discrimination is unlikely. As such, there is very little use for § 1981 in the current private school voucher debate, as the debate concerns the legality of such programs. State-based constitutional protections may assist those seeking to halt the expansion of private school voucher programs, but

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216 *Id.* at 6.

217 *Id.*

218 *Id.* at 4.

219 *Id.* at 5.

220 *See, e.g.*, *Private School Enrollment*, NAT'L CTR. EDUC. STATISTICS, https://nces.ed.gov/programs/coe/indicator_cgc.asp (last updated May 2016).

221 *See supra* Part III.A–B.

222 *See* Zelman v. Simmons-Harris, 536 U.S. 639, 643 (2002).

223 *Id.* at 640.

224 *Id.* at 654–55.

225 *See* Runyon v. McCrary, 427 U.S. 160, 168 (1976); *see supra* Part III.B for a more complete discussion regarding the implication of *Runyon* on voucher students.

226 42 U.S.C. § 1981 (2009).

227 *See supra* Part III.B.

even those provisions have not been reliably successful.[228]

D. *State Challenges as Resistance to Abandoning Desegregation-Based Educational Equity: Considering State-Based Constitutional Challenges to Private School Vouchers*

The legality of school voucher programs under federal law seems well-settled.[229]

Would-be plaintiffs must prove that school voucher programs are either overtly discriminatory (as was the case in *Runyon*) or that states are directly funding religious enterprises.[230] Both of these options are unlikely. Thus, opponents of school voucher schemes must turn to other avenues to defeat the programs. They have achieved mixed success in repealing school voucher programs under state constitutional provisions: major court decisions on this issue exist in Wisconsin,[231] Vermont,[232] Florida,[233] Indiana,[234] Louisiana,[235] and Colorado.[236] Part V will discuss the legal precedent set by these cases and evaluate the usefulness of these precedents in overcoming the presumptive legality of school voucher plans. The following analysis will pay particular attention to state constitutional challenges stemming from provisions focused on school uniformity and funding.

In Wisconsin, school vouchers have come under attack for violating uniformity of schools provisions.[237] The plaintiffs argue that private schools operate wholly differently and separate from the uniform system of public schools in the state.[238] As such, these schools cannot be said to be part of a uniform system of public education, despite receiving monies as if they were public schools.[239] The Supreme Court of Wisconsin has addressed this issue.[240] In *Davis v. Grover*, the Wisconsin Supreme Court ruled that school voucher programs need not be part of the uniform system of schools; as long as the uniform

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228 *See supra* Part III.E.

229 *See supra* Part III.A–B.

230 *See id.*

231 *See* Davis v. Grover, 480 N.W.2d 460 (Wis. 1992); Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998).

232 *See* Chittenden Town Sch. Dist. v. Dep't of Educ., 738 A.2d 539 (Vt. 1999).

233 *See* Bush v. Holmes, 919 So. 2d 392 (Fla. 2006).

234 *See* Meredith v. Pence, 984 N.E.2d 1213 (Ind. 2013).

235 *See* La. Fed'n of Teachers, et al. v. State, 118 So. 3d 1033 (La. 2013).

236 *See* Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 351 P.3d 461 (Colo. 2015) [hereinafter *Taxpayers II*]; Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 356 P.3d 833 (Colo. App. 2013) [hereinafter *Taxpayers I*].

237 *See* Davis v. Grover, 480 NW.2d 460 (Wis. 1992); Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998).

238 *See Davis*, 480 N.W.2d at 473.

239 *Id.* at 474.

240 *Id.* at 462.

system of schools existed, students could avail themselves of their constitutional rights to a free, public education.[241] The addition of private schools, which do serve some public school students, does not violate the Wisconsin mandate for a uniform system of schools.[242]

It appears that under Wisconsin law, even private schools receiving all of their operating funds from state coffers are not transformed into district schools.[243] Per the *Davis* court and the Wisconsin Supreme Court in *Jackson v. Benson*,[244] private schools are not, in fact, district schools and need not be uniform with the public school system, regardless of the private school's funding source.[245] The *Jackson* court, following the *Davis* court, summarily rejected the argument that the use of public funds necessarily creates a public school where no public school existed previously.[246]

Plaintiffs in Florida challenged the state's school voucher program on grounds similar to those in Wisconsin.[247] In *Bush v. Holmes*, the plaintiffs argued that the state's siphoning of money from the general education fund to finance schools that were not part of the uniform, free system of education offended the Florida constitution.[248] Unlike the Wisconsin court, the Florida Supreme Court sided with the plaintiffs, finding that the language of the Florida Constitution required that the state provide education by a free public schooling system.[249] According to the Court, the language of the constitution had to be construed to allow only the funding of a free system of uniform schools.[250] Thus, the funding of private school alternatives that charged money was unconstitutional.[251]

In Indiana,[252] Louisiana[253] and Colorado,[254] plaintiffs have sought to repeal school voucher programs utilizing state-based constitutional provisions. Indiana courts rejected plaintiffs' arguments concerning both funding and school uniformity.[255] Like their Florida counterparts, plaintiffs in Louisiana successfully

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241 *Id.*

242 *Id.* at 473–74.

243 *Id.* at 474.

244 Jackson v. Benson, 578 N.W.2d 602, 618–19 (Wis. 1998).

245 *Davis*, 480 N.W.2d at 474; *Jackson*, 578 N.W.2d at 627–28.

246 *Jackson*, 578 N.W.2d at 627–28.

247 Bush v. Holmes, 919 So. 2d 392, 397 (Fla. 2006).

248 *Id.* at 408–09.

249 *Id.* at 405.

250 *Id.* at 415–16.

251 *Id.* at 410.

252 *See* Meredith v. Pence, 984 N.E.2d 1213, 1217 (Ind. 2013).

253 *See* La. Fed'n of Teachers v. State, 118 So. 3d 1033, 1038 (La. 2013).

254 *See* Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 356 P.3d 833, 837 (Colo. App. 2013).

255 *See Meredith*, 984 N.E.2d at 1224–25.

lodged a funding challenge against the state's school voucher program.[256] Plaintiffs in Colorado successfully challenged the voucher system using the reasoning that prevailed in Vermont: there are no controls are in place to ensure public money is not used to provide religious education.[257]

In *Meredith v. Pence*, the Supreme Court of Indiana found that the state's school voucher program was in compliance with the uniform system of schools provisions in the Indiana Constitution.[258] According to the Court, the language of the constitutional provision determines if verbiage is a mandate or aspirational language.[259] The Indiana Supreme Court concluded that the language of the state's constitution was aspirational, allowing for additional educational opportunities provided beyond the scope that is required by the legislation pertaining to the uniform system of schools.[260] Taking the Wisconsin approach, Indiana explicitly rejected the Florida approach.[261] In Florida, statutory language was interpreted as a mandate, while in Wisconsin the state was allowed to create multiple methods of providing a uniform system of education, so long as the free public education remained available.[262]

The Louisiana Supreme Court voucher case rested on provisions regarding uniformity of schools and school funding provisions.[263] In *Louisiana Federation of Teachers v. State of Louisiana*, the Louisiana Supreme Court found that the funding of the school voucher program violated the Louisiana Constitution.[264] In so holding, the Court found that the voucher program legislation impermissibly siphoned off money from the general education fund, which could only be used to fund public schools.[265] Private schools, by definition, were not public schools and could not be funded by the general education fund.[266] School vouchers could be state funded, but could not be funded through the general education fund.[267]

Colorado, like other states in this section, has struggled to balance its school voucher program with its constitutional requirements to educate, and its ability to fund said education. Though the plaintiffs in *Taxpayers for Public Education v. Douglas County School District* sought to have the voucher program

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256 *See La. Fed'n of Teachers*, 118 So. 3d at 1037.

257 *See* Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 351 P.3d 461 (Colo. 2015).

258 *Meredith*, 984 N.E.2d at 1223.

259 *Id.* at 1222.

260 *Id.*

261 *Id.* at 1223–24.

262 *See* Davis v. Grover, 480 NW.2d 460, 474 (Wis. 1992); Jackson v. Benson, 578 N.W.2d 602, 627–28 (Wis. 1998); *c.f.* Bush v. Holmes, 919 So. 2d 392, 405, 408 (Fla. 2006).

263 La. Fed'n of Teachers v. State, 118 So. 3d 1033, 1039 (La. 2013).

264 *Id.* at 1071.

265 *Id.* at 1055.

266 *See id.* at 1050–51.

267 *See id.* at 1055.

repealed due to improper distribution of school monies, the court found that the plaintiffs lacked standing to sue under the state statute authorizing and regulating school funding.[268] Enforcement of school funding provisions in Colorado is vested in the State Board.[269] In fact, the Colorado Court of Appeals specifically held that a private right of action would be inconsistent with the best interpretation of the statutory language because the discretion and flexibility of state agencies could be compromised.[270] Thus, school funding issues appeared to fail to halt the school voucher movement in Colorado.[271]

The Colorado Constitution contemplates a system of thorough and uniform free schools.[272] The plaintiffs in *Taxpayers for Public Education* sought to have the school voucher program snuffed out because the use of private schools "obviously violate[d]" the system of thorough and uniform free schools.[273] The trial court rejected this argument, stating that children in Douglas County could still obtain an education in compliance with the provisions of the Colorado Constitution, using similar reasoning to the state courts in Wisconsin and Indiana.[274] The students could merely choose between systems.[275] The appellate court agreed that there is nothing wrong with giving an additional option for educational opportunity.[276] Colorado appears to have adopted the Wisconsin approach to a uniform system of schools argument.[277] As such, the Colorado Appeals Court found that there is no violation of the uniform system of schools requirement.[278]

The Supreme Court of Colorado more recently issued a final ruling on *Taxpayers for Public Education*.[279] It sided with the Appellate Court on the issue of standing, but, like the Vermont Supreme Court, ruled that the funding of private school voucher programs violated the Colorado Constitution.[280] The

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[268] Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 351 P.3d 461 (Colo. 2015); Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 356 P.3d 833, 841 (Colo. App. 2013).

[269] *See Taxpayers II*, 351 P.3d 461; *Taxpayers I*, 356 P.3d at 840.

[270] *Taxpayers I*, 356 P.3d at 840.

[271] *See id.* at 841.

[272] *See* COLO. CONST. art. IX, § 2.

[273] *See Taxpayers II*, 351 P.3d 461; *Taxpayers I*, 356 P.3d at 839.

[274] *See Taxpayers I*, 356 P.3d at 855 (holding that the Colorado Constitution did not prevent children in Douglas County from obtaining education); *c.f.* Davis v. Grover, 480 NW.2d 460, 477 (Wis. 1992) (holding that the Milwaukee Parental Choice Program passes constitutional scrutiny); Jackson v. Benson, 578 N.W.2d 602, 632 (Wis. 1998) (holding that the amended MPCP does not violate the Wisconsin Constitution or the Wisconsin public doctrine); Meredith v. Pence, 984 N.E.2d 1213, 1230 (Ind. 2013) (holding that the Indiana school voucher program did not violate the Indiana Constitution).

[275] *See Taxpayers I*, 356 P.3d at 844.

[276] *Id.*

[277] *See id.* at 859.

[278] *See id.* at 853.

[279] Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 351 P.3d 461, 475 (Colo. 2015).

[280] *See id.* at 469–70.

Court held that a voucher program designed to pay tuition for public school students enrolled in private, sectarian schools is opposed to the plain language of the Colorado Constitution.[281] The Colorado Constitution specifically bans using public money to fund religious schools.[282]

E. *School Choice, School Desegregation and Critical Race Theory: Are We Still Trying to Serve Two Masters*

In his seminal work, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, Professor Derrick Bell describes how serving the interests of individual clients is juxtaposed with the interests of civil rights attorneys in pursuing an agenda to eradicate segregation in all public places.[283] Bell's paper identifies the potential conflicts that arise when clients desire only educational effectiveness for Black children, whereas civil rights advocates desire broader system-level goals of desegregation.[284] This same conflict may affect the debate between school choice strategies and school desegregation strategies. School choice strategies may not accord well with the desegregation strategies and/or the desire of Black parents to improve the quality schools for their children.

Traditional civil rights groups, or those comprised of middle-class Blacks and Whites, dominated educational equity litigation.[285] These groups supported the integration agenda, notwithstanding the potential drawbacks to relying solely on integration to achieve educational equity.[286] They appear to have embraced the school choice/free market agenda.[287] Traditional civil rights groups have excelled at advocating for the school choice agenda, even if poorer, less privileged Blacks do not have similar interests.[288] These groups have historically failed to advocate for the interests of poorer Blacks; one need only look to the fact that traditional civil rights groups were silent regarding festering issues of mass incarceration while they focused on affirmative action.[289] They entered the national discussion of police brutality when the issue arrived,

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[281] *See id.*

[282] *See id.* at 470.

[283] Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J., 470, 471–72 (1976).

[284] *Id.* at 471.

[285] *See id.* at 489.

[286] Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 532 (1980).

[287] *See* Ron Matus, *More Black Ministers Slamming NAACP for Fighting School Choice*, REDEFINED (May 14, 2015), https://www.redefinedonline.org/2015/05/more-black-ministers-slamming-naacp-for-fighting-school-choice/ (detailing how two prominent groups with historical power in the fight for educational equity, the NAACP and Black clergymen, are at odds about supporting integration and school choice).

[288] *See id.*

[289] *See* MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF

undeniably, to middle class Blacks. Bell notes several examples of Black Americans rejecting desegregation as the only remedy for the ills of racial subordination of Blacks in education.[290] Anecdotally, some poor Black Americans in Northern Mississippi have sought segregated schools.[291] This fact is evidence that Black Americans do not wholesale believe in desegregation as the panacea to racial subordination in schools. Nevertheless, the response to this choice, questioning the Black parents' motives, is evidence that Black parents do not, in fact, have the choice to attempt to minimize the amount of racial subordination that their children incur.

The same shortcoming befalls both the school choice and school desegregation movements. As Professor Bell stated, policies "are not sufficiently directed at the real evil of pre-*Brown* public schools: the state-sponsored subordination of [B]lacks in every aspect of the educational process."[292] Essentially, Black students will not necessarily learn more if Black parents enroll them in predominately White schools.[293] Likewise, Black students will not necessarily learn more if Black parents are simply allowed to choose which schools Black students attend. This is especially the case if school choice does not offer better educational options for Black students.

To overcome the obstacles of racial oppression in the educational system, civil rights advocates must attack all policies that result in racial subordination.[294] It is not enough to merely mask efforts at racial subordination in the educational system by negligibly altering how and where Black students and their parents are marginalized and disenfranchised in the system.[295] Professor Bell reiterated this idea by predicting the development of the school-to-prison pipeline.[296] He argued that higher discipline rates and lower academic achievement might be the results of school desegregation efforts that failed to address broader policies, resulting in continued racial subordination for Black students.[297] The predictions have come to fruition in both the contexts of school desegregation[298] and school choice.[299]

AMERICAN POLITICS 159 (2015); *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 10–11 (rev. ed. 2012).

290 Bell, *supra* note 283, at 507.

291 *See* Joshua Berlinger & Elliot C. McLaughlin, *62 Years After Brown v. BOE, Court Orders Schools to Desegregate*, CNN (May 17, 2016), http://www.cnn.com/2016/05/17/us/cleveland-mississippi-school-desegregation/.

292 Bell, *supra* note 283, at 487.

293 *See id.* at 487–88.

294 *See id.*

295 *See id.*

296 *Id.*

297 *Id.*

298 *See* Mark P. Fancher, *Born in Jail: America's Racial History and the Inevitable Emergence of the School-to-Prison Pipeline*, 13 J.L. SOC'Y 267, 274–76 (2011); *see also* Lia Epperson, *Brown's Dream Deferred: Lessons on Democracy and Identity from* Cooper v.

Like desegregation strategies, school choice strategies run this risk of being advanced as the panacea to racial subordination of Black students in public schools. Bell argued that Black preferences for education equity shifted away from pro-integration strategies and into desires for equal educational opportunities.[300] The same shift is inevitable for Black preferences for school choice, especially since racism is permanent.[301] Bell points out, however, that overreliance on desegregation strategies inhibited other methods of securing educational equity.[302] In particular, Bell cites Professor Leroy Clark in arguing that popular participation and control might achieve educational equity.[303]

Ironically, the school choice movement has resulted in predominantly White, self-selected charter school boards governing predominantly Black student bodies in charter schools with very little, if any, legal recourse.[304] Black charter school students under predominantly White charter school boards experience significant academic disadvantages.[305] Bell also predicted this result: he cites Professor Clark to say that overreliance on White structures could result in movements away from political power.[306] Similarly, Bell cites Professor Gary Bellow to support the argument that unjust laws are the consequences of unequal distribution of political power.[307] Serving the master of desegregation could reduce efforts at securing political power, but serving the master of school choice directly reduces political power. With this information, one must consider whether it matters which master we serve.

In *Brown*, the plaintiffs argued that access to White schools was essential to pursuing educational equity for Black students.[308] As a corollary to this statement, school choice proponents would add that access to "choice"—no matter how restricted—is an indispensible part of educational equity.[309] Given that school choice has not been particularly productive in removing barriers to educational equity, the more likely argument is that the option, no matter how

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Aaron *to the "School-to-Prison Pipeline"*, 49 WAKE FOREST L. REV. 687, 688, 697–98 (2014); Tracie R. Porter, *The School-to-Prison Pipeline: The Business Side of Incarcerating, Not Educating, Students in Public Schools*, 68 ARK. L. REV. 55, 63–64 (2015).

[299] *See* Nelson & Grace, *supra* note 31, at 460.

[300] Bell, *supra* note 283, at 492.

[301] *See* Derrick A. Bell, Jr., *Racism is Here to Stay: Now What?*, 35 HOW. L.J. 79, 88 (1991); *see also* Derrick A. Bell, Jr., *The Racism is Permanent Thesis: The Courageous Revelation or Unconcious Denial of Racial Genocide*, 22 CAP. U. L. REV. 571, 587 (1993).

[302] Bell, *supra* note 283, at 513–14.

[303] *Id.*

[304] *See House of Cards*, *supra* note 32, at 9.

[305] *See* Nelson & Grace, *supra* note 31, at 468; *see also Killing Two Achievements*, *supra* note 30, at 270.

[306] Bell, *supra* note 283, at 514.

[307] *Id.*

[308] *Id.* at 477–78.

[309] *See* Matus, *supra* note 287.

illusory, to attend a high(er) performing school is necessary to the pursuit of educational equity, even if that choice does not result in the placement of Black students in schools that are educationally effective.

As Bell says, "All too little attention has been given to making [schools that serve Black children] educationally effective."[310] Those who pursue civil rights in education should heed the advice of Professor Bell and allow those most affected (students, parents, and communities) to dictate the remedies and/or responses to racial subordination of Black students in public schools.[311] Likewise, civil rights fighters should understand, as Bell points out, that the Black community is often in positions that limit the availability of viable alternatives when assisting oppression.[312] Bell quotes W.E.B. DuBois as saying, "[T]he Negro needs neither segregated nor mixed schools. What he needs is Education."[313] Perhaps Black children need neither desegregated schools nor school choice; what Black children actually need is effective education.

IV. CONCLUSION

Private school voucher programs are presumptively legal under the First Amendment's Establishment Clause.[314] Voucher programs also escape the coverage of the Civil Rights Act.[315] The Supreme Court has endorsed school vouchers despite their evident regressive effect on school desegregation.[316] At the state level, courts are split on the issue of school voucher legality.[317]

Aside from the legal arguments, civil rights advocates should pay careful attention to school voucher programs and other types of school choice. Educational policymakers should specifically take note of the potential for increased segregation in both public and private schools when authorizing or reauthorizing school voucher programs. Reardon and Yun have found that private schools are equally or more segregated than public schools.[318] Frankenberg, Siegel-Hawley and Wang, have found similar results for charter schools, the now standard-bearer of school reform.[319] Armed with this information, it is hard to rationalize arguments that school vouchers—or other forms of school choice—can or will decrease racial isolation in schools.

To assure that minority students are not being left behind in disadvantaged

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[310] Bell, *supra* note 283, at 479.

[311] *Id.* at 512.

[312] *Id.*

[313] *Id.* at 515 (*quoting* W.E.B. Dubois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 335 (1935)).

[314] *See supra* Part III.A–B.

[315] *See supra* Part III.B.

[316] *See supra* Part III.A.

[317] *See supra* Part III.D.

[318] *See supra* Part III.C.

[319] *See Choice Without Equity*, *supra* note 171, at 6.

schools, policymakers should question the enrollment practices of private schools participating in school voucher programs. In particular, policymakers should take affirmative steps to assure that voucher students enrolled in private schools are enrolled in diverse settings. This can be done by requiring private schools that participate in voucher programs to adhere to civil rights statutes and policies. For instance, if a district is a part of a desegregation decree, legislators should require private schools participating in the voucher program to also adhere to the same standards required of public schools to assure that the gains made under the desegregation plan do not dissipate when the school voucher plan is initiated.

School choice and societal interest in integrated schools have historically been in conflict with one other. Because of the difficulty in maintaining desegregated schools, it is possible that policymakers have moved on to other means of achieving educational equity. If that is the case, policymakers should be explicit and unequivocal in stating that desegregation is no longer the preferred policy for pursuing educational equity. If not, they should uniformly adopt one of the existing policies or perhaps develop a new approach.