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Leveling Localism and Racial Inequality in Education Through the No Child Left Behind Act Public Choice Provision

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LEVELING LOCALISM AND RACIAL INEQUALITY IN EDUCATION THROUGH THE NO CHILD LEFT BEHIND ACT PUBLIC CHOICE PROVISION

ERIKA K. WILSON*

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ABSTRACT

School district boundary lines play a pivotal role in shaping students’ educational opportunities. Much of the segregation and inequality that characterizes education in America today occurs along school district boundary lines. Indeed, living on one side of a school district boundary rather than another can mean the difference between being able to attend a high achieving resource enriched school or having to attend a low achieving, resource deprived school.

Despite the prominent and often disparate role that school district boundary lines play in dictating educational opportunities for students, remedies formulated by the federal judiciary—the institution frequently looked upon to remedy issues of school segregation and inequality— are ineffective in addressing disparities between school districts. They are ineffective because the federal judiciary evidences a doctrinal preference for localism in its school equity jurisprudence. This doctrinal preference for localism has led the judiciary to, among other things; reject inter-district school desegregation plans while at the same time authorizing school financing schemes that result in gross disparities in per-pupil spending between school districts.

This Article suggests that a new remedial paradigm that embraces regionalism as an antidote to the localism found in the federal judiciary’s school equity jurisprudence is necessary in order to combat segregation and inequality between school districts. It further suggests that the No Child Left Behind Act (“NCLB”) public choice provision—which allows students to transfer from failing to
non-failing schools—has the potential to fulfill that remedial paradigm if, when amended during its next reauthorization, it adopts a statutory framework similar to the framework found in portions of the Fair Housing Act ("FHA") which embrace regionalism and citizen mobility as a means of facilitating integration and equality.

INTRODUCTION

“I thought I would actually have a choice,” said Christine Bryant whose son Tevin attempted to exercise his right under the federal No Child Left Behind Act to transfer from Towers High School in DeKalb County, Georgia to a better performing school.¹ Towers High School has an enrollment that is ninety-five percent African-American.² Sixty-seven percent of the student body is considered socio-economically disadvantaged.³ At the time Tevin attempted to transfer from Towers High School, the school was in the third consecutive year of failing to satisfy academic proficiency requirements under the No Child Left Behind Act.⁴ Ten of the twenty one high schools in the DeKalb County School District where Towers High School is located also failed to satisfy No Child Left Behind academic proficiency requirements. The nine schools that satisfied the testing requirements could not accommodate transfer requests by Tevin and fifteen hundred students who sought to transfer.⁵ As a result, Tevin was presented with only two options: transfer to a vocational/technical school or take online courses.⁶

A growing number of poor and minority parents and students looking for relief from segregated academically challenged schools have found a new vehicle to seek redress: the race and class-conscious remedies provided in the federal No Child Left Behind Act ("NCLB" or "Act").⁷ While opposition to NCLB has been fierce since its inception,⁸ little attention has been paid to the support that the Act is

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³ Id.
⁴ Id. (noting that Towers high school failed to satisfy testing requirements from 2004-2007).
⁵ Supra, note 1.
⁶ Id.
⁷ 20 U.S.C. § 6301 et seq.
⁸ See e.g., Tim Walker and Alain Jehlen, Multiple Measures’ Momentum, Neatoday (Oct. 2007) (criticizing NCLB’s reliance on “one size fits all tests to measure academic achievement.”), available
receiving from poor minority parents and students—the very group that the Act was intended to assist. Indeed, lost amidst passionate discussion about NCLB’s many deficiencies, is the understanding that NCLB is a complex statute with many different requirements and remedies, with some parts of the statute admittedly more laudable than others.

NCLB is the most recent reauthorization of the Elementary and Secondary Education Act (“ESEA”). Title I of the ESEA provides the largest single source of federal education funding to help states and school districts meet the needs of socioeconomically disadvantaged students. Almost every school district in the country receives some amount of Title I ESEA funding. Significantly, NCLB represents a drastic break from prior reauthorizations of the ESEA in that it dramatically expands the role of the federal government in education. It does so by employing stringent cooperative federalism tactics, namely requiring school districts to adopt an expansive testing and accountability scheme in exchange for much needed federal grant money. More specifically, as a condition for receiving federal funds, NCLB requires schools to develop challenging academic curriculum and to annually test students’ progress on that curriculum. Schools that fail to make adequate yearly progress (“AYP”) towards the Act’s stated goal of 100 percent student proficiency on the tested curriculum are subject to a series of sanctions and are also required to offer students various remedies to assist them in improving their education.


9 See Committee on Educ. and Workforce Hearings, Statement of Representative Saxby Chambliss, 2001 WL 312492 (March 28, 2001) (noting that the purpose of NCLB is to “close the achievement gap. Nearly seventy percent of inner city and rural fourth-graders cannot read at a basic level. Low-income students lag behind their counterparts by an average of 20 percentile points on national assessment tests.”).


13 See Philip J. Weiser, Towards A Constitutional Architecture For Cooperative Federalism, 79 N.C. L. Rev. 663, 665 (2001) (describing cooperative federalism as a “sharing of regulatory authority between the federal government and the states that allows states to regulate within a framework delineated by federal law.”).


15 20 U.S.C. § 6316. The Obama administration recently issued a proposed blueprint for reauthorizing the ESEA. Notably, the blueprint released by the Obama administration proposes requiring schools receiving Title I ESEA funds to develop standards in core classes that “build toward college-and career-readiness by the time students graduate form high school” and to “align statewide assessments with these standards,” rather than requiring schools to meet the 100% student proficiency in basic core classes as currently required by NCLB. See U.S. Dep. Of Educ., Office of Planning Evaluation
One NCLB remedy that is gaining traction amongst poor and minority parents and students is the public choice remedy. The public choice remedy requires schools that fail to make AYP for two consecutive years to offer their students the opportunity to transfer to another school that has met AYP requirements.\(^\text{16}\) Parents and students across the country have vigorously fought to use the NCLB public choice remedy to transfer their children out of racially segregated failing schools into more integrated successful schools.\(^\text{17}\) Their ability to take advantage of the public choice remedy however is often limited by geography insofar as the Act only requires schools to offer \textit{intra}-district transfers rather than \textit{inter}-district transfers.\(^\text{18}\) Put another way, the public choice remedy only requires schools to offer students the option of transferring to another school within the same school district as the school they are attempting to transfer from. It does not require schools districts to offer \textit{inter}-district transfers.\(^\text{19}\)

\(^\text{16}\) See e.g., \textit{Conn. v. Spellings}, Case No. 05-1330 (D. Conn. Jan. 30, 2006), available at 2006 WL 389496 (arguing that minority parents and students should be permitted to intervene in a lawsuit by the state of Connecticut in which Connecticut sought a waiver from compliance with NCLB testing and remedial accountability requirements reasoning that they had a vital interest in seeing that Connecticut was required to comply with NCLB testing and accountability measures in order to protect their interest in “improved schooling,” particularly the public choice provision); \textit{Newark Parents Assoc. v. Newark Pub. Sch.}, 547 F.3d 199 (3d Cir. 2008) (dismissing suit filed by parents of students in Newark NJ seeking to enforce NCLB provisions, including the right to transfer from failing schools to non-failing schools).; Sam Dillon, \textit{Alabama Brings Out Cry of Resegregation}, N.Y. Times, September 17, 2007 available at \url{http://www.nytimes.com/2007/09/17/education/17schools.html?_r=1} (chronicling administrative complaint filed by parents group in Birmingham, Alabama seeking to enforce their children’s right to transfer from a failing school to a non-failing school under NCLB ); Torres, supra note __ (discussing inability of 1,500 students in DeKalb County, Georgia to utilize the public choice remedy). See 20 U.S.C. § 6316 (b)(1)(E)(i). The text of the statute reads in relevant part “[i]n the case of a school identified for school improvement under this paragraph, the local educational agency shall… provide all students enrolled in the school with the option to transfer to another public school served by the local educational agency (emphasis added). See also Jennifer Jellison Holme & Amy Stuart Wells, \textit{School Choice Beyond District Borders: Lessons for Reauthorization of NCLB from Interdistrict Desegregation and Open Enrollment Plans}, In Richard Kahlenberg (Ed.) Improving on No Child Left Behind. New York, NY: The Century Foundation (2008) (noting that since NCLB was implemented, less than 6 percent of students enrolled in schools in which the transfer option is offered have actually taken advantage of the opportunity to transfer to a better performing school).

\(^\text{17}\) The Act’s governing regulations contain language encouraging school districts “to the extent practicable [to] establish a cooperative agreement for a transfer with one or more other [school districts] in the area, when there are no or a lack of eligible schools in the school district to which the student can transfer. See 34 C.F.R. § 200.44.
One of the major consequences of limiting the public choice remedy to intra-district transfers is illustrated by scenarios like the one faced by Tevin. More often than not, schools that are required to offer the public choice remedy are hyper-segregated by both race and class and are usually located within the same school district. In contrast, schools that consistently make AYP tend to have fewer minorities and socio-economically disadvantaged students but are also clustered within the same school district. Because schools that are required to offer the public choice remedy are typically clustered in one school district while AYP compliant schools that are eligible to receive transferring students are often located in another school district, students who attempt to exercise their right to transfer are often faced with the same dilemma as Tevin: no choice or only a nominal choice of better performing schools to which they can transfer.

That school quality—as measured by a school’s ability or failure to make AYP—is delineated by geography or school district boundaries lines is no coincidence. Rather, it is a consequence of concerted policy decisions and laws. No single tradition in public education is more deeply rooted than the notion of local control over schools. In furtherance of this ethos, school district boundary lines are drawn so that students for the most part attend schools in close proximity to where they live. In theory, linking school attendance with residence furthers local control by allowing communities to tailor the education students receive to fit the needs of the community and allowing citizens to participate in formulating education policy. However one of the consequences this policy is that because residential areas are undoubtedly segregated by both race and class, school district demographics reflect this similar pattern of segregation. This in turn leads to the existence of school districts that are racially and economically segregated. Indeed, recent studies have found that “a full 84% of racial/ethnic segregation in U.S. public schools occurs between school districts.”

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21 See e.g., Erin Dillon, Plotting School Choice: The Challenge of Crossing District Lines at 9 (August 2008)(noting that in suburban Plano, Texas over 90 percent of students could transfer to a higher-performing school, without even leaving their home district), available at http://www.educationsector.org/usr_doc/Interdistrict_Choice.pdf.

22 See Kathryn A. McDermott, Controlling Public Education Localism versus Equity 16 (1999).

23 See Charles T. Clotfelter, After Brown: The Rise and Retreat of School Desegregation 59 (2006)(noting that “many of the nation's large urban areas are checkered with dozens of separate school districts, and this balkanization is an important factor in the racial segregation of public schools.”).

Despite the prominent and often disparate role that school district boundary lines play in dictating educational opportunities for students, the efficacy of local control over schools, particularly as it relates to the practice of closely linking school attendance with residence, is rarely questioned.\textsuperscript{25} To be sure, the federal judiciary—the institution frequently looked upon to remedy issues of school segregation and inequality—has done little to nothing to remedy racial and economic segregation between school districts or to curb disparities in educational opportunities between school districts.\textsuperscript{26} Instead the federal judiciary, particularly the Supreme Court, has arguably contributed to the inter-district disparities through the legitimization of localism\textsuperscript{27} in its school desegregation and school finance jurisprudence.

The federal judiciary’s legitimization of localism in its school equity jurisprudence manifests itself in the judiciary’s deference to local school officials in their drawing of school attendance zones, school financing schemes and student assignment plans, despite the adverse impact that these decisions have on educational opportunities for poor and minority students. Significantly, the Supreme Court’s holdings in cases like \textit{Milliken v. Bradley}\textsuperscript{28} and \textit{San Antonio Independent School District v. Rodriguez}.  

\begin{itemize}
  \item[\textsuperscript{25}] While a number of states have enacted voluntary public choice programs which allow students to attend non-neighborhood schools, the majority of such choice programs still limit the choice programs to intra-district choice programs. Thus, similar to the NCLB public choice program, students are allowed to choose to attend schools within the same school district as their neighborhood school but for the most part are not permitted to cross school district boundary lines. \textit{See} James E. Ryan and Michael Heise, \textit{The Political Economy of School Choice}, 111 Yale L.J. 2043, 2064-2065 (2002) (describing the forms that public school choice programs have taken and concluding that most public school choice programs involve intra-district choice).
  \item[\textsuperscript{26}] \textit{See e.g.}, Erwin Chemerinsky, \textit{The Deconstitutionalization of Education}, 36 Loy. U. Chi. L.J. 111, 112 (2004) 36 Loy. U. Chi. L.J. 111, 112 (2004) (arguing that over the last thirty years the Supreme Court and the lower federal courts have done nothing to advance school desegregation or to equalize expenditures for education); Kimberley Jenkins Robinson, \textit{The Case for A Collaborative Enforcement Model For A Federal Right To An Education}, 40 U.C. Davis L. Rev. 1653 (2007) (discussing the federal judiciary’s failure to implement effective school desegregation plans and arguing that a federal right to education be recognized through spending legislation that the federal and state governments collaboratively enforce).
  \item[\textsuperscript{27}] This Article defines localism as an ideological commitment to local governance structures or a belief that the provision of education “ought to be controlled locally, with the interests of local residents as the exclusive desideratum of local decision makers.” Richard Briffault, \textit{Our Localism Part II: Localism and Legal Theory}, 90 Colum. L. Rev. 346, 444 (1990). \textit{See also} Sheryll D. Cashin, \textit{Localism, Self-Interest and the Tyranny of the favored Quarter: Addressing Barriers to New Regionalism}, 88 Geo. L. J. 1985, 1988 (2000) (defining localism as a preference for decentralized local governance structures).
  \item[\textsuperscript{28}] 418 U.S. 717 (1974) (severely limiting the situations in which inter-district remedies can be used to remedy school segregation).
\end{itemize}
School District v. Rodriguez\(^\text{29}\) have given judicial imprimatur to the sanctity of school district boundary lines, even when those boundary lines produce segregated and unequal schools. Indeed, because of the federal judiciary’s commitment to localism in its school desegregation and school finance jurisprudence, the federal judiciary has doctrinally situated itself such that it cannot adequately address issues of racial and economic inequality in schools.

Given the paramount role that school district boundary lines play in determining educational opportunities for students and the federal judiciary’s failure to address the disparities caused by school district boundary lines, several noted educational reformers have suggested amending the NCLB public choice provision to encourage inter-district transfers as means of combating increasing segregation and inequality between school districts.\(^\text{30}\) This Article agrees with the various calls to amend the public choice public to better facilitate inter-district transfers.\(^\text{31}\) It argues that the federal judiciary’s commitment to localism in its school desegregation and school finance jurisprudence makes judicial remedies an ineffective conduit to achieving equalized educational opportunities for poor and minority students.

It further suggests that in amending the NCLB public choice provision to encourage inter-district transfers, Congress should look to the analytical framework contained in portions of the Fair Housing Act (“FHA”). The FHA requires the Housing and Urban Development Department (“HUD”) to take steps to “affirmatively further fair housing.”\(^\text{32}\) Case law interpreting the FHA’s “affirmatively furthering fair housing” language emphasizes that because of intense racial and economic segregation in urban and suburban areas, \(\text{Regionalization}\)\(^\text{33}\) and citizen mobility must

\(^{29}\) 411 U.S. 1 (1973) (upholding local property tax school funding schemes that result in gross disparities in per-pupil spending between school districts).

\(^{30}\) See e.g., Jonathan Kozol, Transferring Up, N.Y. Times, July 11, 2007 (suggesting that the NCLB public choice provision be revised to encourage intradistrict transfers), available at http://www.nytimes.com/2007/07/11/opinion/11kozol.html; Richard Kahlenberg, Helping Children Move From Bad Schools to Good Ones of the Century Foundation 2 (June 15, 2006) (stating that the NCLB transfer provision should be “amended so that low-income students stuck in failing schools are able to transfer to high-quality, solidly middle-class public schools, sometimes in other districts, and so that these schools actually are encouraged to accept the transferring students.”) available at http://www.tcf.org/Publications/Education/kahlenbergsoa6-15-06.pdf and Brown, supra note __, at 21 (recommended that the Department of Education revise the NCLB transfer provision to strongly encourage inter-district choice).

\(^{31}\) This Article deliberately eschews normative questions as to the pedagogical advantages and disadvantages of the standardized tests as a basis for measuring student progress and enforcing accountability. It instead focuses on the broader concept of the public choice remedy as a way of creating student mobility in order to combat principles of localism in education which have been detrimental to the educational opportunities of poor and minority students.

\(^{32}\) See 42 U.S.C. § 3608.

\(^{33}\) This Article uses the term “regionalization” to mean “voluntary, cross-regional collaboration that do[es] not completely supplant local governments” or put another way, utilizing cooperation amongst
be employed as a means of combating segregation in housing. The FHA’s affirmative duty requirement and emphasis on regionalization offers an attractive analytical framework to remedy problems of segregation and inequality between school districts because it accounts for demographic changes in ways that traditional school desegregation and finance jurisprudence and the current iteration of NCLB do not. Accordingly, this Article argues that Congress should emulate the FHA’s “affirmatively further housing” statutory framework with its emphasis on mobility and regionalization in amending the NCLB public choice provision when NCLB is next reauthorized.

The Article proceeds as follows:

Part I provides a brief discussion of localism and the role that localism plays in the provision of education. It suggests that the historical preference for local control over education is rooted in the same theoretical justifications regarding citizen participation and efficiency advanced by proponents of localism as a preferred governance structure. It concludes by analyzing how the theoretical justifications for localism when applied in the education context operate to the detriment of poor and minority students.

Part II analyzes key federal school desegregation and school finance decisions. It contends that the federal judiciary, particularly the Supreme Court, has evidenced a doctrinal preference for localism in these decisions and this doctrinal preference has crystallized racial and economic disparities between school districts.

Part III offers a brief overview of what segregation in schools looks like today. The primary purpose of this Section is to place in context the critique of the localism preference in the federal judiciary’s school desegregation and school finance jurisprudence in the preceding section. This section then argues that in order to combat increased segregation and inequality between school districts, a regionalist approach is necessary. As a basis for comparison, it looks at regionalist solutions applied in the housing context used to promote housing mobility. It concludes that such a regionalist approach, if used in the education context, would provide much needed educational mobility resulting in increased racial and economic desegregation and improved educational opportunities for poor and minority students.

Part IV examines the role that NCLB has played in challenging the paradigm of localism in education. It argues that NCLB’s goal of increased federal involvement in education in order to ensure equality of educational outcomes for poor and minority children is a good first step, to the extent that it challenges the

localities to solve problems in ways that are attentive to the interests of all neighboring localities rather than the interests of a single locality. See Cashin, supra note ___ at 2027.
localism in education paradigm. It further argues that NCLB could do more to alleviate the detrimental effects that localism in education has for poor and minority students if the public choice provision were amended to better encourage inter-district choice. Using the housing mobility framework used in the Fair Housing context, it examines various ways in which the public choice provision could be amended to effectively encourage inter-district transfers.

Part V is a conclusion.

I. Localism and Education

Over the last three decades, metropolitan areas have experienced significant fragmentation and local government proliferation. In most metropolitan areas, the fragmentation is the result of the creation of multiple political jurisdictions—usually suburbs located outside the core central city area—that are afforded fiscal and regulatory autonomy separate and apart from the core central city. This metropolitan fragmentation undoubtedly occurs along racial and economic lines. To be sure, more affluent and middle class whites tend to populate the outer-lying suburbs while lower-income people and minorities tend to populate the core central city and inner-ring suburbs adjacent to the core central city.

The fragmentation of metropolitan areas along these racial and economic lines has serious implications for the provision of education in America. This is because school districts boundary lines -- which dictate which schools children will attend -- reflect this demographic fragmentation. Put another way, school district boundary lines are drawn such that school districts in the core central cities and suburbs reflect the racial and economic demography of the respective localities. Thus, core central city and inner-suburban school districts tend to have predominately poor and minority student bodies while outer lying suburban school

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34 See generally, Richard Briffault, The Local Government Problems in Metropolitan Areas, 48 Stan. L. Rev. 1115, 1123 – 1144(1996)(describing the nature of metropolitan fragmentation, the permeability of local legal boundary lines and the problems with fairly and efficiently allocating public services and goods that result from metropolitan fragmentation).

35 Id. at 1136-1138.

36 See Myron Orfield, Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation 33 Fordham Urb. L.J. 877, 881-884 (2006)(discussing the effects of housing discrimination and urban sprawl and noting that the end result of both housing discrimination and urban sprawl is that minorities are relegated to inner-suburban and central-city housing while whites tend to move to the outer-ring suburbs.). It is important to note that while large numbers of minorities are increasingly moving from urban to suburban areas in significant, much of the migration of minorities to the suburbs is in the form of migration to older suburbs closer to core central cities. As a result, segregation persists as whites move to further out suburbs or outer-ring suburbs. See Id. at 880.

\footnote{39 See e.g. john a. powell, Opportunity Based Housing, 12-WTR J. Affordable Housing & Community Dev. L. 188, 198 (2003) (finding that “[s] tudents educated in economically and racially segregated schools receive substandard educations…[and] when a large number of students in a school face these challenges, the cumulative effect is that the ability of the school to provide a quality education is significantly impeded.”).}
\footnote{40 See e.g., McDermott supra note __, at 15 (discussing a debate about educational policy in which policymakers voiced a staunch preference for local control over education and decrying the soundness of a proposed national educational testing agency on the grounds that “most parents…do not want agents of the federal government devising [those] national tests, making all students take them, or passing judgment on the results.”).
\footnote{41 Id. at 14-15 (discussing the professionalization and centralization movement in the early 1900’s which led to local school districts as we know them today).
\footnote{42 The term educational resources as used in this Article means access to high quality educational inputs such as teachers, curriculum and facilities that are significant factors in the quality of education a student receives. See e.g., Erica Frankenberg, Chungmei Lee and Gary Orfield, A Multiracial Society With Segregated Schools: Are We Loosing The Dream 35 (January 2003), The Civil Rights Project Harvard University, available at http://www.civilrightsproject.ucla.edu/research/reseg03/AreWeLosingtheDream.pdf
\footnote{43 See e.g., Christopher Edley Jr., Keynote address, 4 Stan. J. Civ. Rts. & Civ. Liberties 151, 152-153 (2008) (noting that there is a fundamental tension between localism and the ability of minority students to obtain an equal and quality education because of the “difficult local politics of racial subordination.”).}
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\footnote{41 Id. at 14-15 (discussing the professionalization and centralization movement in the early 1900’s which led to local school districts as we know them today).
\footnote{42 The term educational resources as used in this Article means access to high quality educational inputs such as teachers, curriculum and facilities that are significant factors in the quality of education a student receives. See e.g., Erica Frankenberg, Chungmei Lee and Gary Orfield, A Multiracial Society With Segregated Schools: Are We Loosing The Dream 35 (January 2003), The Civil Rights Project Harvard University, available at http://www.civilrightsproject.ucla.edu/research/reseg03/AreWeLosingtheDream.pdf
\footnote{43 See e.g., Christopher Edley Jr., Keynote address, 4 Stan. J. Civ. Rts. & Civ. Liberties 151, 152-153 (2008) (noting that there is a fundamental tension between localism and the ability of minority students to obtain an equal and quality education because of the “difficult local politics of racial subordination.”).} To the extent that educational opportunities and outcomes are influenced by race and class,\footnote{39 See e.g. john a. powell, Opportunity Based Housing, 12-WTR J. Affordable Housing & Community Dev. L. 188, 198 (2003) (finding that “[s] tudents educated in economically and racially segregated schools receive substandard educations…[and] when a large number of students in a school face these challenges, the cumulative effect is that the ability of the school to provide a quality education is significantly impeded.”). school district boundary lines therefore play a decisive role in determining the quality of education that a student will receive.

This Article posits that the decisive role that school district boundary lines play in dictating students’ educational opportunities is due in large part to a long-held belief by many Americans that local control over education is inherently a more legitimate and democratic way to provide education than a centralized system of education provision.\footnote{40 See e.g., McDermott supra note __, at 15 (discussing a debate about educational policy in which policymakers voiced a staunch preference for local control over education and decrying the soundness of a proposed national educational testing agency on the grounds that “most parents…do not want agents of the federal government devising [those] national tests, making all students take them, or passing judgment on the results.”).} Indeed, local control over schools has been a core principle in the provision of education in America since beginning of the nineteenth century.\footnote{41 Id. at 14-15 (discussing the professionalization and centralization movement in the early 1900’s which led to local school districts as we know them today).
\footnote{42 The term educational resources as used in this Article means access to high quality educational inputs such as teachers, curriculum and facilities that are significant factors in the quality of education a student receives. See e.g., Erica Frankenberg, Chungmei Lee and Gary Orfield, A Multiracial Society With Segregated Schools: Are We Loosing The Dream 35 (January 2003), The Civil Rights Project Harvard University, available at http://www.civilrightsproject.ucla.edu/research/reseg03/AreWeLosingtheDream.pdf
\footnote{43 See e.g., Christopher Edley Jr., Keynote address, 4 Stan. J. Civ. Rts. & Civ. Liberties 151, 152-153 (2008) (noting that there is a fundamental tension between localism and the ability of minority students to obtain an equal and quality education because of the “difficult local politics of racial subordination.”).} However, against the backdrop of increased metropolitan fragmentation and local government proliferation in which the fragmentation is stratified by both race and class, the longstanding commitment to local control over schools results in an unequal distribution of educational resources\footnote{42 The term educational resources as used in this Article means access to high quality educational inputs such as teachers, curriculum and facilities that are significant factors in the quality of education a student receives. See e.g., Erica Frankenberg, Chungmei Lee and Gary Orfield, A Multiracial Society With Segregated Schools: Are We Loosing The Dream 35 (January 2003), The Civil Rights Project Harvard University, available at http://www.civilrightsproject.ucla.edu/research/reseg03/AreWeLosingtheDream.pdf
\footnote{43 See e.g., Christopher Edley Jr., Keynote address, 4 Stan. J. Civ. Rts. & Civ. Liberties 151, 152-153 (2008) (noting that there is a fundamental tension between localism and the ability of minority students to obtain an equal and quality education because of the “difficult local politics of racial subordination.”).} and opportunities for poor and minority students.\footnote{43 See e.g., Christopher Edley Jr., Keynote address, 4 Stan. J. Civ. Rts. & Civ. Liberties 151, 152-153 (2008) (noting that there is a fundamental tension between localism and the ability of minority students to obtain an equal and quality education because of the “difficult local politics of racial subordination.”).}

This Section seeks to provide insight into why local control over schools is such a deeply held value in the provision of education in America. It argues that the longstanding commitment to local control of schools exists because many Americans have embraced the same theoretical arguments advanced in favor of the broader

\begin{itemize}
\item[(39)] See e.g. john a. powell, Opportunity Based Housing, 12-WTR J. Affordable Housing & Community Dev. L. 188, 198 (2003) (finding that “[s] tudents educated in economically and racially segregated schools receive substandard educations…[and] when a large number of students in a school face these challenges, the cumulative effect is that the ability of the school to provide a quality education is significantly impeded.”).
\item[(40)] See e.g., McDermott supra note __, at 15 (discussing a debate about educational policy in which policymakers voiced a staunch preference for local control over education and decrying the soundness of a proposed national educational testing agency on the grounds that “most parents…do not want agents of the federal government devising [those] national tests, making all students take them, or passing judgment on the results.”).
\item[(41)] Id. at 14-15 (discussing the professionalization and centralization movement in the early 1900’s which led to local school districts as we know them today).
\item[(42)] The term educational resources as used in this Article means access to high quality educational inputs such as teachers, curriculum and facilities that are significant factors in the quality of education a student receives. See e.g., Erica Frankenberg, Chungmei Lee and Gary Orfield, A Multiracial Society With Segregated Schools: Are We Loosing The Dream 35 (January 2003), The Civil Rights Project Harvard University, available at http://www.civilrightsproject.ucla.edu/research/reseg03/AreWeLosingtheDream.pdf
\item[(43)] See e.g., Christopher Edley Jr., Keynote address, 4 Stan. J. Civ. Rts. & Civ. Liberties 151, 152-153 (2008) (noting that there is a fundamental tension between localism and the ability of minority students to obtain an equal and quality education because of the “difficult local politics of racial subordination.”).
\end{itemize}
localism doctrine regarding citizen participation and efficiency. Accordingly, this Section provides a brief overview of the citizen participation and efficiency justifications for localism along with the scholarly criticism of those justifications. It goes on to argue that the citizen participation and efficiency justifications for localism when applied in the education context are specious in that they do not actually bear out and operate to the detriment of poor and minority students, particularly in light of increased governmental fragmentation. It further argues that while local control is undoubtedly beneficial in some aspects, the local control framework that currently dominates the provision of education should be reconsidered and reformulated in order to provide a more just distribution of educational resources.

A. Theoretical Justifications For Localism

i. Citizen Participation

Localism is broadly defined as a belief that decentralized, independent local government structures are preferable to a centralized government structure, particularly in metropolitan regions. As noted earlier, one of the central tenants of localism is that the provision of government services “ought to be controlled locally, with the interests of local residents as the exclusive desideratum of local decision makers.” In support of this central tenant, the scholarly literature on localism offers two primary arguments.

The first argument popularized by Professor Gerald Frug is that localism promotes citizen participation and self-determination. Professor Frug suggests that a smaller local government with enhanced powers empowers citizens by allowing them to participate meaningfully in their own governance. According to Professor Frug, citizen participation is critical to the success of a democracy because it allows citizens to take responsibility for their own destiny in their daily lives. By encouraging citizen participation, he suggests that it increases the likelihood that the citizen’s contributions will make a difference in the policy outcome and that the policy solution reached will actually be an effective one for the locality because citizens who live in the locality will have helped shape the solution. He further argues that meaningful citizen participation can only be cultivated through small levels of government because individuals will only participate in government if there is a “genuine transfer of power to [] decentralized units” which allows individuals to see that “the government and their participation in it has a meaningful impact on their every day life.”

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44 See Cashin, supra note __, at 1988.
45 See Briffault, supra note __, at 444.
47 Id. at 1068 - 1069.
48 Id.
49 Id. at 1070.
a distant centralized government with a hierarchical chain of command, the individual is likely to feel powerless and as a result decline to participate in political decision-making.  

The most salient critique of the citizen participation justification for localism is that given our current fragmented system of local governance, the degree of power that individual local governments actually wield varies greatly. Indeed, the degree of power varies in accordance with the economic means of the locality. As noted by Professor Cheryl Cashin, “the reality is that only affluent outer-ring communities have unlimited use of delegated powers because they are not constrained by declining tax bases and increasing social services burdens.” Most notably, citizens who reside in economically challenged localities “do not have a say in important land use and other decisions made by [neighboring more affluent communities] that substantially and negatively affect them.” As a result, these citizens are in actuality disenfranchised to the extent that the locality they live in does not have the means or is not equipped to respond to their policy needs, regardless of their level of participation.

ii. Efficiency

The second argument most often advanced in support of localism is that it will result in the efficient provision of public goods and services. This argument was popularized by Professor Charles Tiebout who hypothesized that decentralization of power to several local governments will create market-like competition amongst local governments for citizens. In Tiebout’s hypothesis, each local government would offer a mix and variation of public goods and services in an effort to attract citizens. Citizens would then “vote with their feet” and locate to the community in which the local government offered their desired mix of public goods and service. For example, residents who desire a high quality of a certain public good would locate themselves in communities with high levels of that particular public good and be willing to pay high taxes to pay for the public good. In contrast, those residents with low demands for quality public goods will choose other communities with low levels of public services and low taxes.

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50 Id.
51 See e.g., Cashin, supra note __, at 2043-2044 (2000).
52 Id.
53 Id. at 2033.
54 Id.
56 Id. at 417.
57 Id.
58 Id. at 418.
59 Id.
Tiebout’s efficiency justification for localism is critiqued on several grounds. Most notably, scholarly critiques of Tiebout’s model emphasize that he makes a number of assumptions that do not bear out in reality. In particular, Tiebout’s model assumes unlimited and costless citizen mobility;\(^{60}\) that citizens have full information that influences their choice of locality;\(^ {61}\) that citizens can chose to live in a number of varied localities and that each locality provides different levels of public goods and services based on citizen “tastes”;\(^ {62}\) and finally that the services provided by one locality do not impose negative externalities upon another community.\(^ {63}\)

The most damaging of these assumptions to the validity of Tiebout’s model is that citizen mobility is unlimited and costless.\(^ {64}\) In actuality, citizens’ mobility is not unlimited but instead citizen mobility is often constrained by a number of factors including the cost of living in the locality, employment opportunities, and familial connections, to name a few.\(^ {65}\) Citizen mobility is also costly. Moving to a new locality entails tangible costs such as the cost of moving and intangible costs such as the emotional costs of abandoning familiar community connections and establishing new connections in a new locality. These costs and limitations on mobility are most heavily borne by poorer citizens as the numbers of places from which poorer citizens can chose to move are limited by their ability to pay.\(^ {66}\)

Another significant critique of the assumptions made by Tiebout’s model is that there are a varied number of localities that provide different levels of public goods and services in accordance with citizen “tastes.” Again, Tiebout’s assumption here conflicts with reality. In reality, the provision of public goods and services by each locality is driven in large part not by citizen “taste” but by the fiscal capacity of the locality.\(^ {67}\) Once again, this is more likely to affect poorer citizens as the places where poorer citizens can afford to live are more likely to have less fiscal capacity and therefore will not be able to provide the same quality or quantity of public services as more affluent localities.

**B. A Critique of Citizen Participation and Efficiency Justifications for Localism in the Education Context**

In the education context, local control over schools is often justified on the same grounds as the broader localism doctrine: citizen participation and efficiency. With respect to citizen participation, one of the primary philosophical arguments for

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\(^{60}\) *Id.* at 419.

\(^{61}\) *Id.*

\(^{62}\) *Id.*

\(^{63}\) *Id.*

\(^{64}\) See *e.g.*, *Cashin, supra note ___*, at 2045-2046.

\(^{65}\) See *e.g.*, *See Briffault, supra note ___*, at 420-421.

\(^{66}\) See *Cashin, supra note ___*, at 2048.

\(^{67}\) *Id.* at 422-423 (noting that the quantity and quality of local services varies directly with local fiscal capacity).
local control over schools is that it fosters democratic participation by allowing citizens to participate in decision-making and allows schools to tailor educational programs to fit the needs of the particular locality. Proponents of local control over schools also contend that the governing bodies of the school districts (i.e. school boards) will be in close proximity to the people and therefore the people will have an opportunity to easily influence education policy.

Critically, in reality citizen participation in decisions made by local boards of education is very limited in most school districts. Indeed, citizen participation as evidenced by citizen attendance at board meetings and voter turnout for board of education elections is traditionally low in both affluent and non-affluent school districts. Moreover, even when citizens do attempt to participate in board of education meetings, many board meetings are structured such that the opportunity for public discussion is limited and any public discussion that does occur typically does not relate to or influence board decisions. Most importantly, as critics of the citizen participation justification for the broader localism doctrine have pointed out, citizen participation is rendered meaningless if a locality lacks the financial or political wherewithal to translate citizen participation into policy that meets the citizens’ needs and desires. In poorer school districts where residents do not have means or the political clout to influence school board policy, citizen participation is not likely to make a significant difference. Thus, the citizen participation justification for localism in education simply does not bear out. Citizens do not actually participate in large numbers at the board of education level and for some citizens; even if they were inclined to participate, their participation would not make much of a difference.

The Tiebout efficiency justification for local control of schools is also flawed. Localism in education is often defended on the grounds that diverse schools and school districts provide citizens the option of “shopping” around and locating themselves in school district that meet their preferred educational needs for their children. These justifications have been advanced by lawmakers, courts and scholars alike. See e.g., Wright v. Council of City of Emporia, 407 U.S. 451, 469 (1972) (“[d]irect control over decisions vitally affecting the education of one’s children is a need that is strongly felt in our society.”).

See McDermott supra note ___, at 53.

Id. at 54-60 (describing the limited nature of public participation in school governance and concluding that the general public for the most part is not attentive to the activities of local boards of education and do not participate in boards’ decision making processes).

Id. at 55.

Id. at 60-67 (studying the structure of board of education meetings in various communities and concluding that most of the deliberations on substantive education policy issues occurs in special meetings, leaving larger meetings open to the public largely for ceremonial functions. The study also noted that that most of the people who attended and commented at meetings open to the public were school principals or other school district employees and that the public comments made at the meetings rarely related to the items actually on the Board agendas)

See Cashin, supra note ___, at 2045-2046.
children. As critics of Tiebout’s efficiency rationale for the broader localism doctrine have pointed out however, the model erroneously assumes unlimited citizen mobility. In the education context, the model assumes that citizens will move to a school district that provides them with the optimal level and quality of education for their children. While it is indeed accurate that for some families residential choice is informed by the quality of the neighborhood, residential mobility as a method for ensuring quality schools is only an option for a limited number of parents. Instead, because the home prices in residential areas with high quality schools are often expensive, parents dissatisfied with their children’s schools more often than not “vote with their feet” by attempting to change schools rather than changing residences. This is particularly true for less affluent parents who lack the financial means to move into better residential areas with better schools.

Furthermore, while parents should undoubtedly have some say in the quality of education that their children receive, the notion that parental “preference” or “choice” should be a guiding principle in maintaining strict local control of schools is inappropriate because education, while sharing characteristics of both a private good and a public good, has more characteristics of a public good than a private good. Put another way, since state government’s bear the responsibility under most state constitutions for the provision of public education, “the benefit of a universally high quality education redounds to society as a whole [and] it is not immediately apparent that parents should have the “choice” to provide their children with an inadequate education.”

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75 See Charles Tiebout, A Pure Theory of Local Expenditures, 64 J. POL. ECON. 416, 417 n.6, 418 (1956); Jack Buckley and Mark Schneider, School Choice, Parental Information, and Tiebout Sorting: Evidence from Washington DC, in The Tiebout Model At Fifty: Essays in Honor of Wallace Oates 103-104 (2006) (finding that households expand more time and resources shopping for education than other services); San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 49-50 (1972) (“[L]ocal control means ... the freedom to devote more money to the education of one’s children.”).

76 See Buckley and Schneider, supra note ___, at 104 (“almost one-quarter of parents in the nation report that they moved to their current neighborhood so that their child can enroll in the local school and this proportion increases with parents’ level of educational attainment.”).

77 Id. at 104 -105 (noting the results of a survey of parents in Washington DC that while many parents considered moving their residence as a means to improve their school choices, the most common form of exercising choice were to try and get their children into a charter school or to try to exercise intradistrict choice).

78 See Mcdermott, supra note ___, at 21 (acknowledging that education has dual characteristics of both a private good and a public good but arguing that education is predominately a public good because “[p]ublic goods are characterized by joint supply and nonexcludability,” and that public education fits the description of a public good because when individuals learn, the effects of that learning accrue not only to them, but to society as a whole by contributing to a well-trained work force and an educated citizenry.”)

The benefits and costs of maintaining an educated populace accrue to society as a whole. Indeed, the fact that a minimum level of education is required in most states and that states are willing to tax the general population to ensure that some level of schooling is provided to citizens for free, demonstrates that there is indeed a collective interest in maintaining an education populace. Yet the Tieboutian efficiency justification for maintaining localism in school treats public education as if it were a private good rather than a public good insofar as it allows market like principles to control the distribution of educational resources. This is problematic because in allowing market line principles to govern, the collective interests of all citizens in ensuring that existence of an educated populace is neglected, particularly for poor and minority residents who often unable to exercise Tieboutian choice in relocating to a residential area that will afford them access to quality schools for their children.

To be fair, local control of schools is undoubtedly beneficial in some senses, namely the logistical ease of governance and the flexibility to respond to communities’ needs and preferences. However, local control as we know it also has an exclusionary side insofar as it creates inequitable distribution of educational resources along geographic lines which are segregated by both race and class. Neither the citizen participation nor the efficiency justifications offer adequate basis for adherence to localism in education, particularly the practice of closely linking school attendance with residence. Instead, they perpetuate pervasive, but false, justifications for the racialized inequalities that now exist between schools and school districts throughout the country. As discussed infra in Section IV, the local control paradigm should be reconsidered in order to allow for a more inclusive and just distribution of educational resources.

II. The Federal Judiciary’s Affirmation of Localism in School Desegregation and School Finance Cases

As discussed above, localism in education is a long accepted principle in the provision of education in America, despite the deleterious effect that localism in education has had on poor and minority communities. Not only has localism in education been accepted as a matter of policy, but it is also vigorously defended by the federal judiciary, particularly the Supreme Court, in the Court’s school desegregation and school finance jurisprudence. Indeed, beginning with the

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80 See Stephen J. Carroll and Emre Erkut, *The Benefits to Taxpayers from Increases In Students Educational Attainment* at 8 (finding that an increase in educational attainment increases both the likelihood of employment and wages when employed for an individual, and reduces the likelihood that the individual will participate in social support programs.), available at http://www.rand.org/pubs/monographs/2009/RAND_MG686.sum.pdf

81 See McDermott, *supra* note 68 at 24 describing the unwillingness of citizens to make sacrifices for the common good when it comes to the education of their children citing the end of voluntary desegregation programs involving busing in Mecklenburg County, North Carolina despite the likely negative impacts it would have on desegregation.
remedial decision in the second Brown v. Board of Education the Court’s acceptance of localism has arguably come at the expense of the constitutional rights of minority and poor student.

A. Brown I and II: A Localist beginning to School Desegregation

In 1954, the Supreme Court in Brown v. Board of Education (“Brown I”) held that schools segregated by race were inherently unequal and denied minority students “equal educational opportunities” in violation of the 14th amendment to the constitution. The Brown decision effectively ended government sanctioned segregation in schools and other public institutions. Brown I was however only the beginning of the effort to desegregate schools. A year later, the Court’s issued a second decision, Brown II, which outlined the remedy to be afforded to eradicate segregation. Significantly, the Court in Brown II rejected the Plaintiffs’ request to immediately enjoin the operation of segregated schools. The Court instead, citing their proximity and understanding of “local conditions,” remanded the cases back to the local district courts with the now infamous instruction that district court’s were to rely upon their equitable remedial authority to formulate remedies which would end segregation in schools with “all deliberate speed.”

While much scholarly attention has been paid to the decision in Brown II to allow for a delayed remedy to the serious constitutional violation imposed by segregation, little attention has been paid to themes of localism present in the Brown II decision. Indeed, most scholars have argued that the Court’s embrace of localism in its remedial school desegregation jurisprudence did not begin until the early 1970’s with the Court’s decisions in Milliken v. Bradley and San Antonio

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83 Brown, 347 U.S. 483.
84 Brown overruled Plessy v. Ferguson, 163 U.S. 537 (1896) in which the Supreme Court previously upheld the constitutionality of segregation in public institutions reasoning that Blacks themselves and not the institution of segregation “stamp[s] the colored race with a badge of inferiority.
87 Brown II, 349 U.S. at 300.
88 See e.g., Charles J. Ogletree Jr., All Deliberate Speed: Reflections on the First Half Century of Brown v. Education 10-14 (2004) ( describing the origins of the term “all deliberate speed” and arguing that the inclusion of that term was intentional and reflected the Supreme Court’s reluctance to take a more forceful position on ending segregation immediately); Paul Gerwitz, Remedies and Resistance, 92 Yale L.J. 585, 609-613 (1983) (offering a theoretical framework for the Brown II all deliberate speed calculation); Bryan L. Adamson, A Thousand Humiliations: What Brown Could Not Do, 9 Scholar 187, 194-195 (2007) (arguing that the Court’s inclusion of the “all deliberate speed” language as a result of capitulation to fear of massive resistance by whites); Gary Orfield and Susan Eaton, Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education (1996) (describing the delays in segregation that resulted after Brown II).
Independent School District v. Rodriguez. A close reading of the Court’s decision in Brown II however suggests that themes of localism—again defined as an ideological commitment to local control of schools at all costs—first appear in Brown II where in declining to order immediate relief to segregated schools the Court reasoned:

Full implementation of [the constitution principles outlined in Brown I] may require solution of varied local school problems...[a]t stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for the elimination of a variety of obstacles in making the transition to a school system operated in accordance with the constitutional principles outlined in our May 17, 1954 decision. (emphasis added)

The “local school problems” and “obstacles” referenced by the Court were undoubtedly the local customs or policies of subjugation of minority, particularly Black citizens. These local customs were so deeply ingrained in some communities that one of the most prominent arguments made by various state Attorney Generals in favor of allowing for gradual rather than immediate desegregation of schools was the existence of an anti-desegregation feeling amongst locals and the threat of white mob violence if schools were integrated. Indeed, a study of the Supreme Court’s internal papers revealed as much.

By deferring to the local sentiment of the communities opposed to desegregation and declining to immediately enjoin the operation of segregated schools, Brown II was a direct contradiction to the Court’s prior decisions involving

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89 See e.g., Joan C. Williams, The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law, 1986 Wis. L. Rev. 83, 105-111 (contending that Rodriguez and Milliken signaled the beginning of the Court’s propensity to use local sovereignty language to support an internal limit on the reach of the fourteenth amendment in school equity cases); Tomiko Brown-Nagin, Toward A Pragmatic Understanding of Status Consciousness: The Case of Deregulated Education, 50 Duke L.J. 753, 839-840 (2000) (noting that the Rodriguez and Milliken decisions reflected the beginning of the federal courts retreat from interference in most state decision-making relating to education.)

90 Brown, 349 U.S. at 299-300.

91 See e.g., Amicus Curiae Brief of the Attorney General of Florida at 23, Brown v. Bd. of Educ. of Topeka, 349 U.S. 294 (1955) (noting that the majority of whites disfavored the desegregating schools and that “there is a minority of whites who would actively and violently resist desegregation, especially immediate desegregation.”), at 1954 WL 45715; Brief of Harry McMullan Attorney General of North Carolina, Amicus Curiae at 37, Brown v. Bd. of Educ. of Topeka, 349 U.S. 294 (1955) (arguing that the immediate desegregation of schools would likely lead to [c] onflicts in the schoolroom, on the playground, and between parents and teachers may lead to racial bitterness in a community and bring to North Carolina the bloody race riots which have disgraced cities and states.”), at 1954 WL 45720.

92 See A. Bickel, The Least Dangerous Branch: The Supreme Court At The Bar Of Politics 253 (1962) (noting the Court’s desire to issue an opinion in Brown II that would reduce opposition and promote flexibility and tolerance among whites).
the impairment of a substantial constitutional right. In such cases prior to Brown II, the Court typically declined to postpone remedial relief for the violation of a present constitutional right. Thus, the Court’s decision to postpone relief was inconsistent with the Court’s description of the injury caused by segregation in Brown I as “affect[ing] [the] hearts and minds” of Black students “in a way unlikely ever to be undone.”

By ordering gradual rather than immediate relief, the Court subordinated the constitutional right of minority children to obtain an equal public education to the local customs of various communities, something that the Court had not previously done in other cases involving serious violations of a personal constitutional right. The Brown II decision set the tone for the remainder of the federal judiciary’s remedial school desegregation jurisprudence as the rights of minority children would continue to be limited by the Court’s deference to localism.

B. Green and beyond: A Brief Retreat From Localism

After Brown II, many states in the South used the Court’s language in Brown II allowing for gradual desegregation as license to not desegregate at all. Indeed, schools districts utilized a number of tactics aimed at stalling desegregation efforts including closing public schools; implementing time consuming administrative procedures in order to discourage minority students from enrolling in predominately white schools; adopting freedom of “choice plans” which purportedly allowed students to select the school they wanted to attend; and flat out refusing to comply with desegregation decrees. The end result of these tactics was that very little desegregation occurred in the years immediately following Brown II. By 1960, four years after Brown II, only 0.15% of Black children in the South attended

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93 See e.g., State of Mo. ex. Rel. Gaines v. Can., 305 U.S. 337 (1938) (finding that Missouri’s denial of admission to Black law school applicant and failure to provide an equal alternative for the Black law school in the State of Missouri, violated the 14th amendment equal protection clause and ordering that the student be admitted to the University of Missouri law school.); Sipuel v. Bd. of Regents, 332 U.S. 631, 633 (1948) (“[t]he petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group.”).

94 Brown, 347 U.S. at 494.

95 Griffin v. County Sch. Bd., 377 U.S. 218, 229-232 (1964) (closing of schools as a means to thwart desegregation efforts held unconstitutional);

96 McNeese v. Bd. of Educ., 373 U.S. 668 (1963) (black children could not be precluded from enrolling in nonsegregated schools for failing to exhaust State administrative remedies)

97 Green v. County Sch. Bd., 391 U.S. 430, 441-442 (1968) (finding “freedom of choice” plan unconstitutional where small number of students chose to attend school in which their race was in the minority and it burdened students and parents with the responsibility of desegregating ).

98 Cooper v. Aaron, 358 U.S. 1, 18-20 (1958) (rejecting the Board of Education’s request to postpone desegregation efforts due to extreme public hostility)
desegregated schools.\textsuperscript{99} By 1964, nine years after \textit{Brown II}, the numbers were similarly dismal as only 1.2\% of Black children in the South attended desegregated schools.\textsuperscript{100}

True desegregation, particularly in the Southern states, did not begin until both the federal judiciary and the federal legislature stopped deferring to the local customs of the South and demanded that states desegregate. In 1964, Congress passed the 1964 Civil Rights Acts which included provisions that prevented racially segregated school districts from receiving federal funding.\textsuperscript{101} Similarly, in 1964 the Supreme Court, disenchanted with the pace of desegregation and the number of dilatory tactics being implemented to stall desegregation, held that that states were required to eliminate all vestiges of prior segregation in schools “quickly and effectively.”\textsuperscript{102} Significantly, the Court commented that with respect to school desegregation efforts “[t]here has been entirely too much deliberation and not enough speed.”\textsuperscript{103} Shortly thereafter in 1968, in an attempt to hasten the speed of desegregation, the Court further held that states have an “affirmative duty” to eliminate segregated school systems “root and branch.”\textsuperscript{104}

The Court’s decisions in 1964 and 1968 conveyed a sense of urgency in implementing desegregation plans, something not present in the \textit{Brown II} decision. The Court followed this up this sense of urgency by holding in \textit{Swann v. Charlotte-Mecklenburg Board of Education}, that federal court’s have broad authority when exercising their equitable remedial authority to formulate remedies in desegregation cases, including the authority to order busing and to implement racial quotas.\textsuperscript{105} The end result of the aggressive string of remedial decisions by the Supreme Court along with federal legislation which threatened to cut off funds was a significant increase in students attending desegregated schools. By the 1968-1969 school year, the number of Black students attending desegregated schools rose to 32\%.\textsuperscript{106} By the 1972-1973 school-year that number rose even higher to 91\%.\textsuperscript{107}

\textbf{C. \textit{San Antonio v. Rodriguez} and \textit{Milliken v. Bradley}: A Return to Defensive Localism}

While the Court adopted an aggressive interventionist approach towards fashioning school desegregation remedies in the 1960’s with cases like \textit{Green} and

\textsuperscript{100} Id.
\textsuperscript{101} 42 U.S.C. § 2000d (1964)
\textsuperscript{102} \textit{Green}, 377 U.S. at 232.
\textsuperscript{103} Id. at 229.
\textsuperscript{104} 391 U.S. at 437-438.
\textsuperscript{105} 402 U.S. 1, 16-18 (1971).
\textsuperscript{106} See Klarman, supra note ___ at 10.
\textsuperscript{107} Id.
Swann, the Court’s aggression waned shortly thereafter beginning in the 1970’s. The Court’s more aggressive school desegregation decisions, particularly Swann’s call for court ordered busing and racial quotas in schools, resulted in backlash consisting of demonstrations and a significant rise in “white flight” out of cities into suburbs.\(^{108}\) Against this backdrop, the Court’s interpretation of the scope of the Fourteenth Amendment in school equity cases involving issues of school finance and school desegregation constricted significantly. As discussed below, the Court’s opinions in *San Antonio Independent School District v. Rodriguez*\(^ {109} \) and *Milliken v. Bradley*\(^ {110} \) utilized localism principles to limit the scope or reach of the Fourteenth Amendment. As a result, minority students have increasingly been trapped in schools that are both racially and economically segregated and unequal.

### i. *San Antonio v. Rodriguez*

In *San Antonio v. Rodriguez*, the Court was asked to decide the constitutionality of the State of Texas’ school financing system. Under the Texas school financing system, school districts received a portion of their funding from the State while the remainder of their funding was derived from property taxes collected on properties within the school district.\(^ {111} \) The Plaintiffs, a class of Mexican-American parents from an urban school district in San Antonio, argued that the financing system resulted in substantial disparities in per-pupil expenditures between school districts due to substantial differences in the value of assessable property among the school districts.\(^ {112} \) The Plaintiffs argued that because the Texas school financing system resulted in inter-district disparities in per-pupil spending, the financing system violated their equal protection rights because it discriminated based upon wealth.\(^ {113} \) The Plaintiffs further argued that the discriminatory financing system violated the 14th amendment because it interfered with their “fundamental right” to an education.\(^ {114} \) The Supreme Court disagreed, finding that the Texas school financing system did not discriminate against any definable category of ‘poor’ people nor did it result in the absolute deprivation of an education for any class of people.\(^ {115} \) The Court further found that education is not a fundamental right.\(^ {116} \)

\(^{108}\) See e.g., Orfield & Eaton, *supra* note ___ at 53-76.


\(^{111}\) *Rodriguez*, 411 U.S. at 4-6.

\(^{112}\) *Id.* at 11-13. The Plaintiffs compared the amount per-pupil expended by Edgewood Independent School District, which contained schools located in a residential area with little commercial or industrial property and residential property occupied by predominately poor Mexican-American residents, with the Alamo heights Independent School District, which contained schools located in a highly residential area occupied by predominately upper-middle class white residents. The Court noted that due to the value of the assessable property in the respective school districts, the Edgewood Independent School District was only able to spend $356.00 per pupil while the Alamo Heights Independent School District was able to spend $594.00 per pupil.

\(^{113}\) *Id.* at 15.

\(^{114}\) *Id.* at 29.

\(^{115}\) *Id.* at 25.
Analyzing the constitutionality of the Texas school finance system under a rational basis test rather than applying strict scrutiny, the court went on to find that the school financing scheme was constitutional, despite the stark inter-district disparities in per-pupil spending.\textsuperscript{117}

In reaching the conclusion that the Texas school financing system did not violate the Plaintiffs’ equal protection rights or impinge upon a fundamental right, the Court analysis is fraught with ‘Frugian’ and ‘Tieboutian’ notions about local control over education cultivating citizen participation and competition for educational excellence. Indeed, the majority opinion suggests that:

[l]ocal control means… the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decisionmaking process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence (emphasis added). \textsuperscript{118} (emphasis added).

The Rodriguez decision represents a significant retreat by the Court from its interventionist approach in cases like Swann and Green. Instead, as Justice Marshall noted in his lengthy dissent, the Court is content to preference local control over education over the ability of poor and minority children to obtain equal educational opportunities.\textsuperscript{119} Indeed, the ‘Frugian’ and ‘Tieboutian’ language in the Rodriguez opinion ignores the reality that school districts with poorer tax bases will not be able to effectively “tailor [school] programs to local needs,” because the poorer districts don’t have the money to do so. Similarly, the idea that “local control” results in ‘competition for educational excellence,’ falls prey to the same fallacies as the Tiebout’s justification for broader localism: poorer localities lack the fiscal capacity to compete so the only competition that will occur is between more affluent localities or school districts. These realities have become abundantly clear several years after the Rodriguez decision.

\textit{ii. Milliken v. Bradley}

Two years after the Court issued the Rodriguez decision, in\textit{ Milliken v. Bradley} the Court was asked to decide the constitutionality of an inter-jurisdictional school desegregation plan between an urban and suburban school district in the Detroit metropolitan area.\textit{ Milliken} was significant because by the 1970’s white flight to the suburbs was becoming an increasing barrier to formulating effective

\textsuperscript{116}\textit{Id.} at 35.  
\textsuperscript{117}\textit{Id.} at 54-55.  
\textsuperscript{118}\textit{Id.} at 49-50.  
\textsuperscript{119}\textit{Id.} at 84-85.
school desegregation plans, particularly in the northern parts of the country. As a result of white flight, many urban school districts had too few white students to implement meaningful desegregation plans. The Detroit metropolitan area was emblematic of this problem as the City of Detroit was predominately African-American while the surrounding suburbs were predominately white. The Plaintiffs in *Milliken* alleged that the City of Detroit’s school system was segregated due to *de jure* practice of State officials. A school desegregation plan encompassing the City of Detroit and adjacent suburban school districts was approved by the District Court and the Court of Appeals. Both Courts acknowledged that given the racial make-up of the City and suburban schools, “any less comprehensive a solution than a metropolitan area plan would result in an all black school system surrounded by practically all white suburban school systems.” Both Courts also reasoned that formulating an inter-district school desegregation plan was within the equitable remedial authority of the federal district court because the City of Detroit’s *de jure* school segregation practices were attributable to the State and the “State controls the instrumentalities [school districts] whose actions is necessary to remedy the harmful effects of the State acts.

The Supreme Court disagreed and instead held that an inter-district school desegregation plan between the City of Detroit school district and the Detroit area suburban school districts was unconstitutional. The Court reasoned that the suburban school districts were autonomous entities separate and apart from the City of Detroit school district. Before an inter-district remedy could be ordered, the Court found that Plaintiffs would first need to show that the suburban school districts engaged in *de jure* segregative practices that produced a significant segregative effect in the City of Detroit school district. The Court concluded that “without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.”

Simply put, the standard articulated in *Milliken* precludes an interdistrict school desegregation plan unless there is proof of an interdistrict violation, a very difficult standard that plaintiffs in only a handful of cases have been able to meet.

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120 An in depth discussion of the causes and consequence of white flight is beyond the scope of the Article. For a more thorough discussion of white flight during the 1970’s and the implications for school desegregation, *see* Orfield and Eaton, *supra* note ____, 10-18.
121 *Milliken*, 411 U.S. at 725.
122 *Id.* at 724.
123 *Id.* at 725-735.
124 *Id.* at 735.
125 *Id.* at 36.
126 *Id.* at 744-745.
127 *Id.* at 745.
128 *Id.* at 745.
129 *See e.g.*, U.S. *v. Bd. of Sch. Comm’r*, 456 F. Supp. 183, 191-192 (finding that interdistrict desegregation order was warranted due to housing discrimination); *aff’d* in part and vacated in part,
Milliken’s requirement of an “interdistrict violation and interdistrict effect” as prerequisites for implementing an inter-district school desegregation plan has been a devastating setback for school desegregation efforts. By making an inter-district violation a constitutional requirement for the implementation of an inter-district remedy, the Court treated school district boundary lines as sacrosanct rather than the administrative creations of the state that they actually are.130 Indeed, the Court recognized as much in its prior cases.131 Similar to the Court’s embrace of local control in Rodriguez, the Court in Milliken favored local control—in this instance local control of school district boundary lines, at the expense of implementing a meaningful school desegregation plan to remedy a constitutional violation. The suggestion that school district boundary lines be disturbed in order to remedy de jure segregation by the City of Detroit engaged in was met with fierce opposition as the Court noted:

 Boundary lines may be bridged where there has been a constitutional violation calling for interdistrict relief, but the notion that school district boundary lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the education process.132

The elevated status given to school district boundary lines in Milliken in the name of “local control” was significant for two reasons. First, it changed the doctrinal


130 See e.g., Mark C. Radhert, Obstacles and Wrong Turns on the Road from Brown: Milliken v. Bradley and the Quest for Racial Diversity in Education, 13 Temp. Pol. & Civ. Rts. Rev. 785, 798 (2004) (arguing that the Milliken majority wrongly characterized the local school districts and the State of Michigan as if they were constitutionally distinct entities and noting that “it is elementary that in our constitutional structure cities and local school boards derive their authority from the state.”); Kevin Brown, Termination of Public School Desegregation: Determination of Unitary Status Based On The Elimination Of Indvidious Value Calculation, 58 Geo. Wash. L. Rev. 1105, 1134 (1990) (noting that the majority in Milliken erred by not finding that “the Detroit Board of Education was an agency of the state of Michigan, [and that] its acts of racial discrimination [should] be considered those of the state of Michigan for purposes of the Fourteenth Amendment.”).

131 See e.g., Sailors v. Bd. Of Educ., 387 U.S. 105, 108 (1967) (characterizing general local governments as “‘convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,’ and the ‘number, nature and duration of the powers conferred upon [them] .... and the territory over which they shall be exercised rest[ing] in the absolute discretion of the State.”).

132 Id. at 741-742.
landscape of the Court’s school desegregation jurisprudence. Given the realities of segregation in residential housing, there simply are not enough white students in urban school districts nor are there enough minority students in suburban school districts to achieve meaningful desegregation. Consequently, the difficult to meet standard required by Milliken in order to obtain an inter-district school desegregation remedy effectively limits the ability of courts to remedy segregated conditions in schools. Second, Milliken arguably encourages whites seeking to avoid integrated education to move to the suburbs. As noted by Professor Erwin Chimerinsky, if Milliken would have been decided differently, a major incentive for moving to the suburbs would be eliminated. In sum, Milliken poses a nearly insurmountable barrier to effective desegregation insofar as it effectively immunizes suburban school districts from scrutiny under the 14th amendment and it encourages whites seeking to avoid integrated education to move to the suburbs.

D. After Rodriguez and Milliken: Localism As A Near Constitutional Norm

The Court’s decisions in Rodriguez and Milliken ushered in new era in the Court’s analysis of the scope of the Fourteenth Amendment in school desegregation cases. The combined effect of Rodriguez and Milliken was arguably to elevate localism in education to a near constitutional norm. Case in point, a trio of cases in the early to mid-1990’s in which the Court was asked to decide the standard under which school districts that were under school desegregation decrees could be considered to have achieved “unitary” status and therefore released from federal court supervision. In each of these cases, the federal judiciary imposed broad and arguably vague standards that afforded school districts the opportunity to terminate school desegregation decrees, even though termination of the decrees would result in the school districts returning to hyper-segregated conditions. For example, in Board of Education v. Dowell, the Court held that a school district need only show that “it complied in good faith with the desegregation decree since it was entered” and that the vestiges of past discrimination “have been eliminated to the extent practicable” in order to be released from a federal court school desegregation decree. Prior to the Court’s ruling in Dowell, school districts could not be released from school desegregation decrees if releasing them would have the foreseeable impact of restoring segregated conditions within a school district. After Dowell, however,

134 See Freeman v. Pitts, 503 U.S. 467 (1992). The term “unitary status” means that the school district has eliminated the old racially segregated dual school system. Seven factors are measured to determine if a school district has achieved unitary status. These factors are: extracurricular activities; transportation; administrative staff assignment; relative quality of education; faculty assignment and student assignment.
136 See Dowell, 498 U.S. 237 at 249-250.
school districts were free from federal court supervision so long as they made a good faith effort “to the extent practicable” to eliminate vestiges of discrimination, even if releasing the school districts would foreseeable desegregation.

In *Freeman v. Pitts*, the Court further weakened the strength of federal court control over school desegregation by finding that federal district courts have authority to relinquish school districts from school desegregation decrees in incremental stages, before the school district has achieved unitary status or eliminated vestiges of segregation in all areas of school operations.  

Finally, in *Missouri v. Jenkins*, the Court ordered an end to successful court-ordered desegregation plans once unitary school systems were achieved, even if terminated the court-ordered school desegregation plans would return the schools back to extreme levels of segregation.

Notably, in *Dowell, Freeman* and *Jenkins*, the Court emphasized that principles of federalism necessitated that federal supervision of local schools be a temporary measure and that local control of schools be returned as soon as possible. The Court further emphasized that that school districts were not responsible for remedying racial imbalance attributable to factors outside of the school district’s control such as demographic change and parental school preference. The preeminence that the Court has given to the concept of local control of schools has allowed defendant school districts to exercise significant control over the school desegregation remedial process. Indeed, since the Court’s decisions in *Dowell, Pitts* and *Jenkins*, school districts are being released from school desegregation decrees in overwhelming numbers and more often than not win challenges to segregated school conditions bought by minority parents and students.

There are two noteworthy implications of the Court ceding such control to defendant school districts in the name of local control. First, from a constitutional

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137 See *Pitts*, 503 U.S. at 492-493.
139 See e.g. *Dowell*, 498 U.S. 237 at 248 (“federal supervision of local school systems was intended as a temporary measure to remedy past discrimination.”); *Jenkins*, 515 U.S. 70 at 102 (emphasizing that the goal of desegregation remedies is to “remedy the violation to the extent practicable, but also to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.”).
140 See e.g., *Id.* at 117 (Thomas, J., concurring) (“[d]istrict courts must not confuse the consequences of de jure segregation with the results of larger social forces…[i]t is not always the case that demographic forces causing population change bear any real and substantial relation to a de jure violation.”)
141 See Wendy Parker, *Connecting the Dots: Grutter, School Desegregation and Federalism*, 45 Wm. & Mary L. Rev. 1691, 1731-1739 (2004) (arguing that defendants are afforded too much deference and control over the school desegregation remedial process in the name of local control).
perspective, the 14th amendment right of minority children articulated in *Brown I* to attend non-segregated schools has been arguably subjugated to the American value preference for “local control” over schools. By insisting that federal court supervision over school desegregation plans was always intended to be a temporal measure and further insisting that school districts not be held accountable for factors beyond their control such as demographic changes, the Court forecloses the possibility of any effective judicially created remedy for school segregation. Second, by imposing a minimal “good faith: requirement on school districts to “remedy vestiges of discrimination to the extent practicable,” in order to escape federal court supervision, the Court implicitly provides safe harbor for school districts to avoid continued participation in school desegregation plans.

### III. Modern Day School Segregation: Geography, Race and Class

The consequences of the federal judiciary’s preference for localism in its school equity jurisprudence cannot be overstated. Because students for the most part attend schools in close proximity to the neighborhoods in which they live, the true ramifications of the Court’s embrace of localism in its school desegregation and school finance jurisprudence can only be understood within the larger context of residential housing segregation and the federal, state and local laws that perpetuate such segregation.

This Section offers an overview of the how residential segregation leads to segregation and inequality between school districts and why such segregation an inequality matters. It then argues that a regionalist approach to providing integrated and equalized educational opportunities is necessary. As a basis for comparison, it looks at the benefits of regionalist solutions applied in the housing context and argues that such a regionalist approach is necessary to increase racial and economic integration and to improve educational opportunities for poor and minority students.

#### A. Segregation by Geography: Segregated Neighborhood and Segregated Schools

One important factor that differentiates school segregation today from school segregation pre-*Brown* is geography. Inequalities in education today are arguably the product of a stark dichotomy between urban and suburban schools. Schools in urban cities and inner-ring suburbs are more often than not inferior to suburban schools as measured by academic achievement and resources devoted to the schools.\(^{143}\) This academic achievement and resource disparity between urban and

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\(^{143}\) See *e.g.*, Margaret C. Wang & John A. Kovach, *Bridging the Achievement Gap in Urban Schools: Reducing Educational Segregation and Advancing Resilience-Promising Strategies*, National Center on Education in the Inner Cities 6-7(1995) (describing one of the side effects of residential segregation being that African-American and other minority students get segregated in schools where academic achievement is low and resources such as qualified teachers and textbooks are nonexistent),
suburban schools is neither accidental nor is it coincidental. Rather, as discussed further in Section III.B infra, it is the result of state and local government laws that encourage affluent and usually white residents to spatially separate themselves from poor and typically minority residents.

The long and sorted history of residential segregation has been discussed at great length by other scholars and need not be recounted in great detail here.\textsuperscript{144} Nevertheless, it is worth briefly describing how intense residential segregation in metropolitan areas leads to segregation in schools.

Residential segregation typically tracks the boundary lines between cities and suburbs. According to the 2000 U.S. Census Bureau report, approximately 77% of individuals who lived in a metropolitan suburb were white while only 23% were minorities (8% Black, 11% of Latinos and 3% Asian).\textsuperscript{145} The racial segregation within residential areas replicates itself in schools because school districts boundary lines are typically drawn coterminous with political subdivisions. Thus, racial segregation within metropolitan areas is similar to the racial segregation found in schools. Demographic enrollment data from the 2006-2007 school year bears this out:

\begin{table}[h]
\centering
\caption{Table: 1 Distribution of Enrollment by School District Location \textit{(\%Share of suburban enrollment)}\textsuperscript{146}}
\begin{tabular}{lll}
\hline
\textbf{White} & \textbf{Black} & \textbf{Latino} \\
\hline
Suburban Enrollment & 59\% & 15\% & 20\% \\
\hline
\end{tabular}
\end{table}

\begin{table}[h]
\centering
\caption{Table 2: Distribution of Enrollment by School District Location \textit{(\%Share children educated by urban schools by race)}\textsuperscript{147}}
\begin{tabular}{lll}
\hline
\textbf{White} & \textbf{Black} & \textbf{Latino} \\
\hline
\end{tabular}
\end{table}

available at
http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/14/49/48.pdf

\textsuperscript{144} See e.g., Douglas S. Massey and Nancy A. Denton, Segregation and the Making of the Underclass (1993) (arguing that residential segregation is the principal factor responsible for the creation of the urban underclass).


\textsuperscript{147} Id. at 4.
As predicted by residential housing patterns, Table 1 shows that white students make up the majority of students enrolled in suburban schools at 59% while Black and Latino students make up a much smaller portion at 15% and 20% respectively. In contrast, Table 2 shows that only 19% of students enrolled in urban schools are white while nearly half are Black or Latino (48% and 47% respectively). The concentration of nearly half of Black and Latino students in urban or central city schools is troubling. Because the majority of urban schools have documented inferior resources and academic achievement levels, the segregation of the majority of white students into suburban schools and the majority of minority students into urban schools, runs counter to Brown’s promise of equal educational opportunity for all students, regardless of race.

B. Racial and Economic Segregation in Schools: Why It Matters

Critics of continued school desegregation efforts often contend that segregation does not matter. That separate schools can indeed be made equal. 148 Extensive research linking levels of segregation with educational outcomes directly contradicts the notion that separate schools can be made equal. Instead, research shows that the existence of racially segregated schools has tremendous consequences in terms of distribution of education resources and academic achievement. An amicus brief submitted to the Supreme Court in Parents Involved in Community Schools v. Seattle School Dist. No. 1 149 by the nation’s leading social scientists concluded that:

Segregated minority schools offer notably weaker educational opportunities. They tend to have more teachers without credentials who teach subjects in which they are not certified, more instability caused by rapid turnover of both students and faculty, more limited academic curriculum, and more exposure to crime and violence in the school's neighborhood. 150

As a result, students who attend segregated predominately minority schools score lower on standardized achievement tests and drop out of school at a much higher

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148 See e.g., Missouri v. Jenkins, 515 U.S. 70, 122 (Thomas, J., concurring) (“Given that desegregation has not produced the predicted leaps forward in black educational achievement, there is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment.”).
Moreover, racial segregation in schools is compounded by an increase in the number of poor students of all races. Students of all races now attend schools with growing populations of poor children. To be expected, the problem is particularly acute for minority students, particularly Black and Latino students. During the 2005-2006 school-year, the average Black or Latino student attended a school in which 59% of their peers were classified as poor. In contrast, during the same school year, the average white student attended a school in which 31% of their peers were classified as poor. The combination of both racial and economic segregation for minority students “increase[s] educational inequality for students in these schools because of problems such as a lack of resources, a dearth of experienced and credentialed teachers, lower parental involvement, and high teacher turnover.” Consequently, racial and economic segregation in schools does matter as it prohibits students attending such segregated schools from obtaining an adequate education.

C. Government Policies Exacerbate Race and Class Segregation in Schools

Federal, state and local government policies are complicit in fostering race and class based residential segregation. As discussed in Section II supra, the Supreme Court’s remedial school desegregation jurisprudence takes the position that school segregation caused by residential segregation lies outside the purview of the federal courts remedial powers. The underlying rationale behind the Court’s reasoning appears to be that residential segregation is a matter of private choice rather than intentional state action. This Section argues the opposite.

Indeed, federal, state and local government policies all played a pivotal role in creating racial and economic segregation amongst urban and suburban communities. With respect to federal government policies, after World War II mortgage insurance programs were established through the FHA that enabled and encouraged middle-class white families to obtain financing for new housing outside core central cities in burgeoning suburbs. At the same time, the FHA maintained underwriting policies that discouraged minorities from buying homes in areas outside of the decaying central city.

151 Id.
153 Id.
154 Id.
155 See e.g., Roberta Achtenberg, Shaping American Communities: Segregation, Housing and the Urban Poor, 143 U. Penn. Law. Rev. 1191, 1193 (1995) (describing how FHA programs benefited white citizens in financing suburban homes)
156 See e.g., Florence Wagman Roisman, Teaching About Inequality, Race and Property, 46 St. Louis U. L.J. 665, 677-678 (2002) (discussing the FHA’s underwriting policies and noting that the FHA
In fact, the FHA’s policies limited the ability of minorities to participate in the overall homeownership bonanza that occurred after World War II as “less than 2 percent of the housing financed with federal mortgage assistance from 1946 to 1959 was available to [Blacks].” To be sure, because the FHA was “deeply committed to financing housing in the suburbs and not [cities]” the federal government played a pivotal role in excluding minorities, particularly [Blacks], from residing in the suburbs. The exclusion of Blacks and other minorities from the suburbs was compounded by the federal government’s subsidization of highways which allowed whites to live in the suburbs while working in central cities. The end result of the FHA’s racially discriminatory lending practices along with the proliferation of federally subsidized highways was to relegate minorities to decaying urban cities while helping to populate suburban enclaves with white citizens.

State and local government policies are similarly culpable in creating and maintaining residential segregation. Many states delegate to localities broad powers that allow localities to separate themselves from predominately poor and minority central cities. As Professor Frug notes, these powers include, naming a few, the right to incorporate as separate municipalities, the right to zone and immunity from annexation by the central city. Conferring such powers on local governments typically leads to the proliferation of several separate political subdivisions located adjacent to a larger central city. This phenomenon, popularly known as “urban sprawl,” usually leads to poor and minority residents being concentrated in the central city while more affluent whites locate in the suburbs. This is because suburban localities often use land exclusionary zoning mechanisms which prevent the poor who are usually minorities from living in their localities. Examples of such exclusionary zoning tactics include capping the number of affordable housing units that can be built in a locality, requiring large lots and floor plans to prevent affordable housing from being built at all or prohibiting multi-family residences from being built.

Given the role of federal, state and local governments in perpetuating residential segregation discussed above, the federal judiciary’s doctrinal stance of treating residential segregation as a consequence of private choice, outside the realm of federal court jurisdiction to account for in formulating school desegregation

“[u]nderwriting Manual specifically instructed that the presence of ‘inharmonious racial or nationality groups’ made a neighborhood’s housing undesirable for insurance...recommended racially restrictive covenants, and warned: ‘If a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes.’)."

157 Id. at 681.
158 Id.
159 See Massey and Denton, supra note ___, at 44-45.
162 Id. at 878.
remedies is simply wrong. By treating school and neighborhood segregation as separate phenomena, the Court blindly denies that federal, state and local government policies are root causes of residential neighborhood segregation. Furthermore, by embracing educational localism in its school desegregation and school finance jurisprudence such that local control of schools is preferred at the expense of providing poor and minority students equal educational opportunities, the Court has made it such that judicially crafted school desegregation remedies are ineffective.

**D. Utilizing a New Regionalist Approach to Fighting Racial and Economic Segregation Between School Districts: An Example From the Fair Housing Act “Affirmatively Furthering” Language**

In the housing context, regionalist solutions have been experimented with as a means to combat racial and economic segregation in housing. Regionalist approaches to solving racial and economic segregation and the ills that accompany such segregation in the housing context that have been applied with some degree of success are urban-suburban mobility programs. Two of the more notable programs are the Gatreaux Program and the Baltimore Housing Mobility (“BHM”) Program. The Gatreaux program allowed low-income public housing residents in Chicago to receive a subsidy in the form of a voucher which they could use in the private rental market to move to predominately white residential areas in the City of Chicago or in the suburbs.\(^{163}\) The program was widely considered a success as participants in the program experienced increased employment opportunities, success to better schools and an increased overall quality of life.\(^{164}\) Similarly, to the Gatreaux program, the BHM program also provides current and former public housing residents on the public housing or the Housing Choice Voucher waiting lists access to private market housing in low poverty and predominantly white neighborhoods.\(^{165}\) Although the BHM program was only recently launched in 2003, early research regarding the success and sustainability of the program indicates that the program has been successful in improving housing stability, access to quality schools and overall quality of life for program participants.\(^{166}\)

Significantly, both the Gatreaux and BHM programs are remedial outgrowths lawsuits involving segregation in public housing. The Gatreaux program came about as a result of the 1976 Supreme Court decision *Hills v. Gautreaux*.\(^{167}\) In that case,

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\(^{164}\) Id. at 656-659.


\(^{166}\) Id. at 2.

\(^{167}\) 425 U.S. 284 (1976)
the Supreme Court required Department of Housing and Urban Development ("HUD") to remedy intentional public housing segregation in the City of Chicago by providing housing opportunities in the greater metropolitan Chicago suburbs.\(^{168}\) In finding that a remedy involving the greater metropolitan suburbs rather than just the City of Chicago was appropriate, the Court distinguished *Milliken* (which had rejected the propriety of a metropolitan school desegregation remedy) on the grounds that "a metropolitan area remedy involving HUD need not displace the rights and powers accorded suburban governmental entities under federal or state law."\(^{169}\) The Court reasoned that this was the case because:

local housing authorities and municipal governments [have] to make application for funds or approve the use of funds in the locality before HUD could make housing assistance available. An order directed solely to HUD would not force unwilling localities to apply for assistance under these programs but would merely reinforce the regulations guiding HUD’s determination of which of the locally authorized projects to assist with federal funds. (emphasis added).\(^{170}\)

The Court further noted that in allowing for a metropolitan remedy, it would allow HUD to comply with its statutory duty “affirmatively to further” fair housing.\(^{171}\)

Similarly, the Baltimore Housing Mobility Program originated from a settlement of *Thompson v. HUD*,\(^ {172} \) another case involving public housing desegregation. The U.S. District Court for Maryland found in that case that HUD violated its statutory duty to “affirmatively further fair housing” by failing to “consider regionally-oriented desegregation and integration policies.”\(^ {173}\) More specifically, the Court found that HUD focused its desegregation efforts almost exclusively on building and demolishing public housing units within the City of Baltimore.\(^ {174} \) Notably, the Court emphasized that “Section 3608 [of the Fair Housing Act] imposes upon Defendants an “affirmative obligation; it requires Defendants to do something more than simply refrain from discriminating themselves or from purposely aiding discrimination by others.”\(^ {175} \) Because HUD failed to consider regional solutions to aid public housing desegregation, particularly options in the Counties surrounding Baltimore City, the Court concluded that it violated Section 3608 of the Fair Housing Act.\(^ {176} \)

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\(^{168}\) Id. at 302.

\(^{169}\) Id. at 303.

\(^{170}\) Id. at 303-304.

\(^{171}\) See 42 U.S.C. § 3608(e) (5).


\(^{173}\) Id. at 408.

\(^{174}\) Id. at 463.

\(^{175}\) Id. at 416.

\(^{176}\) Id.
The recognition in *Gatreaux* and *Thompson* that, given demographic changes and patterns of residential segregation, limiting solutions to housing segregation and inequality to inner-city communities and older suburbs simply will not provide meaningful integration and access to opportunity for minority and lower income families is an important one. As evidenced by the success of the remedial programs that grew out of the *Gatreaux* and *Thompson* litigation, the concept of enabling mobility in order to obtain full access to high opportunity areas in both the suburbs and city is a concept that should be emulated in a wide variety of government programs, including as discussed *infra*, the provision of education.

Indeed, to the extent that mobility programs similar to the *Gatreaux* and BHM programs have been tried in the education context, such programs have been successful. For example, successful inter-district school desegregation plans are currently in place in a number of cities such as St. Louis, Missouri and Hartford, Connecticut. A long-term study of these programs concludes that the achievement of students who transfer out of poor urban and into more affluent suburban school districts as measured by performance on standardized tests, over-time is greater than the performance of urban students who remain in neighborhood schools. The inter-district programs have also helped to improve racial attitudes in the suburbs and have empowered minority parents to mobilize in order to obtain better educational opportunities for their children. To be sure, mobility programs in both the housing and education context have proved successful and should be replicated on a larger scale through the NCLB public choice provision.

IV. The No Child Left Behind Public Choice Provision: Leveling Localism and School District Boundary Lines Through Inter-District Choice

As discussed above, gross disparities in educational resources between school districts makes it difficult for states to provide quality education to all children. Simply put, “[l]iving on one side of a district boundary line or the other can dictate whether a student has access to challenging curriculum, well-prepared teachers, decent facilities, high expectations, non-poor peers, and a wealth of other tangible and intangible factors that influence learning.” NCLB purportedly attempts to

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177 The St. Louis inter-district transfer plan, like the Gateaux and BHM programs, is an outgrowth of a lawsuit alleging de jure school segregation. *See Lidell v. Bd. of Educ.*, 469 F. Supp. 1304, 1309-1312 (E.D. Mo. 1979) rev’d and remanded sub nom. *Adams v. U.S.*, 620 F. 2d 1277, 1281-84 (8th Cir.) en banc. *cert. denied*, 449 U.S. 826 (1980). In 1980, the District Court ordered the implementation of a desegregation plan within the city schools. *See Lidell v. Bd. of Educ.*, 491 F. Supp. 351 (E.D. Mo. 1980), *aff’d*, 667 F.2d 643 (8th Cir.), *cert. denied*, 454 U.S. 1091 (1981). In 1983, the parties entered into an agreement that created a voluntary inter-district transfer program in which African-American students from the city of St. Louis were permitted to attend certain suburban schools, and white suburban students were permitted to attend city schools.

178 *See Stuart et al., supra* note ___, at 5.

179 *Id.* at 7-12.

180 *Id.* at 1.
alleviate such disparities by requiring schools to ensure equitable outcomes at a basic level of educational achievement for students of all races and socio-economic backgrounds.\textsuperscript{181} It does so by employing a cooperative federalism model in which states develop and manage their own accountability programs approved by the Department of Education, in return for Title I funding.\textsuperscript{182}

By increasing the role of the federal government into areas of education policy that are traditionally regulated by state and local governments, NCLB is often criticized as an impermissible impairment to traditional notions of educational federalism.\textsuperscript{183} However, because educational achievement continues to be a national priority, federal involvement in academic achievement and accountability is likely to persist.\textsuperscript{184} Furthermore, because most states receive and rely on significant amounts Title I funding\textsuperscript{185}, it is unlikely that any State will decide to opt out of receiving Title I funding in order to avoid complying with the conditions attached to receiving Title I funding.\textsuperscript{186}

Consequently, this Section argues that although NCLB has undoubtedly expanded the role of the federal government in education in an attempt to alleviate race and class based educational disparities,\textsuperscript{187} the Act could do more to alleviate race and class based educational disparities by lessening the impact that school district boundary lines play in determining educational outcomes for students. This

\begin{itemize}
\item \textsuperscript{181} 20 U.S.C. § 6311 (b)(2).
\item \textsuperscript{182} See generally 20 U.S.C. § 6311 (setting forth the process in which states develop accountability and curriculum plans that must be approved by the Department of Education in return for Title I funds).
\item \textsuperscript{183} See Michael Heise, The Political Economy of Educational Federalism, 56 Emory L.J. 125 (2006) (discussing traditional concepts of federalism in education and how NCLB challenged the federalism status quo in education).
\item \textsuperscript{184} See Kamina Aliya Pinder, Federal Demand and Local Choice: Safeguarding Notions of Federalism in Education Law and Policy, 39 J.L. & Educ. 1 (2010) (discussing the appropriate role of federal and state laws in creating and enforcing laws related to academic achievement and concluding that the federal government should play an important and substantial role).
\item \textsuperscript{185} See Gen. Accounting Office, Title I Preschool Education: More Children Served, But Gauging Effect On School Readiness Difficult at 5 (Sept. 2000) (noting that 90 percent of public schools receive some Title I funding), available at \url{http://gao.gov/new.items/he00171.pdf}
\item \textsuperscript{186} Some states have threatened to forego NCLB funding due to their displeasure with the Act’s accountability scheme and a lack of federal funding to adequately comply with the accountability scheme. Indeed, Utah and Virginia went as far as passing resolutions and proposed legislation that would have had the States opting out from receipt of Title I spending. However, when faced with the reality of how much federal revenue they would lose if they opted out, both states declined to opt out. See Note, No Child Left Behind and The Political Safeguards of Federalism, 119 Harv. L. Rev. 885, 897-900(2006) (describing Utah and Virginia’s efforts to opt out of Title I funding and describing the financial considerations that led them to decline opting out from receiving Title I funding).
\item \textsuperscript{187} See 20 U.S.C. § 6311 noting in the statement of purpose that the Act’s purpose could be accomplished by “closing the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers.”
\end{itemize}
could be done by taking advantage of the fiscal inability of most states to opt out of receiving Title I funding and amending the NCLB public choice provision to include language that facilitates inter-district transfers, similar to the “affirmatively furthering fair housing” language used under the Fair Housing Act.\textsuperscript{188}

Accordingly, this Section provides a brief overview of how the federal government’s role in education originated and evolved through the ESEA. It then analyzes the most recent version of the ESEA—NCLB—and argues that when the ESEA is reauthorized under the new presidential administration, the public choice provision should be amended to encourage inter-district transfers.

\textbf{A. The Role of the federal government in education through the ESEA: From Cooperation to Coercion}

\textbf{1. History of Federal Government Involvement In Education Through The ESEA: 1965-2000}

Throughout the better part of American history, the federal government has played a minimal role in the provision of education. The most extensive involvement in the provision of education by the federal government came in 1965 when Congress passed the ESEA as part of President Lyndon B. Johnson’s efforts to end poverty.\textsuperscript{189} The original purpose of the Act was to improve America’s elementary and secondary schools by providing states with funding to meet the educational needs of poor children.\textsuperscript{190} Notably, although the original purpose of the Act was to assist all poor children, one of the driving impetuses for the Act was to address the deteriorating conditions of inner-city schools which contained high numbers of poor Black children.\textsuperscript{191} By addressing educational inadequacies amongst the poor, particularly the Black poor, the Johnson administration hoped to boost their economic and social mobility.\textsuperscript{192}

The ESEA consists of five titles: Title I provides funding to schools serving children from low-income families; Title II provides schools with money to purchase library books and other instructional material; Title III provides funding for services

\textsuperscript{188} See Section III.D, supra.
\textsuperscript{190} See Pub. L. 89-10 § 205 (a) (1). See also S. Rep. No. 146, at 4 (“The solution to [the] problems [of American education] lies with the ability of our elementary and secondary school systems to provide full opportunity for high quality program of instruction in the basic educational skills because of the strong correlation between educational underachievement and poverty.”).
\textsuperscript{191} See Julie Roy Jeffrey, Education for Children of the Poor, A Study of the Origins and Implementation of the Elementary and Secondary Education Act 29-30 (Ohio State University Press) (1978) (discussing the planning of the ESEA and the Johnson Administration’s desire to focus any comprehensive federal education legislation on the young Blacks on the theory that education offered hope for economic improvement amongst this group).
\textsuperscript{192} Id.
to “at risk” children including after school programs; Title IV provides funding for
college and university research on education, while Title V provides funding to
individual state departments of education. 193

Title I is by far the most significant part of the ESEA. Title I distributes
federal money to local school districts according to the number of poor students in
the school district. School districts in which at least ten children and 2 percent of
the overall student population are classified as poor are eligible to receive Title I
funding.194 Given this low threshold, almost all school districts, even very affluent
school districts, receive some Title I funds.195 School districts with predominately
minority populations have high percentages of students classified as living poor and
therefore receive larger amounts of Title I funding.196

Between 1965 and 1994, Congress reauthorized the ESEA several times. In
each reauthorization Congress placed only minimal conditions on the receipt of
funding under the Act.197 However, in 1994 when Congress reauthorized the ESEA
as the Improving America’s Schools Act (“IASA”), Congress shifted to a standards-
based reform approach. The purpose of the IASA was listed as “to enable schools to
provide opportunities for children served to acquire the knowledge and skills
contained in challenging State content standards.”198 As a precursor to what was to
come under NCLB, IASA required all school districts to identify schools that were
not making AYP. Significantly however, IASA did not impose financial penalties or
otherwise for schools that were not making AYP.199 Instead, IASA only required
school districts to demonstrate that formal steps were being taken to improve schools
that were not making AYP.200

193 Id.
194 See Department of Education, Improving Basic Programs Operated by Local Educational
modified January 27, 2010).
195 Id.
196 Diane M. Piche, Citizens’ Comm’n on Civil Rights, Title I in Midstream: The Fight to Improve
Schools for Poor Kids 17 (Corrine M. Yu and William L. Taylor eds., 1999), available at
http://www.cccr.org/doc/midstream.pdf. Admittedly however, the Title I funding scheme has come
under attack recently for being a source of inequity in educational services for students in high-
poverty schools. See e.g., Cassandra Havard, Funny Money: How Federal Education Funding Hurts
funding regime has become a source of inequity in educational services for students in high-poverty
schools because it allows for discretion in the allocation of federal monies.).
197 See Janet Y. Thomas and Kevin P. Brady, The Elementary and Secondary Education Act at 40:
Equity, Accountability and the Evolving Federal Role in Public Education, Review of Research in
198 Id.
199 Id.
200 Id.
NCLB: Expanding the Role of the Federal Government In Education

Congress’s use of ESEA as a means of influencing education policy increased exponentially in 2001 when it reauthorized the ESEA as the No Child Left Behind Act. NCLB is the most important piece of education legislation in the last thirty-five years. It dramatically changed the balance of power between the federal and state government in the provision of education. For the first time in the history of the ESEA, to achieve its stated goal of “[e]nsuring that all children have a fair, equal and significant opportunity to obtain a high quality education,” NCLB requires schools to comply with rigorous teaching, testing and accountability schemes as a condition for receiving Title I funds. More specifically, the Act requires public schools to annually test students in math, reading and science. Each year, schools must show steady improvement in the test results for every grade and for multiple demographic groups, including minorities, English language learners and socioeconomically disadvantaged students. The results of the annual tests along with other measurements such as attendance and graduation rates are used to determine whether a school is making adequate yearly progress (“AYP”) towards 100% proficiency for all students by the 2013-2014 school-year.

If a school that receives Title I funds fails to make AYP for the school is identified as “in need of improvement.” Once a Title I school fails to make AYP for two consecutive years, the school enters “improvement status” and a series of remedies are afforded to students attending the school, including the right to transfer to a non-failing school or the provision of supplemental education services for tutoring for students who elect to remain at the school.

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201 20 U.S.C. § 6301
204 See U.S.C. § 6311 (b) (2) (C) (II). This lesser known, yet useful, component of NCLB is the race and class conscious accountability scheme contained in the Act. The accountability scheme requires schools to disaggregate student performance data into four subgroups for purposes of determining whether a school has complied with the academic performance requirements. The four subgroups are: (i) economically disadvantaged students; (ii) students from major racial or ethnic groups; (iii) students with disabilities and (iv) students with limited English proficiency. If any subgroup of a school fails to meet its AYP for two consecutive years, the school is identified as a “school in need of improvement” and subject to sanctions. Thus, a school can be deemed “in need of improvement” and subject to sanctions if the majority of students met the performance requirements but a single subgroup of students—(e.g., socioeconomically disadvantaged students) fails to do so.
205 Id.
B. The NCLB Public Choice Provision

i. Statutory Scheme

An important but often overlooked part of the NCLB statutory scheme is the public choice remedy.\textsuperscript{208} In a concession to the time and effort needed to reform schools that are not meeting NCLB’s AYP requirements, the public choice remedy requires schools in “improvement status” or further along in the NCLB remedial phase to offer students the opportunity to transfer to a better performing school.\textsuperscript{209} In essence, the local school district is required to provide each student attending a school that fails to make AYP for two consecutive years with a choice of alternative public schools (including charter schools) that are making adequate yearly progress to which the student can transfer.\textsuperscript{210} If there is more than one school within the school district to which the student may transfer, the school district must provide the parent with a choice of more than one school and take into account the parent’s preference in choosing a school.\textsuperscript{211} In keeping with the Act’s mission of ensuring an adequate education for disadvantaged students, school districts are required to give low performing students from low-income families’ priority in exercising the right to transfer.\textsuperscript{212} Critically, school districts are only required to offer the student an opportunity to transfer to a school that has made AYP within the \textit{same} school district.\textsuperscript{213} If there are no other eligible schools within the school district to which the student can transfer, the school district is encouraged “to the extent practicable,” to “establish a cooperative agreement” with a nearby school districts to accept transfers.\textsuperscript{214} The school district may also offer supplemental educational services or tutoring to eligible students if there are no other eligible schools to which the student can transfer within the school district, but only if the school is in its first year of “improvement status.”\textsuperscript{215} The school district can under no circumstances use “lack of capacity” or lack of eligible schools as a basis for denying a student the opportunity to transfer to a better performing school.\textsuperscript{216}

ii. Obstacles to Effective Utilization of The Public Choice Provision

Despite the statutory safeguards included in the public choice provision aimed at ensuring that students have the opportunity to take advantage of the transfer option, to date the public choice provision has been utilized by only a handful of

\textsuperscript{208} See 20 U.S.C. § 6316 (b)(E)(1).
\textsuperscript{209} Id.
\textsuperscript{210} Id.
\textsuperscript{211} See C.F.R. §§ 200.44 (a)(4)(i)-(ii).
\textsuperscript{212} See 34 C.F.R. § 200.44 (e)(1)
\textsuperscript{214} 34 C.F.R. § 200.44 (h)(1)
\textsuperscript{215} 34 CFR § 200.44 (h)(2)
\textsuperscript{216} 34 CFR § 200.44 (d).
eligible students. Indeed, a 2007 U.S. Department of Education report that analyzed
the use of the public choice option in nine large, urban districts found that a mere
0.5% of the students eligible to transfer to a higher performing school actually
exercised their right to transfer. Much criticism has been levied at school districts
for their ineffective implementation of the transfer provision, particularly their
failure to notify parents and students of their right to transfer in time for the students
to exercise the transfer option. The U.S. Department of Education in attempt to
alleviate these barriers to effective utilization of the public choice option issued
regulations in October of 2008 requiring, among other things, schools to provide
“timely and clear” notification to parents and students of their rights to transfer to a
better performing school.

While the recent regulations may address one obstacle to effective utilization
of the public choice provision, they do not address one of the key obstacles: lack of
viable transfer options due to the inter-district restriction on the transfer provision.
Conceptually, the NCLB public choice provision is on the right track by allowing for
student mobility but in practice the ongoing dedication to localism, to the extent that
student mobility is limited to within the school district, prohibits the public choice
provision from being effective. By encouraging cooperative agreements between
school districts and prohibiting schools from using “lack of capacity” as a basis to
deny students the right to transfer, the public choice statutory provisions and
regulations undoubtedly attempt to ensure that some choice of a transferring school
is available to students. However, in reality effective use of the public transfer
option is constrained both by the lack of viable transfer options and the lack of
incentives for school districts to create viable options. As noted earlier and
illustrated by Tevin’s case, poorer performing schools that are required to implement
the public choice remedy are typically congregated within the same school

217 Zimmer, R., Gill, B., Razquin, P., Booker, K., and Lockwood, J.R., State and Local
Implementation of the No Child Left Behind Act: Volume 1—Title I School Choice, Supplemental
Education Services, and Student Achievement 8, available at
http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/2a/57/54.pdf
218 See e.g., Brown, supra note ___, at 63(noting that “[i] n many urban school districts the number of
schools in need of improvement is so large that there literally are not enough successful schools from
which to choose.”)(noting the inconsistencies and inadequacies in school procedures for notifying
students and parents of their right to transfer); Frederick M. Hess and Chester E. Finn Jr., Inflating the
Life Rafts of NCLB: Making Public Choice and Supplemental Services Work For Students In
“[d]istricts unenthusiastic about the NCLB remedies can and do drag their feet in myriad ways:
sending parents indecipherable letters, making a “needs improvement” label on a school sound like a
badge of honor, providing unclear direction (and plenty of red tape) to parents regarding their
options . . .”).
219 See U.S. Department of Education, Strengthening Choice and Free Tutoring, available at:
districts.\(^{220}\) As a result, the geographical limitation of transfers to “inter-district” transfers often means that students eligible to utilize the transfer provision will have only a nominal choice of schools to choose from because many of the schools within the school district will also be in “improvement status” and ineligible to receive transfers.\(^{221}\)

Furthermore, although the Act encourages school districts to establish cooperative agreements with neighboring school districts to accept transfers, higher performing school districts have no incentive to enter into such an agreement. This is because large numbers of students from poorly performing schools are likely to decrease the overall academic performance of a school. AYP-compliant schools and school districts therefore have no incentive to enter into such agreements insofar as a decrease in the overall academic performance of the school increases the probability that transferee school could itself have trouble meeting the AYP requirements.\(^{222}\) Moreover, although charter schools are eligible to receive transfers under the Act, most high performing charter schools have long waiting lists and are unlikely to be able to accommodate transfer requests.\(^{223}\) As a result of the inter-district limitation contained in the public choice provision, there is not enough space in AYP-compliant schools to provide viable transfer options for more than a handful of students. Consequently, the public choice remedy in its current form provides students a right without a viable remedy to exercise that right.

**C. Taking a Regionalist Approach to Public Choice: Suggested Changes to the Public Choice Provision**

**i. Incorporating An “Affirmative Duty” Into The NCLB Statutory Framework**

As discussed in Section III.D, the Fair Housing Act mandates that HUD take affirmative actions to further fair housing. Specifically, 42 U.S.C. § 3608 (e) (5) provides that the HUD Secretary must “administer the programs and activities

\(^{220}\) See e.g., Brown, supra note __, at 63.

\(^{221}\) See e.g., Erin Dillon, In Need of School Improvement: Revising NCLB’s School Choice Provision, Education Sector Report 1-2 (noting that in 2004 175,000 students were eligible to utilize the NCLB public choice provision but only 438 students or less than 1 percent utilized the transfer option “due to a scarcity of nearby higher-performing schools and competition for space in those schools from the many lower-performing schools in Chicago.” ), available at http://www.educationsector.org/usr_doc/NCLB_Choice_Idea_at_Work.pdf (November 2008).

\(^{222}\) See Hess and Finn, supra note__ at 37.

\(^{223}\) See Frankenberg, E., Siegel-Hawley, G., Wang, J., Choice without Equity: Charter School Segregation and the Need for Civil Rights Standards, Los Angeles, CA: The Civil Rights Project/Proyecto Derechos Civiles at UCLA, available at www.civilrightsproject.ucla.edu (finding increased racial segregation in charter schools and that higher performing charter schools have stringent requirements for admission and sizeable waiting lists) (2010).
relating to housing and urban development in a manner affirmatively to further the policies of this [Act].” Cases interpreting this statutory provision have found that it imposes on HUD an obligation and an affirmative duty to do more than just provide discrimination free housing. Significantly, in light of demographic changes that have wrought high levels of residential segregation with minorities populating inner cities and inner-ring suburbs and whites populating outer-ring suburbs, courts interpreting HUD’s duty under § 3608(e)(5) have found that the affirmative duty includes the duty to “consider regionally-oriented desegregation and integration policies.”

The § 3608(e)(5) statutory language and cases interpreting the scope of that language, provides an analytical framework that allows for citizen mobility by requiring HUD to act regionally, rather than locally. Such a framework, if emulated, would be beneficial to increasing the effectiveness of the NCLB public choice provision. In particular, language could be added to NCLB similar to the §3608(e)(5) language requiring school districts (referred to as Local Educational Agencies “LEA” in the Act) to “affirmatively further” the educational achievement of all racial, ethnic and socio-economically disadvantaged groups. In the FHA context, the inclusion of the “affirmatively further” language has meant that HUD is required to take affirmative action to fulfill the FHA’s stated goal of maintaining open, integrated housing patterns. NCLB’s stated goals are, among other things, “meeting the educational needs of low-achieving children in our Nation's highest-poverty schools,” and “closing the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers.” If language similar to § 3608(e)(5) were added to the Act, it could also be construed to require state’s and LEA’s to do more than simply offer a basic level of education. In particular as evidenced in the FHA cases interpreting the § 3608(e)(5) language, adding similar “affirmatively furthering” language to

224 See e.g., NAACP v. Secretary of Housing and Urban Development, 817 F. 2d 149, 155 (1st Cir. 1987) (“HUD [has] an obligation to do more than simply refrain from discriminating (and from purposely aiding discrimination by others”); Otero v. New York City Housing Authority, 484 F.2d 1122, 1125 (1973) ([HUD] is obligated to take affirmative steps to promote racial integration even though this may in some instances not operate to the immediate advantage of some non-white persons.).

225 See Thompson, 348 F. Supp. 2d 398 at 459.

226 See Otero, 484 F.2d 1122 at 1134 (reasoning that §3608(e)(5) requires HUD to take action “to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.”).


228 20 U.S.C. § 6301 (3).

229 See e.g., Otero 484 F.2d 1122 at 937 (“[a]fter careful consideration and reflection we are obliged to conclude that on the record here it is necessary and equitable that any remedial plan to be effective must be on a suburban or metropolitan area basis.”); Thompson, 348 F. Supp. 2d 398 at 458 (finding
NCLB could require NCLB to be constructed to mean that state’s and LEA’s have a duty to act regionally where necessary in order to “close the achievement gaps between minority and nonminority students” and to meet the needs of low-achieving students in high poverty schools.

ii. Recalibrating AYP Accountability Scheme on At The Regional Level Rather Than The School District Level

In addition to adding an “affirmatively furthering” requirement to the overall NCLB statutory framework, the NCLB accountability system could be amended such that LEA’s are held accountable for making AYP on a regional basis rather than an individual basis. Currently, as discussed in Section IV.A.1.(i), the Act’s accountability scheme requires individual schools and school districts to meet AYP requirements and imposes penalties on individual schools and school districts that fail to make AYP.\(^{230}\) The Act could be amended such that the State is responsible for carving out regional zones that encompass LEA’s or school districts that are in close geographic proximity to one another. In addition to each individual school and school district being required to make AYP, each regional zone identified by the state should also have to make AYP. If the regional zone as a whole fails to make AYP, each school district that comprises the regional zone should be penalized as discussed in section IV.C.ii. \textit{infra}. More importantly, the public choice provision should be amended such that it requires schools that fail to make AYP to offer the student the opportunity to transfer to any school within the Regional Zone that is within a reasonable driving distance from the transferee home school. Amending the NCLB accountability scheme generally and the public choice provision specifically in this manner furthers the goal of utilizing a regionalist approach rather than a localist approach towards equalizing educational opportunities for poor and minority students.

iii. Fiscal and Accountability Incentives Should Be Incorporated Into The Public Choice Provision To Encourage Inter-District Transfers

In addition to amending the general NCLB statutory scheme to include an “affirmatively furthering” requirement and holding LEA’s responsible for making AYP on a regional basis, the public choice provision should be amended to include fiscal incentives to induce inter-district transfers. As other scholars and education activists have noted, one of the primary impediments to effective inter-district plans is cost, particularly transportation costs and costs incurred by the school district receiving the transferee student.\(^{231}\) A separate funding stream should be created so that the State and not the individual school districts (i.e. neither the sending nor

\(^{230}\) See 20 U.S.C. § 6311 (b) (2) (A).

\(^{231}\) See e.g., Kozol and Brown, \textit{supra} note \underline{___}. 
receiving school district) should be required to bear the costs of transportation or any other costs associated with the transfer. 232

Another concern associated with inter-district transfers is that the AYP calculations for the receiving school district will decline and school districts are therefore reluctant to take on transfers. 233 In order to this concern, the Act should be amended such schools who receive large numbers of transfer students from having those students included in their AYP calculations for an appropriate length of time (i.e. one year). Along these same lines, transfer students should be afforded additional education services such as tutoring in order to assist them in

Finally, LEA’s that fail to make AYP on the regional basis discussed in IV.C.ii. supra should be penalized financially with a proportional financial penalty being levied on each individual LEA. Such a financial penalty will hopefully inspire cross-collaboration between the LEA’s on a regional basis. 234

V. Conclusion

While Milliken, Rodriguez and other federal court cases which emphasize principles of localism over the rights of poor and minority students are at best poorly reasoned and at worst pernicious attempts to maintain privilege for whites and the affluent, they are well established law unlikely to be overruled. Moreover, the likelihood of obtaining racial and economic residential integration is minimal at best, particularly in light of exclusionary zoning and other practices that contribute to residential segregation discussed in Section III.C supra. Consequently, in order to help alleviate the educational inequities caused by racial and socio-economically hyper-segregated and isolated schools, access to high quality schools and educational resources must be disentangled from access to middle-class and affluent residences.

One such way to do this is by amending the public choice provision in order to better facilitate inter-school district transfers. Due to the cooperative federalist nature of the NCLB statutory scheme itself and the practical inability of states to opt out of receiving Title I funding, utilizing the NCLB public choice provision offers a promising opportunity to require states to challenge the localist paradigm that mandates that children attend school where they live. This Article’s proposed approach of emulating the FHA framework and revising the NCLB to include language that would require school districts to “affirmatively further” the educational achievement of all groups and requiring AYP to be calculated on a regional basis

232 Id.
233 See Brown, supra note ___.
234 For additional reading on proposed amendments to increase the effectiveness of the public choice provision see Abigail Aikens, Being Choosy: An Analysis of Public School Choice Under The No Child Left Behind Act, 108 W. Va. L. Rev. 233 (2005).
would encourage school districts to participate in more cross-district collaboration transfer plans.

To the extent that such an approach minimizes or at least diminishes the current local control paradigm that links school attendance with residence, this is a good thing because the local control paradigm has is used both implicitly and explicitly to deny educational resources to poor and minority students. While taking such a legislative approach is by no means a panacea and undoubtedly will not rescue all poor and minority students from failing schools, it may prove to be one effective method for achieving racially and economically integrated schools and improving educational opportunities for some poor and minority students.