

William & Mary Law Review

Volume 36 (1994-1995)
Issue 2 Symposium: *Brown v. Board of
Education After Forty Years: Confronting the
Promise*

Article 9

February 1995

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Marilyn V. Yarbrough, *Still Separate and Still Unequal*, 36 Wm. & Mary L. Rev. 685 (1995),
<https://scholarship.law.wm.edu/wmlr/vol36/iss2/9>

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STILL SEPARATE AND STILL UNEQUAL

MARILYN V. YARBROUGH*

From an early date in the history of this country, universal public education has been recognized as essential for political and personal reasons.¹ In *Brown v. Board of Education*,² a unanimous U.S. Supreme Court recognized that "education is perhaps the most important function of state and local governments."³ Numerous judicial opinions before and after *Brown* repeat this theme.⁴

Today, effective education remains a prerequisite for personal development. In addition, quality education is an important political goal, as is demonstrated by the recently pervasive preoccupation with "global competitiveness."⁵ One difference, however, is that we no longer hear these arguments made in reference to public education as we have come to know it. Indeed,

* Associate Provost, University of North Carolina; Professor of Law, University of North Carolina School of Law. This Essay represents my third examination of the consequences of school choice schemes on equal educational opportunity. Much of the foundational and informational material found here is also found in those previously published essays. See Marilyn V. Yarbrough, *School Choice and Racial Balance: Silver Bullet or Poison Dart?* 2 KAN. J.L. & PUB. POL'Y 25 (1992); Marilyn V. Yarbrough, *Educational Choice and the Constitution*, in QUALITY EDUCATION FOR ALL IN THE 21ST CENTURY: CAN WE GET THERE FROM HERE? 173 (1994) (Fourth Annual Constitutional Law Symposium, Constitutional Resource Center, Drake University). Those commentaries, adapted from public speeches, address public policy and constitutional concerns related to educational choice.

1. See Horace Mann, *The Ground of the Free School System*, 5 OLD SOUTH LEAFLETS, 177 (1902) (excerpting from his Tenth Annual Report as Secretary of the Massachusetts State Board of Education, 1846).

2. 347 U.S. 483 (1954).

3. *Id.* at 493.

4. See, e.g., *Honig v. Doe*, 484 U.S. 305, 309 (1988); *Plyler v. Doe*, 457 U.S. 202, 222-23 (1982); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29-30 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); *id.* at 238-39 (White, J., concurring); *Abington-Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring); *Pierce v. Society of Sisters*, 268 U.S. 510, 519 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

5. See, e.g., WILLIAM B. JOHNSTON & ARNOLD H. PACKER, *WORKFORCE 2000* (1987).

increasingly we find "market solutions" touted as the remedy for our educational system.⁶ Although we are constantly assured that schemes such as "privatization" and "educational (or school) choice" do not mean an end to universal education, there is evidence that it may effectively end the progress in minority education experienced in this country since the early 1960s.

Americans of all races have become increasingly disenchanted with the notion that racial balance in elementary and secondary schools is essential to effective education. With increasing frequency, African American advocates and parents have indicated a willingness to forego racial balance in favor of effective education when the two seem incompatible.⁷ A lingering and countervailing concern of these parents and advocates, however, is that, as the Supreme Court determined in 1954, separate is inherently unequal. To the extent that racial imbalance causes minority or other disadvantaged youngsters to be shortchanged educationally, all of us, not just minority parents and advocates, should be concerned. "School choice" schemes that ignore these concerns do so at the expense of the undereducated minority children, and at the risk of sacrificing our nation's position in relation to that of other world powers.

I. THE PROMISE OF *BROWN I* AND *II*

In 1954, the Court stated that the determination of the effects of racially separate schools on public education and on students must be made in light of the contemporary relevance of segregation to American life.⁸ Citing the lower court's pronouncement

6. In one of the most highly publicized private ventures, Knoxville, Tennessee, publisher Christopher Whittle's Edison Project joined twelve nonprofit organizations recently chosen to design and operate new public "charter" schools in Massachusetts. Jean Merl, *Project Will Try To Light Way to Reform*, L.A. TIMES, Mar. 30, 1994, at A5. These charter schools are managed under contract with the state but are largely unfettered by local and state regulation. *Id.* The Edison Project, headed by former Yale President Benno Schmidt, is the second for-profit operator to enter the arena. *Id.* Education Alternatives, Inc. operates public schools in Baltimore and Miami. *Id.*

7. See, e.g., Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); Paul M. Barrett, *Brown vs. Board—High Court To Revisit School Desegregation; Some Blacks Do, Too*, WALL ST. J., Oct. 4, 1991.

8. *Brown v. Board of Educ.*, 347 U.S. 483, 492-93 (1954).

as indicative of the effect of racial separation on educational opportunity, the Court adopted the Kansas district court's finding that "[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law" ⁹ In other words, forty years ago, the Court, aided by psychological and sociological studies of the time, recognized that even where "[n]egro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors," separate facilities violated the Equal Protection Clause of the United States Constitution. ¹⁰

Approximately fifteen years later, in 1968, the Court considered the legality of a "freedom of choice" plan, one Virginia county's response to *Brown's* order to eliminate de jure segregation. ¹¹ After noting that eighty-five percent of the black pupils in the district continued to attend the historically black school, the Court determined that such a plan was constitutionally impermissible, mainly because parents were constrained by custom and fear in exercising their choices. ¹² Professor Paul Gewirtz of Yale Law School, in his examination of the concept of choice as a corrective technique in school desegregation actions, has noted that one could not help but recognize that the choice to be made in the middle 1960s in Virginia was a tainted one: tainted by "racially identified schools and the many other effects

[Education] is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id.

9. *Id.* at 494. Justice Marshall observed that the Court was adopting "a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs." *Id.* (citation omitted).

10. *Id.* at 492.

11. *Green v. New Kent County Sch. Bd.*, 391 U.S. 430 (1968).

12. *Id.* at 441.

of a regime of segregation."¹³

Professor Gewirtz continued: "Preferences and choices were skewed by established institutions, established patterns of behavior, established information, and an established psychology, that were rooted in discrimination."¹⁴ He analogized these tainted choices to "market failure" in the economic realm,¹⁵ but emphasized that "[i]n the 'end-state'—that is, once discrimination and its effects have been eliminated—nothing in the equal protection clause prevents the government from adopting policies that give effect to individual choices."¹⁶ This optimistic prediction assumes that discrimination and its effects can be eliminated in the near term.

A. *The Next Forty Years*

A recently published report of a study of American public education reveals that racial segregation in our schools has reached the highest levels since 1968,¹⁷ the year that the Court decided *Green v. New Kent County School Board*.¹⁸ The Harvard Project on School Desegregation reports that 4.6 million of the nation's 6.9 million African American and 3.7 million of the 5 million Hispanic public school students attended predominantly minority¹⁹ schools in the 1991-92 academic year.²⁰ Over the previous twenty-three years, the numbers had decreased for African Americans while they had increased for Hispanics:

13. Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 749 (1986).

14. *Id.*

15. *Id.*

16. *Id.* at 730.

17. William Celis 3d, *Study Finds Rising Concentration of Black and Hispanic Students*, N.Y. TIMES, Dec. 14, 1993, at A1.

18. 391 U.S. 430 (1968).

19. GARY ORFIELD, *THE GROWTH OF SEGREGATION IN AMERICAN SCHOOLS: CHANGING PATTERNS OF SEPARATION AND POVERTY SINCE 1968*, at 5 (1993). "Predominantly minority" is defined in the report as comprising more than 50% African American, Latino, Native American or Asian students. *Id.*

20. Total school enrollment figures and extrapolations were contained in Celis, *supra* note 17 (citing ORFIELD, *supra* note 19).

PERCENTAGE OF MINORITY STUDENTS IN
PREDOMINANTLY MINORITY SCHOOLS²¹

School Year	Blacks	Latinos
1968-69	77%	55%
1972-73	64%	57%
1980-81	63%	68%
1986-87	63%	72%
1991-92	66%	73%

Today, in addition to continuing external societal influences and actual physical and social separation, internal constraints related to the continuing effects of racial separation persist. As was true in 1968, when schools already have a racial identity, given a choice, blacks may tend to choose "black schools" and whites may tend to choose "white schools."²² A freedom-of-choice plan makes those with the choice responsible for school integration and therefore invites others to blame them or make them the targets of hostility if problems arise.²³ In addition, victims of discrimination may adapt to the past unavailability of certain options by concluding that they do not really want them, a reaction to the cognitive dissonance involved in wanting what one cannot, or in the past, could not, have.²⁴

Information and coordination problems exist as well. Because a parent cannot select a preferred racial mix while ignorant of the simultaneous choices of others, choices are made from incomplete information. This lack of information often results in blacks and whites choosing to remain in separate schools.²⁵ Even though the school choice plans that are the subject of this Essay are generally proposed for reasons other than the racial makeup of the schools, the continued existence of racially identifiable (and essentially unequal) public and private schools²⁶

21. ORFIELD, *supra* note 19, tbl. I, at 7.

22. Gewirtz, *supra* note 13, at 743.

23. *Id.* at 744.

24. In other words, compelled separation is an insult and an act of domination, but chosen separation may reflect pride and a commitment to group self-determination. *See id.* at 746.

25. *Id.* at 749.

26. *See generally* JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S

suggests that these sociological forces that act to increase segregation will affect these plans in much the same way.²⁷

As the Supreme Court noted in 1954, the effects of these separate schools on public education and on students must be examined in a contemporary context. To determine whether harm persists, at least two questions need to be asked. First, we must ask whether the racial separation that precipitated the lawsuits that resulted in the *Brown* decision continues to be an important concern in public education. If so, we must then determine whether we can continue to look to the judicial system to assist in the achievement of desegregation.

B. The Significance of Racial Separation

For many, the decision in *Brown* confirmed what they already intuitively knew—that the stigma of inferiority attendant to the separation of the races was an expected (if not intended) product of the second class citizenship accorded African Americans in our pre-1954 society.²⁸ Today, opinion is divided as to whether that same stigma continues forty years later.

Some argue that, regardless of the stigmatizing effects of the separation at the time of *Brown*, today, after several decades of integrated activities in this country, the taint no longer exists.²⁹ Others, who argue that the stigma remains, might nevertheless

27. In the context of higher education, where one would imagine that parents and their college-aged children may be less constrained in exercising their choices, the fifth circuit indicated that support for freedom of choice plans

assumes that black students possess the same freedom to choose as do white students.

. . . *Brown* explicitly recognized that vestiges of de jure segregation distort the perceptions of blacks. Blacks do not, therefore, make choices from a tabula rasa. Instead, they choose against a history of racial subjugation with its attendant messages of inferiority.

Ayers v. Allain, 893 F.2d 732, 751 (5th Cir. 1990), *reh'g granted en banc*, 914 F.2d 676, *vacated sub nom.* *United States v. Fordice*, 112 S. Ct. 2727 (1992).

28. See Kevin Brown, *The Legal Rhetorical Structure for the Conversion of Desegregation Lawsuits to Quality Education Lawsuits*, 42 EMORY L.J. 791, 805-09 (1993); Kimberle W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1377-78 (1988).

29. See James A. Washburn, Note, *Beyond Brown: Evaluating Equality in Higher Education*, 43 DUKE L.J. 1115, 1150 (1994) (arguing that stigma may not exist for students in predominantly black colleges).

resent the intimation that black children can only achieve academically when educated with white children.³⁰

Among those who criticize the view that racial mixing is necessary for quality education are those who would argue that problems of low self-esteem, to the extent that they persist, should be addressed through increased emphasis on Afrocentric education or other methods that focus on building self-esteem as an end unto itself.³¹ Proponents of this line of thought remind us that as we consider elementary and secondary schools, quality education is the goal, and to the extent that attempts at forced racial mixing have not achieved this quality education, they should be abandoned in favor of other strategies.³²

Many who adhere to this strategy are ardent proponents of school freedom-of-choice plans. They argue that these plans would give minority parents control over the education of their students and therefore would provide more say in how resources are deployed and a unique and particularized ability to affect their students' education and self-esteem.³³ They see control over facilities, personnel and curriculum as a means to achieve not just quality education, but strong cultural identity and pride as well.³⁴

Advocates of continued attempts at the integration of schools suggest that even if racial mixing is not a precondition to quality education, it is necessary for other social, political, economic, and educational reasons.³⁵ They suggest that because ethnic and social minorities will compose the majority of the American workforce in the next century, our country's future in world leadership is dependent upon having a citizenry and workforce

30. See Kevin Brown, *Has the Supreme Court Allowed the Cure for de Jure Segregation To Replicate the Disease*, 78 CORNELL L. REV. 1 (1992).

31. See Sonia R. Jarvis, *Brown and the Afrocentric Curriculum*, 101 YALE L.J. 1285, 1286-87 (1992).

32. See *id.* at 1303.

33. See Patricia Wen, *Boston Schools Approach a New Era Assignment Plan Seen as Key Step*, BOSTON GLOBE, Dec. 26, 1988, at C1.

34. *Id.*

35. See Scott J. Davidson, et al., *The RIFFING of Brown: De-Integrating Public School Faculties*, 17 HARV. C.R.-C.L. L. REV. 443, 500-02 (1982); James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463 (1990).

that is reflective of and cognizant of the diverse cultures that comprise the country.³⁶

The belief that the education system is the only viable means of achieving this recognition and acceptance of diverse cultural attributes derives from the fact that mandatory, universal, and, in most instances public, education is the common ground on which citizens of this country meet. Accordingly, integrating the citizenry at the earliest possible time is the most effective and efficient manner of fostering interracial understanding and acceptance. Much has been made of the fact that global competitiveness in a world market requires that minority workers be well educated and well trained if the country is to take a leadership role in the world. Better education and the education of minorities with non-minorities is an essential factor in this enterprise.

A second line of argument favoring racial mixing in schools may sound cynical but has significant basis in fact. Some have labeled this the "green follows white" theory,³⁷ recognizing that even in those instances where resources are found to be or are stipulated to be equal, when whites and minorities have been educated separately, educational outcomes have invariably been unequal, with greater resources devoted to the education of the white children.³⁸ Advocates of freedom-of-choice plans suggest that the lack of control over these resources leads to the inequities. When largely white school boards have exclusive control over resources as well as pupil and teacher assignments, the resources are not deployed in a manner that overcomes the inequity. Whatever the reason, largely white, principally suburban schools produce better educational results than largely minority, principally urban schools that expend a comparatively equal amount of funds.³⁹

36. See David G. Carter & James P. Sandler, *Access, Choice, Quality, and Integration*, 23 EDUC. & URBAN SOC'Y 175, 183 (1991).

37. This phrase is often used in African-American communities to describe the frequently observed phenomenon of resources (green referring to money) being redirected to new projects as whites move out and blacks move in.

38. See generally, *Brown v. Board of Educ.*, 347 U.S. 483 (1954); KOZOL, *supra* note 26; ORFIELD, *supra* note 19.

39. Several reasons can explain this anomaly, not the least of which are the high-

Even if we were to determine that racial mixing is not itself an important goal, there is growing evidence that socio-economic class rather than race causes the difference in educational achievement.⁴⁰ If class does matter and students from lower socio-economic backgrounds suffer more educational disadvantage than their middle and upper class peers, to the extent that so many more minority students than non-minority students are poor, minority students suffer disproportionately. Therefore, mixing socio-economic classes invariably means mixing races, a potential catalyst for better education for poor students and, therefore, better education for minority students.

The 1966 Coleman Report,⁴¹ and the 1972 Mosteller and Moynihan reexamination of that report⁴² were not well received in minority communities.⁴³ Those reports concluded that rather than the level of resources, classroom colleagues were a major determinant of the achievement of minority group children. When comparing the influence of fellow students with the influence of school facilities and the influence of staff, the Coleman Report concluded that "attributes of other students account for far more variation in the achievement of minority group children" than the other factors. The new report of the Harvard Project on School Desegregation, issued in December of 1993 and examining the academic year 1991-92, repeats these findings.⁴⁴ Professor Gary Orfield, director of the Project, indicates that it is not just the mix of students but the fact that poor students in a school not overwhelmed by poverty, and therefore not called upon to serve all of the needs of its students, whether educational or not, succeed better.⁴⁵ In addition to the lack of distractions

er fixed-cost expenses such as security and health without offsetting donations from parents and community supporters.

40. See, e.g., Carter & Sandler, *supra* note 36 (focusing on issues in the Connecticut school desegregation and financing cases of *Horton v. Meskill*, 486 A.2d 1099 (Conn. 1985), and *Sheff v. O'Neill*, 609 A.2d 1072 (Conn. Super. Ct. 1992)).

41. JAMES S. COLEMAN ET AL., *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966).

42. ON *EQUALITY OF OPPORTUNITY* (Frederick Mosteller & Daniel P. Moynihan, eds., 1972).

43. See, e.g., Patricia Lines, *Race and Learning: A Perspective on the Research*, 11 *INEQUALITY IN EDUC.* 26 (1972) (describing the limitations of social science studies of the effects of school desegregation).

44. Celis, *supra* note 17, at A1.

45. Jordana Hart, *Poverty Takes Dramatic Toll on Education, Study Says; Many*

that accompany attempts to meet the nutritional, health, and other non-academic needs of the students, higher expectations regarding student performance, a different kind of peer pressure regarding academic achievement, and the modeling that is acquired from students who are not like them, cause students to do better among less needy peers.⁴⁶

C. *The Law Regarding "Freedom of Choice"*

1. *Formerly de Jure Segregated Schools*

Although the Supreme Court rejected the New Kent County freedom-of-choice plan in 1968, it did not determine that a similar plan would be found to be unconstitutional in all circumstances.⁴⁷ The Court decided that in desegregating a de jure dual system, a plan based on freedom-of-choice "is not an end in itself. . . . [I]t is only a means to a constitutionally required end—the abolition of the system of segregation and its effects."⁴⁸ The Court conceded that freedom-of-choice plans may be effective devices in fulfilling this duty.⁴⁹

The Court has thereby empowered lower courts to validate freedom-of-choice schemes proposed under school desegregation plans, as long as those plans achieve an integrated result. At least two recent opinions by the high court considering court-ordered plans would suggest that newer plans, whether or not fashioned as a remedy to intentional discrimination, may not have to meet such a test.

Board of Education of Oklahoma City v. Dowell,⁵⁰ a 1991 Supreme Court decision, and *Freeman v. Pitts*,⁵¹ decided by the

Believe Segregation Crisis Is One of Money and Class More Than Race, BOSTON GLOBE, Mar. 6, 1994, at A27 (quoting ORFIELD, *supra* note 19).

46. *Id.*

47. *Green v. New Kent Cty. Sch. Bd.*, 391 U.S. 430, 439 (1968).

48. *Id.* at 440 (quoting *Bowman v. County Sch. Bd.*, 382 F.2d 326, 333 (4th Cir. 1967) (Sobeloff, J., concurring)).

49. "Where [a freedom-of-choice plan] offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, non-racial system there might be no objection to allowing such a device to prove itself in operation." *Id.* at 440-41.

50. 498 U.S. 237 (1991).

51. 112 S. Ct. 1430 (1992).

Court in 1992, have been pessimistically interpreted as providing (1) an excuse for school systems that have attempted but not succeeded in desegregating their schools and (2) ammunition for those who would have the schools stop trying.

In both opinions, the Court remanded the cases for findings in accord with the Court's determination that a segregated school system's partial compliance with a desegregation order could trigger the partial dissolution of the order, even if the schools have not attained racial balance or have become resegregated through "private decisionmaking and economics" such as residential patterns.⁵²

Although proponents of school choice have always been aware of the potential for resegregation of the schools, many have assumed that sensitivity and careful planning would alleviate any projected imbalance⁵³ while others have been willing to sacrifice racial balance in exchange for greater parental choice and the consequential influence and control that generally follows.⁵⁴ Depending on the interpretation and implementation of the law declared in *Dowell* and *Freeman*, students in segregated, unequal schools may find no relief under the Fourteenth Amendment of the Constitution unless the official government (federal,

52. *Dowell*, 498 U.S. at 243 (1991); see also *Freeman*, 112 S. Ct. at 1445, 1447.

[I]n the course of supervising desegregation plans, federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations. While retaining jurisdiction over the case, the court may determine that it will not order further remedies in areas where the school district is in compliance with the decree. . . .

. . . .

. . . Once the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors.

Id. at 1445-47.

53. Former Secretary of Education Terrel Bell and his co-author, Donna Elmquist, propose parental choice as an incentive for educators to establish excellent schools. TERREL H. BELL & DONNA L. ELMQUIST, *HOW TO SHAPE OUR NATION'S SCHOOLS* 32 (1991). They recognize that problems of desegregation and transportation, deemed "sensitive issues" by them, should be taken into account so that "unintended stratification or resegregation" does not occur, and suggest as examples that "school boards should encourage minority student enrollment in predominantly majority schools and prohibit the concentration of minority students in one school." *Id.*

54. See Bell, *supra* note 7.

state, or local) policy providing for or facilitating freedom-of-choice constitutes state action and involves provable discriminatory intent. Conceivably, therefore, there will be no legal redress for these newly segregated schools.

In *United States v. Fordice*,⁵⁵ decided in 1992, the Court, in an opinion joined by eight of the nine Justices, sought to clarify earlier rulings regarding the application of the Equal Protection Clause to formerly de jure segregated higher education institutions. These schools have adopted race neutral policies that have nonetheless resulted in continued segregation or in resegregated institutions. In doing so, the Court analogized to freedom-of-choice plans in elementary and secondary schools, the subject of this Essay.

Language in the opinion can be read as supporting the notion that the adoption of policies such as educational choice that are not only race-neutral on their face, but also race-neutral in terms of intent, may nonetheless violate the Equal Protection Clause if they result in segregated schools. Justice White, writing for the majority, indicated:

[W]e do not disagree with the Court of Appeals observation that a state university system is quite different in very relevant respects from primary and secondary schools. Unlike attendance at the lower level schools, a student's decision to seek higher education has been a matter of choice. . . .

We do not agree with the Court of Appeals or the District Court, however, that the adoption and implementation of race-neutral policies alone suffice to demonstrate that the State has completely abandoned its prior dual system. That college attendance is by choice and not by assignment does not mean that a race-neutral admissions policy cures the constitutional violation of a dual system. . . .

. . . .
. . . If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably eliminated, the State has

55. 112 S. Ct. 2727 (1992).

not satisfied its burden of proving that it has dismantled its prior system. Such policies run afoul of the Equal Protection Clause, even though the State has abolished the legal requirement that whites and blacks be educated separately and has established racially neutral policies not animated by a discriminatory purpose.⁵⁶

2. *New Freedom-of-Choice Schools*

Any speculation as to what significance *Fordice* has for elementary and secondary schools is just that—speculation. Even more speculative is the question of what relevance decisions like *Dowell*, *Freeman*, and *Fordice* might have for elementary and secondary schools that cannot be said to be the product of de jure segregation. Mississippi's dual system of higher education had its historical roots in legislative mandates regarding separate schools. The same can be said about the New Kent County schools in 1968 and the schools that are the subject of *Dowell* and *Freeman*. Teacher assignment policies, the retention of district lines that include or exclude racially segregated neighborhoods, and the maintenance of a pattern of curricular offerings that traditionally appeal to either African-American or white children may represent the perpetuation of policies and practices that continue to have segregative effects. In *Fordice*, the Court rejected the Fifth Circuit Court of Appeals' holding that by simply adopting race-neutral policies, the system had met its affirmative obligation to disassemble the prior dual system. In enunciating its disagreement with the lower court, the Supreme Court noted that the fact that college attendance is by choice and not by assignment does not cure the constitutional violation because student attendance, even in a system based on choice, is determined by many other factors that may or may not be attributed to state policies.⁵⁷ In declaring that new race-neutral policies and practices that continue to have segregative effects must be abandoned if they are "without sound educational justification and [they] can be practicably eliminated,"⁵⁸ the Court

56. *Id.* at 2736-37.

57. *Id.* at 2736.

58. *Id.* at 2737.

employed reasoning that may be useful in ascertaining whether the new freedom-of-choice plans will pass constitutional muster when the schools subject to the plans remain segregated.

a. In Formerly de Jure Segregated Districts

Determining whether the adoption of such a plan is constitutional, in those systems that were under an obligation to dismantle the remnants of a segregated dual system, despite hopes to the contrary when *Freeman* and *Dowell* were announced, would require, at the very least, establishing that the adoption of school choice plans was preceded by an examination of the educational justification for such plans. Because there is a strong argument that school systems where freedom-of-choice is promoted continue to be "tainted" by "racially identified schools and the many other effects of a regime of segregation,"⁵⁹ as they were in 1968, the adoption of school choice in the face of this prior discrimination might well be unjustified. "Controlled choice" plans⁶⁰ may prevent re-segregation of the schools and thus escape the type of scrutiny that is suggested by *Fordice*. "Open enrollment" plans, on the other hand, may not withstand this test.

A controlled choice plan in effect for eleven years in Cambridge, Massachusetts, has been highly praised.⁶¹ Originally, the school system created the program in order to achieve integration without mandatory busing.⁶² Under the plan, informing parents about their options is a top priority.⁶³ In fact, before parents may enroll their children in Cambridge schools, they must visit an information center to learn about the programs offered by each of the thirteen elementary schools in the city.⁶⁴

59. Gewirtz, *supra* note 13, at 749.

60. The term "controlled choice," as used here, refers to systems that take racial balance into account in permitting transfers. Amy S. Wells, *Quest for Improving Schools Finds Role for Free Market*, N.Y. TIMES, Mar. 14, 1990, at A1, B8; see *infra* text accompanying notes 62-70.

61. The term "open enrollment," as used here, refers to a system that makes no effort to control for racial balance. See *infra* text accompanying note 71.

62. Wells, *supra* note 60, at B8.

63. *Id.*

64. *Id.*

Only then are parents allowed to register their children for their top three school choices.⁶⁵ Taking parents' preferences into consideration, the district makes assignments that maintain student bodies representative of Cambridge's racial composition.⁶⁶

Overall, the plan has received more praise than criticism.⁶⁷ One reason for the support is that the district prohibits any one school from having a monopoly on a popular program by offering similar programs in multiple schools.⁶⁸ The district also is praised for its policy of not closing less popular schools but focusing its attention on improving them.⁶⁹

It is interesting to contrast the Cambridge city plan with plans in other Massachusetts cities and with the proposed statewide plan. Of the state's 436 school districts, sixteen have adopted controlled choice programs.⁷⁰ In July 1991, Massachusetts adopted a statewide choice program that differs from the controlled choice programs in that (1) it allows parents to send children to public schools in other districts with the state forwarding the state aid from the student's home community to the chosen school district and (2) it makes no attempt to achieve a racial balance.⁷¹ The president of the American Federation of Teachers, Albert Shanker, has described the Massachusetts plan as "unusually punitive for urban children" because it allows "suburban public schools to behave like selective private schools."⁷²

Those who support statewide choice plans complain that controlled choice "promotes a form of racial quotas or racial preference for African-American and Hispanic students."⁷³ However, advocates of controlled choice plans contend that such plans do

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. Diego Ribadeneira, *642 Choose Schools Out of District*, BOSTON GLOBE, Sept. 6, 1991, at 17-18.

72. Muriel Cohen & Diego Ribadeneira, *Schooling by Selection; Choice Plan Raises Confusion, Worry over Fiscal Fairness*, BOSTON GLOBE, Aug. 11, 1991, at 1.

73. Robert A. Jordan, *A School Plan That Does Work*, BOSTON GLOBE, June 22, 1991, at 25.

not give a preference to any racial group, but rather allocate seats in schools "in proportion to the number of whites, blacks, and Hispanics already enrolled in the school system."⁷⁴

Critics of the free choice program argue that "poorer urban and rural districts will lose students and funds to wealthier, suburban communities, leaving the more-impooverished systems in even more desperate straits."⁷⁵ This criticism is becoming a reality in Massachusetts. By September 1991, 642 students had transferred into new districts, costing the school systems they left at least \$4 million.⁷⁶ By failing to provide transportation or money for transportation, Massachusetts' free choice program discriminates against those who do not own cars, those who cannot afford bus fare, and those who are unable to shuttle their children to and from school at the required times.⁷⁷

b. In Districts with No History of de Jure Segregation

Because school systems as diverse as Durham, Denver, Des Moines, Montgomery, Minneapolis, and Milwaukee have been subject to desegregation orders or consent decrees, it may be difficult to find school systems, especially large school systems, that have not searched for remedies aimed at eliminating segregation. If such school systems exist, or if some school systems have been or will be relieved of the obligation to desegregate based on the *Dowell* and *Pitts* decisions, a serious question arises as to whether there is any remedy at law for segregated schools. Even if the *Fordice* freedom-of-choice rationale for higher education carries over to elementary and secondary education, *Fordice* is by its terms only applicable to previously dual systems. If, however, school boards and parents agree that race or class balance in public schools is a good idea, how should school choice plans be designed to fulfill the promise of *Brown*?

Race-conscious remedies involving controlled choice or magnet schools raise additional questions regarding constitutional scrutiny, but some evidence shows that these plans, when directed

74. *Id.*

75. Ribadeneira, *supra* note 71, at 17.

76. *Id.*

77. *Id.*

towards school desegregation, may merit different treatment than that accorded other race-conscious remedies.⁷⁸ Whether such plans will be successful in cities like Des Moines, where parents were able to challenge successfully an open enrollment plan despite its controls to prevent racial tipping and the resegregation of schools, remains an open question. As noted above, in Cambridge the experiment has been deemed a success.⁷⁹ Des Moines hopes to achieve the same ends by a more carefully crafted and developed plan. School board members there feel hopeful that this effort will succeed.

II. CONCLUSION

In New Kent County, Virginia, in 1968, in response to the mandate of *Brown v. Board of Education*, local authorities adopted a freedom-of-choice plan designed to desegregate the schools. In petitioning for relief in the actions that eventually became known as *Brown v. Board of Education*, African-American parents and their advocates were motivated by a desire for quality education for all children, black and white. Given the social climate of the time, racial mixing seemed a prerequisite for quality education. Separation necessarily was regarded as a badge of inferiority.

Today's parents are motivated by similar concerns about the lack of quality education for minority students. Forty years after *Brown*, however, we have learned that minority students continue to suffer educational disadvantage in our public schools. We have come full circle, albeit with strange bedfellows.⁸⁰ The present focus on market solutions to the lack of quality education has taken us once again to advocacy of freedom-of-choice as a

78. See, for example, the lengthy references to exceptional treatment of school desegregation orders in Justice Scalia's concurrence in the leading case requiring strict scrutiny of race-conscious remedies in one city's affirmative action "set-aside" plan. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 524-25 (1988) (Scalia, J., concurring).

79. See *supra* notes 60-69 and accompanying text.

80. Stuart Butler & Will Marshall, *Rx for the Problem '90s: Some Odd-Couple Politics*, L.A. TIMES, Dec. 22, 1991, at M2 (describing a "post-ideological agenda" that finds liberals and conservatives working together on matters such as school choice, public housing, and homelessness).

solution. The notion that *quality education* has some absolute definition or measurable content that is not necessarily dependent on *equality of education* has led many to renounce racial balance or racial mixing as the touchstone of academic achievement. Inequality and a concern about inferiority no longer drive the quality education movement. Empowerment—through control, multicultural education, and in many cases, separation—is seen by many to be the ultimate solution to educational quality concerns. A close reading of *Brown* suggests that this shift could not have been anticipated in 1954.

Forty years later, as cities, including Topeka, Kansas, continue to grapple with the problems of racial separation and the lack of quality education, school choice, though it may lead to school segregation, is being proposed. Linda Brown Smith, the elementary school student whose father was the first named plaintiff in the 1954 case, is a plaintiff in *Brown III* on behalf of her children.⁸¹ After opinions from the District Court of Kansas,⁸² the Tenth Circuit,⁸³ and the Supreme Court,⁸⁴ the case was remanded to the Tenth Circuit to determine whether, in light of *Dowell* and *Pitts*, the school district should be relieved of its obligation to implement a new desegregation plan.⁸⁵ That court determined that no viable plan had been implemented.⁸⁶ After the United State Supreme Court refused in 1993⁸⁷ to hear yet another appeal, the parties in the litigation are devising new plans, expected to be presented in May, 1994. We've come full circle.

81. *Brown v. Board of Educ.*, 84 F.R.D. 383, 391 n.4 (D. Kan. 1979) (*Brown III*).

82. *Brown v. Board of Educ.*, 671 F. Supp. 1290 (D. Kan. 1987).

83. *Brown v. Board of Educ.*, 892 F.2d 851 (10th Cir. 1990).

84. *Brown v. Board of Educ.*, 112 S. Ct. 1657 (1992).

85. *Brown v. Board of Educ.*, 978 F.2d 585 (10th Cir. 1992) *cert. denied*, 113 S. Ct. 2994 (1993).

86. *Id.*

87. *Id.*