Desegregation and Parental Choice in Public Schooling: A Legal Analysis of Controlled Choice Student Assignment Plans

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I. INTRODUCTION

The history of school desegregation in the United States is a troubled one. Before 1954, most public schools in southern states were racially segregated by state constitution or statutory mandate. This legally enforced segregation is known as de jure segregation.¹ School desegregation by court order began in the South in 1954 with Brown v. Board of Education,² which abolished de jure segregation in public education.³ The Supreme Court intended that this court order eliminate single-race schools and lead to racial integration of public schools.⁴ It failed to do so.

In response to Brown, southern state legislatures erased education clauses which mandated segregation from their constitutions and statute books, and many school boards implemented freedom of choice student assignment plans.⁵ Freedom of choice plans allowed students to attend the school of their choice, regardless of their race. While freedom of choice plans complied with the letter of the Brown ruling, they did not comply with the spirit. Freedom of choice plans frustrated Brown’s goal of racial desegregation because few African-Americans chose to risk violence and ostracism by attending the former Caucasian schools, and virtually no Caucasians chose to attend former African-American schools.⁶ In the

¹ De jure segregation “refers to segregation directly intended or mandated by law or otherwise issuing from an official racial classification or in other words to segregation which has or had the sanction of the law.” BLACK’S LAW DICTIONARY 383 (5th ed. 1979).
³ Brown, 347 U.S. at 495.
⁵ See, e.g., id.
⁶ Id. at 440–41.
ten years that followed Brown’s abolition of de jure segregation, little desegregation took place in the South. Thus, freedom of choice plans failed as a method of school desegregation. Federal district courts responded to the failure of freedom of choice plans by forcing school boards to implement mandatory student assignment plans to achieve unitariness. Mandatory student assignment plans allow parents no choice in where their children attend school. Many parents of public school students, however, believe that they should have the right to choose the school that their child attends. This issue is hotly contested, and there are a wide array of arguments on both sides of the debate. A theme of the choice in education movement is that choice incorporates two bedrock principles of democracy—freedom and competition. In theory, choice in education is modeled on marketplace principles. Proponents of choice in education, including the Bush Administration, argue that competition among schools benefits students because it forces schools to enhance their educational programs.

7 See id. at 439. Although the Supreme Court has not defined the term unitary, “the Court has suggested that the elimination of ‘invidious racial distinctions’ related to student assignment, transportation, support personnel, and extracurricular activities, and [a] school administration’s concern for producing and maintaining schools of like quality, facilities, and staffs meet a threshold showing of unitariness.” Dowell v. Board of Educ., 890 F.2d 1483, 1491–92, n.15 (10th Cir. 1989) (quoting Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 18 (1971).

9 According to a 1986 Gallup poll, 68% of all parents of public school students believe that they have the right to choose the public school that their child attends. Rossell & Glenn, The Cambridge Controlled Choice Plan, 20 Urb. Rev. 75, 77 (1988).

10 Cohen, Movement for Parental School Choice Debated, Boston Globe, Apr. 17, 1990, at 1, col. 2.


12 National Education Secretary Lauro Cavazos has stated that parental choice in education is the “cornerstone” of the Bush Administration’s educational policy, while President Bush, himself, has referred to parental choice as “the single most promising idea” in contemporary education. Daniels, Cavazos Presses Parental Choice in Public Schools, N.Y. Times, Oct. 18, 1989, at B8, col. 3.

13 Id.

14 Wells, supra note 11. Additionally, parents desire choice because of the increasingly popular belief that a uniform instructional method does not meet the needs of every student. Rossell & Glenn, supra note 9 at 77. For example, choice in education permits the existence of gifted and talented programs for students with special strengths, handicapped and learning disabled programs for students with special needs, and programs for bilingual students. Id. Choice plans often involve magnet schools that feature curricula organized around a special
Opponents of choice respond, however, that choice in education is a "regressive idea."\textsuperscript{15} They argue that giving people the freedom to choose among schools may lead to segregation on the basis of income and race.\textsuperscript{16} They argue that just as in the consumer marketplace, people with fewer resources receive lower quality goods.\textsuperscript{17} Students from low-income families, often racial minorities, have fewer resources available to help them make informed choices or to transfer to schools outside their neighborhoods.\textsuperscript{18} Also, opponents argue that a marketplace philosophy allows poor schools to decline gradually in enrollment until they are forced to close. In the meantime, many students receive inferior educations.\textsuperscript{19}

This controversy has led to a search for student assignment plans that incorporate parental choice yet prevent racial and economic isolation.\textsuperscript{20} A nine-year-old plan called controlled choice purports to strike this balance effectively.\textsuperscript{21} The Supreme Court has not yet decided a case in which the constitutionality of a controlled choice plan was at issue. In fact, there has been little litigation in the lower courts concerning controlled choice. This Note examines

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\textsuperscript{16} Wells, \textit{supra} note 11.

\textsuperscript{17} \textit{Id.}

\textsuperscript{18} \textit{Id.}

\textsuperscript{19} \textit{Id.} Furthermore, choice opponents maintain that in a system of choice and competition, school administrators devote more time to public relations to attract students, than to actual improvement of their school’s curricula. Seder, \textit{supra} note 15. Administrators hide their school’s weaknesses, thus frustrating parents’ hopes of making informed choices. \textit{Id.} Additionally, choice opponents contend that school administrators focus on designing superficially glamorous programs, rather than on teaching the basics. “It looks good on paper, but it doesn’t matter if a school offers tourism if they don’t offer a decent foreign language or math program,” says a senior policy analyst at the Massachusetts Advocacy Center. Ribadeneira, \textit{Confusion Is Feared in Student Placement}, Boston Globe, Dec. 5, 1989, at 29, col. 6. “Unless choice is coupled with school restructuring and real reform in the classrooms, it will fail as a method of improving schools,” maintains an assistant to the President of the American Federation of Teachers. Cohen, \textit{supra} note 10.

\textsuperscript{20} See Armor, \textit{supra} note 14, at 24-25.

the constitutionality of controlled choice plans in light of school desegregation laws created during the past thirty-five years.

Controlled choice is distinct from the freedom of choice plans of the 1960s which the Court held unconstitutional, because controlled choice uses quotas to ensure racial balance in schools. Thus, a court would not strike down a controlled choice plan on the same grounds used to invalidate freedom of choice plans. In a challenge to any student assignment plan, a crucial issue is the burden of proof. There is currently a conflict among the federal circuits regarding the proper allocation of the burden of proof in litigation concerning a school system that has achieved unitariness. This Note demonstrates that a plaintiff-student would have difficulty challenging a controlled choice plan if forced to carry the burden. Finally, this Note demonstrates that a controlled choice plan's use of racial quotas is constitutionally problematic because the Court has approved only the limited use of quotas.

II. History of Desegregation

In the 1954 landmark case *Brown v. Board of Education*, the Supreme Court held that racial segregation in public education is unconstitutional. The Court ruled that state-mandated separation of African-American students from Caucasian students in public schools is a denial of equal protection guaranteed by the fourteenth amendment. The Court stated, "To separate [African-American school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." The Court remanded the four cases it had consolidated in *Brown* to the federal district courts to enforce its order to desegregate the racially separated systems.

In the years following *Brown*, many school districts implemented freedom of choice plans to end legally enforced segregation in compliance with *Brown*. As previously stated, these plans had little impact on the racial composition of schools because Caucasian

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22 *See, e.g.*, Dowell v. Board of Educ., 795 F.2d 1516 (10th Cir. 1986); Riddick v. School Bd., 784 F.2d 521 (4th Cir. 1986).
25 *Id.*
26 *Id.* at 494.
parents kept their children in schools that traditionally enrolled only Caucasian students, and few African-Americans chose to send their children to the formerly Caucasian-only schools. After fourteen years of virtually no change in the racial composition of schools, it was evident that the spirit of *Brown* had been ignored. In 1968, the Court took *Brown* one step further with *Green v. County School Board*.

In *Green*, the Supreme Court ruled that segregated school systems not only have the duty to refrain from enforcing segregation, but also have an affirmative obligation to achieve desegregation. The *Green* case involved a small rural school district in New Kent County, Virginia, in which half the population was African-American and half was Caucasian. There were only two schools in the county, and there was little residential segregation. Before *Brown*, the county school board had operated a racially segregated school system as mandated by the Virginia Constitution. One school allowed only Caucasian students to attend and the other allowed only African-American students. In 1965, however, in order to remain eligible for federal financial aid, the district adopted a freedom of choice plan for desegregating its schools. The plan allowed pupils to attend either of the county's two schools. Three years after its implementation, however, no Caucasian child had chosen to attend the former African-American school, and only fifteen percent of the African-American children had chosen to attend the former Caucasian school.

The school board defendant in *Green* contended that it had fully discharged its obligation to desegregate by adopting a plan by which all students, regardless of race, could "freely" choose the school they would attend. The Court, however, found that the plan did not adequately comply with the desegregation requirements of *Brown*. The Court charged the school board with the affirmative duty to "take whatever steps might be necessary to con-

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29 See *id.* at 440–41 n.5 (1968).
30 *Id.* at 430.
31 *Id.* at 437–38.
32 *Id.* at 432.
33 *Id.*
34 *Id.*
35 *Id.*
36 *Id.* at 433.
37 *Id.* at 441.
38 *Id.* at 441–42.
39 *Id.*
vert to a unitary system in which racial discrimination would be eliminated root and branch.”40 In rejecting the freedom of choice plan, the Court placed the burden on the school board to formulate a new plan to convert the school system into one without racially identifiable schools.41 The Court suggested geographic zoning as a way to achieve this result.42

In small rural areas, such as New Kent County, where little residential segregation existed, the elimination of freedom of choice plans and the implementation of geographic zoning resulted in desegregation.43 In large, residentially segregated urban areas, however, geographic zoning alone did not solve the problem.44 These areas required more intensive measures. Therefore, in a 1971 decision, the Court authorized the use of mandatory student assignments and crosstown busing in the desegregation of large urban school systems.45 In that case, Swann v. Charlotte-Mecklenburg Board of Education, the Court stated that district courts could require local authorities to employ bus transportation as one tool of desegregation, as long as the time the students spent traveling did not adversely affect their health or education.46

Two years after Swann, in Keyes v. School District, the Court held that if intentional discrimination is found in a portion of a school district, a court may require the school board to design a plan to desegregate the entire district.47 Keyes was the first non-southern desegregation case to reach the Supreme Court.48 The decision shifted the focus of desegregation from the South to the rest of the country.49 State legislatures outside the South had never mandated public school segregation. Yet because of segregated housing patterns and intentional gerrymandering of school attendance zones by school authorities, many schools were racially identifiable.50

As a result of landmark decisions such as Brown, Green, and Keyes, school boards across the nation had an affirmative duty to

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40 Id. at 437–38.
41 Id. at 442. The Court in Green did not find freedom of choice plans unconstitutional per se but held that where such plans fail to eliminate segregation, other means must be employed. Id. at 439–40.
42 Id. at 442 n.6.
45 Id. at 29–30.
46 Id. at 30–31.
48 Id. at 217 (Powell, J., concurring in part and dissenting in part).
49 Id. at 218.
50 See id. at 191; see also, Alves & Willie, supra note 21, at 67–68.
desegregate their systems. With court-ordered desegregation, school boards were charged with developing their own desegregation plans, but the district courts often modified or redesigned the plans. Desegregation plans formulated during the 1970s usually entailed mandatory student assignment and mandatory busing. The plans incorporated little parental choice. Mandatory student assignment plans were unpopular with parents and often led to racial violence and "white flight" from public schools. The theory of controlled choice is a response to dissatisfaction with mandatory student assignment plans. Controlled choice marks a departure from the strict controls of mandatory assignment, while adhering to the legal principles established by Brown and its progeny.

III. Operation of a Controlled Choice Plan

The goal of controlled choice is to maximize parental choice while ensuring desegregation and improved educational opportunities. Controlled choice was first introduced as an educational concept in Cambridge, Massachusetts in the early 1980s. It has been adopted in such cities as White Plains, New York; Seattle, Washington; and Port St. Lucie, Florida. In Massachusetts, sixteen of the state's 436 school districts have implemented controlled

53 See Armor, supra note 14, at 25.
55 Cuddy, A Proposal to Achieve Desegregation Through Free Choice, Am. Educ., May, 1983, at 27. In Boston, for example, Caucasian enrollment plummeted from 65% to 30% during eight years of mandatory busing. Id. Today, Caucasian enrollment in the Boston public school system is approximately 20%. Ribadeneira, Court Pullout From Schools Raises Fears, Boston Globe, May 3, 1990, at 1, col. 1.
During the years of mandatory busing, Caucasian enrollment declined over 40% in Philadelphia, over 45% in New York City, over 60% in Chicago, and over 75% in Detroit. Cuddy, supra, at 27. Given these statistics, it appears that mandatory busing contributes to the existence of racially-identifiable schools. Id. Thus, mandatory student assignment does not necessarily achieve its goal of integration.
56 Alves & Willie, supra note 21, at 74.
57 C. Glenn, supra note 21, at 6. Glenn distinguishes controlled choice from theories of choice which promote "unrestricted market forces in education." Id. at 3. The latter, he points out, often negatively affect low income and minority students. Id.
choice plans. Cambridge implemented its controlled choice plan in 1981 to desegregate its school system, and the system has been hailed as a model of success of choice in education. In Boston in 1989, a controlled choice plan replaced the desegregation plan that was implemented by court order in 1974 after a judicial finding of intentional segregation in the school system. Thus, a controlled choice plan can be used to expand choice in a school system that needs to achieve or maintain desegregation.

Controlled choice plans eliminate geographic attendance zones and allow students to select schools on a district-wide basis. To determine which school a student will attend, parents first select a predetermined number of schools, and rank them in order of preference. School selection for the fall takes place before the end of

59 Wells, supra note 11.
60 See generally Rossell & Glenn, supra note 9, at 84.
61 Jordan, Don't Count This Integration Plan Out, Boston Globe, Aug. 12, 1990, at A19, col. 3.
62 Morgan v. Herrigan, 379 F. Supp. 410, 482 (D. Mass. 1974), aff'd sub nom. Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974). After finding that school authorities had purposefully operated a segregated school system, United States District Court Judge Arthur Garrity ordered that the Boston public school system assign students to schools using a desegregation plan known as "geocoding." See Morgan v. Kerrigan, 401 F. Supp. 216, (D. Mass. 1975). This plan utilized "eight hundred defined geographic areas developed originally as police reporting areas . . . . For pupils resident in each geocode there was a designated elementary school, middle school, and high school. Combinations of geocodes were assigned to schools in a way calculated to achieve a desegregated enrollment in each school." C. Glenn, supra note 21, at 5.

In 1985, ten years after the court-ordered desegregation plan was implemented, Judge Garrity gave authority to the Boston School Committee to modify the plan, as long as certain racial enrollment guidelines were met. Morgan v. Nucci, 620 F. Supp. 214, 217, 228 (D. Mass. 1985). In 1989, the school committee adopted a controlled choice plan as "an attempt to reduce the role of mandatory assignments in meeting the desegregation obligations of the school system and also a means of stimulating school improvement." C. Glenn, supra note 21, at 3. In 1989, the plan was implemented on a "pilot basis," affecting only kindergarten, first and sixth grade students, while the geocode system remained in effect for all other grade levels. Id. at 1, 7. In 1990, the controlled choice plan went into effect for all grade levels. See id. at 3.

The African-American plaintiffs in the original 1974 lawsuit filed a motion to block the plan, arguing that it would lead to resegregation of the school system. Memorandum Supporting Plaintiffs' Request for Injunctive Relief at 9, Morgan v. Nucci (No. 72-911-G) (1989) [hereinafter Plaintiffs' Memorandum]. The four African-American members of the nine-person Boston School Committee supported the plaintiffs' opposition to the plan. Id. at 2. Judge Garrity, however, approved the plan, finding that it would not result in resegregation. Morgan v. Nucci, No. 72-911-G (D. Mass. May 31, 1989) (order denying injunctive relief). In his report on the first year of Boston's controlled choice plan, Charles Glenn pointed out that, contrary to opponents' assertions, the plan resulted in more integration than existed under the court-ordered plan. C. Glenn, supra note 21, at 8.

63 Alves & Willie, supra note 21, at 76, 77.
64 Id. at 80.
the current school year.\textsuperscript{65} Parents file their choices with a student assignment officer who assesses each application on the basis of space availability and racial balance.\textsuperscript{66} Students are not guaranteed enrollment in the school of their choice.\textsuperscript{67} In order to ensure racial balance in each school, controlled choice plans use racial quotas that represent the racial mix of the community as a whole.\textsuperscript{68} If students of one race oversubscribe to a particular school, a lottery is held to determine which students of that race may enroll and which students must be assigned to another school.\textsuperscript{69} After a controlled choice plan is implemented, only students entering a school system for the first time, moving to a higher level of schooling, or changing schools make selections.\textsuperscript{70} Once a student is enrolled in a school, he or she may remain there until the highest grade level of that school.

The theory of controlled choice is that when parents select or do not select a certain school, they make a judgment on the quality of education at that school.\textsuperscript{71} In this way, controlled choice forces each school to "compete" for students, creating attractive educational programs in order to become a popular choice of parents. The school board focuses on improving schools that are not selected frequently by parents.\textsuperscript{72} This feature is essential because it addresses the concerns of choice opponents who argue that less frequently selected schools will deteriorate until they are forced to close, meanwhile providing students with an inferior education.\textsuperscript{73}

Dr. Charles Willie, Professor of Education and Urban Studies at the Harvard Graduate School of Education, and Michael Alves, former Desegregation Expert and Educational Planner for the Mayor's Office in Boston,\textsuperscript{74} stress that a controlled choice plan must

\textsuperscript{65} Id.
\textsuperscript{66} Id. at 80–81.
\textsuperscript{67} Id. at 76.
\textsuperscript{68} Id. at 78.
\textsuperscript{69} Id. at 81.
\textsuperscript{70} See id. at 79–80. See, e.g., C. Glenn, supra note 21, at 6–7.
\textsuperscript{72} Id.
\textsuperscript{73} C. Glenn, supra note 21, at 38.
\textsuperscript{74} Dr. Willie is a sociologist who has written several books on school desegregation. In 1975, Dr. Willie was appointed a Master by the United States District Court for the District of Massachusetts to formulate a school desegregation plan for Boston. In 1975, Michael Alves was employed by the Massachusetts Department of Education to assist the Boston public school system in the implementation of its court-ordered desegregation plan. He also
incorporate the following five operating procedures to ensure desegregation:

1. Eliminate all geographic school attendance zones.
2. Adopt and enforce a definition of desegregation that guarantees each race proportional access to every school.
3. Allow parents to make multiple school selections but with no guarantee that they will receive their first choice.
4. Implement an effective parent information and outreach program.
5. Ensure honesty and integrity in all school assignments.\(^{75}\)

With regard to geographic attendance zones, Dr. Willie explains: "A fundamental principle underlying controlled choice is that all children have a right to an instructionally effective, desegregated education, but that no child has an implied property right to attend a particular school."\(^{76}\) While the neighborhood school is a traditional part of American education, in residentially segregated areas neighborhood zoning inevitably leads to segregation.\(^{77}\) Many desegregation plans, therefore, attempt to integrate schools by redrawing school attendance zones so that each zone includes different ethnic and racially identifiable neighborhoods.\(^{78}\) This approach to desegregation, however, is often unsuccessful. Elementary school zones are usually too small to embrace a mixed racial population.\(^{79}\) Also, population shifts can lead to resegregation of a once integrated zone.\(^{80}\)

Another approach to desegregation is to close a school building in a minority neighborhood and disperse its student body through-

\(^{75}\) Alves & Willie, \textit{supra} note 21, at 76.
\(^{76}\) \textit{Id.} (emphasis omitted).
\(^{77}\) \textit{See id.} at 67–68.
\(^{78}\) \textit{Id.} at 68.
\(^{79}\) \textit{Id.}
\(^{80}\) \textit{Id.} at 69. The Court has held that a school board is not constitutionally obligated to make yearly adjustments of the racial compositions of schools in a system that has been desegregated by court order. Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 31–32 (1971). This ruling leaves little judicial remedy for the problem of resegregation of geographic attendance zones due to population shifts.
out the remaining schools in the district. The minority students are forced to relocate to a school outside their neighborhood, while their Caucasian peers remain in a school in their own neighborhood. At least one circuit has ruled that this method of desegregation unfairly places the burden of desegregation on the minority race(s). Unlike desegregation plans that incorporate geographic attendance zones, controlled choice plans allow parents to select the school best suited to their child's needs from within their entire district. "Controlled choice has broken the hostage relationship between real estate and the public schools," says Dr. Willie.

While controlled choice plans do not utilize geographic zoning, a controlled choice plan may address the fact that parents prefer to have their children attend school close to home. The Cambridge controlled choice plan, for example, takes into consideration where a student lives when making school assignments. In Cambridge, a student who selects a school in his or her neighborhood is given priority over a student from another neighborhood if the assignment does not create racial imbalance. In 1986, forty-two percent of the students in Cambridge public schools attended a school located in their neighborhood. At the same time, however, the system was fairly well desegregated. The average minority student attended a school with approximately fifty-two percent Caucasian enrollment.

The success of the Cambridge model in allowing so many students to attend school near home while maintaining desegregation stems from the fact that Cambridge has a small school district with a reasonable level of residential integration. In larger school systems, however, the elimination of all geographic attendance zones may pose implementation problems. In districts with more than twenty thousand students, controlled choice works most effectively if the district is subdivided into a few zones, so that maximum travel time for students is no more than forty-five minutes.

81 Alves & Willie, supra note 21, at 69.
82 See Higgins v. Board of Educ., 508 F.2d 779, 793 (6th Cir. 1974).
83 Alves & Willie, supra note 21, at 76.
85 Rossell & Glenn, supra note 9, at 84.
86 Id. at 85.
87 Id. at 89.
88 Id. at 82.
89 Alves & Willie, supra note 21, at 77.
90 Id.
when controlled choice was adopted in Boston in 1989, the city was subdivided into three zones for all levels except high school.91 If subdivision of a school district is necessary for administrative ease, each subdivision must reflect the racial, ethnic, and socioeconomic composition of the entire city.92

It is generally recognized that students benefit the most from a desegregated education in which the racial and ethnic composition of their schools closely reflects that of the entire district.93 The Court in Brown asserted that segregated education has an adverse effect on the opportunities, motivation, and self-perception of African-American students.94 Nevertheless, many school boards implement desegregation plans that are least offensive to Caucasians, rather than plans that are most beneficial to African-Americans.95 Often, these plans result in superficial integration.96 For example, a school is only superficially integrated if its composition is within plus or minus twenty percent of the racial or ethnic composition of the school district.97 In order to guarantee true desegregation, Dr. Willie and Mr. Alves recommend that under a controlled choice plan, the racial enrollments of each school fall within plus or minus five to ten percent of the composition of the whole attendance area.98

A goal of controlled choice is to honor the greatest number of choices possible.99 In Cambridge, for example, from 1982 through 1986, the school board assigned an average of seventy-three percent of all new students to their first choice school and eighteen percent to their second or third choice school.100 Only nine percent received an involuntary assignment.101 Generally, the earlier that parents register, the more likely they will receive their first choice.102 For example, in Cambridge in 1982, only twelve percent of all students were given mandatory assignments.103 Fifty percent of the students

91 Boston School Department, Student Assignment Plan for Boston Public Schools, Revised Executive Summary 1 (May 26, 1989).
92 Alves & Willie, supra note 21, at 77.
93 Id. at 78.
96 Alves & Willie, supra note 21, at 78.
97 Id.
98 Id.
99 Rosell, supra note 71, at 351.
100 Rosell & Glenn, supra note 9, at 85.
101 Id.
102 Id.
103 Id.
who did not enter the system until the opening of school in September, however, were given mandatory assignments.\textsuperscript{104} As racial trends in mobility demonstrate that minorities are more likely than Caucasians to be newcomers to a district, a higher percentage of minorities miss the advantage of registration in the previous school year.\textsuperscript{105} Thus, the importance of early registration may be racially discriminatory. For example, in Cambridge in 1984, the number of minority students who received mandatory assignments was six percent higher than for Caucasian students.\textsuperscript{106}

Finally, under a controlled choice plan, it is essential that a school district have an effective parent outreach program, including parent information centers that help parents make informed choices.\textsuperscript{107} The school board should distribute literature about the application process in several languages, and it should provide transportation for parents unable to reach the information centers on their own. School administrators should arrange for parents to visit schools and meet with prospective teachers and staff. In many districts using controlled choice, schools hold “open houses” for parents during the selection period, and some information centers provide checklists that aid parents in evaluating schools.\textsuperscript{108} Overall, \textsuperscript{104} \textit{Id.} \\
\textsuperscript{105} \textit{Id.} at 88. \\
\textsuperscript{106} \textit{Id.} \\
\textsuperscript{107} \textit{Id.} at 80. In White Plains, New York, for example, parents of prospective kindergarten students may set up an interview at the Parent Information Center, during which a staff member explains the controlled choice system and distributes brochures describing each elementary school. Keegan, \textit{White Plains Parents Choosing Schools}, N.Y. Times, Mar. 12, 1989, § 12, at 12, col. 1. In Cambridge, Lawrence, and Lowell, Massachusetts, schools use the parent information centers as a method of recruiting new students. Schools also advertise in local newspapers, hold promotions at local nursery schools, and have “meet-the-principal nights” for parents of prospective students. Leslie, \textit{supra} note 84, at 79. \\
\textsuperscript{108} See, e.g., J. Ferriabough & S. Kooperstein, \textit{Introducing ... The New Boston Student Assignment Plan} (Mar. 30, 1989) (an information brochure distributed by the Boston School Committee and the Boston School Department). In the Boston controlled choice lawsuit, the plaintiffs’ arguments illustrated the importance of effective parental information and outreach. Plaintiffs’ Memorandum, \textit{supra} note 62, at 10–11. The plaintiffs argued that the Boston School Department’s failure to provide parents with adequate information and transportation to visit schools led to racially segregative selections by parents. \textit{Id.} The plaintiffs pointed out that the school department distributed applications before it provided parents with information about schools in the system. \textit{Id.} at 10. As a result, many parents returned their school selection applications without having made informed choices. \textit{Id.} The plaintiffs also argued that the school department did not provide an adequate system of transportation to assist parents in visiting schools. \textit{Id.} at 10–11. No transportation was available to parents on weekdays after working hours or on weekends. \textit{Id.} at 10 n.19. The plaintiffs alleged that because of vast residential segregation in Boston, the lack of transportation available to low-
with parent information centers, as well as the elimination of geographic zoning and the use of quotas to ensure racial balance, controlled choice plans strike a balance between mandatory assignment and absolute freedom of choice.

IV. Controlled Choice Distinguished From Freedom of Choice

In *Green*, the Supreme Court ruled that a freedom of choice student assignment plan was unconstitutional because it failed to bring about the goal of desegregation set forth in *Brown*.\(^{109}\) The Court did not hold, however, that choice plans are unconstitutional per se.\(^{110}\) With the use of racial quotas to help prevent segregation, controlled choice is distinguishable from the freedom of choice plan in *Green*. Although this issue has not come before the Supreme Court, the Ninth Circuit distinguished controlled choice from freedom of choice in *Diaz v. San Jose Unified School District*.\(^{111}\)

In that case, the court of appeals found that in using a neighborhood student assignment plan, the school board in San Jose, California, acted with segregative intent in maintaining imbalanced schools.\(^{112}\) To remedy this constitutional violation, the court fashioned a plan similar to controlled choice to achieve desegregation.\(^{113}\) The plan allowed students to rank their school preferences.\(^{114}\) The plan featured district-wide magnet schools and schools with specialty enrichment programs.\(^{115}\) These schools were designed to encourage students to attend schools outside their own neighborhoods, in an attempt to achieve voluntary desegregation.\(^{116}\) If voluntary choices did not lead to sufficient desegregation, however, the school board would impose "ethnic caps" (quotas) to achieve the desired racial and ethnic balance in the schools.\(^{117}\) The court explained that "ethnic caps" were "a means of establishing a limit on


\(^{110}\) *Id.* at 440.

\(^{111}\) 733 F.2d 660 (9th Cir. 1984).

\(^{112}\) *Id.* at 675.


\(^{114}\) *Id.* at 813.

\(^{115}\) *Id.* at 812.

\(^{116}\) *Id.* In 1984, the San Jose public school system enrolled 30,565 students, 57% Caucasian and 43% minorities. The school district was very residentially segregated. *Id.* at 809.

\(^{117}\) *Id.* at 818.
the enrollment of new students of a particular ethnicity at selected schools." Administrators were to assign students to one of their three choices unless the "ethnic cap" barred their enrollment, in which case the office of desegregation advised them of their other options.

The plaintiffs in Diaz, a class of Hispanic students, challenged the assignment plan as a violation of Green's holding that a freedom of choice plan is an inadequate means of achieving desegregation. The Ninth Circuit Court of Appeals upheld the plan, distinguishing it from the freedom of choice plan in Green because the "ethnic caps" as well as the magnet schools and specialty enrichment programs ensured effective desegregation. The court of appeals also stated that the San Jose plan "reflects Green's admonition that 'freedom of choice is not an end in itself,' but that it may have a proper place in a desegregation plan." The Diaz case demonstrates that choice in education is not per se unconstitutional.

V. Burden of Proof After a Finding of Unitariness

A plaintiff in a school desegregation lawsuit has the initial burden of establishing purposeful discrimination on the part of the authorities. If the plaintiff reaches this burden and a court determines that a violation has occurred, the school board is under a duty to implement a remedial plan that will dismantle the segregated system. The district court retains jurisdiction over the school board until the court is satisfied that the system has become unitary. While under the court's jurisdiction, the school board, if challenged, bears the burden of showing that any action it takes does not impede desegregation. Once the district court makes a finding of unitariness and relinquishes jurisdiction, however, it is unclear whether a challenged school board still has the burden to justify any actions which lead to racial separation. The federal circuits differ with regard to this issue, but the Supreme Court has

118 Id.
119 Id. at 817–18.
120 See Diaz v. San Jose Unified School Dist., 861 F.2d 591, 595 (9th Cir. 1988).
121 Id. at 595–96.
122 Id. at 596.
124 Id.
recently decided to hear an appeal from the Tenth Circuit which could resolve the conflict.\footnote{127}{Board of Educ. v. Dowell, 890 F.2d 1483 (10th Cir. 1989), cert. granted 110 S. Ct. 1521, 1522 (No. 89-1080) (1990). A resolution of this conflict among the circuits "could be the most important desegregation issue of [this] decade." Taylor, Court Won't Hear 2 Busing Appeals, N.Y. Times, Nov. 4, 1986, at A1, col. 1.}

The Tenth Circuit case, \textit{Board of Education v. Dowell}, contrasted with a Fourth Circuit case, \textit{Riddick v. School Board}, best illustrates the conflict. According to the Fourth Circuit, after a judicial finding of unitariness and the termination of a district court's supervision, a school board no longer has the burden of justifying its actions.\footnote{128}{Riddick, 784 F.2d at 535.} A plaintiff, in challenging an action of the school board after a finding of unitariness, carries the burden of proving discriminatory intent.\footnote{129}{Id. at 537.} The Tenth Circuit, however, disputes this allocation, and has ruled that the burden of proof remains with the school board after a finding of unitariness.\footnote{130}{Dowell v. Board of Educ., 795 F.2d 1516, 1523 (10th Cir. 1986).}

In \textit{Riddick v. School Board}, the plaintiffs challenged a school district's return to a neighborhood school plan after a finding of unitariness in the school system.\footnote{131}{Riddick v. School Bd., 627 F. Supp. 814 (E.D. Va. 1984).} Following a finding that the Norfolk, Virginia, school board operated a segregated school system, the United States District Court for the Eastern District of Virginia ordered implementation of an assignment plan that utilized busing and other techniques to desegregate its schools.\footnote{132}{See Riddick, 784 F.2d at 524–25.} In 1975, the district court determined that the school board had eliminated racial segregation and that the school system was unitary.\footnote{133}{Id. at 525.} The court then relinquished its jurisdiction, and the school board was free to implement a new student assignment plan.\footnote{134}{Id.}

The school board continued mandatory crosstown busing until 1983.\footnote{135}{Id.} At that time, however, the board became alarmed about the loss of Caucasian students from the school system.\footnote{136}{Id. In 1969 through 1970, the Norfolk public schools enrolled 56,880 students, 57% Caucasian and 43% African-American. In 1980 through 1981, the total enrollment dropped to 36,643, 42.6% Caucasian and 57.4% African-American. By 1983, the total enrollment had declined to 34,803, with 42% Caucasian students and 48% African-American students. Id.} The board attributed the declining Caucasian enrollment to busing.\footnote{137}{Id. at 526. An expert hired by the school board concluded that if busing continued,
before, it proposed the elimination of crosstown busing and a return to a neighborhood school assignment plan for elementary school students. The neighborhood plan was to result in six of Norfolk's thirty-six elementary schools becoming seventy percent or more Caucasian, and twelve schools becoming seventy percent or more African-American. Of those twelve schools, ten were to become ninety-five percent or more African-American.

A class of African-American schoolchildren brought suit against the school board challenging its adoption of the plan as racially discriminatory. Although the proposed plan would create several racially-identifiable schools, the Fourth Circuit affirmed the decision of the district court to allow its implementation because the plaintiffs could not establish discriminatory intent on the part of the school board. The court of appeals stated: "While the effect of the plan in creating several [African-American] schools is disquieting, that fact alone is not sufficient to prove discriminatory intent." The court of appeals relied on its previous finding in Vaughns v. Board of Education that "[o]nce a school system has achieved unitary status, a court may not order further relief to counteract resegregation that does not result from the school system's intentionally discriminatory acts." The court of appeals held that the district court's 1975 finding of unitariness returned control of the school system to the Norfolk school board. The burden of proof then shifted to the plaintiffs to show that the school board's adoption of a new assignment plan was intentionally discriminatory. The plaintiffs challenged this allocation of proof, claiming that the burden should remain on the school board to prove that the new assignment plan would not "perpetuate the

the school system would be 75% African-American by 1987. With this ratio, the average child would not be educated in a desegregated school. While the expert believed that busing had initially led to racial balance, he believed that resegregation was inevitable with such a rapid attrition of Caucasian students. Id.

138 Id. at 526–27. The attendance zones were to be drawn to maximize racial integration. Id. at 527.
139 Id.
140 Id.
141 Id. at 524.
142 Id. at 543.
143 Id.
144 758 F.2d 983 (4th Cir. 1985).
145 Riddick, 784 F.2d at 536 (quoting Vaughns, 758 F.2d at 988).
146 Id. at 538.
147 Id.
vestiges of the past de jure dual system," but the court of appeals rejected this argument.\(^{148}\)

In *Dowell v. Board of Education*, the Tenth Circuit criticized the Fourth Circuit's recasting of the burden of proof in *Riddick*.\(^{149}\) In *Dowell*, after many years of litigation in the Oklahoma City public school system, the United States District Court for the Western District of Oklahoma found that the school system had achieved unitariness.\(^{150}\) The court terminated active supervision of the school board, and the board adopted a new student assignment plan.\(^{151}\) The new plan resulted in thirty-three of the system's sixty-four elementary schools becoming ninety percent single-race.\(^{152}\) The plaintiffs filed a motion to reopen the case, but the court denied the motion and determined that absent a showing of discriminatory intent, the existence of racially identifiable schools is not unconstitutional.\(^{153}\)

On appeal, the Tenth Circuit held that the district court had erred in denying the motion and had improperly placed the burden of proving discriminatory intent on the plaintiffs.\(^{154}\) The court of appeals held that the finding of unitariness did not negate the existence of the original desegregation order.\(^{155}\) The court of appeals maintained that the district court retained its power to enforce the mandatory desegregation order, and the defendant school board had a continuing duty to eliminate the vestiges of segregation.\(^{156}\) The court stated: "[T]he purpose of court-ordered school integration is not only to achieve, but also to maintain, a unitary school system . . . . [T]he plaintiffs, as the beneficiaries of the original injunction, only have the burden of showing the court's mandatory order has been violated."\(^{157}\) If, for example, a new assignment plan reintroduces a measure of segregation, the school board "must present evidence that . . . changed conditions require modification [of the original desegregation order] or that the facts or law no longer require enforcement of the order."\(^{158}\) Thus, the court placed the burden of proof with the school board.

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\(^{148}\) *Id.* at 534.

\(^{149}\) *Dowell v. Board of Educ.*, 795 F.2d 1516, 1520 n.3 (10th Cir. 1986).

\(^{150}\) *Id.* at 1518.

\(^{151}\) *Id.*

\(^{152}\) *Id.*

\(^{153}\) *Id.* at 1518–19.

\(^{154}\) *Id.* at 1517, 1523.

\(^{155}\) *Id.* at 1519.

\(^{156}\) *Id.* at 1520.

\(^{157}\) *Id.* at 1520, 1523.

\(^{158}\) *Id.* at 1521, 1523. In *United States v. Overton*, the Fifth Circuit Court of Appeals
The allocation of the burden of proof after a finding of unitariness is crucial to a constitutional analysis of a controlled choice plan. Often, a controlled choice plan is implemented to maintain racial balance in a school district that has achieved desegregation.\textsuperscript{159} The allocation of the burden of proof under \textit{Riddick} may make success elusive for a plaintiff challenging a new student assignment plan in a school system with a judicial finding of unitariness. In \textit{Riddick}, the fact that the new assignment plan would lead to resegregation was insufficient to establish discriminatory intent on the part of the school board. Thus, it would appear impossible to prove discriminatory intent on the part of a school board that implements a controlled choice plan for the stated purpose of maintaining desegregation, even if the plan failed to maintain desegregation. As a result of \textit{Riddick}, "[T]he question . . . has arisen whether . . . any plaintiffs can meet the requisite burden of proof of discriminatory intent in a school system that already has achieved unitary status . . . . [T]he \textit{Riddick} court's requirement of proof of discriminatory intent may discourage future plaintiffs with potentially legitimate grievances from seeking judicial review."\textsuperscript{160}

On the other hand, under \textit{Dowell}, a court hearing a challenge to a controlled choice plan in a system with a finding of unitariness would focus on the result of the plan. If the court found that the plan maintained racial balance in schools, the court would likely uphold the plan. If, however, the plan resulted in a resurgence of segregation, the court would require the school board to justify its adoption of the plan.\textsuperscript{161}

\section*{VI. Racial Quotas in a Controlled Choice Plan}

The Supreme Court has held that the use of racial quotas for affirmative action purposes is a denial of equal protection under the fourteenth amendment.\textsuperscript{162} In \textit{Regents of University of California} followed the reasoning of the Fourth Circuit in \textit{Riddick} and criticized the \textit{Dowell} court's allocation of the burden of proof on the defendant school board. United States v. Overton, 834 F.2d 1171 (5th Cir. 1987). The court stated, "we are convinced that [a finding of unitariness] must also be accompanied by a release of a unitary district from the burden of proving that its decisions are free of segregative purpose." \textit{Id.} at 1175.

\begin{footnotesize}
\textsuperscript{159} Alves & Willie, \textit{supra} note 21, at 79. The \textit{Riddick} court limited the applicability of its holding to school systems with a judicial finding of unitariness. \textit{Riddick v. School Bd.}, 784 F.2d 521, 543 (4th Cir. 1986).
\textsuperscript{161} \textit{See Dowell}, 795 F.2d at 1523.
\end{footnotesize}
v. Bakke, a case involving graduate school admissions quotas, a re­
jected Caucasian medical school applicant challenged the validity of
the school's minority set-aside program on many grounds, including
equal protection under the fourteenth amendment. The Court
held that the University of California at Davis Medical School's rigid
use of quotas was unconstitutional. The Court stated:

If petitioner's purpose is to assure within its student body
some specified percentage of a particular group merely because
of its race or ethnic origin, such a preferential purpose must be
rejected not as insubstantial but as facially invalid. Preferring
members of any one group for no reason other than race or
ethnic origin is discrimination for its own sake. This the Con­
istution forbids.

The Court suggested in Bakke that racial quotas are constit­
tutional when used to remedy identified discrimination, but not
when implemented in response to "the effects of 'societal discrimi­
nation,' an amorphous concept of injury that may be ageless in its
reach into the past." The Court reaffirmed this position in City of
Richmond v. J.A. Croson Co. In that case, the city of Richmond,
Virginia, required contractors that were awarded city construction
jobs to subcontract at least thirty percent of the dollar amount of
their contracts to businesses owned by minorities. The Court held
that this system violated the equal protection clause because the city
had not implemented the plan to remedy discrimination against
Richmond contractors specifically. Rather, the city claimed that it
had adopted the plan in response to the effects of discrimination
in the construction industry in general. The Court stated: "Like
the claim that discrimination in primary and secondary schooling
justifies a rigid racial preference in medical schools admissions, an
amorphous claim that there has been past discrimination in a par­
ticular industry cannot justify the use of an unyielding racial
quota."

163 Id. at 277–78.
164 Id. at 307.
165 Id.
166 Id. at 307–09.
167 Id. at 307.
169 Id. at 712–13.
170 Id. at 730.
171 Id. at 723.
172 Id. at 724.
Bakke and Croson raise the question of whether the Court would uphold a controlled choice plan's use of racial quotas. In school desegregation cases, the Court has allowed the use of racial quotas as "a useful starting point in shaping a remedy to correct past constitutional violations." The Court, however, has authorized only the "very limited use" of quotas in formulating the racial makeup of a public school. The Court has expressly stated that racial balance in schools is not a "substantive constitutional right." Quotas are problematic both in a system that has attained unitary status and in a system that has never been desegregated by court order because evidence of specifically identified discrimination, which Croson requires, is absent.

The Court has suggested that once a school system achieves unitary status, the Court will not look to the past to find the requisite evidence of discrimination. In Keyes, the Court stated: "[A]t some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of de jure segregation warranting judicial intervention." Federal courts of appeals have also implied an unwillingness to look to the past. For example, the Fourth Circuit Court of Appeals stated in Riddick v. School Board: "While this history of discrimination cannot and should not be ignored, it 'cannot in the manner of original sin, condemn governmental action that is not itself unlawful.'" Additionally, the Fifth Circuit has ruled that "a finding of unitariness and dismissal . . . means that a school district has removed the taint of prior discrimination and attained the same legal status as a district that never has discriminated." Thus, in any school system that is not under a court order to desegregate, the use of racial quotas may not withstand attack.

Although the use of racial quotas is the feature that sets controlled choice apart from the freedom of choice plan struck down in Green, the Court's aversion to racial quotas is problematic for a controlled choice plan. For example, students excluded from the school of their choice under a controlled choice plan could challenge the plan's use of racial quotas on the same grounds that the plaintiff

174 Id.
175 Id. at 24.
178 United States v. Overton, 834 F.2d 1171, 1178 (5th Cir. 1987).
in *Bakke* challenged the medical school's admissions policy. Students excluded on the basis of race from a non-magnet or non-specialty school would not have a strong equal protection claim, however. As long as the school board equalized all schools as mandated by a controlled choice plan, the students can receive a similar education at any school in the district. Students excluded from a magnet school or other special program would have a stronger claim under the fourteenth amendment. Arguably, they were excluded from the school of their choice on the basis of race and, if no other school in the district offers that educational program, they have been denied equal protection under the fourteenth amendment.179 Thus, a plaintiff's strongest argument in a challenge to a controlled choice plan is that the plan's use of quotas is racially discriminatory.

VII. Conclusion

A controlled choice plan's use of racial quotas is constitutionally problematic. If a court finds intentional discrimination in a school system, the court will uphold the use of quotas. In a system that has achieved unitary status, however, it is questionable whether a court would rely on past discrimination to justify such racial classification. Because a constitutional right to racial balance in public schools does not exist, a controlled choice plan's use of racial quotas may lead to its downfall. A plaintiff's success in challenging a controlled choice plan, however, will also depend on the Supreme Court's resolution of the question of who carries the burden of proof in litigation concerning a unitary school system. It is unlikely that a plaintiff would prevail if forced to carry the burden of proof.

As Justice Powell stated in *Keyes*: "It is well to remember that the course we are running is a long one and the goal sought in the end—so often overlooked—is the best possible educational opportunity for all children."180 If a controlled choice plan accomplishes its stated purpose of providing students with quality desegregated educational opportunities, students have no cause to challenge the

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179 The Seventh Circuit confronted a similar issue in *Samayoa v. Chicago Board of Education*. 798 F.2d 1046, 1048–50 (7th Cir. 1986). In that case, Cuban, Native American, and Caucasian students alleged that the school board violated the fourteenth amendment in excluding them from a magnet school because of a quota system used to ensure racial balance. *Id.* at 1049. The court of appeals rejected their argument, holding that their exclusion was not a denial of equal protection. *Id.* at 1048–50. This decision lends support to the defense of a controlled choice plan's use of racial quotas.

plan. The fact that in nearly ten years of existence there has been little litigation concerning controlled choice suggests that it is capable of accomplishing its goal. Controlled choice is a promising plan to bring about the long-awaited end to the battle over desegregation in American education.

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