

THE LAW OF SCHOOL CATCHMENT AREAS

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INTRODUCTION

The established account of American school desegregation is one of triumph, then tragedy.¹ By the late 1960's, federal courts were finally matching the soaring aspiration of *Brown v. Board of Education*² with powerful remedies.³ Jim Crow school districts could no longer avoid integration through delay⁴ or phony choice plans;⁵ nor could northern school districts, segregated through different yet equally pernicious means,⁶ escape scrutiny under the 14th Amendment.⁷ But for civil rights activists, optimism quickly faded when a new conservative majority on the Supreme Court limited integration across school district lines,⁸ while public anti-busing sentiment reached a fever pitch.⁹ White families could now confidently escape integration by fleeing to the suburbs, away from already-shrinking cities.¹⁰ What's more, courts increasingly

1. See, e.g., Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597 (2003) (describing conservative court decisions of the 1970's and 1990's that are to blame for present-day segregation); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983) (discussing the interplay between popular sentiment and judicial remedies that has weakened desegregation efforts). Myron Orfield, *Milliken, Meredith, and Metropolitan Segregation*, 62 UCLA L. REV. 364 (2015) (using Detroit and Louisville as case studies of desegregation turned to re-segregation); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 252 (1999) (summarizing the legal history of desegregation remedies).

2. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

3. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (ordering busing of students across a large metropolitan district, Charlotte, to achieve integration).

4. See *Alexander v. Holmes Cty Bd. of Educ.*, 396 U.S. 19 (1969) (overturning lower court-approved delays of desegregation plans in southern Mississippi and holding that the previous standard of "all deliberate speed" was no longer permissible).

5. See *Green v. Cty. Sch. Bd. of New Kent City*, 391 U.S. 430 (1968) (holding that a Virginia school district's "freedom of choice" plan which resulted in continued segregation did not comply with *Brown*).

6. See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (detailing the history of housing segregation driven by government policy).

7. See *Keyes v. Sch. Dist. No. 1, Denver*, 413 U.S. 189 (1973) (holding that the Denver public school system had intentionally created and maintained segregated schools, in violation of the 14th Amendment).

8. See *Milliken v. Bradley*, 418 U.S. 717 (1974) (striking down a lower court's inter-district desegregation plan for the Detroit metropolitan area and affirming importance of local control over school districts).

9. See, e.g., JAY ANTHONY LUCAS, *COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES* (1985) (describing the controversy over court-ordered busing in Boston); but see MATTHEW F. DELMONT, *WHY BUSING FAILED: RACE, MEDIA, AND THE NATIONAL RESISTANCE TO SCHOOL DESEGREGATION* (2016) (arguing that a minority of parents and a racialized media conspired to defeat busing initiatives, rather than a true majority popular sentiment).

10. See JAMES S. COLEMAN ET AL., *Trends in School Segregation, 1968-73*, URB. INST. (1975) (finding causal links between desegregation orders and white flight); Diane Ravitch, *The "White Flight" Controversy*, 51 PUB. INTEREST 135, 145 (Spring 1978) (it is "impossible to contend" that court-ordered desegregation does not accelerate white flight).

released school districts from consent decrees despite lack of true “unitary status,”¹¹ while in other instances white districts were allowed to “secede” entirely from larger, more diverse ones.¹² As a result, this account goes, today schools across the nation have “re-segregated” to levels not seen since before *Brown*.¹³

That story needs an update. Today Americans are increasingly concentrated in dense metropolitan areas,¹⁴ in the center of which several of the nation’s largest cities are undergoing the phenomenon of gentrification.¹⁵ Racial and ethnic housing segregation has steadily decreased since *Brown*,¹⁶ partially due to increasing integration in the suburbs, but also because affluent, white families are basking in the “triumph of the city.”¹⁷ The attractiveness of an urban lifestyle is no longer a fantasy played out on “Friends,”¹⁸ but instead a real phenomenon that draws and retains white families in growing cities, due to

11. See *Missouri v. Jenkins*, 515 U.S. 70 (1995) (setting a goal of swift return of school governance to district authorities rather than courts); *Bd. of Educ. of Ok. City v. Dowell*, 498 U.S. 237 (1991) (holding that districts courts need only consider whether school districts have “complied in good faith” with prior court orders and whether de jure segregation has been eliminated “to the extent practicable”).

12. See Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139 (2016) (describing the phenomenon of “succession districts”); Nikole Hannah-Jones, *The Resegregation of Jefferson County*, N.Y. TIMES MAG. (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/magazine/the-resegregation-of-jefferson-county.html> (detailing the history and litigation over succession of one predominantly white Alabama town from its school district).

13. See Gary Orfield et al., *Brown at 60*, UCLA CIV. RIGHTS PROJECT (2014), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future>; see also, Sean F. Reardon and John T. Yun, *Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South, 1990-2000*, 81 N.C. L. REV. 1563 (2003) (describing the increase in black-white school segregation in the South in 1990s, even as residential segregation decreased).

14. See U.S. Census Bureau, *Growth in Urban Population Outpaces Rest of Nation*, *Census Bureau Reports* (Mar. 26, 2012), available at https://www.census.gov/newsroom/releases/archives/2010_census/cb12-50.html.

15. See BERNADETTE HANLON ET AL., *CITIES AND SUBURBS* (2009) (detailing the supply/demand factors that led to gentrification); Derek S. Hyra, *Conceptualizing the New Urban Renewal: Comparing the Past to the Present*, 48 URB. AFF. REV. 498 (2012) (providing an extensive analysis of the causes behind gentrification and urban renewal between 1992-2007).

16. See Edward Glaeser & Jacob Vigdor, *The End of the Segregated Century: Racial Separation in America’s Neighborhoods, 1890-2010*, 66 CIVIC REP. 1 (2012).

17. See generally, EDWARD GLAESER, *THE TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER* (2011).

18. *Friends* (Bright/Kauffman/Crane and Warner Bros. Productions 1994-2004). See Tim Gibson, *Urban Fortunes: Television, Gentrification, and the American City*, *FLOW JOURNAL* (Oct. 12, 2007), available at <https://www.flowjournal.org/2007/10/urban-fortunes-television-gentrification-and-the-american-city/> (describing how late-90’s television shows like “Friends” and “Sex and the City” reflected new popular conceptions of attractive urban life, contrasting with earlier shows showing urban decay, like “Hill Street Blues” or “Homicide: Life on the Streets”).

studied social¹⁹ and economic²⁰ benefits of agglomeration. In theory, then, within the nation's booming centers of urban gentrification, schools should be at least moderately integrating by race and ethnicity.

In practice, they are not; this paper aims to explain why. Undoubtedly a multitude of factors are at play, from continued housing segregation by neighborhood,²¹ to the persistent preference of white parents to send their children to private or parochial schools.²² But gentrification is spelling the decline of neighborhood segregation in many of the nation's wealthiest cities,²³ and urban white parents are beginning to shun the skyrocketing price of private education in favor of free public schools.²⁴ Why, then, are these diverse urban school districts still segregated?

This paper argues that understanding the law and policy of school attendance zones, or "catchment areas" (in the parlance of local government law), is crucial in explaining this phenomenon. A product of school district policy, catchment areas are the bounded zones which determine the school placement of roughly 80% of public school students;²⁵ more than 95% of

19. See Richard Florida, *Cities and the Creative Class*, 2 CITY & COMMUNITY 3 (2003) (arguing that successful cities attract diverse and innovative members of the "creative class").

20. See David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507 (2010) (economic agglomeration effects make locational decisions stickier for urban residents).

21. See Glaeser & Vigdor, *supra* note 16; see also William H. Frey, *Census Shows Modest Declines in Black-White Segregation*, BROOKINGS INST. (Dec. 5, 2015), <https://www.brookings.edu/blog/the-avenue/2015/12/08/census-shows-modest-declines-in-black-white-segregation> (concluding that segregation within metropolitan areas remains high, though is slightly lower since 2010).

22. See *infra*, notes 225-228 and accompanying text.

23. See Lance Freeman, *Neighbourhood Diversity, Metropolitan Segregation and Gentrification: What Are the Links in the US?* 46 URBAN STUDIES 2079 (2009) (finding a correlation between neighborhood-level diversity and gentrification); Lance Freeman & Frank Braconi, *Gentrification and Displacement: New York City in the 1990s*, 70 J. AM. PLANNING ASS'N 39 (2004) (finding lower rates of residential turnover in gentrifying neighborhoods compared to non-gentrifying neighborhoods); Glaeser and Vigdor, *supra* note 16.

24. See LINN POSEY-MADDOX, *WHEN MIDDLE SCHOOL PARENTS CHOOSE URBAN SCHOOLS: CLASS, RACE, AND THE CHALLENGE OF EQUITY IN PUBLIC EDUCATION* (2014) (analyzing class and race tensions when middle-class parents choose urban public schools); JENNIFER BURNS STILLMAN, *GENTRIFICATION AND SCHOOLS – THE PROCESS OF INTEGRATION WHEN WHITES REVERSE FLIGHT* (2012) (interviews with New York City parents in gentrifying neighborhoods); see also, Nikole Hannah-Jones, *Choosing a School for My Daughter in a Segregated City*, N.Y. TIMES MAG. (June 9, 2016), <https://www.nytimes.com/2016/06/12/magazine/choosing-a-school-for-my-daughter-in-a-segregated-city.html> (describing gentrification of public schools in Dumbo, Brooklyn).

25. Sarah D. Sparks, *New Tool Maps School Attendance Zones Across U.S.*, EDUC. WEEK (July 27, 2015), available at <https://www.edweek.org/ew/articles/2015/07/27/new-tool-maps-school-attendance-zones-across.html>.

public schools nationwide use catchment areas in some form.²⁶ These catchment areas, and the schools within them where students are assigned, are often more racially and ethnically segregated than districts themselves, and sometimes even more so than the small neighborhoods that surround them.²⁷ Today's acrimonious battles over desegregation are therefore as likely to take place at community meetings on the Upper West Side of Manhattan—where Donald Trump received 7.5% of the 2016 presidential vote²⁸—as in federal courthouses of the South.²⁹ Those catchment areas are the focus of this paper, which will use a variety of approaches to assess the law and policy of catchment areas. While legal and economics scholars have assessed the drawing of school district lines,³⁰ and others have examined the education policy effects of school catchment areas,³¹ this paper's unique contribution is in describing and assessing the legal and theoretical underpinnings of school catchment areas.

This paper will proceed as follows. Part I will provide an overview of the law and policy of catchment areas, and then will use school districts in New York, Washington, D.C., and San Francisco as case studies to analyze their effects further. Part II will examine the conceptual justifications for using school catchment areas in the context of local government theory, including comparisons to other intra-local institutions. Finally, Part III will evaluate potential reforms for catchment areas that would decrease racial segregation, returning to the case studies of the three aforementioned cities, as well as examining more radical reforms. In sum, this paper will argue that reliance on school catchment areas for student assignment, as currently instituted across the country, is a poor public policy choice with little theoretical justification.

PART I: THE LAW AND POLICY OF SCHOOL CATCHMENT AREAS

This Part will describe the law and policy of school catchment areas, beginning with federal case law around intra-district school desegregation and the weak legal limits on the power of school catchment areas. Next, this Part

26. See Tomas Monarrez, *Attendance Boundary Policy and Segregation of Public Schools in the United States* 1 (unpublished draft) (2017), <https://sites.google.com/site/tmonarrez>.

27. See *infra* Part I.B.1.

28. Tanveer Ali, *How Every New York City Neighborhood Voted in the 2016 Presidential Election*, DNAINFO (Nov. 9, 2016), <https://www.dnainfo.com/new-york/numbers/clinton-trump-president-vice-president-every-neighborhood-map-election-results-voting-general-primary-nyc>.

29. See Patrick Wall, *The Privilege of School Choice*, THE ATLANTIC (Apr. 25, 2017), <https://www.theatlantic.com/education/archive/2017/04/the-privilege-of-school-choice/524103> (analyzing the history of a recent Upper West Side rezoning fight).

30. See, e.g., WILLIAM A. FISCHER, *MAKING THE GRADE: THE ECONOMIC EVOLUTION OF AMERICAN SCHOOL DISTRICTS* (2009); Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495 (2010).

31. See *infra* Part I.B.2.

will review the empirical evidence for these drawbacks on a national basis—namely, that catchment areas tend to create segregated clusters of student achievement. Finally, this Part will use case studies of three large urban school districts experiencing rapid gentrification to demonstrate the drawbacks of relying heavily on school catchment zones to define student assignment.

A. *National Overview of School Catchment Area Law*

1. *The Constitutional Centrality of Catchment Areas*

School catchment areas have taken on such prominence in school desegregation debates because of dwindling opportunities to integrate schools by other legal means. It was not always this way. In the decade and a half following *Brown*, civil rights advocates racked up victories in federal court mandating that districts dismantle segregation by a variety of means. Initially activists tackled de jure segregation in the former Confederacy, and won rulings attacking “freedom of choice” plans as inadequate³² and ordering busing within large districts.³³ But soon the desegregation fight moved north, perhaps reaching its zenith in *Keyes*, where the Court held that Denver’s decades-long housing segregation was responsible for racially isolated schools.³⁴ For a moment, it seemed, all school districts in the country would be scrutinized for racial isolation, and perhaps be forced to remediate via busing.

But this moment quickly faded, as the Supreme Court took a rightward turn with President Nixon’s three appointments. In 1974 the Court held in *Milliken v. Bradley* that while busing *within* a segregated district may be an appropriate remedy, doing so *across multiple districts* is improper unless each district is acting to perpetuate a segregated system.³⁵ Furthermore, *Milliken’s* language held sacrosanct “local control” over district schools: “No single tradition in public education is more deeply rooted than local control over the operation of schools.”³⁶ The effect was immediate: in Denver, for example, white families after *Keyes* quickly fled the district boundaries in large numbers, and the state of Colorado in 1974 adopted a constitutional amendment prohibiting urban

32. See *Green*, *supra* note 5.

33. See *Swann*, *supra* note 3. Indeed, racially restrictive catchment areas took on increased importance in the South not only because of prior de jure segregation, but also because southern school districts were typically far larger and racially diverse as a whole than their northern counterparts. Fischel argues this fact stemmed from the historic inefficiency of southern localities separating white and black children into separate school districts, and instead choosing to operate one large but dual system. See Fischel, *supra* note 30, at 157-216.

34. See *Keyes*, *supra* note 7.

35. See *Milliken*, *supra* note 8, at 745.

36. *Id.* at 742.

districts from annexing new areas in the suburbs.³⁷ Court-ordered desegregation across multiple districts, it seemed, was now dead and buried.³⁸

Desegregation remedies even within single districts didn't fare much better. The Court soon loosened the standard for when de jure-segregated districts had achieved unitary status—i.e., a single, integrated district rather than dual, segregated districts—moving away from its earlier mandate that racial discrimination “be eliminated root and branch.”³⁹ In *Dowell*, the Court now held that Oklahoma City public schools should be released court supervision where the district could show compliance with court orders “for a reasonable period of time”—even where, as in *Dowell*, the district was moving decisively to re-segregate schools after the court withdrew its supervision.⁴⁰ The Court added in *Freeman v. Pitts* that districts—in this case, one in suburban Atlanta—need not demonstrate unitary status in all categories of school policy to be released from court supervision in incremental stages.⁴¹ And most recently, the Court has flipped the script on *Brown* and struck down even voluntary measures aimed at intra-district desegregation in districts with or without a history of de jure segregation. In *Parents Involved*, a divided Court found that the Seattle and Louisville school districts had violated white students' 14th Amendment rights by using school assignment formulas designed to prevent racial isolation.⁴²

While concurring in the judgment of *Parents Involved*, however, Justice Kennedy singled out the drawing of school catchment areas as one important tool for districts to voluntarily increase student diversity. District administrators “may pursue the goal of bringing together students of diverse backgrounds and races through other means, including...drawing attendance zones with general recognition of the demographics of neighborhoods...and tracking enrollments, performance and other statistics by race.”⁴³ One scholar points out that Kennedy's carefully caveated language mimics the Court's precedents in the context of affirmative action in higher education: to avoid strict scrutiny from courts, when districts draw attendance zones they must consider a “general recognition of the demographics of the neighborhood,” rather than any strict,

37. See CHUNGMEI LEE, THE CIV. RIGHTS PROJECT AT HARV. U., DENVER PUBLIC SCHOOLS: RESEGREGATION, LATINO STYLE 3 (2006), <https://files.eric.ed.gov/fulltext/ED500819.pdf>.

38. The exceptions are a few successful suits stemming from state law. See, e.g., *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996) (ordering inter-district remedies in the Hartford area based on Connecticut state constitutional violations).

39. See *Green*, *supra* note 5, at 438.

40. *Dowell*, *supra* note 11, at 248.

41. See *Freeman v. Pitts*, 503 U.S. 467 (1992).

42. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

43. *Id.* at 782 (Kennedy, J. concurring in part and concurring in the judgment).

race-based quotas.⁴⁴ Kennedy's standard has been widely recognized as the controlling precedent in *Parents Involved*, and districts across the country have used his guidance to fashion desegregation schemes based on attendance zones.⁴⁵

2. *The Legal Limits of Catchment Areas*

Legally, catchment areas are the creations of school districts, which in turn are creations of the states. In most instances, school districts themselves are but one of many of "special purpose districts" authorized by state government to provide services separately from traditional municipal governments. Though states may employ different legislative means of authorizing (or restricting the authority of) school districts, ultimately the state legislature must act.⁴⁶ These "independent school districts," not governed by another municipal authority or by the state directly, typically have a nonpartisan, elected board of members that sets policy and appoints a district superintendent. By contrast, a small minority of school districts—about 1,500 out of 14,000—are not independent, but instead are governed directly by county, town, city, or even state government.⁴⁷ But within this minority are several of the most populous school districts in the country, which are effectively controlled by the mayor: New York City, Chicago, Washington, D.C., and Boston.⁴⁸ Whatever the form of school district governance, the manner in which school district authorities draw catchment area lines is far too varied to summarize neatly. Indeed, even in New York City, where near-absolute authority comes from the mayor, state law delegates veto power over catchment areas to an entirely separate, obscure body.⁴⁹

In addition to local and state law, federal constitutional law may place constraints on the drawing of catchment areas. First, there is the question of who decides—that is, how representatives of school district governance are chosen. Since 1969 the Court has held that local elections, including those for school boards, are subject to the same "one-person, one-vote" principle laid down years earlier for federal elections.⁵⁰ But in the years that followed, the Court carved out exceptions where the responsibilities of a special purpose

44. See Rachel M. Abel, *Drawing the Lines, Pushing Past Arlington Heights and Parents Involved in School Attendance Zone Cases*, 2012 B.Y.U. EDUC. & L.J. 369, 399 (2012).

45. See *infra* Part III.A.

46. See LYNN A. BAKER ET AL., *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* 205-06 (5th ed. 2015).

47. *Id.*

48. See National League of Cities, *List of Mayor-Controlled Public Schools*, <http://www.nlc.org/list-of-mayor-controlled-public-schools>. Other districts such as those in Philadelphia and Baltimore City share power between the mayor and the governor.

49. See *infra*, Part I.C.1.

50. See *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969).

district “are so far removed from the normal governmental activities and so disproportionately affect different groups” that “one-person, one-vote” would not apply.⁵¹ For example, the Court upheld restrictions of voting rights for a water storage district⁵² and an agricultural improvement and electrical district⁵³ on the basis that the powers of those bodies were limited and narrow—even where, in the latter case, its operations affected a broad swatch of residents. Therefore, while it is clear that elections for school district governance must follow the “one-person, one-vote” principle, it is not clear whether the same standard applies to a more localized elected body exercising control over one or more catchment areas.

Second, there is the constitutional question of whether the shape of a catchment area may violate the Equal Protection Clause. In an obvious case, it is clear from *Parents Involved*⁵⁴ (as well as older precedents like *Washington v. Davis*⁵⁵) that a district cannot intentionally assign students to schools based on race alone. But where a district draws facially race-neutral catchment areas that have a discriminatory effect, it is unlikely that courts would not find an Equal Protection Clause violation absent proof of discriminatory intent. In the *Keyes* case, for example, even a more liberal Court defined de jure segregation as “a current condition of segregation resulting from *intentional* state action.”⁵⁶ In one recent case that reached the Fifth Circuit from Louisiana, a school district that had recently been freed from court supervision enacted a school assignment plan with a clear segregating effect. The Court held that the case should be examined for “discriminatory motive,” absent which the plan could proceed.⁵⁷ In a similar case, the Sixth Circuit upheld a bench trial finding against plaintiffs who could not prove that a Nashville catchment area plan used any explicit racial classifications. The Court explained:

To accept the general claim that geography-based school-assignment policies are unconstitutional because they are really nothing more than race-based policies in disguise would mean that neighborhood-school policy adopted in a community with racially identifiable housing patterns is unconstitutional. Such a far-reaching implication has been repeatedly disavowed by...the Supreme Court.⁵⁸

51. *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 56 (1970).

52. *See Sayler Land Co. v. Tulare Water Dist.*, 410 U.S. 719 (1973).

53. *See Ball v. James*, 451 U.S. 355 (1981).

54. *See Parents Involved*, 551 U.S. at 701 (2007).

55. *See Washington v. Davis*, 426 U.S. 229 (1976) (holding that the government violates the Equal Protection Clause where it enacts a policy that has discriminatory purpose and discriminatory impact).

56. *Keyes*, 413 U.S. at 205 (1973) (emphasis added).

57. *Lewis v. Ascension Par. Sch. Bd.*, 662 F.3d 343, 352 (5th Cir. 2011).

58. *Spurlock v. Fox*, 716 F.3d 383, 396 (6th Cir. 2013).

It is perhaps unsurprising, then, that as a descriptive question, catchment areas are often more racially and ethnically segregated than their school districts, and sometimes even the smaller neighborhoods that surround them.⁵⁹

B. *Policy Effects of School Catchment Area Law*

1. *Effect on Racial and Ethnic Segregation*

As reviewed earlier, a bevy of research has concluded that American public schools today remain highly segregated, including in the three case study cities examined in this paper.⁶⁰ While less research addresses a causal connection between that phenomenon and catchment areas, there is an emerging consensus that the reliance of school catchment areas in student assignment systems reinforces, and in some instances exacerbates, racial and ethnic segregation.

Using geospatial analysis combined with demographic data, one set of researchers have found that the average school catchment areas is “gerrymandered” to reflect racial and ethnic isolation at the neighborhood level, and in some cases exaggerate that isolation. Most recently, Tomas Monarrez concluded overall that the typical catchment area recreates residential segregation, though he also noted “ample heterogeneity,” with several large school districts exacerbating segregation with gerrymandered catchment areas, and some lessening the effects of neighborhood segregation.⁶¹ Similarly, Meredith Richards examined a national sample of more than 15,000 catchment areas across 663 districts. Richards compared these catchment areas to imaginary “natural” school boundaries (either circles or polygons typically used in other types of gerrymandering studies). She concluded that, although there is some variability in the effects of catchment areas on segregation, catchment areas overall result in more racially and ethnically segregated schools than natural school boundaries would create. In particular, school districts that have recently experienced rapid demographic changes are more likely to have such racially and ethnically gerrymandered catchment areas.⁶² Indeed, another researcher studied the redrawing of catchment areas in 2009 in Henrico County, Virginia, a school district near Richmond that experienced had experienced 50% overall growth since 1990, including an influx of black and Latino students. The elected school board considered several plans, but ultimately landed on one that created irregular catchment areas which exacerbated patterns of racial isolation in its high schools.⁶³

59. *See infra* Part I.B.

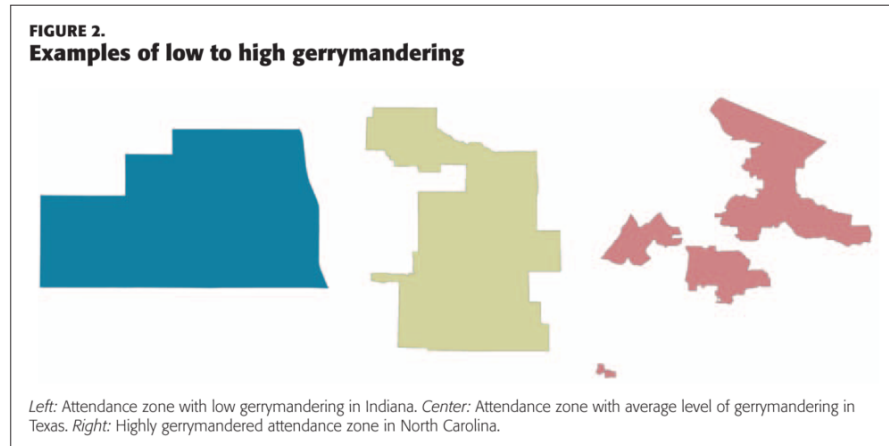
60. *See infra* Part I.C.

61. *See* Monarrez, *supra* note 26, at 3.

62. *See* Meredith P. Richards, *The Gerrymandering of School Attendance Zones and the Segregation of Public Schools: A Geospatial Analysis*, 51 AM. EDUC. RES. J. 1119 (2014).

63. *See* Genevieve Siegel-Hawley, *Educational Gerrymandering? Race and Attendance Boundaries in a Racially Changing Suburb*, 83 HARV. EDUC. REV. 580 (2013).

In a later study, Richards and Kori Stroub examined an even larger set of catchment zones to determine the extent of catchment area gerrymandering. The two used the following figure to illustrate their conclusions:



Roughly one out of ten catchment areas show low levels of gerrymandering, similar to the blue figure on the left. The average catchment area is reflected in the beige figure in the middle, where the shape is irregular but at least contiguous. And in roughly one in ten instances, catchment areas appear similar to the red figure on the right—non-contiguous, and not resembling any typical neighborhood.⁶⁴

2. Effect on Student Achievement

Given the numerous variables involved, it is quite difficult to measure the direct impact of catchment area-based school assignment upon student achievement.⁶⁵ But if we accept that reliance on catchment areas results in racial and ethnic segregation, there is plenty of research to conclude that catchment areas negatively affect children of all backgrounds.

64. See Meredith P. Richards & Kori Stroub, *An Accident of Geography? Assessing the Gerrymandering of Public School Attendance Zones*, 117 TEACHERS COL. REC. 1 (2015); see also *Shaw v. Reno*, 509 U.S. 630, 647 (1993) and Justin Levitt, *The Legal Context for Scientific Redistricting Analysis* 19 (Loy. L. Sch. Legal Stud. Paper No. 2011-13, (2011) (noting that Supreme Court has held that contiguity is one important “traditional districting principle” in considering whether electoral districts have been racially gerrymandered).

65. One indication of this difficulty is the vastly divergent literature on the effect of school choice and open enrollment systems on student achievement. See Valerie Ledwith, *The Influence of Open Enrollment on Scholastic Achievement Among Public School Students in Los Angeles*, 116 AM. J. OF EDUC. 243, 244-46 (2010) (reviewing the sprawling and contradictory literature on the subject).

Decades of research have documented the detrimental impact of racial and ethnic segregation on the education outcomes for children. To begin with, highly effective, qualified, and experienced teachers are less likely to teach in segregated school settings,⁶⁶ and teacher quality has been demonstrated to be the most powerful influence on academic achievement.⁶⁷ Second, schools serving racially and ethnically concentrated minorities are more likely to provide less challenging curricula⁶⁸ and focus on rote skills and memorization,⁶⁹ with fewer AP-or honors-level courses offered.⁷⁰ Finally, school discipline is far harsher and expulsion rates higher at segregated schools.⁷¹ As a result of these factors and more, school segregation is linked to higher dropout rates, lower college-going rates, lower test scores,⁷² and long-term psychological and economic harm done to minority students.⁷³

Desegregation, on the other hand, has proven a consistently effective trigger for boosting outcomes not only for racial and ethnic minorities, but also for white students.⁷⁴ Students in integrated schools are significantly more likely to graduate high school,⁷⁵ score higher on standardized tests,⁷⁶ demonstrate

66. See Charles T. Clotfelter et al., *Who Teaches Whom? Race and the Distribution of Novice Teachers*, 24 ECON. ED REV. 377 (2005).

67. See, e.g., Steven G. Rivkin et al., *Teachers, Schools, and Academic Achievement*, 73 ECONOMETRA 417 (2005).

68. See Russell W. Rumberger & Gregory J. Palardy, *Does Segregation Still Matter? The Impact of Student Composition on Academic Achievement in High School*, 107 TEACHERS COL. REC. 1999 (2005).

69. See Christopher B. Knaus, *Still Segregated, Still Unequal: Analyzing the Impact of No Child Left Behind on African-American Students*, in THE STATE OF BLACK AMERICA: PORTRAIT OF THE BLACK MALE 105 (The National Urban League ed., 2007).

70. See Gary Orfield & Chungmei Lee, *Why Segregation Matters: Poverty and Educational Inequality*, UCLA: THE CIVIL RIGHTS PROJECT (2005).

71. See Advancement Project & The Civil Rights Project, *OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES* (2000).

72. See Orfield & Lee, *supra* note 70; see, e.g., James Benson & Geoffrey Borman, *Family, Neighborhood, and School Settings Across Seasons: When Do Socioeconomic Context and Racial Composition Matter for the Reading Achievement Growth of Young Children?*, 112 TEACHERS COL. REC. 1338 (2010); See, e.g., R.A. Mickelson, *Segregation and the SAT*, 67 OHIO ST. L.J. 157 (2006); R.A. Mickelson, *First- and Second-Generation Segregation in the Charlotte-Mecklenburg Schools*, 38 AM. EDUC. RES. J. 215 (2001).

73. See Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. EDUC. RES. 531 (1994); see also Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods – A Constitutional Insult*, 7 RACE SOC. PROBS. 21 (2015).

74. See generally Amy Stuart Wells et al., *How Racially Diverse Schools and Classrooms Can Benefit All Students*, CENTURY FOUND. (Feb. 2016), <https://tcf.org/content/report/how-racially-diverse-schools-and-classrooms-can-benefit-all-students> (summarizing the plethora of research linking favorable outcomes to desegregation).

75. See Robert Balfanz & Nette Legters, *Locating the Dropout Crisis: Which High Schools Produce the Nation's Dropouts? Where Are They Located? Who Attends Them?*, CRESPAR (2004), <https://files.eric.ed.gov/fulltext/ED484525.pdf>.

higher-order critical thinking and problem-solving skills,⁷⁷ and receive more equitable access to resources.⁷⁸ One study found that attending an integrated school was a more effective academic intervention than increased school funding,⁷⁹ while another found that reducing segregation nationally by 50% would improve the economy by more than three times the cost of doing so.⁸⁰ In short, students would significantly benefit academically from a decrease in racial and ethnic segregation, and would therefore benefit from less reliance on catchment area-based student assignment policy.

3. *Effect on Property Values*

Finally, a third policy consideration is economic rather than educational: how school catchment areas affect property values. The literature on this topic is somewhat mixed, although nearly all conclude that housing prices rise and fall to some degree according to the school catchment area lines.

A few studies produce a hedonic model—that is, an estimate of the contributory value of a single independent variable—in which school quality affects the pricing of housing according to catchment area.⁸¹ One study considered several school districts in Massachusetts, and then compared prices within them by catchment area, controlling for other factors. It concluded that a 5% increase in elementary school test scores within a given catchment area (approximately one standard deviation) led to an increase of 2.1% in the mean house price.⁸² Another study examined how the quality of schools within a given catchment area affected housing prices, using data from Florida reform whereby every public school in the state would be assigned a letter grade from A-F based on its performance. Researchers concluded that, although the effect

76. See David Card & Jesse Rothstein, *Racial Segregation and the Black-White Test Score Gap* (Nat'l Bureau of Econ. Research, Working Paper No. 12078, 2006), <https://www.nber.org/papers/w12078.pdf>.

77. See generally SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2008).

78. See Amy Stuart Wells, *Why Boundaries Matter: A Study of Five Separate and Unequal Long Island School Districts* (July 2009) (unpublished report), <http://www.policyarchive.org/handle/10207/95995>.

79. See Heather Schwartz, *Housing Policy Is School Policy: Economically Integrative Housing Promotes Academic Success in Montgomery County, Maryland*, in *THE FUTURE OF SCHOOL INTEGRATION* 27 (Richard D. Kahlenberg ed., 2012).

80. See Marco Basile, *The Cost-Effectiveness of Socioeconomic School Integration*, in *THE FUTURE OF SCHOOL INTEGRATION*, *supra* note 79, at 27.

81. Other research concludes that increases in school funding also drives up housing prices. See, e.g., Linda Loubert, *Housing Markets and School Financing*, 30 J. EDUC. FIN. 412 (2005) (summarizing literature on this causal effect). But because here we are considering homes within the same district, school funding should be equalized across all catchment areas, save for unofficial subsidies from PTA's and other groups which are hard to calculate.

82. See Sandra E. Black, *Do Better Schools Matter? Parental Valuation of Elementary Education*, 114 Q. J. ECON. 577 (1999).

dissipated over time because the grades fluctuated year to year, in the first year the distinction between an “A” and “B” grade was valued at a 19.5% difference in the housing market, and the difference between “B” and “C” was valued at 15.6%.⁸³

Nonetheless, other research suggests that, to the extent housing prices are driven by school catchment area, this phenomenon stems from the demographics of schools rather than quality itself. One study analyzed the impact of desegregation efforts in Mecklenberg County, North Carolina in the late 1990’s that resulted in redrawing catchment areas to ensure compliance with the decades-old desegregation order.⁸⁴ Though it found significant pricing differentials according to the new catchment areas, the effect of test scores themselves were less than one quarter of what one might expect. Instead, over time the demographics of catchment areas themselves shifted, as did the quality of the housing stock, which in turn were the true drivers of prices.⁸⁵

Other analyses demonstrate the impact of school reputation rather than quality. A summary of parent surveys in the Hartford metropolitan area found that a majority of homeowners obtained information about the school in their catchment area through “social networks” rather than actual research about the school’s profile or test scores. More startling, 25% of homeowners who said that schools were part of their home-buying decision were not able to accurately state the schools for which they were zoned.⁸⁶ Finally, though not directly relevant to the question of housing prices, other studies have found that parent choice is often more driven less by quality or impact of instruction than by the achievement of the students who enter the school.⁸⁷

In sum, catchment area lines have an exogenous effect on housing prices; why this is so is less clear, and how housing prices react to fundamental changes in catchment area law will be explored later in this paper.

83. David N. Figlio & Maurice E. Lucas, *What’s in a Grade? School Report Cards and the Housing Market*, 94 AM. ECON. REV. 591, 593 (2004).

84. *Swann*, 402 U.S. at 7.

85. See Thomas J. Kane et al., *School Quality, Neighborhoods, and Housing Prices*, 8 AM. L. & ECON. REV. 183 (2006).

86. See Christina Ramsay et al., *Shopping for Homes and Schools: A Qualitative Study of West Hartford, Connecticut*, (2006) (unpublished), http://digitalrepository.trincoll.edu/cgi/viewcontent.cgi?article=1028&context=cssp_papers.

87. See, e.g., Atila Abdulkadiroglu et al., *Do Parents Value Effectiveness?* (Nat’l Bureau of Econ. Research, Working Paper No. 23912, 2017), <https://www.nber.org/papers/w23912.pdf> (concluding that in the New York City high school enrollment process, parents prefer schools that enroll high-achieving peers to schools that actually demonstrate improvements in student outcomes).

C. Local Case Studies of School Catchment Area Law

1. New York City

Catchment areas in New York City Public Schools, the largest school district in the country by far, apply primarily to student assignment for elementary school. For kindergarten-5th grade, families have virtually no traditional public school choices aside from their assigned school.⁸⁸ By middle school, students generally may choose schools outside of their immediate elementary school catchment areas, but still within their community school district, which is a larger neighborhood within their borough.⁸⁹ In high school, the student assignment process is far more complex and relies less on catchment areas.⁹⁰

The school system remains highly segregated. The overall population of the more than 1.1 million public school students in the 2016-17 school year was 27% black, 40% Hispanic, 16% Asian, 15% white, and the rest other races or ethnicities, or mixed.⁹¹ And yet in almost 70% of elementary schools, the population is either 80% or more black and Hispanic, or 80% or more white or Asian. The average black or Hispanic student attends an elementary school that is made up of 80% black or Hispanic students.⁹² Generally speaking, the city's school catchment areas reinforce residential segregation.⁹³ But in many instances, catchment areas are more racially and ethnically segregated than their neighborhoods. One study compared the makeup of catchment areas with community school districts, the thirty-two subdivisions of the city that are slightly larger than catchment areas but still far smaller than boroughs. It found that in nearly sixty elementary schools, with a combined enrollment of more than 28,000 children, the population of the neighborhood was less than 80% black or Hispanic, and yet the catchment area was more than 90% black and Hispanic. The analysis found this phenomenon most prevalent in neighborhoods that have recently gentrified. On the Upper West Side, for example, before a contentious re-zoning in 2016, P.S. 191 had an 80% black and Hispanic population, while the population of the community school district

88. See *Elementary School*, NEW YORK CITY DEP'T OF EDUC., <https://www.schools.nyc.gov/enrollment/enroll-grade-by-grade/kindergarten> (last visited April 28, 2019).

89. See *Middle School*, NEW YORK CITY DEP'T OF EDUC., <https://www.schools.nyc.gov/enrollment/enroll-grade-by-grade/middle-school> (last visited April 28, 2019).

90. See *infra*, Part III.B.1.

91. *Information and Data Overview*, NEW YORK CITY DEP'T OF EDUC., <http://schools.nyc.gov/Accountability/data/default.htm> (last visited Apr. 23, 2019).

92. Elizabeth A. Harris & Ford Fessenden, *The Broken Promises of Choice in New York City Schools*, N.Y. TIMES (May 5, 2017), https://www.nytimes.com/2017/05/05/nyregion/school-choice-new-york-city-high-school-admissions.html?_r=0%20-.

93. See Alvin Chang, *We Can Draw School Zones to Make Classrooms Less Segregated: This Is How Well Your District Does*, VOX (Jan. 8, 2018), <https://www.vox.com/2018/1/8/16822374/school-segregation-gerrymander-map>.

was just 21% black and Hispanic. In downtown Brooklyn, P.S. 287 had an 89% black and Latino population, while the district was 43% black and Latino.⁹⁴

Historically, New York's public school governance has been a pendulum swinging from decentralization to centralization, with one important exception as a constant: the hyper-local determination of school catchment areas. Writes historian Diane Ravitch, "[W]hen...the political legitimacy of educational authorities appeared doubtful, there has been a trend to decentralize control of the schools, as in the 1840s and 1960s."⁹⁵ Her reference to the 1960s, indeed, informs the city's current last gasps of decentralization. Up until that point, for decades the mayor had appointed the entire nine-member Board of Education. But in 1969 the state legislature, with support from Mayor John V. Lindsay, devolved power to thirty-two elected community school boards, which would make most decisions for elementary and middle schools (including catchment area lines).⁹⁶ ⁹⁷ A central Board of Education, appointed jointly by borough presidents and the mayor, would have authority over high schools and system-wide matters such as school lunches, construction, and certain budgeting authority.⁹⁸

The pendulum swung back toward centralization in 2002 under Michael Bloomberg. The newly elected mayor secured near-total control over the nation's largest school system after months of negotiation with legislative leaders and the governor. The initial state law eliminated the city's thirty-two local community school boards completely and created a task force to devise a replacement to ensure some measure of localized input. Nearly all power now flowed to the mayor's appointed chancellor, who would oversee the district's daily management.⁹⁹ The mayor moved quickly to eliminate the staff and

94. Clara Hemphill & Nicole Mader, *Segregated Schools in Integrated Neighborhoods: The City's Schools Are Even More Divided Than Our Housing*, THE NEW SCHOOL: CENTER FOR NEW YORK CITY AFFAIRS (2016), <http://www.centernyc.org/segregatedschools>.

95. DIANE RAVITCH, *THE GREAT SCHOOL WARS: A HISTORY OF THE NEW YORK CITY PUBLIC SCHOOLS* 401 (1974).

96. See Anenoma Hartocollis, *Growing Outrage Leads Back to Centralized Leadership*, N.Y. TIMES (Jun. 7, 2002), <http://www.nytimes.com/2002/06/07/nyregion/consensus-city-schools-history-growing-outrage-leads-back-centralized-leadership.html>.

97. Lindsay's support of school decentralization was part of a larger push, popular among progressive urbanists at the time, to transfer municipal decision-making away from City Hall and into individual communities. Lindsay established informal, decentralized administrative centers across the city known as "Little City Halls" where commissioners could respond directly to hyper-local concerns, and eventually created an Office of Neighborhood Government to coordinate city services with neighborhood leaders. See David Rogers, *Management Versus Bureaucracy*, in *SUMMER IN THE CITY: JOHN LINDSAY, NEW YORK, AND THE AMERICAN DREAM* 123-28 (Joseph P. Viteritti ed., 2014).

98. See Hartocollis, *supra* note 96.

99. See Catherine Gewirtz, *N.Y.C. Mayor Gains Control Over Schools*, EDUC. WK. (Jun. 19, 2002), https://www.edweek.org/ew/articles/2002/06/19/41_nyc.h21.html; James C. McKinley, Jr., *State Senate Passes Bill Giving Mayor Control of Schools*, N.Y. TIMES (Jun. 12, 2002), <http://www.nytimes.com/2002/06/12/nyregion/state-senate-passes-bill-giving-mayor-control-of-schools.html>; *Panel for Education Policy*, NEW YORK CITY DEP'T OF

administrators of the old local community boards, replacing them with a small number of regional superintendents who would oversee instruction and report directly to the chancellor.¹⁰⁰

But Bloomberg soon found himself unable to jettison the community school boards completely. For one thing, several aspects of city voting law were still under supervision of the U.S. Department of Justice, stretching back to Voting Rights Act violations from the late 1960s. In 1998 DOJ denied granting preclearance under Section 5 of the Voting Rights Act to a Republican-passed plan in the state legislature that would have changed the method of voting for community school boards.¹⁰¹ In fact, several state senators reportedly agreed to pass Bloomberg's centralization bill only because they assumed DOJ would force Bloomberg to reinstate the community boards.¹⁰² Instead, when DOJ appeared to drag its feet at Bloomberg's takeover, Democratic state senator Carl Kruger and other activists took matters into their own hands and filed suit in state court to save the community boards. Bloomberg was also facing pushback from parent activists and the powerful United Federation of Teachers over the prospect of total centralization.¹⁰³

As a result, in 2003 Bloomberg struck a compromise, with huge implications for catchment areas. The mayor settled in state court and received DOJ approval for a legislative plan that was negotiated with leaders in Albany. The community school boards would retain token authority: a miniscule staff of three (compared to hundreds under the old system), and a superintendent with virtually nonexistent authority. But accompanying the community school boards were new bodies called Community District Education Councils ("CECs"). These councils would have several advisory duties and public hearing obligations, but only one real exercise of veto power over the mayor: under the statute they would have the power to "approve zoning lines, as submitted by the superintendent, consistent with the regulations of the chancellor, applicable to schools under the jurisdiction of the community district."¹⁰⁴ The relevant "regulation...of the chancellor" essentially requires

EDUC., <https://www.schools.nyc.gov/about-us/leadership/panel-for-education-policy> (last visited Apr. 28, 2019). A new Panel for Education Policy replaced the central Board of Education to advise on budgetary planning and certain citywide policy matters, but the majority of its members would be the mayor's appointees.

100. See Abby Goodnough, *Mayor Sets Plan for Tight Control Over City Schools*, N.Y. TIMES (Jan. 16, 2003), <http://www.nytimes.com/2003/01/16/nyregion/vision-for-schools-overview-mayor-sets-plan-for-tight-control-over-city-schools.html>.

101. See Tamar Lewin, *School Plan May Face Tough Hurdle in Washington*, N.Y. TIMES (Jun. 7, 2002), <https://www.nytimes.com/2002/06/07/nyregion/consensus-city-schools-legalities-school-plan-may-face-tough-hurdle-washington.html>.

102. See McKinley, Jr., *supra* note 99.

103. See Catherine Gewertz, *NYC Mayor's Strategy for Schools is Drawing Flak*, EDUC. WK., (May 21, 2003), <https://www.edweek.org/ew/articles/2003/05/21/37nyc.h22.html>.

104. N.Y. EDUC. LAW § 2590-e (2009).

that the community superintendent receive approval from the chancellor¹⁰⁵ – meaning that no catchment area rezoning can move forward without approval from both the mayor and the relevant CEC.^{106 107}

The election of CEC members would be a byzantine process that many find unrepresentative of the local population. Of the twelve members, nine must be parents who are elected by the leadership (president, secretary, and treasurer) of the Parent-Teacher Associations from each elementary and middle school in the district – typically a voting population of around seventy-five. The remaining two members are appointed by the borough president.¹⁰⁸ Of the parent members, they must attend a candidates' forum before being selected by the PTA officers. The Bloomberg administration in the late 2000's set up an online straw poll for all parents to weigh in, although ultimately only the PTA leaders had a vote.¹⁰⁹ Critics charged that Bloomberg did too little to recruit candidates and streamline the election process; but even after his predecessor Bill de Blasio created outreach programs to increase participation from both candidates and PTA leaders, participation remains uneven. Some Brooklyn districts in recent years, for example, had about three times as many parents run for CEC seats as others, and had highly uneven voting rates from PTA leaders.¹¹⁰ In addition, technical glitches continue to taint the process.¹¹¹

Nonetheless, CECs remain ground zero for the most critical debates in the city over school desegregation. In the 2012-2013 school year alone, CECs considered fourteen proposals submitted by the chancellor to redraw catchment areas, all duked out at CEC hearings. At a hearing to consider an ultimately failed plan to diversify Park Slope's elementary schools, discussion gave way

105. See CHANCELLOR'S REG. A-185 § (II)(A)(2).

106. See *Avery Parents' Ass'n, Ltd. v. N.Y.C. Dep't of Educ.*, 910 N.Y.S.2d. 760 (N.Y. Sup. Ct. 2010) (affirming CEC's veto power but rejecting petition on the grounds that the city met its procedural obligations).

107. Interestingly, an alternative compromise was floated by two members of the City Council's Education Committee who would go on to remarkable prominence as antagonists over the city's education policy. The proposal would have created two councils: one for elected parents and one for appointed community members, both of which would exercise more significant authority local oversight over schools, including over catchment area lines. Those two Council Members were Eva Moskowitz (now leader of Success Academy Charter Schools) and Bill de Blasio (now mayor). See *The Council's Plan*, GOTHAM GAZETTE (Jan. 16, 2003), <http://www.gothamgazette.com/government/1626-the-councils-plan0>.

108. See N.Y. Educ. Law § 2590-c.

109. See Beth Fertig, *The Debate Over "Community Education Councils,"* WNYC (Apr. 21, 2009), <https://www.wnyc.org/story/74696-the-debate-over-community-education-councils>.

110. See Patrick Wall, *After City Outreach, More Parents Participate in Education Council Elections*, CHALKBEAT NY (May 13, 2015), <https://ny.chalkbeat.org/posts/ny/2015/05/13/after-city-outreach-more-parents-participate-in-education-council-elections>.

111. Susan Edelman, *Parents outraged DOE isn't doing anything about advisory election 'glitches,'* N.Y. POST (Jun. 4, 2017), <https://nypost.com/2017/06/04/parents-outraged-doe-isnt-doing-anything-about-advisory-election-glitch>.

to yelling, insults, and police intervention.¹¹² During a years-long battle on the Upper West Side, “Racial anxieties coursed through the debate, often just below the surface,” as one reporter described.¹¹³ The principal of one of the schools involved in the plan was shouted down by opponents of the initial proposal, which the city withdrew once the CEC indicated it would reject it in 2015.¹¹⁴ Mayor de Blasio was forced to moderate the desegregation plan considerably, which only barely passed in a CEC vote a year later.¹¹⁵ And at one CEC meeting in Dumbo, Brooklyn, parents angrily accused the mayor and CEC members of withholding information, with one parent declaring, “I’m not going to let anybody take from my daughter.”¹¹⁶ On the day of the vote, other reporter described the scene: “Nearly four dozen [parents] who’d taken two buses chartered by the church filed into the auditorium of the Brooklyn elementary school, sitting behind a cluster of anxious parents from Dumbo.... The meeting lasted more than three hours as parents spoke passionately.”¹¹⁷

In New York, then, catchment area law gives hyper-local institutions veto power, resulting in continuing controversy over line drawing and persistently segregated public schools.

2. *San Francisco*

The obstinate influence of catchment areas has endured in America’s other bastion of liberalism, San Francisco, despite decades of litigation around student assignment policy. According to the most recent data, out of the more than 55,000 students in the San Francisco Unified School District (SFUSD) last year, 35% were Asian, 27% were Latino, 14% were white, 7% were African-American, with the rest being other ethnicities and races, mixed race, or those who declined to say.¹¹⁸ But, in the 2013-14 school year, almost one quarter of schools had a student body comprised of 60% or more of one racial or ethnic

112. Soni Sangha, *School Rezoning’s Border Wars*, N.Y. TIMES (Nov. 23, 2012), <http://www.nytimes.com/2012/11/25/nyregion/brooklyn-school-rezoning-touches-off-a-border-war.html>.

113. See Wall, *supra* note 29.

114. See Kate Taylor, *Education Dept. Drops Proposal to Rezone Upper West Side Schools*, N.Y. TIMES (Nov. 18, 2015), <https://www.nytimes.com/2015/11/19/nyregion/education-department-drops-proposal-to-rezone-upper-west-side-manhattan-schools.html>.

115. See Kate Taylor, *Rezoning Plan for Schools on Upper West Side Is Approved After Bitter Fights*, N.Y. TIMES (Nov. 22, 2016), <https://www.nytimes.com/2016/11/22/nyregion/rezoning-plan-for-schools-on-upper-west-side-is-approved-after-bitter-fight.html>.

116. Kate Taylor, *Race and Class Collide in a Plan for Two Brooklyn Schools*, N.Y. TIMES (Sept. 22, 2015), <https://www.nytimes.com/2015/09/23/nyregion/race-and-class-collide-in-a-plan-for-two-brooklyn-schools.html>.

117. See Hannah-Jones, *supra* note 24.

118. S.F. UNIFIED SCH. DIST., FACTS AT A GLANCE: 2017 1-2 (2018), <http://www.sfusd.edu/en/assets/sfusd-staff/about-SFUSD/files/sfusd-facts-at-a-glance.pdf>.

group.¹¹⁹ At one quarter of elementary schools, the level at which catchment areas hold the most sway in student assignment, the population is 3.3% white or less.¹²⁰ At half of San Francisco's high schools, the population of white students is 5.7% or less.¹²¹ In fact, white students are concentrated at a relatively small number of schools,¹²² and the typical white student attends school with 29% black or Latino students; the typical black or Latino student attends school with 53% black or Latino students.¹²³

Although San Francisco's public school system has always been an independent entity, governed by an elected school board,¹²⁴ since the 1960s, civil rights litigation has often put federal courts in the driver's seat. In 1969, the NAACP won a lawsuit against SFUSD, winning a judgment finding that the district had created a "dual system" of segregated schools by establishing several discriminatory policies, including the drawing of catchment areas. De jure segregation, the court found, need not be limited to instances where a district explicitly creates all-white and all-black schools; instead, as in SFUSD, it may be the case that that district officials "have exercised powers given them by law in a manner which creates or continues or increases substantial racial imbalance in schools. It is this government action, regardless of the motivation for it, which violates the Fourteenth Amendment."¹²⁵ The Ninth Circuit would later vacate the holding because of its inconsistency with the "intent" requirement found in *Keyes*, decided between the district court's decision and the circuit court's decision, but it declined to undo the injunction of the district court until retrial.¹²⁶ That injunction led to a citywide busing program

119. Jeremy Adam Smith, *As Parents Get More Choice, S.F. Schools Resegregate*, S.F. PUB. PRESS (Feb. 2, 2015), <http://sfpublicpress.org/news/2015-02/as-parents-get-more-choice-sf-schools-resegregate>.

120. Rosie Cima, *Where Are All the White People in San Francisco Public Schools?* PRICEONOMICS (Mar. 24, 2015), <https://priceonomics.com/where-are-all-the-white-people-in-san-francisco>.

121. *Id.*

122. Max Ehrenfreud, *White Kids Are Winning San Francisco's School Lottery, and the Data Proves It*, WASH. POST WONKBLOG (Mar. 27, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/03/27/these-charts-show-how-white-kids-win-san-franciscos-school-lottery/?utm_term=.405b25855267.

123. GARY ORFIELD & JONGYEON EE, UCLA CIV. RIGHTS PROJECT, SEGREGATING CALIFORNIA'S FUTURE, INEQUALITY AND ITS ALTERNATIVE 60 YEARS AFTER BROWN V. BOARD OF EDUCATION (May 14, 2014), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/segregating-california2019s-future-inequality-and-its-alternative-60-years-after-brown-v.-board-of-education/CRP-CA-Exposure-rates-district-level-20144.pdf>.

124. *See Overview & Members*, SFUSD, <http://www.sfusd.edu/en/about-sfusd/board-of-education/overview-and-members.html> (last visited Apr. 21, 2019).

125. *Johnson v. S.F. Unified Sch. Dist.*, 339 F. Supp. 1315, 1319 (N.D. Cal. 1971).

126. *See Johnson v. S.F. Unified Sch. Dist.*, 500 F.2d 349, 352 (9th Cir. 1974).

nicknamed the “horseshoe plan” due to the wide bus routes created to move students of different races around the city.¹²⁷

White opposition to busing was swift and severe, and catchment areas eventually were restored. During the first few weeks of busing, some 40% of students skipped school as parents boycotted,¹²⁸ and by 1983 SFUSD enrollment had dropped by more than 30,000 students.¹²⁹ By 1978, the district court judge in the original case ended court supervision and brought busing to an end, concluding that the schools were adequately unified. The NAACP responded quickly by filing a new suit, which would wind its way through federal courts until 1983, when SFUSD entered into a consent decree.¹³⁰ The agreement stipulated that no SFUSD school could have more than 45% of its student body from a single race and that at least four racial groups (out of nine total defined by the district) must be represented at each school. SFUSD kept in place neighborhood schools – and their catchment areas – with the caveat that students would enter an alternative enrollment process to maximize diversity once a school had reached its 45% limit.¹³¹ By 1992 a court monitor reported that SFUSD schools were predominantly “not racially identifiable.”¹³²

But the district would soon face a new legal challenge, leading to yet another change. Asian-American families filed suit claiming that the racial quota system unconstitutionally discriminated against them on the basis of race. After another drawn-out legal battle, SFUSD in 1999 entered yet another consent decree, this time barring it from using race at all in school assignments.¹³³ Instead, beginning in 2001, SFUSD would use a “diversity index” made up of factors such as poverty level, language, or family education levels, in place of the old 45% limit. When the court ended supervision of SFUSD in 2005, it was in part because it had concluded that court intervention only increased segregation now that the district was not allowed to account for race.¹³⁴ The diversity index, though it weakened the power of catchment areas through its alternative enrollment process, did not erase segregation.

127. Sanna Bergh & Paul Lorigerie, *As Courts Flip-Flopped on School Integration, Diversity Has Remained Elusive*, S.F. PUB. PRESS (Feb. 5, 2015), <http://sfpublicpress.org/news/2015-02/as-courts-flip-flopped-on-school-integration-diversity-has-remained-elusive>.

128. *Id.*

129. Heather Knight, *Living Together, Learning Apart: Is Desegregation Dead?* S.F. CHRON. (Feb. 7, 2016), <http://www.sfchronicle.com/schools-desegregation>.

130. *See* S.F. NAACP v. S.F. Unified Sch. Dist., 576 F. Supp. 34 (N.D. Cal. 1983), *rev'd on other grounds*, 896 F.2d 412 (9th Cir. 1990).

131. *See* Bergh & Lorigerie, *supra* note 127.

132. Henry Der, *Resegregation and Achievement Gap: Challenges to San Francisco School Desegregation*, 19 BERKELEY WOMEN'S L.J. 427, 429 (2004).

133. *See* S.F. NAACP v. S.F. Unified Sch. Dist., 59 F. Supp. 2d 1021, 1039 (N.D. Cal. 1999).

134. Bob Egelko, *Judge Puts End to Court's Role in Desegregation of City Schools*, S.F. GATE (Nov. 9, 2005), <http://www.sfgate.com/education/article/SAN-FRANCISCO-Judge-puts-end-to-court-s-role-in-2574811.php4>.

Finally in 2011, through a vote of its board, SFUSD began implementation of yet another school assignment system. This system, which remains in place today, aims to avoid busing while avoiding overreliance on catchment areas. Under the plan, parents of children entering kindergarten, 6th, and 9th grade enter a citywide lottery in the spring, listing as many schools in ranked order as they would like. Students are then given preference to their top ranked schools according to various factors, which differ for each grade level. For elementary schools, preference is given first to students who have a sibling in the school, then to those who attended a pre-K program in the school's catchment area, then to those who live in a census tract which was especially low average test scores, and finally to those who live in the catchment area itself. For middle schools, there are no catchment areas except that, after priority is given first to siblings, it goes next to students who come from a "feeder" elementary school (typically close-by geographically), and then lastly to those in a low-scoring census tract. For high schools, the assignment system does away with geography altogether, giving preference only to siblings and then to those who live in low-scoring census tracts.¹³⁵ In sum, assignment according to catchment area remains an important, though not the determinative, factor in student assignment. The pre-K and middle school feeder tiebreakers, as well as the preference in elementary schools for those in the catchment area itself, retain the influence of catchment area boundaries over school demographics.¹³⁶

But unlike in New York, SFUSD vests authority to draw the catchment areas entirely with the board-appointed superintendent. The Board revised the catchment areas and feeder schools when it created the new assignment system in 2011, but it devolved future revisions to the superintendent. In fact, the Board requires that SFUSD staff review catchment area boundaries "on an annual basis" and make recommendations to the superintendent, who then has authority to adjust them, with notification—but not approval—required for the Board. The Board lists several factors to be taken into account when drawing catchment area boundaries, in no order of importance: population growth patterns, the goal of maximizing racial diversity, traffic, facilities, and "coherence of pre-K to kindergarten and elementary to middle school pathways."¹³⁷

135. S.F., CAL., SAN FRANCISCO UNIFIED SCHOOL DISTRICT AND COUNTY OFFICE OF EDUCATION BOARD POLICY 5101, STUDENT ASSIGNMENT (Oct. 9, 2018), <https://www.boarddocs.com/ca/sfusd/Board.nsf/goto?open&id=B55QMC657423>.

136. Even this increased emphasis on catchment area-based assignment wasn't enough for many parents. That year a group of residents launched Proposition H, a citywide effort to pass a non-binding resolution urging SFUSD to change the assignment system to make catchment area preference the *primary* tiebreaker for all school levels. The measure narrowly failed, and research on voting patterns suggests that support for the measure was strongly correlated with neighborhoods that had higher median income and concentrations of white families. See Lorien Rice, et al., *Neighborhood Priority or Desegregation Plans? A Spatial Analysis of Voting on San Francisco's Student Assignment System*, 36 POPULATION RES. POL'Y REV. 805 (2017).

137. See S.F. CAL., *supra* note 135.

All in all, despite the many changes made to student assignment policy, SFUSD's segregation levels remain stubbornly high, and catchment areas remain influential.

3. *Washington, D.C.*

The use of catchment areas in Washington, D.C. for student assignments contrasts interestingly with how New York and San Francisco use catchment areas. Unlike in New York, authority for drawing attendance boundaries is vested completely in a centralized authority (the mayor); unlike in San Francisco, catchment area location is virtually the only determinant of a placement for non-charter school students.

Despite these differences, Washington, D.C.'s levels of school segregation are similar to those of the other cities. The total population of D.C. public school children is roughly 76,000, with 73% black, 14% Hispanic, 9% white, and the rest Asian, other races, or mixed race. But, as of 2013, at more than 70% of schools, less than 1% of students were white. On the other hand, white and Asian students are concentrated in a small number of schools: on average they attend schools where nearly half of their classmates are the same race.¹³⁸
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Inspired by Bloomberg's perceived successes in New York, reform-minded mayor Adrian Fenty moved to gain control of District of Columbia Public Schools (DCPS) in 2007 after winning approval from the City Council and the U.S. Congress.¹⁴⁰ He installed a controversial chancellor, Michelle Rhee, who quickly made enemies with parent groups and the powerful teachers' union.¹⁴¹ Nonetheless, mayoral control persisted even after Fenty lost, after just one term in office, to one of Rhee's chief critics, Vincent Gray. Gray's replacement for Rhee, Kaya Henderson, proved more popular,¹⁴² and moved swiftly to tackle

138. See Gary Orfield & Jongyeon Ee, *Our Segregated Capital: An Increasingly Diverse City with Racially Polarized Schools*, UCLA CIV. RTS. PROJECT 11-12 (2017), <http://apps.washingtonpost.com/g/documents/local/report-on-segregation-in-dc-schools/2347>.

139. But one cannot blame catchment areas for much of this segregation, as 44% of students attend charter schools, which are far more highly segregated than their traditional counter-parts. See Halley Potter, *What Can We Do About Segregation in DC Schools?*, CENTURY FOUND. (Mar. 18, 2014), <https://tcf.org/content/commentary/what-can-we-do-about-segregation-in-dc-schools>. This phenomenon will be explored in depth, *infra* Part III.B.

140. See David Nakamura, *Fenty's School Takeover Approved*, WASH. POST (Apr. 20, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/19/AR2007041902376.html>.

141. See Amanda Ripley, *How to Fix America's Schools*, TIME MAG. (Dec. 8, 2008), <http://content.time.com/time/magazine/article/0,9171,1862444,00.html>.

142. See Kaya Henderson *On Education and Her Tenure as D.C. Schools Chancellor*, NPR (Sept. 27, 2016), <https://www.npr.org/2016/09/24/495321478/kaya-henderson-on-education-and-her-tenure-as-d-c-schools-chancellor> (discussing why she gained more support than Rhee, even though her policies were largely the same).

the controversial topic of redrawing school catchment areas, which had not been comprehensively overhauled in more than forty years.¹⁴³

Though the mayor and chancellor's authority includes total control over catchment area lines, Gray appointed an advisory committee to study the issue citywide. This process, of course, stands in stark contrast to New York's approach to elementary school re-zonings, where catchment areas are tinkered with one-by-one at the most local level possible. Gray's twenty-member committee was unelected, and included urban planning and policy experts, as well as parents from both traditional and charter schools.¹⁴⁴ The committee released its recommendations after five months, and a few months after that, the recommendations were approved wholesale by the mayor.¹⁴⁵ But by that point Gray had been defeated in the Democratic primary for re-election by council member Muriel Bowser, who had repeatedly decried the plan and vowed to restart the entire process.¹⁴⁶ Once she became mayor however, Bowser made only small changes to a few boundary lines and approved the overhaul otherwise.¹⁴⁷

Under the current plan, all D.C. homes are assigned one elementary, middle, and high school which students have a right to attend. Significantly, the advisory commission scrapped an initial proposal to reject catchment areas and adopt a citywide lottery system somewhat akin to San Francisco's. Parents from the city's affluent Northwest area strongly opposed the change, and the commission reverted to reliance on catchment areas, citing the public's desire for "predictability" in school assignment. But the district did adopt some measure of parent choice to drive desegregation.¹⁴⁸ The plan mandated that a certain percentage of seats in all schools would be reserved for "out-of-

143. See Michael Alison Chandler & Mike DeBonis, *D.C. Mayor Gray Adopts New School Boundary Recommendations*, WASH. POST (Aug. 21, 2014), https://www.washingtonpost.com/local/education/dc-mayor-gray-adopts-new-school-boundary-recommendations/2014/08/21/9fed7d4a-249b-11e4-8593-da634b334390_story.html?utm_term=.fb0df13d2060.

144. See Emma Brown, *D.C. Kicks Off School Boundary Overhaul*, WASH. POST (Oct. 28, 2013), https://www.washingtonpost.com/local/education/dc-kicks-off-school-boundary-overhaul/2013/10/28/5ec66b94-4006-11e3-9c8b-e8deeb3c755b_story.html?utm_term=.7480e5ac4007.

145. See *id.*

146. Michael Alison Chandler, *Bowser Opposes New D.C. School Boundaries Plan: Catania Calls for Delay*, WASH. POST (Aug. 26, 2014), https://www.washingtonpost.com/local/education/dc-mayoral-candidate-muriel-bowser-rejects-new-school-boundariesplan/2014/08/26/fd35ca0a-2d2b-11e4-bb9b-997ae96fad33_story.html?utm_term=.382c4ad51853.

147. Michael Alison Chandler & Aaron C. Davis, *Bowser Announces 'Tweaks' to D.C. School Boundary Plan*, WASH. POST (Feb. 27, 2015), https://www.washingtonpost.com/local/education/bowser-announces-tweaks-to-dc-school-boundary-plan/2015/02/27/b5f33f34-be2f-11e4-bdfa-b8e8f594e6ee_story.html?utm_term=.b10e044221a9.

148. See Emma Brown, *D.C. School Proposals Trigger Debate over Future of Neighborhood Schools*, WASH. POST (Apr. 12, 2014), https://www.washingtonpost.com/local/education/dc-school-proposals-trigger-debate-over-future-of-neighborhood-schools/2014/04/12/1695acd4-c168-11e3-bcec-b71ee10e9bc3_story.html?utm_term=.dd015addac24.

boundary” students, and in more affluent schools, 25% of those seats would be reserved for “at-risk” students.¹⁴⁹ Less than a month after Gray adopted the plan, 56% of D.C. residents polled supported it, with levels of agreement consistent across most neighborhoods and racial and ethnic groups.¹⁵⁰

By measures of public support and consistency across administrations, then, D.C.’s catchment area law is largely successful. But by measures of effective public policy, its tight connection to student assignment and therefore school segregation make it a failure, as the next section will explore.

PART II: LOCAL GOVERNMENT THEORY AND CATCHMENT AREAS

The previous Part examined school catchment area law and policy on a descriptive basis, concluding that its influence is profound on present-day school segregation. Part II will analyze the theoretical basis for school catchment areas, according to generally accepted theories of local government law. The typical justifications for local control—increasing democratic participation and strengthening community; engendering a more responsive and accountable government; and allowing efficient sorting according to the Tiebout model—all show deep flaws when applied to the sub-local institution of school catchment areas. The second half of this Part will compare the law of school catchment areas to that of two other sub-local institutions, business improvement districts and fire stations, to highlight more theoretical problems with school catchment areas.

A. *Theoretical Justifications for Localism*

Proponents of localism traditionally have given three broad justifications for local control of public institutions, which I will lay out in order to consider whether they apply to the sub-local institution of school catchment areas. First, proponents of localism charge that local control—rather than control by state, regional, or federal entities—cultivates democratic participation and community-building. Perhaps the progenitor of this notion was Thomas Jefferson, who urged in the early 19th century that the counties of Virginia be subdivided into “wards” of six square miles so that each would “be a small republic within itself.” Jefferson believed the result would be “every man in the

149. See Chandler & DeBonis, *supra* note 143.

150. Michael Alison Chandler, *Most D.C. Residents Support School Boundary Plan, Poll Finds*, WASH. POST (Sep. 18, 2014), https://www.washingtonpost.com/local/education/most-dc-residents-support-school-boundary-plan-poll-finds/2014/09/18/56fbadfa-3f4e-11e4-b03f-de718edeb92f_story.html?utm_term=.1a0fd7df6114. Note, however, that the polling question is somewhat misleading in its implication that parents have significant choices outside of their catchment areas; (“[T]he District announced changes to neighborhood school boundaries, including where students can attend traditional public schools and when children are able to attend schools outside their boundaries. Based on what you’ve read and heard, do you generally support or oppose these changes?”).

state” becoming “an acting member of the common government.”¹⁵¹ Alexis de Tocqueville reiterated the Jeffersonian ideal in his classic *Democracy in America*, arguing that municipal rule would allow citizens to “practice . . . the art of government in the small sphere within [their] reach.”¹⁵² More recently, Gerald Frug has used increased local participation as one of many arguments against centralized authority. He argues that engagement and localized policy-making go hand-in-hand: “No one is likely to participate in the decision-making of an entity of any size unless that participation will make a difference in his life. Power and participation are inextricably linked”¹⁵³

Related is the sense that localism fosters a sense of community among residents that otherwise would be lost. “Local governments,” writes one scholar, “through the existence of choice, allows for the fullest expression of self.”¹⁵⁴ This is so, explains Richard Briffault, because “[l]ocalities are not simply arbitrary collections of small groups of people who happen to buy public services or engage in public decision-making together. They are communities—groups of people with shared concerns and values”¹⁵⁵ Briffault concludes that “[l]ocal borders, once created, reinforce local identification [and] become a focus of sentiment and symbolism”¹⁵⁶

Second, proponents of localism theorize that local governments are more responsive to the needs of residents. As a basic matter, Frug argues, “popular involvement in the decisionmaking process, rather than . . . merely providing a choice of candidates in an election, is possible only at the local level.”¹⁵⁷ Carol Rose elaborates that opportunities for both “exit” and “voice”¹⁵⁸ are more feasible and powerful at the local level, where residents can more easily express concerns at community meetings, or simply move from one locality to

151. Letter from Thomas Jefferson to John Cartwright (June 5, 1824), in 4 MEMOIR, CORRESPONDENCE, AND MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON 393 (Thomas J. Randolph ed., 1829); see also HANNAH ARENDT, ON REVOLUTION 234-59 (1963) (“The basic assumption of the ward system . . . was that no one could be called happy without his share in public happiness, that no one could be called free without his experience in public freedom, and that no one could be called either happy or free without participating, and having a share, in public power.”).

152. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 68 (Phillips Bradley ed., Alfred A. Knopf, Inc. 1945) (1835).

153. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1070 (1980).

154. Georgette C. Poindexter, *Collective Individualism: Deconstructing the Legal City*, 145 U. PA. L. REV. 607, 622 (1997).

155. Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1, 17 (2000).

156. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 445 (1990).

157. *Supra* note 153, at 1069.

158. See generally ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970) (describing how members of an organization or community may exercise one of two responses when they perceive decline: “exit” (withdrawing from the community) or “voice” (attempting to improve the community through activism)).

another in protest.¹⁵⁹ Others argue that smaller levels of government give residents have an easier ability to monitor officials and avoid collective actions problems. John Stuart Mill explained, “It is the local public alone which has any opportunity of watching [local public officials], and it is the local opinion alone which either acts directly upon their own conduct or calls the attention of the government” to malfeasance.¹⁶⁰ Absent localism, residents may suffer from the classic problem of collective action, wherein each individual lacks an incentive to remediate shortcomings of public goods on her own, but each resident also benefits from public goods even if she does not contribute. But when power devolves to the lowest level of government possible, individual residents have a greater ability and incentive to police their peers, and a lesser opportunity to take a free ride.¹⁶¹

Third, proponents of localism make an argument about economic efficiency. These scholars begin with Charles Tiebout’s classic *Theory of Local Expenditures*, which asserts that localism allows for an efficient “sorting” of residents into the locality which best meets their needs with respect to taxing and public services.¹⁶² Localities will then “compete” for residents until each reaches its optimal size. The proliferation of local governments also creates a competition between them, as residents can vote with their feet where government is ineffective or corrupt, thereby triggering a positive response by the government to attract residents back.¹⁶³ More recent empirical scholarship concludes that localities do, in fact, compete for residents when enacting taxing and spending measures.¹⁶⁴ In addition, William Fischel provides evidence that the quality of services in a locality—including the reputation of its corresponding school district—is a “priced into” home values across the country.¹⁶⁵ Another scholar has argued that the phenomenon of suburban migration beginning in the 1950s is evidence of Tiebout’s hypothesis, as suburbs provided high-quality services at lower rates of taxation, and were

159. See Carol Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism from the Attack on ‘Monarchism’ to Modern Localism*, 84 NW. U. L. REV. 74, 97-98 (1989). But see Schleicher, *supra* note 20, at 1511 (arguing that positive agglomeration effects make residents less likely to “discipline local government policies they dislike through the threat of exit”).

160. JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (1861), as reprinted in *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* 13 (Lynn A. Baker et al. eds., 5th ed. 2015).

161. See Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75 (1998) (arguing for block-level governance structures to head off the collective action problem); see also Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982) (arguing that homeowners associations can provide local public goods more efficiently than municipalities in many instances).

162. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

163. See *id.* at 419-20.

164. See, e.g., Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 514-18 (1991).

165. See WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS* 39-97 (2001).

more responsive and effective forms of government than large cities.¹⁶⁶ But Tiebout's work itself includes several important assumptions which clearly are not always met: 1) residents have perfect ease of mobility between one locality and another, including no restrictions on employment opportunity or access to housing; 2) residents have perfect information about each locality; 3) there are no significant externalities or public benefit spillovers from one locality to another; and 4) local officials have complete control over policies that can, among other things, optimize community size and lower average costs.¹⁶⁷

B. *Problems with Localism as Applied to School Catchment Areas*

For several reasons, however, the justifications for localism described above are deeply problematic in the context of school catchment areas. As several scholars have argued, many of the theoretical critiques I will present apply in equal measure to local government,¹⁶⁸ or to school district governance.¹⁶⁹ But in several respects, the unique characteristics of school catchment areas make them particularly difficult to defend on theoretical grounds. In the end, the function of school catchment areas is mostly to choose and exclude neighbors, compared to other local institutions which may foster economic efficiency, promote democratic participation, or build community.

The most serious theoretical problems emerge as we examine fundamental contrasts between the nature of school catchment areas and local government. Tiebout rationalized the "consumer-voter" model on the basis that localities, as self-governing institutions, could adjust their level of services to attract residents to reach an optimal population level.¹⁷⁰ But school catchment areas are not self-governing in any meaningful sense. Unlike local governments, they cannot raise revenues or make other necessary funding decisions, and per-pupil funding for schools is generally constant between catchment areas within one school district.¹⁷¹ Indeed, the level of "services" offered by a catchment area—presumably a mix of inputs that contribute to overall school quality—is a function of decisions made by a variety of federal, state, and local officials.¹⁷²

166. See Poindexter, *supra* note 154, at 615-18.

167. See Tiebout, *supra* note 162, at 419.

168. See, e.g., Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1115 (1996) (highlighting spillovers, fiscal disparities, and inter-local conflicts that arise from localism).

169. See Saiger, *supra* note 30 (applying Briffault's critiques to local control of school districts).

170. See Tiebout, *supra* note 162, at 418.

171. See *id.*

172. See NANCY KOBER & ALEXANDRA USHER, CTR. ON EDUC. POL'Y, A PUBLIC EDUCATION PRIMER: BASIC (AND SOMETIMES SURPRISING) FACTS ABOUT THE U.S. EDUCATIONAL SYSTEM (2012), https://www.cep-dc.org/cfcontent_file.cfm?Attachment=KoberUsher_Report_Primer2012_1.19.12.pdf (detailing the important roles of federal, state, and local governments in determining finance, curriculum, and basic programmatic decisions in public schools).

Furthermore, it is typically the central school district, rather than sub-local entities, that draws catchment area lines, which trigger the externalities described earlier in this section.¹⁷³ Those lines also create racial and ethnic segregation and thus crucial inequalities that undercut another of Tiebout's assumptions, namely that all individuals floating between localities provide equal sources of revenue and demand for services.¹⁷⁴ Where certain catchment areas are drawn to isolate poor and minority students, those catchment area schools are forced to pay the higher cost of educating such students without the ability to raise the requisite revenue.¹⁷⁵ As a result, the realities of catchment areas violate key assumptions of Tiebout's model, and thus lack a grounding in economic efficiency.

One might object that PTAs exercise oversight and supply crucial funding for a given school. But the power of PTAs varies too widely to be properly considered a legitimate governing institution over catchment areas,¹⁷⁶ and their funding supplements are typically a function of the wealth of the school district as a whole rather than of individual catchment areas.¹⁷⁷ And even if PTAs do add or subtract services for certain school catchment areas within a district,¹⁷⁸ from a normative perspective it is unclear that we want the quality of schools within districts—or their levels of segregation—to be a “bargaining chip” in the competition for residents.¹⁷⁹

173. See *supra* Part I.C. Recall that the exception to this rule is the veto power given to New York City's Community Education Councils – though even there, catchment area changes must originate with the Chancellor's Office, and CECs are hardly a democratic institution. See *supra* notes 76-89 and accompanying text.

174. Other scholars have updated Tiebout's model to reflect the reality of proportional property taxes rather than the lump-sum taxes that Tiebout assumed. See Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205, 210-11 (1975).

175. See Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 404-09 (2012) (reviewing research showing the harm done to minority students and increased cost of educating them at racially segregated schools).

176. See Patricia A. Brauch & Ellen B. Goldring, *Parent-Teacher Participation in the Context of School Governance*, 73 PEABODY J. EDUC. 15, 16 (1998) (detailing the wide variety of authority given to parent organizations).

177. See Catherine Brown et al., *Hidden Money: The Outsized Role of Parent Contributions in School Finance*, CTR. FOR AM. PROGRESS (Apr. 8, 2017), <https://www.americanprogress.org/issues/education-k-12/reports/2017/04/08/428484/hidden-money/> (“Well-funded PTAs are much more likely to exist in more affluent districts.”).

178. See *id.* (finding a few instances where wealthy PTAs bolster high-income schools within larger lower-income districts, such as P.S. 6 on New York's Upper East Side).

179. Indeed, scholar Erika K. Wilson argues that we do not. She reasons that as a “social good,” public education is not comparable to other public services which Tiebout argues may rightfully vary between localities, because of its value “to the health and well-being of the American democracy” and as a force “leveling the playing field so that social mobility across classes can occur.” Wilson, *supra* note 12, at 189-90; see also Erika K. Wilson, *Blurred Lines: Public School Reforms and the Privatization of Public Education*, 51 WASH. U. J.L. & POL'Y 189, 216-17 (2016) (arguing against market-based school reforms like vouchers because of public education's status as only a “quasi” public good).

In addition, the realities of catchment area governance belie meaningful democratic participation and monitoring. The case studies, in fact, are examples of how catchment areas do not live up to Jefferson or Ellickson's ideals. In DCPS, catchment areas have no sub-local governance whatsoever, but instead are managed in all aspects by central district authorities appointed by the mayor.¹⁸⁰ Residents of school catchment areas therefore do not participate in decision-making over boundaries of the catchment areas, or the services provided within them; and for a variety of reasons turnout in urban mayoral elections, such as in D.C., is often quite low.¹⁸¹ In San Francisco, catchment areas are also governed by a centralized authority, in this instance the SFUSD school board. Nationally, school board elections have extremely low turnout, averaging between 18-20%, and often below 10% where they are held in off-years— comparable to, and even slightly lower than, turnout in local elections generally.¹⁸² New York, however, does have some level of catchment area governance in the form of CECs, which have veto authority over drawing new boundary lines.¹⁸³ But as noted earlier, the makeup of CECs is highly undemocratic, and virtually no members of the community elect CEC members.¹⁸⁴ Other historical examples of decentralized school governance show similar patterns of disengagement, as well as corruption. Before Bloomberg dissolved New York's community school boards, they operated as patronage fiefdoms, with jobs and student assignments doled out by members elected with minuscule turnout.¹⁸⁵ In Chicago, local school councils have seen steadily declining voter turnout, and in 2014 an inability to even find parent-candidates for eighty-six schools.¹⁸⁶

180. See *supra* notes 143-145 and accompanying text.

181. See Kriston Capps, *In the U.S., Almost No One Votes in Local Elections*, CITYLAB (Nov. 1, 2016), <https://www.citylab.com/equity/2016/11/in-the-us-almost-no-one-votes-in-local-elections/505766> (finding an average participation rate of 15% for mayoral elections, and a rate of 19.8% participation rate among eligible voters in the 2014 D.C. mayoral election).

182. KENNETH WONG ET AL., *THE EDUCATION MAYOR: IMPROVING AMERICA'S SCHOOLS* 6 (2007); see also Ann Allen & David N. Plank, *School Board Election Structure and Democratic Representation*, 19 EDUC. POL'Y 510 (2005); Julia A. Payson, *When Are Local Incumbents Held Accountable for Government Performance? Evidence from US School Districts*, 52 LEGIS. STUD. Q. 421 (2016) (demonstrating special interest capture and lacking accountability in many school board elections); *supra* note 169.

183. See *supra* notes 106-107 and accompanying text.

184. See *supra* notes 108-111 and accompanying text.

185. See Lydia Segal, *The Pitfalls of Political Decentralization and Proposals for Reform: The Case of New York City Public Schools*, 57 PUB. ADMIN. REV. 141, 141 (1997) ("The pitfalls of community control are illustrated by New York's experience with school decentralization, where program vulnerabilities in the context of politicized, often poor urban communities led to unintended, widespread, and systemic corruption").

186. See Denisa R. Superville, *Chicago's Local School Councils 'Experiment' Endures 25 Years of Change*, EDUC. WK. (Oct. 7, 2014), <https://www.edweek.org/ew/articles/2014/10/08/07chicagocouncil.h34.html>. Note also that Chicago's original voting scheme for local school councils was ruled unconstitutional by the state supreme court for violating the

Other theoretical problems for catchment area localism mimic those of other local entities. First, school catchment areas create several externalities that betray the assumptions of localism. A catchment area is not an island: the effects of segregation and lowered student achievement spill over into others. For example, externalities occur between catchments areas in a district – and likely within a metropolitan region¹⁸⁷ – where failing, segregated schools have a negative impact on the local economy,¹⁸⁸ crime,¹⁸⁹ and the need for welfare services.¹⁹⁰ There are less tangible externalities, as well: the effect that negative schooling can have on behavioral norms in neighbors' children,¹⁹¹ and the declining inculcation of a stable and democratic society.¹⁹² These externalities reduce the ability of residents to exercise monitoring or advocacy power over their catchment area, since key aspects of school and neighborhood quality are outside their control. And without this control, there is weaker justification for localism as combatting the collective action problem, or the assertion that localism increases participation and community-building.

Next is the problem of mobility, an oft-criticized assumption in Tiebout's model that residents are perfectly mobile – that is, able to choose the locality which meets their needs, regardless of employment or housing status.¹⁹³ This mobility enables Tiebout's efficient "sorting," as well as the ability of localities to compete for residents, and for residents to build communities of like-minded individuals. Of course, in the real world such mobility is rare. It is quite

one-person, one-vote standard. See *Fumarolo v. Chi. Bd. of Educ.*, 566 N.E.2d 1283 (Ill. 1990).

187. See generally Briffault, *Localism and Regionalism*, *supra* note 155, at 17 (arguing for regional rather than local control of critical institutions, in part because of the primacy of regional economies); see also Briffault, *The Local Government Boundary Problem*, *supra* note 168, at 1133-44 (describing economic spillovers within metropolitan areas).

188. See Eric A. Hanushek et al., *Economic Gains for U.S. States from Educational Reform*, (Nat'l Bureau of Econ. Research, Working Paper No. 21770, 2015), <http://www.nber.org/papers/w21770> (finding that educational achievement strongly predicts economic growth across U.S. states over four decades).

189. See David J. Deming, *Better Schools, Less Crime?*, 126 Q.J. ECON. 2063, 2065 (2011) (finding sustained lower crimes rates among students in more effective schools).

190. See CLIVE R. BELFIELD, UCLA CIVIL RIGHTS PROJECT, *THE ECONOMIC BURDEN OF HIGH SCHOOL DROPOUTS AND SCHOOL SUSPENSIONS IN FLORIDA*, (2014), https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/summary-reports/the-economic-burden-of-high-school-dropouts-and-school-suspensions-in-florida/111816_FL_Belfield_CCRR_final-combined.pdf (examining the fiscal consequences for federal, state, and local governments of high school dropouts).

191. See Burton A. Weisbrod, *Education and Investment in Human Capital*, 70 J. POL. ECON. 106, 118 (1962).

192. See Milton Friedman, *The Role of Government in Education*, in *CAPITALISM ECONOMICS AND THE PUBLIC INTEREST* 123, 124 (Robert Solo ed., 1955) ("A stable and democratic society is impossible without widespread acceptance of some common set of values and without a minimum degree of literacy and knowledge on the part of most citizens. Education contributes to both.").

193. For several criticisms of Tiebout's mobility assumption, see Briffault, *Our Localism, Part II*, *supra* note 156, at 420-22.

possible that more affluent – and more often white – families shop for homes based on perceptions of school quality.¹⁹⁴ But for less affluent – and more often black and Hispanic – families, mobility is severely limited by employment,¹⁹⁵ the cost of housing,¹⁹⁶ and social networks.¹⁹⁷ These arguments have traditionally applied as between cities and towns or between school districts, but also can apply at least to some degree as between catchment areas, despite their smaller size. Housing prices can be prohibitively high even *within* school districts because of catchment area lines,¹⁹⁸ and because of exclusionary zoning restrictions that artificially drive up the cost of housing in affluent neighborhoods.¹⁹⁹ Social networks are dominant factors in housing location, even within cities.²⁰⁰ And within large school districts like New York, low-income residents often face employment mobility restrictions based on access to public transportation.²⁰¹ Therefore, mobility within school districts is far from perfect, thereby severely undermining the Tiebout efficiency justification for school catchment areas.

194. See Jennifer J. Holme, *Buying Homes, Buying Schools: School Choice and the Social Construction of School Quality*, 72 HARV. EDUC. REV. 177, 192-94 (2002) (describing how affluent homebuyers intentionally shop for homes based on school district). *But see supra* notes 83-86 and accompanying text (casting doubt on whether school quality per se drives housing prices or parental decision-making on home location).

195. See David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 114-31 (2017) (analyzing the impact of various legal regimes such as occupational licensing and public employee benefits that restrict mobility to high-growth localities).

196. See Briffault, *Local Government Boundary Problem*, *supra* note 168, at 1134-36 (describing how affluent localities drive up the cost of housing to the exclusion of outsiders); *see also* Peter Ganong & Daniel W. Shoag, *Why Has Regional Income Convergence in the U.S. Declined?* (Nat'l Bureau of Econ. Research, Working Paper No. 23609, 2017) (finding empirical evidence that restrictive housing regulations have driven down mobility across localities).

197. See Joanna M. Reed et al., *Voucher Use, Labor Force Participation, and Life Priorities: Findings from the Gautreaux Two Housing Mobility Study*, 8 CITYSCAPE 219, 235 (2005) (describing the importance of social networks in housing choices of poor, minority participants in an urban housing mobility study).

198. See *supra* Part I.B.3.

199. See David Schleicher, *City Unplanning*, 122 YALE L.J. 1670 (2013) (finding exclusionary zoning practices between different neighborhoods within cities); *see also* Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91 (2015) (finding the same result).

200. See Reed et al., *supra* note 197.

201. See HAROLD STOLPER & NANCY RANKIN, THE TRANSIT AFFORDABILITY CRISIS: HOW REDUCED MTA FARES CAN HELP LOW-INCOME NEW YORKERS MOVE AHEAD 14 (2016), <http://lghttp.58547.nexcesscdn.net/803F44A/images/nycss/images/uploads/pubs/The%20Transit%20Affordability%20Crisis%20updates%204%2018%2016%20-%20UPDATE%204.pdf> (finding that 31% of blacks and 43% of Latinos in New York “very often” or “sometimes” have not been able to find a job far from their homes because of the high cost of public transportation); *see also* Snyder, *infra* note 280 and accompanying text (describing transportation shortcomings in D.C. that limit mobility for low-income students); Robinson, *supra* note 268 and accompanying text (describing the same for San Francisco).

Finally, as with local governments, school catchment areas suffer from definitional problems in drawing boundaries. Several scholars have noted this issue with respect to local governments,²⁰² and also to school district lines, which the Court in cases like *Milliken* gives a “pregovernmental” deference, as if the boundaries were wholly natural and existed before officials put them there.²⁰³ In fact these lines are anything but natural, and instead are constructs built to perpetuate segregation and exclusion.²⁰⁴ Because “boundary lines are more typically built around principles of exclusion rather than inclusion,” one scholar writes, “and the choice to move to a particular municipality is not voluntary for everyone, the community rationale for localism is arguably seriously flawed.”²⁰⁵ The same argument, of course, can be applied to school catchment areas: if they are often gerrymandered, and minority families do not elect to live within them, how can one argue that they represent and/or cultivate community? Whose community, exactly, is being cultivated, and who decides?

C. Comparisons with Other Sub-Local Institutions

School catchment areas are not the only form of sub-local institution to emerge recently as a significant force in America’s towns and cities.²⁰⁶ Examining two of these, business improvement districts and fire station siting, will help to draw out further aspects of school catchment area law that are theoretically problematic.

Business improvement districts (BIDs) are perhaps the most common and influential sub-local institution in the U.S. A BID is typically defined as a subdivision of a locality wherein property owners or businesses are subject to additional taxes or fees, which fund supplemental services within that area.²⁰⁷ As of 2015, there were over 1,000 BIDs in the United States, with more than 70

202. See, e.g., Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 416 (2001) (“Community implies an association of like minds, but the fact is that a residential neighborhood is generally an aggregate of strangers who happen to live next door to one another.”).

203. See Briffault, *Our Localism, Part II*, *supra* note 156, at 387.

204. See Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1844 (1994) (“[P]olitical geography - the position and function of jurisdictional and quasi-jurisdictional boundaries - helps to promote racially separate and unequal distribution of political influence and economic resources. Moreover, these inequalities fuel the segregative effect of political boundaries in a vicious circle of causation: each condition contributes to and strengthens the others.”).

205. Wilson, *supra* note 12, at 193.

206. See Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 508 (1997) (examining the theoretical implications for the proliferation of enterprise zones, tax increment finance districts, special zoning districts, and business improvement districts).

207. See Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 368 (1999).

just in New York.²⁰⁸ BIDs began their ascent in the 1980s, and by the mid-1990s had grown popular in many cities as a method of improving urban spaces at little or no cost to municipal governments – though they also gained detractors who characterized them as undemocratic, and perpetuating inequality of public services.²⁰⁹ In nearly all jurisdictions, BID formation requires a substantial level of support from property owners and is always subject to veto from city government.²¹⁰ One scholar notes that, as a practical matter, “creation of a BID usually requires proponents to invest considerable time, energy, and funds.”²¹¹

Once formed, though subject to municipal oversight, a BID has significant powers over its jurisdiction. BIDs are empowered to levy an additional tax on property owners to raise revenue, which also may be supplemented by other levels of government.²¹² BIDs may use these revenues for a host of purposes that mimic local government services, including: physical improvements, ranging from street or sidewalk repair to bus shelters to parking garages; traditional municipal services, such as street sweeping, garbage collection, graffiti removal, and public safety; social services, typically aimed at the homeless; and business-oriented services that resemble the work of chambers of commerce.²¹³ Though BID governance law varies by state, typically a BID’s board of directors exercises significant authority over taxing and spending decisions. Board membership and elections procedures are far from uniform, but most states allow business owners to wield for significant power over other property owners or residents.²¹⁴

The nature, role, and governance of BIDs vary considerably from those of school catchment area, with important implications. First, BIDs are self-

208. Oscar P. Abello, *Business Improvement Districts Are More Than Just a Name on a Trash Can*, NEXT CITY (Aug. 7, 2015), <https://nextcity.org/daily/entry/business-improvement-districts-support-small-business>.

209. See Briffault, *A Government for Our Time*, *supra* note 207, at 370-73 (summarizing common praise for, and objections to, the rise of BIDs).

210. *See id.* at 378-79.

211. *Id.* at 383.

212. *See id.* at 389-94.

213. *See id.* at 394-409. *See also* Nicole Stelle Garnett, *Governing? Gentrifying? Seceding? Real-Time Answers to Questions About Business Improvement Districts*, 3 DREXEL L. REV. 35, 43 (2010) (providing case studies of Philadelphia’s BIDs that suggest they are “more akin to quasi-private providers of supplemental services than to local governments”).

214. *See* Briffault, *A Government for Our Time*, *supra* note 207, at 412-14. This decidedly undemocratic flavor of many BIDs has led some to claim their governance is unconstitutional. *See, e.g.,* Daniel R. Garodnick, *What’s the BID Deal? Can the Grand Central Business Improvement District Serve a Special Limited Purpose?*, 148 U. PA. L. REV. 1733 (2000) (arguing that that BID’s authority is broad and deep enough to warrant application of the “one-person, one-vote” standard). As a question of legal precedent, however, federal courts have sided with BIDs. *See Kessler v. Grand Cent. Dist. Mgmt. Ass’n*, 158 F.3d 92 (2d Cir. 1998) (holding that BIDs are not subject to “one-person, one-vote” scrutiny).

forming and self-governing, with property owners, with property owners having lobbied to form the BID in the first place, and an elected or appointed body of representatives who manage, or at least advise on, taxing and spending levels. School catchment areas, as discussed above, are not in any meaningful manner self-governing, nor do residents ever directly vote on forming or adjusting the bounds of a catchment area. This contrast illustrates the inapplicability of Tiebout-like sorting, Ellickson-like monitoring, or Jefferon-like participation with respect to catchment areas. Second, BIDs can and do provide a variety of services according to their circumstances and wishes of their members. School catchment areas, meanwhile, have a singular, if difficult, function: to provide high-quality schools. And crucially, they cannot ever determine their own taxing or spending levels. Again, such differences cut against the notion of catchment areas as theoretically justified according to Tiebout, as BIDs can adjust their services to engender or respond to sorting far more easily than can school catchment areas.

A second, closer comparison is with the siting of fire stations with large cities. As a general matter, localities rely on highly technical evaluations of population, geography, and land use to optimize the siting of fire stations for economy and public safety.²¹⁵ Predictably, however, political concerns intercede.²¹⁶ Residents are typically loathe to have roaring fire trucks parked next door to their homes, but also scared if firehouses are too far for a quick response. A case study of New York's recent history of firehouse closings is illustrative. The mayor alone appoints the city's fire commissioner, who in turn has total authority over the Fire Department,²¹⁷ including the siting of fire stations.²¹⁸ Since the 1970s fiscal crisis, New York mayors have used fire station closings as a budget tool, despite certain instances that trigger fierce protest from community members worried about rising response times.²¹⁹

To insulate himself from political backlash – or perhaps merely to appease his opponents – Mayor Bloomberg agreed with the City Council Speaker in 2003 to create a joint commission to study firehouse closings. At that time, the

215. See Alan T. Murray, *Fire Station Siting*, in 232 APPLICATIONS OF LOCATION ANALYSIS 293, 294-96 (H.A. Eiselt & Vladimir Marianov eds., 2015) (reviewing various technical considerations used by a variety of localities in fire station siting).

216. See E.S. Savas, *On Equity in Providing Public Services*, 24 MGMT. SCI. 800 (1978) (discussing how the equitable allocation of public services within a locality is ultimately decided by the political process).

217. See NYC Charter § 487.a (2019) (“The commissioner shall have sole and exclusive power and perform all duties for . . . the fire department . . .”).

218. The only limit to this power is one of notice: the commissioner must provide written notification to the relevant council member, community board, and borough president at least 45 days prior to a firehouse closing. See *id.* But even here, remedies against the mayor's power are weak. See *Markowitz v. Bloomberg*, 766 N.Y.S.2d 815, 828 (2003) (although Bloomberg failed to adequately notify one of the relevant community boards, a court would not enjoin the city from closing the firehouse in question as a remedy).

219. See Gail Robinson, *Firehouses*, GOTHAM GAZETTE (Aug. 11, 2003), <http://www.gothamgazette.com/economy/1923-firehouses>.

city faced a fiscal shortfall from the post-9/11 recession, as well as shifting population trends in new areas of the city. The panel was made up of two Bloomberg appointees, three appointees of the Fire Department, and two appointees of the Speaker.²²⁰ The commission came back a few months later with recommendations to close eight firehouses around the city, a position opposed by the two Speaker appointees and several members of the City Council.²²¹ The mayor quickly embraced the recommendations and held firm, despite fierce negotiations with the Council²²² and an unsuccessful lawsuit brought by some of its members.²²³ The commission – and the mayor – reasoned that with the average New York firehouse built in the early 1900s, their locations did not match current rates of fire emergencies or population shifts of the city. In response to his critics, the mayor’s spokesman at the time said flatly, “Not everyone gets everything they want, but that’s democracy.”²²⁴

Fire station siting draws out further inequitable and illogical aspects of school catchment area law. In a fire station siting, local officials are careful to set a baseline of adequate public safety wherever the station is sited. But failing, segregated schools – which do deep, if gradual, damage to localities – are accepted as a fact of life, even in highly diverse, affluent cities.²²⁵ Second, unlike school catchment areas, the siting of fire stations is typically a citywide exercise with at least the stated goal of balancing the needs of the city with those individual neighborhoods. Where local governments rely on citywide advisory panels and make concurrent siting decisions rather than ones seriatim, they signal to residents that some neighborhoods may suffer slightly for the greater good of the city. By contrast, where school districts allow for sub-local veto power²²⁶ or disproportionate influence by white residents,²²⁷ they signal that hyper-local interest will ultimately win out.

220. See Nichole M. Christian, *Commission Backs Bloomberg On Plan to Close 8 Firehouses*, N.Y. TIMES (Apr. 5, 2003), <http://www.nytimes.com/2003/04/05/nyregion/commission-backs-bloomberg-on-plan-to-close-8-firehouses.html>.

221. See *id.*

222. See Robinson, *supra* note 219.

223. See Markowitz, *supra* note 218.

224. See Robinson, *supra* note 219.

225. See Kate Taylor, *De Blasio, Expanding on Education Program, Dismisses Past Approaches*, N.Y. TIMES (May 11, 2017), <https://www.nytimes.com/2017/05/11/nyregion/de-blasio-expanding-community-schools-initiative.html> (quoting Mayor Bill de Blasio in reference to school segregation: “We cannot change the basic reality of housing in New York City”); Patrick Wall, *On Upper West Side, Fariña Says School Integration Can’t Be Forced on Parents*, CHALKBEAT (Oct. 29, 2015), <https://www.chalkbeat.org/posts/ny/2015/10/29/on-upper-west-side-farina-says-school-integration-cant-be-forced-on-parents> (quoting schools Chancellor Carmen Fariña in reference to school segregation by catchment area: “Parents make choices [about where to live]. When you have choice, then parents have to decide what’s their biggest priority”).

226. See *supra* Part I.C.1.

227. See Chandler & DeBonis, *supra* note 143 and accompanying text.

PART III: REFORMING CATCHMENT AREAS

This final Part considers and assesses possible reforms to school catchment areas, beginning with an analysis of what is permissible under *Parents Involved* and a national overview of intra-district school desegregation strategies. Next, a return to the case studies from Part I illustrates the effects of three different school choice models implemented in New York, San Francisco, and Washington D.C. None of these models, however, has fundamentally disrupted segregation by catchment area, and therefore the last section of this Part considers more radical proposals to disrupt reliance on catchment areas that reinforce segregation.

A. *National Overview of Catchment Area Reform*

As detailed in Part I, the evolution of school desegregation jurisprudence has resulted in catchment area reform emerging as a key policy tool for decreasing racial and ethnic school segregation.²²⁸ Justice Kennedy's controlling concurrence in *Parents Involved* included two important elements supporting the legal basis for focusing on catchment areas. First, though he agreed that student assignment based strictly on race would receive strict scrutiny, he found it generally permissible under the 14th Amendment for school districts to "encourage a diverse student body, one aspect of which is racial composition."²²⁹ Second, he specifically named "drawing attendance zones with general recognition of the demographics of neighborhoods" as one tactic school districts may use to escape strict scrutiny.²³⁰ Furthermore, joint guidance from the U.S. Departments of Justice and Education in 2011 encouraged intra-district student assignment policy designed to disrupt assignment based on catchment area. In addition to re-drawing catchment areas, the guidance also suggested magnet schools, realignment of feeder patterns, school siting planning, and open enrollment policy as methods to decrease segregation.²³¹ Such tactics have not triggered strict scrutiny and have been held up in federal court as constitutionally permissible. For example, the Third Circuit recently reviewed a catchment area redrawing plan in a Philadelphia suburb where district officials set an explicit goal of lessening racial and ethnic segregation.²³² The court concluded that because the consideration of student "diversity" did not imply a discriminatory purpose, it would apply only rational

228. *See supra* Part I.A.

229. *Parents Involved*, *supra* note 42, at 788.

230. *Id.* at 789.

231. U.S. DEP'T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS (2011), <https://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.html>.

232. *See Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524 (3d Cir. 2011).

basis review, and therefore quite easily approved of the plan as constitutionally permissible.²³³

As a practical matter, a small but growing number of urban school systems are disrupting the reliance on catchment areas for student assignments. One study found that ninety-one school districts and charter school networks – including more than four million students, or 8% of all U.S. public school students – use socioeconomic status as a factor in student assignment, replacing or supplementing the use of catchment areas. These school systems are mostly within racially diverse localities, and their number more than doubled between 2007 and 2016.²³⁴ School districts employ three common strategies to redraw catchment areas and boost racial and ethnic diversity. First, districts can enact choice policies whereby catchment areas are partially or completely eliminated. Under these policies, families may opt to send their children to any school in the district. Second, districts often create magnet schools—schools within a district that can admit students outside any catchment area or even outside the district. Third, districts sometimes tweak charter school admissions policies, most typically where a charter’s lottery system is supplemented by reserving seats for low-income students.

Of course, even where districts find the political will to weaken or eliminate the influence of catchment areas, outside factors often limit the extent of resulting school desegregation. First is the overrepresentation of white students in private schools. Nationally, 10% of all pre-K-12 students are enrolled in private schools. This population includes 11% of all white students nationally, but just 5% of black students and 3% of Hispanic students.²³⁵ Within private schools, 69% of students were white, 10% Hispanic, 9% black, 6% Asian, and the rest other races or mixed.²³⁶ By comparison, in public schools as of 2015, 49% of students were white, 26% were Hispanic, 15% were black, 5% are Asian, and the rest other races or mixed.²³⁷

Second, despite rising gentrification, there is still a ceiling for intra-district integration due to residential segregation and the ability of school districts which are contiguous with municipalities to exclude residents. Within large metropolitan areas, for example, on average the racial composition of public schools is just 20% white in central cities, compared to 50% white in

233. *Id.* at 554, 557. See also Abel, *supra* note 44 (analyzing Justice Kennedy’s concurrence and applying it to explain the *Lower Merion* decision).

234. See Halley Potter et al., *A New Wave of School Integration: Districts and Charters Pursuing Socioeconomic Diversity*, CENTURY FOUND. (Feb. 9, 2016), <https://tcf.org/content/report/a-new-wave-of-school-integration>.

235. Richard J. Murnane & Sean F. Reardon, *Long-Term Trends in Private School Enrollments by Family Income*, 17 (Nat’l Bureau of Econ. Research, Working Paper No. 729, 2018). By “private schools,” I refer to both religiously-based and secular schools that operate outside of any school district control.

236. *Private School Universe Survey*, NAT’L CTR. FOR EDUC. STAT. (2016), <https://nces.ed.gov/surveys/pss/tables/TABLE09fl.asp>.

237. *Racial/Ethnic Enrollment in Public Schools*, NAT’L CTR. FOR EDUC. STAT. (May 2017), available at https://nces.ed.gov/programs/coe/indicator_cge.asp.

surrounding suburbs; these numbers are even more pronounced in mid-sized or small metro areas.²³⁸ One study focusing on socioeconomic segregation²³⁹ found that almost 4,000 school district borders divided districts whose child poverty rates differed by more than double the national average. It also highlighted the country's "50 most segregating borders," where wealthier districts on average had a poverty rate of just 9%, while neighboring low-income districts had a poverty rate of higher than 46%.²⁴⁰ Yet another study used comprehensive demographics to determine the extent to which, through the disruption of catchment areas, districts could eliminate completely the existence of high-poverty schools.²⁴¹ Because so many districts have a majority of poverty-stricken students, it concluded that less than 6% of schools nationwide are in districts able to do so. If every viable school were to implement this intra-district strategy, 500,000 fewer students would have to attend high-poverty schools.²⁴²

Nonetheless, as discussed earlier, gentrification and the rising density of diverse, urban school districts provide potential conditions for intra-district desegregation.²⁴³ Revisiting the three case studies from Part I reveals the

238. See Orfield et al., *supra* note 13, at 14. Of course, this level of segregation would matter less if school districts were large enough to encompass several diverse municipalities. Hence the concern over "succession" school districts in the South. See Wilson, *supra* note 12.

239. While racial and ethnic segregation are distinct from socioeconomic segregation, for research purposes socioeconomic status can be helpful in tracking the extent of racial and ethnic isolation. For a general discussion of the connections between socioeconomic status and race and ethnicity, see generally, NATIONAL POVERTY CENTER, *The Colors of Poverty: Why Racial & Ethnic Disparities Persist*, (Ann Chih Lin and David R. Harris, eds., Jan. 2009), available at http://www.npc.umich.edu/publications/policy_briefs/brief16/PolicyBrief16.pdf.

240. *Fault Lines: America's Most Segregating School District Borders*, EdBUILD (Aug. 23, 2016), <http://viz.edbuild.org/maps/2016/fault-lines>. Examples include lines separating Detroit and Grosse Pointe in Michigan, Hartford and South Windsor in Connecticut, and the remarkably gerrymandered district lines separating inner-city Birmingham from its wealthy surrounding suburbs in Alabama.

241. See Ann Mantil et al., *The Challenge of High Poverty Schools: How Feasible Is Socioeconomic School Integration?* in *THE FUTURE OF SCHOOL INTEGRATION*, *supra* note 79 at 155.

242. *Id.* at 188. Several considerations, however, suggest that this finding is overly pessimistic. First, the authors' goal of completely eliminating all "high-poverty" schools within a district seems unnecessarily aspirational; simply reducing poverty levels (or racial isolation levels) to match the demographics of the locality or metropolitan area seems more logical. Second, the authors define "high-poverty" school as one where 50% or more of the students receive federally subsidized free or reduced lunch. See *id.* at 186. But many commentators have suggested various reasons why that free/reduced lunch status dramatically overstates the level of poverty within a school. For example, students with household incomes 185% of the actual federal poverty line qualify for reduced lunch. See Matthew M. Chingos, *No More Free Lunch for Education Policymakers and Researchers*, BROOKINGS INST. (Jun. 30, 2016), <https://www.brookings.edu/research/no-more-free-lunch-for-education-policymakers-and-researchers>.

243. See *supra* notes 14-24 and accompanying text.

progress and shortcomings toward such desegregation as those cities moved away from reliance on school catchment areas.

B. *Case Studies of Catchment Area Reform*

1. *Citywide Choice in New York City High Schools*

Following Mayor Bloomberg's centralization of authority over the New York City's school system in 2002, he moved quickly to severely weaken the influence of catchment areas for high school student assignment. In the days of community boards of education, students were mostly assigned to high schools by catchment area; nonetheless, many high schools chose to institute selective admissions policies, or were rife with corruption in community school boards.²⁴⁴ Beginning in the 2004-2005 school year, Bloomberg instituted a citywide choice program, whereby students would rank-order twelve choices of high school across the city. A computer algorithm would then "match" the student to a high school based on certain admissions criteria that each high school could adopt, including preference for students within a catchment area. Schools Chancellor Joel Klein explained that the "matching" method was modeled on that used by medical residency programs, with the goal of distributing opportunity as fairly as possible. He explained, "[t]he City of New York has gone to a model that is recognized by virtually any economist as the welfare-maximizing model."²⁴⁵

Klein was overstating the equity of the new policy. First, many high schools continued to give preference for residents of catchment areas, replicating the old model that segregated by neighborhood. For example, several of the most sought-after high schools in the city restrict admissions almost entirely to families living in District 2, a community school district which includes some of the wealthiest and whitest neighborhoods in the city.²⁴⁶ Indeed, among New York's high schools that give preference by residential location, the student body on average is more than 50% white or Asian – far

244. Monica Disare, *Eric Nadelstern, Former Klein Deputy, Has a Radical Solution for Struggling Schools: Unzone the City*, CHALKBEAT (May 1, 2017), <https://www.chalkbeat.org/posts/ny/2017/05/01/eric-nadelstern-former-klein-deputy-has-a-radical-solution-for-struggling-schools-unzone-the-city>. Explained a key deputy chancellor, under the old system, "Local politicians would call a [community] superintendent and say 'I'd like to get this particular kid into that school.' The supes would make it happen."

245. David Herzenhorn, *Revised Admission for High Schools*, N.Y. TIMES (Oct. 3, 2003), <http://www.nytimes.com/2003/10/03/nyregion/revised-admission-for-high-schools.html>.

246. See Beth Fertig, *In Era of High School Choice, One District Retains Elite Status*, WNYC (Nov. 20, 2013), <https://www.wnyc.org/story/era-high-school-choice-manhattan-district-retains-elite-status> (Bloomberg "allowed an affluent and successful school district to keep its barriers to entry"). Community School Districts like District 2 are larger than the blocks-wide catchment areas applied to elementary school placement in New York, but are still restrictive by larger neighborhood area.

from the demographics of city schools as a whole.²⁴⁷ Second, Bloomberg allowed high schools to set selective and often byzantine admissions policies – which factor into the matching algorithm – to favor savvy parents who could effectively game the matching process.²⁴⁸ Not surprisingly, these policies, according to one reporter, “tend[] to favor children who live in certain neighborhoods, grew up in English-speaking families, attended good elementary and middle schools, and perhaps above all, have parents with the ability and fortitude to negotiate a very complication process.”²⁴⁹ According to the data, these families are whiter and wealthier than the averages citywide. Just to name a couple of examples: Beacon High School on the Upper West Side requires a portfolio of middle school work, high test scores, and an in-person interview, resulting in a 5.6% admissions rate; Bard High School Early College has its very own entrance exam, resulting in a 4.2% admissions rate.²⁵⁰ Bard’s student body is approximately 31% black and Hispanic,²⁵¹ while Beacon’s approximately 25%; citywide that figure is 70%.²⁵² Third, Bloomberg retained and even expanded the number of the city’s specialized high schools, a group of public schools including Stuyvesant and Bronx Science that are considered the best in the city.²⁵³ These schools employ a standardized admissions exam that many view as exclusionary, outdated, and heavily favoring admission to white and Asian students whose parents can afford test-prep courses.²⁵⁴ Why did Bloomberg enact such exclusionary

247. Harris & Fessenden, *supra* note 92.

248. See Monica Disare, *In New York City’s Dysfunctional High School Admissions System, Even ‘Unscreened’ Schools Have Tools to Sort Students*, CHALKBEAT (Nov. 7, 2016), <https://www.chalkbeat.org/posts/ny/2016/11/07/caught-in-a-dysfunctional-system-some-unscreened-high-schools-collect-information-that-raises-questions-about-how-they-admit-students> (discussing the proliferation of deviations in the admissions processes of selective public high schools from the overall admissions system).

249. See Gail Robinson, *The Problem with NYC High-School Admissions? It’s Not Just the Test*, CITY LIMITS (Feb. 8, 2016), available at <https://citylimits.org/2016/02/08/the-problem-with-nyc-high-school-admissions-its-not-just-the-test/> (“Every school has its own rules and procedures, creating a patchwork that tends to favor children who live in certain neighborhoods, grew up in English-speaking families, attended good elementary and middle schools and, perhaps above all, have parents with the ability and fortitude to negotiate a very complicated process”).

250. Elizabeth A. Harris, *Couldn’t Get Into Yale? 10 New York City High Schools Are More Selective*, N.Y. TIMES (Mar. 10, 2017), <https://www.nytimes.com/2017/03/10/nyregion/new-york-city-high-school-admissions-rate.html>.

251. *Bard High School Early College*, INSIDESCHOOLS, <https://insideschools.org/school/01M696> (last accessed Apr. 28, 2019).

252. *Beacon High School*, INSIDESCHOOLS, <https://insideschools.org/school/02M479> (last accessed Apr. 28, 2019).

253. See Katrina Shakarian, *The History of New York City’s Special High Schools*, GOTHAM GAZETTE, <http://www.gothamgazette.com/government/5392-the-history-of-new-york-citys-special-high-schools-timeline>.

254. See David R. Jones, *The Myth of Merit in New York City’s Elite Public Schools*, COMMUNITY SERV. SOC’Y (June 16, 2014), at <http://www.cssny.org/news/entry/the-myth-of-merit-in-new-york-citys-elite-public-schools> (analyzing how the SHSAT disadvantages poor, minority students). Note, however, that the city’s original three specialized high

policies, even as, in theory, he wanted to weaken catchment-area based student assignment? One deputy chancellor explained later, “He and Joel [Klein] thought it was their job to retain the middle class.” He added, “What Joel and Bloomberg were afraid of,” if the city moved to a completely un-zoned and unselective system, “was turning New York into Atlanta, having the white students enroll elsewhere.”²⁵⁵

More than a decade after the implementation of citywide high school choice, New York’s high schools remain severely segregated. The average racial makeup of the city’s high schools for black and Hispanic students is nearly exactly the same as it is for elementary schools, where small catchment areas determine assignment almost entirely. Worse still, a higher percentage of high schools are highly racially isolated – more than 80% black and Hispanic – than middle or elementary schools in the city.²⁵⁶ Not surprisingly, students suffer from this segregation. Graduation rates at unselective high schools (which accept students across academic levels, and on average are 81% black or Hispanic), are far lower than their selective counterparts, and nearly half of that at the specialized high schools like Stuyvesant.²⁵⁷ The Klein deputy came to regret the results of their high school choice system, explaining, “I don’t think you create schools that segregate the middle class as a way of retaining the middle class. It doesn’t make sense.”²⁵⁸

2. *Controlled Choice in San Francisco*

Next, we will return briefly to the latest iteration of SFUSD’s student assignment system—a variation on “controlled choice.” This method was first introduced in Cambridge, Massachusetts, and generally refers to enrollment systems that employ parental choice while also mandating levels of racial and ethnic or socioeconomic concentrations within particular schools.²⁵⁹ Some districts have stricter controls than others. In Cambridge, for example, the district considers parents’ ranked choices but ensures that no school in the

schools – Stuyvesant, Bronx Science, and Brooklyn Tech – are authorized by a specific state statute outside of the mayor’s control. *See* N.Y. CLS Educ. § 2590-h.

255. Disare, *supra* note 244. Atlanta was a curious contrast for Klein and Bloomberg to use. By 2010, segregation among public school elementary school students in the Atlanta metropolitan area as measured by the widely accepted dissimilarity index was significantly lower than that in the New York metropolitan area. *See School Segregation (Dissimilarity Index): Public Primary School Students Dissimilarity with White (Non-Hispanic) Students by Race/Ethnicity*, DIVERSITYDATAKIDS.ORG, <http://www.diversitydatakids.org/data/ranking/90/school-segregation-dissimilarity-index-public-primary-school-students-dissimilar#loct=3&tf=5&ch=2,3,4,5>.

256. Harris & Fessenden, *supra* note 92.

257. *Id.*

258. Disare, *supra* note 242.

259. *See generally* Charles V. Willie et al., SCHOOL DIVERSITY, CHOICE, AND SCHOOL IMPROVEMENT (2002) (describing the history and details of controlled choice in several localities).

district is more than ten percentage points off of the district-wide average for students receiving free or reduced lunch, a common marker of poverty.²⁶⁰ In San Francisco, by contrast, the district does not set any explicit goals for the socioeconomic or racial and ethnic makeup of schools. Instead, SFUSD considers a number of “tiebreakers” in student assignment, including whether the student comes from a high-poverty census tract – but also, for younger students, whether they live in the relevant catchment area or attended a pre-K program in the catchment area.²⁶¹

While Cambridge has seen success in using controlled choice to integrate its schools,²⁶² San Francisco has not. As discussed earlier, SFUSD has stubbornly high levels of racial and ethnic segregation, despite the gentrifying population of the city.²⁶³ Most likely, SFUSD’s failure stems from systemic issues that also plague D.C. and New York. First is the persistence of catchment area influence which benefits white families, who are more likely to live near successful, disproportionately white schools in neighborhoods like Cole Valley or the Lower Haight.²⁶⁴ As in D.C. and New York, white students cluster at a handful of schools, and are almost entirely absent from huge swaths of others.²⁶⁵ Second, there is growing evidence that, like in New York, the parents who benefit most from a complex system of choice are affluent, mostly white parents who can successfully navigate it. The highest-performing schools in SFUSD are more likely than lower-performing schools to be ranked highly by educated, often white parents.²⁶⁶ In fact, 21% of African-American and 15% of Latino parents – compared to 4% of whites – do not even *participate* in the first round of applications, putting their children at a severe disadvantage.²⁶⁷ Third, as in D.C., most public schools lack a robust free transportation service, leaving many low-income families helpless to transport their children across the city even if they could gain access to less segregated schools.²⁶⁸ And

260. See Carole Learned-Miller, *Cambridge Public Schools: Pioneers of Equitable Choice*, CENTURY FOUND. (Oct. 14, 2016), <https://tcf.org/content/report/cambridge-public-schools>.

261. See *supra* notes 135-136 and accompanying text.

262. See Learned-Miller, *supra* note 260 (“84% of Cambridge’s students are attending racially balanced schools”).

263. See *supra* notes 118-123 and accompanying text.

264. See Smith, *supra* note 119.

265. See Cima, *supra* note 120.

266. See *id.* See also Rosie Cima, *How San Francisco’s Most Diverse, High-Achieving School Became Mostly White*, PRICEONOMICS (Aug. 29, 2016), <https://priceonomics.com/how-san-franciscos-most-diverse-high-achieving> (describing how one successful elementary school became a “victim of its own success” and is now disproportionately white due to overwhelming demand from white families).

267. *Id.*

268. See Rebecca Robinson, *Transportation Challenges Complicate School Choice for S.F. Students*, S.F. PUB. PRESS (Jan. 29, 2015), <http://sfpublicpress.org/news/2015-01/transportation-challenges-complicate-school-choice-for-sf-students> (describing various shortcomings of transportation options for low-income students, leading to further racial/ethnic isolation despite school choice).

finally, it appears that there is still lagging participation of white families in the city's public schools, particularly as students get older. The percentage of white students in the system declines steadily from 16.4% to 10.9% to 8.9% as students move from elementary to middle to high school – suggesting that parents move their children to suburbs or private schools as the influence of catchment areas on school assignment wanes.²⁶⁹

3. *Charter Schools in Washington, D.C.*

Washington, D.C.'s experiment in reducing the influence of catchment areas took a different form: the proliferation of charter schools. But similar to the results of citywide high school choice in New York and San Francisco, D.C.'s reforms have done little to lessen racial and ethnic segregation, and in some ways exacerbated it.

The District was an early adopter of charter schools, which have since grown to educate nearly half of all public school children in D.C. In 1996, Congress authorized the District to form the D.C. Public Charter School board, an independent entity appointed by the mayor which is responsible for authorizing and overseeing charter schools.²⁷⁰ The enrollment numbers of charter and traditional public school students ("DCPS students") were mirror opposites between 1996 and 2010. Since 2010, charter enrollment has continued its steady increase, while DCPS enrollment had stabilized and seen a slight increase.²⁷¹ Today sixty-six different nonprofits operate 120 D.C. charter schools, representing 46% of all public school students in the district. And most relevant to this paper, D.C. charter schools do not assign students by catchment area, or even use them as a preference in their selection system. Instead, all students across the district are randomly given a lottery number, they rank their choices, and an algorithm matches them to a charter school.²⁷² Such a system, in theory, could negate the persistence of neighborhood segregation and instead draw into its schools a diverse population of students from across a gentrifying city.

But rather than alleviating neighborhood segregation, D.C. charters are more racially isolated than DCPS schools. As of 2014, nearly one quarter of D.C. charter schools were "hypersegregated," enrolling 99-100% of non-white

269. See *Cima*, *supra* note 120. San Francisco, in fact, has the highest rate of private school enrollment of any district in the state, and the third-highest of any in the nation. *Id.* Note, however, that there is no direct evidence of causality between white enrollment and dissatisfaction with the student assignment process; furthermore, it is possible that these data simply reflect a younger white population which may remain in SFUSD schools once they age.

270. See *Frequently Asked Questions*, D.C. PUBLIC CHARTER SCH. BD., <http://www.dcpsb.org/faq> (last visited Apr. 28, 2019).

271. See *Facts and Figures: Market Share*, D.C. PUBLIC CHARTER SCH. BD., <https://www.dcpsb.org/facts-and-figures-market-share> (last visited Apr. 28, 2019).

272. See *FAQs*, MY SCHOOL DC: THE PUBLIC SCHOOL LOTTERY, <http://www.myschooldc.org/faq/faqs> (last visited May 14, 2019).

students, while less than half of DCPS schools were. And this disparity holds true even within gentrifying areas. Between 2007 and 2014, the share of hyper-segregated DCPS schools in gentrifying neighborhoods fell from 67% to 41%, while in those same neighborhoods the share of hyper-segregated charters fell only from 77% to 70%.²⁷³ Overall, the typical black charter school student in D.C. attends a school that is nearly 90% black, while the typical DCPS student attends a school that is just over 80% black.²⁷⁴

Experts give several reasons why D.C. charters are so racially isolated. First, the mission of most charters in D.C. and in other urban school systems is to serve historically disadvantaged populations, including low-income children and racial and ethnic minorities. This mission is the result of historical efforts by philanthropists, who help fund charters as a poverty-fighting tool, as well as policymakers, who in many states mandate that charters educate students who are disproportionately low-income and minority.²⁷⁵ In D.C., the charter board requires applicants to “address how they will serve all students – particularly historically disadvantaged groups.”²⁷⁶ The two largest charter operators in the district were each founded and funded with an aim of alleviating poverty and serving minority students.²⁷⁷ D.C. charters are far more likely to be located in highly segregated neighborhoods,²⁷⁸ to recruit and appeal to minority populations,²⁷⁹ and often do not provide transportation for students living in other parts of the district.²⁸⁰ Overall, D.C. charters are over 90% black and

273. Kfir Mordechay & Jennifer Ayscue, *White Growth, Persistent Segregation: Could Gentrification Become Integration?* UCLA CIV. RIGHTS PROJECT 8 (Dec. 2017), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/white-growth-persistent-segregation-could-gentrification-become-integration/DC-Gentrification-122217-km.0.pdf>.

274. Orfield & Ee, *supra* note 138, at 59-60.

275. See Richard D. Kahlenbeg & Halley Potter, *Diverse Charter Schools: Can Racial and Socioeconomic Integration Promote Better Outcomes for Students?* 6-7. CENTURY FOUND. (May 2012), http://production.tcf.org.s3-us-west-2.amazonaws.com/app/uploads/2012/05/24013615/Diverse_Charter_Schools-8.pdf (summarizing history of charter financing and policymaking as anti-poverty measures serving minority populations).

276. *How Diverse are DC Public Charter Schools?*, D.C. PUBLIC CHARTER SCH. BD., <http://www.dcpsb.org/how-diverse-are-dc-public-charter-schools> (last visited May 14, 2019).

277. See *20 Years of Achievement: A Timeline*, FRIENDSHIP PUB. CHARTER SCH., <https://www.friendshipschools.org/about/history> (founder of Friendship Public Charter Schools “recognizes the need for quality education to end the cycle of poverty in D.C.”); JAY MATHEWS, *WORK HARD, BE NICE: HOW TWO INSPIRED TEACHERS CREATED THE MOST PROMISING SCHOOLS IN AMERICA* (2009) (describing the origins of the KIPP charter school network as a force to fight poverty and serve black and Latino children).

278. See Mordechay & Ayscue, *supra* note 273.

279. See Kahlenberg & Potter, *supra* note 275, at 14 (contrasting typical charter school recruitment with efforts by certain diverse charters to attract a more diverse student body).

280. See Tanya Snyder, *As D.C.’s School Options Improve, Commutes Become More of a Headache*, WASH. CITY PAPER (Apr. 2, 2015), <https://www.washingtoncitypaper.com/news/city-desk/blog/13069582/as-d-c-s-school-options-improve-commutes-become-more-of-a-headache> (describing the difficulties faced by charter school parents in arranging transportation).

Latino and 5.5% white, compared to DCPS's 82% black and Latino and 13% white population.²⁸¹ All of these facts make it far less surprising that charters in D.C. are racially isolated.²⁸²

Another possibility is that DCPS's continued reliance upon catchment areas results in affluent white families remaining in their neighborhoods schools and not entering the charter sector. After all, white students at DCPS schools are highly racially concentrated. The typical white student at a DCPS school attends a school that is nearly 50% white, despite the fact that just over 12% of all DCPS students are white.²⁸³ At ten DCPS schools, almost all in affluent white neighborhoods, the school is well over 50% white. In fact, of the ten most diverse schools in the city, six are charters and four at traditional public schools.²⁸⁴

Whatever the cause, D.C. charters have not lived up to their promise of diversifying public schooling in the District. School choice resulted mostly in white students remaining within the traditional catchment area-based system, and in many black students fleeing them for still-racially isolated charters.

In sum, these case studies illustrate that parent choice reforms inadequately robust or well-designed are not enough to weaken the influence of school catchment areas and thereby lessen racial and ethnic segregation. In New York, reliance on catchment areas for high school placement was replaced with a complex admissions process that favored affluent, white families. In San Francisco, despite some tools aimed at socioeconomic segregation, several factors have overridden the weakening of catchment areas to maintain a segregated system. And in D.C., the proliferation of charter schools that lack any mechanism or intent to desegregate has given black and Hispanic families more options – but options that are nonetheless segregated. The next section briefly considers the policy implications of more radical changes to catchment areas.

281. D.C. Public Charter School Board, *Student Demographics*, <https://data.dcpsb.org/stories/s/Student-Demographics/gwuv-6rba>.

282. Indeed, D.C. charters are one of many urban charter systems where students are more racially isolated than their traditional public school counterparts, a fact that has stirred considerable recent debate. See Andre M. Perry, *How charter school are prolonging segregation*, BROOKINGS INST. (Dec. 11, 2017), <https://www.brookings.edu/blog/the-avenue/2017/12/11/how-charter-schools-are-prolonging-segregation> (summarizing both sides of charter segregation debate, and concluding, “Charter schools didn’t create segregation, but the charter school movement isn’t helping to end it either”).

283. Orfield & Ee, *supra* note 138, at 57.

284. Michael Alison Chandler, *As D.C. gentrifies, some charter schools aim to reach broader spectrum*, WASH. POST (Dec. 4, 2015), available at https://www.washingtonpost.com/local/education/charter-schools-appealing-to-more-diverse-families-as-dc-gentrifies/2015/12/03/1d79c3f8-8dab-11e5-acff-673ae92ddd2b_story.html?utm_term=.58c035903001. Diversity in this instance is measured by the probability that two randomly chosen students at the school are of a different race.

C. More Radical Changes to Student Assignment

Other districts have experimented with student assignment policies that aim to eliminate entirely the influence of school catchment areas that reinforce or exacerbate patterns of residential segregation. One common reform is controlled choice, discussed earlier, which has anecdotally proven effective in several small- or mid-sized school districts. In those instances, controlled choice has reduced racial and ethnic isolation, but not created a shock to housing prices or induced white flight. Cambridge, a district of 6,500 students, is a leading example of controlled choice, having eliminated catchment areas entirely since 1981. Today, it boasts a district where all but two of its schools have less than a fifteen percentage point gap between white and non-white students. It has also seen rising test scores and graduation rates above state averages.²⁸⁵ Similarly, Jefferson County, Kentucky (encompassing Louisville and surrounding suburbs, including over 100,000 students) persisted in its controlled choice program even after losing at the Supreme Court in *Parents Involved*.²⁸⁶ The district still does not use catchment areas at all. It replaced its racial balancing quotas with a district-wide choice program that aims to keep all schools within a certain “diversity index” made up of several socioeconomic and racial and ethnic criteria. All but 14 of its 134 schools meet this diversity index goal, even as 90% of parents receive their first choice of kindergarten and only 25% of white families surveyed indicated they wished to drop the district’s desegregation practices.²⁸⁷ Yet another example is in the school district of Champaign, Illinois, a mid-sized city south of Chicago, serving roughly 10,000 students. There officials instituted a similar controlled choice program in 2002 and have seen almost identical success.²⁸⁸

Another option to disrupt the segregating influence of catchment areas is to gerrymander them in reverse – that is, to draw catchment area lines to purposely include a diverse population. Indeed, researchers studying the phenomenon of gerrymandered school catchment areas note that some of the most egregious instances are actually in the interest of desegregation.²⁸⁹ The

285. See Learned-Miller, *supra* note 260; Richard D. Kahlenberg, *Socioeconomic School Integration: Preliminary Lessons from More Than 80 Districts*, in *INTEGRATING SCHOOLS IN A CHANGING SOCIETY* 167, 176 (Erica Frankenberg & Elizabeth Debray-Pelot eds., 2011).

286. See *Parents Involved*, *supra* note 42.

287. Kim Bridges, *Jefferson County Public Schools: From Legal Enforcement to Ongoing Commitment*, CENTURY FOUND. (Oct. 14, 2016), <https://tcf.org/content/report/jefferson-county-public-schools>.

288. Halley Potter, *Champaign Schools: Fighting the Opportunity Gap*, CENTURY FOUND. (Oct. 14, 2016), available at <https://tcf.org/content/report/champaign-schools>.

289. See Richards, *supra* note 62 (“[G]errymandering is associated with reductions in segregation in a substantial minority of districts, notably those under desegregation orders”); Salvatore Saporito & David Van Riper, *Do Irregularly Shaped School Attendance Zones Contribute to Racial Segregation or Integration?* 3 SOC. CURRENTS 64, 64 (2016) (“attendance zones that are highly irregular in shape almost always contain racially diverse populations”).

leading example of this strategy is from Wake County, North Carolina, a district making up nearly 150,000 students that includes Raleigh and its surrounding areas. In 2000 the district set a goal of having no school in the district with more than 40% eligible for free/reduced lunch. It accordingly drew new catchment areas while also adding a few district-wide magnet schools. Catchment areas have been redrawn quite frequently since then, with the result that just under two-thirds of school were deemed racially desegregated by the mid-2000s.²⁹⁰ The plan came under attack after Republicans seized control of the school board in 2010, but moderates rallied to the cause of desegregation to largely save the plan the following year.²⁹¹

In addition to the success found in these districts, there is some empirical evidence that such disruptions to catchment area policy do not cause significant shocks to housing prices, nor white flight – either of which would undermine the political and even practical feasibility of such reforms. Monarrez studied data from the Charlotte-Mecklenburg school district, where in 1999 a court declared the system “unified” and ordered an end to desegregation efforts. By 2002 the district had drawn new catchment areas closely identified with neighborhoods, leading to a dramatic increase in racial and ethnic segregation. Monarrez studied the “sorting” effects of these new catchment areas and found that in catchment areas where minority student populations increased significantly, 85% of white families remained. By another measure, he concluded, if a catchment area saw a twenty-five percentage point increase in the fraction of minorities assigned, just under 4% of the white population would exit – a significant but modest number that indicates white flight fears may be unjustified.²⁹² With respect to housing prices, other researchers considered several districts’ catchment areas and concluded that there was significant variability in the impact of desegregation efforts; in addition, disentangling the impact of school quality, demographics, and neighborhood characteristics were quite difficult.²⁹³

There is, however, other empirical evidence demonstrating that desegregation efforts have historically led to white flight and a weakened local housing market. As noted earlier, many scholars have concluded as a general matter that *Brown* and its remedies triggered national white flight to the suburbs or to private schools.²⁹⁴ A more recent study examined large-scale data

290. See RICHARD D. KAHLENBERG, CENTURY FOUND., RESCUING BROWN V. BOARD OF EDUCATION: PROFILES OF TWELVE SCHOOL DISTRICTS PURSUING SOCIOECONOMIC INTEGRATION 9-13 (2007), <https://tcf.org/content/commentary/rescuing-brown-v-board-of-education>.

291. See Sheneka M. Williams, *The Politics of Maintaining Balanced Schools: An Examination of Three Districts*, in THE FUTURE OF SCHOOL INTEGRATION, *supra* note 79, at 256, 265-66.

292. See Monarrez, *supra* note 26, at 35.

293. See Patrick Bayer et al., *A Unified Framework for Measuring Preferences for Schools and Neighborhoods*, 155 J. POL. ECON. 588 (2007).

294. See Coleman et al., *supra* note 10 and accompanying text.

on black and white migration patterns between 1960 and 1990, concluding that school desegregation orders resulted in a significant increase of white flight to the suburbs – though it noted the interplay of several other demographic patterns and influences.²⁹⁵ With respect to housing prices, one study found that court-ordered school desegregation in Atlanta weakened demand and dented housing prices,²⁹⁶ while another concluded that the anticipation of court-ordered desegregation in Columbus, Ohio led to relatively slower increases in housing prices in the city than in suburbs.²⁹⁷

In sum, the potential effects of radical student assignment reforms in today's urban centers are unclear.²⁹⁸ Generally speaking, however, school officials should take into account the demographics and geographies unique to their cities. In sprawling cities with deep neighborhood segregation, for instance, tinkering with catchment area lines is unlikely to allow for school integration. By contrast, in denser cities where gentrification is breaking down neighborhood segregation, a citywide controlled choice program may be unnecessary if catchment areas can be periodically updated to include diverse populations. Second, new research is needed to match the reality of today's urban desegregation efforts. Nearly all the empirical research studying impacts of student assignment reforms on housing prices or white flight come either from an era before gentrification and reverse white-flight, or from policies stemming from court-ordered desegregation. Future studies should aim to evaluate voluntary efforts within today's cities to desegregate – for example, examining New York's newest micro-experiments in controlled choice²⁹⁹ that policymakers view as promising hints of future wide-scale reform.³⁰⁰

CONCLUSION AND RECOMMENDATIONS

Through the study of school catchment area law, this paper has attempted to highlight novel aspects of contemporary school desegregation. Because of

295. See Nathaniel Baum-Snow & Byron F. Lutz, *School Desegregation, School Choice, and Changes in Residential Location Patterns by Race*, 101 AM. ECON. REV. 3019 (2011).

296. See Charles T. Clotfelter, *The Effect of School Desegregation on Housing Prices*, 57 REV. ECON. & STATISTICS 446 (1975).

297. See H. Leroy Gill, *Changes in City and Suburban House Prices during a Period of Expected School Desegregation*, 50 SOUTHERN ECON. J. 169 (1983).

298. See *infra* Conclusion and Recommendations.

299. See Christina Veiga, *With critical parents now on board, New York City will move forward with district-wide diversity plan*, CHALKBEAT NY (Oct. 26, 2017), <https://www.chalkbeat.org/posts/ny/2017/10/26/with-critical-parents-now-on-board-new-york-city-will-move-forward-with-district-wide-diversity-plan> (noting one community school district will use controlled choice in elementary school assignment).

300. See Suchi Saxena, *New York City Public Schools: Small Steps in the Biggest District*, CENTURY FOUND. (Oct. 14, 2016), <https://tcf.org/content/report/new-york-city-public-schools> (“New York City officials are taking early steps to make diversity a consideration in more of the district’s policies.”).

jurisprudential developments and demographic shifts, intra-district strategies in large urban school districts represent perhaps our greatest opportunity to desegregate America's schools. Blocking this opportunity, however, is the persistent influence of school catchment areas upon student assignment policy. These catchment areas wax and wane in influence, but across the nation they almost never cease to dictate which children go to which schools. School catchment areas alone do not create school segregation; but, as currently designed, they do reinforce and exacerbate residential patterns of racial and ethnic isolation. This results in depressed student achievement and disparate housing prices. Furthermore, sub-local control of schools is not theoretically justified, failing in several ways on those theories' own terms, and comparing unfavorably to other sub-local institutions.

And yet, this paper has also discussed three case studies in which efforts to weaken the influence of school catchment areas have proven unsuccessful. These case studies illustrate lessons for reformers of what to avoid. First, pure district-wide choice can have unintended results. In D.C., charter schools have mostly utilized school choice only to fulfill their narrow – if admirable – mission of improving opportunities for low-income, minority families, even if still segregated. Second, school choice that involves overly complex or selective admissions processes, or that retains catchment area preference, often results in affluent, white families concentrating in a handful of successful schools – as in New York and San Francisco. Third, as the experiences of D.C. and San Francisco demonstrate, transportation matters, particularly where localities fail to provide adequate support for low-income families and thus stymie desegregation. Fourth, as the New York Community Education Council battles illustrate, catchment area-drawing should be a citywide practice; redrawing attendance zones seriatim rather than simultaneously citywide creates opportunities for racially polarizing, hyper-local controversies that serve narrow interests.

These lessons suggest the need for more radical disruptions of catchment area law and policy, either by instituting controlled choice (as in Cambridge) or gerrymandering catchment areas in reverse (as in Wake County). It is unclear whether such strategies would prove successful in the far larger and denser districts of New York, San Francisco, or D.C. – that is, whether they would trigger housing price declines and/or white flight that would make desegregation unfeasible. There is less doubt, however, that the influence of school catchment areas is pernicious and unjustified – but that policymakers are not powerless to stop it.